
New York Supreme Court

Appellate Division--Second Department

AD No. 08-00193

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

MICHAEL OLIVER, GESCARD ISNORA, and
MARC COOPER,

Defendants.

AFFIRMATION AND MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR CHANGE OF VENUE

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JANUARY 17, 2008

Queens County
Indictment Number 1/2007

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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JOHN M. CASTELLANO, an attorney admitted to practice law in the State of New York, affirms the following statements to be true under the penalties of perjury:

1. I am an Assistant District Attorney, of counsel to Richard A. Brown, the District Attorney of Queens County. I am submitting this affirmation in opposition to defendants' joint motion pursuant to Criminal Procedure Law section 230.20 to change the venue of the above-captioned case. I make the statements in this affirmation upon information and belief, based on my review of the Grand Jury minutes and the records and files of the Queens County District Attorney's Office.

2. In the early morning hours of Saturday, November 25, 2006, Sean Bell was shot and killed on Liverpool Street in Queens County after five police officers surrounded his car and fired a total of fifty shots in his direction. Mr. Bell had just left the Kalua Cabaret, a gentleman's club, where he had celebrated his bachelor party with a number of his friends, including Trent Benefield and Joseph Guzman. After they left the club, Mr. Bell

entered his Nissan Altima with Mr. Guzman in the front passenger seat and Mr. Benefield in the back. As Mr. Bell was about to drive off, defendant Gescard Isnora, who had been acting as an undercover police officer inside the club as part of the New York City Police Department's Club Enforcement Unit, approached the Altima and started shooting at Mr. Guzman through the front passenger side of the car. In total, Isnora fired all eleven rounds that were in his gun. He was soon joined on the passenger side of the Altima by defendant Michael Oliver, a backup officer on the team, who also concentrated his fire on Mr. Guzman. Oliver soon emptied his clip that contained sixteen rounds and reloaded. During the firing of the second clip of fifteen rounds, which was also emptied, Oliver concentrated his fire at Mr. Guzman in the front seat and Mr. Benefield in the back seat. After hearing the gunshots, defendant Marc Cooper, who was part of the Enforcement Team and was in an unmarked police vehicle -- a Toyota Camry -- a few feet away, fired three or four rounds in the direction of the Altima from an unbalanced and unstable position. One of his bullets hit a window of the elevated Air Train some distance away. During the barrage of gunfire, in which two other officers -- Michael Carey and Paul Headley -- also fired, several of Mr. Bell's friends and others were on the street.

3. Mr. Bell sustained four gunshot wounds, two of which were fatal. Ballistics evidence showed that the rounds that cause the fatal wounds came from defendant Oliver's gun. Mr. Guzman and Mr. Benefield sustained multiple gunshot wounds, but survived.

4. Public statements made by Police Commissioner Raymond W. Kelly shortly after the incident indicated that some of the men in the car were involved in a confrontation

outside the club prior to the shooting and that one of the victims threatened to get a gun. Commissioner Kelly also stated that Sean Bell, the deceased driver, had struck Detective Isnora with the Altima and had rammed a minivan containing plain-clothed police officers before the gunfire erupted.

5. In January of 2007, an investigative Grand Jury was empaneled to hear witnesses and review evidence with regard to the case. After a three-month investigation, the Grand Jury returned an indictment against three of the five police officers who fired their weapons. Detective Oliver was charged with Manslaughter in the First and Second Degrees, two counts of Assault in the First Degree and two counts of Reckless Endangerment in the Second Degree. Detective Isnora was charged with Manslaughter in the First and Second Degrees, Assault in the First and Second Degrees and Reckless Endangerment in the Second Degree. And, finally, Detective Cooper was charged with two counts of Reckless Endangerment in the Second Degree (Queens County Indictment Number 1 of 2007). The two other officers who fired their weapons that night were not indicted. After arraignment, the case was assigned to Hon. Arthur J. Cooperman, Justice of the Supreme Court, Criminal Term, Queens County.

6. In a joint omnibus motion dated July 12, 2007, the defendants moved to dismiss certain counts in the indictment claiming that the evidence presented to the Grand Jury was legally insufficient to support the charges. Defendant Cooper also moved for a severance from his co-defendants. The motion was denied in its entirety on September 7, 2007.

7. At that time, Justice Cooperman set down the trial of the case for January 2, 2008. On November 9, 2007, defendants asked for and received an in-chambers conference at which they requested a two-month adjournment of the trial to prepare the defense. The Court and counsel for both sides eventually agreed to adjourn the case to February 4, 2008. Justice Cooperman explained that a large number of juror summonses would be sent out well in advance of the February 4th trial date to ensure that a fair and impartial jury could be selected in what was expected to be a lengthy trial. No mention was made at that time by defense counsel regarding a change of venue motion. On November 14, the case was adjourned, as planned, to February 4, 2008.

8. On December 20, 2007, defendants asked for and received another in-chambers conference. At that time, the defense announced its intention to file a change of venue motion on or before December 28, 2007. The motion was not filed, however, until 10 days later.

9. Upon information and belief, on or about January 10, 2008, the Queens County Clerk's Office issued 4500 juror summonses returnable on February 4, 2008 for the trial of this case.

10. Defendants now move this Court for a change of venue, citing what they describe as overwhelmingly prejudicial pretrial publicity and a public opinion poll commissioned by the defense allegedly demonstrating juror attitudes that preclude the selection of a fair and impartial jury in Queens.

11. Defendants' motion should be denied. Contrary to defendants' claim, the pretrial publicity in this case does not warrant the extraordinary relief of a change of venue prior to any attempt to empanel a jury. Indeed, defendants seriously skew their presentation of the media coverage of the case, isolating a few articles that they allege are prejudicial but ignoring the vast majority of the coverage that has been fair and balanced, and avoiding any mention of the many articles, opinions and editorials highly favorable to the defense. Moreover, much of the publicity has been self-generated by the defense or defense representatives through extensive public comment on every phase of the proceedings in this case and an extensive print and radio ad campaign advancing the defense position. By contrast, the District Attorney of Queens County has declined comment other than to acknowledge the existence of an investigation, report the indictment and remind the public that the indictment is an accusation and that the defendants are presumed innocent. In addition, defendants have failed to establish the existence of any locale within the State where news coverage about the incident has been substantially different from Queens County, perhaps accounting for the complete failure of the defense to suggest a different venue for the trial of this case.

12. Nor does defendants' public opinion poll establish that a fair jury cannot be empaneled in Queens County. The numbers reflected in the defendants' poll are disputed in a more recent public opinion survey conducted by Siena College Research Institute at the request of the prosecution, attached as People's Exhibit A. That research shows that only 35.5% of potential jurors report having formed an opinion about this case and that 67% of

those potential jurors believe that they would be able to set that opinion aside if they were instructed to do so in a court of law. *See* Exhibit A at p. 6 (second question), p. 7 (third question); *see also* pp. 3-4. Moreover, even assuming the validity of defendants' poll results, his own data shows that 75% of potential jurors retain an open mind and are willing to listen to additional evidence that would change their opinion. Thus, defendants have failed to sustain their burden of establishing that a fair and impartial jury could not be empaneled in Queens County.

WHEREFORE, and for the reasons set forth in the annexed memorandum of law, the People respectfully request that this Court deny the defendants' motion for a change of venue in its entirety.

Dated: Kew Gardens, New York
January 17, 2008

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This memorandum of law is submitted in response to the defendants’ motion for a change of venue.

ARGUMENT

**DEFENDANTS HAVE FAILED TO ESTABLISH THAT
THEY ARE ENTITLED TO THE EXTRAORDINARY
RELIEF OF A PRE-VOIR DIRE CHANGE OF VENUE.**

Defendants have completely failed to sustain their heavy burden of demonstrating their entitlement to the extraordinary relief of a change of venue prior to jury selection. Indeed, rather than make any effort to examine potential jurors and establish that a fair and impartial jury cannot be selected in Queens County—a county that is home to almost 2.3 million people¹ — they instead request a change of venue based upon a collection

¹ See U.S. Census Bureau 2006 Population estimate, at U.S. Census Bureau, State and County Quick Facts (quickfacts.census.gov/qfd/states/36/36081.html).

of allegedly prejudicial newspaper articles and a public opinion survey commissioned by the defense.

Defendants' motion should be denied. As hereinafter explained in greater detail, defendants' portrayal of the media coverage of this case is seriously skewed, as defendants have culled out a relatively small number of unfavorable articles and ignored the vast majority of the media coverage, which has been fair and balanced. Indeed, most articles have consistently reported facts favorable to the defense as well as comments and explanations offered by the defense and defense representatives. Defendants have also ignored a substantial segment of the coverage that has been wholly favorable to the defense, including public comments, opinions and editorials adopting the defense viewpoint and many news reports of facts unfavorable to the prosecution case. In addition, a good portion of the media coverage has been generated by representatives and supporters of the defense, who have taken every opportunity to comment on every phase of the proceedings, appeared repeatedly on radio and television, and run an extensive ad campaign to advance the defense agenda. In contrast, the District Attorney of Queens has simply acknowledged the investigation, reported the indictment, and reminded the public that the indictment is solely an accusation and that the defendants are presumed innocent. The pre-trial publicity, then, fails to demonstrate that the defendants have been unfairly subjected to a "tidal wave" of prejudicial pretrial publicity precluding the selection of a fair jury in Queens County.

The public opinion survey commissioned by the defense provides no better reason to preempt all efforts to select a fair and impartial jury in Queens County. In fact, the

poll results offered by the defense have been seriously disputed, as a more recent survey conducted by the Siena College Research Institute establishes, contrary to the defense poll, that only 35% or approximately one-third of potential jurors report having formed an opinion about the case and that 67% of those believe that they could set that opinion aside if asked to do so in a court of law *See* Exhibit A at p. 6 (second question), p. 7 (third question). Moreover, defendants' own data, even if taken at face value, shows that 75% of potential jurors retain an open mind and would listen to additional evidence that would change their opinion. Given these numbers, the defense cannot viably maintain that there is no point in even making the effort to obtain a fair jury in Queens.

Indeed, despite the initial publicity in this case, the empaneling judge of the Grand Jury was able to select, through proper and appropriate screening, twenty-three grand jurors who fully and carefully considered all of the facts and potential charges in this case.

REDACTED - DUE TO GRAND JURY SECRECY - C.P.L. § 190.25(4)

Nor do Mayor Bloomberg's remarks or the First Department's decision to change venue in the Amadou Diallo case require a change of venue here, as defendants allege. The Mayor took great pains, at the time he made his remark regarding "excessive force," to explain that very little was known about the actual facts and circumstances of the case at that time and he immediately qualified his remarks by saying "that's up to the investigation to find out what really happened." *See* "Mike Takes A Shot," *New York Post*, November 28, 2006. In addition, within one day of his statement, he acknowledged that he was speaking as a civilian, that he was not a law enforcement professional, and that "if you're not there, your opinion is not worth very much." *See* "Wedding Day Shooting Inside Probe; Mayor Meets Victim's Family," *Newsday*, November 29, 2006 (City Edition). The Mayor was also roundly criticized for his remarks in many of the same papers that defendants now allege provided coverage prejudicial to the defense. Moreover, these remarks, which were made quite early on in the case, did not prevent the Grand Jury from fully and carefully considering the case, and coming to a thoughtful and nuanced conclusion.

Similarly, contrary to defendants' contention, this case is substantially different from the Diallo case. First, much more publicity was attendant to Diallo: while defendants complain of the 120 *New York Times* articles in this case, the *Times* printed 453 articles referring to Diallo prior to the First Department's decision on the venue motion in that case. Second, unlike the situation in Diallo where mass protests resulted in over 1200 arrests, including three members of Congress and the former Mayor of the City of New York, here, all protests have been peaceful, with virtually no arrests. Indeed, most protests in this case

have attracted hundreds rather than thousands of protesters and most have been characterized by quiet reflection rather than violence or even civil disobedience. Third, far fewer potential jurors have formed an unfavorable opinion in this case on the defendants' guilt or innocence: in Diallo, 81% of Bronx residents formed an unfavorable opinion prior to voir dire while here the Siena poll shows that only 35% of Queens residents have formed any opinion at all. Even taking defendants' poll at face value, the 63% that have allegedly formed an adverse opinion in this case is far less than the 81% in Diallo. Also, here, unlike in Diallo, defendants' own poll shows that 75% of potential jurors retain an open mind about the case. Thus, Diallo does not require a change of venue here.

Other reasons abound to attempt to obtain a fair jury in Queens. Unlike in some cases, most of the witnesses in this case – and there are likely to be over 50 of them – reside in Queens County or neighboring counties, as do the survivors and family members of the deceased. Removal of the case to a distant locale will seriously interfere with the attendance of the witnesses and may significantly impede the proceedings. It will also seriously interfere with the rights of the friends and family of the deceased to be present at the trial. In addition, Queens has now available a new technologically advanced courtroom that will allow the seamless presentation of the substantial amount of scientific and photographic evidence in this case that will likely be introduced by both sides. Moreover, potential jurors are already being summoned for the impending February 4th trial date, and little is to be gained by turning them away before making any effort to determine whether a fair and impartial panel can be drawn.

Defendants have, in short, completely failed to demonstrate why no effort should be made to personally examine potential jurors to determine whether a fair trial can be had in Queens County. Indeed, fair juries have been drawn in Queens in a host of very high publicity cases, and each one was subsequently affirmed on appeal. These include three capital cases tried in Queens County where the selection of the jury required not only the ordinary qualification process but also qualification to serve in a death penalty case, further paring down the available jurors. It also includes the trials presided over by Justice Cooperman in the notorious "stun-gun" cases arising out of the 106th Precinct. Given that defendants have provided no sound reason for believing that similar fair juries can be drawn in this case, his motion for a pre-voir dire change of venue should be denied.

A. Defendants Have Failed to Establish the Existence of Pretrial Publicity So Prejudicial and Pervasive That it Warrants a Pre-Voir Dire Change of Venue.

Criminal Procedure Law Section 230.20(2)(a) provides that this Court may order a change of venue upon a showing that there is "reasonable cause to believe that a fair and impartial trial cannot be held" in the county where venue lies. While Section 230.20 provides that a motion for a change of venue can be made at any time, New York courts are traditionally "disinclined to presume prejudice," *see People v. Cahill*, 2 N.Y.3d 14 (2003), and "have consistently held that except in exceptional circumstances . . . change of venue motions pursuant to C.P.L. § 230.20(2) made prior to the voir dire are premature" *People v. Bell*, N.Y.L.J., May 8, 1998 (2d Dept. 1998); *People v. Brensic*, 136 A.D.2d 169, 172 (2d Dept. 1988) (citations omitted); *see also People v. Boudin*, 90 A.D.2d 253, 255 (2d

Dept. 1982) (defendant seeking pre-voir dire change of venue must demonstrate that case is "extraordinary"; earlier denial of defendant's motion for pre-voir dire change of venue "was consistent with the great majority of decisions dealing with such pre-voir dire motions." [citations omitted]); *People v. Shedrick*, 83 A.D.2d 988 (4th Dept. 1981) (pre-voir dire change of venue motion denied as "premature" and appropriate application could be made "[i]f it develops during voir dire that a fair and impartial jury panel cannot be drawn . . . ").²

In order for a defendant to establish a need for this extraordinary relief, the defendant must demonstrate that the county was "deluged with a tidal wave of prejudicial publicity to such an extent that even an attempt to select an unbiased jury would be fruitless." *People v. Cahill*, 2 N.Y.3d at 38-41; *see also Culhane*, 33 N.Y.2d 90, 110 n.4 (1973)(venue should be changed where voir dire would become a "hopelessly burdensome and futile process"). It is not enough to establish the existence of extensive media coverage about the case. "Newspaper comment alone, even though extensive, does not establish inability to get a fair trial." *People v. DiPiazza*, 24 N.Y.2d 342, 347 (1969) (citation and internal quotation marks omitted); *see also United States v. Barker*, 925 F.2d 728, 732 (4th Cir. 1991) ("Sheer volume of publicity alone does not deny defendant a fair trial"). Rather, "[t]he question is

²*See also People v. Morin*, 56 A.D.2d 715 (4th Dept. 1977) ("Since the case has not yet progressed to the voir dire of potential jurors, we deem this application [for a change of venue] premature"); *People v. Sekou*, 45 A.D.2d 982, 983-84 (4th Dept. 1974) (defendant's pre-voir dire change of venue motion denied; defendant charged with various crimes arising out of Attica prison riots provided court with statistical study of attitudes possessed by residents of county encompassing jury pool).

whether media or other accounts have been so inflammatory as to thwart the selection of a fair-minded jury." *Cahill*, 2 N.Y.3d at 40.

Applying this rule, the Court of Appeals in *People v. DiPiazza*, 24 N.Y.3d at 347, upheld the denial of a change of venue, despite extensive pretrial publicity, where the media coverage was essentially that to be expected in any case of substantial notoriety. The Court found nothing prejudicial in the fact that "the victim's funeral and the members of her family were sympathetically portrayed and the defendant's action was described as having caused a widespread reaction and aroused deep feeling." *Id.* And while the reports that the defendant's grandfather -- whom the defendant visited right before the murder -- had previously been convicted of murder might be seen as hostile to the defendant, other facts favorable to the defense, including a Grand Jury investigation into the District Attorney's handling of the case, were also covered in the media. This "surprisingly objective" coverage was not such as to require a change of venue, according to the Court. *See also People v. Cahill*, 2 N.Y.3d at 40 (change of venue properly denied; quoting *DiPiazza* regarding sympathetic portrayal of family members and noting that "most of the media coverage tended to be objective, including . . . news reports on the court proceedings").

Even where media coverage has been extensive, highly emotional and the subject of much political debate, this Court has not ordered a change in venue in the absence of a showing that the defendant cannot receive a fair trial in the county where the crime occurred. Thus, in *People v. McClary*, 150 A.D.2d 631 (2d Dept. 1989), this Court declined to change the venue of the trial of one of the defendants accused of killing Police Officer

Eddie Byrne despite “pervasive and, at times, highly emotional media coverage”; extensive “editorial comment decrying the brazen violence employed by those immersed in drug trafficking” and the fact that the murder “served as a rallying cry for those who seek the reimposition of the death penalty.” *Id.* at 632.

In addition, courts have been highly reluctant to require a change of venue when a defendant himself engenders publicity about the case. Thus, a defendant who “willingly and voluntarily participate[s] in the pretrial publicity” by, for example, “giving a statement to the media concerning the incident which formed the basis for the charge,” is hardly in a position to complain about the extent of the pretrial publicity afforded by the press. *See People v. Ruger*, 288 A.D.2d 686, 687 (3d Dept. 2001).

Here, defendants have failed to establish that they have been subjected to a “tidal wave” of prejudicial publicity requiring the conclusion that any attempt to select a jury would be “fruitless.” While there have been many articles and news reports, defendants’ portrayal of the media coverage surrounding the case is in fact seriously skewed. From a select handful of articles, defendants would have the court extrapolate that the media coverage has been overwhelmingly prejudicial, repeatedly attacking the defense position and reporting essentially irrelevant and inflammatory information with an eye toward convicting the defendants in the press before the trial has even begun. This is simply not the case here. To the contrary, the public has been presented with the widest array of stories, opinions, and editorials with regard to this case, many of which vigorously support the defense position and the vast majority of which comprise objective, fair, and balanced reporting.

Coverage favorable to the defense, entirely omitted from the defendants' discussion of the media reports, has been evident throughout the pendency of this case in at least two forms: editorials, columns, op-ed pieces and letters to the editor expressing opinions highly favorable to the police officer defendants, and news articles reporting facts that undermine the People's case or the credibility of the People's witnesses. As to the first category, examples may readily be found. In response to the indictment in this case, many voiced opinions that charges were unwarranted, particularly homicide charges, and sharply attacked the victims' supporters for suggesting otherwise. *See, e.g.*, "The Bell Indictments," New York Post, March 17, 2007 (People's Exhibit B, attached, at B1); "Criminalizing Tragedy," New York Post, March 20, 2007 (People's Exhibit B, attached, at B2); "It's Criminal to Declare This Murder", New York Post, March 20, 2007 (Exhibit B at B4); "A Tragedy, Not a Murder; Without Evidence, It's Utterly Irresponsible to Say Cops Set Out to Slay Sean Bell," Daily News, March 21, 2007 (Exhibit B at B5); "Bell Indictment Fallout," Daily News, March 20, 2007 (Exhibit B at B6).

In its first editorial after the indictment, for example, the New York Post unequivocally stated, "[W]e don't believe these officers should be facing charges at all – because the next time a cop in a similar situation finds himself hesitating, even for a second, for fear of possibly being hauled into court, it could well cost him his life" (Exhibit B, attached, at B1). Describing one Bell family supporter as "a mean-spirited, self-aggrandizing disgrace to New York City," the editorial refers to the undercover officer's first shot "fired in response to a perceived mortal threat in a split-second judgment" as the "one that counts."

The editorial concludes, again in no uncertain terms, that “Sean Bell’s death was a tragedy. But it wasn’t a crime.” Later, the Post returned to this theme in “Criminalizing Tragedy,” published on March 20, 2007, just after the arraignment of the defendants (Exhibit B, attached, at B2). Emphasizing the dangers attendant to police work, the editorial concluded, “criminalizing tragic outcomes serves only to embolden criminals and to hamstring the police. And to propel New York back to the abyss.” Another columnist called the shooting “a cataclysmic case of the wrong guy in the wrong place. It wasn’t murder – nor was it manslaughter.” “Hey, Mike, Don’t Let Us Lose These Finest, Too,” New York Post, March 17, 2007 (Exhibit B at B7). Others were even more direct in their criticism, calling the indictment “A disgrace!” and stating, “It is absolutely shameful that an officer can be criminally charged for doing his job.” *See* “Bell Indictment Fallout,” Daily News, March 20, 2007 (Exhibit B at B6).

Similarly, one prominent columnist, referring to a supporter of the Bell family as a “nitwit,” concluded that murder charges were not appropriate and that Detective Oliver “perceived . . . that he and his fellow comrades were under deadly fire. And in any cop’s handbook, you know that under fire, you return all the fire until deadly force is removed.” “It’s Criminal to Declare This Murder,” New York Post, March 20, 2007 (Exhibit B at B4). Quoting Michael Palladino, the President of the Detectives’ Endowment Association, the union that represents the defendants, the columnist stated, “Bell’s car ‘was still moving as

shots were fired, and it struck an undercover officer twice.”³ The columnist observed that “it’s always been the case that you don’t shoot – and there are six pall-bearers at your funeral. You do shoot – and you go to jail. What’s the sense?” *See also* Goodwin, “A Tragedy Not a Murder,” Daily News, March 21, 2007 (Exhibit B at B5) (“the cops, from what we know now, believed they were in a fight for their lives, and they didn’t have the advantage of hindsight.”)

And in an op-ed piece featured prominently in the New York Times shortly after the indictment, one commentator stated that Club Kahlua was “a hotbed of narcotics, prostitution, gun sales, and underage drinking,” without any particular support; recited as fact that the undercover officer had calmly identified himself as a police officer (an issue vigorously disputed by the parties); insisted that the victim “us[ed] his car as a 3,000 pound weapon”; and opined that “[c]ertainly there were mistakes . . . [b]ut it was the occupants of the car who made them.” “Point-Blank Perspective,” New York Times, March 20, 2007, Robert Leuci (Exhibit B at B8). The commentator concluded, as did the columnist cited above, with the “ancient cop saying: ‘I’ll always rather be judged by 12 of my fellow citizens than carried by six of my brother officers.’”

Many other editorial and opinions throughout the pendency of the case have echoed similar sentiments. Shortly after the incident itself, one editorial reminded the public that “as a matter of law, cops have an explicit right to use deadly force if they are in

³This assertion appears to be erroneous. Neither the Police Commissioner nor the undercover officer has maintained that the officer was struck twice with the victim’s car.

reasonable fear for their lives” and concluded that available information “suggest[s] such a fear was indeed reasonable, given that Bell apparently drove his car into an undercover cop. And that officers on the scene thought the man had a gun.” “A Reasonable Fear,” New York Post, November 28, 2006 (Exhibit B at B9).

In addition, many of the articles, opinions, and editorials linked the Bell incident to the shootings and stabbings of other police officers. *See e.g.*, “Criminalizing Tragedy,” New York Post, March 20, 2007) (Exhibit B at B2) (referring to recent shooting of plain-clothed police officer, an unrelated stabbing of another police officer, and the shooting of two unarmed auxiliary cops); “In the Line of Duty,” New York Post, March 16, 2007 (Exhibit B at B10) (shooting of officers in Greenwich Village gave “context” to the Sean Bell shooting; “cops live in the real world. And face real dangers, as Pekearo and Marshalik did, with horrific results”); “Death in the Line of Duty,” Daily News, March 16, 2007 (Exhibit B at B11) (referring to shooting of auxiliary police officers, “All of this is a stunning reminder of how dangerous it is to be a cop . . . a terrible fact that must be remembered when passing judgment on police actions, as a Queens Grand Jury is now doing in the Sean Bell shooting”); “Real Men in Blue, Who Really Bleed Red,” New York Times, March 16, 2007 (linking Bell shooting to several recent police shootings; “a city reeled from fresh reminders of how risky police work can be, with life or death sometimes measured in seconds”); “He Heroically Held Fire and Nearly Paid Price,” Daily News, May 10, 2007. In addition to referring to the shooting of two auxiliary police officers in Greenwich Village, many of these columns and editorials brought up the trial of Ronell Wilson in Brooklyn for

shooting two undercover police officers in the back of the head. “Real Men in Blue, Who Really Bleed Red,” *New York Times*, March 16, 2007; “Plain Clothes, Perilous Choices,” *New York Times*, December 1, 2006 (Exhibit B at B13); “Selective Sympathy,” *New York Post*, December 1, 2006. These opinion pieces uniformly extolled the dangers of police work and suggested in strong terms that police officers who must make split-second decisions should not be second-guessed.

Moreover, the attacks on Bell supporters have by no means been confined to the period surrounding the indictment. *See* “Bile-filled Bigots Tarnish Bell Case,” *New York Post*, January 29, 2007; “Lies of the Race-Baiters,” *New York Post*, December 19, 2006; “Sharpton Continues His Self-Serving Charade,” *New York Observer*, December 18, 2006; “The Wrong Messenger,” *New York Sun*, December, 1 2006, Alicia Colon; “A Reasonable Fear,” *New York Post*, November 29, 2006 (Exhibit B at B9). These articles sought to undermine, most often quite strenuously, the credibility of Bell family advocates.

In addition to the editorials, columns, and op-ed pieces, many news articles were otherwise quite favorable to the defense position. In “Meet the Cops Behind the Bullets; Devoted Family Man Led Squad,” *Daily News*, November 30, 2006 (Exhibit B at B14), the authors recount defendant Oliver’s prior incident in which he and a another rookie cop disarmed two men in a gunfight without firing a shot, quoting Detectives’ Endowment Association President Michael Palladino as saying, “It shows the control he had even as a rookie, to draw his gun and handle a threat, make the arrests without firing . . . That’s not a cowboy.” Similarly, a *New York Times* article on the front page of the Metro section shortly

after the incident delved into the background of the officers involved in the shooting, describing them as “a handpicked team of officers responsible for several hundred arrests between them without ever having fired a round in the line of duty.” “For 5 Officers, No Shots Fired for Years, and Then 50 At Once,” *New York Times*, November 29, 2006 (Exhibit B at B15); *see also* “31 Shots Are Cop’s First in His 12 Years on Job,” *Daily News*, November 27, 2006. That same day, also on the front page of the Metro section, the Times revealed one of the surviving victim’s prior criminal history. “Wounded Man Tried to Escape a Violent Past,” *New York Times*, November 29, 2006 (Exhibit B at B17) (detailing Mr. Guzman’s prior gunpoint robbery and conviction for selling drugs on school grounds). In fact, the alleged prior criminal activity of all of the victims was a regular subject of discussion in the press. *See, e.g.*, “Pal of Sean Bell Bets,” *Daily News*, December 5, 2006 (detailing prior alleged criminal activity and arrests of victims); “My Friend is Dead,” *Daily News*, December 6, 2006 (stating that all of the victims were subject of drug probe but not arrested on those charges).

Additional articles also directly undermined the credibility of prosecution witnesses. A spate of articles chronicled Trent Benefield’s arrest in a gambling raid shortly after the incident. *See, e.g.*, “Bell’s Pal in Gamble Bust,” *New York Post*, December 29, 2006 (People’s Exhibit C, attached, at C1); “Man Who Was Hurt in Police Fusillade Is at Scene of Gambling Raid,” *New York Times*, December 30, 2006. A similar flood of articles occurred when Benefield was arrested for allegedly assaulting his girlfriend. *See, e.g.*, “50-Shot Victim Held as ‘Beater,’” *New York Post*, September 27, 2007 (Exhibit C at C2); “Man

Wounded in Sean Bell Shooting is Charged with Assault,” New York Times, September 27, 2007 (Exhibit C at C3); “Bell Witness Accused of Assault,” Newsday, September 27, 2007; “Arrest of Sean Bell’s Friends May Change Case Against Police,” New York Sun, September 27, 2007; “Bell Pal Arraigned in Fiancee Beating Rap,” Daily News, September 27, 2007 (Exhibit C at C4); “Bell Pal Comes Up Craps In Raid,” Daily News, December 30, 2007 (Exhibit C at C5). Even when that case was disposed of with a plea to a violation rather than a crime, the publicity was negative. *See, e.g.*, “50-shot Man Gets Beat Break,” New York Post, October 12, 2007 (Exhibit C at C6); *see also* “Qns. Cop-shooting Victim Beats ‘05 Trespass Rap,” New York Post, December 30, 2006 (Exhibit C at C5).

Other negative stories were printed when allegations came to light that Benefield and Guzman had received funds from the Rev. Al Sharpton’s National Action Network. *See, e.g.*, “Rev. Al ‘Lame’ Excuse, 50 Shot ‘Work Comp,’” New York Post, September 28, 2007 (Exhibit C at C7); “50-shot Victim Held as Beater, Says Sharpton Pays Him to Loaf,” New York Post, September 27, 2007 (Exhibit C at C2) (quoting Benefield as saying, “Sharpton and my lawyer don’t want me to work” and “[w]hatever I want they give me”). Similar allegations of impropriety were raised when it was learned that the victims received money from the Crime Victims Board, allegedly on a fraudulent basis. “State Panel Gave Money to Bell’s Pals & Fiancee,” Daily News, October 18, 2007 (Exhibit C at C8). These, unfortunately, were far from the only unseemly, or unjustified, allegations. And still other credibility issues were raised in articles concerning the Bell family’s civil suit. *See,*

e.g., “Bell’s Fiancee to Sue,” Daily News, July 24, 2007; “Victim’s Fiancee Sues City, Cops”, Newsday, July 25, 2007.

Other articles directly attacked the deceased victim as well. *See, e.g.*, “Bell ‘Sex’ Shock,” New York Post, September 4, 2007 (Exhibit C at C9) (detailing allegations that deceased victim tried to obtain sex at strip club prior to shooting). Many of these were stories concerning the deceased victim’s alcohol use on the night of the incident. *See, e.g.*, “Police: Sean Bell Was Drunk,” Newsday, December 23, 2006 (Exhibit C at C10); “Bell’s Alcohol Level Twice Legal Limit,” Daily News, December 23, 2006 (Exhibit C at C11). Others raised the even-more-shocking, although apparently entirely unfounded, allegation that Sean Bell had shot another man the year before in a drug dispute. *See, e.g.*, “Sean Bell Shot Me,” New York Post, March 27, 2007 (Exhibit C at C12); “Dealer: I Was Shot by Bell,” Daily News, March 27, 2007 (Exhibit C at C13); *see also* “Bell Tattler Shoots Down Own Tale,” New York Post, March 28, 2007; “Legal Eagles Debate Claims’s Effect on Judge and Jury,” Daily News, March 27, 2007 (quoting attorney Marvyn Kornberg: “For once, the pretrial publicity is going to help the defense”). Even the location of the bachelor party was attacked. *See* “Seedy Club’s Long History of Sleaze,” Daily News, November 26, 2006; “For Owner’s of Club in Police Shooting Case, Years of Raids and Suits,” New York Times, December 3, 2006.

Other articles announced the existence of a “fourth man” allegedly at the scene firing at the officers and further justifying their actions. *See, e.g.*, “Last Minute Bell Shocker. Cop-Shoot Witness Sez He Saw ‘4th Man’ Run With Gun,” Daily News, March 15, 2007

(Exhibit C at C15); “Mystery Witness Could Influence Bell Jury,” New York Sun, March 15, 2007. They were followed by articles concerning charges leveled against a supervisor of a potential defense witness for attempting to intimidate the witness into refusing to testify. *See, e.g.*, “Witness Intimidation Charged in Sean Bell Case,” New York Sun, March 29, 2007; “Witness Intimidation is Charged in Sean Bell Case,” New York Times, March 29, 2007.

In addition, many of the articles, and much of the publicity generally, was instigated or spurred on by representatives of the defendants, both in the form of their constant comment and continuing readiness to raise issues in the press, radio, and TV, and in a concentrated print and radio ad campaign advancing the defense position. Indeed, Michael Palladino, president of the detectives’ union, has been quoted in countless articles with regard to the Sean Bell case,⁴ has appeared no less than three times on New York One’s “Inside City Hall,”⁵ and has been interviewed at great length by such commentators as Brian Lehrer with regard to the Bell matter.⁶ Typical of his outspoken attempts to advance the defense cause is one incident noted by the Times in which, while the defendants appeared

⁴A search of LexisNexis’s “Mega News, All” database reveals 238 stories quoting Palladino in connection with the Sean Bell case.

⁵In these interviews, dated November 28, 2006, March 22, 2007, and October 4, 2007, Palladino vigorously defended the officers and attacked the credibility of the victims. He discussed the “fourth man” who allegedly fired on the police officers, insisted that an investigation was required into the “salary” paid to the victims from the National Action Network, questioned the victims’ lifestyles, assailed Bell for being intoxicated, and vehemently defended Oliver for the \$4500 meal that he consumed immediately after the incident. Recordings of these interviews are available upon request.

⁶*See* “Cops Off Hook, Union Big Says,” Daily News, December 21, 2006.

in court for an adjournment, Palladino “planted himself firmly on the front steps of the courthouse, trying to make himself heard” “At Bell Hearing, More Action Outside Court Than In,” New York Times, April 12, 2007; *see also* “Detective Who Fired 31 Shots Testifies,” New York Times, March 10, 2007 (“as Detective Oliver was escorted to the office building . . . the leader of the detectives' union, Michael J. Palladino, paused at a bank of microphones”). Many other stories were also instigated by Palladino. *See, e.g.*, “Union: Probe Rev. Al,” New York Post, October 3, 2007 (People’s Exhibit D, attached, at D1); “Union Chief No. 1 Backer of Bell Cops,” Daily News, Sunday, October 28, 2007 (Exhibit D at D2); “Union Slams the ‘100’; Police Group Wants ‘Blacks’ Names,” New York Post, December 19, 2007 (Exhibit D at D3); “Detective’s Union Rips Slay Report,” New York Post, December 12, 2007; “Cops Off Hook, Union Big Sez,” Daily News, December 21, 2006; “Lethal Weapon – Cop Union: 50 Shot Slay Justified,” New York Post, November 27, 2006. These were supplemented by Palladino’s numerous interviews and television appearances with regard to the Bell case.

In addition, the Union undertook an extensive advertising campaign on behalf of the defendants, consisting of a veritable media blitz designed to sway public opinion before any trial could begin. The detectives’ union ran two separate commercials, narrated by Palladino himself, on at least three different major radio stations in the New York market, WABC-AM 770, 1010 WINS, and WCBS Newsradio 880, for a total of well over 200 “flights,” or broadcasts. *See* Exhibit E at E1 (chart detailing flights). As the attached transcripts of the ads reveals, in these commercials, Palladino immediately invokes “9/11”,

although no conceivable connection exists between this case and any terrorist plot or agenda, and explains that police officers “place their lives in jeopardy every day to protect the public from crime and terrorism.” *See* Exhibit E at E2. He then cites statistics that purportedly show that since 1990, in the 16 years prior to this case, 66 police officers were killed in the line of duty with, allegedly, more than 185,000 line of duty injuries. Directly referencing the Sean Bell case, he calls the Police Department the most “professional” and “restrained” in the country and asks for “understanding” from every New Yorker. In the second ad, Palladino again invokes “9/11,” tells the listeners that the NYPD has prevented over 13,000 homicides, and again requests the public’s “understanding” of the events in the Sean Bell case (Exhibit E, at E3).

These radio commercials were supplemented by full page print ads in the New York Post and the New York Daily News directly addressing the details of the Bell case and advancing the defendants’ position. *See* Exhibit E, attached, at E4-5. In one, Palladino announces that “It’s Time to Set the Record Straight,” that the five officers involved in the “tragic events” have previously assisted in 1000 arrests, that none had ever before fired a single shot, that no departmental charges or civilian complaint had ever been filed against any of the officers, that the dramatic reduction in citywide crime is due to the dedication of the members of the NYPD, and that twelve detectives have been killed in the line of duty since 1998 (Exhibit E at E4). In the other full page ad, Palladino recites similar statistics, including that NYPD members prevented 13,000 homicides and that in a 10-year period New York City police officers have been shot at more than 200 times. He also argues that the

NYPD is “remarkably restrained” in its use of force (Exhibit E at E5). Again, Palladino asked for “understanding” from every New Yorker for the defendants.

Still further publicity was prompted by the defendants’ attorneys. *See, e.g.*, “Tell Us How Much Sharpton Paid Witnesses, Lawyers for Sean Cop Demands,” Daily News, October 7, 2007; “Separate Trial for Bell Cop? Attorney Mulls Severing Case,” Daily News, March 21, 2007; “Shooter: They Knew I Was Cop,” Daily News, November 29, 2006. Defense counsel have, it appears, been ever ready to comment on every aspect of the evidence and proceedings from the time they entered the case. Indeed, a search of the LexisNexis news database reveals 165 stories in which the defense attorneys have been quoted.⁷ In addition, many of the articles relate to the change of venue motion itself, hardly a fact of which the defendants can complain. “50-shot Cops: Move Our Trial,” New York Post, November 13, 2007 (reporting lawyers’ statements that venue motion would be filed months before filing); “Trial in Death of Sean Bell Postponed,” Associated Press, November 14, 2007 (Palladino states officers “were still considering whether to seek a change of venue”).

This is in sharp contrast to the conduct of the District Attorney in this case. The District Attorney has repeatedly declined comment upon inquiry by the press and rejected countless requests for interviews on the topic. Even at the time of the indictment, the District Attorney did no more than acknowledge the lengthy investigation in the case and

⁷The search, conducted on January 10, 2008, used the Mega News LexisNexis database, including national and international news sources.

recite the charges in the indictment. *See* Exhibit F. In fact, the District Attorney took great pains at that time to remind the public that the Grand Jury did not decide the guilt or innocence of the defendants and that its determination amounted to only an accusation, and to say, “I remind you that the defendants are presumed innocent until proven guilty beyond a reasonable doubt” (Exhibit F at F5).

In short, the detectives’ union’s media campaign, clearly designed to sway public sympathy in favor of the defendants, along with the articles instigated by the defendants and the constant comment of Palladino and defendants’ attorneys, demonstrate defendants’ conscious decision to use the media to their best advantage. In light of this decision, they are hardly in a position to complain about the extent of the pretrial publicity that has been attendant to this case.

The remaining publicity in the case – that not wholly favorable to the defense or directly attributable to defense representatives – has indeed been quite objective. This is reflected in several different ways. First, much of the initial reporting about the incidents, even those articles describing the tragic death of Sean Bell on the day of his wedding, balanced their accounts of the incident with information favorable to the defense. Picking up on the Police Commissioner’s public statements about the incident on the day it occurred, most of the articles published recited key aspects of those statements from the defense point of view, specifically that prior to the shooting, the undercover officer witnessed a confrontation between one or two of the victims and another man outside the club; that during that confrontation, one of the victims allegedly said, “Yo, go get my gun,” right before

walking to the victims' car; and that the deceased victim allegedly struck the undercover officer with his vehicle and rammed the minivan full of police officers once or twice before any gunfire erupted. These critical allegations, repeatedly relied on by supporters of the defendants, were routinely recited in the press stories immediately following the incident. *See, e.g.*, "Officer Who Fired First Shot Thought Man Had Gun," New York Times, November 27, 2006; "Police Kill Man After Bachelor Party in Queens," New York Times, November 26, 2006; "Groom Dies in NYPD Barrage," New York Post, November 26, 2006. "Cops Shoot Groom Dead," Daily News, November 26, 2007.

Second, many of the news stories reflected comments not solely from Bell family supporters but from the defendants' representatives, attorneys, and supporters as well. Palladino in particular was regularly quoted as a counterweight to any statements made by Bell supporters.⁸ In addition, as noted above, once defense counsel entered the case, they consistently added their comments as well, which the press was more than ready to include in their news stories. *See, e.g.*, "3 Cops Hit By '50 Shot' Rap," New York Post, March 17, 2007 (Exhibit G at G2). In this way, as well as through citing the key facts favorable to the defense, the press was able to achieve fair and balanced coverage in the case.

Third, much of the coverage simply touched on the various types of proceedings attendant to this, or indeed any, case. This included stories concerning the indictment charges, the arraignment of the defendants on the indictment in court, the trial court's denial of the motion to dismiss, and subsequent adjournments. *See, e.g.*, "Queens:

⁸*See* pages 28-29 and footnote 7, *supra*.

Delay in Police Shooting Trial,” New York Times, November 15, 2007; “Bell Cops Lose Bid to Nix Trial,” Daily News, September 8, 2007; “Bell Cops Will Stand Trial,” Newsday, September 8, 2007; “Sean Bell Case: The Charges,” Newsday, March 20, 2007. These stories had little that was controversial and provided another example of the objective coverage of the press.

Fourth, much of the coverage, including news reports, opinions, and editorials, acknowledged the complicated nature of the case and the possibility that the incident represented nothing other than a tragic accident. *See, e.g.*, “In a Flash, A Tragic Turn,” Daily News, November 28, 2006; “Both Partygoers and Police Panicked by Bullet Threat,” Daily News, November 27, 2006; “Learning from Bell,” New York Sun, December 14, 2006 (Exhibit G at G6); “Legal Eagles Debate Claims’s Effect on Judge and Jury,” Daily News, March 27, 2007. And most articles recognized that all the facts had not been revealed about the incident, underscoring the need to withhold judgment. “Sorting Out Bell Shooting. Excessive? Justified? Cops’ Indictment Provides an Opportunity to Find Out,” Newsday, March 20, 2007 (Exhibit G at G1); “Mixed Views on Indictments,” Newsday, March 18, 2007 (Exhibit G at G7); “The Twists of the Sean Bell Case,” New York Times, March 26, 2007; “50 Bullets, One Dead, and Many Questions,” New York Times, December 11, 2006.

In the end, the vast majority of press coverage was balanced and objective in one or more of these ways. Rather than simply presenting one side, the press sought very much to include comments and facts supporting the multiple views of what occurred during the incident. Indeed, because of the complicated nature of this case and the multiple

viewpoints routinely expressed, the coverage here may have been much more objective than in other high publicity homicide cases. For example, in *People v. Taylor*,⁹ a death penalty case and the last Queens County criminal case in which a venue motion was presented to this Court, this Court denied a change of venue despite truly extensive publicity unfavorable to the defense. The shocking crime – involving the cold-blooded execution of five people forced to kneel at the back of a refrigerator with their hands tied behind their back and plastic bags over their heads as they were shot from point-blank range – was universally condemned in the press as the “Wendy’s Massacre,” and resulted in many vociferous and pained cries for justice against the two defendants. *See* People’s Exhibit H, attached.¹⁰ Fairly read, no article favored the defense, except to say that the defendants should spend their lives in prison rather than be executed. Here, by contrast, much of the coverage has been either directly favorable to the defense, doubting the commission of any crime at all, or well balanced to show the opposing viewpoints of the tragic events.

⁹This Court denied two venue motions in connection with the Taylor case, one in 2000 and one in 2001. The People rely on the papers submitted to the Court by both sides in that case in the discussion of the publicity attendant to that case and the motions for a change of venue.

¹⁰The articles contained in this exhibit all originally appeared in the Defendant’s Exhibits to the Change of Venue Motion before this Court in *People v. John Taylor*, A.D. No. 2000/08461, Queens Co. Ind. No. 1845/2000 (motion filed September 8, 2000). These include, “Angel of Death at Wendy’s Massacre,” Daily News, July 31, 2000; “Terrifying Tale of Death, Victim’s Shot with Bags Over Their Heads,” Daily News, May, 26, 2000; “Anatomy of the Slaughter,” Daily News, May 28, 2000; “Shattered by Horror,” New York Post, May 26, 2000; “Massacre Hero Tells How His Friends Died,” May 27, 2000; “This is What the Death Penalty is Made For,” New York Post, May 30, 2007; “These Vile Animals Should be Facing the Death Needle,” New York Post, May 28, 2000; “End of Dreams,” Newsday, May 26, 2000; “Kin Demand ‘Vengeance,’” May 28, 2000; “‘Boom, I Shot Him in the Back of the Head,’” New York Post, May 28, 2000 (recounting defendant Taylor’s confession); “Suspects Confessed and Then ‘Slept Like Babies,’” New York Post, May 29, 2000.

Similarly, in the *McClary* case, 150 A.D.2d 631, cited above, the press coverage was “pervasive and, at times, highly emotional,” including extensive “editorial comment decrying the brazen violence employed by those immersed in drug trafficking.” *Id.* at 632. The case also “served as a rallying cry for those who [sought] the reimposition of the death penalty,” as the press coverage at the time widely reflected. *Id.* The coverage in *McClary* was thus, like the coverage in *Taylor*, in no way favorable to the defense. Despite this overwhelmingly negative coverage in *McClary*, however, this Court felt that no change of venue was necessary. The same result should apply even more so here, where the press has presented a balanced picture with multiple viewpoints.

Nevertheless, defendants raise several complaints about the press coverage here, citing a handful of allegedly prejudicial articles. These articles do not require the conclusion that defendants have been subjected to a “tidal wave” of publicity. First and foremost, the defendants complain about Mayor Bloomberg’s statement immediately after the incident suggesting that excessive force may have been used. *See* Defendants’ Motion at 4-5. These statements do not require a change of venue for several reasons. First, at the time these statements were made, Mayor Bloomberg also “took pains to point out that the facts were not all in, saying several times that he did not yet know what happened in the shooting.” “Bloomberg Calls 50 Shots by Police ‘Unacceptable,’” *New York Times*, November 28, 2006. The Mayor in fact immediately added, “we’ll wait and see whatever the facts are,” *id.*, and “that’s up to the investigation to find out what really happened.” “Mike Takes A Shot,” *New York Post*, November 28, 2006. In addition, the initial articles reporting

the Mayor's statements contained immediate and contrary responses to the Mayor's comments. *Id.* (quoting defense attorney); "Mayor: Shooting Was Excessive," *New York Sun*, November 28, 2006 (quoting Palladino).

Second, the very next day after making that statement, Mayor Bloomberg strongly qualified his remarks. According to published reports, the Mayor said about his statement, "I'm a civilian, not a professional law enforcement officer. If you're not there, your opinion is not worth very much." *See* "Wedding Day Shooting Inside the Probe; Mayor Meets Victim's Family," *Newsday*, November 29, 2006 (City Edition). At the same time, Mayor Bloomberg "also voiced support for police, who have been heavily criticized in recent days," *id.*, and "urged New Yorkers not to rush to judgment." "Judge and Fury – Mike Has Cop 'Trial' All Set Up," *New York Post*, November 29, 2006. Subsequently, the Mayor discussed the case without repeating his comments and instead emphasized, "We don't know what happened." "Mike Holds Fire vs. NYPD," *New York Post*, December 2, 2006. The Mayor went on to state that "these guys [the police] have dangerous jobs," citing the murder of two undercover police officers in the then-pending Ronell Wilson case. *Id.*

Third, as soon as the comment was made, rebukes in the press were swift and severe. These were not limited to the Detectives' Endowment Association and the Sergeants' Benevolent Association, who quickly sharply criticized the Mayor for his comments, but included many experienced journalists writing columns and editorials. *See* "Mike Plays Right Into the Hands of Race-Baiter Al," *New York Post*, November 28, 2006; "Jurors Will Avenge Diallo," *New York Post*, March 14, 2007 (Mayor Bloomberg's statement "pandered

shamelessly to the aggrieved community” and he “engaged his mouth before he had a chance to hear the explanation”); “Bloomberg’s Blunder,” New York Sun, November 29, 2006 (“We have no doubt that the mayor’s reputation suffered Monday” and “[c]ertainly thousands of New Yorkers shook their heads in amazement yesterday”); “Mike’s Excess, Bloomberg Plays Judge and Jury,” New York Post, November 29, 2006; “It’s Mayor Mike,” New York Post, March 24, 2007 (describing uproar over Mayor’s comments and saying “he needs to think first and consider all the possible repercussions before sharing [his] opinions with the public”); “The Wrong Messenger,” New York Sun, December 1, 2006 (“Sadly, the Mayor has made a very grievous error in prejudging the incident”); “The Police Shooting and the Mayor,” New York Times, December 1, 2006 (the Mayor “has swung too far in the other direction. His snap condemnation of the police in the heated aftermath of Saturday morning’s fatal shooting by officers in Queens is wrong for the same reasons the previous administration was wrong to immediately defend the police”).

Fourth, the Mayor’s comments were made early on in the case, and their long-term effect, if any, does not appear to have precluded a full and thorough subsequent investigation and careful consideration of the fruits of that investigation by the Grand Jury as to whether any crime was committed in this case.

REDACTED - DUE TO GRAND JURY SECRECY - C.P.L. § 190.25(4)

The Grand Jury, then, did not simply accept the Mayor's qualified statements about the incident and rush to judgment, but heeded the calls for a thorough inquiry and a nuanced consideration of the potential criminal liability of each individual officer.

Fifth, according to the defendants' own survey, which, as explained below, may be overly favorable to the defense point of view, most Queens residents did not and would not simply accept the Mayor's statements. According to that survey, most Queens residents, 53%, would only "somewhat believe" or "somewhat reject" the Mayor's statements about the case, while another 11% would "strongly reject" his statements and 21% are unsure. This leaves only 13% who would be willing to accept the Mayor's statement at face value, without further thought and consideration such as the Grand Jury exercised in this case.

In light of the highly qualified nature of the Mayor's statement – with the Mayor himself saying his opinion was "not worth very much" – the ensuing firestorm of criticism in the press, and the proof suggesting that the statements are not likely to preclude a thorough consideration of the evidence at trial, the press coverage concerning the Mayor's statements are simply insufficient to show that any attempt to obtain a fair jury in Queens would be fruitless.

Nor does the fact that former Governor Pataki briefly concurred in the remarks change the picture. Former Governor Pataki, on a remote video feed from Kuwait, did agree with the Mayor's comments. But, the force of this statement was necessarily diminished by his absence from the State during the incident and the fact that, for this reason, he quite

evidently could only have had minimal information about the events. Moreover, defendants offer no evidence that these statements were repeated, and the statements seemingly did nothing to undermine the thorough consideration of criminal charges in the case by the Grand Jury.

Defendants also cite two articles reporting a purportedly erroneous statement by Commissioner Kelly that officers are trained to fire three times and then pause and reassess the situation. *See* Defendants' Motion at 4-5. As the very limited number of citations by the defendants suggest, there were very few stories that reported this information.¹¹ The minimal nature of the coverage of the statement, dating from over a year ago, in a much larger sea of information about the case, suggests that few potential jurors would be aware of it, and that the issue could be effectively addressed in *voir dire*.¹²

Defendants also complain, however, about various protests, vigils, and demonstrations organized by Bell family supporters. *See* Defendants' Motion at 15-16. But their complaints, like the protests themselves, are somewhat muted. Indeed, the largest such event, the "Shopping for Justice" rally that occurred prior to the indictment, well over a year ago, was promoted as a "silent rally," with no speeches or slogan shouting at all. *See* "A

¹¹Defendants' assertion that "all of the other major New York City newspapers" covered these statements is not supported by any citation, and a search in the LexisNexis news database under the "Mega News, All" file, for "Sean Bell" and "Kelly," "reassess," or "pause" reveals only one additional mention. *See* "Reason Prevails on Tragic Shooting," Daily News, November 28, 2006. Defendants' motion papers in this case prompted one additional mention, "Detectives in Bell Case Want Trial Out of City," New York Times, January 8, 2008.

¹²In addition, the NYPD has confirmed that officers must qualify at the range twice a year with their sidearms and that the shots are fired in two or three shot sequences. "Detectives in Bell Case Want Trial Out of City," New York Times, January 8, 2008.

March for Justice on Fifth: Silent Rally,” *Newsday*, December 16, 2006 (no speeches); “Shop for Justice; Fifth Ave. Bell March Today,” *New York Post*, December 16, 2007 (no speeches). The rally went off without a hitch; no violence erupted, no civil disobedience took place, and no one was arrested. *See* “Protesters Flood Fifth Avenue,” *New York Times*, December 17, 2006 (“largely devoid of shrieks, speeches and most of the usual sound-and-fury tactics of demonstrations”). Most of the other demonstrations have taken the form of much smaller peaceful protests, involving at most a few hundred, or even simply “dozens,” of supporters. *See, e.g.*, “Bride’s Farewell,” *New York Post*, December 3, 2006 (150 in rally); “Peaceful Protesters Demand Justice,” *Newsday*, December 10, 2006; “Pain Still Lingers,” *Newsday*, November 26, 2007 (“dozens” at one-year anniversary memorial). Some have simply taken the form of “vigils,” as the Bell family’s preference for quiet and contemplative gatherings has become known. *See* “Vigil For Groom Ends,” *Newsday*, February 20, 2007. “Bell’s Kin Reject City Vigil Call,” *New York Post*, November 16, 2007. These demonstrations are far from the large, and often violent, protests resulting in mass arrests in other cases.

At the same time, defendants complain about the “demure” Ms. Paultre-Bell, the deceased’s bride-to-be, who, in her quiet and continuing grief, has become “the face . . . of the victims in this case.” *See* Defendants’ Motion at 13. Her conduct, however, provides no ground for a change of venue. For one thing, it is Ms. Paultre-Bell who has strongly advocated peaceful and respectful gatherings over loud and demonstrative protests, and in that way she has limited the potential prejudice to the defendants that could have arisen from

such events. *See, e.g.*, “Sean Bell Surviving Witnesses to Testify,” *Amsterdam News*, March 1, 2007 (Paultre-Bell: “I have faith in the criminal justice system”). Surely, had she advocated mass demonstrations and made angry and vengeful demands for convictions, as have the families of victims in other high publicity cases,¹³ the defense would be arguing that her conduct was inappropriate and prejudicial. Her actual demeanor appears much better suited to the calm atmosphere conducive to a fair trial.

For another thing, the image of the grieving widow depicted in the press is one that, unfortunately, is all too familiar in high publicity homicide cases. Indeed, the stories here are not far from those referenced in the *Cahill* and *DiPiazza* cases, where the Court of Appeals held that no change of venue was required: “The victim’s funeral and the members of her family were sympathetically portrayed and the defendant’s action was described as having caused a widespread reaction and aroused deep feeling.” *Cahill*, 2 N.Y.3d at 40; *DiPiazza*, 24 N.Y.3d at 347. Similarly, in the *Taylor* case, the families of the five deceased victims and the two survivors of the attack, both of whom had also been shot in the head, presented powerful images in the press of the grief and suffering caused by the defendants in that case. *See* footnote 10, *supra*. Yet, these evocative images did not provide a sufficient ground for a change of venue.

Here, in comparison, the print media was quite balanced. Even some of the articles relied on by the defense, handpicked to show prejudice, instead show the

¹³Cries for “vengeance” were, for example, made by some of the victim’s families in the Wendy’s Massacre. *See* “Kin Demand Vengeance,” *New York Post*, May 28, 2000.

ambivalence of the press and the public in this case, especially when compared to other high publicity homicides like the *Taylor* case. According to the Daily News column included as Exhibit K to defendants' motion papers, the person interviewed expressed that, "I have mixed feelings about the whole thing." She goes on to say, "Maybe, you know, there was a reason the cops started to shoot. Guys go to clubs like that one and they come out with liquor in their head." The story also quotes her as saying she feels bad for the victims, but "I also feel bad for the families of the cops." This type of ambivalence is indeed characteristic of the press's and the public's reaction to the case – reflecting their understanding that there are important considerations on both sides calling for thoughtful responses. Moreover, whatever the particular potential juror in the story might end up thinking, it is surely more ambivalent than those who read stories about and formed opinions about the Wendy's Massacre or the Police Officer Eddie Byrne homicide.

Defendants also complain about stories and other information available on websites that are "anything but balanced." Defendants' Motion at 15-16. But just as those websites exist, so do others that heavily favor the defense. Illustrative of these is "On the Job Radio.Com," sponsored by the Sergeants' Benevolent Association, which has numerous radio broadcasts highly favorable to the defense point of view, and the "Independent Conservative" website, which carries articles such as "Sean Hannity Versus Nut Charles Barron. People Who Hit Cops with Cars Usually Get Shot!!" (www.Independentconservative.com/2006/11/29/Hannity__versus__Barron). In addition, extensive blogs also exist that spout information and opinions highly favorable to the defense

point of view, including the “NYPD Rant” website.¹⁴ Moreover, according to the recent survey conducted by the Siena College Research Institute discussed at greater length below, only a relatively small proportion of the jury pool in Queens has gotten its information about the case from the internet. *See* Exhibit A at pp. 5-6. According to the survey, only about 16% of the jury pool has gotten information about the case from the internet and only about 2% report that they have gotten most of their information about the case from the internet. The defense fears of rampant prejudice from potential jurors perusing the internet, then, do not appear to be warranted.

Reviewing the publicity as a whole, then, there can be no question that the press coverage of the incident and its aftermath is not overwhelmingly biased against the defense, but has been predominantly fair and balanced. Significantly, according to defendants’ own poll discussed below, only 23% of the public shares the defendants’ opinion that the media coverage is biased against the police. *See* Defendants’ Exhibit B, Question 19. Moreover, the fact that coverage of this sort does not compel a change of venue is made abundantly clear by reviewing the press attention received in other cases in which venue changes have been denied, such as the *Taylor* and *McClary* cases, where virtually all of the press coverage was unfavorable to the defense. Accordingly, defendants have failed to sustain their burden of showing a “tidal wave” of prejudicial publicity against them.

¹⁴*See, e.g.* www.city-journal.org/html/con2006-12-04hm.html; www.libertypost.org/cgi-bin/readart.cgi?Art_Num=168503; www.theurbangrindblog.com/?p=1931; c-hayes.blogspot.com/2007/04/update-on-sean-bell-more-brime-in.html.

B. Defendants' Disputed Poll Results Fail to Establish that Any Attempt to Select A Jury in Queens Would Be Fruitless; Indeed, The Results of A More Recent Survey Demonstrate Just the Opposite.

Defendants attempt to buttress their selective portrayal of media coverage with the use of a public opinion survey commissioned from a private pollster that allegedly establishes that an unacceptably high percentage of potential jurors have formed an indelible opinion about the case, such that any attempt to select a jury in Queens would be fruitless. His results, even if taken at face value, fail to establish what they claim, as even these results suggest that 75% of the public remains open minded, willing to hear “additional evidence” that would change any opinion they may have formed. Moreover, defendants’ results are highly suspect, as they conflict in key respects with another poll independently commissioned by the Daily News suggesting that two-thirds of the public believe that a fair trial can be obtained in Queens County in this case, and they also conflict with a survey performed just this month by the Siena College Research Institute, commissioned by the prosecution, showing that only a third of all potential jurors have formed a definite opinion about the case and that, consistent with the independent poll, two-thirds believe that they could set any prior opinion aside and decide the case based solely on evidence presented in the courtroom. Defendants’ polling data then falls far short of establishing that a fair jury cannot be selected in Queens County.

In considering change of venue motions, this Court has strongly cautioned against over-reliance on poll results. Reviewing courts “often do well,” this Court has observed, “to rely less heavily on a poll taken in private by private pollsters and paid for by

one side than on a recorded, comprehensive voir dire examination conducted by the judge in the presence of all parties and their counsel pursuant to procedures, practices and principles developed by the common law” *People v. Boudin*, 90 A.D.2d 253 (2d Dept. 1982) (citations and internal quotation marks omitted). The Fourth Department has echoed similar sentiments, denying change of venue motions based on public opinion surveys by saying, on more than one occasion, that "until the [survey’s] conclusions can be tested in the context of the voir dire examination, the relief requested in the application before us is premature." *People v. Gray*, 51 A.D.2d 889 (4th Dept. 1976); *People v. Sekou*, 45 A.d.2d 982 (4th Dept. 1974).

Moreover, even when voir dire has been attempted and hard data is available, the Court of Appeals has made clear that a defendant seeking a change of venue on pretrial publicity grounds has a heavy burden. First, under Court of Appeals precedent, the defendant must show more than that potential jurors are knowledgeable about the case. For example, in *People v. Cahill*, 2 N.Y.3d at 39-41, the Court of Appeals addressed the claim that 86% of the potential jurors had heard about the case before coming to court (including 8 of the eventual 12 jurors chosen). The Court disposed of this claim by observing, "The test for removal . . . is not based on the number of prospective jurors who heard of the case. If that were the test, juries in highly publicized cases would necessarily consist only of the most reclusive and uninformed segment of the population." *See also People v. Culhane*, 33 N.Y.2d 90, 110 (1973) ("No matter how desirable it may be, it is unrealistic to expect and require jurors to be totally ignorant prior to trial of the facts and issues in certain cases")

(citations omitted); *People v. Quartararo*, 200 A.D.2d 160 (2d Dept. 1994) (95% of initial pool of prospective jurors had knowledge about the case; change of venue not required). Neither the Constitution nor C.P.L. section 230.20 require that such a "reclusive" jury be empaneled.

Second, a change of venue, particularly a pre-voir dire change of venue, is not required simply because potential jurors have formed opinions about the case. Indeed, there is a "presumption that jurors are capable of putting aside whatever preconceptions they might initially have as a result of external influences and of deciding the case strictly in accordance with the trial court's instructions and in accordance with the evidence." *People v. Quartararo*, 200 A.D.2d at 160. As the Supreme Court has noted, "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961).

Our Court of Appeals has also long held to the same effect. The Court has observed that "an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." *People v. Genovese*, 10 N.Y.2d 478 (1962) (internal quotation marks and citations omitted). Yet, "[i]n recognition of the fact that few persons enter the jury box, at least for the trial of a well-publicized case, without

knowing something about it, it has long been the rule in this State that “[e]ven one who has formed an opinion or impression of the defendant's guilt or innocence may be selected to sit if he swears that he believes that it will not influence his verdict” *People v. Genovese*, 10 N.Y.2d at 481 (citations omitted); *see also Cahill*, 2 N.Y.3d at 39-41 (52% of jurors came to court with an opinion as to guilt or innocence). It is for this reason that this Court has held, even after voir dire has been attempted, that “[t]here is no bright-line test which requires a change of venue based solely upon the fact that a fixed percentage of the veniremen have expressed a preconceived opinion about the case.” *People v. Ryan*, 151 A.D.2d 528, 529 (2d Dept. 1989)

Third, a change of venue motion need not be granted even when many jurors express their belief, upon examination by the trial court during voir dire, that they may not be able to set their opinions aside and judge the case fairly. In *Quartararo*, only 37% of the original jury panel indicated that they could be fair; nevertheless, this Court upheld the denial of a change of venue, observing, "The key is to conduct a thorough screening process so that however many close-minded venirepersons there might be, the jurors ultimately selected have open minds." 200 A.D.2d at 166-67. “There will always be people who form strong opinions based on a minimum of information; however, there will fortunately always be others who, even if possessed of a great amount of information, will wisely hold off judgment knowing that there may be more to learn.” *Id.* at 167.

In this case, defendants’ polling data is insufficient to show that members of the jury pool are not only familiar with the case, but hold such strong opinions unfavorable

to the defense as to overcome the presumption that the jurors could set those opinions aside. Nor has he shown that such an overwhelming portion of the jury pool holds this type of immutable opinion as to render any attempt to conduct a voir dire examination fruitless.

Defendants offer the results of a survey conducted on their behalf by a private polling concern allegedly showing that 63% of the jury pool in Queens has already formed an opinion that the defendants conduct was unjustified and that only 39% believe that the defendants can receive a fair trial in Queens County. But the defendants' poll is inadequate to make the required showing for several reasons. Initially, even taking the defendants' polling data at face value – and there is ample reason to believe the data overstates the negative opinion of the jury pool, as explained below – its own results show only that jurors have formed opinions about the case, not that jurors are incapable of setting those opinions aside if asked to do so in a court of law. To this extent, then, the poll fails to address directly the critical issue that would be before a trial court in voir dire – the extent to which a juror who may have formed an opinion can nevertheless set the opinion aside and be fair and impartial.

Moreover, defendants' own data suggests that even potential jurors who have already formed an opinion remain open-minded. In a portion of the survey not mentioned in the defendants' argument on this issue, the poll reveals that 75% of the survey respondents stated that they were “open to hearing additional evidence that would change [their] mind.” See Exhibit B, Question 14. Indeed, only 18% – less than 1/5th of the jury pool – answered that they had “completely made up [their] minds,” with 7% being undecided. This data alone

strongly suggests that the jury pool has kept an open mind concerning the case. The 18% of close minded jurors in defendants' poll is in fact much less than the 37% in *Quartararo*, where a change of venue motion was denied.

In addition, according to defendants' own survey, 55% of the jury pool believes that it is *likely* that there is "evidence in the case which [they] have not heard which would alter [their] opinion about the case." *See* Defendants' Exhibit B, Question 15. A much smaller percentage, 35%, believe that is unlikely that such evidence exists, with more than half of those respondents, 18%, saying that it is only "somewhat unlikely" that such evidence would be revealed. Stated conversely, only 17% of the jury pool believes that it is "very" or "extremely" unlikely that additional evidence would come to light sufficient to alter their views.

Other numbers in the defendants' poll suggest the presence of more general attitudes that are advantageous to the defense and could dispose even unfavorable potential jurors to a favorable change of mind. For example, 76% of respondents answered affirmatively the question of whether they trusted the police. *See* Defendants' Exhibit B, Question 2. Also, many more respondents were likely to "assume," if they heard a story about the police shooting someone in their neighborhood, that the police were justified, 46%, than would "assume" that excessive force was used, 32%. *See* Defendants' Exhibit B, Question 7. In addition, another 21% responded "Don't know," indicating that they at least had an open mind on the issue.

And, on a more case-specific note, many more survey respondents stated that they believed that if they were to *acquit* the defendants in this case they would receive a *favorable* response among friends, family and acquaintances, 38%, than said they would receive an unfavorable response, 25%. Defendants' Exhibit B, Question 18. And only 10% stated that they would receive a "very" or "extremely" unfavorable response from friends and family if they were to acquit. The specter of jurors caving into intense pressure from family and friends is thus unfounded, even according to defendants' own poll.

Furthermore, other results of defendants' poll – including the data upon which defendants most heavily rely – are suspect. The poll, for example, purports to show that only 39% of Queens residents believe that defendants can get a fair trial in Queens County. But in an independent survey conducted on behalf of the Daily News concerning this case, 55% of respondents stated that they believed that the defendants' could get a fair trial in Queens. *See* Exhibit I, attached. This difference is quite substantial.

Similarly, while, allegedly, 63% of the Queens jury pool believes that no justification is possible for the defendants' actions, 48% of those who responded to the defendants' survey stated that it was possible that the defendants made an honest mistake. These numbers too do not appear to be consistent.¹⁵

¹⁵Similarly, many of defendants' other conclusions are suspect, even accepting the data in the report. For example, the survey results pertaining how closely the respondents have followed the case can be read differently from the way defendants interpret them. In fact, 27.9% of respondents said they had been following the case "somewhat" closely, while 27.7% said they had followed the case "not at all," "not too closely," or "don't know." *See* Defendants' Exhibit B, Question 8.

And other questions about the defense survey remain unanswered. It appears, for example, that the pollster “oversampled” for African Americans, surveying 200 African Americans out of 600 or so total responses, as the cover of the report seems to indicate. *See* Defendants’ Exhibit B, cover. This is a much greater percentage of African Americans than the 21% present in the population of Queens.¹⁶ In addition, according to the attachments to the defendants supplemental filing with regard to this motion, the margin of error for African Americans in the poll is +/- 6.9 percent, creating a potential swing of almost 14% in the results with regard to this group. This too provides a reason to view the poll with considerable caution. Similarly, the defense survey does not explain the process used to approximate the jury pool in Queens. This suggests that the results may not accurately reflect the views of those who will in fact be summoned to court.

But the greatest reason to doubt the numbers in the survey conducted by the defense, and to doubt the conclusions that the defense has drawn from the data, can be found in the poll conducted by the Siena Research Institute during the first week of this month. That survey, commissioned by the prosecution from a highly respected pollster,¹⁷ addresses not only public opinions toward this case generally, but also the ability of those who have

¹⁶*See* U.S. Census Bureau statistics at quickfacts.census.gov/qfd/states/36/36081.html.

¹⁷The Siena Research Institute, affiliated with Siena College in Loudonville, New York, is frequently relied upon by the press for its public opinion polling. A search of the LexisNexis newsgroup database shows over 1800 articles referencing their surveys. By comparison, the Luntz, Maslansky firm commissioned by the defense is referenced in only 61 articles.

formed opinions to set those opinions aside if asked to do so in the context of a trial – the critical issue that a trial judge would face in attempting to empanel a fair jury.

The results of the Siena poll paint a substantially different picture from that advanced by the defense. According to the Siena survey, only 35.5% of respondents, representing those in the Queens jury pool,¹⁸ stated that they have formed an opinion about this case. *See* Exhibit A, p. 6 (second question). This leaves roughly two-thirds of the jury pool in the category of those who have formed no opinion with regard to the case, certainly an adequately large group to warrant further examination in voir dire.¹⁹

Moreover, of the 35.5% who have formed an opinion, only 43.4% believe that the police officers used excessive force and are guilty of a serious crime. *See* Exhibit A, p. 3 (bottom paragraph). This group represents a total of no more than 15.4% of the jury pool as a whole who might be excluded from service for holding a preconceived opinion favorable to the defense. *Id.* at p. 3 (bottom paragraph). And even if one were to additionally exclude those who responded that the defendants acted *properly* under the circumstances as having

¹⁸As attached Exhibit A indicates, the survey asked pre-qualifying questions designed to isolate the jury pool in Queens. Those questions were based on the five “source lists” used in identifying jurors for service: voter registration list, driver’s license list, tax list, welfare list, and unemployment list. *See* testimony of Chester Mount, Director of the Office of Court Research for the Office of Court Administration, from hearing on jury composition on *People v. John Taylor*, Ind. No. 1845/2000 appearing in Record on Appeal in Court of Appeals.

¹⁹Some portion of the survey respondents stated that they had not formed an opinion about the case, but when they were asked to do so “given what you know now,” answered unfavorably to the defendants. As stated in the report, the position of these individuals can best be described as “soft.” Moreover, even combining the “soft” unfavorable views with the other “hard” unfavorable opinions results in an aggregate of only 23% of the entire sample that hold the unfavorable view. *See* Exhibit A at p. 6 (second question). This leaves approximately 77% of the sample who could potentially serve.

an opinion that might later disqualify them from serving as a juror on this case (about 8%), still approximately 77% of the jury pool would be eligible to serve, depending, of course, on their responses to voir dire questions. *Id.* In light of these results, it simply cannot be said that it would be “fruitless” to attempt to obtain a jury in Queens County in this case.

Moreover, even those jurors who stated that they formed an opinion about the case would not automatically be disqualified during voir dire; they could serve on a jury if they attested that they could set their opinion aside and decide the case based solely on the evidence adduced at trial. *See People v. Genovese*, 10 N.Y.2d at 481; *People v. Quartararo*, 200 A.D.2d at 164. The Siena survey, unlike the defendants’ survey, directly addresses this question by asking the respondents whether they could “set aside any opinion that you have about this case and all the people involved and base your decision only on what you hear in the courtroom.” *See Exhibit A*, p. 7 (third question). Approximately 67% of those who indicated that they had formed an opinion either that defendants used excessive force or that they had acted properly stated that they could set their opinions aside. *Id.* at p. 7 (third question); *see also* p. 4 (first full paragraph). This group too could serve on a jury in this case, or at least potentially so, depending on their answers to voir dire questions.

Combining these eligible groups, 92% of the potential jurors would be eligible to serve,²⁰ depending, again, on their specific responses during voir dire and the court’s

²⁰According to the report, only 23% hold a potentially disqualifying opinion and 67% of those say they could set their opinion aside. This leaves only 8% who hold a potentially disqualifying opinion who feel they could not set that opinion aside.

assessment of those responses. Under these circumstances, there can be no doubt that an attempt to obtain a jury in Queens would not be “fruitless.”

In short, defendants have utterly failed to sustain their burden of establishing that juror attitudes in Queens are so highly unfavorable and strongly held that it would be futile to attempt to obtain a jury within this county. To the contrary, the available evidence, from defendants’ poll and from the Siena survey, establish just the opposite – that the vast majority of potential jurors have not formed an opinion and that most of those who have could set that opinion aside if asked to do so in a court of law.

C. Neither the Diallo Case nor *People v. Porco* Require a Change of Venue Here.

Defendants rely primarily on two cases in attempting to establish that a change of venue is warranted here: *People v. Boss*, 261 A.D.2d 1 (1st Dept. 1999) – the shooting of Amadou Diallo in which the First Department moved the trial of five police officers out of Bronx County – and *People v. Porco*, 30 A.D.3d 543 (2d Dept. 2006), in which venue was changed from the Third Department to the Second Department. These cases are readily distinguishable. As explained below, in *Boss*, the amount and nature of the publicity, along with the public reaction as reflected in polling numbers and in mass demonstrations and arrests, was very different from this case. In *Porco*, the identity of the deceased was largely dispositive, since the brutally slain victim was the court attorney to the Presiding Justice of the Third Department. Thus, neither case warrants a change of venue here.

In the Diallo case, the First Department concluded that the defendants had been subjected to a “tidal wave” of prejudicial publicity, including an “endless repetition” of

columns and editorials calling for the conviction of the defendants accompanied by the conclusion that the defendants had acted out of racial prejudice. Each recited the two central facts of the case – that the defendants had shot the victim 41 times and that the victim was unarmed, with few or no facts favorable to the defense to counterbalance these assertions. The First Department found significant the “weeks of mass demonstrations” in which “thousands participated daily, and over one thousand persons, including high ranking present and former public officials and other prominent persons, were arrested.” *Id.* at 6. The Court also found compelling surveys conducted by independent polling entities and by the defense indicating that 81% of all Bronx County residents thought there was no possible justification for the shooting. “Significantly,” the Court stated, “the prosecution failed to submit any polling data casting doubt on the accuracy of the poll results.” *Id.* The Court also cited a Post editorial in which the word “Bang” was repeated 41 times and a then-recent advertisement by the American Civil Liberties Union, traditionally a stalwart protector of defendants’ rights, in which 41 bullet holes were pictured. *Id.* at 4-5. The Court concluded that jurors would be under “enormous pressure to reach the verdict demanded by public opinion.” *Id.* at 6.

The relevant facts in this case are readily distinguishable on many grounds. First, the amount and nature of the publicity in this case is very different from that in Diallo. As one veteran journalist has noted, “Frankly, it is hard to see how the news coverage of recent months, over all, amounts to a Diallo-level tsunami.” “Again, Question of Fair Jury for Officers,” *New York Times*, April 10, 2007; *see also* “50-Shot Sean Bell Trial, To Move

or Not to Move,” nypdconfidential.com (January 14, 2008) (“the pretrial publicity in the Bell case does not approach Diallo’s”). The numbers back up this observation. While defendants attempt to show the magnitude of the press in this case by pointing out that 120 articles have been published in the New York Times, Defendants’ Motion at p. 12, the number of New York Times articles in Diallo was much greater: prior to the date the venue motion was decided in that case, December 16, 1999, over 450 articles were published in the Times concerning the Diallo case.²¹ This amounts to nearly *four times* as much coverage in the press in the Diallo case as in this case. Put another way, the coverage in this case was statistically only 26% as great as the coverage in the Diallo case.

Equally important, the nature of the coverage itself was quite different. In Diallo, few facts were available to support the defense point of view and, thus, as the First Department noted, the press focused almost exclusively on the 41 shots and the death of an unarmed victim. Here, as noted above, the Police Commissioner made statements on the same day as the incident disseminating information concerning the events that was favorable to the defense, including information about the altercation outside the club, the statement by one of the victims, “Yo, go get my gun,” the deceased victim’s striking of the undercover officer with the Altima before any shots were fired, and the deceased victim’s ramming of the minivan full of plain-clothed officers before gunfire erupted. The press has routinely

²¹Like the search referenced in defendants’ papers, the search here was conducted on the New York Times website, nytimes.com. The name “Amadou Diallo” was used and the “custom date range” feature was used to restrict the search to articles before December 16, 1999, the date of the *Boss* decision. The cite references 453 articles for this search. Using simply “Diallo” as a search term reveals even more articles, 529 in all.

reported this information in its stories from the outset, and, as a result, press coverage has, for this reason alone, been much more balanced than the coverage in Diallo.

Nor has the press in this case engaged in, to any significant degree, the ardent cries for conviction that were present in Diallo. The Post, for example, rather than dramatically publishing an editorial with the word “Bang” 41 times, has in this case frequently published editorials supporting the defense point of view. “The Bell Indictments,” New York Post, March 17, 2007; “Criminalizing Tragedy,” New York Post, March 20, 2007; “A Reasonable Fear,” New York Post, November 28, 2007; “In the Line of Duty,” New York Post, March 16, 2007. The Daily News has done likewise, while many other editorials and articles have advocated further study and investigation. *See, e.g.*, “5 Key Questions Have to Be Answered,” Daily News, November 30, 2006; “Sorting Out Bell Shooting, Excessive? Justified?,” Newsday, March 20, 2007.

And in contrast to the prejudicial A.C.L.U. advertisement that the First Department found so disturbing in the Diallo case, here defense representatives took out full page print ads and paid for extensive radio advertising to support the defense position. Some of these have been dramatic, invoking 9/11 despite the absence of possible connection to terrorism. In addition, here, unlike in Diallo, many articles have surfaced vilifying the victims. These include articles proclaiming that the deceased victim was drunk, that all of the victims had criminal records, that one victim was arrested for gambling and later for domestic abuse, and that the victims have allegedly been improperly obtaining funds from the Crime Victims Board and the National Action Network to “loaf.” *See* pp. 23 to 25,

supra. Thus, unlike in Diallo, much of the press coverage here was quite favorable to the defense. At worst, press coverage reflected substantial cross-currents, ones that were simply not capable of producing a “Diallo-level tsunami.”

Furthermore, as many commentators have noted, the public furor in Diallo over the shooting was on an entirely different scale from the reaction in this case. *See, e.g.*, “Keep It in Queens,” *New York Post*, January 9, 2008 (“the controversy in this case did not even begin to approach the reaction to Diallo’ death”) (Exhibit G at G9); “Indicted Officers Likely to Seek Out-of-City Trial,” *New York Sun*, March 20, 2007. In Diallo, as the First Department noted, daily mass protests resulted in the arrests of over 1000 people, in fact, 1200 people according to published reports. *See* “Kadi Diallo’s Trial,” *New York Times*, January 9, 2000. These included three sitting Congressman, the former Mayor of the City of New York, and various prominent celebrities. *Id.* Here, the size and nature of the demonstrations were much smaller, consisting mainly of the silent rally on Fifth Avenue, some additional events attended by a few hundred people, and a series of quiet vigils. No arrests have been made in connection with these events, or at least none were reported in the press. Thus, this critical factor relied on by the First Department in *Boss* is not present here.

Still further, the survey results in this case are far different from those in Diallo. Rather than the two studies in Diallo showing an overwhelming 81% of Bronx County residents that believed no justification was possible, here, even taking defendants’ numbers at their face value, no more than 63% felt the same. Moreover, this percentage difference

reflects a much greater absolute number of residents who do not share the negative conclusion referenced in Diallo since the population of Queens County is almost one million people greater than Bronx County.²² Given the difference in county size, the difference in percentages represents an additional 405,931 people in Queens who, even according to defendants' survey, do not hold the offending opinion. This number alone is larger than the population of 51 out of the 62 counties in this state.²³

Furthermore, here, unlike in Diallo, the prosecution has provided survey results that supply ample reason to doubt the defense survey numbers. As noted above, according to the Siena College Research Institute Survey, only 35% of the jury pool stated that they formed any opinion at all, and only 43.4% of those expressed an opinion contrary to the defense, representing only 15.4% of the entire jury pool. Moreover, over 67% of those expressing an opinion either for or against the defense stated that they could set their opinion aside and base their verdict solely on evidence heard in the courtroom.

²²According to census data, Queens County currently is estimated to have 2,255,175 while Bronx County in 2000 had 1,332,650 residents. The difference is 922,525. See quickfacts.census.gov.

²³Census data reveals the following counties in New York have populations less than 405,000: Albany (297,556), Alleghany (50,265); Broome (196,269); Cattaraugus (51,554), Cayuga (81,243); Cautauqua (135,357); Chemung (88,641); Chenango (51,787); Clinton (82,166); Columbia (62, 955); Cortland (48,483), Delaware (46,977); Dutchess (295,146); Essex (38, 649); Franklin (50,968); Fulton (55,435); Genesee (58,830); Greene (49,822); Hamilton (5,162); Hekimer (63,332); 114,264); Lewis (26,685); Livingston (64,173); Madison (70,197); Montgomery (49,112); Niagra (216,130); Oneida (233,954); Ontario (104,353); Orange (376,392); Orleans (43,213); Oswego (123,077); Otsego (62,583); Putnam (100,603); Rensslear (155,292); Rockland (294,965); St. Lawrence (111,284); Saratoga (215,473); Schenectady (150,440); Schoharie (32,196); Schuyler (19,415); Seneca (34,724); Steuben (98,236); Sullivan (76,588); Tioga (51,285); Tompkins (100,407); Ulster (182,742); Warren (66,087); Washington (63,368); Wayne (92,880); Wyoming (42,613); Yates (24,732).

In addition, defendants' own survey debunks the notion that jurors in this case would feel under "enormous pressure to reach the verdict demanded by public opinion." First, as noted above, only 23% of potential jurors share the defendants' view that public opinion as reflected in the press favors the prosecution. *See* Defendants' Exhibit B, Question 19. Second, many more jurors believe they would be treated favorably if they acquit the defendants (38.2%) than those who say they would be treated unfavorably if they acquit (24.7%). Third, most of the jurors who say they would be treated unfavorably believe they would be treated only "somewhat" unfavorably; only 10% of jurors felt that they would be treated "very" or "extremely unfavorably." This evidence too, then, allays a critical concern present in Diallo.

Yet another factor representing a difference between this case and Diallo is that racial issues were much stronger in Diallo than here. All of the officers in Diallo were white and the victim was black, and, as the First Department noted, many articles and editorials insisted that the officers were racist. Here, of course, the officers who fired their weapons are themselves much more racially diverse, quelling any serious protestations that race was involved. *See* "3 Cops Hit By 50 Shot Rap," *New York Post*, March 17, 2007 (reporting that Oliver is of Syrian and Lebanese descent, and Isnora is of Haitian and Mexican descent). Indeed, the surviving victims, Bell family supporters, and defense supporters agree that race is not an issue in this case. *See, e.g.,* "Cops Off Hook, Union Big Says," *Daily News*, December 21, 2006 (Palladino: "Race has nothing to do with it"; Sharpton: "It doesn't matter

about the race here”); “Out-of-Hospital Survivor,” New York Post, January 25, 2007 (Guzman: “I don’t think this was racial”).

Moreover, as many have noted, race relations in the City have changed significantly in the years since Diallo. *See, e.g.*, “Mayor Focuses on Dialogue,” New York Times, November 27, 2006; “Indicted Officers Likely to Seek Out-of-City Trial,” New York Sun, March 20, 2007. Diallo, it must be remembered, followed closely on the heels of the Abner Louima case – tried in Federal Court the summer before the Diallo venue motion was decided – and that case too had sparked angry mass race-related protests – including the angry demonstration of 8000 protesters who marched across the Brooklyn Bridge, many carrying plungers. Since these two overlapping cataclysmic events, race relations in the City, while not perfect, have cooled. Indeed, one veteran pollster interviewed in connection with this case specifically noted the change in racial attitudes over this period of time. *See* “Not as Simple as Black and White,” Daily News, March 25, 2007. And, as others have noted, the racially diverse group of officers in this case reflect a much more racially diverse police department, with significantly different policing attitudes. *See, e.g.*, “Mayor Focuses on Dialogue,” *supra*. Thus, the underlying racial concerns present in Diallo are much diminished in this case, to the extent they exist at all.

In the final analysis then, virtually every factor cited by the First Department weighing in favor of a change of venue in the Diallo case is not present here. In Diallo, the staggering amount of publicity, the overwhelmingly unfavorable tenor of the publicity, the unrelenting fear-inducing public demonstrations resulting in over a thousand arrests, and the

strikingly one-sided nature of the survey results compelled a change of venue. Here, by contrast, the relevant events have generated a small fraction of the publicity in Diallo, the press reports have been largely neutral or very often favorable to the defense, demonstrations have been peaceful and uneventful, and survey results show a dramatically different picture than in Diallo. Accordingly, Diallo provides no ground for a change of venue here.

The decision in *People v. Porco*, 30 A.D.3d 543 (2d Dept. 2006), is even more readily distinguishable. Although the decision itself contains few details, a review of the moving papers reveals that the brutally slain victim, Peter Porco, was the law secretary to the Presiding Justice of the Third Department. See Affirmation of Terence Kindlon in Support of Motion for Change of Venue, dated June 6, 2006.²⁴ The surviving victim was Mr. Porco's wife and the defendant was Mr. Porco's own son. The elder Mr. Porco, according to the motion papers, worked at the Albany County Courthouse and was known to "virtually all of the judges in the Third Department." *Id.* at par. 2. So obvious was the appearance of a conflict that the venue motion itself was decided by this Court rather than the Third Department, even though the Criminal Procedure Law specifies that the motion should be heard in the Department encompassing the county in which the prosecution is pending. In addition, the sensational tale of intra-family murder was highly publicized: over 230 major news stories saturated Albany, which has a population of only about 95,000 people.²⁵ Still

²⁴Because the motion was heard in the Second Department, this affirmation and the rest of the motion papers in the Porco case are on file in this Court.

²⁵See quickfacts.census.gov, which reflects a 2003 estimated population of 93,919.

further, evidence that was likely to be, and in fact later was, suppressed was widely disseminated in the media. *Id.* at par. 33; *People v. Porco*, 2006 N.Y. Misc. Lexis 2859 (Co. Ct. Albany 2006). This Court cited as grounds for removal not simply the extensive publicity, but the Court also relied on the “unusual circumstances surrounding this case, including the identity of the victims [and] the nature of the crime.” *Porco*, 30 A.D.3d at 543. Here, of course, the “unusual circumstances” found so important in *Porco* simply do not exist. In addition, the county encompasses over 20 times the number of potential jurors as Albany, and no suppressed evidence has been disseminated. Accordingly, *Porco* does not compel a change of venue here.

In short, defendants have failed to identify any precedent that warrants the conclusion that a change of venue is mandated in this case. For this reason too, defendants’ motion should be denied.

D. Other Factors Weigh Against a Change of Venue.

Several other factors weigh against a change of venue here. These include the fact that the court empaneling the Grand Jury was able to select, even at the height of the publicity, a panel of impartial jurors who deliberated carefully on the evidence in the case; several policy concerns; and additional practical concerns, some quite immediate, that make removal of the case at this stage highly undesirable.

First, the Grand Jury proceedings in this case demonstrate that despite widespread publicity, fair and impartial jurors can be found.

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Furthermore, experience has proven that fair trial juries can be selected in the same community where the crime was committed even in the most troublesome of high publicity cases. A fair jury was selected, after the denial of a change of venue motion, in the Colin Ferguson case, even though Ferguson had killed five people on a commuter train in Nassau – a shocking crime in a county with a very high number of commuters and their families. And a fair jury was selected, after a change of venue motion was denied, in the Lemuel Smith case, where the defendant brutally murdered a female corrections officer in a county heavily laden with correction officers and their families. *See People v. Smith*, 63 N.Y.2d 41, 69 (1984). Cahill too received a fair trial, after the denial of a change of venue motion, despite a torrent of pretrial publicity over the premeditated hospital-bed murder of his wife – a hospital bed defendant himself had put the victim in. *See Cahill*, 2 N.Y.3d at 38-41; *see also People v. Sekou*, 45 A.D.2d 982, 983-84 (4th Dept. 1974) (defendant's pre-voir dire change of venue motion denied even though defendant charged with various crimes arising out of Attica prison riots in county where many corrections officers and family resided and defendant provided court with statistical study of unfavorable attitudes possessed by residents).

And Queens County too has a history of trials before fair and impartial juries in notorious cases. These date back to the trial of Winston Mosely for the brutal public slaying of Kitty Genovese on the streets of Kew Gardens, and they include such well publicized cases as *People v. Hammeed*, 88 N.Y.2d 232 (1996), the trial of two black liberation army members for the execution of one police officer and the wounding of another;

People v. Claudio, 83 N.Y.2d 76 (1993), the sensationalized prom night killing of a 17-year-old boy; the notorious 106th Precinct stun-gun cases, presided over by Justice Cooperman, who is assigned to this case as well, *see People v. Pike*, 131 A.D.2d 890 (2d Dept. 1987); *People v. McClary*, 150 A.D.2d 631, *supra*, the murder of Police Officer Eddie Byrne, whose badge then-President Bush retained in his desk drawer in the oval office; and three death penalty cases (two of which resulted in a non-capital verdict), in which jurors had to possess not only the ordinary qualifications to serve but had to be “death-qualified” as well. There is, then, little reason to assume, without examining a single juror, that a fair trial cannot be had in Queens County in this case.

Other considerations weighing against a change of venue are also present. Removal of the criminal proceedings to an upstate locale will create substantial hardships on the witnesses in the case. Both of the survivors and the family of the deceased reside in Queens, as do most of the other witnesses who were present in or around the Kalua Club on the night the incident happened. In addition, many police officers involved in the handling of the ballistics and other evidence, those with the Crime Scene Unit, as well as other essential personnel, reside in the New York metro area. In all, removal to an other locale would require the displacement, transportation, and perhaps even lodging of approximately 60 witnesses for the prosecution alone. Moreover, this displacement would necessarily take a toll on the administration of justice, as many difficulties would undoubtedly arise in obtaining and transporting witnesses, necessarily resulting in many delays and interruptions

in the courtroom. In what already promises to be a lengthy trial, these difficulties may significantly prejudice the ability of the jury to hear and understand the case.

In addition, given the substantial amount of scientific and visual evidence at issue, a technologically advanced courtroom would substantially facilitate the jury's ability to hear and appreciate the case. Understanding this, the Office of Court Administration has outfitted a Queens courtroom with considerable technological improvements, ones that, other things being equal, should be used to assist the jury in their consideration of the evidence here. "Techno Upgrade in Bell Courtroom," Daily News, October 29, 2007. Defendants have presented no reason not to take advantage of this courtroom.

Moreover, as of this date, 4500 juror summonses have been issued returnable specifically for the trial of this case on February 4, 2008. These summonses will provide an ample number of jurors to test the defendants' assertions that too much of the jury pool has been exposed to, and prejudiced by, the pretrial publicity in this case. There is no reason at this time to prevent that real-life test of the defendants' highly suspect assertions from occurring. This is particularly true given the number of jurors whose time and service would be wasted by a change of venue.

Finally, to change venue now, on the basis of defendants' collection of articles and news reports, before there has been any attempt to empanel a jury, would deprive the community of its legitimate interest in the just resolution of this matter. A criminal prosecution implicates far more than the interests of the individual victims and the accused. The prosecution of a criminal defendant also implicates the interests of the jurisdiction at

large. The community has legitimate concerns in seeing that, if a crime has been committed within its confines, the offender or offenders are brought to justice.

Indeed, "[p]olicy considerations deserve some weight in assessing the fairness of venue. It is important in criminal cases for the community to be confident wrongdoing conducted in its state against its citizens is penalized." *United States v. McDonald*, 740 F. Supp. 757, 765 (D. Alaska 1990). Simply put, the residents of Queens County maintain a strong interest in seeing that the case be tried by its own residents.

Thus, there are substantial factors to be considered in deciding the motion that are nowhere mentioned by the defense. These factors weigh in favor of denying the motion.

E. Defendants Have Failed to Identify Any Other County That Remains Unaffected by Publicity Concerning the Case or That Possesses the Same Diversity as Queens.

Defendants' motion should also be denied because they have failed to identify any county that possesses the "character" of Queens County and that is unaffected by the allegedly prejudicial pretrial publicity cited by defendants. Indeed, defendants have failed to suggest any county at all in New York state as a substitute for a trial in Queens. This is understandable, because the publicity attendant to this case reached not only statewide but nationwide, and because no county adequately replicates the cultural diversity of Queens.

In order to establish that a change of venue on pretrial publicity grounds is appropriate, a defendant must demonstrate not simply that pretrial publicity has permeated the jurisdiction in which the case is pending, but also that there is another jurisdiction with appreciably different media coverage to which the trial can be moved. In *People v.*

Berkowitz, 64 A.D.2d 995 (2d Dept. 1977), for example, this Court, in denying a change of venue motion, noted that “[t]he widespread publicity generated by this case has not been restricted to Kings County. Indeed there are few areas of the country in which the media has not carried numerous detailed accounts of the matter.” As a result, this Court concluded that transferring the case to Sullivan County, as requested, or to any other county in the state “would not succeed, to any significant degree, in mitigating the effects of such publicity.”

Similarly, in *People v. Quartararo*, 200 A.D.2d at 162, this Court denied a change of venue motion noting that the “propriety of this remedy does not hinge solely on proof of the extent to which the original venue has been saturated with pre-trial publicity.” Instead, it hinges on “the extent to which, as between the original venue and the venue to which a transfer is sought, significantly different levels” of pretrial publicity exist, “thus rendering the selection of a fair jury impossible in the one place and possible in the other.” *Id.*

Here, defendants’ failure to specify a county to which the matter could be transferred is fatal to their claim, because, by definition, they have failed to make this fundamental showing. This alone stands as enough reason to deny the motion.

Moreover, an analysis of the reach of the publicity concerning this case on a statewide and nationwide basis demonstrates that, as in *Berkowitz*, there are “few areas of the country in which the media has not carried numerous detailed accounts of the matter.”

64 A.D.2d at 995. Detailed stories on the case have appeared all over the state²⁶ and in such diverse newspapers as The Washington Post,²⁷ The Los Angeles Times,²⁸ The Chicago Tribune,²⁹ The Philadelphia Inquirer,³⁰ The Boston Globe,³¹ The Newark Star-Ledger,³² The Kansas City Star,³³ The Houston Chronicle,³⁴ The Lexington Herald Leader (Kentucky),³⁵

²⁶*See, e.g.*, “There is Nothing Excessive About This Worry,” Star-Gazette (Elmira), December 15, 2006; “Victims, Families, Watch Accused Cops in Court,” Albany Times Union, March 20, 2007; “Bloomberg Critical of Cops Actions,” Albany Times Union, November 28, 2006; N.Y. City Crowd Demands Answers,” Buffalo News, November 27, 2006; “Victim of Police Shooting Buried,” Buffalo News, December 3, 2006. At least 25 articles appeared in the Times Union and 20 articles in the Buffalo News.

²⁷*See, e.g.*, “Police Kill Groom on Wedding Day,” Washington Post, November 26, 2006, “New York Police Assailed for Bachelor Party Shooting,” November 27, 2006.

²⁸“The Nation: Crowd Unites in Grief,” Los Angeles Times, November 27, 2006.

²⁹“Vigil Held for Groom Killed by Police,” Chicago Tribune, November 27, 2006.

³⁰“Police Killing Spilled from Cauldron of New York,” Philadelphia Inquirer, November 27, 2006.

³¹“Somber Remembrance,” Boston Globe, November 30, 2006.

³²“New York Rally Condemns Police Shooting,” Newark Star-Ledger, November 18, 2006; “New York City Police Kill Man On Wedding Day,” Newark Star-Ledger, November 26, 2006.

³³“Police Shooting Sparks Protest,” Kansas City Star, November 27, 2006.

³⁴“Groom Shot Dead Outside Queens Club,” Houston Chronicle, November 26, 2006.

³⁵“Police Kill Groom on Wedding Day,” Lexington Herald Leader, November 26, 2006.

The Birmingham Post,³⁶ The Grand Rapid Press,³⁷ Fort Wayne Journal-Gazette (Indiana),³⁸ The Bismarck Tribune,³⁹ The Seattle Post Intelligencer,⁴⁰ The Roanoke Times (Virginia),⁴¹ and many more. Wire stories on the Associated Press state, national, and international wires have routinely been disseminated, as have news stories on Reuters and UPI.⁴² All major television networks also carried news stories in prime time.⁴³ Indeed, news stories have appeared regularly beyond the country's borders as well.⁴⁴ Under the circumstances, it would

³⁶"Family's Anger After Police Kill Groom," Birmingham Post, November 27, 2006.

³⁷*See, e.g.*, "NYPD Shoots Three People Near Club," Grand Rapid Press (Michigan), November 26, 2006; "No Justice, No Peace," Grand Rapid Press (Michigan), November 26, 2006.

³⁸*See, e.g.*, "Groom Killed on Wedding Day," Fort Wayne Journal-Gazette, November 26, 2006; "Local Lawmen Discuss NYPD Role in Slaying," Fort Wayne Journal-Gazette, November 26, 2006; .

³⁹"Police Shoot Man on the Day of His Wedding," Bismarck Tribune, November 26, 2006.

⁴⁰"New York: Sharpton Leads Rally," Seattle-Post Intelligencer, November 27, 2006.

⁴¹"New Yorkers Demand Answers," Roanoke Times (Va.), November 27, 2006.

⁴²Associated Press Worldstream, for example, carried 81 stories regarding the case, according to a search of the "LexisNexis MegaNews, All" database. Reuters and UPI carried another 30 stories.

⁴³National Media: "Outrage After New York City Shooting," CNN, CNN Newsroom, 7:00 p.m. EST November 26, 2006; "Groom Gunned Down," Good Morning America, November 26, 2006, 7:12 a.m. ; "Political Headlines," Fox News Network, Show: Special Report with Brit Hume, November 27, 2006; "New York City Police Fire 50 Times at Unarmed Man," NBC Nightly News, November 27, 2006, 6:30 pm EST, November 27, 2006; "Excessive Force: New York City Police Under Fire," Show: World News With Charles Gibson, 6:49 p.m., EST, November 27, 2006; "Outrage Over Police Shooting," CBS News Transcripts, Show: The Early Show, November 27, 2006.

⁴⁴"New Yorkers Angry Over Cops Shooting," Agence France Press, November 27, 2006; "Groom Dies," The Sun (England), November 27, 2006; "Man Shot Dead by New York Cops Before Getting Married," Today (Singapore), November 27, 2006; "NYPD to Cop It on Shooting – Groom Slain," Sydney MX (Australia); "Groom Dies in Hail of Police Bullets," Daily Telegraph

be surprising to find a venue in or out of the state where pretrial publicity was not an issue. As one commentator put it, “If the trial were moved out of Queens, it would likely take place in a jurisdiction where the jurors knew just as much about the case, and where there is a smaller jury pool than Queens.”⁴⁵

In addition, defendants have failed to establish the existence of a locale that bears the same character as Queens to which the trial could be moved. As the Court of Appeals held in *People v. Goldswor*, 39 N.Y.2d 656, 663 (1976), “within reasonable limits, the community to which the trial is transferred should reflect the character of the county where the crime was committed.” Queens County is both intensely urban and suburban, and arguably the most diverse county in the nation. It has been described as “a patchwork quilt of dozens of unique neighborhoods, each with its own distinct identity,” including many Hispanic neighborhoods, Chinese and Korean American enclaves, large African American and Caribbean populations, and the largest population of Sikhs outside of India.⁴⁶ Defendants have wholly failed to suggest another locale within the state that would realistically approximate the diversity of Queens County.

(London), November 27, 2006; “Police Kill Groom Leaving Stag Party,” Sunday Times (London), November 26, 2006; “World Ticker, Police Kill Groom as He Leaves Party,” Toronto Sun, November 26, 2006.

⁴⁵“Change of Venue in the Sean Bell Case,” Gotham Gazette, March 27, 2007. Virtually every county in the state has a smaller population than Queens, and at least 51 of the 62 counties have less than 20% of Queens’ population. See footnote 21, *supra*.

⁴⁶See Long Island Resources, www.lieconomy.com/li/liqueens/history.htm.

Because defendants do not and cannot identify another county in New York with a similar character to Queens that has not experienced the same type of publicity present here, they have failed to sustain one of their required burdens. The motion should thus be denied for this reason alone.

* * * *

In short, defendants have failed to establish the existence of a “tidal wave” of prejudicial publicity in this case or that juror attitudes in Queens are so overwhelmingly in favor of conviction that a fair jury cannot be selected. The publicity, while extensive, has been largely balanced, often quite favorable to the defense, and only a small fraction of the publicity in the Diallo case. Public sentiment too has been mixed, with many withholding judgment. Indeed, one conclusion can be drawn from both the prosecution and the defense polls – most Queens residents retain an open mind about the case. And, as the prosecution poll shows, even those with fully formed opinions understand the difference between expressing an opinion in a poll and performing a duty in a courtroom. As one editorial put it, “the yelling stops at the courthouse door and jurors take their responsibilities seriously.”⁴⁷ Surely, the record of the Grand Jury in this case supports that conclusion. To transfer the trial now – without even a single potential juror being questioned – “would signal that the courts have determined that New Yorkers are unable to render justice fairly in charged police cases. This is simply not true.”⁴⁸ Certainly, the defense in this case has failed to establish

⁴⁷“Prejudging Queens Jurors,” Daily News, January 28, 2008.

⁴⁸*Id.*

that attempting to select a jury in Queens would be futile, and, as a result, the motion for a change of venue should be denied.

CONCLUSION

_____For the aforementioned reasons, this Court should deny the defendants' motion for a change of venue in its entirety.

Respectfully submitted,

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