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CLERK OF SUPERIOR COURT
COUNTY OF STANISLAUS

[Signature]
DEPUTY

FILED BY FAX

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF STANISLAUS**

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

SCOTT LEE PETERSON,

Defendant.

Case No. 1056770

**OPPOSITION TO MOTION TO
CONDUCT VENUE SURVEY**

DATE: August 14, 2003
TIME: 8:30 a.m.
PLACE: Dept 2

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rec'd 8-13-03

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Defendant Scott Lee Peterson ("Mr. Peterson") hereby opposes the prosecution's motion to conduct a venue survey on the grounds that (1) the motion is premature and (2) the proposed procedure is fatally flawed.

Dated: August 13, 2003

Respectfully submitted,
GERAGOS & GERAGOS

By: 
MARK J. GERAGOS
Attorney for Defendant
SCOTT LEE PETERSON

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

1
2
3
4 Mr. Peterson has not had a preliminary hearing in this matter. Discovery is
5 nowhere near complete in this matter. Most, if not all of the forensic testing results have
6 not been provided to the defense. Yet, unbelievably the prosecution proposes to have this
7 Court expend taxpayer funds to conduct a survey before a preliminary hearing. Most
8 notable is the fact that the prosecution has proposed a type of survey designed to not only
9 tamper with prospective jurors in this case but in any other criminal cases in which those
10 prospective jurors would sit. Indeed, the prosecution is not just content to tamper with
11 the Stanislaus County jury pool, they additionally seek to take this side show on the road
12 and tamper with jury pools in two additional counties as well. Not only is this procedure
13 illegal and ethical - - its mere suggestion would almost be amusing if it was not proposed
14 in a capital case.

15 The prosecution's motion to tamper with the jury pool is predicated entirely on one
16 case that (according to the prosecution)¹ stands for the proposition that,

17 The People, as well as the defense, are entitled to conduct a
18 public opinion survey *in preparation for a hearing on a*
19 *change of venue motion.*

20 (Motion at 3:8-12, citing *Maine v. Superior Court* (1968) 68
21 Cal.2d 375, 383; California Criminal Law, Procedure and
22 Practice, Fifth Ed. Section 16.12 and 16.19.)

23
24 ¹In fact, the *Maine* court stated,

25 [A trial court's determination of a motion for change of venue]
26 may be based on such evidence as qualified public opinion
27 surveys or opinion testimony offered by individuals, or on the
28 court's own evaluation of the nature, frequency, and timing of
the material involved. A showing of actual prejudice shall not
be required.

(*Maine* at 383.)

1 No motion for change of venue has been filed in this case. As this Court knows
 2 the defense has indicated that if Mr. Peterson is bound over for trial the defense may
 3 bring such a motion. However, it is somewhat insulting to the Court (and defense
 4 counsel) for the prosecution to assume a month before the preliminary hearing that Mr.
 5 Peterson will be bound over - - particularly prior to the prosecution's having even seen all
 6 the evidence.

7 As such, the prosecution's motion is premature and must be denied. Furthermore,
 8 the proposed procedure is so fundamentally defective that it must be rejected.

9
 10 **II.**

11 **THE MOTION IS PREMATURE**

12 The prosecution offers no authority supporting its request to conduct a survey prior
 13 to the preliminary hearing and in the absence of a pending motion for change of venue.
 14 As noted above, the only "authority" on which the prosecution's Motion is based provides
 15 no support for conducting a survey at this time. Furthermore, in that trial court matter it
 16 was the defense who made the request for a survey of actual jurors. Neither the defense
 17 nor the court can prevent the prosecution from conducting a survey. That is not the issue.
 18 The issue is whether *Maine* (or any other authority) authorizes the prosecution to take a
 19 "survey," the effect of which will be to co-opt the jury commissioner and jury pools of
 20 three different counties and tamper with the jury pool.

21 This strained interpretation of *Maine* would not create a savings to the taxpayers,
 22 but would shift resources initially from the District Attorney's office to that of the Court
 23 administration budget. Secondly, the prosecution never addresses the fact that every
 24 defense lawyer who has a case with one of the jurors who is surveyed will have a built-in
 25 motion to excuse that entire jury venire panel. As such, the proposed procedure will cost
 26 the taxpayers even more. All surveyed/disqualified jurors will be paid their nominal sum,
 27 they will have wasted their valuable time to be surveyed and contaminated in the jury
 28 assembly room, and then when they do get to a courtroom they will be excused because

1 they will have been tampered with by the prosecution. In addition, the supervising Judge
 2 of the Criminal Courts for Los Angeles County has taken the same position and indicated
 3 that he will not allow any such survey in Los Angeles.^{2/}

4 In any case, the prosecution's motion must be denied as premature not to mention
 5 presumptuous.

6
 7 **III.**

8 **THE PROPOSED PROCEDURE IS FATALY FLAWED**

9 The prosecution requests that the court permit a procedure purportedly used by Dr.
 10 Ebbe Ebbesen in one (1) case in Ventura County in December 2002. (Motion at 3:23-26,
 11 Ebbesen's Vita at page 4.) There is no indication that Dr. Ebbesen's procedure has ever
 12 been used in any other case in any court - - state or federal. There is also no authority to
 13 indicate that this procedure would stand appellate muster. Indeed, many defense
 14 attorneys would likely have been tempted to only perfunctorily object to this procedure so
 15 as to inject reversible error in this case. However, given the fact that Mr. Peterson is
 16 factually innocent, he vigorously objects to the proposed procedure. As set forth below,
 17 Dr. Ebbesen's procedure is so fundamentally defective that it should never be used again
 18 in any court in this country:

19
 20 **A. The procedure permits the prosecution to take an infinite number of**
 21 **peremptory strikes.**

22 The suggested procedure provides that any juror who completes the survey will not
 23 be called in this case. (Motion at 4:8-10.) This component of the procedure effectively
 24 permits the prosecution's agents to walk up to any Stanislaus County juror in the
 25 courthouse and disqualify all jurors who agree to participate. For example, if the
 26 prosecution wants to disqualify all women from the jury pool, it need only distribute the
 27 survey to women.

28 _____
² See Declaration of Mark J. Geragos

1 The Ebbesen procedure in reality creates an unlimited number of peremptory
2 strikes to be exercised. In addition, the procedure deprives Mr. Peterson of *any*
3 meaningful review of the prosecution's striking of jurors to determine whether the
4 prosecution was exercising strikes unconstitutionally. It is not difficult to imagine the
5 myriad ways in which the prosecution could capitalize on an unfettered opportunity to
6 disqualify prospective jurors.

7
8 **B. The procedure permits a juror to disqualify himself or herself from the**
9 **case absent voir dire.**

10 A citizen summoned to serve on a jury cannot merely say to the judge, prosecution,
11 and defense, "I don't feel like being on this case." Incredibly, the Ebbesen procedure
12 authorizes jurors to do just that. Any juror in the courthouse can disqualify himself or
13 herself from this case merely by seeking out an agent of the prosecution and volunteering
14 to take the survey. Given that a trial in this matter (should one ever occur) would
15 undoubtedly last many, many months, it is not difficult to imagine hordes of prospective
16 jurors clamoring to surveyors in order to avoid serving on the jury. The prosecution's
17 likely argument that these jurors would already be excused for any case for one year
18 ignores two other realities; hardship declarations and determinations are often done in the
19 courtroom, so that jurors who may have had their service postponed to sometime later in
20 the year and been called in the Peterson venire would now be eliminated. In the
21 alternative, at the present pace of discovery it is conceivable that those excused from
22 service this year would be back if a trial took place more than a year away. They would
23 also be excused from serving.

24
25 **C. The procedure amounts to jury tampering.**

26 As the Court is aware, every juror summoned to the courthouse is admonished to
27 avoid contact with attorneys - - if for no other reason than to avoid the appearance of
28 impropriety. The Ebbesen procedure actually *requires* agents of the prosecution to not


1 only have contact with summoned jurors but in a non court supervised setting. It defies
 2 comprehension that any court would authorize agents of the district attorney to have
 3 unmonitored, unlimited communications with jurors waiting to be assigned to pending
 4 cases.^{2/}

5
 6 IV.
 7 CONCLUSION

8 In light of the foregoing, Mr. Peterson respectfully requests that the prosecution's
 9 motion to conduct a survey of summoned jurors be denied, or, alternatively, that the Court
 10 set a hearing during which all interested parties may be heard.

11
 12 Dated: August 13, 2003

Respectfully submitted,
 GERAGOS & GERAGOS

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 15 By: 
 16 MARK J. GERAGOS,
 Attorney for Defendant
 SCOTT LEE PETERSON

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 27 ³In the event this Court has any inclination to authorize the proposed procedure, the Defense
 28 believes the Office of the Attorney General and the local Public Defender's offices should all be
 invited to file *amicus* briefs setting forth their respective positions on the proposed procedure. Mr.
 Peterson believes this is necessary to ensure that all interested parties can comment thereon.

DECLARATION OF MARK J. GERAGOS

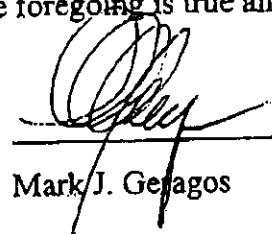
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Mark J. Geragos declares:

1. I am an attorney for Scott Peterson in this matter.
2. On or about August 11, 2003 I went into the chambers of Department 100 for the Honorable David Wesley, supervising judge of the criminal courts in Los Angeles County.
3. I informed Judge Wesley of the procedure jury survey proposed by the prosecution and asked if the Los Angeles County Court would authorize such a procedure.
4. Judge Wesley stated in no uncertain terms that he would not allow this procedure as he believed it would disqualify all such jurors for any subsequent case. In addition, he indicated that he had previously denied a request to survey jurors that had been submitted by a local college professor for similar reasons.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: August 13, 2003



Mark J. Geragos

PROOF OF SERVICE BY FAX
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 350 S. Grand Avenue, 39th Floor, Los Angeles, California 90071.

On execution date set forth below, I served the following

DOCUMENTS OR DOCUMENTS DESCRIBED AS:

OPPOSITION TO MOTION TO CONDUCT VENUE SURVEY

_____ placing a true copy thereof enclosed in sealed envelopes with postage thereon fully prepaid, to the attorneys and their perspective addresses listed below, in the United States Mail at Los Angeles, California.

transmitting by facsimile transmission the above document to the attorneys listed below at their receiving facsimile telephone numbers. The sending facsimile machine I used, with telephone number (213) 625-1600, complied with C.R.C. Rule 2003(3). The transmission was reported as complete and without error.

_____ personally delivering the document(s) listed above to the party or parties listed below, or to their respective agents or employees.

PARTIES SERVED BY FAX:

Rick Disatso, DDA
David P. Harris, DDA
Fax No.: 209-525-5545

Kirk McAllister
Fax No.:209-575-0240

Executed on August 13, 2003, at Los Angeles, California.

I declare under penalty of perjury that the above is true and correct.



JOSLIN RUDD