IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	Case No. 1:08CR384-1
	)	
	)	
DEMARIO JAMES ATWATER,	)	
	)	
Defendant.	)	
	)	
	)	

MOTION TO TRANSFER VENUE

AND ACCOMPANYING MEMORANDUM OF LAW[1]

COMES NOW the Defendant, by and through undersigned counsel, and moves, pursuant to the Fifth, Sixth and Eighth Amendments to the United States Constitution and Fed. R. Crim. P. 21(a), to transfer venue in this case to a location outside the State of North Carolina, for the reasons set forth below.

INTRODUCTION

In the early morning hours of March 5, 2008, the body of a young white female was found on a street near the campus of UNC Chapel Hill. When it was quickly discovered that the victim was Eve Carson, the young, accomplished, beloved Student Body President at North Carolina's flagship university, the media

[1]The defendant hereby requests leave to exceed the page limit for this memorandum of law contained in Local Rule 7.3, as the defendant cannot adequately set forth the necessary matters for determination of this motion within the page limitations.

latched onto the story and has not let go. The publicity surrounding this case has been staggering. The “facts” of the case itself, and the prior criminal background of the accused, Mr. Atwater, have been the subject of thousands of newspaper articles, television news stories, radio broadcasts and internet reports. The epicenter of this media explosion has been the Middle District of North Carolina, with shock waves reverberating from one end of North Carolina to the other.

The result of the dissemination of the above information throughout North Carolina has been to taint the jury pool throughout this State. A statewide survey conducted by Dr. Richard Seltzer in June 2009(the “Venue Survey”, Summarized in Dr. Seltzer’s Affidavit, Exhibit A, with underlying raw data and Dr. Seltzer’s resume attached at Exhibits A1 - A8) revealed that 80% of North Carolina respondents have knowledge of the case and 53% already believe, without a trial first having been conducted, that Mr. Atwater is guilty of murdering Eve Carson. (Exhibit A, pp. 7, 11). If found guilty, 52% of the citizens polled throughout North Carolina already believe that Mr. Atwater should be sentenced to death. (Exhibit A, p. 12). A fair trial in the Middle District, or in any other North Carolina District, is not possible. Accordingly, the defendant moves for a change of venue.

The Indictment in this case involves one of the most highly publicized crimes ever in North Carolina. The impact of these events upon the surrounding community and the attendant press coverage is as extensive as any other case in recent memory. The fact that Mr. Atwater was on probation at the time of the killing, and that he had appeared in court two days before the killing, but was sent home due to a "clerical error," generated tremendous media discussion of the failures of the North Carolina probation program and of Mr. Atwater's "extensive" criminal record. The nature of the coverage is highly prejudicial to Mr. Atwater, painting him as a violent and remorseless chronic offender who slipped through the cracks of our justice system.

The "facts" reported by the media in this case are common knowledge among North Carolina citizens. The media has authoritatively reported, often using Mr. Atwater's own supposed "admissions" as drawn from anonymous confidential informant(s), that Mr. Atwater and 17 year old Lawrence Alvin Lovette took Ms. Carson from her home, forced her into her vehicle, drove to an ATM machine, forced her to disclose her PIN number, withdrew money from her account, drove her throughout Chapel Hill and Durham, returned with her to Chapel Hill, and then shot her in the head as she raised her hand to shield herself. The above events are reported as established facts by the media, and accepted as true by the citizens of North Carolina. As a result,

there exists little doubt in the minds of far too many of the citizens of North Carolina that Mr. Atwater is guilty of murder. (Venue Survey, p. 11). The majority of the citizens polled further believe that Mr. Atwater should be sentenced to die if found guilty of this murder. (Venue Survey, p. 12).

Beyond just media accounts of the case, technology has allowed the public easy access to many official documents related to the case, including search warrant affidavits (which recite certain "admissions" that Mr. Atwater allegedly made to unnamed informant(s)), and Ms. Carson's autopsy report. One astute reader posted the following comment about the media's barrage of court documents:

> I think the news media are wrong to publish the warrants, details of the investigation, or anything else about an open case UNTIL the court has established it's jury pool. As a reader of the above article, my opinion has now been changed to the view that these are hardened criminals who had planned to kill the victim from the start. And as a consequence has made me ineligible to be a jury member.

Raleigh News & Observer, 6/28/08.[2] In light of the above, any argument that the blizzard of media coverage has not created a

[2] Copies of all Raleigh News & Observer articles cited herein, with attached reader comments, are attached in chronological order as Exhibit B. With respect to the various articles or news stories attached to this memorandum of law, only representative samples are used. The defendant does not purport to attach each and every article or story that any media outlet published in this case.

biased jury pool, or that these biases can be "set aside" once the juror enters the courtroom, rings hollow.

To obtain direct and objective evidence that the pretrial publicity in this case has poisoned the jury pool throughout North Carolina, Dr. Richard Seltzer commissioned a thorough and detailed survey throughout all of North Carolina and, as a basis of comparison, the Eastern District of Virginia, Alexandria Division (Exhibit A). The Venue Survey revealed that the vast majority of North Carolina respondents were not only familiar with the Carson case, but that greater than half of respondents already believed that Mr. Atwater was guilty of murder *and* that he deserved the death penalty. (Exhibit A, pp. 7, 11, 12).

In the Middle District of North Carolina, 88% of respondents possessed knowledge of the case, 57% believed that Mr. Atwater is guilty of murder and 57% believe that he should be executed. *Id*. at pp. 7, 11, 12. This objective evidence of prejudice and pre-determination from the very persons who currently make up the jury pool cannot be denied.

The Venue Survey also establishes that the prejudice that exists in the Middle District cannot be escaped by simply moving the case to another North Carolina District. Potential jurors from the Western and Eastern Districts of North Carolina also exhibit overwhelming high levels of both awareness of the case and a predetermination of Mr. Atwater's guilt. Of Eastern

District of North Carolina respondents, 79% possessed knowledge of the case and 55% believed Mr. Atwater to be guilty. (Venue Survey, pp. 7, 11). Western District of North Carolina respondents registered 74% and 47% on the same criteria. *Id*.

As such, to escape the entrenched prejudice against Mr. Atwater in North Carolina, this Court must look to neighboring districts where the citizenry is not familiar with the reported details of the Eve Carson murder case. The Venue Survey revealed that the Eastern District of Virginia, Alexandria Division, by way of comparison, has less knowledge about the case and a smaller percentage of persons with fixed opinions about Mr. Atwater's involvement in the crime. Statistics demonstrate that 37% of Eastern District of Virginia, Alexandria Division, respondents possessed knowledge of the case. (Exhibit A, p. 7). This number is striking in that over 1 out of 3 persons as far away as Alexandria, Virginia, are familiar with this case. However, this level of awareness is less than half of the 88%, 79% and 74% levels of awareness registered in the three North Carolina districts. *Id*.

In contrast to the North Carolina respondents, over 50% of whom already believe that Mr. Atwater is guilty of this capital offense, 80% of the surveyed respondents in Alexandria, Virginia, do not hold the opinion that Mr. Atwater is guilty. *Id*. at p. 7. This demonstrates that this case should be moved outside of the

State of North Carolina to a location not subject to the pervasive influence of the North Carolina media.

Yet another indication of the pervasive prejudice that exists in the Middle District of North Carolina lies in a query posed by the website digtriad.com in the heart of the Middle District: "*Do you think he should receive the death penalty*?" The question itself, in that it is posed before Mr. Atwater has been tried in a court of law, and posed to persons whose only knowledge of the case comes from media reports, reveals that a "presumption of guilt" has already attached to Mr. Atwater. The website digtriad.com didn't even bother asking the question: "*Do you think that Mr. Atwater is guilty of murder?*," as that seems to be a foregone conclusion. The responses further demonstrate the public's ingrained belief that Mr. Atwater deserves the death penalty. The answers are uniformly in the affirmative, and many are filled with hate and vitriol:

> Shoot both of them 5 times each. . . . Today, in public!! And don't waste my tax money feeding and taking care of this scum!!!!!

digtriad.com, 8/11/08.[3]

Mr. Atwater has already been tried, convicted and sentenced to die in the North Carolina court of public opinion. In light of the above, this motion seeks a change of venue to another

[3] Copies of all digtriad.com articles cited herein, with attached reader comments, are attached in chronological order as Exhibit C.

district where Mr. Atwater can secure an impartial venire free from the prejudice which has pervaded the residents of this district. The defendant suggests the Eastern District of Virginia as a possible forum, subject to further study. In the alternative, the defendant seeks a continuance of the trial date, to allow the publicity to abate.

I. THE EXTENT AND NATURE OF THE PRETRIAL PUBLICITY IN THIS CASE

There is no means by which the defendant can document the entirety of the coverage of this case to which jurors may potentially have been exposed and the obvious prejudicial nature of the coverage. He therefore asks the Court to take judicial notice of the saturation level of local and even national coverage that this case has attracted. In the alternative, the defendant has compiled the attached Exhibit D, summarizing the media coverage by judicial district, which consists of more than 1000 representative stories that been have published about the case by various North Carolina media outlets. In addition, the defendant requests an evidentiary hearing at which to subpoena and produce all media coverage, should that be necessary.

The media response to Ms. Carson's death was immediate and intense. The coverage was magnified by a number of factors. Ms. Carson was the Student Body President at UNC Chapel Hill. As such, she carried a high profile in the Chapel Hill area and was a much loved, intelligent, and gifted young woman. Some ten

thousand people attended her memorial service in Chapel Hill. The service aired live on all major North Carolina news networks and remains easily accessible on the internet today. *See* (http://www.wral.com/news/local/video/2536984/). Even before their arrest, the defendants were identified as young black males via photographs from ATM surveillance cameras. Ever since, Mr. Atwater's face has been synonymous with Ms. Carson's killer throughout North Carolina.

Mr. Atwater was arrested March 12, 2008 and Laurence Alvin Lovette on March 13, 2008. Shortly thereafter, Mr. Lovette was also charged with the murder of a Duke University graduate student, Abhijit Mahato, who was shot in the head at point-blank range during a robbery at his off-campus Duke University apartment. This occurred in January of 2008, approximately six weeks before the murder of Eve Carson. Since then, Mr. Lovette and Mr. Atwater's names have been linked not only in association with the Carson murder, but also the murder of the Duke student. The line between who was charged with what became blurred. Media headlines contributed to the confusion: *"Suspect in UNC murder now charged in Duke student's death".* Asheville Citizen Times, 3/13/08.[4] *"They're [Atwater and Lovette] also charged in the January killing of Abhijit Mahato*." Charlotte Observer,

[4] Copies of all Asheville Citizen Times articles cited herein are attached in chronological order as Exhibit E.

12/9/08.[5] A typical example of how Lovette and Atwater are lumped together is:

> The high school dropouts were convicted of crimes but put back on the street by a system that failed to notice when they were arrested again. Both are now behind bars, held without bail and charged with murdering two college students. . . .

Asheville Citizen Times, 3/15/08. The public opinion survey conducted by the defense confirmed that confusion regarding Mr. Mahato's killer still exists. Respondents (from the Middle District) stated that Mr. Atwater: "has killed before" and "the person he murder (sic) was a foreign student at Duke" and that "he is connected to another murder at Duke". (Venue Survey, Question 9, Division 1).

Early media speculation that the killing was gang related has receded. However, based in part on the early media reports, public perception that the killing was gang related is still pervasive. (See, e.g. "I have witnessed the tragic events that have unfolded regarding recent murders (Eve Carson and Abhijit Mahato) by two suspected gang members, Laurence A. Lovette, Jr. and Demario J. Atwater." (Letter to Editor, Fayetteville Observer, 4/22/08[6]). This misconception was furthered by comments from Judge Craig Brown in Durham County District Court

[5] Copies of all Charlotte Observer articles cited herein are attached in chronological order as Exhibit F.

[6] Copies of all Fayetteville Observer articles cited herein are attached in chronological order as Exhibit G.

when, during Mr. Lovette's first appearance hearing, he requested that state lawmakers meet immediately in a special session to address gang violence. (See, The Raleigh News & Observer, 3/15/08, "*Judge sees urgent need for state anti-gang laws*").

The media furor intensified when it became public that Mr. Atwater and Mr. Lovette were both on probation and that Mr. Atwater had been in court two days before Ms. Carson's death but was sent home due to a clerical error. It quickly became clear that the probationary efforts for both Mr. Atwater and Mr. Lovette had been badly mismanaged. The Department of Corrections launched an investigation into the handling of Mr. Atwater's probationary case. The formal report of the investigation into Mr. Atwater's probation is available in full online. (See, e.g. abclocal.go.com/wtvd, 4/2/08[7]). This seven-page internal Department of Correction document (attached hereto as Exhibit I) details all of Mr. Atwater's past legal issues, and heavily criticizes the probation system's lax treatment of Mr. Atwater. As a result of this investigation, Mr. Atwater's previous criminal record was regularly mentioned as a part of the media coverage. Such articles invariably describe Mr. Atwater's criminal history as "extensive." (See, e.g. Fayetteville Observer, March 14, 2008, reporting on Atwater's "*extensive*

[7] Copies of all abclocal.go.com/wtvd articles cited herein, with attached reader comments, are attached in chronological order as Exhibit H.

criminal record”). The media’s focus on the probation scandal, and the exhaustive discussion of every detail of Mr. Atwater’s previous charges and convictions in multiple media sources has burned an image into the local public consciousness that Mr. Atwater is a chronic and violent offender. (*See, e.g.*, Venue Survey, Question 9, Division 1, asking what Middle District respondents had “read, seen or heard” about Mr. Atwater: “that boy got a criminal record as long as it gets”; “he is a habitual offender”; “he had a long record”; “he was a repeat offender”; “my impression is that he is a long term criminal”; “gang member accused of killing another student at a different campus”.)

Several newspapers also reported that Mr. Atwater was on “parole” at the time of arrest, implying previous incarceration in prison. On March 13, 2008, the Fayetteville Observer reported that “Atwater is on parole after receiving suspended sentences for a 2005 breaking-and-entering conviction and a 2007 firearms conviction.” The next day, the Fayetteville Observer, again reported that “Lovette and Atwater were on parole and facing additional criminal charges”. The Asheville Citizens Times reported on March 13, 2008, that “State records indicated both suspects are currently on parole.” An online story published by WXII12.com reported that “State records show both Lovette and

Atwater were on parole." WXII12.com, 3/12/08.[8] (See also, Venue Survey noting that Atwater "was on parole for another crime" and he "violated his parole". Question 9, Division 1).

Equally troubling, the media has disclosed information about infractions within the Department of Corrections since his arrest and misrepresented those on at least one occasion: "The state Department of Correction reports that Atwater is being held in disciplinary segregation at an undisclosed location after being held at Central Prison in Raleigh," (WRAL report, Exhibit EE) implying that Mr. Atwater's move to the county pre-trial detention facility was a result of behavioral concerns (which it was not). Another report stated that: "According to records at the N.C. Department of Correction, he [Atwater] had nine noted infractions between July and September, including lock tampering, gang involvement, threatening staff members, and using profanity." Winston-Salem Journal, 12/3/08.[9] There is evidence that these stories have made an impression on potential jurors, to wit: "If this isn't a death penalty crime I've never seen one. You need only look at Atwater's behavior since he's been in jail

[8] Copies of all WXII12.com articles cited herein are attached in chronological order as Exhibit J.

[9] Copies of all Winston-Salem Journal articles cited herein, with attached reader comments, are attached in chronological order as Exhibit K.

to see what a danger he would continue to be even in prison." dailytarheel.com, reader comment, 2/13/09.[10]

The media coverage in this case continues to the present time. The defendant submits some 20 articles obtained over the past three months that discuss this case. Several of these articles link, most recently, the Atwater case with another highly publicized and recent crime, the murder of five year old Shaniya Davis. That is the case where the five year old's own mother, who now faces felony charges of child abuse and human trafficking, had allegedly sold her five year old daughter into sex slavery. The man whose image had been reportedly captured on a surveillance camera as he carried the little girl from a Sanford hotel, Mario McNeill, was charged with the child's kidnaping, rape and murder. The media is reporting that the defendants in the Eve Carson and the Shaniya Davis cases were both on probation at the time of the offenses. (See Exhibit FF, Recent Articles Throughout the State of North Carolina). Notably, in a recent article in the Winston-Salem Journal, dated September 10, 2009, entitled "Two probation officers ordered to be restored to posts", comments continue to reveal a deep seated sentiment of hatred and bigotry in Winston-Salem, the seat of the upcoming trial in the Middle District of North Carolina:

[10] Copies of all dailytarheel.com articles cited herein, with attached reader comments, are attached in chronological order as Exhibit L.

* If either of these two were in any way derelict in monitoring the scum who killed Carson, the state needs to appeal the decision;

* I do not know the details of the events that led to the officers' firings but if their failure to do their jobs contributed to the two thugs murdering Eve Carson then they should be held accountable BUT let us lay the real blame where it belongs . . . . Lawrence Alvin Lovette Jr. and Demario James Atwater. They should FRY and admission should be charged;

* TomToddy: but we'll need to see if the death penalty has been "unfairly applied" in the jurisdiction where these two misunderstood lambs are to be sentenced. Remember we have to ensure "Racial Justice."

* of course staballoy, lest I forget that lame (in my opinion) argument. One of the thugs was under 18 at the time and not eligible for the death penalty anyway I believe. I'm become nauseous just thinking about these two nappyheaded 'misunderstood lambs' so I will have to end on that note.

(Exhibit FF, article 2).

A. Media Coverage of the Case has Been Extensive in all Three NC Districts

The sheer volume of the coverage of this case, through all media outlets, has been overwhelming. A summary of the media coverage in each District of North Carolina, Middle, Eastern and Western, and through each major medium – newspaper, television, and internet -- follows.

1. Middle District

Newspaper Coverage. Newspapers throughout North Carolina have been filled with stories about this case. The heaviest media coverage has been focused on the Middle District, encompassing

the population centers of Durham, Chapel Hill, Greensboro, and Winston-Salem. The Winston-Salem Journal, which is located just blocks from the courthouse where this case is scheduled to be tried, has carried in excess of 48 articles related to the incident. (Exhibit D). Another prominent newspaper in the Middle District, the Durham Herald Sun, has carried over 102 stories related to Ms. Carson's death. *Id*. The most-read newspaper in the Middle District, the Greensboro News & Record, has carried more than 22 stories related to the case. *Id.* The Chapel Hill Herald has carried some 33 stories about Ms. Carson's death. *Id.* The Daily Tar Heel has carried over 36 stories. *Id.* Many of the above stories have appeared as front-page and even lead stories. The focus of many of the above newspaper stories has been to recite the "facts" of this case, detail the past criminal record of Mr. Atwater, and to analyze the failures of the probation system that allegedly led to this tragedy. Sample headlines include:

- *Atwater said to have fired shot that killed UNC student body president*. Durham Herald-Sun, 2/17/09.[11]
- *Probation System Fails Terribly*. Greensboro News & Record, 3/15/08.[12]

[11] Copies of all Durham Herald-Sun articles cited herein are attached in chronological order as Exhibit M.

[12] Copies of all Greensboro News & Record articles cited herein are attached in chronological order as Exhibit N.

- *Suspects had long criminal history*. Greensboro News & Record, 3/14/08.

- *Federal report highlights flaws in NC probation system*. Winston-Salem Journal, 8/20/08.

- *Autopsy shows Carson likely shielded herself from shots*. Winston-Salem Journal, 7/1/08.

Numerous passages in the above and other newspaper articles published in the Middle District go into even more detail about the alleged "facts" of the case.

- The federal indictment states that Atwater shot Carson with a shotgun in the face after Lovette had already shot and wounded her four times with a small-caliber handgun. Durham Herald-Sun, 2/26/09.

- The autopsy report, which recorded injuries from two separate weapons, corroborated the informant's statement to investigators that Atwater said Lovette shot Carson several times and that Atwater shot her afterward. Durham Herald-Sun, 7/8/08.

- The [autopsy] report revealed that Carson was shot at least five times on the right side of her body by two different weapons. In addition to a shotgun wound to the temple, the 22-year old was shot in her right cheek, shoulder, upper arm, hand and buttocks. Chapel Hill Herald, 7/12/08.[13]

- Chapel Hill police investigators interviewed Atwater and he admitted he was in Chapel Hill the night Carson was killed, according to the search warrant affidavits, and also said he was in Carson's Toyota Highlander. Durham Herald-Sun 6/28/08.

- Atwater also admitted it was him who was pictured in a surveillance photo taken at a BP convenience store . . . Durham Herald-Sun 6/28/08 (citing search warrant affidavit).

[13] All Chapel Hill Herald articles cited herein are summarized in Exhibit D.

Other newspaper articles in the Middle District focus on failures in the probation system, highlighting Mr. Atwater's past criminal record in the process.

- Atwater had a significant criminal history engaging in unlawful conduct as his primary source of income and committed the homicide while he was on probation. Durham Herald-Sun, 2/17/09 (citing aggravating factors alleged by prosecution).

- The suspects in the homicides [Atwater and Lovette] were found to have been on probation, but both had fallen through gaping cracks in the system. Durham Herald-Sun, 12/31/08.

On April 3, 2008, the Durham Herald-Sun devoted an entire story to the criminal history of Atwater and Lovette. This story gave a timeline of every charge against Atwater, and provided details of Atwater's past criminal offenses (see exhibit M).

Television Coverage. In addition to the above newspaper coverage, the Carson case was the lead story on local television newscasts for weeks after her death. A memorial service conducted at UNC was attended by 10,000 people, and also aired live on every major North Carolina television station. Even now, more than eighteen months after Ms. Carson was killed, television has continued to report on the case and the upcoming trial. Television stations in the Middle District have led the coverage. WTVD (Durham), WFMY (Greensboro), WGHP (High Point), WXII (Winston-Salem) and WINC (Chapel Hill) have all reported extensively on the Carson case. No accurate count on the exact

number of television stories that have aired is possible,[14] but a search of the archives of the above stations reveals numerous archived video reports and online articles. WTVD (Durham) has 14 archived videos and 63 online documents related to the Carson case. (See Exhibit D). WFMY (Greensboro) has 38 videos and online documents. Id. WXII (Winston-Salem) also has extensive archived content, including 16 archived videos and dozens of archived stories. *Id.* Some content available to users of the above stations' websites include:

> Atwater was moved last month from Central Prison to an undisclosed location. According to N.C. Department of Correction records, he had nine noted infractions between July and September, including lock tampering, gang involvement, threatening staff and using profanity.

WGHP (High Point), 12/2/08.

Online Coverage. The third major medium through which publicity about the Carson case has been distributed is the internet. Internet content can take the form of independent web sites, web sites run by newspapers, and web sites run by television stations. A web site can obviously be accessed from anywhere in the world. However, web sites devote their coverage to a particular locale, and thus tend to draw readers from that

[14] Defendant requests the Court to rule on the instant motion without an evidentiary hearing. However, in the event that the Court deems it necessary, Defendant requests leave to conduct an evidentiary hearing at which all media representatives will be subpoenaed for testimony and all documentation and video will be subpoenaed for the Court's review.

locale. One major web site in the Middle District is digtriad.com, which is affiliated with WFMY and serves Greensboro, Winston-Salem and High Point. This website has published at least 61 stories about the Carson case. (See Exhibit C). These stories are archived and can be accessed by any person at any time. In addition, digtriad.com has links to videos and court documents related to the case. These materials have generated 868 comments from readers. The content of these comments will be addressed further in the "Public Opinion" section below.

Another major website in the Middle District is abclocal.go.com/wtvd (Hillsborough). This website, which is affiliated with the television station WTVD in Hillsborough, has archived 23 stories about the Carson case. (See Exhibit D). The abclocal.go.com/wtvd web site also has links to video and court documents, and has a comments section that has generated hundreds of comments which reveal the attitudes of Middle District residents. Two typical comments posted to the above site state: "Since they have confessed they should be put to death immediately to avoid more torture to her family." and "Demario Atwater, 22, and Laurence Lovette, 17, - two thugs who were high-school dropouts are charged in Orange County with first-degree murder of 22-year-old Eve Carson who was the University of North Carolina's student body president. If I'm on the juror

panel - trust me, I will have absolutely no trouble recommend the death penalty for both defendants." abclocal.go.com/wtvd (Hillsborough), 6/30/08 and 10/29/08. These comments (there are dozens more in the "Public Opinion" section below) indicate that the web site had successfully "educated" its readers about the Carson case to the point where, based only on the information provided, the readers felt confident in sentencing Mr. Atwater to death. No trial necessary.

2. Eastern District

Newspaper Coverage. Newspaper coverage in the Eastern District of North Carolina is equally comprehensive. Raleigh, which is only a short distance away from the location of Ms. Carson's death, is by far the largest population center in the Eastern District. The Raleigh News & Observer, which has a circulation of 176,000, and serves Raleigh (Eastern District), Durham (Middle District), Cary (Eastern District) and Chapel Hill (Middle District), has published 122 articles on Ms. Carson's murder.[15] The Fayetteville Observer has published 13 articles. (Exhibit D). Sample headlines include:

- *Death penalty filing details Carson shooting*. Raleigh News & Observer, 2/15/09.

[15] The majority of these stories are attached hereto as Exhibit B. If the Court prefers, all of these stories could be subpoenaed to an evidentiary hearing on this matter.

- *Carson shot five times, autopsy shows*. Raleigh News & Observer, 7/1/08.

- *Atwater "guilty" of probation violations*. Raleigh News & Observer, 5/1/08.

- *Suspects have lengthy records*. Fayetteville Observer, 3/14/08.

- *System in shambles*. Raleigh News & Observer, 4/6/08.

Excerpts from some of the above articles reveal the same focus on (1) the "facts" of the alleged crime and (2) Mr. Atwater's past criminal record.

- Lovette, Atwater and Oates have extensive criminal records. Lovette and Atwater were on parole and facing additional criminal charges when, police suspect, they targeted Carson on March 5 and left her dead on a street in a Chapel Hill neighborhood. Fayetteville Observer, 3/14/08.

- Atwater is a glaring example of a poorly handled probation violation. Fayetteville Observer, 3/15/08 (quoting Robert Guy, director of the state Division of Community Corrections).

- Both suspects had criminal records that pointed to an escalation in the type and severity of crimes they might be involved with in the future. Although human error contributed to the circumstances, Demario James Atwater, for one, could have been kept off the streets if criminal justice computer systems simply "talked" to each other. Despite the suspects' numerous encounters with law enforcement, critical weaknesses in the system meant that authorities failed to keep them locked away from the public. Raleigh News & Observer, 3/24/08.

The Raleigh News & Observer also published a story with a "Timeline" attached to it that detailed Mr. Atwater's past criminal charges, including arrests for which no convictions have be obtained. Raleigh News & Observer, 4/2/08. These included:

- Demario James Atwater is arrested by Raleigh police and charged with stealing a Savage rifle and Martin 12-gauge shotgun.

- Atwater is arrested by Butner police when they find him with a .40 caliber Hi-point handgun.

- Durham police arrest Atwater and charge him with felony gun violation and marijuana possession.

The Raleigh News & Observer ran a series entitled: "Losing Track: North Carolina's crippled probation system." Raleigh News & Observer, 12/10/08. A later article in the same paper ran the headline: "Carson murder prompts $2.5M probation reform." Raleigh News & Observer, 10/12/08.

Television Coverage. In the Eastern District, WRAL (Raleigh) has carried at least 104 stories related to the Carson case. WWAY [16] (Wilmington) has broadcast more than 53 stories. As with the newspaper coverage, many of these stories depict a "story behind the story" angle that try to dig deeper into the "facts" of the case and the probation failures involving Mr. Atwater. Sample story titles include:

- *Atwater in court on firearm, drug charges*. WRAL (Raleigh), 7/11/08.

- *Warrants: Both suspects shot Eve Carson*. WRAL (Raleigh), 6/29/08.

- *How Demario Atwater was overlooked*. WRAL (Raleigh), 3/14/08.

[16] Copies of all articles cited on WWAY are attached in chronological order as Exhibit O.

- *Suspects in slayings of NC college students fell through cracks*. WWAY (Wilmington), 3/17/08.

One WRAL (Raleigh) online print story goes into exhaustive detail regarding the alleged timeline of events. Exhibit O, WRAL, 3/18/08, updated 3/4/09. This article credits its sources as "North Carolina Superior and U.S. District court documents, 911 calls, autopsy results, public statements, court proceedings and WRAL News reports." It provides a litany of "evidence" linking Mr. Atwater to Ms. Carson's death:

- Atwater and Lovette allegedly see lights on and blinds raised in Carson's house. Confidential informants attribute Atwater as stating he and Lovette abducted Carson from inside the house.

- Carson is presumably driven to Hillcrest Road and Hillcrest Circle, about a half-mile from the UNC campus, where she is shot four times with an Excam GT-27 .25-caliber semi-automatic pistol and once with a sawed-off Harrington & Richardson Topper-model 12-gauge shotgun.

- She is shot in the right shoulder, right upper arm, right buttocks, and right cheek and once at close range in the right temple. She also sustains a wound to her right hand - likely because she used it to cover her face.

- Atwater is identified as the man in the convenience store photos.

- Search warrants indicate a confidential informant told investigators that Atwater admitted to abducting Carson from her home and the both he and Lovette shot her multiple times.

- Federal prosecutors lay out their reasoning for seeking the death penalty. Among them: Eve Marie Carson was "*particularly vulnerable*" when Atwater "*fired a single shotgun round from close range through the victim's hand and into her brain*."

The above article is replete with inadmissable and prejudicial evidence. Based on the above "facts," the reader is naturally going to be biased against Mr. Atwater, and possess a belief as to his guilt. This conclusion of guilt will reside in the heart of the juror, even as he/she enters the courtroom for jury selection. As evidence of this phenomena, a comment posted to abclocal.go.com/wtvd (Hillsborough) states:

> These two thugs . . . deserve the death penalty for cold-bloodedly murdered (sic) Ms. Eve Carson after shooting her five times.

7/31/08. The "facts" of this case are well-known to jurors in the Eastern District. So much so that, more than a year before the trial is set to begin, the above prospective juror already claims to know the "facts" and the appropriate sentence. (See also, "I say forget the trial, and string those two ********* up right now." Exhibit B, Raleigh News & Observer, 6/30/08).

Online Coverage. WRAL (Raleigh) has also published a tremendous amount of online material related to the Carson case at its web site, wral.com. The site contains some 56 stories related to the case, as set forth in Section B, below, wral.com has provided links to fifteen documents related to the Carson case, including several search warrants filled with hearsay from an unnamed "confidential informant."

The presence of online content has greatly expanded the ability of potential jurors to "investigate" the "facts" of a

case. In fact, the Eastern District jury pool, based on their interest in the Carson case, has logged on to web sites that serve the Middle District. One such prospective Eastern District juror even posted a comment to a Middle District web site:

> I truly have never been a proponent of the death penalty, but if anyone ever deserves it is it (sic) this piece of XXXX. * * * I read where her hand was actually blown off, trying to shield herself. She never hurt a soul in her life and was trying to help them! Hey, if they need a change of venue, send them on down to Johnston County. He will get a fair trial.

abclocal.go.com/wtvd (Hillsborough), 1/18/09. As this comment reveals, the Eastern District is permeated with the same information about the "facts" of the case and the same pre-disposition towards the death penalty as the Middle District.

3. Western District

Newspaper Coverage. The Western District has also had extensive newspaper coverage. The Charlotte Observer has carried over 83 stories. The Asheville Citizen times, though 221 miles from the site of Ms. Carson's death, has carried more than 26 articles about the case. Samples of headlines from articles in the above newspapers include:

- *Suspects in UNC, Duke murders had long criminal histories*. Asheville Citizen Times, 3/13/08.
- *Suspects in student slayings fell through cracks*. Asheville Citizen Times, 3/15/08.
- *Deadly errors?, Man Accused of Killing Eve Carson Should Have Been in Jail*. Charlotte Observer, 3/16/08.

- *Warrants Give Account of Slaying, They Say Eve Carson was Kidnapped from her Chapel Hill Home Before Being Killed*. Charlotte Observer, 6/28/08.

The Charlotte Observer ran a three-part series, all on the front page of Section A of the paper, titled: "N.C. Losing Track of Criminals" addressing the mistakes made in the handling of Mr. Atwater's probation. (Charlotte Observer, 12/7/08, 12/9/08 and 12/11/08). In one of the three articles, the paper reports that "Long before Demario Atwater was arrested in the March killing of Eve Carson, Lee Lloyd had flagged him as dangerous. . . ." Charlotte Observer, 12/9/08. In a Charlotte Observer editorial addressing the problems with North Carolina's probation system, the writer stated that probation mistakes "invite tragedy, such as the murder of Eve Carson." Charlotte Observer, 3/16/08.

Television Coverage. In the Western District, WCNC (Charlotte) ran some 35 stories about the Carson case. WCCB (Charlotte) also ran at least nine stories about the case. Some headlines from the online summary of these stories are:

- *Two people with a history of crime have been charged with murdering the popular student leader*. WCNC (Charlotte), 3/19/08.
- *Police Believe Gang Involved in Eve Carson's Death*. WCCB (Charlotte), 3/10/08.

Online Coverage. The Western District also has significant online content, from both affiliated and independent web sites. Sample headlines include:

- *Probation officials find mistakes in wake of student killings*. blueridgenow.com, 4/2/08.

- *Suspects in students' slayings fell through cracks*. blueridgenow.com, 3/15/08.

- *Suspects in UNC, Duke murders had long criminal histories*. blueridgenow.com, 3/13/08.

Some excerpts from the above stories go into even greater detail:

- Whenever there's been a crack to fall through in North Carolina's legal system, Laurence Lovette and Demario Atwater have found it. blueridgenow.com, 3/15/08.

- Police were led to Lovette and Atwater by tips generated by several ATM and convenience store surveillance photos, which show Lovette driving Carson's Toyota Highlander while Atwater is in the back seat. Police also believe Atwater was the suspect shown trying to use Carson's ATM card inside a convenience store. blueridgenow.com, 3/15/08.

Clearly, media coverage of this case has permeated each of the three federal judicial districts in North Carolina. Attached as Exhibit B through N are copies of well over one hundred stories about this case. These represent merely the tip of the iceberg.

B. Numerous Documents Related to the Case are Available Online

As a result of the massive media coverage, numerous documents are available online. These documents include search warrant affidavits, detailing the supposed facts of the abduction/murder of Ms. Carson, Ms. Carson's autopsy, law enforcement investigative reports, a full report on problems with

Mr. Atwater's probation and the government's notice of intent to seek the death penalty in the present case. As one might expect, these documents are filled with inadmissible and prejudicial information about the Carson case. WRAL, the Raleigh television station, has led the way with at least fifteen documents on its web site. These documents are:

1. Government's Notice of Intent to Seek Death Penalty
2. Superseding Federal Indictment
3. Federal Indictment
4. April 23, 2008 letter from U.S. Attorney to District Attorney Jim Woodall (attached as Exhibit P).
5. State Court Indictments (attached as Exhibit Q).
6. Ms. Carson's Autopsy Report (attached as Exhibit R).
7. Ms. Carson's Medical Examiner's Investigative Report (attached as Exhibit S).
8. Ms. Carson's Toxicology Report
9. Search Warrant - 1213 Shepherd Street, Durham, NC - 3/17/08 (attached as Exhibit T).
10. Search Warrant - 1213 Shepherd Street, Durham, NC - 3/12/08 (attached as Exhibit U).
11. Search Warrant - Demario Atwater - 3/12/08 (attached as Exhibit V).
12. Search Warrant - Lawrence Alvin Lovette, Jr. - 3/17/08 (attached as Exhibit W).
13. Search Warrant - 2507 South Roxboro Street, Apartment 11, Durham, NC - 3/17/08 (attached as Exhibit X).
14. Search Warrant - 2507 South Roxboro Street, Apartment 11, Durham, NC - 3/12/08 (attached as Exhibit Y).

15. Search Warrant - Eve Marie Carson - 3/6/08 (attached as Exhibit Z).

The above documents contain a vast amount of inadmissible and prejudicial information regarding the case.

Search Warrants. Several search warrants were unsealed in June of 2008, generating wide reporting regarding the alleged "facts" of the case. The Raleigh News & Observer attached the seven search warrants referenced above to a story it published on June 27, 2008. The story recited the following "facts" about the Carson case:

- "Awater admitted that he and Laurence Lovette, Jr. entered Eve Carson's home in Chapel Hill through an open door March 5 . . . . "
- "Atwater and Lovette forced Carson into the backseat of the Toyota Highlander and drove her to the ATM machine."
- "Lovette shot Carson multiple times, and Atwater subsequently shot her with a different weapon."
- "Police arrested Atwater on March 12. After his arrest, he admitted being in Carson's Highlander in Chapel Hill on March 5 and identified himself as the person whose image was captured in the BP security photo, according to the warrants."
- "Furthermore, police tapped a cell phone call in which Atwater talked to an informant about his involvement in the crime, according to the documents."

Readers can review the actual language of the search warrants with the simple click of a mouse. Some excerpts from the search warrant affidavits are as follows:

- "I, INVESTIGATOR CELISA LEHEW, have probable cause to believe that the crime of: First Degree Murder

(N.C.G.S. 14-17) and Sexual Assault of unknown nature occurred. . . .”

- “Rio advised her that he and an unknown individual took Eve Carson to an ATM machine.”
- “Rio told the caller that he and the other individual planned to obtain Carson’s ATM card PIN from Carson before killing her.”
- “Atwater told the CW that he and Alvin Lovette entered Eve Carson’s residence through an open door on the date of Carson’s murder, which was March 5, 2008.”
- “The CW said Atwater told the CW that he and Lovette forced Carson to accompany them to Carson’s car and take them to an ATM machine.”
- “The CW learned that Carson was forced into the back seat with Atwater, and Lovette drove Carson’s vehicle. That information is consistent with video footage taken from and ATM camera on that date.”
- “The CW also informed investigators that Carson was shot multiple times by Lovette and was subsequently shot by Atwater.”
- “Chapel Hill Police Department investigators interviewed Atwater following his arrest. During that interview, Atwater admitted being in Chapel Hill the night Carson died and also admitted being inside Carson’s Toyota Highlander. Atwater also admitted it was him who was pictured in a surveillance photo taken at a BP convenience store . . . .”

Search Warrant - Demario Atwater - 3/12/08 (attached as Exhibit V); Search Warrant - 2507 South Roxboro Street, Apartment 11, Durham, NC - 3/17/08 (attached as Exhibit X).

Following the publishing of the above warrants, it was been reported that “*a warrant also says police have probable cause to believe ‘sexual assault of an unknown nature occurred*.’” abclocal.go.com/wtvd, 6/28/08. There exists no evidence of a

sexual assault in this case. However, the reader of the above article may continue to believe that Mr. Atwater is accused of sexually assaulting Ms. Carson. (See, e.g. Question 5, Division 1 (Middle District), "they took and killed and raped her"; "she was apprehended, sexually assaulted and murdered"; "picked up by two men and raped and murdered"; "she was taken and murdered and raped"; "they went into her apartment took her to the bank raped her and then killed her").

Carson Autopsy Report. The autopsy report has been widely published by the online media.(Copy of Autopsy Report attached as Exhibit R). The web site dailytarheel.com published a link to the autopsy report on June 30, 2008. The autopsy report was also published the same day by abclocal.go.com/wtvd (Hillsborough), which ran the headline: "*Shocking details released in Carson murder*." The sub-headline read: "*A slain North Carolina student body president likely raised her arm to shield herself from a shotgun blast that hit her in the hand and head, according to an autopsy report released Monday*." The nine-page autopsy reported:

> Significant findings at autopsy include multiple gunshot wounds. There is a perforating shotgun wound of the right hand and an irregularly abraded shotgun wound of the head with injury to the skull and brain and recovery of birdshot pellets and a plastic shot cup. These wounds most likely represent a single shot with the hand acting as an intermediate target.

As evidence of the effect the autopsy report had on persons who read it, one comment posted to a Middle District web site stated:

> This is awful! This world would have been fine without these 2 animals. What kind of person does things like this? If you are reading this and it dosent (sic) make your stomach turn, then you have a serious problem, and need to seak (sic) help immediately.

abclocal.go.com/wtvd (Hillsborough), 6/30/08.

Investigative Report on NC Probation System. A twenty-five page report entitled "Technical Assistance Request" dated July 1, 2008 was made available to the public through, among other sources, the website abclocal.go.com/wtvd (Hillsborough). The purpose of this report was to review "certain aspects of the Division of Community Corrections' operations" and was initiated "in response to two probation offenders under supervision of the DCC who were arrested and charged with murder." Report, page 3. (Exhibit AA)

Report of Investigation Into Mr. Atwater's Probation.

On April 2, 2008, abclocal.go.com/wtvd (Hillsborough), ran a story entitled "Probation report released for Lovette, Atwater" and attached a link to the report itself. The report is a seven-page memorandum directed to Robert Guy, director of the state Division of Community Corrections. (Attached as Exhibit BB). This report takes the reader on a step-by-step chronicle of Mr. Atwater's probation, including details on each arrest and court

appearance. While its focus is the probation system and its shortcomings, it paints Mr. Atwater as a habitual and chronic offender.

Governments's Notice of Intent to Seek Death Penalty. The seven-page Government's Notice of Intent to Seek the Death Penalty was filed on February 13, 2009. It was reported on, and published to readers, the same day. abclocal.go.com/wtvd (Hillsborough), 2/13/09. The story reported that "Prosecutors believe Atwater tortured Eve Carson in her last moments, and they believe he killed her because she could identify him in her kidnapping, carjacking and robbery." abclocal.go.com/wtvd (Hillsborough), 2/13/09. The above document was also immediately available for download at dailytarheel.com,

Indictment and Revised Indictment. The Indictment was revised and re-filed on January 30, 2009. The information contained therein was widely reported, and links to the six-page document were set up by several web sites. abclocal.go.com/wtvd (Hillsborough), 2/9/09 and 2/13/09. The stories published following the revised Indictment reported the "special findings" that "the defendant, Demario James Atwater, committed the homicide offense in an especially heinous, cruel, and depraved manner in that it involved torture and serious physical abuse to the victim, Eve Marie Carson." abclocal.go.com/wtvd (Hillsborough), 2/9/09. The Daily Tar Heel's website ran the

headline: "*Torture prior to killing, feds say*" and also provided a link for readers to download the six-page indictment. dailytarheel.com, 2/9/09.

Due to the notoriety of the case, media sources developed Eve Carson pages that were set up with multiple convenient links to stories, documents, video footage, and even a timeline of Mr. Atwater's previous arrest and conviction record. These links have made mountains of information available for those interested in the case, which information is replete with inadmissible and highly prejudicial evidence. As evidence of the effect that the above documents have had on the potential jury pool, one reader posted the following comment:

> I think the news media are wrong to publish the warrants, details of the investigation, or anything else about an open case UNTIL the court has established it's jury pool. As a reader of the above article, my opinion has now been changed to the view that these are hardened criminals who had planned to kill the victim from the start. And as a consequence has made me ineligible to be a jury member.

Raleigh News & Observer, 6/28/08. The author of this comment recognized that reading the published information "changed his/her view" and that, because he/she now believed Mr. Atwater to be a "hardened criminal," he/she is ineligible to be a member of the jury. That a layperson, who is presumably unfamiliar with the standards applicable to disqualification of jurors, would implicitly know that their ingrained prejudice disqualifies them from Mr. Atwater's case, speaks volumes.

C. Independent Websites Have Published Highly Inflammatory Information Regarding the Case

The information available on the internet related to this case can also be found on independent websites that focus on discussion forums or certain topics. These sites provide much insight into the public prejudice against Mr. Atwater. Examples of such sites include:

- podblanc.com contains three videos regarding Mr. Atwater. One video is entitled "Demario James Atwater, Dr. Frankenstein's Nigger Beast." This video is replete with racial animus and advocates to "exterminate Nigger Beast Demario Atwater." The second video is entitled " White Power! Die Motherfucker Die! Demario James Atwater." This video also advocates the death of Atwater, and contains "lyrics" which repeatedly urge "Die Motherfucker Die" and shows extensive footage of a death chamber wherein defendants are killed by lethal injection. The third video identifies Mr. Atwater as the "Orangutan that killed Eve Carson" and also contains numerous racial slurs and reference to "monkeys."

- zimbio.com published a "story" which opened: "Scumbag Demario James Atwater, 21, has been charged with first degree murder in the death of University of North Carolina student Eve Carson, according to Orange county district attorney Jim Woodall. Thank God that SOB is off the streets." The comments posted about the story were even more inflammatory: "Your 'blood' brother Demario is a is a illiterate piece of sh*t like you and Lawrence. I hope Demario gets the death penatly, (sic) but even if he doesn't he will still be found GUILTY, because he is, and spend THE REST OF HIS LIFE IN PRISON BEING SOMEONE (sic) BITCH." (Exhibit CC).

These sites reveal how deeply people have been affected by Ms. Carson's murder. They further reveal the prevalent attitude that Mr. Atwater is guilty, and, ultimately, that he should be killed. Even worse, the posts to these websites reveal a racial

bias against Mr. Atwater, and a belief that Mr. Atwater represents all young, black males and that he is a danger to society. Such beliefs tend to indicate that Mr. Atwater's trial will have less to do with the evidence presented by the prosecution at trial, and more to do with prejudicial stereotyping and with what jurors learned from the media, true or false, admissible or not, before trial.

D. The Government Has Caused Additional Prejudicial Publicity

Additional prejudicial publicity has been generated by the media in response to court proceedings where various government officials have made comments in the case. Orange County Prosecutor Jim Woodall has been quoted numerous times commenting on the "evidence" against Mr. Atwater:

- "Woodall said Monday that Atwater shot Carson in the head with a 12-gauge shotgun after he and Lovette kidnapped Carson and drove her to several ATMs." WCNC (Charlotte), 8/11/08.
- "Woodall said Carson was shot four times with a .25 caliber handgun, which police believe was use by Lovette, and once by Atwater's shotgun." Asheville Citizen Times, 8/11/08.
- "He [Atwater] had been seen with that weapon before and after the crime." Durham Herald-Sun, 9/12/08.
- "Woodall also said that the state has DNA evidence that links Lovette to Carson's car and DNA evidence that links Atwater to the shotgun." Durham Herald-Sun, 9/12/08.
- "The blinds on the windows were raised that morning. They could see a person in that [Eve Carson's] house." Charlotte Observer, 8/12/08.

- "Eve Carson was working on her computer in front of those windows that night." Raleigh News & Observer, 8/11/08.

The Durham Herald-Sun also reported: "Demario James Atwater fired a single shotgun round killing Eve Carson to eliminate her as a witness after she had already been wounded, according to U.S. Attorney Anna Mills Wagoner." Durham Herald-Sun, 2/17/09. On March 13, 2008, the Fayetteville Observer credited Chapel Hill Police Chief Brian Curran as stating:

- "In a surveillance photo released over the weekend, Curran said Lovette was driving Carson's 2005 Toyota Highlander , and Atwater was in the back seat."
- "Atwater was photographed alone in a convenience store photo also trying to use Carson's bank card."

The media has taken statements made by various officials and quoted them in such a manner to create a presumption of guilt. Even Robert Lee Guy, the Director of the N.C. Division of Community Corrections, in addressing the probationary deficiencies in Mr. Atwater's case, speaks with a presumption of guilt: "Most of the time, those reviews take place and everything looks above board," Guy said. "The rarities (are) like this case.... Most of them are not the tragedy of this nature, when you take someone's life." Winston-Salem Journal, 3/16/08.

Even the comments from public officials acknowledge the prejudice that permeates the local community. Orange-Chatham

County District Attorney Jim Woodall is quoted in the Chapel Hill Herald on August 16, 2008 as saying:

> This case horrifies us to a completely different level than I think I've experienced before. I don't remember a crime in this community – or in any other community – that has generated the kind of revulsion this one has.

Earlier, in his motion to seal Ms. Carson's autopsy report, Mr. Woodall had acknowledged that the case had attracted great interest from the local and national media, and that hundreds of stories had been written about Carson's murder. Chapel Hill Herald, 5/6/08.

II. PUBLIC OPINION REVEALS DEEPLY IMBEDDED PREJUDICE AS TO MR. ATWATER'S GUILT AND DESERVEDNESS OF THE DEATH PENALTY

A. The Venue Survey Confirms that North Carolina Residents Harbor Deeply Ingrained Negative Opinions Regarding Mr. Atwater, including that he is Guilty and that he Deserves the Death Penalty.

Objective evidence of the prejudice against Mr. Atwater is demonstrated by the Venue Survey. The Venue Survey inescapably establishes that the publicity described above has rendered impossible any opportunity for the defendant to obtain a fair and impartial jury in the Middle District of North Carolina. The complete results of the Venue Survey are attached to this Motion as Exhibit A. The Venue Survey documents the widespread prejudice against Mr. Atwater throughout all three North Carolina judicial districts, and, by contrast, much less knowledge

regarding the case and prejudice against Mr. Atwater in the Eastern District of Virginia, Alexandria Division.

In the Middle District, a staggering 88% of respondents have heard about the case, 57% presume Mr. Atwater to be guilty, and 57% believe that he should receive the death penalty. (Venue Survey pp. 7, 11, 12). Other districts in North Carolina are similarly prejudiced. In the Western District, 74% of respondents have heard about the case, 47% presume Mr. Atwater to be guilty, and 53% believe that he should receive the death penalty. *Id.* In the Eastern District, 79% of respondents have heard about the case, 55% presume Mr. Atwater to be guilty, and 50% believe that he should receive the death penalty. *Id.*

The above figures overwhelmingly demonstrate that Mr. Atwater cannot receive a fair trial in any North Carolina district. The potential jurors of North Carolina have already heard the facts of the case, and more than half in every district have concluded that Mr. Atwater is guilty *and* that he should be executed.

Comparing the above figures to the corresponding responses in Eastern District of Virginia, Alexandria Division, is startling. There, in contrast, 36% of respondents have heard about the case, and only 20% presume Mr. Atwater to be guilty. (Venue Survey pp. 7, 11). These figures reveal that far fewer potential jurors in Northern Virginia have pre-conceived notions

regarding the facts of the case and, more importantly, Mr. Atwater's guilt. Hence, the farther the case is removed from the State of North Carolina with its barrage of publicity, the more impartial the potential jury panel becomes.

In fact, Middle District of North Carolina respondents have pre-judged Mr. Atwater to such an extreme that less than half, only 41%, of respondents indicated that they "Don't Know" whether Mr. Atwater is guilty of murder. (Venue Survey p. 11). The Western District (49%) and the Eastern District (43%) of North Carolina have similarly pre-judged Mr. Atwater. (*Id*). Mr. Atwater is constitutionally entitled to a jury made up entirely of person who "Don't Know" whether he is guilty and therefore will base their conclusions on his guilt or innocence on the evidence presented in court. Of all jurisdictions questioned, by far the highest percentage responding that they "Don't Know" whether Mr. Atwater is guilty is the Eastern District of Virginia, with 78%. *Id.* Mr. Atwater has a far better chance of obtaining the impartial jury to which he is constitutionally entitled from the Eastern District of Virginia than from any district in North Carolina.

The specific responses from the Eastern District of Virginia further bolster the above conclusion. When specifically asked "What is your opinion of Demario Atwater?", dozens and dozens of the respondents from the Eastern District of Virginia answered "I

don't have one" or "I have no opinion." (Venue Survey, Question 10, Division 10). In contrast, the responses from the Middle District of North Carolina to the same question state: "That's the killer"; "He's a low life"; "I think he's a scumbag"; "He is the lowest level criminal"; and "He's lower down than a rattlesnake . . . he ought not even get a trial"; "I think he's shit'; "the scum he's on the bottom of the ocean"; "I think he should get the death penalty because they proved he was one of the two they proved killed her"; "he needs to be shot hung electrocuted or gas chambered lethal injection water boarded pissed on"; "I think he should be hung"; "common thug"; "He's scum". (Venue Survey, Question 10, Division 1). Mr. Atwater is entitled to a jury without deeply imbedded negative feelings toward him. Such a jury is not available in North Carolina.

The Venue Survey further reveals that Middle District respondents not only harbor negative feelings about Mr. Atwater in general, but they also recall specific details of the alleged crime. Examples of crime details mentioned by respondents include: "some loser on a rampage decided to kill her"; "she was abducted and taken around trying to get money out of her ATM machine and then killed"; "it was two black males that did it, they pretty much took her to the teller machine withdrew money and from there killed her"; "she was kidnapped from her home was taken to a few ATM's in her vehicle then eventually was shot and

killed on a street in Chapel Hill". (Venue Survey, Question 5, Division 1). The above responses reflect that the media has been successful in indoctrinating Middle District jurors regarding the facts of the case. Middle District jurors already "know" what happened to Ms. Carson, and they already "know" who did it to her. Mr. Atwater is entitled to a jury that learns the facts of the case from the witness stand, not the evening news.

B. Public Opinion Reflected in Responses to Media Coverage

The publicity described above has rendered impossible any opportunity for Mr. Atwater to obtain a fair and impartial jury in the Middle District. In addition to the Venue Survey, this is further shown by a sampling of the public comments that have been born out of the media barrage. Mr. Atwater has already been tried and convicted of this crime before he even steps foot in the courtroom. More specifically, the potential jurors throughout North Carolina, and especially in the Middle District, have deeply imbedded beliefs regarding (1) Mr. Atwater's nature as a chronic, violent and unrepentant criminal; (2) Mr. Atwater's guilt, and the specific and heinous acts that he committed; and (3) the sentence that Mr. Atwater should receive – to wit – death. Such jurors could not possibly set aside these beliefs, and give Mr. Atwater the fair and impartial jury to which he is constitutionally entitled. Moreover, it is doubtful that any member of the public holding such firm beliefs will confess the

same in open court. Rather, most potential jurors will want to please the court and respond that they can set such opinions aside when, in reality, this is impossible to do. They may try, but in the end, they will tend to selectively filter the evidence to fit their pre-conceived ideas as to guilt and penalty.

Newspapers have generated online commentary in which citizens voice their opinions on the Carson case. The online stories published by television stations also generate online commentary from citizens. The comments from local citizens, and the Venue Survey responses, provide a window into the minds of the potential jurors in the Middle District and throughout North Carolina. Each reveal a deep prejudice against Mr. Atwater and a firm conviction as to his guilt. A sampling of comments from each of the three areas listed above include:

<u>Mr. Atwater's Alleged Nature as a Chronic, Violent and Unrepentant Criminal:</u>

- "I think it an outrage that Demario James Atwater and Laurence Lovette, with their long records of criminal activity, were free to walk the streets before Eve Carson was so cold bloodedly murdered." Letter to Editor, Durham Herald-Sun, 3/17/08.
- "These two CAREER CRIMINALS have more charges than Al Capone." abclocal.go.com/wtvd (Hillsborough), 1/19/09.
- "He is a habitual offender." Survey Response, Question 9, Division 1 (Middle District).
- "He was a no good criminal who had no regard for life." Survey Response, Question 9, Division 1 (Middle District).

- "He was a punk all his life . . . he is a piece of crap." Survey Response, Question 9, Division 1 (Middle District).

Mr. Atwater's Alleged Guilt

- "Guilty, that's it." Winston-Salem Journal, 12/2/08.

- "Since they have confessed they should be put to death immediately to avoid more torture to her family." abclocal.go.com/wtvd (Hillsborough), 6/30/08.

- "Please just kill them the same way that they killed her. Do it now, don't waste the court's time and our money when we know that the police is right and they are guilty." Winston-Salem Journal, 7/1/08.

- "I would say that being caught on tape using her car and getting money from her account is pretty good evidence. Why does it have to be such long process. Both guys need to be put to death sooner rather than later." Winston-Salem Journal, 1/17/09.

- "Now we all know that Ms. Eve Carson got shot multiple times. Since some of the early evidences (sic) have already demonstrated that Mr. Demario Atwater is involved in her cold-blooded murder - it's very logical to consider he's guilty." abclocal.go.com/wtvd (Hillsborough), 1/19/09.

- "why should there even be a trial?" Winston-Salem Journal, 10/28/08.

- "They don't even need a trial. They need to burn in hell." Winston-Salem Journal, 8/11/08.

The belief that Mr. Atwater Should be Put to Death

- "These two punks deserve no more justice than they gave her and deserve to die a horrible death, just as she did." abclocal.go.com./wtvd, 6/27/08.

- "Both these animals need to die." Winston-Salem Journal, 1/16/09.

- "These two. . . people, and I use the term loosely, deserve to waste away on death row knowing that they

are going to die when and where the judge decides." Winston-Salem Journal, 6/28/08.

- "this crime screams for the death penalty." Winston-Salem Journal, 6/28/08.

- "They still deserve to die for the way they treated the two victims and the absolute disregard for life that they both displayed." Also, "They're scum - pull the switch." Winston-Salem Journal, 12/2/08.

- "Pull the switch and eliminate them - like they were nothing." Winston-Salem Journal, 10/28/08.

- "These to (sic) low life men who killed Eve Carson deserve to die." Winston-Salem Journal, 9/30/08.

- "Can't wait to see these two thugs get the needle." WCNC (Charlotte), 10/27/08.

- "I hope they both die painful and slow deaths." Winston-Salem Journal, 10/13/08.

- "Only a sick amimal (sic) could do such a thing. The death penalty would be too good for this low life!!!" WWAY (Wilmington) 10/28/08.

- "We need to bring capital punishment or public hanging back. We spend way too much time & energy on worrying about the rights of these law breakers or thugs as you call them. My two cents worth is the day they took someone's life away from them or sexually molested a child or raped someone, they threw their rights out the window." digtriad.com 11/10/08.

- "Death is too humane for this scumbag." digtriad.com, 1/16/09.

- "Execute them all ASAP and be done with it." abclocal.go.com/wtvd (Hillsborough), 6/30/08.

- "these two punks should get death (a tortureous (sic) one) and her family should be able to watch." abclocal.go.com/wtvd (Hillsborough), 6/30/08.

- "The both of them should not be allowed to just lay down and be put to sleep. They should be kidnapped in the dead of night, forced into a DATA bus at gun point,

driven to a crack house, then blown away with a shotgun 1st, then a pistol while laying on the groung dying. They deserve Nothing less." abclocal.go.com/wtvd (Hillsborough), 6/30/08.

- "They both should be put to death just like the way the put Eve Carson to death, I don't think she had a chance, WHY would or should they." abclocal.go.com/wtvd (Hillsborough), 8/11/08.

- "lethal injection, 'no'. Lowered slowly into a 'Stump Grinder', yes." abclocal.go.com/wtvd (Hillsborough), 2/14/09.

- "Put a gun to his temple and pull the trigger and do the world a favor." abclocal.go.com/wtvd (Hillsborough), 2/26/09.

- "they should both be hung because of their horrific crime. It should be a public *execution"* dailytarheel.com, 1/18/09.

- May the SOBs who ended this promising young life ROT in HELL.....Notice I said HELL NOT PRISON.....Imprisonment of these lowlife idiots is just ANOTHER waste of out HARDEARNED TAX $$$$$$..... May the perps of this crime SUFFER !!!!!! Hope this is a front row seat right next to the furnace in HELL for them!!!!!!! Raleigh News & Observer, 3/5/09.

- "These pieces of **** should be drawn and quartered . . . " Raleigh News & Observer, 8/12/08.

- "Hang him! That would even be too good." Winston-Salem Journal, 2/24/09.

- "He doesn't need a trial, just hang him. Winston-Salem Journal, 2/25/09.

- "They deserve death for what they did to that girl." Winston-Salem Journal, 1/16/09.

- "Bring back the firing squad on this piece of scum." Winston-Salem Journal, 1/16/09.

- "They should both fry." Winston-Salem Journal, 12/2/08.

- "execute them both." Winston-Salem Journal, 10/14/08.

- "Justice would be these guys being executed in less than a year." Winston-Salem Journal, 7/1/08.

- "I think he should get the death penalty because they proved he was one of the two they proved killed her." Survey Response, Question 10, Division 1 (Middle District).

- "He ought to be tormented . . . the death penalty is the easy way out." Survey Response, Question 10, Division 1 (Middle District).

Many of the above comments were posted to a newspaper in the very city in which this case is scheduled for trial. These comments give valuable insight into the mindset of the jury pool in the Middle District and indeed throughout North Carolina. These comments reflect that, not only has the pretrial publicity in this case been voluminous, it has also succeeded in imbedding beliefs into members of the jury pool which are antithetical to a fair trial.

In addition to the above, the public comments also reveal that many North Carolina citizens have already formed negative beliefs regarding Mr. Atwater's mental state during the alleged crime.

- "Their callous acts of indifference to human life tells us that they wouldn't think anything of killing someone for a few dollars." Winston-Salem Journal, 10/28/08.

- "They MORE than deserve to die for the uncaring way they killed her and just left her. They are worse than animals. They're scum." Winston-Salem Journal, 7/1/08.

- "They had no respect for life, so we don't respect theirs." Winston-Salem Journal, 6/28/08.

- "I suppose he didn't know right from wrong and his upbringing caused him to do this. Because everyone who is poor and neglected murders people in cold blood, don't they? * * * Boo hoo hoo." Winston-Salem Journal, 12/2/08.

- "And these two idiotic punks, thug-wanna-be's, morons, aholes, scum, pieces of crap took Eve away from this earth way too early." digtriad.com 3/5/09.

- "They knew exactly what they were doing." digtriad.com, 8/11/08

- ". . . it is a hate crime because of jealousy and evil in the hearts of the perpetrators." digtriad.com, 6/30/08.

- "These 2 thugs like so many others . . . wanted something for nothing and never mind who gets in the way." digtriad.com, 6/30/08.

- "They knew what they were doing they knew that killing this young lady was wrong . . . " abclocal.go.com/wtvd (Hillsborough), 6/30/08.

- "Make them wish they were never born. I say this because they knew what they were doing." Winston-Salem Journal, 8/12/08.

- "He acts like he has no remorse." Survey Response, Question 9, Division 1 (Middle District).

Public opinion in the Middle District and throughout North Carolina also reveals a class bias against Mr. Atwater and in other instances even an attitude that poor young black men are generally dangerous and need to be taken off the streets. Examples include:

- "I'm betting these two POS are both products of our welfare state - do you think either one of them ever earned so much as one paycheck?" Greensboro News & Record, 3/26/08.

- "These gang thugs usually come from a family of siblings where all or most of the kids have different daddies." Winston-Salem Journal, 11/10/08.

- "These 'helpless youth' who are dropping out of school and committing small crimes that soon escalate to pure evil are the by-products of bad parenting and a failed judicial process." Letter to the Editor, Durham Herald-Sun, 3/19/08.

- "All I can say is tough crap. No doubt the 'younger brother' was just as much a thug as his older sibling. Too bad the same thing didn't happen to the older brother. Better yet, maybe now the older brother can feel a little bit of the pain he inflicted on the Carson family. I have no sympathy for any of these thug punks. They can all rot as far as I'm concerned. digtriad.com, 11/10/08.

- "Both [Atwater and Lovette] are nothing but society trash, need to be disposed of ASAP." abclocal.go.com/wtvd (Hillsborough), 6/30/08.

- "Much of the black community is broken. No fathers in sight, a perverse loathing of education, hatred of American Society, abject ignorance - all without any relief in sight. abclocal.go.com/wtvd (Hillsborough), 6/30/08.

- "What a society we live in where we work 2 and 3 jobs to support people so they can spawn animals such as this only to never even teach them the value of a human life. These two evil, inhumane excuses for men deserve nothing less than the execution they have given these two victims." abclocal.go.com/wtvd (Hillsborough), 6/30/08.

- "They are less than animals because even the lowest form of life can't be compared to them." abclocal.go.com/wtvd (Hillsborough), 6/30/08.

- "Just like wild animals you must keep them caged to control them!!!" abclocal.go.com/wtvd (Hillsborough), 6/30/08.

- "He was a punk all his life . . . he is a piece of crap . . . a lot of the problem is that some black guys and some white guys don't know who their father is and so

they have no guidance." Survey Response, Question 9, Division 1 (Middle District).

C. Online "Poll" Reveals Overwhelming Predisposition Towards Death Penalty

As further evidence of the deeply embedded prejudice in this district, a website in the heart of the Middle District, digtriad.com, asked readers: "Do you think he should receive the death penalty?" The question itself, in that it is posed before Atwater has been tried in a court of law, and posed to persons whose only knowledge of the case come from media reports, reveals that the media has pre-judged Mr. Atwater. The responses further confirm the public's ingrained belief as to Mr. Atwater's guilt. None of the responses are: "I can't possibly answer this question because I am not a juror who has heard the evidence against Mr. Atwater in a court of law." Instead, the answers are uniformly in the affirmative and hate-filled:

- "Shoot both of them 5 times each . . . . Today, in public!! And don't waste my tax money feeding and taking care of this scum!!!!!"
- Yes. Both of them should be fried.
- BRING BACK PUBLIC HANGINGS!!
- I think he should be killed the same way he killed her.
- Until a more severe punishment is allowed . . . . DEATH will do.
- Those murderers don't deserve the death penalty, that's too nice and easy for them. They need to feel what that poor girl felt, the fear, the pain. . . they need to get to a point where they're BEGGING to be put out of their misery.

- These two men that committed this crime were not human beings. No human being would commit a crime this haneous, thus these two should not be treated as human beings. This is exactly why the death penalty was put in place for scum like this. I can't call them animals because that would be a disgrace to the animal kingdom! Off with their heads!!!!

- I think that they should be taken to the woods, tied with wet salted rawhide around the neck, penis, testicles, and legs. Go back in a week and see the results.

digtriad.com, 8/11/08. (Exhibit C). These are but a few of the twenty-two responses (out of twenty-four) calling for Mr. Atwater's death. No one wrote to question how such a determination could be made without a trial. None seems necessary because of the inflammatory media coverage of this case.

III. THE LOCAL PRETRIAL PUBLICITY AND TAINTING OF THE JUROR POOL REQUIRE THIS COURT TO CHANGE THE VENUE OF THIS TRIAL

A. Holding the Trial in This District Will Violate Mr. Atwater's Rights Under the Constitution

The Sixth Amendment to the United States Constitution guarantees to the accused a public trial by an impartial jury. The Fifth Amendment guarantees that no individual shall be deprived of life, liberty or property, without due process of law. The Eighth Amendment prohibits cruel and unusual punishment from being inflicted upon a defendant. The Supreme Court of the United States gave practical meaning and definition to these constitutional provisions, particularly the Fifth and Sixth

Amendments, in the context of venue in the landmark decisions of *Irvin v. Dowd*, 366 U.S. 717 (1961), *Rideau v. Louisiana*, 373 U.S. 723 (1963), and *Sheppard v. Maxwell*, 384 U.S. 333 (1966). Simply put, a criminal defendant must receive a fair trial consistent with constitutional due process. *Sheppard v. Maxwell*, 384 U.S. 333, 335 (1966). *Sheppard* specifies that a "fair trial" requires "a trial by an impartial jury free from outside influences." *Id.* at 362. Accordingly, a court must grant a motion to change venue "if prejudicial pretrial publicity makes it impossible to seat an impartial jury," *U.S. v. Carona,* 571 F. Supp. 2d 1157 (C.D. Cal. 2008).

The above Supreme Court decisions recognize that when there has been pervasive media coverage of a case and the quality of the coverage creates a reasonable likelihood or perception that a fair and impartial trial cannot be had in the current district, prejudice is presumed and venue must be changed. In this case, because there has been so much adverse pretrial publicity and because the impact of the death of Ms. Carson upon this community has been so profound, this venue is inherently improper, and this Court can, as a matter of law and without further evidentiary inquiry, transfer the venue in this case. *United States v. Jones*, 542 F.2d 186, 193 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976).

The *Irvin*, *Rideau*, and *Sheppard* decisions involved notorious trials with extensive media coverage. Recognizing the potential

for prejudice to the criminal justice system, especially in highly charged cases of intense local interest, the Supreme Court moved swiftly and decisively to endorse change of venue, *proactively*, in order to preserve an accused's right to a fair trial and, importantly, the public's perception of fairness. These landmark decisions and their progeny are remarkable in two respects. First, the Supreme Court did not set a demanding standard for a favorable consideration of a request for a change of venue. Rather, transfer is encouraged where, as here, the threat of prejudice lurks. Second, the judiciary has honored the Court and the Constitution by readily and repeatedly changing venue where circumstances support such a ruling.

A defendant can establish either presumed prejudice or actual prejudice to warrant a change in venue. *United States v. Rewald*, 889 F.2d 836, 863 (9th Cir. 1989), *amended on other grounds*, 902 F.2d 18 (9th Cir. 1990), *cert. denied*, 498 U.S. 819 (1990). Actual prejudice occurs when a community has such fixed opinions that it cannot impartially judge the defendant. *United States v. Dischner*, 974 F.2d 1502, 1525 (9th Cir. 1992), *cert. denied*, 507 U.S. 1993). Such determinations are usually reached during the jury selection process. *Id.*

On the other hand, prejudice is *presumed* where "pretrial publicity is so pervasive and prejudicial that we cannot expect to find an unbiased jury pool in the community." *Goss v. Nelson,*

439 F.3d 621, 628 (10th Cir. 2006). In such cases, a trial court is permitted to transfer venue without conducting voir dire of prospective jurors. *See Sheppard v. Maxwell,* 384 U.S. 333, 362-63 (1966) ("[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity."); *Estes v. Texas,* 381 U.S. 532, 542-43 (1965).

Because of the timing of this motion (before trial/jury selection), the issue at present is whether Mr. Atwater can show presumed prejudice. Prejudice is presumed:

> when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime . . . . Under such circumstances, it is not necessary to demonstrate actual bias.

Harris v. Pulley, 885 F.2d 1354, 1361 (9th Cir. 1988), *cert. denied*, 493 U.S. 1051 (1990)(citations omitted). Another recent district court decision recited the prevailing standard as follows:

> a Defendant need not show that he suffered actual harm because of pretrial publicity if he can demonstrate that the prejudicial pretrial publicity so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community.

United States v. Cortez, 251 F.R.D. 237, 237 (E.D. Tex. 2007) (citations omitted). The *Cortez* decision is concise and bereft of facts. However, it involved extensive pretrial publicity in

print, television and on the internet regarding the defendant and other crimes in which he was possibly involved, including a prior murder. *Id.* at 237. The Court summarily granted defendant's Motion to Transfer Venue noting that, since "the prejudicial pretrial publicity has been pervasive" that "in the interest of due process and fairness, this case should be transferred to another division." *Id.* at 237-238.

The instant case is directly on point with *Cortez*. The pretrial publicity is pervasive, and extends to all media outlets, including print, television and internet. Much of the publicity surrounding the instant case is related to Mr. Atwater's criminal background and his mishandled probation. As such, the public has been deluged with information about Mr. Atwater's criminal record. For instance, The Raleigh News & Observer reported a detailed account of Mr. Atwater's "criminal record" on March 13, 2008:

> Convictions dating from 2004 in Wake and Durham counties for simple assault, common law robbery, misdemeanor larceny, breaking and entering, possession of stolen goods, and possession of marijuana. Additional cases apparently pending alleging resisting a public officer, possession of a firearm by a felon, second-degree trespass, possession with intent to sell and deliver marijuana, possession of drug paraphernalia.

The above information, like the information in *Cortez*, relates crimes other that those for which Atwater is to be tried. That it has had an effect on potential jurors is confirmed by

comments like “that boy got a criminal record as long as it gets.” (Venue Survey Response, Question 9, Division 1). As in *Cortez*, the pervasive nature of the publicity, in combination with the fact the content of said publicity includes Mr. Atwater’s prior criminal record, requires a finding of presumed prejudice and a corresponding transfer of venue.

In *Murphy v. Florida,* 421 U.S. 794, 800 n. 4, (1975), the Supreme Court distinguished “mere familiarity with the petitioner or his past” from an “actual predisposition against him.” The Court also noted the distinction between “largely factual publicity” and “that which is invidious or inflammatory.” *Id.* In *Murphy,* the Supreme Court found that the general community (metropolitan Dade County) atmosphere was not inflamed and that the publicity, which itself was largely factual in nature. *Id.* at 802.

By contrast, in the instant case, the publicity is not contained to a factual presentation and the comments noted above go far beyond a “familiarity” with Mr. Atwater, instead revealing an “actual predisposition against him.” There is no stronger evidence of a predisposition against someone than a fervent desire to see him killed. This sentiment is rampant in the Middle District as revealed in the responses to the Venue Survey wherein 57% of Middle District respondents stated that Mr. Atwater should receive the death penalty if convicted. (Exhibit

A, Venue Survey, Page 12). The "actual predisposition" against Mr. Atwater is further revealed in the specific responses from Middle District respondents regarding the sentence that Mr. Atwater should receive, among other things: "a very slow painful death"; "firing squad"; "death by lethal injection, actually death by electric shock"; "he should go straight to the front of the line for the death penalty"; and "burning at the stake". (Question 10, Division 1).

Even more evidence of an "actual predisposition" against Mr. Atwater by Middle District residents is revealed in response to a simple survey question regarding what the respondent had "read, seen or heard" about Mr. Atwater: "that he just full of the devil . . . he should be put to death"; "he's psycho"; "human debris"; "he was a no good criminal who had no regard for life. He is the lowest thing on earth"; "he is a low life"; "he is a thug"; "he was a punk all his life . . . he is a piece of crap". (Question 9, Division 1). The responses exhibit precisely the sort of "actual predisposition" against the accused that, following *Murphy,* requires a transfer of venue.

Further, much of the publicity has gone beyond a factual recitation of what allegedly happened and instead has spilled over into speculation regarding why Ms. Carson was killed, and the mental state of the defendants before and during the alleged crime. Media coverage has described the Mr. Atwater "tortured"

Eve Carson (“*Torture prior to killing, feds say*” dailytarheel.com, 2/9/09) and then killed her to eliminate her as a witness. *(“Demario James Atwater fired a single shotgun round killing Eve Carson to eliminate her as a witness after she had already been wounded, according to U.S. Attorney Anna Mills Wagoner*.” Durham Herald-Sun, 2/17/09). Dr. Michael Teague, a forensic psychologist and criminal profiler, was quoted by the local television station (WRAL)as stating that the manner in which Ms. Carson was shot showed *“a complete lack of regard for the other person. I don’t see any element from going through the autopsy that there was any concern for this victim. It’s just like she was the repository for their anger, and how dare she say no to them, whatever she said no to them for*.” (WRAL, *Multiple gunshots killed Eve Carson*, 6/30/08). Dr. Teague’s “analysis” of the depraved mental state of the defendant departs sharply from a mere factual recitation from the autopsy report. Instead, Dr. Teague offers his “expert opinion” that Mr. Atwater exhibited a “complete lack of regard” for the victim. This goes far beyond “largely factual publicity” and is precisely the sort of “invidious and inflammatory” publicity that *Murphy* teaches should result in a transfer of venue.

A recent Ninth Circuit case further distilled existing Supreme Court law and delineated that three factors should be considered when determining presumed prejudice: (1) whether there

was a barrage of inflammatory publicity immediately prior to trial, amounting to a huge wave of public passion; (2) whether the news accounts were primarily factual because such accounts tend to be less inflammatory than editorials or cartoons; and (3) whether the media accounts contained inflammatory or prejudicial material not admissible at trial. *Daniels v. Woodford*, 428 F. 3d 1181, 1211 (9th Cir. 2005), *cert. denied sub nom Ayers v. Daniels*, 550 U.S. 968 (2007) (quotations and citations omitted). *Daniels* involved the murder of two police officers. The *Daniels* Court found that, after reviewing the above factors, defendant had sufficiently proved presumed prejudice and therefore a transfer of venue was proper. *Id.* The *Daniels* Court's analysis is instructive.

Factor One - Barrage of Publicity. The *Daniels* Court found the following facts relevant to factor one of the analysis: (1) the murders generated extensive and nearly continuous publicity immediately after the shootings and again before trial; (2) news accounts described the perpetrator as a black parapalegic; (3) the defendant was identified in press accounts as the killer from the very beginning; (4) local newspapers printed numerous letters from readers calling for defendant's execution; (5) approximately three thousand people attended the decedents' funerals. Based on the above, the *Daniels* Court concluded that "the public's

response to this publicity clearly amounted to a 'huge' wave of public passion." *Id.* at 1211.

The above five facts mirror almost exactly the facts of the instant case in that: (1) Ms. Carson's murder generated extensive and nearly continuous publicity; (2) early news accounts described the perpetrators as two black young men; (3) Mr. Atwater was identified in press accounts as the killer from the very beginning; (4) local newspapers printed numerous letters and comments from readers calling for Mr. Atwater's execution; and (5) approximately ten thousand people attended a memorial service for Ms. Carson shortly after her death.[17] As in *Daniels*, the above clearly establish a "huge wave of public passion."

Further evidence of a "barrage" of publicity is supplied by the Survey response showing that, in June of 2009, 88% of Middle District respondents had knowledge of the case. This figure shows the depth to which the barrage of publicity has become embedded in the psyche of Middle District residents. By contrast, in the Eastern District of Virginia, outside the media spotlight, only 35% of respondents had knowledge of the case.

Factor Two - Whether news accounts were factual. On this point, the *Daniels* Court found that: "The press accounts did not

[17] In addition, another memorial service was held on the one-year anniversary of Ms. Carson's death, in March of 2009. Speaking of this service, UNC Chancellor Holden Thorp noted that: "*For many of us, the loss of Eve Carson continues to occupy our thoughts*." Raleigh News & Observer, 2/24/09.

merely recite factual details, but included editorials and letters to the editor calling for Daniels' execution. In addition, news articles reflected the prosecution's theory of the case by attributing the killings to Daniels's desire to escape justice." *Id.* at 1212. Once again, the instant case possesses nearly identical facts. Atwater's press accounts do not merely recite factual details, but include many editorials, letters to the editor, and dozens of reader comments calling for Atwater's execution. Further, the news articles reflect the prosecution's theory that Atwater shot Ms. Carson to eliminate her as a witness. The Durham Herald-Sun reported that "*Demario James Atwater fired a single shotgun round killing Eve Carson to eliminate her as a witness after she had already been wounded, according to U.S. Attorney Anna Mills Wagoner*." (February 17, 2009). (See, also WRAL (Raleigh), February 13, 2009; reporting prosecution's position that Atwater killed Carson "to eliminate her as a possible witness to other offenses, including, at least, kidnapping, carjacking and robbery.")

Factor Three - Whether publicity included prejudicial material not admissible at trial. On this final factor, the *Daniels* Court found: "Also well-publicized by the press was Daniels' past criminal offenses, including an arrest for shooting at a police officer. Such information was highly prejudicial and would not have been admissible at the guilt phase of Daniels'

trial." *Id.* at 1212. Once again, the facts of the instant case are identical. Atwater's past criminal offenses, including gun charges and other crimes, have been the focus of countless news stories. (See, e.g., Asheville Citizen Times, 3/13/08, "Atwater's criminal record includes . . . felony possession of a firearm.") More egregious are those articles linking Atwater to the Duke student killing, a crime with which he has not been charged. As in *Daniels*, this information is highly prejudicial and inadmissible at the guilt phase of Atwater's trial.

The *Daniels* Court summed up the analysis thusly: "Applied here, these factors compel a finding that the venue was saturated with prejudicial and inflammatory media publicity about the crime sufficient for a presumption of prejudice." *Id.* at 1211. Based on the striking factual similarity between the *Daniels* case and the instant case, an identical conclusion is inescapable. The Middle District of North Carolina is "saturated with prejudicial and inflammatory media publicity" about Atwater's alleged crime "sufficient for a presumption of prejudice."

A finding of presumed prejudice is both warranted by the facts of the instant case, and also compelled by judicial efficiency. In *Shepard v. Maxwell*, 384 U.S. 333 (1966), the Supreme Court offered this advice as to the timing of the decision concerning the question of venue:

> But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair

> trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity . . . we must remember that reversals are not but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception.

Id. at 363 (emphasis added). In deciding that a change of venue was required in *Shepard*, the Court took special note of the "nature" of the publicity, observing that much of the material printed or broadcast was never heard from the witness stand. *Id.* at 356. Such will be the case here; the jury will not (or should not) hear about Mr. Atwater's past involvement in the justice system, or other matters outside the scope of the Indictment, such as the hearsay within hearsay statements in the search warrant affidavits, but which matters have received repeated coverage in articles and reports about Mr. Atwater's case.

In *Rideau v. Louisiana*, 373 U.S. 723 (1963), the Supreme Court wasted no time in presuming prejudice where the record established that a confession by the accused had been televised. The Court arrived at its conclusion of presumed prejudice *without examining* the transcript of voir dire. It was not concerned with whether or not any jury had seen the televised interview. Instead, the Court emphatically observed:

> we do not hesitate to hold, without pausing to examine a particularized transcript of the voir dire examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen or heard Rideau's televised 'interview.'

Id. at 727.

From these Supreme Court decisions it is clear that where pretrial publicity concerning a criminal prosecution clouds the likelihood that prospective jurors will be impartial, a trial court must, in advance of trial, presume prejudice and change venue.

The Court in *United States v. McVeigh*, 918 F. Supp. 1467 (W.D. Okla. 1996) took heed of the directive that venue issues be resolved prior to jury selection in high profile cases. The *McVeigh* court stated:

> Deferment of the venue motions in this case is impracticable and inimical to the public interest in obtaining a just determination without undue delay. It is apparent that some special precautions and logistical arrangements must be taken in preparation for trial of these charges in any location. The scope and intensity of the public interest necessitates it. The safety of the accused and all trial participants must be considered as well. Moreover, a failed attempt to select a jury would , itself, cause widespread public comment creating additional difficulty in beginning again at another place for trial.

Id. at 1470. Those considerations present in *McVeigh* exist in the instant case. The scope and intensity of the public interest in the instant case is immense. The epicenter of this interest is the Triangle/Triad area of North Carolina. This Court should take action now to remove the proceedings from the current district, which lies in the midst of the media frenzy, and transfer the proceedings to a district not permeated so completely with information (and misinformation) about the case.

Another lesson taught by the *McVeigh* case is the special nature of a death penalty case, and the heightened need to scrutinize the applicable pretrial publicity for prejudice towards death. *Id.* at 1474. The *McVeigh* court stated:

> Because the penalty of death is by its very nature different from all other punishments in that it is final and irrevocable, the issue of prejudice raised by the present motions must include consideration of whether there is a showing of a predilection toward that penalty. Most interesting in this regard is the frequency of the opinions expressed in recent televised interviews of citizens of Oklahoma emphasizing the importance of assuring certainty in a verdict of guilty with an evident implication that upon such a verdict death is the appropriate punishment.

Id. at 1474. In the instant case, the Venue Survey shows that more than 56% of the Middle District respondents feel that Mr. Atwater should receive the death penalty. Exhibit A, Venue Survey Response, Page 12. This is exactly the "predilection" toward the death penalty that resulted in a change of venue in *McVeigh*.

A review of the public comments further reveals a heavy slant towards death. (See, e.g. "*Both guys need to be put to death sooner rather than later*." Winston-Salem Journal, 1/17/09; and "*Both these animals need to die*." Winston-Salem Journal, 1/16/09; "*Please just kill them the same way that they killed her. Do it now, don't waste the court's time and our money when we know that the police is right and they are guilty*." Winston-Salem Journal, 7/1/08). The preceding are but three of the

numerous such comments that have been made by members of the local community regarding their desire that Mr. Atwater be killed. This bias exists now, prior to trial, and is based on information and opinions outside the judicial process. Venue must be transferred to a district that does not demonstrate this pre-determined bias towards death.

Because the focus of pretrial publicity in this case has been so pervasive and inflammatory as to Mr. Atwater, and because the publicity goes far beyond the mere reporting of facts associated with the progress of the case and includes investigative reporting that is highly speculative and frequently inaccurate, this Court should presume prejudice. Waiting until the jury is selected in this case to determine actual prejudice will most likely constitute a waste of the judicial resources of this Court and will necessitate a delay in the trial.

B. Venue Must Be Changed Under Fed. R. Crim. P. 21(a).

Alternatively, this Court should also transfer this case away from the Middle District pursuant to Rule 21(a) of the Federal Rules of Criminal Procedure. Rule 21(a) provides that:

> [t]he court upon motion of the defendant shall transfer the proceeding . . . to another district . . . if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place . . . in that district.

The burden of establishing presumed prejudice under Rule 21(a) is not a difficult burden to meet, and is lower than that

required to establish a constitutional violation. It can be met despite juror assurances of impartiality and where jurors have only read or scanned newspaper articles and not suffered nearly the impact that jurors in this district have due to Ms. Carson's death. *Marshall v. United States*, 360 U.S. 310 (1959). This latitude and flexibility is necessary in order to further "the exercise of our supervisory powers to formulate and apply proper standards for enforcement of the criminal law in the federal courts." *Id.* at 313 (citations omitted).

In applying *Marshall*, courts have repeatedly found that "there is a very significant difference between matters within the scope of our supervisory power and matters which reach the level of constitutional dimension." *Rideau v. State of Louisiana*, 373 U.S. 723, 729 (Clark, J., dissenting). Federal courts have universally recognized this latter showing of prejudice when considering a request for a change of venue. In *United States v. McNeill*, 728 F.2d 5, 9 n.5 (1st Cir. 1984), the court stated:

> In the exercise of supervisory powers over the federal district courts, we may make a finding of juror bias on a lesser showing of prejudice than would be required under the constitutional standard applicable to state courts.

United States District Court judges have repeatedly and properly changed venue, presuming prejudice, relying on their authority to supervise criminal proceedings in a manner that eliminates any public concern about the appearance of fairness.

In *United States v. Moody*, 762 F. Supp. 1485 (N.D. Ga. 1991), venue was changed where the court found widespread, and prejudicial publicity concerning the case. *Moody* stated the test as follows:

> As we read the Supreme Court cases, the test is: Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial.

Id. at 1486, (citing *Pamplin v. Mason*, 364 F.2d 1 (5th Cir. 1966)). The *Moody* Court also relied upon the guidance provided by the applicable ABA Standard for Criminal Justice which reads:

> A motion for change of venue or continuance shall be granted whenever it is determined that, because of the dissemination of potentially prejudicial material, there is a substantial likelihood that, in the absence of such relief, a fair trial cannot be had. This determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency and timing of the material involved. A showing of actual prejudice shall not be required.

ABA Standard for Criminal Justice, 2nd Ed.1980 § 8-33(c). The *Moody* Court specified that:

> [t]he above authorities to require that a motion for change of venue be granted whenever: (1) the court "is satisfied" of the existence of great prejudice; (2) outside influences affecting the community's opinion as to defendant are "inherently suspect"; (3) there is "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial;" or (4) there is "substantial likelihood" a fair trial cannot be had in the absence of transfer.

Id. at 1487. The *Moody* Court, in applying the above factors to the facts of the case, found that "there exists in this district so great a prejudice against defendant that he cannot obtain a fair and impartial trial here." *Id.* Some of the facts present were the defendant's "substantial criminal record" which had been "widely reported" and that " Defendant was an early suspect in the case" and that the case caused "wide public interest." *Id.* As has been noted herein, Mr. Atwater's alleged "substantial criminal record" has also been "widely reported." Also, Mr. Atwater was an early suspect in the case. His picture was broadcast across the state and his face became synonymous with Ms. Carson's murder. Finally, the case has generated "wide public interest." As in *Moody*, all of the above result in a "substantial likelihood" that a fair trial cannot be had in the absence of a transfer. Above and beyond the factors cited above, the Venue Survey reveals objective evidence of prejudice against Mr. Atwater in the Middle District and throughout North Carolina. This further establishes the "substantial likelihood" of prejudice that *Moody* teaches must result in a transfer of venue.

In *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986), the Court found that a venue transfer was proper based on facts very similar to the instant case. *Coleman* involved a rural community where defendant's alleged rape, robbery, and multiple murder received extensive

publicity from print and broadcast media as well as word-of mouth communication within the community. In deciding to transfer venue, the Court stated that:

> After reviewing the record in the instant case, the manifest picture that emerges is a community that was deeply prejudiced as to both guilt and sentence. As soon as petitioner Coleman and his co-indictees were identified as suspects in the case, law enforcement officials announced that circumstantial evidence against the suspects was "overpowering," and that "there's no point in looking for anybody else." The press revealed that the suspects' fingerprints had been found at the scene of the crime. The fact that petitioner Coleman and his co-indictees were escapees from a Maryland prison was reported along with their prior criminal records, including the crime spree along the Eastern Seaboard of which the instant murders were a part. Petitioner Coleman was rarely identified as a suspect in the case without the article noting that he had confessed to the murder of Pennsylvania youth Richard Miller. All of the foregoing was widely reported in all of the newspapers serving Seminole County, and in what the record discloses of the broadcast media. It was repeated time and again. The details of the testimony of Coleman's own half-brother, Billy Isaacs', describing explicitly the horrible manner in which Coleman and the others murdered the six Alday family members, were widely and repeatedly reported in Seminole County immediately prior to Coleman's trial. In short, there was an overwhelming showing in the press of petitioner Coleman's guilt before his trial ever began.

Id. at 1538-1539. Very similar facts are present in the instant case. Law enforcement officials, most notably Orange County District Attorney Jim Woodall, have made public statements, albeit in court, about the evidence against Mr. Atwater. The press has published those statements as if they are evidence.

- *"Woodall said Monday that Atwater shot Carson in the head with a 12-gauge shotgun after he and Lovette*

kidnapped Carson and drove her to several ATMs." WCNC (Charlotte), 8/11/08.

- *"Woodall said Carson was shot four times with a .25 caliber handgun, which police believe was use by Lovette, and once by Atwater's shotgun*." Asheville Citizen Times, 8/11/08.

- *"He [Atwater] had been seen with that weapon before and after the crime*." Durham Herald-Sun, 9/12/08.

In addition, the prior criminal record of Atwater, and the fact that he was on probation, have been widely publicized. The murder of the Duke University student, Abhijit Mahato, has been mistakenly and very prejudicially linked to Atwater through the press coverage of Lovette. The manner in which Ms. Carson was killed has been detailed explicitly over and over again, every time with the presumption that Mr. Atwater fired the fatal shot and that Ms. Carson raised her hand in defense thereof. Just as the *Coleman* Court found that "the press revealed that the suspects' fingerprints had been found at the scene of the crime," in the instant case, the press reported that "the state has DNA evidence . . . that links Atwater to the shotgun." Durham Herald-Sun, 9/12/08. The following issues, which are all similar to the issues addressed by the *Coleman* court contribute to concerns that Mr. Atwater cannot get a fair and unbiased trial in any district in North Carolina include the following:

- The public's awareness of Atwater's prior criminal record

- The public's awareness of the alleged facts of the case
- The availability of case documents that outline the "facts" of the case in detail
- The public's presumption of guilt
- The public's presumption of appropriate penalty of death
- Linkage to Lovette and therefore to Duke student murder case
- Linkage to probation scandal which leads to public awareness of prior record
- The public's perception of defendant's linkage to gangs and gang involvement in Eve Carson's murder.

In addition, Mr. Atwater being the poster child for a failed probationary system has drawn the ire of the surrounding population not just for crime itself but for the failures of North Carolina's entire probationary system. *Coleman* shares many of the above factors with the instant case. All of these factors have led to a community which is "deeply prejudiced to both guilt and sentence." As in *Coleman*, this prejudice requires a transfer of venue.

A number of additional cases demonstrate the appropriateness of a change of venue in the wake of substantial pretrial publicity. In *United States v. Abrahams*, 453 F. Supp. 749 (D.

Mass. 1978), the defendant was charged with making a false statement. The defendant, notorious in his community, presented to the court large numbers of articles written about him and his case. He also presented strong evidence that many of the articles and broadcasts were slanted heavily against him. In granting a change of venue, the court determined that the excessive pretrial publicity created in the district of Massachusetts an atmosphere of pervasive community prejudice so inflammatory as to "substantially reduce the reasonable likelihood of Abrahams obtaining a fair trial before a panel of impartial jurors anywhere in this district." *Id.* at 753. This ruling occurred in advance of the jury selection process.

Another recent case that provided a detailed analysis of the venue issue emphasized a "wide breadth of consideration" of the potentially prejudicial outside influences:

> A district court's consideration of a federal criminal defendant's motion for change of venue is guided by Rule 21(a), which directs that the court must transfer the proceedings "if the court is satisfied that so great a prejudice against the defendant exists ... that the defendant cannot obtain a fair and impartial trial. To show presumed, rather than actual prejudice, the defendant must show that "outside influences affecting the community's climate of opinion as to a defendant are inherently suspect" and that "the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue." In reviewing whether the outside influences operated to deprive the defendants of a fair trial, we may "widen our breadth of consideration" and may consider the combined effect of various factors. Courts, therefore, look at not only the pretrial publicity, but will also consider "inherent community prejudice," the government's closing argument, an "inflamed community atmosphere," the connection

> between the community prejudice and the trials, the interplay between the crime and the economic life of the community, and a familiarity with unpopular or ill-reputed groups with whom the defendant was associated.

U.S. v. Campa, 459 F. 3d 1121, 1174-1175 (11th Cir. 2006) (citations omitted). Many of the factors set forth above are present in the instant case. "Inherent community prejudice" is shown by comments from the community like: "How can it be that two thugs could be arrested multiple times for theft and burglary yet be released to wander our streets, cruise our highways, and even walk in our midst while we shop." Durham Herald-Sun, letter to editor, 3/19/08. Also, "I'm betting these two POS are both products of our welfare state - do you think that either one of them ever earned so much as one paycheck?" Greensboro News & Record, 3/26/08. "Inflamed community atmosphere" is indicated by comments like "Can't wait to see those two thugs get the needle" WCNC (Charlotte), 10/27/08, and "Death is too humane for this scumbag." digtriad.com, 1/16/09. The fact of the wide differences in race and class between Carson and Atwater have also been reported, leading even more to and "inflamed community atmosphere." One article juxtaposed the two thusly:

> *Carson, who was white, was a prestigious Morehead-Cain scholar at North Carolina, a pre-med major who was majoring in political science and biology.*
>
> *Both Atwater and Lovette are black high-school dropouts arrested repeatedly on a variety of crimes in the weeks leading up to her death.*

WCNC (Charlotte), 10/29/08. *Further, Mr. Atwater has been associated with "ill-reputed groups" to wit, gangs, in the community*. (See, e.g. "Gang suspicions surround murders." abclocal.go.com/wtvd (Hillsborough), 3/14/08).

Thus, not only is Ms. Carson well known to potential jurors, but that the fact that (in the minds of potential jurors) a beautiful, female, white, overachiever was killed by a young, black, male underachiever with a criminal record incites deep feelings of hatred, bigotry and revenge which, as in *Campa*, necessitate transfer out of the current district. Other courts have also considered how the charged crime reinforced "deeply-rooted passions" and "deeply-held prejudice" within the community, *United States v. Holder,* 399 F. Supp. 220, 227-28 (D.S.D.1975), the defendants' state citizenship and community racial bias, *United States v. Washington,* 813 F. Supp. 269, 274, 275 (D.Vt. 1993), *aff'd* 48 F.3d 73 (2nd Cir. 1995), *cert. denied*, 515 U.S. 1151 (1995), "extreme community hostility," the defendant's prominence in the community, the victim's position as a public servant, and the defendant's position as a community "outsider." *State v. Koedatich,* 112 N.J. 225, 548 A.2d 939, 963 (1988)*, cert. denied*, 488 U.S. 1017 (1989).

In *United States v. Florio*, 13 F.R.D. 296 (S.D.N.Y. 1952), the defendant was an alleged gangster whose arrest and imminent prosecution prompted substantial pretrial publicity. The motion

for a change of venue was granted because the publicity had been intense, critically timed and indubitably prejudicial. The court granted the motion in order to prevent subsequent questions concerning the fairness of the proceeding and because it recognized that the case was of particular interest locally and likely to be less well known elsewhere, observing:

> The issues which these newspaper articles discussed concerned a matter of peculiarly local interest. Public interest in the work of this commission was and is great and it is understandable that the newspapers of this city would endeavor to bring to the citizens of New York a full coverage of the activities and disclosures of that commission. It was also reasonable to assume that because of this great local interest, the amount of coverage which these matters received and the interest created by these articles in the New York area was far in excess of that accorded this subject elsewhere.

Id. at 298.

In *United States v. Tokars*, 839 F. Supp. 1578 (N.D. Ga. 1993), *aff'd*, 95 F.3d 1520 (11th Cir. 1996), *cert. denied sub nom Mason v. United States*, 520 U.S. 1151 (1997), the defendant was charged with racketeering, money laundering, a drug conspiracy, and various acts of violence. His case received widespread local media coverage. The motion for a change of venue was referred to a magistrate judge, who recommended against it. The district court decided otherwise, finding:

> However, combining the extraordinary volume of coverage (virtually all of which is highly negative to the Defendants) with the emotional nature of some of the coverage, one may infer that a widespread bias exists which could interfere with a fair trial.

Id. at 1582.

The court in *Tokars* was especially mindful of factors that are also present in this case, "the large amount of investigative reporting which was undertaken by local media" and the improbability that the reported information would "be reflected in the government's evidence at trial." *Id.* The reported and inadmissable information and misinformation that has been so generously dispensed in this district is highly prejudicial. Most prominent in this regard are the search warrant affidavits that describe in detail what Mr. Atwater allegedly told a confidential informant.

- "Rio advised her that he and an unknown individual took Eve Carson to an ATM machine."
- "Rio told the caller that he and the other individual planned to obtain Carson's ATM card PIN from Carson before killing her."
- "Atwater told the CW that he and Alvin Lovette entered Eve Carson's residence through an open door on the date of Carson's murder, which was May 5, 2008."
- "The CW said Atwater told the CW that he and Lovette forced Carson to accompany them to Carson's car and take them to an ATM machine."
- "The CW learned that Carson was forced into the back seat with Atwater, and Lovette drove Carson's vehicle. That information is consistent with video footage taken from and ATM camera on that date."
- "The CW also informed investigators that Carson was shot multiple times by Lovette and was subsequently shot by Atwater."

- "Chapel Hill Police Department investigators interviewed Atwater following his arrest. During that interview, Atwater admitted being in Chapel Hill the night Carson died and also admitted being inside Carson's Toyota Highlander. Atwater also admitted it was him who was pictured in a surveillance photo taken at a BP convenience store . . . ."

Search Warrant - 2507 South Roxboro Street, Apartment 11, Durham, NC - 3/17/08 (4 pages) attached as Exhibit X. The above information, like the information in *Tokars*, will likely not be "reflected in the government's evidence at trial." As in *Tokars*, the above information will cause "widespread bias" among the jury pool which would "interfere with a fair trial."

In *United States v. Engleman*, 489 F. Supp. 48 (E.D. Mo. 1980), the defendant was charged with damaging a vehicle in interstate commerce by means of an explosive. The case received saturated coverage locally. Looking inward to its responsibility and authority the court ruled:

> The trial judge has a nondelegable responsibility under Rule 21 of the Federal Rules of Criminal Rules and the United States Constitution to insure that a defendant receive a fair and impartial trial.

Id. at 49. The court rejected the government's request to stay ruling on the question of venue until jury selection, noting that witnesses would be traveling to court for the trial and scores of potential jurors would have to be summoned to court. Similarly, in the instant case, to change venue during voir dire would

measurably increase the burden, expense, and inconvenience to all parties concerned and would result in unacceptable delay.

In *United States v. Holder*, 399 F. Supp. 220 (D.S.D. 1975), the defendants were charged with federal offenses arising out of the "Wounded Knee" takeover on the Pine Ridge Indian Reservation in South Dakota. The court granted the defendants' motion for change of venue without a hearing. Noting that the Wounded Knee incident was a highly charged event that contributed to feelings of prejudice towards Indians, the court found a "reasonable likelihood" that a fair jury could not be empaneled. *Id.* at 228. In doing so, the court relied in part upon *United States v. Marcello*, 280 F. Supp. 510 (E.D. La. 1968), *affirmed*, 423 F.2d 993 (5th Cir.), *cert. denied*, 398 U.S. 959 (1970). In that case, the defendant was charged with forcibly assaulting and intimidating an FBI agent in New Orleans. Pretrial publicity included a photograph purporting to depict the defendant striking the agent. The trial judge relied on Rule 21(a) in deciding to grant the motion for a change of venue before empaneling a jury, stating:

> The rule is preventative. It is anticipatory. It is not solely curative as is a post-conviction constitutional attack. Thus the rule evokes foresight, always a more precious gift than hindsight and for this reason the same certainty which warrants the reversal of the conviction will not always accompany the change of venue. Succinctly then, it is the well-grounded *fear* that the defendant will not receive a fair and impartial trial which warrants the application of the Rule.

Id. at 513 (emphasis in original).

See also *Calley v. Callaway*, 519 F.2d 184, 206 (5th Cir. 1975), *cert. denied sub nom Calley v. Hoffman*, 455 U.S. 911 (1976)("A prejudicial publicity claim must be viewed differently when the news accounts complained of are straight news stories rather than invidious articles which would tend to arouse ill will and vindictiveness"); *Hale v. United States,* 435 F.2d 737, 748 (5th Cir. 1970) ("no editorials or cartoons denounced appellant"), *cert. denied,* 402 U.S. 976 (1971). In the instant case, the articles regarding Mr. Atwater go far beyond "straight news stories." The publicity surrounding Mr. Atwater focuses in large part on systemic failures. As such, Mr. Atwater has become a symbol for all that is wrong with our justice system, which has fomented ill will and vindictiveness in the local community. In addition, Mr. Atwater has been depicted in hateful cartoon images. (See cartoon of black baby holding large pistol, Exhibit DD[18]). This level of ridicule and hatred confirms the deep prejudice potential jurors in this district harbor against Mr. Atwater.

The "ill will and vindictiveness" harbored toward Mr. Atwater is further shown by the Venue Survey. The responses of Middle District residents to the survey question "What is your

[18] The original link is no longer present. Exhibit DD depicts a copy of the image that was captured in March of 2009.

opinion of Demario Atwater?" include: "He's a low life"; "I think he's a scumbag"; "He is the lowest level criminal"; and "He's lower down than a rattlesnake . . . he ought not even get a trial"; "I think he's shit'; "the scum he's on the bottom of the ocean"; "I think he should get the death penalty because they proved he was one of the two they proved killed her"; "he needs to be shot hung electrocuted or gas chambered lethal injection water boarded pissed on"; "common thug"; "He's scum". (Question 10, Division 1). The above answers reveal the emotionally charged atmosphere that exists in the Middle District toward Mr. Atwater.

In short, federal district court judges enjoy a long and distinguished record of exercising their supervisory authority to grant requests for changes of venue when the circumstances of pretrial publicity raise questions concerning the possibility of anything less than a fully impartial jury. In making this important decision, judges invariably consider not only the quantity of the pretrial publicity, but also its quality. The fact that many or most potential jurors have been exposed to pretrial publicity is not enough where the coverage is "largely factual and neutral in nature." *United States v. Dischner*, 974 F.2d 1502, 1524 (9th Cir. 1992), *cert. denied*, 507 U.S. 923 (1993).

Mr. Atwater's request for transfer under Rule 21(a) does not question the legitimacy of media interest in and coverage of his case, although the unblemished reporting of so many inaccurate facts has caused problems. Rather, he simply asks the Court to exercise its authority in a way that ensures his right to a fair trial. As put by the Honorable Irving R. Kaufman in the *Florio* case:

> Enjoying as we do a free press, neither the court nor any state or government agency may dictate their policies. Indeed that is as it should be. Judicial intervention to curtail such publications would endanger the constitutional guarantes [sic] of the freedom of the press. But the Court cannot ignore the constitutional safeguards placed around a defendant. True, both rights, freedom of the press and the right to a fair and unprejudiced trial, are constitutionally guaranteed. But both can be protected by the exercise of wise judicial discretion in the appropriate case.

Id. at 298.

Very few recent Fourth Circuit cases have squarely addressed a venue transfer request in a highly publicized case. One of the most recent Fourth Circuit cases to address the venue issue is *U.S. v. Higgs*, 353 F.3d 281 (4th Cir. 2003). In that case, the Court stated:

> As a general premise, a change of venue is warranted when the court is satisfied that there exists in the district where the prosecution is pending "so great a prejudice against the defendant" that "the defendant cannot obtain a fair and impartial trial." Fed.R.Crim.P. 21(a). The determination of whether a change of venue is required as a result of pretrial publicity involves a two-step process. *See United States v. Bakker,* 925 F.2d 728, 732 (4th Cir.1991). First, the district court must determine "whether the

> publicity is so inherently prejudicial that trial proceedings must be presumed to be tainted," and, if so, grant a change of venue prior to jury selection. *Id.* However, "[o]nly in extreme circumstances may prejudice to a defendant's right to a fair trial be presumed from the existence of pretrial publicity itself." *Wells v. Murray,* 831 F.2d 468, 472 (4th Cir.1987); *see also United States v. Jones,* 542 F.2d 186, 193 (4th Cir.1976) (noting that cases in which prejudice will be presumed will be rare). Ordinarily, the trial court must "conduct[ ] a *voir dire* of prospective jurors to determine if actual prejudice exists." *Bakker,* 925 F.2d at 732. If " *voir dire* reveals that an impartial jury cannot be empanelled," the trial court should then grant the motion. *Id.*

Id. at 307-308. This above recitation of the "presumed prejudice" test is consistent with that of the Supreme Court and also that of other circuits. The *Higgs* Court, applying the above test, found that defendant's motion for a change of venue was properly denied. In doing so, the Court found it persuasive that the media coverage was not "highly inflammatory" and that "the bulk of the coverage" occurred four years before trial. *Id.* at 308. In contrast, the media coverage in the instant case is inflammatory, and the bulk of the coverage occurred within the past year. Furthermore, the coverage is ongoing and cumulative. Many stories have been written in 2009. In *Higgs*, media coverage had abated by the time of trial. In the instant case, it is still going strong. The instant case is one of the "extreme circumstances" contemplated by *Higgs* where the pre-trial publicity is so "inherently prejudicial" that prejudice to the defendant should be presumed.

CONCLUSION

For the foregoing reasons, the defendant respectfully urges the Court to grant his request for a change of venue to a district outside the State of North Carolina in order to assure his constitutional right to an impartial jury and to further assure that the appearance of justice is honored in this case. Counsel request further that the Court grant the venue change without an evidentiary hearing. Judicial efficiency is furthered by simply noting what is obvious – that the type and extent of publicity that this case has generated has impacted too large a percentage of citizens of this State and has been expressed in the community's general sentiment that Mr. Atwater is guilty of this crime and should be sentenced to die. Gathering and reproducing the hundreds of articles and recordings reporting on the case would be both time-consuming and expensive, and prejudice in this case is so extreme that it should fairly be presumed. However, a sampling of hundreds of articles is contained in Exhibits B through N and FF. In the alternative, Defendant requests that an evidentiary hearing be scheduled such that Defendant could subpoena every article and/or story regarding the Carson case to the hearing.

The Defendant further request, for judicial economy reasons, that the Government be required to respond to this motion by January 15, 2010, and that, if the Court finds a hearing on this

motion to be necessary, the hearing be set for January 27, 2010. Further, the Defendant requests that should the Court find it necessary for the Defendant to issue subpoenas and require production of all of the media coverage in this case, that the Defendant be notified of that fact sufficiently in advance of the hearing date, if any, set for this motion.

This the 11th day of December, 2009.

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CERTIFICATE OF SERVICE

This is to certify that on the 11th day of December, 2009, a true and correct copy of the above and foregoing pleading was served on the persons and in the manner listed below:
SERVICE BY FILING ON CM/ECF SYSTEM:

Clifton Barrett
Assistant United States Attorney

/s/
_____
Kimberly C. Stevens
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA	:	
	:	SUPERSEDING
v.	:	1:08CR384-1
	:	
DEMARIO JAMES ATWATER	:	

RESPONSE TO DEFENDANT'S MOTION TO TRANSFER VENUE

The United States of America, by and through Anna Mills Wagoner, United States Attorney for the Middle District of North Carolina, respectfully responds to Defendant's Motion to Transfer Venue. For reasons identified and discussed below, the motion should be denied.

Article III, Section 2 of the Constitution of the United States requires criminal trials to "be held in the State where the said Crimes shall have been committed ...."

The capital case venue statute provides that a "trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience." 18 U.S.C. § 3235 (2008). In addition, under Rule 18 of the Federal Rules of Criminal Procedure, "[u]nless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must

set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice."

Case law has established, however, that Section 3235 does not vest a defendant with an absolute right to a trial within the county where the offense was committed. Brown v. United States, 257 F. 46 (5th Cir. 1919), cert. granted and reversed on other grounds, 256 U.S. 335 (1921). The right is a qualified one, and if such a setting works as "a great inconvenience" the matter may be set elsewhere. Id. The district court's decision in this regard will not be disturbed absent an abuse of discretion. Id. At least one circuit court has held that the "inconvenience" referred to in this section is that of the United States. United States v. Parker, 103 F.2d 857, 861 (3rd Cir.), cert. denied, 307 U.S. 642 (1939). In the instant case there is no federal courthouse in Orange County even were this Court inclined to set the matter for trial there. This Court maintains its chambers in Winston-Salem. The courtroom to be used for the trial has recently undergone extensive renovations which allow for the use of courtroom presentation equipment. A setting in Orange County would also work an inconvenience for the government, which maintains staffed offices only in

Greensboro and Winston-Salem.[1] Both counsel for Defendant Atwater practice law in Winston-Salem. For these reasons, a setting in Winston-Salem would be of greatest convenience to all parties.

Independent of Section 3235, there is a preference in the law for criminal trials to be conducted in or near the geographical location in which the charged crimes were committed. For the rare exception to that preference, Rule 21(a) of the Federal Rules of Criminal Procedure provides that the district court must, upon motion of defendant, transfer a case to another district "if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there."

Pretrial publicity, even pervasive and adverse publicity, does not inevitably lead to an unfair trial. Nebraska Press Association v. Stuart, 427 U.S. 539, 554 (1976). A defendant who contends that prejudice from pretrial publicity should be presumed has an "extremely high" burden. United States v. McVeigh, 153 F.3d 1166, 1182

[1] The U.S. Attorney's Office presently has an unstaffed branch office in Durham, North Carolina, but this office will be closed in the near future after a decision was made not to renew the lease. The Durham location is a one-room office with very little space.

(10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999). Such a presumption of prejudice is "rarely" applicable and is reserved for "extreme situations." United States v. Campa, 459 F.3d 1121, 1143 (11th Cir. 2006)(en banc)(quoting Mayola v. Alabama, 623 F.2d 992, 997 (5th Cir. 1980), cert. denied, 451 U.S. 913 (1981)); see also United States v. Childress, 58 F.3d 693, 706 (D.C. Cir. 1995) (presumption is "reserved for only the most egregious case"), cert. denied, 516 U.S. 1098 (1996); Dobbert v. Florida, 432 U.S. 282, 303 (1977)("Unfairness of constitutional magnitude not be presumed in the absence of a 'trial atmosphere ... utterly corrupted by press coverage'")(quoting Murphy v. Florida, 421 U.S. 794, 798 (1975)). In the Fourth Circuit, the determination of whether a change of venue is required as a result of pretrial publicity involves a two-step process. United States v. Higgs, 353 F.3d 281, 307 (4th Cir. 2003), cert. denied, 543 U.S. 999 (2004)(citing United States v. Bakker, 925 F.2d 728, 732 (4th Cir. 1991)). First, the district court must determine "whether the publicity is so inherently prejudicial that trial proceedings must be presumed to be tainted," and, if so, grant a change of venue prior to jury selection. Id. However, "[o]nly in extreme circumstances may prejudice to a defendant's right to a fair

trial be presumed from the existence of pretrial publicity itself." Wells v. Murray, 831 F.2d 468, 472 (4th Cir. 1987); see also United States v. Jones, 542 F.2d 186, 193 (4th Cir.), cert. denied, 426 U.S. 922 (1976)(noting that cases in which prejudice will be presumed will be rare). "Ordinarily, the trial court must conduct a voir dire of prospective jurors to determine if actual prejudice exists." Bakker, 925 F.2d at 732. If "voir dire reveals that an impartial jury cannot be impanelled," the trial court should then grant the motion. Id.

Mere knowledge of the case is not enough to disqualify a potential juror, provided that juror can set aside whatever prior knowledge they may have and decide the case based upon the evidence. Irvin v. Dowd, 366 U.S. 717, 722-23 (1961). The Fourth Circuit has noted that fair trials are possible in highly publicized cases, noting the trials of "Oliver North, Lyndon LaRouche, and Jim Bakker as examples." Washington Post Company v. Hughes, 923 F.2d 324, 329 (4th Cir.), cert. denied, 500 U.S. 944 (1991).

Defendant has attached two exhibits in support of his position that pretrial publicity in the instant case is presumptively prejudicial: the results of a defense-commissioned survey concerning pretrial publicity, and

examples of media coverage related to the death of Eve Carson. Neither exhibit, however, is persuasive.

A. *The survey*. The defense has submitted as part of its motion to change venue a survey prepared by Dr. Richard Seltzer. Prior to addressing the merits of the defense study, a review of Dr. Seltzer's methodology is instructive. In paragraph 3 of his "Declaration," Dr. Seltzer cites to a "Zimbio" article calling Defendant Atwater a "scumbag," further claiming that this is "indicative of the strong negative emotions on this case". "Zimbio" is an online magazine service and is in no way a "legitimate" news organization. Further, few if any articles from legitimate news sources identify Defendant Atwater in this way.

Paragraph four identifies the type and dates of research. The final survey was conducted between June 4, 2009, and July 13, 2009, roughly 15 to 16 months after Ms. Carson's death and between 10 and 11 months before trial. The size of the survey pool is reported to be 1,401 persons.

Paragraphs ten and eleven identify the methodology. For each call the surveyor asked to speak to the youngest male currently residing in the household who was a U.S. citizen and at least 18 years of age. If no eligible male was in the residence, only then did the surveyor ask to

speak to the youngest female with the same qualifications. Paragraph thirteen states that "[t]his method of selecting respondents within each household improves participation among young people who are typically under-represented using other random selection methodologies."

There is no explanation for the methodology of preferring the youngest man over eighteen in every household, and failing in that, the youngest woman over eighteen in every household. A random sample would seem to be just that, and not reached by including a preference in the pool to be questioned. While this methodology might be preferred by the Pew Research Center, this is not a political survey, like much of the work performed by that group.

Additionally, nowhere in the materials are the ages of the male versus female responders noted.

Paragraph thirty-two identifies the questions asked of the individuals polled and contains the raw answers provided. Some questions were open-ended and some were closed-ended. Paragraph thirty-three provides "content analysis" for the questions asked in paragraph thirty-three. These are summarized in Chart 3. One major problem with the survey as it was conducted is that the participants were never provided (before responding) with the basic tenets

regarding the trial of a criminal case - that an indictment is not evidence of guilt; that the government must prove the defendant's guilt beyond any reasonable doubt; that the defendant is presumed innocent; and that the defendant can refuse to testify or offer evidence.

That "Mr. Atwater has already been tried, convicted and sentenced to die in the North Carolina court of public opinion," as the defense claims in their motion, is hardly supported by the data. Indeed, the answers to some of the more salient questions support the United States' position that the motion for change of venue should be denied and that a fair and impartial jury can be seated in the Middle District of North Carolina. For example, according to Chart 2 of Dr. Seltzer's survey slightly more than four out of five people in the Middle District reported having heard of the case, unaided.[2] Yet, according to the Chart 5, only slightly more than one out of five think that, based upon their knowledge of the case, Demario Atwater is definitely guilty of murdering Eve Carson, while slightly more than two out of five people report that they do not know.[3] And while

[2] Paragraph 29 of Dr. Seltzer's declaration identifies a sampling error of plus or minus 5 points for the Middle District.

[3] Although the term "murder" is used throughout Dr. Seltzer's study, Defendant Atwater is obviously not charged with that

81.8% of the Middle District population eligible for jury service in this case reported unaided case awareness, more than half of that number (41.3%) had not formed any opinion as to Demario Atwater's guilt.

The U.S. Census Bureau estimates that the total population of the counties which comprise the Middle District of North Carolina is roughly 2,731,063 as of July 1, 2008.[4] Approximately 23.8% of district residents are under 18 years old, and thus ineligible to serve as jurors. This leaves a potential jury pool of approximately 2,080,284 adults. The ultimate jury pool is difficult to determine numerically. Jurors in the Middle District are drawn from both voter and North Carolina Division of Motor Vehicles (NCDMV) rolls. Records provided by the North Carolina Board of Elections show that as of January 11, 2010, there were 1,810,440 registered voters in the Middle District of North Carolina. According to NCDMV records, as of January 21, 2010, 2,055,795 in the Middle District of North Carolina have either a North Carolina driver license or

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offense, but rather with other federal violations resulting in the death of Eve Carson. Whether this mis-characterization skews the results is unknown.

[4] See, www.quickfacts.census.gov. For compilation of relevant data also refer to Attachment A.

identification card. Assuming, arguendo, the statistical validity of the defense survey, and a potential jury pool of 2,080,284, approximately 387,612 potential jurors are unfamiliar with or unaware of the case against Defendant Atwater.[5] Likewise, approximately 1,626,782 potential jurors have not yet decided that Defendant Atwater is definitely guilty of murdering Eve Carson[6] and approximately 859,157 potential jurors report that they simply "don't know."[7] Given the raw data it seems highly unlikely that the Court could not seat twelve completely fair and impartial jurors to hear the case.

Even excluding 57.1% of potential jurors who indicated they either definitely or probably thought Defendant Atwater is guilty of murdering Eve Carson, that would still leave a potential jury pool of approximately 892,442 people from which to select a jury.[8] These figures do not support a

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[5] See, Seltzer Declaration, p.7, Chart 2, Q3 - "Heard-unaided." 100 - 81.8% = 18.2%. 18.2% x 2,080,284 = 378,612.

[6] See, Seltzer Declaration, p.11, Chart 5, Q11 - "Definitely guilty." 100 - 21.8% = 78.2%. 78.2% x 2,080,284 = 1,626,782.

[7] See, Seltzer Declaration, p.11, Chart 5, Q11 - "Don't know." 41.3% x 2,080,284 = 859,157.

[8] See, Seltzer Declaration, p.11, Chart 5, Q11 - "Definitely or probably guilty." 100 - 57.1% = 42.9%. 42.9% x 2,080,284 = 892,442.

presumption that extreme prejudice exists such that defendant would be denied a fair trial. If anything, these figures support the notion that, with probing questions about pretrial publicity, an impartial jury can be impaneled.

As for the death penalty findings, the percentages provided in the survey are hardly a surprise. The question was posed, "If Demario Atwater is convicted of premeditated murder, which penalty do you believe Mr. Atwater should receive?" According to Dr. Seltzer's study, 38.7% of those surveyed indicated "definitely death penalty" and 18.0% indicated "probably death penalty." There are two issues of concern here: first, much as in the context of the guilt questions, the individuals polled have been given no instruction in the death penalty process, and so hardly can answer the question intelligently; and secondly, national opinion polls have long reflected that a majority of Americans are in favor of capital punishment. A telephone poll conducted by Rasmussen Reports (dated 11/12/2009) finds that 61% of Americans are in favor of capital punishment, 23% oppose capital punishment, and 16% are undecided. Men are slightly more likely to favor capital punishment, as are whites versus African Americans (65% versus 45%). The pro-

death penalty findings are somewhat tempered in this same poll, which also reports that 73% of those polled are concerned that some may be executed for crimes they did not commit, with 40% of this number being very concerned.

Hunter Bacot, the Director of the Center for Public Opinion Polling and an Associate Professor in Political Science and Public Administration at Elon University, identified a number of shortcomings in Dr. Seltzer's study, primarily based on methodology, survey questions and technique. His summary findings regarding methodology are as follows:

> The survey methodology is based on customary and acceptable methods and procedures. There are some areas of concern in reviewing the statistical and methodological approaches used to acquire opinions on this survey. These concerns involve the explicit identification of subsamples, the methodology, statistical measures, and procedures used in the content analysis (as it is not included), and questions about the methods used in constructing the population from which the sample is drawn.[9]

A summary of Professor Bacot's findings regarding survey questions and technique includes the following:

Based on an assessment of the survey instrument

[9] The United States is prepared to present evidence as to specific methodology flaws in Dr. Seltzer's poll at an evidentiary hearing or, with the consent of the defense and the Court, by submitting in camera a summary of Professor Bacot's findings and conclusions.

> provided for analysis, many conventional and accepted practices advised for the construction of survey questions are not observed; these are detailed in the report. Given the issues enumerated in this report, results from the "Venue Survey" as presented for evaluation are largely without merit and conclusions based on these result should be dismissed. Moreover, the percentages reported for each question are meaningless as these are derived from faulty question construction. Recognizing the proliferation of questionnaire construction concerns, it is my professional opinion that these results are fraught with error and provide little information of sufficient integrity upon which to draw reasonable conclusions about peoples' opinions on the topics posed to them in this survey.[10]

It is, of course, entirely proper for this Court to decline to rely on public opinion polls such as the one prepared by Dr. Seltzer. See Campa, 459 F.3d at 1145-46 (district court did not err by refusing to rely on public opinion poll); United States v. Malmay, 671 F.2d 869, 875-76 (5th Cir. 1982)(district court did not err by denying change of venue motion when public poll revealed only general public awareness of the crime rather than widespread belief about defendant's guilty); United States v. Haldeman, 559 F.2d 31, 64, n.43 (D.C. Cir. 1976)(trial judge had

[10] The United States is prepared to present evidence as to specific instrument and question construction flaws in Dr. Seltzer's poll at an evidentiary hearing or, with the consent of the defense and the Court, by submitting in camera a summary of Professor Bacot's findings and conclusions.

discretion to ignore a "poll taken by private pollsters and paid for by one side," given adequacy of jury instructions), cert. denied, 431 U.S. 933 (1977); and United States v. Long Elk, 565 F.2d 1032, 1041 (8th Cir. 1977)(noting the district court declined to rely on public opinion poll).

B. *Media coverage.* Defendant also cites to "highly inflammatory" articles in the news media in support of his motion for change of venue. What the data reflects is a high degree of awareness of the case and a great deal of sympathy for the victim. This includes citations to articles: that Atwater was charged with the killing of Duke student Abihijit Mahato (Defense motion at pp. 9-10); that state authorities failed to adequately confine and supervise Atwater (Id., at pp. 11-12, 33-34); that Atwater had a previous criminal history (Id., at pp. 11-12); that Atwater was on parole at the time of the alleged offense (Id., at pp. 12-13); a list of Atwater's infractions while in the North Carolina Department of Corrections (Id., at pp. 13-14); copies of search warrants from the investigation (Id., at pp. 30-32); Ms. Carson's autopsy report (Id., at pp. 32-33); various criminal pleadings in the case (Id., at pp. 34-37); and statements

from government officials (Id., at pp. 37-39).[11]

The vast majority of the news coverage has been factually accurate, an important factor when considering pretrial publicity. See United States v. Murphy, 421 U.S. 794, 802 (1975)(news articles "largely factual in nature").

Most of media coverage occurred soon after the offense was committed (or "immediate[ly]," as the defense characterizes it). As the Supreme Court, in holding that the passage of four years between two murder trials rebutted any presumption of unfair prejudice observed, "that time soothes and erases is a perfectly natural phenomenon, familiar to all." Patton v. Yount, 467 U.S. 1025, 1034 (1984)(voir dire testimony and record of publicity did not reveal a "wave of public passion" such that fair trial unlikely by jury as a whole.) In reviewing the newspaper coverage of the offense related to the defense submissions, in the Middle District of North Carolina 85% of the print articles were published in calendar year 2008, as opposed to 15% in calendar year 2009. For the Eastern District of North Carolina the numbers are similar, 82% in 2008 versus

[11] Defendant's motion in this section is captioned "[T]he Government has caused additional prejudicial publicity." There has been no allegation that the United States has made extrajudicial comments prohibited by Department of Justice policy and Middle District Local Criminal Rule 57.2.

18% in 2009, and in the Western District of North Carolina 88% in 2008 versus 12% in 2009.

And potential jurors are not required to be totally ignorant of the facts and issues involved in high profile cases:

> In these days of swift, widespread and diverse methods of communication, 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. 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, 366 U.S. at 722-23; see also Murphy, 421 U.S. at 800 (same).

Given the potential jury pool for the case, anecdotal examples of citizen outrage are not of any assistance in a fair determination of the issue. A portion of the present motion relates to comments posted online, including comments posted on blogs. A telephone poll conducted by Rasmussen Reports (dated 10/7/2009) finds that just 10% of Americans say they or a family member have their own blog. Additionally, only 20% of Americans report that they

regularly read blogsites. Finally, only 28% of adults say that they are at least somewhat confident in the reliability of reports from bloggers and internet journalists - and just 2% are very confident in them.

In support of their position that the pretrial publicity in the instant case has caused venue to be "inherently improper" in the Middle District, thus allowing this Court to transfer venue even without an evidentiary hearing, the defense cites to United States v. Jones, 542 F.2d 186 (4th Cir.), cert. denied, 426 U.S. 922 (1976)(Defense motion, p.53). In Jones, however, the district court observed it to be the "rare case" (and certainly not the case before it) where there would be a showing of inherently prejudicial publicity which had so saturated the community, so as to have a probable impact upon the prospective jurors. Id., at 193. The Court in Jones also found that the

" ... proper manner for ascertaining whether the adverse publicity may have biased the prospective jurors was through the voir dire examination." Id. Jones also cited with approval United States v. Nix, 465 F.2d 90, 96 (5th Cir.), cert. denied, 409 U.S. 1013 (1972), reh. denied, 409 U.S. 1119 (1973), for the proposition that whether or not the

facts in a particular case meet the criteria of "inherently prejudicial publicity" is ordinarily committed to the discretion of the trial court.

The cases of Irvin, 366 U.S. 717 (1961), Rideau v. Louisiana, 373 U.S. 723 (1963), and Sheppard v. Maxwell, 384 U.S. 333 (1966), are three cases the defense cites to as similar to the instant case. (Defense motion, pp. 53-54). These cases are distinguishable. In Irvin there was a "barrage" of publicity six to seven months prior to trial, publicity which included information about the defendant's background, offered plea agreement, and confession to police. 366 U.S. at 725-27. The prosecutor's office had issued press releases, which were intensively publicized, that the defendant had confessed to six murders. Id., at 719-20. Additionally, 268 of 430 members of the Irvin venire reported having "fixed opinions" about his guilt, and fully 90% of the venire entertained some opinion as to guilt ranging in intensity from mere suspicion to absolute certainty. Id., at 727. Indeed, of the prospective jurors, "[a] number admitted, if they were in the accused's place in the dock and he in theirs on the jury with their opinions, they would not want him on a jury." Id.

In Rideau the publicity included a televised broadcast

of the defendant confessing his guilt to police in a videotaped interrogation. Three of the jurors in the case admitted having heard the confession, and two members of the jury were members of the sheriff's office which had taken the confession.[12] Id., at 725. The court held the proceedings to be a "hollow formality," where the "real trial had occurred when tens of thousands of people, in a community of 150,000, had seen and heard the defendant admit his guilt before the cameras." Id., at 726.

Sheppard involved the high-society murder of a pregnant woman in a Cleveland suburb. Newspaper accounts described the defendant, the victim's husband, as a "Lothario" with multiple lovers, called into question his account to police, repeatedly called for an inquest and chided the defendant for refusing a lie-detector test. 384 U.S. at 338-40. One news account even stated that he [Sheppard] was now "proved under oath to be a liar." Id., at 341. Every juror, save one, stated they had heard or read about the case. Id., at 345. The names and addresses of the venire had also been published in the local paper, resulting in prospective jurors being contacted prior to their service. Id., at 342.

[12] Having exhausted his peremptory challenges, Rideau attempted to strike the two sheriff's deputies for cause. These challenges were denied by the court.

The defense highlights three cases identifying the controlling precedent for presumed prejudice, however, in none of the cases was prejudice found. See United States v. Rewald, 889 F.2d 836, 863-64 (9th Cir. 1989)(no presumption or prejudice where 12% of jurors excused for pretrial publicity, citing cases as high as 26% where no prejudice found), opinion amended, 902 F.2d 19 (1990), and cert. denied, 498 U.S. 819 (1990); United v. Dischner, 974 F.2d 1502, 1524-25 (9th Cir. 1992)(no presumption even where 69% of registered voters, from where jury poll drawn, were familiar with the investigation related to the case they were being selected for, 64% of that number believed there to be "serious dishonesty" involved with the targets of the investigation, and fully 90% believed the dishonesty to involve public officials), cert. denied, 507 U.S. 923 (1993); and Goss v. Nelson, 439 F.3d 621, 631-32 (10th Cir. 2006)(timing of news articles, dispersed nature of news articles, infrequency of local news publications, and that articles were factual and non-inflammatory failed to establish presumed prejudice). In fact, despite the proliferation of the news media and its technology, the Supreme Court has not found a single instance of presumed prejudice since the Sheppard case in 1966. McVeigh, 153 F.3d

1166 (10th Cir. 1998).

In identifying recent cases dealing with the issue of presumed prejudice, the defense cites to United States v. Cortez, 251 F.R.D. 237 (E.D. Tex. 2007). However, Cortez provides little guidance. In that particular case a defendant was charged in the Sherman Division, where he had been depicted on film and in photographs as a "prime suspect" in a quadruple murder in McKinney, Texas, even though he had not been charged. The court specifically observed, "[t]he question of whether that publicity renders virtually impossible a fair trial by an impartial jury drawn from the Sherman Division is an open one." Id. (emphasis added). There was no indication the government either joined in the motion or opposed it.

Likewise, the factors in the case of Daniels v. Woodford, 428 F.3d 1181 (9th Cir. 2005), cert. denied, 550 U.S. 968 (2007), do not weigh in Defendant Atwater's favor. First, the coverage in the instant case has largely been factual and non-inflammatory in nature and could hardly be characterized as creating a "huge wave of public passion." As the defense states, the suspects in Ms. Carson's killing were alleged to be black and Defendant Atwater was identified as the killer - both facts which are supported by

the expected trial evidence. According to defense submissions, and as set out earlier, in the Middle District 85% of the articles were written in 2008, the year Ms. Carson was killed. Secondly, most of the news coverage is factual in nature, relying on public information, such as search warrants and DOC records, as well as pleadings from the federal prosecution. Thirdly, there is very little in the way of non-admissible evidence adduced from the press coverage.

Other cases cited by the defense in support of the motion to change venue also are of little assistance in deciding the matter. United States v. Moody, 762 F. Supp. 1485 (N.D. Ga. 1991)(motion to change venue unopposed by government involving mail bomb deaths of 11th Circuit Judge Robert Vance and civil rights attorney Robert Robinson, inordinate and widespread media attention caused, in part, by government agents); Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985)(publicity in a small, rural community of 7,059 people in rape, robbery, and murder trial where extensive print and broadcast media, as well as word-of-mouth communication within community; court also found publicity had been calculated to provoke or reflected an atmosphere of hostility); United States v. Abrahams, 453 F. Supp. 749 (D.

Mass. 1978)(publicity regarding defendant's unlawful behavior, prior convictions and other charges pending against him so pervasive venue ordered changed to another state, irrespective of government's concession that a more minor change in venue would have been appropriate); Campa, 459 F.3d 1121 (11th Cir. 2006) (11th Circuit, en banc, holding that pretrial publicity not so pervasive and inflammatory so as to give rise to a presumption of prejudice, and district court's decision not to accord substantial weight to results of survey conducted by defense expert was a decision entirely within its prerogative); United States v. Florio, 13 F.R.D. 296 (S.D.N.Y., 1952)(court granting change of venue agreed upon by the parties, where pervasive publicity for several days preceding trial, becoming most intense on morning of trial, including information about defendant's past and events unassociated with the crime charged); United States v. Tokars, 839 F. Supp. 1578 (N.D. Ga. 1993)(media reports had saturated the local market, 66.6% of persons surveyed who had heard or read about defendant's case had formed an opinion as to his guilt or innocence as to related state murder charge, 97.9% of those who had an opinion believed him to be guilty, while 53.3% of persons surveyed who had

heard or read about defendant's case had formed an opinion as to his guilt or innocence as to federal charges, 99% of those who had an opinion believed him to be guilty), aff'd. by 95 F.3d 1520 (1996), and cert. denied, 520 U.S. 1132 (1997); United States v. Engleman, 489 F. Supp. 48 (E.D. Mo. 1980)(allowing change of venue where specific testimony of essential witnesses has been outlined in the press, wide dissemination of highly inflammatory evidence shortly before trial, with publicity not abating and likely continuing); United States v. Holder, 399 F. Supp. 220 (D.S.D. 1975)("Wounded Knee" prosecutions, "deeply-rooted" passions and "deeply-held" prejudice necessitated a change in venue); and Calley v. Calloway, 519 F.2d 184 (5th Cir. 1975)(My Lai massacre;
even though massive publicity, finding that "prominence does not necessarily bring prejudice," and noting that no court had found that the only impartial juror is an uninformed one), cert. denied, 425 U.S. 911 (1976).

CONCLUSION

In conclusion, the United States contends that the defendant has not demonstrated that the publicity in this case is so inherently prejudicial that trial proceedings must be presumed to be tainted without a change in venue.

This the 22nd day of January, 2010.

Respectfully submitted,

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336/333-5351__

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA	:	
	:	SUPERSEDING
v.	:	1:08CR384-1
	:	
DEMARIO JAMES ATWATER	:	

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2010, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, and I hereby certify that the document was delivered to the following:

Gregory Davis, Esq.
Assistant Federal Public Defender
Senior Litigator

Kimberly C. Stevens, Esq.

/S/ CLIFTON T. BARRETT
Assistant United States Attorney
Chief, Criminal Division
United States Attorney's Office
Middle District of North Carolina
P.O. Box 1858
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Phone: 336/333-5351

County	Pop. Estimate	% under 18	(100- % under 18)	Pop. 18+
Alamance	148,053	23.8%	76.2%	112,816
Cabarrus	168,740	26.9%	73.1%	123,349
Caswell	23,248	20.0%	80.0%	18,598
Chatham	63,077	22.7%	77.3%	48,758
Davidson	158,166	23.5%	76.5%	120,997
Davie	40,971	23.0%	77.0%	31,548
Durham	262,715	24.6%	75.4%	198,087
Forsyth	343,028	24.5%	75.5%	258,986
Guilford	472,216	23.7%	76.3%	360,301
Hoke	43,409	30.8%	69.2%	30,039
Lee	59,091	25.8%	74.2%	43,846
Montgomery	27,358	25.0%	75.0%	20,519
Moore	85,608	21.9%	78.1%	66,860
Orange	126,532	19.0%	81.0%	102,491
Person	37,438	23.1%	76.9%	28,790
Randolph	141,186	24.1%	75.9%	107,160
Richmond	46,005	24.8%	75.2%	34,596
Rockingham	92,282	22.3%	77.7%	71,703
Rowan	139,225	23.4%	76.6%	106,646
Scotland	36,508	24.8%	75.2%	27,454
Stanly	59,614	23.2%	76.8%	45,784
Stokes	46,171	21.7%	78.3%	36,152
Surry	72,468	23.2%	76.8%	55,655
Yadkin	37,954	23.2%	76.8%	29,149
TOTAL POP.	**2,731,063**			**2,080,284**

Affidavit of Dr. Richard Seltzer

I, Richard Seltzer, declare,

I filed an affidavit with this Court on December 11, 2009 concerning a venue survey that I conducted in the case of United States v. Demario James Atwater.

On January 23, 2010 I received a copy of the Government's motion on the transfer of venue. I have a few comments that I would like to present to the Court.

In paragraph 3 of my affidavit I referred to the Zimbio internet citation which the Government noted was not a "legitimate" news organization. I never posited that Zimbio was a "legitimate" news organization. My points were since this was the first internet "hit" to come up when "Demario Atwater" was entered as a search term in Google:

a. Most people who entered "Demario Atwater" as a search term would also see this as the first entry and the one most likely to read; and
b. Google's algorithm for determining the order in which entries occur is affected mostly by the frequency by which those sites are viewed. This implies that the Zimbio site was widely viewed by internet readers who used the search term "Demario Atwater."

On page 6 of the Government response, they implicitly criticize the dates of my survey because it took place 15-16 months after Ms. Carson's death and 10-11 months before the trial. In fact, because this survey occurred when there was a hiatus of publicity, one can expect far more public awareness of the case as the trial approaches and far more likelihood of potential jurors developing an opinion as the guilt or innocence of Mr. Atwater.

The Government criticizes my methodology (copied from the Pew Research Center) of within-household selection (youngest male followed by youngest female). They imply that Pew conducts only political surveys. Pew conducts far more than political surveys. Furthermore, I believe they are among the top three non-governmental survey organizations in the United States in terms of reputation, quality and transparency. They publish numerous monographs on methodology and spend considerable resources testing different methodological strategies. The methodology discussed above helps ameliorate one of the major problems confronting survey methodology. [1]

The government criticizes my survey because I did not educate respondents "with the basic tenets regarding the trial of a criminal case..." Clearly, I am not attempting to substitute for the role of the Court. I am attempting to find out the level of preconceptions among the respondents. If I had attempted to "educate" respondents with the basic tenets of a criminal case, that would have introduced an unacceptable level of social desirability bias into the survey. In essence, respondents would have tried to "please" the interviewer rather than give their true feelings.[2]

It is significant to note that the Government's expert commented on my survey methodology by stating "The survey methodology is based on customary and acceptable methods and procedures.

The Government's expert also stated that "many conventional and accepted practices for the construction of survey questions are not observed;" and "the percentages

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[1] For more on this issue see: C. Gaziano, (2005) Comparative Analysis of Within-Household Respondent Selection Techniques, *Public Opinion Quarterly*, 69:1, 124-157.

[2] For how this plays out in voir dire situations see my article: R. Seltzer, M.A. Venuti & G.M. Lopes (1991). Juror Honesty During the Voir Dire. *Journal of Criminal Justice*. 19:5, 451-462.

reported for each question are meaningless as these are derived from faulty sentence construction." I am unable to comment on his criticism of my construction of the survey questions as no details are provided. However, the questionnaire was constructed with conventional and accepted practices.

I am more than willing to testify and answer any questions the Court may have about the methodology I employed in conducting the venue survey.

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

Richard Seltzer

1/25/2010
Date

Certified this 25th day of January, 2010

Notary Public

MICHAEL LOGAN STERN
Notary Public
Commonwealth of Virginia
Reg. #368277
My Commission Exps. July 31, 2013

LEGAL STUDY (MW#50909-1-298 6/3/09)
FINAL QUESTIONNAIRE

Hello, this is _____, calling from MarketWise. We're conducting a public opinion survey on your community's views about the criminal justice system, and related legal and social issues. We are not selling anything. I think you will find the questions interesting.

(IF NEEDED ADD.) Your cooperation is VERY important because your household was selected at random and is representative of other households like yours in this area. All your answers are completely confidential. I don't have your name and your phone number will not be on the questionnaire.

RESPONDENTS IN CELL PHONE SAMPLE WILL BE ASKED S1 AND THEN SKIP TO S5.

QUALIFYING QUESTIONS

S1. First, in what county is this household located? DO NOT READ LIST. SELECT ONE ANSWER.

MIDDLE DISTRICT (SAMP=1)

1 Alamance
2 Cabarrus
3 Caswell
4 Chatham
5 Davidson
6 Davie
7 Durham
8 Forsyth
9 Guilford
10 Hoke
11 Lee
12 Montgomery
13 Moore
14 Orange
15 Person
16 Randolph
17 Richmond
18 Rockingham
19 Rowan
20 Scotland
21 Stanly
22 Stokes
23 Surry
24 Yadkin

ALL DISTRICTS:

997 NONE OF ABOVE (TERMINATE) -- CODE AS NQ - NOT IN SURVEY AREA
998 DON'T KNOW (TERMINATE) -- CODE AS NQ – NOT IN SURVEY AREA
999 REFUSED (TERMINATE) -- CODE AS INITIAL REFUSAL

EASTERN DISTRICT

Eastern Division (SAMP=2)

25 Beaufort
26 Carteret
27 Craven
28 Edgecombe
29 Green
30 Halifax
31 Hyde
32 Jones
33 Lenoir
34 Martin
35 Pamilco
36 Pitt

Northern Division (SAMP=3)

37 Bertie
38 Camden
39 Chowan
40 Currituck
41 Dare
42 Gates
43 Hertford
44 Northhampton
45 Pasquotank
46 Perquimans
47 Tyrrell
48 Washington

Southern Division (SAMP=4)

49 Bladen
50 Brunswick
51 Columbus
52 Duplin
53 Onslow
54 New Hanover
55 Pender
56 Robeson
57 Sampson

Western Division (SAMP=5)

58 Cumberland
59 Franklin
60 Granville
61 Harnett
62 Johnston
63 Nash
64 Vance
65 Wake

66 Warren
67 Wayne
68 Wilson

WESTERN DISTRICT
Ashville Division (SAMP=6)
69 Avery
70 Buncombe
71 Haywood
72 Henderson
73 Madison
74 Mitchell
75 Transylvania
76 Yancey
77 Burke
78 Cleveland
79 McDowell
80 Polk
81 Rutherford

Byrson Division (SAMP=7)
82 Cherokee
83 Clay
84 Graham
85 Jackson
86 Macon
87 Swain

Charlotte Division (SAMP=8)
88 Anson
89 Gaston
90 Union
91 Mecklenburg

Statesville Division (SAMP=9)
92 Alexander
93 Alleghany
94 Ashe
95 Caldwell
96 Catawba
97 Iredell
98 Lincoln
99 Watauga
100 Wilkes

IF TYPE=2, CELL PHONE SAMPLE, SKIP TO S5 (ALL DISTRICTS)

RESPONDENTS IN MIDDLE DISTRICT ARE ASKED THESE QUESTIONS:

S2. Think just about the members of your household who are US citizens and age 18 or older. For statistical purposes, I need to know if any of these adults are either registered to vote, have a valid driver's license, or both.

1 YES
2 NO (TERMINATE CODE AS NO QUALIFIED RESPONDENT)
3 DON'T KNOW (Is there someone else in your household who would know?)
4 REFUSED (TERMINATE CODE AS INITIAL REFUSAL)

S3. For this study, we are interviewing both men and women, but for this particular interview I would like to speak with the youngest male currently living in your household, who is a US citizen and age 18 or older. This person must also be either a registered voter, have a valid driver's license, or both.

Who should I speak with?

1 MALE RESPONDENT MEETS QUALIFICATIONS (GO TO S5)
2 SOME OTHER MALE MEETS QUALIFICATIONS (GO TO S4)
3 NO MALE IN HOUSEHOLD MEETS QUALIFICATION (GO TO S3_2)
4 NO MALE IN HOUSEHOLD AT ALL (GO TO S3_2)
5 DON'T KNOW (GO TO S3_2)
6 REFUSED (GO TO S3_2)

S3_2 May I then speak with the youngest female currently living in your household, who is a US citizen and age 18 or older. This person must also be either a registered voter, have a valid driver's license, or both.

Who should I speak with?

1 FEMALE RESPONDENT MEETS QUALIFICATIONS (GO TO S5)
2 SOME OTHER FEMALE MEETS QUALIFICATIONS (GO TO S4)
3 NO FEMALE IN HOUSEHOLD MEETS QUALIFICATION (TERMINATE NO QUALIFIED RESP)
4 NO FEMALE IN HOUSEHOLD (TERMINATE NO QUALIFIED RESP)
5 DON'T KNOW (TERMINATE)
6 REFUSED (TERMINATE RECORD AS INITIAL REFUSALS

RESPONDENTS IN ALL OTHER DISTRICTS ARE ASKED THESE QUESTIONS:

S2. Think just about the members of your household who are US citizens and age 18 or older. For statistical purposes, I need to know if any of these adults are registered to vote.

1 YES
2 NO (TERMINATE CODE AS NO QUALIFIED RESPONDENT IN HH)
3 DON'T KNOW (Is there someone else in your household who would know?)
4 REFUSED (TERMINATE CODE AS INITIAL REFUSAL)

S3. For this study, we are interviewing both men and women, but for this particular interview I would like to speak with youngest male currently living in your household, who is a US citizen and age 18 or older. This person must also be a registered voter.

Who should I speak with?

1 MALE RESPONDENT MEETS QUALIFICATIONS (GO TO S5)
2 SOME OTHER MALE MEETS QUALIFICATIONS (GO TO S4)
3 NO MALE IN HOUSEHOLD MEETS QUALIFICATION (GO TO S3_2)
4 NO MALE IN HOUSEHOLD AT ALL (GO TO S3_2)
5 DON'T KNOW (GO TO S3_2)
6 REFUSED (GO TO S3_2)

S3_2. May I then speak with the youngest female currently living in your household, who is a US citizen and age 18 or older. This person must also be a registered voter.

Who should I speak with?

1 FEMALE RESPONDENT MEETS QUALIFICATIONS (GO TO S5)
2 SOME OTHER FEMALE MEETS QUALIFICATIONS (GO TO S4)
3 NO FEMALE IN HOUSEHOLD MEETS QUALIFICATION (TERMINATE NO QUALIFIED RESP)
4 NO FEMALE IN HOUSEHOLD (TERMINATE NO QUALIFIED RESP)
5 DON'T KNOW (TERMINATE)
6 REFUSED (TERMINATE)

S4. Hello, this is _____, calling from MarketWise. We're conducting a public opinion survey on your community's views about the criminal justice system, and related legal and social issues. We are not selling anything. I think you will find the questions interesting.
(IF NEEDED ADD.) Your cooperation is VERY important because your household was selected at random and is representative of other households like yours in this area. All your answers are completely confidential. I don't have your name and your phone number will not be on the questionnaire.

0 CONTINUE WITH SURVEY
1 CB, RECORD GENDER, FIRST NAME & BEST TIME (RECORD AS PARTIAL W CALLBACK)
2 INITIAL REFUSAL MALE
3 INITIAL REFUSAL FEMALE

S5. RECORD GENDER OF CORRECT RESPONDENT
1 MALE
2 FEMALE

S6. Have you been a resident of (SHOW COUNTY IN S1) for the past 12 months?
1. YES (CONTINUE)
2. NO (TERMINATE) CODE AS NO QUALIFIED RESPONDENT
3. DK/REF (TERMINATE) CODE AS INITIAL REFUSAL

S7_1. Are you registered to vote?
1 YES
2 NO
3 DK/REF

S7_2 Are you a US citizen, age 18 or older, with a valid driver's license?
1 YES
2 NO
3 DK/REF

(MIDDLE DISTRICT: IF (S7_1>1 AND S7_2>1) (TERMINATE CODE AS NO QUALIFIED RESPONDENT)

(EASTERN & WESTERN DISTRICTS) IF S7_1>1 (TERMINATE) CODE AS NO QUALIFIED RESPONDENT

S8. Are you currently serving as a juror in federal court?
1 YES (TERMINATE) CODE NQ-S8
2 NO
3 DK/REF (TERMINATE) INITIAL REFUSAL

S9. Are you an active member of any branch of the armed forces?
(IF NATIONAL GUARD OR RESERVES CHOOSE "NO")
1 YES (TERMINATE) CODE NQ-S9
2 NO
3 DK/ REF (TERMINATE) INITIAL REFUSAL

S10. Are you a firefighter, police officer or a law enforcement officer?
1 YES (TERMINATE) CODE NQ-S10
2 NO
3 DK/ REF (TERMINATE) INITIAL REFUSAL

S11. Are you or anyone else in your immediate household an elected or appointed public official?
(FEDERAL, STATE, COUNTY OR CITY OFFICIAL)
1 YES (TERMINATE) CODE AS NQ-S11
2 NO
3 DK/ REF (TERMINATE) INITIAL REFUSAL

QUESTIONNAIRE

Before we go on, I'd like to remind you that all your answers are confidential. There are no right or wrong answers on the survey. We are only interested in your opinions. If at any time you do not know the answer to a question or you have no opinion, please say so.

Q1. How serious a problem do you think crime is in your county? Would you say . . :

1 Very serious
2 Somewhat serious
3 Not very serious or
4 Not at all serious
5 DON'T KNOW (DO NOT READ)
6 REFUSED (DO NOT READ)

Q2. People hold different opinions about the death penalty. What is your opinion? Do you strongly favor, somewhat favor, somewhat oppose, or strongly oppose the death penalty for persons convicted of intentional, premeditated murder?

1 Strongly favor
2 Somewhat favor
3 Somewhat oppose
4 Strongly oppose
5 DON'T KNOW (DO NOT READ)
6 REFUSED (DO NOT READ)

Now I'd like to ask you some questions about a specific case that has been in the news lately.

Q3. Have you read or heard anything about the murder of Eve Carson, the student body president at the University of North Carolina in Chapel Hill?

1 YES .(SKIP TO Q5)
2 NO
3 DON'T KNOW
4 REFUSED

Q4. In 2008, Eve Carson was the Student Body President at the University of North Carolina at Chapel Hill. She was kidnapped and murdered. Given this brief description, do you recall hearing about this case?

1 YES
2 NO SKIP TO DEMOGRAPHICS
3 DON'T KNOW SKIP TO DEMOGRAPHICS
4 REFUSED SKIP TO DEMOGRAPHICS

Q5. What do you recall about the murder of Eve Carson?
(RECORD EXACTLY WHAT RESPONDENT ANSWERS. USE PROBE MARKS (P).
DO NOT CHANGE RESPONSE.)
(REQUIRED PROBE) Do you recall anything else?

_____

Q6. What have you read, seen or heard about Eve Carson?
(RECORD EXACTLY WHAT RESPONDENT ANSWERS. USE PROBE MARKS (P).
DO NOT CHANGE RESPONSE.)
(REQUIRED PROBE) Is there anything else?

_____

Q7. Have you heard about this case from any of the following sources?

a.	Newspaper	1 Yes	2 No	3 DK	4 REF
b.	Television	1 Yes	2 No	3 DK	4 REF
c.	Internet, including blogs	1 Yes	2 No	3 DK	4 REF
d.	Radio	1 Yes	2 No	3 DK	4 REF
e.	News magazines	1 Yes	2 No	3 DK	4 REF
f.	Conversations with family or friends	1 Yes	2 No	3 DK	4 REF
g.	Other conversations in community	1 Yes	2 No	3 DK	4 REF

Q8. Was the murder of Eve Carson more upsetting to you, less upsetting, or just as upsetting as other murders that have occurred in your state?

1 More upsetting
2 Less upsetting
3 Just as upsetting
4 DON'T KNOW
5 REFUSED

Q9. Demario Atwater is accused of killing Eve Carson. What have you read, seen or heard about Demario Atwater? (RECORD EXACTLY WHAT RESPONDENT ANSWERS. USE PROBE MARKS (P).
DO NOT CHANGE RESPONSE.)
(REQUIRED PROBE) Do you recall anything else?

_____

Q10. What is your opinion of Demario Atwater?
(RECORD EXACTLY WHAT RESPONDENT ANSWERS. USE PROBE MARKS (P).
DO NOT CHANGE RESPONSE.)
(REQUIRED PROBE) Is there anything else?

_____

RN IS A RANDOMLY GENERATED NUMBER OF 1 OR 2. APPROXIMATELY ½ OF THE RESPONDENTS WILL GET ASKED Q12A AND ½ Q12B.

IF RN=2, SKIP TO Q11B

Q11a. From what you've read or heard about the murder of Eve Carson, do you think that Demario Atwater is . . . (READ LIST AS SHOWN)

1 Definitely guilty
2 Probably guilty
3 Probably not guilty or
4 Definitely not guilty
5 DON'T KNOW
6 REFUSED

Q11b. From what you've read or heard about the murder of Eve Carson, do you think that Demario Atwater is . . . (READ LIST AS SHOWN)

4 Definitely not guilty
3 Probably not guilty
2 Probably guilty or
1 Definitely guilty
5 DON'T KNOW
6 REFUSED

Q12. If Demario Atwater is convicted of murdering Eve Carson, what penalty do you believe he should receive?(RECORD EXACTLY WHAT RESPONDENT ANSWERS. USE PROBE MARKS (P). DO NOT CHANGE RESPONSE.)

_____

RN IS A RANDOMLY GENERATED NUMBER OF 1 OR 2. APPROXIMATELY ½ OF THE RESPONDENTS WILL GET ASKED Q12A AND ½ Q12B.

IF RN=2, SKIP TO Q13B

Q13a. If Demario Atwater is convicted of premeditated murder, jurors would have to choose between two sentencing options, the death penalty or life imprisonment without possibility of parole. If he is convicted of this charge, which penalty do you believe Mr. Atwater should receive? Would you say . . .
(READ LIST AS SHOWN))

1 Definitely the death penalty
2 Probably the death penalty
3 Probably life imprisonment without possibility of parole or
4 Definitely life imprisonment without possibility of parole
5 DON'T KNOW
6 REFUSED

Q13b. If Demario Atwater is convicted of premeditated murder, jurors would have to choose between two sentencing options, the death penalty or life imprisonment without possibility of parole. If he is convicted of this charge, which penalty do you believe Mr. Atwater should receive? Would you say . . .
(READ LIST AS SHOWN)

4 Definitely life imprisonment without possibility of parole
3 Probably life imprisonment without possibility of parole
2 Probably the death penalty or
1 Definitely the death penalty
5 DON'T KNOW
6 REFUSED

Next, I'm going to read a series of statements. After I read each one, tell me if you agree strongly, agree somewhat, disagree somewhat, or disagree strongly.

Q14. In general, blacks are more violent than whites.
1 Agree strongly
2 Agree somewhat
3 Disagree somewhat
4 Disagree strongly
5 DON'T KNOW
6 REFUSED

Q15. The country needs more black people in positions of leadership.
1 Agree strongly
2 Agree somewhat
3 Disagree somewhat
4 Disagree strongly
5 DON'T KNOW
6 REFUSED

Q16. In general, blacks have lower moral standards than whites.

1 Agree strongly
2 Agree somewhat
3 Disagree somewhat
4 Disagree strongly
5 DON'T KNOW
6 REFUSED

DEMOGRAPHICS

Finally, I have just a few other questions that we ask for statistical purposes only. Again, your responses will be kept completely confidential.

Q17. What was the last grade of school you finished?

1 Grade school (1st - 6th grade)
2 Middle school (7th – 8th grade)
3 Some high school (9th – 11th grade)
4 High school graduated
5 Some college or community college
6 Trade school/technical school
7 College graduate
8 Some post graduate work, or post graduate degree
9 REFUSED

Q18. What is your age? _____ AGE
99 = REFUSED
IF RESPONDENT IS UNDER 18 WE WILL DROP DATA FROM THE SURVEY.

Q19. I am going to read a list of racial and ethnic categories. Would you please tell me which category best describes you? (READ LIST. ONE ANSWER ONLY.)

1 White, not Hispanic
2 Black or African-American, not Hispanic
3 Hispanic
4 Asian or South Asian
5 American Indian or Native American
6 Multi racial
7 OTHER (SPECIFY) _____)
8 REFUSAL

Q20. Which of the following types of telephone service do you or your household have?
(READ LIST. MULTIPLE ANSWERS ALLOWED.

1 Landline phone?
2 Cell phone?
3 Internet phone?
4 REFUSED ALL

Q21. Have you been convicted of a felony punishable for more than 1 year, and have not had your civil rights restored?

1 YES
2 NO
3 DON'T KNOW
4 REFUSED

That's all the questions we have. I would like to thank you very much for your time. Your answers have been very helpful. So that my supervisor knows that I actually talked with someone, may I have only your first name?
<RECORD FIRST NAME.> _____
Good day/Good night!