IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE
DIVISION V

STATE OF TENNESSEE	)	
	)	
	)	
v.	)	**Case No. 2019-A-26**
	)	
	)	
ANDREW DELKE	)	

FILED
Davidson County
Criminal Court Clerk
AUG 2 0 2019
BY

Deputy Clerk

MOTION FOR CHANGE OF VENUE

> *The right to an impartial jury is a fundamental aspect of a fair trial. . . . An impartial jury is one which is of impartial frame of mind at the beginning of trial, is influenced only by legal and competent evidence produced during trial and bases its verdict upon evidence connecting defendant with the commission of the crime charged.*

State v. Davidson, 509 S.W.3d 156, 193 (Tenn. 2016)

I. Introduction

Under Rule 21 of the Tennessee Rules of Criminal Procedure and the other authorities cited herein, Officer Delke moves for a change of venue. A change of place of trial is required on motion of the defendant if "extraordinary local prejudice will prevent a fair trial." *Skilling v. United States*, 561 U.S. 358, 378 (2010). The core purpose of the venue inquiry is to assure "a fair and impartial trial," which is "a basic requirement of due process." *Id.* at 378.

The Fifth and Sixth Amendment guarantees of due process and a fair trial by an impartial jury require that this Court grant this motion. A venue change must be ordered when, as here, a fair trial is "unlikely" in the county where the offense was allegedly committed because of (1) undue excitement against the defendant <u>or</u> (2) for any other

cause. Tenn. R. Crim. P. 21(a). *See also* Tenn. Code Ann. § 20-4-201(1) (venue may be changed "upon good cause shown").

A motion for change of venue "shall be accompanied by affidavit(s) averring facts constituting the alleged undue excitement or other cause on which the motion is based." Tenn. R. Crim. P. 21(b). Affidavits from Bryan Edelman, Ph.D., Attorney David Raybin, and John Morris which document the publicity are attached in support of this motion and are incorporated by reference.

Officer Delke is entitled to a change of venue due to both "undue excitement" surrounding this case as well as several "other cause[s]." There has been extensive pretrial publicity— much of it hostile to Officer Delke—concerning related policy issues such as the proper role of law enforcement, the legitimacy of traffic stops, whether "body cams" should be implemented, when deadly force is appropriate, how police oversight should exist, and the causes and effects of racial inequality. While these matters are important in the competing narratives of the event in the community, they are ultimately more prejudicial than probative to the dispositive questions in Officer Delke's criminal trial.

A fair and impartial jury is constitutionally mandated. It is the bedrock of our criminal justice system. Both federal and state law dictate that voir dire will not adequately safeguard Officer Delke's right to a fair trial. This motion will establish that the pretrial publicity referencing this incident has consistently used inflammatory and prejudicial themes, words, and phrases. A significant percentage of potential Davidson County jurors have already formed strong (and potentially immutable) opinions about the case which may not be overcome by the evidence ultimately presented at trial. A jury venire from another

county free of the pretrial publicity and excitement is the only way Officer Delke can receive a fair trial.

II. Background

A police officer's conduct "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." This is so because "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."

Graham v. Connor, 490 U.S. 386 (1989)

Defendant Andrew Delke ("Officer Delke") is a police officer employed by the Metropolitan Government of Nashville and Davidson County, Tennessee. Officer Delke was assigned to an elite police tactical unit whose mission was to get guns off our streets.

On July 26, 2018, after developing sufficient reasons to stop Daniel Hambrick's vehicle, Officer Delke activated his emergency equipment. Mr. Hambrick refused to stop and instead sped down the interstate, swerved onto the shoulder, and passed a bus on the right in order to evade apprehension. Shortly thereafter, Mr. Hambrick exited the interstate and entered an apartment complex, where he was again spotted by Officer Delke. Upon seeing Officer Delke, Mr. Hambrick sprinted away from Officer Delke in another attempt to evade apprehension.

Officer Delke pursued Mr. Hambrick on foot. Upon seeing Mr. Hambrick display a firearm, Officer Delke issued multiple verbal commands for Mr. Hambrick to drop his gun. Officer Delke –as he was required to do – gave a final warning of his intent to use deadly force if Mr. Hambrick refused to obey lawful commands. After Mr. Hambrick ignored these repeated warnings and, instead, continued his flight in a manner presenting a clear

and present danger to the officer and the community, Officer Delke shot Mr. Hambrick. Another officer who responded to the scene found the large, loaded semiautomatic pistol still in Mr. Hambrick's hand.

Much of the incident was captured by several video cameras. On August 8, 2018 the prosecutor authorized the release of clips from some of the video, resulting in a firestorm of publicity and controversy making a fair trial a functional impossibility. The video release left out important pieces of related information which would have added significant context to viewers who naturally began to rush to judgment one way or the other. For example, there was no explanation that the limited video frame rate meant that certain movements from either man would not have been captured. There was no explanation that the video is a distorted blowup of footage taken from hundreds of feet way where nearby squirrels appear larger than distant humans. See Exhibit 10 to the Affidavit of John Morris which contains a copy of the video on a DVD.

When the video was first released there was no information provided to the public that Mr. Hambrick had been running through a densely populated area with a loaded handgun or that he had been warned that deadly force would be used if he did not drop his firearm. It was also not made clear that other video footage clearly showed Mr. Hambrick had the firearm as he ran, leading some citizens to speculate police had "planted" the gun ultimately recovered in his hand.

The following is one news article published immediately after the video release by the prosecutor:

VIDEO: New Footage Shows Nashville Police Shooting as It Unfolded

By CHAS SISK • AUG 8, 2018 Nashville Public Radio

WARNING: This post contains graphic video.

The Davidson County district attorney released footage of the fatal shooting of Daniel Hambrick by Nashville Police Officer Andrew Delke.

The video was taken by cameras on July 26, 2018, in the John Henry Hale apartment complex and the nearby Martin Luther King Jr. Magnet High School.

Below is an excerpt of the critical moments from nearly 30 minutes of video. This shows Hambrick fleeing Delke, Delke shooting and Delke's initial reactions.

See also Exhibit 6, Page 001000 which contains additional stories containing clips of the video which will be shown during the evidentiary hearing.[1]

On the heels of an earlier police-related shooting, members of the community proposed a referendum for a police oversight board. There was but limited support for the referendum until the shooting here rocked the community:

> By July 2018, as the [referendum filing] deadline approached, the activists had just over 4,000 signatures. In a delicate rapprochement, NOAH had offered to enlist its vast membership in collecting names. But reluctant to reengage after the damaging split, Community Oversight Now rejected the help, even if doing so kept it from reaching the threshold. That decision might well have spelled its defeat. But then, less than a week before the deadline, Officer Andrew Delke of the Metro Nashville Police shot and killed Daniel Hambrick.
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> ….
>
> The activists began to realize something profound had shifted in the city's residents. In the final week of July, the activists collected as many signatures as they had since their campaign began that spring. On the submission deadline of August 1, Lee carried a box of 8,269 signatures into the county clerk's office to have the measure certified and put on the ballot.
>
> Journalists connected the [Hambrick] shooting to the campaign for police oversight. Public officials who had stayed on the sidelines after Clemmons's death were more outspoken in questioning [Chief] Anderson's leadership; NOAH issued a statement tasking Mayor Briley to fire him. "Most people could not rationalize how that tape [of the shooting] looked," says Tucker. "It upset their sensibilities."

Who Will Hold the Police Accountable? Atlantic, July 25, 2019 (Exhibit 6, page 001107).

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[1] Exhibit 6 is attached to the affidavit of Attorney David Raybin. The actual video appears as Exhibit 10 to the Affidavit of John Morris.

Within three months of the release of the Delke-Hambrick shooting video, the referendum received a significant majority of votes and became law.

Officer Delke would have preferred not to have filed this Motion seeking a change of venue. He does not lightly waive his right to be tried by the residents of Davidson County, but the public opinion survey commissioned by the Defense demonstrates that 82% of survey respondents who recognized this case have already developed an opinion about guilt. While 33.6% believe that Officer Delke is *not* guilty and 48% believe he is guilty, the total percentage (82%) who hold strong feelings in either direction poses an insurmountable obstacle to his ability to be judged by a jury that can be fair and be likely to render a unanimous verdict (Exhibit 5, page 6). [2]

The survey also demonstrates the deep racial divisions in our community: 83% of those African Americans who were familiar with the case believe that Officer Delke is guilty of murder whereas only 31% of Caucasians familiar with this case believe Officer Delke is guilty (Exhibit 5, page 21). These statistics evidence the extreme passions that exist before the first trial witness has even taken the stand.

The pretrial publicity cannot be undone by the Defense and is so pervasive that a fair trial is impossible. The division of the public sentiment is a recipe for a hung jury which is in no one's interest. Only a change of venue will protect Officer Delke's constitutional rights.

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[2] Exhibits 1-5 are attached to the affidavit of Bryan Edelman, Ph.D.

III. Legal Standards for Change of Venue – Federal Constitutional Standard

A. In General – Federal Constitutional Standard.

Article III of the Constitution provides that the trial of criminal cases "shall be held in the State where the said Crimes shall have been committed." U.S. CONST. Art. III, § 2, cl. 3. The Sixth Amendment affirms this principle, but also secures to criminal defendants the right to trial by an *impartial* jury:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

U.S. CONST. amend. VI. It is, however, well settled that

> The Constitution's place-of-trial prescriptions . . . do not impede transfer of the proceeding to a different district at the defendant's request if extraordinary local prejudice will prevent a fair trial—a basic requirement of due process.

Skilling v. United States, 561 U.S. 358, 378 (2010) (internal citations and quotation marks omitted).

The Sixth Amendment to the United States Constitution is likely a model for state constitutional provisions which – like Tennessee – uniformly grant the defendant the right to a local trial. See *United States v. Cabrales*, 524 U.S. 1, (1998) ("The Constitution ... safeguards the defendant's venue right."); *United States v. Cores*, 356 U.S. 405 (1958) ("The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place."). The portion of the Sixth Amendment requiring that a case be tried in the state and district where the crime

was committed applies to federal prosecutions only and is not applicable to proceedings in state court. See *Caudill v. Scott*, 857 F.2d 344, 345-46 (6th Cir.1988).

That said, it is the federal constitution's Fifth and Sixth Amendment guarantees of due process and a fair trial by an impartial jury which protect a defendant where a state court refuses to alter venue if a defendant cannot obtain an impartial jury in the county where the charges are brought. Accordingly, in such cases, the defendant is entitled to a change of venue. *See Groppi v. Wisconsin*, 400 U.S. 505, 510-511 (1971).

In years past, the Supreme Court repeatedly recognized that pervasive pretrial publicity can cause an unfair trial. In such instances, the Court *presumed* that the defendant had been prejudiced and his due process rights denied by requiring him to remain in the venue where the criminal offense occurred. *See, e.g. Irvin v. Dowd*, 366 U.S. 717, 730 (1961) ("A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception.") (concurring opinion of Frankfurter, J.); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) ("[C]ourt proceedings in a community so pervasively exposed to such a spectacle [of media coverage] could be but a hollow formality."); *Estes v. Texas*, 381 U.S. 532, 542-543 (1965) (actual prejudice not required when the circumstances are "inherently lacking in due process"); *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) ("Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.").

More recently, the Court has become somewhat cautious regarding presumed prejudice. In *Skilling v. United States*, 561 U.S. 358 (2010), the Court stated:

> In [*Rideau, Estes, and Sheppard*], we overturned a conviction obtained in a trial atmosphere that [was] utterly corrupted by press coverage; our decisions, however, cannot be made to stand for the proposition that juror exposure to .. news accounts of the crime .. alone presumptively deprives the defendant of due process. Prominence does not necessarily produce prejudice, and juror *impartiality,* we have reiterated, does not require *ignorance*. A presumption of prejudice, our decisions indicate, attends only the extreme case.

Id. at 380-381 (internal citations and quotation marks omitted). *Skilling* signaled a relaxation of the rigorous standards of "presumed prejudice" established in *Rideau* and its progeny, thus raising the bar of establishing presumed prejudice for criminal defendants. The foregoing notwithstanding, however, the prosecution of Officer Delke is an "extreme case" and, as will be shown, prejudice should be presumed, and the motion should be granted.

In *Skilling*, the Supreme Court analyzed the circumstances under which a presumption of prejudice would arise and warrant or command a change of venue. It addressed four factors it regarded as pertinent to whether the defendant had demonstrated a presumption of prejudice that required a venue transfer: 1) the size and characteristics of the community in which the crime occurred and from which the jury would be drawn; 2) the quantity and nature of media coverage about the defendant and whether it contained "blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight"; (3) the passage of time between the underlying events and the trial and whether prejudicial media attention had decreased in that time; and (4) in hindsight, an evaluation of the trial outcome to consider whether the jury's conduct ultimately undermined any possible pretrial presumption of prejudice. *Id.* at 381-85.

Although the *Skilling* Court found that removal was not necessary in that case, the Court's analysis provides guidance to lower courts as to when removal is required. Many of these factors are relevant under the Tennessee law analysis appearing later in this memorandum. The primary *Skilling* factors are addressed here.

B. The Size of the Community– Federal Constitutional Standard.

Davidson County's estimated population is 689,006. As to the significance of population in assessing a possible need for a venue change in this case, a larger population provides does not always provide adequate protection from community prejudice. In *Powell v. Superior Court*, 283 Cal. Rptr. 777 (1991), white police officers were charged with the alleged assault on an African American person. The incident was videotaped. This occurred in Los Angeles, a city of immense size.

The Court considered numerous affidavits and public opinion surveys to determine whether a fair trial was possible. The Court ordered a change of venue based on the various factors, including the public opinion surveys:

> The potential of community bias mounts in direct ratio to the pervasiveness of publicity… In counties geographically removed from the locale of the crime, lack of a sense of community involvement will permit jurors a degree of objectivity unattainable in the locale of the crime itself. Most significantly, such jurors are far less likely to be involved in the prevailing political controversies which we have set out in some detail and which appear to be reasonably limited to the greater Los Angeles area.

Id. This rationale applies with equal force here when considering the massive adverse publicity, which is a key factor addressed in *Skilling*. *See also Nevers v. Killinger*, 990 F. Supp. 844 (E.D. Mich. 1997), aff'd, 169 F.3d 352 (6th Cir. 1999) (manifest error in murder

trial for trial court to refuse to change venue from Detroit in face of immense prejudicial pretrial publicity surrounding alleged murder of African American suspect by white police officer).

C. The Nature of the Media Coverage – Federal Constitutional Standard.

The nature of the media coverage is an important factor to consider when weighing the need for a change of venue under the federal constitution and under Tennessee law as well. *See State v. Hoover*, 594 S.W.2d 743, 746 (Tenn. Crim. App. 1979). The coverage in this case incorporates emotional, sensational, and prejudicial elements that are likely to undermine the presumption of innocence and create undue excitement against Officer Delke. Examples of language in the pretrial publicity that is certain to increase the salience of race and racial bias include the following:

- "Two white Nashville cops. Two dead black men." THE NASHVILLE SCENE (online), October 2, 2018. [Exhibit 2, page 0457. [3] Author: Steven Hale.]

- ". . . white Nashville police officer who shot and killed a fleeing black man . . ." THE NASHVILLE SCENE (online), January 7, 2019. [Exhibit 2, page 0520. Author: Steven Hale.]

- ". . . black man fatally shot by white Nashville police officer . . ." THE TENNESSEAN (online), March 11, 2019. [Exhibit 2, page 0001. Reporter: Adam Tamburin.]

- ". . . second fatal shooting of a fleeing black man by a white Nashville police officer in less than 18 months . . ." THE NASHVILLE SCENE (online), August 16, 2018. [Exhibit 2, page 0418. Author: Steven Hale.]

[3] Exhibit 2 is attached to Edelman's affidavit and is an archive of articles reviewed by Edelman as more particularly addressed in his affidavit.

- "... second black man to be shot and killed by a white Nashville police officer while fleeing a traffic stop in 18 months . . . THE NASHVILLE SCENE (online), August 28, 2018. [Exhibit 2, page 0431. Author: Steven Hale.]

- "The white Nashville police officer who shot and killed a black man fleeing a traffic stop in July has been charged with criminal homicide. , , , Mayor David Briley called the charges 'a necessary step toward' justice for Hambrick." THE NASHVILLE SCENE (online), September 27, 2018. [Exhibit 2, page 0452. Author: Steven Hale]

- ". . . surveillance video . . . showed a white Nashville police officer shooting a fleeing black man in the back . . ." THE NASHVILLE SCENE (online), October 11, 2018. [Exhibit 2, page 0464. Author: Steven Hale.]

- "'Whenever you have black man dead, white man shooting, the mentality is already there.'" THE TENNESSEAN (online), July 27, 2018. [Exhibit 2, page 0082. Reporter: Jordyn Pair, quoting Michael Jordan, president of the J. Henry Hale Resident Association.]

- "'Stop Killing Us. Surely this basic human right cannot be denied.'" TENNESSEE TRIBUNE (Nashville) (online), August 30, 2018. [Exhibit 2, page 0438. Author: Dr. Chris Jackson, quoting community organizer D. J. Hudson.]

- "Nashville police should stop shooting African American males in the back and claim self-defense – this only a fool would state." TENNESSEE TRIBUNE (Nashville) (online), August 16, 2018. [Exhibit 2, page 0417. Author: Rosetta Miller Perry.]

- "'We are not asking anything elaborate. We are asking the police to stop killing us.'" THE TENNESSEAN (online), August 8, 2018. [Exhibit 2, page 0137. Reporter: Holly Meyer, quoting D. J. Hudson, Black Lives Matter activist.]

- "The shooting inflamed tensions between Nashville's African-American community and the police—which have been simmering for decades of injustice, abuse of power and mistrust. Delke is white; Hambrick was black." THE TENNESSEAN (online), September 28, 2018. [Exhibit 2, page 0060. Opinion by David Plazas.]

- "[F]or years MNPD ha[s] been distributing The Tactical Edge, a decades-old book with explicitly racist claims that people of color are more violent than white people, to all new police recruits." THE NASHVILLE SCENE (online), August 16, 2018. [Exhibit 2, page 0419. Author: Steven Hale.]

- "The case has fueled ongoing criticism of the police department, with activists citing it as a violent illustration of racial bias within the department." THE TENNESSEAN (online), January 4, 2019. [Exhibit 2, page 0017. Reporter: Adam Tamburin.]

- "Delke, who is white, shot Hambrick, who was black, three times in the back during a July 26 foot chase in North Nashville. Activists said Hambrick's death was a violent example of racial bias within the police force." THE TENNESSEAN (online), January 18, 2019. [Exhibit 2, page 0019. Reporters: Adam Tamburin and Mariah Timms.]

- "Hambrick's death has renewed claims of racial bias on the police force. Echoing criticism against law enforcement nationwide, Nashville activists say the case is an example of the ways police policies and individual officers unfairly target people of color." THE TENNESSEAN (online), January 4, 2019. [Exhibit 2, page 0017. Reporter: Adam Tamburin.]

- "Activist and religious groups . . . have long said police training and policies are racially biased . . ." THE TENNESSEAN (online), January 18, 2019. [Exhibit 2, page 0021. Reporters: Adam Tamburin and Mariah Timms.]

- "[T]he past several years of pervasive coverage of police shootings have proven a stubborn fact: The videos of black men being shot and killed by police officers far outnumber the police officers serving jail time for such killings." THE NASHVILLE SCENE (online), October 2, 2018. [Exhibit 2, page 0458. Author: Steven Hale.]

- "'I'm feeling that all the negativity about police officers is true, that they're out to kill African-American men,' Perkins said." THE TENNESSEAN (online), July 27, 2018. [Exhibit 2, page 0081. Reporter: Jordyn Pair, quoting Gretchen Perkins.]

- "'[H]ey hey, ho ho, these racist cops have got to go.'" THE TENNESSEAN (online), August 11, 2018. [Exhibit 2, page 0093. Reporter: Natalie Allison, quoting unnamed demonstrators.]

- "If we don't get no justice, you don't get no peace." THE TENNESSEAN (online), August 11, 2018. [Exhibit 2, page 0095. Reporter: Natalie Allison, quoting unnamed demonstrators.]

- "The chilling killing of Daniel Hambrick in Nashville on July 26, 2018 occurred about five blocks from this writer's church." TENNESSEE TRIBUNE (Nashville) (online), August 30, 2018. [Exhibit 2, page 0437. Author: Dr. Chris Jackson.]

- "'The police officer fired four times, three of those bullets ripped Daniel apart. He fell to the ground, where he was cuffed and left, left there like a dog. Worse than a dog." THE TENNESSEAN (online), January 6, 2019. [Exhibit 2, page 0141. Reporters: Joey Garrison, Natalie Allison, and Adam Tamburin, quoting Joy Kimbrough.]

- "Attorney Joy Kimbrough, who represents the family said: 'They shot him in the back. The police officer fired four times. He fell to the ground where he was cuffed and left there like a dog—worse than a dog. He was left there until the ambulance arrived.'" NASHVILLE PRIDE (online), August 10, 2018. [Exhibit 2, page 0411. Article quoting Joy Kimbrough.]

- "'Nobody helped him," [Dominique Appleton] said. 'They allowed him to lay there like a dead deer on the side of the road.'" THE TENNESSEAN (online), August 11, 2018. [Exhibit 2, page 0094. Reporter: Natalie Allison, quoting Dominique Appleton.]

- "At that moment Delke became Judge, Jury and Executioner." TENNESSEE TRIBUNE (Nashville) (online), August 30, 2018. [Exhibit 2, page 0437. Author: Dr. Chris Jackson.]

- "The video footage of Delke's execution of Hambrick was horrifying. Shooting a man in the back who is unarmed [sic] and in the process of running away from an officer is entirely unacceptable." THE NASHVILLE SCENE (online), September 27, 2018. [Exhibit 2, page 0453. Author: Steven Hale.]

- "... two months after unarmed [sic] North Nashville resident Daniel Hambrick's head was exploded by a bullet from Metropolitan Nashville Police Department officer Andrew Delke's gun . . ." TENNESSEE TRIBUNE (Nashville) (online), October 18, 2018. [Exhibit 2, page 0468. Author: Grayce Gadson.]

- "'That's her son. She carried him nine months,' Kimbrough said. 'He's dead today. That's real. She buried him. That's real. She had to pick out his clothes to wear in the casket. That's real. And now we're going through a trial.'" THE TENNESSEAN (online), January 6, 2019. [Exhibit 2, page 0171. Reporter: Adam Tamburin, quoting Joy Kimbrough.]

- "On July 26, Daniel Hambrick joined a tragic fraternity of black men who have been killed by white police officers." THE NASHVILLE SCENE (online), December 27, 2018. [Exhibit 2, page 0512. Author: SCENE staff.]

- "[T]he police department, created a 'culture of fear, violence, racism and impunity' that Delke 'internalized' at the police training academy and on the job." THE TENNESSEAN (online), March 11, 2019. [Exhibit 2, page 0001. Reporter: Adam Tamburin, quoting from federal civil lawsuit filed against Delke.]

- "District Attorney Glenn Funk said the defense, that Delke had to shoot Hambrick as he ran away, was equivalent to arguments 'used at Nuremberg.'" THE TENNESSEAN (online) February 13, 2019. [Exhibit 2, page 0010. Reporter: Adam Tamburin, quoting District Attorney General Glenn Funk.]

- "Officer Andrew Delke, 25, who is white, was charged with criminal homicide in the shooting death of Daniel Hambrick, also 25, who was black, as he was running away during a foot chase. Prosecutors scrambled to a General Sessions judge to sign off on an arrest warrant after a lower level magistrate said they didn't have enough evidence to prosecute Delke. It was a turning point that drew passionate responses from all corners of the city. Battle lines are drawn for a fractious debate that could last for years as the case travels through the court system. THE TENNESSEAN (online), September 29, 2018. [Exhibit 2, page 0103. Reporter: Adam Tamburin.]

- "[The Tribune] also stand[s] with [the Hambrick family], the NAACP and other organizations in asking that Delke be charged with second degree murder, or at

minimum manslaughter." TENNESSEE TRIBUNE (Nashville) (online), August 16, 2018. [Exhibit 2, page 0416. Author: Rosetta Miller Perry.]

- "This pattern of 'chase and shoot to kill' is a repeat of the Jocquez [sic] Clemmons case eighteen months prior by another overzealous police officer. . ." TENNESSEE TRIBUNE (Nashville) (online), August 30, 2018. [Exhibit 2, page 0437. Author: Dr. Chris Jackson.]

- "There were many of us upset that no charges were ever made in that case [Officer Clemmons], but the amount of outrage evident after that is mild compared to reactions people have had since the video of the Hambrick shooting was released last Wednesday." TENNESSEE TRIBUNE (Nashville) (online), August 16, 2018. [Exhibit 2, page 0415. Author: Rosetta Miller Perry.]

- Hambrick's death has spurred vigils and a protest. NASHVILLE PRIDE (online), August 3, 2018. [Exhibit 2, page 0401.]

- "Hambrick's death spurred a weekend vigil and a protest in memory of the man loved ones call 'Dan Dan.'" THE TENNESSEAN (online), July 30, 2018. [Exhibit 2, page 0071. Reporter: Holly Meyer.]

- "[S]ocial justice advocates and other community members expressed outrage over the footage "[of the shooting]." THE TENNESSEAN (online), August 8, 2018. [Exhibit 2, page 0143. Reporters: Joey Garrison, Natalie Allison, and Adam Tamburin.]

- "Surveillance footage does not show Hambrick pointing [h]is gun at Delke, and [the General Sessions judge] concluded that it was 'improbable' he had done so." THE NASHVILLE SCENE (online), January 18, 2019. [Exhibit 2, page 0524. Author: Steven Hale.]

- ". . . [Assistant DA] Dowdy drew attention to the fact that surveillance footage of the chase, drawn from several cameras in the area, showed no evidence that Hambrick looked at Delke or took aim." THE TENNESSEAN (online), January 4, 2019. [Exhibit 2, page 0016. Reporter: Adam Tamburin.]

- "[A]vailable footage of the incident doesn't show [Hambrick] aiming the handgun he was allegedly [sic] carrying at Delke. But there is a blind spot, a 36-foot strip of grass at one corner of the John Henry Hale Apartment complex that was out of the cameras' sight that evening. Prosecutors argue it's not plausible that Hambrick turned and aimed at Delke in that short stretch; the officer's attorneys say it is." THE NASHVILLE SCENE (online), January 5, 2019. [Exhibit 2, page 0517. Author: Steven Hale.]

- "The video may be grainy and taken by a sole camera a mile away, but it clearly shows that from multiple angles Delke shot a man who was running away from him. The fact that three of the four bullets found on Hambrick's body were in the back clearly indicates he was trying to get away." TENNESSEE TRIBUNE (Nashville) (online), August 16, 2018. [Exhibit 2, page 0415. Author: Rosetta Miller Perry.]

- Police chief Steve Anderson, after viewing the video, called it "very disturbing." THE TENNESSEAN (online), August 9, 2018. [Exhibit 2, page 0190. Reporter: Adam Tamburin, quoting Chief of Police Steve Anderson.]

- "We [the NAACP] have concluded that officer Andrew Delke did not have justification to fire his weapon at Mr. Hambrick. . . .We now demand that Officer Andrew Delke be relieved of duty and charged with the murder of Daniel Hambrick immediately." NASHVILLE PRIDE (online), August 10, 2018. [Exhibit 2, page 0411. Article quoting unnamed spokesman for the Nashville Branch of the NAACP.]

- "[The Metropolitan Minority Caucus] [4] finds the homicide of Daniel Hambrick very disturbing. It is clear that Daniel Hambrick was not a threat to Officer Delke." NASHVILLE PRIDE (online), August 10, 2018. [Exhibit 2, page 0410. Article quoting a statement issued by the Metropolitan Minority Caucus.]

- "'I'm a criminal defense attorney. If there is ever a case of premeditated first-degree murder, this is it.'" THE TENNESSEAN (online), August 8, 2018. [Exhibit 2, page 0141. Reporters: Joey Garrison, Natalie Allison, and Adam Tamburin, quoting Joy Kimbrough.]

[4] The Minority Caucus is a sub-set of the Metropolitan Council, the governing body of the Metropolitan Government of Nashville and Davidson County, Tennessee.

- “Under no circumstances should police officers be shooting fleeing suspects, and especially not in residential neighborhoods where anyone might catch a stray bullet or a deflected shot.” TENNESSEE TRIBUNE (Nashville) (online), August 16, 2018. [Exhibit 2, page 0416-417. Author: Rosetta Miller Perry.]

- “As far as anyone can tell right now, Delke did not need to shoot Daniel Hambrick, and so there is a real, cruel sense in which Hambrick died in vain.” THE NASHVILLE SCENE (online), December 27, 2018. [Exhibit 2, page 0512. Author: SCENE staff.]

The media recently republicized Officer Delke’s incident on the “one-year anniversary” of the shooting:

> In the year since the shooting, calls for reform and accountability have been met with varied responses, including a new citizen oversight board and criminal charges for Delke — but even a year has not been enough time to see sweeping changes and many feel not enough has been done.

THE TENNESSEAN July 25, 2019 Exhibit 6, Page 001003.

See “Facts are facts:” Family of Daniel Hambrick sues Nashville for $30 million. THE TENNESSEAN, March 11, 2019. [Exhibit 2, page 0001. Reporter: Adam Tamburin.]

See also Hambrick Family Sues Metro and Officer Andrew Delke Over Fatal Shooting. THE NASHVILLE SCENE, March 11, 2019. [Exhibit 2, page 0536. Author: Steven Hale.] This article provides a link to the complaint in the federal lawsuit filed in the Middle District of Tennessee entitled *Estate of Daniel Hambrick ex rel. Vickie Hambrick v. Metropolitan Government of Nashville-Davidson County, Tennessee, and Andrew Delke*, Case 3:19-cv-00216. See Raybin Affidavit, Exhibit 7 for a copy of the publicly available Civil Complaint.

In a section heading on page 23 of the civil complaint, available in its entirety to anybody who clicks the link in the article, the plaintiff asserts in bold type **"Officer Delke Murders Mr. Hambrick."** Other headings include the following:

- **"MNPD Justifies the Murder."** Exhibit 7, Complaint at 24.
- **"The District Attorney's Office Prosecutes Officer Delke for Murder."** *Id*. at 26.
- **"Delke's Murder of Mr. Hambrick was Consistent with MNPD Policy and Practice."** *Id*. at 28.

There is also an online petition to change the street name where the shooting occurred from "17th and Jo Johnston" to "Daniel Hambrick Way." [5]

D. Relationship of Media Coverage to Presumed Prejudice– Federal Constitutional Standard.

With respect to media coverage, the *Skilling* Court found that "although news stories about [the defendant] were not kind, they contained no confession or other blatantly prejudicial information" of the type that readers or viewers could not reasonably be expected to ignore. 561 U.S. at 382-83. Unlike *Skilling*, the news stories regarding Officer Delke's case "present the kind of vivid, unforgettable information, [the Court has] recognized as particularly likely to produce prejudice." *Id*. at 384.

[5] *Change Street Name from 17th and Jo Johnston to Daniel Hambrick Way*. This appears in Exhibit 6, page 01084.

As an initial matter, the news coverage at issue in *Skilling* did not contain a video. The video in this case depicts a person being shot and killed and is now seared in the minds of prospective Davidson County jurors. It is no answer to say that the shooting video will eventually be shown to the jury here no matter from where they are summoned. Unlike the initial video release by the prosecutor after the incident here, the jury from another venue will be presented with the entire surrounding context contemporaneously. It is critical for the jurors to see both the video and the surrounding context with fresh eyes, instead of with predetermined opinions formed primarily by the video (without context) and the drumbeat of publicity.

Perhaps the District Attorney's Office promoted a legitimate policy interest by expediting the release of video footage to promote transparency.[6] But the District Attorney cannot have it both ways: if prejudicial information is released that prompts a public reaction, the State must also be prepared to accept a change of venue to preserve the accused's due process rights. This is a reasonable balancing of interests and accommodates both concerns.

The defense has retained Brian Edelman, Ph.D., to determine if, and to what extent, pretrial publicity has affected the jury pool in Davidson County. Dr. Edelman's analysis is reflected in the attached affidavit which includes an evaluation of relevant

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[6] "Nashville District Attorney General Glenn Funk's office said the footage [of the shooting] was released 'in an effort to show transparency as much as possible during this investigation,' adding that the investigation is expected to be finished within the next two weeks."

Nashville police shooting video released; review announced. August 9, 2018 Associated Press Exhibit 6 to Affidavit of David Raybin, page 001172

newspaper and television publicity, social media, and completion of community attitude surveys in Davidson County and – for comparison purposes – Hamilton County (Edelman Affidavit, with Exhibits 1-5).

Based upon his analysis and evaluation, Dr. Edelman opines that the jury pool in Davidson County has been exposed to extensive prejudicial news and social media coverage surrounding the Daniel Hambrick shooting, the video, and the ensuing political fallout. In his expert opinion, given the nature of this pretrial publicity – and its apparent negative effect on the jury pool – Dr. Edelman believes that the presumption of innocence has been undermined and that remedial measures, particularly a change of venue or venire, is necessary to protect Officer Delke's right to a fair and impartial trial (Edelman Affidavit, pages 1-3).

Dr. Edelman is the co-founder of Trial Innovations, Inc., a national full-service jury research firm.[7] Over the past 20 years, he has worked on hundreds of criminal and civil cases across the country. As a trial consultant, he has conducted mock trials, focus groups, surveys, post-trial interviews and other research exercises. He has consulted in the courtroom and assisted with jury selection in over 100 cases.

Dr. Edelman has also served as a presenter on jury decision-making at state and county bar associations, law firms, national conferences, and webinars through Lorman Education Services and Clear Law. He has been invited by Public Defender and District Attorney Offices in multiple states to present CLE courses relating to jury selection and juror decision-making. He has also served as a guest lecturer at the University of Santa Cruz and Stanford Law School.

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[7] Dr. Edelman's qualifications are summarized at pages 3-6 of his affidavit. His curriculum vita is attached to his affidavit as Exhibit 1.

In addition, Dr. Edelman has conducted content analyses of media coverage on a host of topics and has designed over 50 community attitude surveys over the years. He has been retained as an expert to conduct and evaluate change of venue studies and to recommend remedial measures for addressing exposure to pretrial publicity outside of a change of venue. He has been retained as an expert witness on change of venue in over 40 cases for the prosecution, defense and as a court expert, and has testified in state and federal courts across the country.

Dr. Edelman began his analysis of the pretrial publicity in this case by reviewing and evaluating relevant newspaper articles, television publicity and social media (Edelman Affidavit, pages 1-2). According to Dr. Edelman, the coverage often included powerful and emotional language; descriptions of what the shooting video shows; passage of a community oversight board within months of the shooting by voters; and an escalating confrontation between the FOP and the District Attorney's office. There have also been thousands of "shares" and/or article posts and comments on Facebook debating the shooting, the video, and how race may have factored into the incident.

According to Dr. Edelman, this high online engagement would suggest that this incident captured the community's attention, and this type of expansive social media activity plays a significant role in spreading both information and misinformation. *Id.* at 2. A striking example of this can be seen with the video of the shooting – a key piece of evidence which will be used in determining whether or not Officer Delke is guilty of murder. The video of the shooting was released by the prosecutor just days after the shooting and has received over 200,000 views online. *Id.* Moreover, according to Dr. Edelman, this video was played countless times by local television news stations, and the

newspaper coverage often described the incident in a very prejudicial manner, specifically as one in which a white police officer shot an African American man several times. *Id.*

Dr. Edelman also caused to be conducted a community attitude survey in Davidson County in order to better assess the impact of this media coverage on the jury pool. **This survey was conducted *prior* to the one-year anniversary of the shooting when renewed media attention might be expected.** According to Dr. Edelman's findings, in Davidson County case recognition is quite high with (67%) of the jury pool familiar with this case. *Id.*; Exhibit 5 at page 6. Strikingly, case recognition increases to 92% for those who regularly watch news and read newspapers. *Id.*; Exhibit 5 at page 18. Seventy-three percent (73%) of those familiar with the case have already watched the shooting video released by the prosecutor. *Id.*; Exhibit 5 at page 11. Approximately 72% of survey respondents recognized at least three of six media items listed in the survey. *Id.*; Exhibit 5 at page 17.

Davidson County has been exposed to extensive coverage in the form of both traditional media and social media regarding this shooting incident, and such exposure has eroded Officer Delke's presumption of innocence. Almost half of the respondents, specifically 48%, who recognize this case believe that based upon what they have read, seen and heard, Officer Delke is guilty of murder. Exhibit 5 at page 6. Forty-three percent (43%) of respondents state that given what they know about this case Officer Delke would have a difficult time convincing them that he is **not** guilty. Exhibit 5 at page 7. Moreover, a majority of the prospective jury pool who recognize this case have already formed an opinion on the most significant element of this case—whether Officer Delke was in danger of serious injury or losing his life.

Fifty-two percent (52%) report a belief that Officer Delke was **not** in danger when he shot Mr. Hambrick whereas only 24% of respondents believe Officer Delke was in danger. Exhibit 5 at page 11. These percentages clearly reflect the jury pool's pre-existing attitudes, clearly undermine the presumption of innocence, and put the burden of proof on the defense to change jurors' opinions on the most important question in the case.

The Davidson County polling data also show a significant racial divide between African Americans and Caucasians on almost every key issue in this case. For example, 80% of African Americans recognized the case compared to 65% of Caucasians. Edelman Affidavit at page 3; Exhibit 5 at page 21. Moreover, 83% of those African Americans who were familiar with the case believe that Officer Delke is guilty of murder whereas only 31% of Caucasians familiar with this case believe Officer Delke is guilty. *Id.* Seventy-two percent (72%) of African Americans reported Officer Delke would have a difficult time convincing them that he is **not** guilty compared to 27% of Caucasians. Exhibit 5 at page 22. Most strikingly, this pattern of racial divide also existed when examining how prospective jurors interpreted the shooting video. Ninety-one percent (91%) of African Americans reported that Officer Delke was **not** in danger of losing his life or suffering serious injury when he shot Daniel Hambrick whereas only 36% of Caucasians came to a similar conclusion. *Id.*; Exhibit 5 at page 22.

For comparison purposes, a community attitude survey was also conducted in Hamilton County. Only 16% of survey respondents recognized this case compared to 67% in Davidson County. Edelman Affidavit at page 2; Exhibit 5 at page 6. For those who did recognize the case, only 25% were familiar with three or more media items, and 50% had watched the video. *Id.*; Exhibit 5 at page 11 and 17.

Dr. Edelman's affidavit establishes that the jury pool in Davidson County has been exposed to extensive prejudicial news and social media coverage surrounding this shooting. The nature of this pretrial publicity – and its apparent prejudicial effect on the jury pool – has undermined the presumption of innocence. Officer Delke's right to a fair trial with an impartial jury must be secured by remedial measures, particularly a change of venue or venire to a county which has not been subjected to the same degree of media coverage and local controversy.

E. Passage of Time – Federal Constitutional Standard

The passage of time has not diminished prejudicial publicity and public controversy concerning this case; if anything, it has grown worse. The polling data submitted to the Court is all very recent. Although many events that are publicized in the "24-hour news cycle" are quickly forgotten, the Delke incident and the surrounding controversies remain fresh in the minds of the vast majority of Davidson County residents. Given that more than a year has already elapsed, it is also unlikely that any difference in attitude will occur by the time this case goes to trial given the constant drumbeat of publicity.

F. Conclusion– Federal Constitutional Standard

Although the Court in *Skilling* reserved the question of whether a presumption of prejudice can ever be rebutted, the Court was persuaded that no presumption arose in that case. *See Skilling*, 561 U.S. at 385 n.18. In *Rideau v. Louisiana*, 373 U.S. 723 (1963), the Court reversed the defendant's conviction based upon inherently prejudicial circumstances

and in doing so, the Court did not pause to examine "the voir dire examination of the members of the jury." *Id*. at 727. In *Rideau*, the Court held that a fair trial required a change of venue. *Id*. *See also United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) ("When a petit jury . . . has been exposed to prejudicial publicity, we have required reversal of a conviction because the effect of the violation cannot be ascertained" (interior quotes omitted). *Id*. at 149 n.4.

Officer Delke's case has received prejudicial pretrial publicity, and the community atmosphere remains inflamed. Media coverage has not dwindled in the time since his arrest. Public debate over police-related conduct is becoming of ever greater concern in Nashville as documented in the following news article:

> Friday marks one year since the fatal shooting of Daniel Hambrick by Metro Nashville Police Officer Andrew Delke during a foot chase in North Nashville.
>
> Delke, 26, a white officer, was charged in September with criminal homicide in connection with the shooting of Hambrick, 25, who was black.
>
> In the year since the shooting, calls for reform and accountability have been met with varied responses, including a new citizen oversight board and criminal charges for Delke — but even a year has not been enough time to see sweeping changes and many feel not enough has been done.

THE TENNESSEAN, July 25, 2019, Exhibit 6, Page 001003.

> On the anniversary of his death, Daniel Hambrick's family is hoping to speak justice into existence.
>
> A vigil was held Friday evening at Watkins Park in North Nashville, across the street from where Hambrick, 25, was killed by Metro Nashville Police Officer Andrew Delke during a foot chase.

> Dozens of family, friends and activists gathered as the sun set to light candles in his honor and share memories of Hambrick.
>
> "We will get justice," Hambrick's first cousin Domonique Appleton said. She and Hambrick were four years apart and were very close.
>
> She and her family do not want to see Delke "get away" with what he did. Delke was charged with criminal homicide in connection with the shooting, and the case is ongoing.
>
> Friends and family gather during a candlelight vigil on the anniversary of the fatal shooting of Daniel Hambrick at Watkins Park in Nashville on Friday.
>
> "Delke got to celebrate his 26th birthday," Appleton said. "My cousin celebrated his in Greenwood Cemetery. We want to be the example to the families who didn't get justice for their loved ones."

'We will get justice:' Family of Daniel Hambrick mourns, hopes for change on anniversary of his death. THE TENNESSEAN July 26, 2019. Exhibit 6, Page 001009.

It is notable that these two articles were published in Nashville's largest circulation newspaper on consecutive days on the anniversary of the shooting – a mere month ago. If this case does not merit a change of venue under federal law, it is difficult to conceive of a case which would under the binding federal constitutional standards.

IV. Legal Standards for Change of Venue –Tennessee law

A. In General

The Tennessee Constitution also affords a defendant a fair trial consistent with due process. Article I, § 9 states that "in all criminal prosecutions, the accused hath the right to

. . . speedy public trial, by an impartial jury of the County in which the crime shall have been committed."

Rule 18(a) of the Tennessee Rules of Criminal Procedure – as the commission comments to the rule provide – is derived from Article I, § 9, Tennessee Constitution: "Except as otherwise provided by statute or by these rules, offenses shall be prosecuted in the county where the offense was committed." But where an impartial jury cannot be had in such a county, Rule 21 of the Rules sets forth the standard, stating:

> The court may change venue of a criminal case on the defendant's motion or on its own initiative with the defendant's consent. The court should order a venue change when a fair trial is unlikely because of undue excitement against the defendant in the county where the offense was committed or for any other cause.

Tenn. R. Crim. P. 21(a).

The provisions regarding a change of venue have been the law since at least 1808. *See Dula v. State*, 16 Tenn, 511 (1835) (laws regarding a change of venue "have existed ever since the year 1808, and many cases have occurred where the venue has been changed several times. In the cases of *Burnett v. The State*, and *Bridges v. The State*, in 1819, the convictions took place after several changes of venue, and each of the culprits was executed under the sentence of this court.").

A change of venue is merited. Tennessee law does not require the defendant to establish proof of actual prejudice; the test is only whether a fair trial is "unlikely." Tenn. R. Crim. P. 21(a).

Tennessee courts have identified numerous factors to in determining whether a change of venue should be granted. It should be not lost to the Court's attention that the appellate cases litigate only instances where a change of venue is denied. Where common sense reigns and venue is changed, the cases never make it to the law books. *See, e.g., Dula v. State*, 16 Tenn, 511 (1835) and S*tate v. Coe*, 655 S.W.2d 903, 911 (Tenn. 1983) (venue removed from Weakley County to Obion County). Such should be the case here.

Tennessee courts have considered the following factors regarding pretrial publicity in considering change of venue motions:

1. The nature, extent, and timing of pretrial publicity.

2. The nature of publicity as fair or inflammatory.

3. The particular content of the publicity.

4. The degree to which the publicity complained of has permeated the area from which the venire is drawn.

5. The degree to which the publicity circulated outside the area from which the venire is drawn.

6. The time elapsed from the release of the publicity until the trial.

7. The participation by police or by prosecution in the release of publicity.

8. The severity of the offense charged.

9. The absence or presence of threats, demonstrations, or other hostility against the defendant.

10. Size of the area from which the venire is drawn.

11. Affidavits, hearsay or opinion testimony of witnesses.

These 11 factors are taken from *State v. Hoover*, 594 S.W.2d 743, 746 (Tenn. Crim. App. 1979), citing 33 A.L.R.3d 1, which lists some additional six factors for a total of seventeen factors. However, these additional factors address a post-trial, appellate assessment of the propriety of the denial of a change of venue. Matters such as the ease or difficulty of picking a jury are not relevant to the pretrial assessment. For the sake of organization, the pretrial factors have been numbered as above and referred to herein as the *Hoover* factors.

While the pretrial factors identified in *Hoover* are addressed throughout this motion, the connection between the release of the shooting video and the community oversight vote is profound, undeniable, and unprecedented. A venue change must be ordered when, as here, a fair trial is "unlikely" in the county where the offense was allegedly committed because of (1) undue excitement against the defendant or (2) **for any other cause**. Tenn. R. Crim. P. 21(a). *See also* Tenn. Code Ann. § 20-4-201(1) (venue may be changed "**upon good cause shown**"). Thus, these as-yet-unlitigated provisions of the Rule and the Statute contemplate a change of venue on some basis other than the traditional "undue excitement" factor. There is certainly abundant "good cause" in this case.

B. Procedural Considerations: Venue, Vicinage, or Venire?

The decision to "change venue" must also be assessed in light of the various options available to the Court to assure the fair trial protections are fully accorded to Officer Delke. Tennessee employs various terms which are collectively denominated as a "change of venue" in this motion.

1. Venue.

Rule 21 contemplates a transfer of the entire case from the court in which venue lies ("the sending court") to another court ("the receiving court"), which "shall take the case and proceed to trial, judgment, and execution, in all respects as if the indictment or presentment had been returned to that court." Tenn. R. Crim. P. 21(e)(4)(A). *See State v. Hall*, 8 S.W.3d 593, 595 (Tenn. 1999).

2. Vicinage.

In 1994, the Tennessee Supreme Court held that Rule 21 could be satisfied by the trial court's granting of "change of vicinage." Vicinage is defined as "the place from which the jurors must be summoned." *See State v. Nichols*, 877 S.W.2d 722, 727 (Tenn. 1994). In *Nichols*, a Hamilton County trial judge granted a change of venue to Sumner County . . . but only for the limited purpose of jury selection." The court then ordered the case back to Hamilton County for trial with the Sumner County jury. *Id.* at 725. The Tennessee Supreme Court approved the trial judge's procedure but suggested that a statute permitting the summoning of jurors from another county would be beneficial. *Id.* at 729. In response, the legislature amended Tenn. Code Ann. § 20-4-201 to permit a change of venue in criminal and civil cases and included the procedure employed in *Nichols*. *See State v. Abbott*, 1998 WL 847919, at 17 (Tenn. Crim. App. 1998).

3. Venire.

The change of vicinage in *Nichols* was, in effect, a change of *venire*, *i.e.* a change in the panel of persons from whom jurors are to be selected. The amended statute specifically addressed changes of venire, stating, *inter alia,* that in all criminal cases a court

"may issue an order for a special venire of jurors from another county if in its discretion it determines the action to be necessary to ensure a fair trial."[8] Tenn. Code Ann. § 20-4-201(2); *see State v. Kiser*, 284 S.W.3d 227, 235 (Tenn. 2009) (Hamilton County trial court ordered a "special venire" and a jury was selected from Davidson County); *State v. Huskey*, 2002 WL 140059, at 108 (Tenn. Crim. App. 2002) (because of the "considerable amount of recent publicity" about a rape case, the Knox County trial judge properly ordered a special venire from Hamilton County).

4. Determining the "Receiving Court"

Because Davidson County is a single-county judicial circuit, Tenn. R. Crim. P. 21(d)(2) *requires* that any change of venue must be to the nearest county where the same cause for change of venue does not exist. *Hopkins v. State*, 78 Tenn. 204, 205 (1882) (defendant indicted in Robertson County moved for change of venue; the court changed the venue to adjacent Davidson county).

The inquiry here will not only be if there is to be a change of venue, but, if so, from where the jurors are to be chosen. While State action in releasing the shooting video and the surrounding pretrial publicity and public controversy compel Officer Delke to waive his valued venue rights he in no way waives the "nearest county" requirement which Tenn. R. Crim. P. 21(d)(2) guarantees him.

[8] It will be noted that this statute empowers the trial court to change vicinage/venire *proactively. See State v. Clements,* 175 W. Va. 463, 467, 334 S.E.2d 600, 605 (1985) ("S*tate v. Sette* concerns a change of venue and not a change of venire. However, these are two remedies designed to cure a common ill. The rules governing the grant or denial of a change of venue would also apply to a change of venire.").

The test is not mere publicity, but a fair trial in an adjacent county. *State v. Smith*, 906 S.W.2d 6, 9–10 (Tenn. Crim. App. 1995) ("Clearly, the defendant waived venue in Sullivan County, a single county judicial district in January of 1985. Moreover, the record of the original proceedings established that Hamblen County was the nearest venue untainted by the pretrial publicity; according to the trial judge, that was "the closest place" a fair trial could be held. The majority interprets that ruling as compliant with subsection (d) of Rule 21."); *State v. Thacker*, 164 S.W.3d 208, 235 (Tenn. 2005) (public opinion survey dictated venue change from Dyer County to adjacent Lake County).

C. Procedural Considerations: Timing of the motion for change of venue

There are two remedies for extreme "undue excitement" or profound pretrial publicity: a continuance or a change of venue.

A statutory provision allows the trial judge to grant a continuance "because of too great excitement to the prejudice of the defendant."[9] The factors regarding a continuance due to prejudicial excitement are varied,[10] and, in general, the continuance is within the discretion of the judge.[11] However, sometimes, a continuance must be granted.

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[9] T.C.A. § 40-14-108. Prior to this statute, which was enacted in 1875, another law, enacted in 1827 and since repealed, provided for an automatic continuance to another term because of "great excitement." See *John v. State*, 38 Tenn. 49 (1858).

[10] *See* 39 A.L.R. 2D 1327. See also the extensive citations in *U.S. v. Hoffa*, 156 F. Supp. 495, 500-509 (S.D.N.Y. 1957).

[11] *King v. State*, 91 Tenn. 617, 20 S.W. 169 (1892); *Hughes v. State*, 126 Tenn. 40, 148 S.W. 543 (1912); *State v. Poe*, 76 Tenn. 647, 1881 WL 4469 (1881) (sound discretion does not mean an

In the leading case of *Caldwell v. State*, 164 Tenn. 325, 48 S.W.2d 1087 (1932), the defendant was charged with fraudulent breach of trust arising out of lost funds attendant to the failure of his bank. The defendant requested a continuance supported by affidavits of more than "a hundred leading citizens" relating to popular prejudice against the defendant due in part to the failure of banks in general which was certainly prevalent during the era. The court reversed. The court held that the "setting of the trial was ill-timed to the manifest prejudice of the defendant." The court concluded:

> This issue was submitted to a jury drawn from a public whose interest had been aroused by bank failures and by the financial distress of the entire community, fanned and kept alive by continued broadsides from an active and influential press, and by legislative invective and investigation, to the very day the trial was begun. Affirmative testimony that members of the jury were in fact influenced by this public clamor to agree to the conviction was controverted, but the affirmative testimony is sufficient to reflect somewhat upon the integrity of the verdict.

Id.

Officer Delke hoped that perhaps the passage of time might have abated the concern, but such is not the case and he is now compelled to seek a change of venue

This case is still in the early, pretrial stage of discovery. Rule 21(c), Tenn. R. Crim. P., provides that the motion for change of venue must be "made at the earliest date after which the cause for the change of venue is said to have arisen."[12]

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arbitrary discretion which may be reversed for abuse); *Dowlen v. State*, 2 Tenn. Crim. App. 24, 450 S.W.2d 788 (1968) (newspaper articles).

[12] It should be noted that the defense also relies on Tenn. Code Ann. § 20-4-201 (1) which permits change of venue in criminal cases "upon good cause shown." This statute contains no temporal filing requirements.

The timing of this motion is appropriate for several reasons. First, and most importantly, since the “passage of time” is a factor in the change of venue analysis it would have been premature to seek a change in venue before it could be determined whether the undue influences had subsided. Second, the Defense did not receive discovery until a few months ago, which was extensive. A full review of the State’s evidence was necessary to assess potential defenses and issues that may arise, including those relevant to public sentiment. Third, it has taken time to locate a jury expert, commission the survey, conduct the survey, analyze the survey, research the relevant laws and cases, and then put together this motion and accompanying documentation.

This Motion is being filed at the first opportunity at which meaningful affidavits and proof can be presented to this Court. There can be no prejudice to adjudicating this Motion at this time given that the Defense has conducted the necessary opinion polls. No trial date has yet been scheduled that would need to be delayed. The Defense would ask the Court to set this motion for an evidentiary hearing to allow the State to respond so the Court can determine the merits in consideration of the multiple factors addressed in *State v. Hoover*.

D. *State v Hoover* factors – Publicity

The first four *Hoover* factors are as follows:

1. The nature, extent, and timing of pretrial publicity.
2. The nature of publicity as fair or inflammatory.
3. The particular content of the publicity.

4. The degree to which the publicity complained of has permeated the area from which the venire is drawn.

The factors have been addressed earlier under the federal constitutional standard; all weigh heavily in favor of Officer Delke.

E. *State v Hoover* factors – Publicity Outside Davidson County.

The fifth *Hoover* factor considers the degree to which the publicity circulated outside the area from which the venire is drawn. "The rationale for giving consideration to this factor would appear to be that should the pretrial publicity elsewhere be actually or potentially as capable of creating a prejudice against the defendant as the pretrial publicity in the place scheduled for trial, then a change of venue would not assure the defendant a more fair and impartial trial." 33 A.L.R.3d 1.

The media cited in this motion primarily comes from mainstream television and newspapers in Middle Tennessee. Thus, residents of adjacent counties such as Wilson, Rutherford or Williamson certainly have been exposed to the "Nashville press." However, as we know, the "mere fact that jurors have been exposed to pretrial publicity will not warrant a change of venue." *State v. Sexton*, 368 S.W.3d 371, 387 (Tenn. 2012).

Because Davidson County is a single-county judicial circuit, Tenn. R. Crim. P. 21(d)(2) requires that any change of venue must be to the nearest county where the same cause for change of venue does not exist. There has been no suggestion that residents of Wilson, Rutherford, or Williamson Counties have engaged in protests or community wide referendums. Thus, venue could be – and may be required to be – changed to counties

adjacent to Davidson County. This would have the additional advantage of not sequestering the jury.[13]

While this case involves a national issue of police-involved shootings of African Americans, there is no suggestion this case has received pervasive national[14] or even extensive state publicity. To cement the issue, public opinion surveys of Hamilton County establish low case recognition and further do not reveal significant prejudice against Officer Delke as is found in Davidson County. Thus, the fifth *Hoover* factor weighs in favor of Officer Delke.

F. *State v Hoover* factors – Time from release of publicity to trial.

The sixth *Hoover* factor considers the time elapsed from the release of the publicity until the trial. As has been noted, the publicity is continuing and has reached a new crescendo on the anniversary of the shooting just a month ago. There is nothing to suggest the publicity will subside, particularly once the trial actually begins. Thus, the sixth *Hoover* factor weighs in favor of Officer Delke.

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[13] The federal court located here in Nashville conducts trials with jurors from outside Nashville with no problems.

[14] *But see New York Times*, March 12, 2019: "The family of a black Tennessee man who was shot and killed by a white police officer in Nashville in July sued [Officer Delke] and the city on Monday, saying that its Police Department discriminates against black people and that its officers are too quick to use lethal force…Joy S. Kimbrough, who is representing Mr. Hambrick's family, said at a news conference in Nashville on Monday that what was done to Mr. Hambrick was 'beyond some misconduct.' She added, 'We want the responsible party to be responsible for their actions.'"

G. *State v Hoover* factors – Participation of Parties in Publicity

The seventh *Hoover* factor is the "participation by police or by prosecution in the release of publicity." In *People v Luedecke*, 22 App Div 2d 636, 258 NYS2d 115 (1965), the court found that pretrial publicity required that the defendant, indicted for murder, be granted a change of venue. The court stated that the active participation by not only the law enforcement officers but also the district attorney in the release of prejudicial publicity had the effect of "poisoning the fountain of justice before it began to flow."

Such "poisoning the well" here included the prosecutor's release of the shooting video without significant additional context, such as the facts that Mr. Hambrick had a large semiautomatic pistol in his hand at the time he was shot; that Officer Delke gave repeated verbal commands and warnings that went unheeded; that there had been a prior pursuit in which Mr. Hambrick drove recklessly around other cars at a high rate of speed; and that the poor quality of the video meant that significant amounts of movement by both men might not have been captured and displayed. Once the video was released without any of these other contextual circumstances, Officer Delke's fair trial rights with a Davidson County jury evaporated. As one article reported:

> Surveillance video, released by the prosecutor, shows 25-year-old Delke chasing Hambrick. The officer opens fire on Hambrick, who does not appear to turn toward Delke as the officer later claimed. He hits Hambrick twice in the back. After Hambrick falls to the ground, the officer circles the dying man while continuing to point his weapon at him.

Cop 'Followed Training' When He Shot A Black Man in the Back, Lawyer Says Officer Andrew Delke is the first Nashville cop charged with criminal homicide for an on-duty shooting. Written By News One Staff, Posted January 6, 2019. Exhibit 6, Page 00149.

Mr. Hambrick's family attorney also added to the media frenzy surrounding the video release:

> [Mrs. Hambrick] sat next to [her] attorney Joy Kimbrough. She released information that police officials had not yet made public. Kimbrough said Officer Delke shot Daniel three times in the back and in the back of his head. **"He was cuffed and left - left there like a dog,"** Kimbrough said. "I hope that they do what is right. I hope that justice is done. . . . **If there's ever a case of premeditated first degree murder, this is it.** He stops and takes his time and makes sure he gets his shot," Kimbrough said.

'I Just Want Justice for My Son': Family Calls for Officer To Be Charged With Murder Channel 5 Posted: 5:56 AM, Aug 09, 2018. Exhibit 6, Page 001154. (emphasis added).

Tennessee cases not only look to the actions of the prosecutors (and information released by the police) but consider defense activity. *See Miller v. State*, 520 S.W.2d 729 (Tenn. 1975) (defendant's pretrial activities also "created some notoriety in the community" due to the filing of "numerous pretrial motions" and suing the sheriff). The Defense fully acknowledges issuing statements in response to the video release and allegations made by the prosecutor:

> Although attorneys for Delke declined to comment for this story, citing the ongoing case, the officer's defense is tied to claims he adequately followed his training. In previous comments to the media, District Attorney Glenn Funk said similar arguments about following orders were used during the war crimes tribunals at Nuremberg after World War II and the Holocaust. Such comments, Delke's attorney David Raybin said, were akin to the DA declaring war on the police force.

Nashville has changed since an officer killed Daniel Hambrick a year ago, but how much? Mariah Timms, THE TENNESSEAN Published July 26, 2019. Exhibit 6, Page 001004.

> Nashville police officer Andrew Delke's defense attorneys said Monday that District Attorney Glenn Funk has "declared war on the police department." Nothing, Funk's office said, "could be further from the truth." ……During the preliminary hearing, which spanned two days, Delke's defense team said the officer was following his training when he saw Hambrick holding a gun before engaging in a foot pursuit and shooting him in the back. . . .
>
> Delke's defense team is led by Nashville attorney David Raybin, who [is] also the counsel for the local branch of the Fraternal Order of Police. Funk compared that defense to an argument "used at Nuremberg" when trials were held against Nazi leaders. Funk pushed back at the defense's contention that Delke had to shoot Hambrick as he ran away. “There were a number of options that were available,” Funk said during the hearing, suggesting Delke could have stopped, sought cover and called for help.
>
> Monday, Raybin fought back. "By making that statement, the district attorney Glenn Funk has functionally declared war on our police because all of our officers are trained in an identical fashion," Raybin said. “Let me be clear, Nashville police officers are not Nazis.”

Delke lawyers: DA Glenn Funk 'declared war' on Nashville police with Nuremberg comparison Mariah Timms, THE TENNESSEAN Published 5:41 p.m. CT Jan. 7, 2019. Exhibit 6, Page 001121.

The Defense response was in keeping with ethical standards which permit – and indeed contemplate – appropriate push back to “mitigate substantial undue prejudice created by the statements made by others.[15] It is significant that Defense Counsel’s

[15] RULE 8: TENNESSEE RULES OF PROFESSIONAL CONDUCT. RULE 3.6: TRIAL PUBLICITY [7]. Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public

statements were made after and in response to the video release and the surrounding publicity from the media, law enforcement, the prosecutor, not to mention often wildly inaccurate and inflammatory commentary across social media including suggestions that Mr. Hambrick's gun had been "planted" by police and other outrageous statements. *See also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 (1991):

> An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.

The seventh *Hoover* factor: the "participation by police or by prosecution in the release of publicity," weighs heavily in favor of a change of venue. The prosecutor here may have had the best of intentions in informing the public of the events surrounding the shooting. [16] His good or bad faith is not the test. It is, instead, the effect that decision had

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response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate substantial undue prejudice created by the statements made by others.

[16] "Nashville District Attorney General Glenn Funk's office said the footage [of the shooting] was released 'in an effort to show transparency as much as possible during this investigation,' adding that the investigation is expected to be finished within the next two weeks."

Nashville police shooting video released; review announced. August 9, 2018 Associated Press Exhibit 6 to Affidavit of David Raybin, page 001172

on Officer Delke's fair trial rights. Indeed, perhaps the proper balance is for police shooting videos to be released promptly (notwithstanding the fact that important context may be missing) for the benefit of the public so long as the accused receives a change of venue when the video generates the amount of controversy seen here.

H. *State v Hoover* factors – Severity of offense and probable defense

The eighth factor addressed in *State v. Hoover*, 594 S.W. 2d 743 (Tenn. Crim. App. 1979), concerns the severity of the offense charged. Here, Officer Delke is charged with a murder in the first degree, the most serious offense in our law. Officer Delke is on trial for his life,[17] and, thus, should be accorded every remedy the law permits to guarantee his fair trial rights.

The nature of the offense factor should also consider the nature the defense to determine if the public opinions and publicity would affect a fair decision on Officer Delke's defenses. This is critical since the burden is on the State to disprove justification defenses—self-defense, defense of others, law enforcement use-of-force defenses—beyond a reasonable doubt: "If the issue of the existence of a defense is submitted to the jury, the court shall instruct the jury that any reasonable doubt on the issue requires the defendant to be acquitted." Tenn. Code Ann. § 39-11-203(d).

[17] And when Officer Delke asserts he is on trial for his life, such is an accurate statement. "An attorney for the white Chicago police convicted in the fatal shooting of black teenager Laquan McDonald says the officer was beaten by fellow inmates within hours of his transfer from an Illinois prison to a federal prison in Connecticut." USA TODAY, Published 12:49 a.m. ET Feb. 14, 2019.

Unlike civilians, who sensibly run from danger, police officers must run toward danger. All jurisdictions acknowledge that officers may be required to use deadly force and thus provide for the justification defense of law enforcement authority. As a police officer, Delke was authorized to use deadly force and was justified in using deadly force under Tenn. Code Ann.§ 39-11-620. But the question here is whether a Davidson County jury will truly put the burden on the State to negate the justification defenses, given the toxic atmosphere engendered by the publicity, the referendum, and the hard lines already drawn in this community.

Because this is part of the justification defenses, use of deadly force by a law enforcement officer is a "defense" which requires the government to negate the elements of the defense beyond a reasonable doubt in a jury trial.[18] Thus, the State must prove beyond a reasonable doubt that the conduct was *unjustified* to meet the components of the burden of proof requirements of Tenn. Code Ann. § 39-11-201 regarding the justification defense of law enforcement authority.

> Justification defenses, such as self-defense and law enforcement authority, are common in every jurisdiction. They share the characteristic of exculpating a person whose conduct otherwise would constitute a criminal offense, because the conduct is accepted or encouraged given the presence of special justifying circumstances. For example, a police officer's conduct in making an arrest may satisfy the requirements of assault, but she is free from liability if that conduct also satisfies the requirements of the law enforcement justification for the use of force.

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[18] *See also State v. Belser*, 945 S.W.2d 776, 782 (Tenn. Crim. App. 1996): "The state has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. Tenn. Code Ann. § 39–11–201(a) (3) provides that 'No person may be convicted of an offense unless each of the following is proven beyond a reasonable doubt: . . . The negation of any defense to an offense defined in this title. . . .' Self-defense qualifies as such a defense. See Tenn. Code Ann. §§ 39-11-601 and 39-11-611."

Paul H. Robinson, John M. Darley, Testing Competing Theories of Justification, 76 N.C. L. Rev. 1095, 1096–97 (1998).

The Tennessee law enforcement authority defense, in full, with its Sentencing Commission comments provides:

Tenn. Code Ann. § 39-11-620. Deadly force; law enforcement officers

(a) A law enforcement officer, after giving notice of the officer's identity as such, may use or threaten to use force that is reasonably necessary to accomplish the arrest of an individual suspected of a criminal act who resists or flees from the arrest.
(b) Notwithstanding subsection (a), the officer may use deadly force to effect an arrest only if all other reasonable means of apprehension have been exhausted or are unavailable, and where feasible, the officer has given notice of the officer's identity as such and given a warning that deadly force may be used unless resistance or flight ceases, and:
(1) The officer has probable cause to believe the individual to be arrested has committed a felony involving the infliction or threatened infliction of serious bodily injury; or
(2) The officer has probable cause to believe that the individual to be arrested poses a threat of serious bodily injury, either to the officer or to others unless immediately apprehended.

COMMENTS OF THE TENNESSEE SENTENCING COMMISSION
This section is a codification of the principles set forth by the United States supreme court in *Tennessee v. Garner*, 465 U.S. 1098 (1985). It is identical to § 40-7-108. Subsection (a) requires a law enforcement officer to give notice of his or her identity as an officer in order to be justified in using any force to make an arrest. The amount of force justified is only that reasonably necessary to accomplish the arrest.

Subsection (b) allows justification for the use of deadly force in effecting an arrest under very limited circumstances: (1) all other means of apprehension are exhausted or are unavailable; and (2) where feasible, the officer has given notice both of his or her identity as an officer and that deadly force may be

> used; and (3) the officer has probable cause to believe the individual has committed a felony involving threatened or inflicted serious bodily injury or poses a threat of serious bodily injury unless he or she is immediately apprehended. The *Garner* decision made drastic changes in the law in Tennessee that previously allowed an officer to use deadly force if necessary to effect the arrest of any felon.

Counsel is not aware of any other prosecution in Tennessee of an officer for shooting someone in the line of duty in circumstances such as presented here. Tenn. Code Ann. § 39-11-620 is not even cited in any Tennessee criminal case and there are no pattern jury instructions on this. The Court will note that the Sentencing Commission comments to Tenn. Code Ann. § 39-11-620 provide that the statute was derived from *Tennessee v. Garner,* 465 U.S. 1098 (1985), which is the seminal decision of the United States Supreme Court governing police use of force.

While it has no burden to do so, the Defense will argue and present evidence to the jury that the shooting here fell within the Tennessee statute and was justified. The Defense will also argue that state cannot sustain its burden of proof to negate the justification defense beyond a reasonable doubt and that reasonable doubts on the issue compel an acquittal.

But how will jurors assess Officer Delke's justification defenses through the veil of prejudicial pretrial publicity? The following editorial in the largest circulation paper in the city profoundly misstates the issues:

> What we know is that he shot and killed Daniel Hambrick on July 26 after a pursuit in North Nashville. The issue is: Was he justified to do so? ….
>
> Was Daniel Hambrick truly a danger? True, an affidavit states that Hambrick held a gun when Delke pursued him. But was Delke justified in pursuing him? And was Hambrick a danger to police and the public? The video footage of the shooting is disconcerting and, at the very least, calls into question Delke's judgment. The shooting inflamed tensions between Nashville's African-American community and the police — which have been simmering for decades of injustice, abuse of power and mistrust.
>
> Delke is white; Hambrick was black. ….
>
> And, while he will serve as a symbol for communities long aggrieved by police brutality and abuse of power, this case should be about Delke and his actions. …
>
> Did he abuse his power? Did he overstep his authority? Did he unlawfully kill Daniel Hambrick? …

THE TENNESSEAN *Opinion*, Editorial Sept. 28, 2018. Exhibit 6, Page 001081.

This Editorial – which again refers directly to the video – purports to suggest the very questions jurors will be asked to resolve. But the Editorial fails to articulate the settled legal doctrine that that it is the State's burden – beyond a reasonable doubt – to show the shooting was unjustified and not the other way around. However, the massive publicity has created a narrative of preordained guilt deeply engrained in the public conscious. This type of coverage can be particularly caustic, where here, it has unalterably eroded the presumption of innocence standard.

A change of place of trial is required if Officer Delke is to receive the "fair trial by a panel of impartial, 'indifferent' jurors" guaranteed by the United States Constitution. *Irvin*

v. Dowd, 366 U.S. 717, 722 (1961). As stated in *Sampson v. United States*, 724 F.3d 150, 163 (1st Cir. 2013), "[t]he right to an impartial jury is nowhere as precious as when a defendant is [as here] on trial for his life." Rooting out the overwhelming prejudice—even with the most thorough voir dire imaginable—is an impractical and unrealistic undertaking that cannot overcome prospective Davidson County jurors' powerful biased opinions to this case. Those few jurors who survive the sifting process of voir dire will not be representative of the community, the risk of seating biased jurors is too high, and in any event the appearance of impartiality cannot survive the endeavor.

Simply put, the presumption of prejudice precludes both actual and apparent impartiality and undermines public confidence in the proceedings. The presumption cannot be overcome or cured. Thus, given that he is on trial for his life, the eighth *Hoover* factor weighs heavily in favor of Officer Delke.

I. *State v Hoover* factors – The absence or presence of threats, demonstrations, or other hostility against the defendant.

The ninth *Hoover* factor addresses hostility to the defendant. The media attention to this case has been unrelenting. There have been rallies and marches and public protestations that Officer Delke will "not get away with it."

Exhibit 6, compiled by counsel David Raybin, contains multiple articles cited in this Memorandum. These include outrageous social media comments on both sides. They speak for themselves in comments by and large by people who are not shy in attaching their names to their opinions.

A Tennessean editorial proclaims that "mob rule, malleable public opinion and social media commentary should never replace a trial. THE TENNESSEAN Opinion, Editorial Sept. 28, 2018. Exhibit 6, Page 001081.That such an editorial was even written leads to the inescapable conclusion that the writer's concerns can only be addressed by a change of venue with jurors who have no preset agenda.

An unprecedented factor which can certainly be interpreted as hostility to the defendant is the effect of the Citizen's Oversight Board referendum and the charter amendment. As noted earlier, Nashville had on the ballot last year an amendment to the Charter to create a Citizen's Oversight Board (COB) which would have subpoena power and would investigate alleged wrongdoing of Nashville police officers. In the attached *Atlantic* article, it is suggested that the referendum was prompted primarily by an earlier police-related shooting in Nashville. As the article notes, the later shooting involving Officer Delke was significant in getting sufficient additional signatures for the referendum: "Journalists connected the [Delke] shooting to the campaign for police oversight." *Who Will Hold the [Nashville] Police Accountable*? *The Atlantic*, July 25, 2019.

> But activists say they've seen some progress in the past year. Hambrick's death pushed forward a years-long movement to form an independent civilian oversight board that will investigate allegations of police misconduct.
>
> In the week after Hambrick's shooting, organizers got the thousands of signatures they needed to put the issue on the ballot. Voters approved the measure with sweeping margins, and an 11-person commission was selected in January.

One Year After Daniel Hambrick Was Shot By A Police Officer, What's Changed? Nashville Public Radio July 28, 2019, Exhibit 6, page 001015.

Within 90 days of the prosecutor's release of the shooting video, the citizens of Nashville voted on the referendum to create the COB; 134,371 votes were in support and 94,129 votes were against. The COB became law. The COB itself was subject to intense publicity on both sides with community activists advocating for the law and the Fraternal Order of Police advocating against passage.[19]

On top of this, the legislature enacted statutes restricting some of the power of community oversight boards in response to passing the Nashville COB. *See* Public Chapter 320. *See also Fraternal Order of Police v. Metropolitan Government of Nashville*, 2019 W.L. 169092 (Tenn. App. 2019), which addresses litigation filed by the Fraternal Order of Police against the City about the required number of signatures on the referendum ballot. This litigation was also subject to media attention.

The citizens of Nashville functionally voted on many of the very issues addressed in this case. Multiple sources have identified that this case may well have triggered the majority vote for passage of the COB Charter Amendment:

> Community Oversight Now 2:04 PM, Sep 28, 2018:
>
> We are encouraged by today's move toward accountability with the [arrest] of Officer Andrew Delke by Metro Nashville DA Glenn Funk for the July 26, 2018 homicide of Daniel Hambrick. We stand with his family and the community that was traumatized by his death.

[19] The text of the Community Oversight Board referendum for Amendment to the Charter, the State statute restricting sam, the Election Commission vote count, and appellate litigation regarding the legality of the referendum vote appear as Exhibit 8 to the Affidavit of David Raybin.

> While the news is encouraging in regards to this decision, Community Oversight Now reinstates its insistence there be independent oversight of policing in Nashville. There has long been a call for more transparency in the investigations, training and misconduct of Nashville police officers. There has been a tone-deaf response by all departments of local government involved regarding police actions. The video footage of Delke's execution of Hambrick was horrifying. Shooting a man in the back who is unarmed and in the process of running away from an officer is entirely unacceptable.
>
> The February 10, 2017 shooting of Jocques Clemmons reignited a call for independent oversight of policing when Officer Joshua Lippert fired three shots into the back of Mr. Clemmons as he ran from a traffic stop. This came on the heels of eight disciplinaries that found Lippert had been written up for overly aggressive responses to citizens when detaining them. In the case of Andrew Delke there are equally egregious documented violations where he went well beyond any reasonable response when seeking to detain persons.
>
> The coalition of organizations called Community Oversight Now, and thousands of Nashville citizens, worked tirelessly on a referendum that allows voters to decide on the oversight process. With the decision today to indict Officer Delke we are both grateful for the indictment and convinced moving toward this referendum was the right thing to do. When Nashville votes on November 6th, the democratic process can maintain this momentum by voting FOR Amendment 1."

Delke Charged: Mayor, TBI React to Decision, CHANNEL 5, SEP 28, 2018. Exhibit 6, Page 001126.

Thousands of citizens signed the referendum petition. Their names are matter of public record. Since they had to be citizens of Davidson County, all are potential jurors. And as noted, over 100,000 people voted for the COB Charter Amendment. Without doubt, that would be a significant issue to be explored during jury selection.

The ninth *Hoover* factor favors Officer Delke given the unique circumstances that the community that will judge him has already spoken. Change of venue will avoid this issue completely.

J. *State v Hoover* factors – Size of the area from which the venire is drawn.

The tenth *Hoover* factor is the size of the area from which the venire is drawn. This has been addressed in the federal change of venue discussion. See also the remarkably similar case of *Ex parte Smith*, No. 1171025, 2019 WL 168425 (Ala. Jan. 11, 2019), reh'g denied, No. 1171025, 2019 WL 1716352 (Ala. Mar. 29, 2019), where, in an officer-involved shooting, the Alabama Supreme Court found that pretrial publicity warranted a change of venue away from Montgomery. The court determined there was "presumed prejudice" resulting "from community saturation with such prejudicial pretrial publicity that no impartial jury can be selected."

The tenth *Hoover* factor weighs in favor of changing venue. While "size usually matters," the nature of the hostility and publicity involving Officer Delke has reached potentially combustible levels in a city of over half a million people. If venue was changed in police-related shootings in Los Angeles and Detroit, it must be changed in Nashville.

K. *State v Hoover* factors – Affidavits, hearsay or opinion testimony of witnesses.

The eleventh *Hoover* factor concerns affidavits, hearsay or opinion testimony of witnesses. The burden is on the defendant to advance enough facts to justify a change of

venue. *See generally State v. Sexton*, 368 S.W. 3d 371 (Tenn. 2012). The Court must consider a vast amount of information in determining whether to change venue.

Rule 21(a), Tenn. R. Crim. P., requires that a motion for change of venue be accompanied by affidavits stating facts "constituting the alleged undue excitement or other cause of which the motion is based." While the ultimate decision to change venue must await the evidentiary hearing where this Court may consider "hearsay or opinion testimony of witnesses," *State v. Hoover*, 594 S.W. 2d 743 (Tenn. Crim. App. 1979), affidavits are mandatory to trigger the necessary evidentiary hearing. Given the number of *Hoover* factors which this Court must consider in determining the propriety of a change of venue, the affidavits must demonstrate the necessary cause for the venue change.

The Court may then examine witnesses at the evidentiary hearing to determine the issue. *Porter v. State*, 71 Tenn. 496 (1879). Typically, the affidavits recite newspaper articles and may even include a survey showing a high degree of knowledge of the facts. *See, e.g.*, *State v. Cherry*, 638 S.W. 2d 683 (Tenn. Crim. App. 1982) (testimony from media representative); *Brady v. State*, 584 S.W. 2d 245 (Tenn. Crim. App. 1979) (numerous newspaper articles and a survey showing high degree of knowledge of facts).

Affidavits must be presented which establish that a fair trial is improbable in the county. Illustrative is *Gardner v. State*, 120 S.W. 816 (Tenn. 1908), where the defendant's motion for a change of venue on a murder charge was denied by the trial judge. The defendant submitted numerous affidavits (which are set forth in full in the court's opinion) to the effect that certain "night riders" were responsible for the killing and that public

outrage was such that a fair trial could not be held. The Tennessee Supreme Court reversed the conviction, noting that:

> We have seen that there are many affidavits directed to the condition existing in Montgomery and all the adjoining counties above named. Some of the affidavits are fuller than others, but all of them show that owing to the condition of the public mind existing in the counties named there would be a greater improbability of the plaintiffs in error obtaining a fair trial. It is particularly shown in these affidavits that the condition in Montgomery County is such that it would be difficult to find a jury that would feel safe in rendering a verdict of acquittal, even if they should believe the plaintiffs in error not guilty …. We think this request should have been granted, and the court below committed error in refusing to grant this change of venue.

Similarly, in *Gass v. State*, 172 S.W. 305 (Tenn. 1914), the defendant was charged with receiving a deposit knowing the bank to be insolvent. The defendant was the president of the bank and because of the bank failure he requested a change of venue which was denied by the trial judge. The appellate court reversed based on an affidavit which established

> that 5,000 or 6,000 depositors of the bank reside in Knoxville and Knox county; that great prejudice exists against Mr. Gass among the depositors and their friends, and these probably comprise a great many more than 5,000 or 6,000—perhaps 20,000—people, and that, furthermore, threats have been made against him, and that he has been the subject of bitter comment in the newspapers. It may be that notwithstanding all this he would have a fair trial in Knox County; yet, as it is important that the administration of the law should be free from the influences of partisan bias, we believe the interests of justice would be promoted by a change of the venue as prayed in the petition of the prisoner.
>
> 172 S.W. at 310

The attached affidavits here include that of an expert who conducted public opinion surveys which follows the modern method of determining venue changes. These affidavits more than justify an evidentiary hearing to demonstrate that a change of venue is required.

V. Prejudice to Officer Delke If Venue Is Not Altered

The prosecutor's release of the shooting video, the surrounding pretrial publicity, and the related public debate has created a prejudicial situation, which only a change of venue can remedy. Otherwise, Officer Delke's presumption of innocence is illusory:

> Delke is accused in the shooting death of Daniel Hambrick, who was killed after a traffic stop last July. Hambrick's family was in the courtroom for [Officer Delke's] arraignment [in Criminal Court]. "We've all seen the tape, we know what he did, and I guess that's just typical that he'd come in here and say not guilty instead of taking responsibility," said the family's attorney, Joy Kimbrough.

Metro police officer pleads not guilty in deadly shooting of suspect WSMV, Channel 4 Carley Gordon Posted Feb 13, 2019, Exhibit 6, page 001069.

Officer Delke does not lightly waive Davidson County venue, but he has no other choice. To try the case with Davidson County residents who have undoubtedly all seen or been exposed to the shooting video and, as voters, participated in the community oversight referendum will compel an unnecessarily protracted jury selection process. This could involve one-on-one jury questioning. The defense would insist that the State and defense alternate "who goes first" in questioning the prospective jurors, since the State should not have the opportunity at every pass to rehabilitate jurors. Given the extremely high

percentage of Davidson County residents who already hold strong feelings one way or the other, both sides will quickly run out of challenges well before a fair jury can be empaneled.

If the Court denies the motion for change of venue, then the defense must preserve the objection. This can only be accomplished by exhausting the defense peremptory challenges. *See, e.g.*, *State v. Thacker,* 164 S.W. 3d 208 (Tenn. 2005); *State v. Kyger*, 787 S.W. 2d 13 (Tenn. Crim. App. 1989) (failure to use challenges waived complaint about change of venue).

Officer Delke's attorneys do not wish to be forced to exclude jurors to preserve the change of venue issue. Officer Delke does not wish to exchange one right for another.

Another problem here concerns the truthfulness of the jurors, regarding their responses, about their knowledge in history of the case. As we are aware, prospective jurors may give dishonest answers to be excluded from jury service.[20]

In contrast, prospective jurors may want to be on a jury and may not express their true beliefs and opinions in a high-profile case.[21] This so-called "stealth juror" is a person

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[20] *An Examination of Website Advice to Avoid Jury Duty,* Volume 52, Journal of American Judges Association, Issue 3 (2016) (Before the advent of the Internet, individuals who desired to be excused from jury service either had to come up with an excuse on their own or ask a close friend or relative for advice. Now, the Internet allows information to be shared quickly and impersonally. This is a relatively new phenomenon that has not been explored in the context of efforts to avoid jury duty. To investigate relevant Internet search trends among American citizens, we conducted a Google Trends search utilizing the phrase "how to get out of jury duty" (which is, of course, one of many similar phrases a person may use")).

[21] *Nevers v. Killinger*, 990 F. Supp. 844, 864 (E.D. Mich. 1997), aff'd, 169 F.3d 352 (6th Cir. 1999)("The [State] argues that because each member of the jury swore to uphold his or her oath to only consider the evidence introduced at trial, this Court should not second guess the trial court's decision denying a transfer of venue. However, adverse pretrial publicity can create such a presumption of prejudice that the jurors' claims that they can be impartial should not be believed.").

who, motivated by a hidden agenda in reference to a legal case, attempts to be seated on the jury and to influence the outcome.[22] These prospective jurors are difficult to detect.[23] The potential for a "stealth juror" is particularly high in a case like this that both concerns an issue of public controversy and is itself a case that has been in the local spotlight.

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[22] *Stealth Jurors,* American Bar Association, (September 2012) (There is a type of difficult juror that deserves special attention. This juror is the stealth juror. While this juror holds the biases often present in the difficult juror, the stealth juror seeks to gain a seat on the jury by masking his or her bias in order to forward a personal agenda (e.g., convict a defendant, acquit a defendant, punish a corporation or party, right a perceived wrong, or insure that the verdict is consistent with the stealth juror's view of "justice"). Consider the following examples of jurors who may have had an agenda. A potential juror assures the court that he could be fair and impartial, which the court takes to be "sincere" and "honest." He is subsequently qualified to serve in a murder trial. However, prior to being seated on the jury, coworkers come forward and advised the court that the juror told them that he knew the defendant was guilty and he was going to "fry the bastard" if he made it on the jury. This juror was removed.).

[23] *Stealth Jurors' A Trial Pitfall in Era of Celebrity,* Chicago Tribune, February 2015 (In the Martha Stewart conspiracy case, there was the juror who didn't disclose he had been sued several times and jailed for allegedly beating his girlfriend. In the Scott Peterson double-murder case, there was the juror dismissed after telling fellow senior citizens on a gambling outing that the defendant "was guilty" and "I'm going to get him." In the Michael Jackson child-molestation case, nobody knows what secrets prospective jurors might be concealing when they face questioning in open court. But as lawyers prepare for the grilling, expected to begin Monday, they will be looking hard at the candidates whose answers appear too perfect, whose neutrality is too evident, whose eagerness to serve is too keen. Earlier this month, more than half of the 400 or so people summoned to the courthouse here indicated they could spend as long as six months on the jury. Their willingness to endure the tedium of a long trial immediately raised alarms among legal consultants: How many, they asked, may be less interested in delivering a fair verdict than in becoming media stars, selling their stories to the tabloids? And how many of these "stealth jurors" have deep-seated prejudices about the case that they know better than to reveal? "There's no question that each side really has to be worried," said San Francisco trial consultant Beth Bonora. "Maybe there's a hidden fan who can't believe that Michael Jackson is guilty, or doesn't care if he is, or just wants to acquit him. And the defense has to worry about people who have made up their minds that Jackson is so bizarre and difficult to understand that he must be guilty." Judges and attorneys agree that the great majority of people who serve on juries, however grudgingly, take their duties seriously. But a 2001 survey by DecisionQuest, *a Los Angeles trial-consulting firm, concluded that one of every seven Americans is willing to hide personal information in order to sit on a high-profile jury*.).

Jurors exposed to pretrial publicity may sit on a panel if they can demonstrate to the trial court they can put aside what they have heard and decide the case on the evidence. *State v. Gray*, 960 S.W. 2d 598, 608 (Tenn. Crim. App. 1997). But counsel cannot ask enough questions to fully explore a juror's preconceived notions where the juror may be motivated to sit on a jury to render a verdict one way or the other. Changing venue will avoid that risk.

VI. Conclusion

When a jury pool has been saturated with media coverage, many prospective jurors enter the courtroom with extensive knowledge and attitudes about the case. The prejudicial effects of preexisting attitudes occur at both a conscious and subconscious level and jurors who profess impartiality may not be fully aware of their bias or how it may affect them throughout the trial. The Supreme Court has recognized and questioned the adequacy of voir dire as a safeguard against the effect of pretrial publicity.

In *Irvin v. Dowd*, 366 U.S. 717 (1961), the Court found that "adverse publicity caused a sustained excitement and fostered a strong prejudice among the people" of the venue. *Id*. at 726. "27 of the 35 prospective jurors were excused for holding biased pretrial opinions" on the first day of jury selection. *Id*. The "'pattern of deep and bitter prejudice shown to be present throughout the community' . . . was clearly reflected in the sum total of the voir dire examination of a majority of the jurors finally placed in the jury box." *Id*. The Court stated, "The influence that lurks in an opinion [of guilt] once formed is so

persistent that it unconsciously fights detachment from the mental processes of the average man." *Id*. at 727.

In *Irvin*, the Supreme Court held:

> No doubt, each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, "You can't forget what you hear and see."

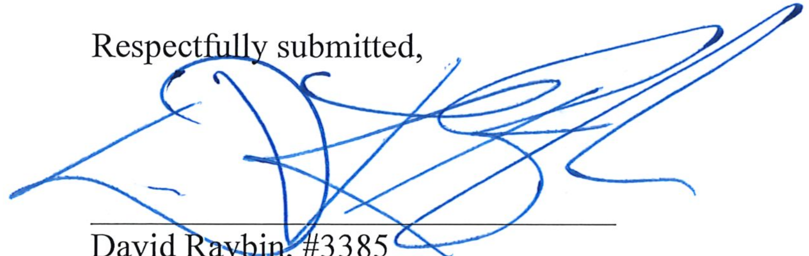
Dowd, 366 U.S. 717, 727-28 (1960).

Officer Delke wants a fair chance for an acquittal after a single trial. Yet the objective evidence documented in the accompanying materials—including polling, a plethora of media publications, the impact of the video released by the prosecution without full context, the results of the Community Oversight Board vote, and anecdotal comments—make it clear that a Davidson County jury is unlikely to provide the fair trial guaranteed to Officer Delke by the Constitution and other provisions of law.

For all these reasons, Officer Delke respectfully requests this Court change venue to the nearest county in which unfair prejudice does not exist.

FILED THIS THE 20th DAY OF AUGUST 2019

Respectfully submitted,



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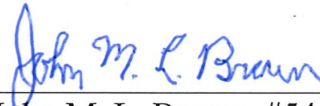

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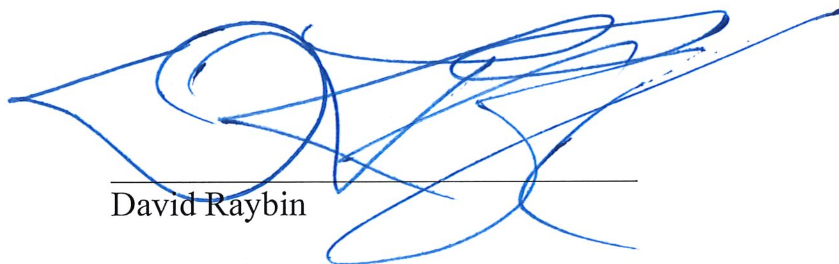
CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing motion and Affidavits from Bryan Edelman, Ph.D., Attorney David Raybin, and John Morris, incorporated by reference, have been served on Roger Moore, Deputy District Attorney, 222 2nd Avenue North, Washington Square, Suite 500, Nashville, Tennessee 37201 on this the 20th day of August 2019.



David Raybin