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**IN THE DISTRICT COURT OF FRANKLIN COUNTY, KANSAS
FOURTH JUDICIAL DISTRICT**

STATE OF KANSAS,)
Plaintiff,)
vs.) Case No. 2013 CR 104
)
KYLE FLACK,)
Defendant.)

STATE'S RESPONSE TO THE DEFENDANT'S MOTION FOR CHANGE OF VENUE

COMES NOW the State of Kansas, by and through Stephen A. Hunting,
Franklin County Attorney, in response to defendant's Motion for Change of
Venue:

ARGUMENTS AND AUTHORITIES

Constitutional Rights & Codified Law

The Sixth Amendment guarantees a defendant "in all criminal prosecutions" the right to a trial by an "impartial jury". U.S. Const. amend. VI; *State v. Carr*, 331 P.3d 544, 595 (Kan. 2014). This constitutional right is incorporated into and made applicable to the states through the due process clause of the Fourteenth Amendment. U.S. Const. amend. XIV; *Id.* The Kansas Constitution includes a "similarly worded guarantee" for its citizens in Section 10 of the Bill of Rights, which recognizes a defendant's right to a speedy and public trial "by an impartial jury of the county or district in which the offense is alleged to have been committed". Kan. Const. B. of R. § 10; *Carr*, 331 P.3d at 595.

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The U.S. Supreme Court has examined Sixth Amendment venue challenges in two contexts: presumed prejudice and actual prejudice. *Carr*, 331 P.3d at 596; *See also State v. Longoria*, 343 P.3d 1128, 1142 (Kan. 2015) (recognizing presumed and actual prejudice). The Kansas Supreme Court has likewise examined pretrial publicity venue challenges in the context of statutory prejudice. The Kansas Supreme Court looks to K.S.A. § 22-2616(1) when considering statutory prejudice.

K.S.A. § 22-2616(1) allows Kansans to change venues to prevent an impartial jury from commandeering the trial. Subsection (1) states: “In any prosecution, the court upon motion of the defendant shall order that the case be transferred as to him to another county or district if the court is satisfied that there exists in the county where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that county”. Kan. Stat. Ann. § 22-2616(1) (2014).

The Kansas Supreme Court has long held that media publicity alone has never established prejudice per se and that it is the defendant’s burden to show that “the publicity has reached the community to such a degree that it is impossible to get an impartial jury”. *State v. Grissom*, 840 P.2d 1142, 1192-93 (Kan. 1992).

Presumed Prejudice

A court should presume prejudice, even before voir dire, when “pretrial publicity is so pervasive and prejudicial that a court cannot expect to find an unbiased jury pool in the community”. *Longoria*, 343 P.3d at 1142. In evaluating the defendant’s claim of presumed prejudice, this court must review the seven *Skilling* factors. *Id* at 1143; *Skilling v. United States*, 561 U.S. 358, 381-85 (2010). The burden of proof under the *Skilling* test is high, usually only met when the defendant has shown that “publicity has

displaced the judicial process entirely or that the courtroom proceedings resemble more of a circus or a lynch mob". *Id.*

The seven *Skilling* factors are as follows: (1) media interference with courtroom proceedings; (2) the magnitude and tone of the coverage; (3) the size and characteristics of the community in which the crime occurred; (4) the amount of time that elapsed between the crime and the trial; (5) the jury's verdict; (6) the impact of the crime on the community; and (7) the effect, if any, of a codefendant's publicized decision to plead guilty. *Longoria*, 343 P.3d at 1143.

This court must carefully examine each *Skilling* factor to determine whether it weighs against or in favor of presuming prejudice. See, *State v. Longoria*, 343 P.3d 1128 (Kan. 2015) and *State v. Carr*, 331 P.3d 544 (Kan. 2014).

***Skilling* Factor (1): Media Interference**

The first *Skilling* factor is media interference with courtroom proceedings. Both courts of *Carr* and *Longoria* found no suggestion in the record that any media representative interfered with courtroom administration at any time. *Carr*, 331 P.3d at 600; *Longoria*, 343 P.3d at 1143.

Consequently, both courts held this factor weighed against the presumption of prejudice. *Id.* *Carr* clarified that this factor is only favorable in presuming prejudice when the courtroom "atmosphere is utterly corrupted by press coverage". *Carr*, 331 P.3d at 600. Without evidence of courtroom disruption, a trial judge is likely weigh this factor against the presumption of prejudice.

Like in *Carr* and *Longoria*, this court should find this factor weighs against the presumption of prejudice. The mere presence of media during courtroom proceedings

does not rise to the level of interference that the *Skilling* test is referencing. This court has outlined several procedures and guidelines for the conduct of the media during the proceedings, and the media presence up to this point has not been disruptive. Thus, the factor weighs against the presumption of prejudice.

***Skilling* Factor (2): Magnitude and Tone of Coverage**

The second *Skilling* factor is the magnitude and tone of media coverage. This court must examine the media's pervasiveness and whether it intends to influence the case's outcome. The magnitude of media coverage of both *Carr* and *Longoria* was vast. *Carr*, 331 P.3d at 600; *Longoria*, 343 P.3d at 1143. However, the Kansas Supreme Court held that the Sixth Amendment does not demand juror ignorance. *Id.* Generally, where media coverage is factual and not inflammatory, this factor weighs against presuming prejudice. *Id.*

A court's focal emphasis is the tone in which a crime and case are covered. *Id.* If media coverage is inflammatory, fictitious, and intends to influence the outcome, a court will likely weigh this factor in favor of presuming prejudice. Yet, the Kansas Supreme Court acknowledges that factual coverage, even of inadmissible facts, goes against presumption of prejudice. *Id.* Simply proving extensive coverage does not establish prejudice. *See Carr*, 331 P.3d at 600 (Pretrial publicity, even pervasive, adverse publicity, does not inevitably lead to an unfair trial).

For example, in *Carr* the court highlighted that heinous crimes are inherently sensational and, therefore, are covered as such. "A quadruple execution-style homicide and an attempted first-degree premeditated murder preceded by hours of coerced sex acts and robberies naturally gives rise to press coverage that some may fairly

characterize as ... sensational. It can hardly help but be so". *Carr*, 331 P.3d at 601. The court concluded that the factual tone of the media coverage compensated for its sheer magnitude. *Id.*

In this case, the defendant does not specifically identify which, if any, articles it considers inflammatory. The overall tone of the articles has been largely factual. Additionally, the coverage does not appear to endorse a desired outcome (i.e. guilty or innocent; death or life). Rather, the coverage in general appears to reflect facts presented or arguments made in court or through written pleadings.

Additionally, the prosecution purposely filed under seal many of its pleadings to help control potentially inadmissible evidence from being exposed through media coverage to the potential jury pool. Specifically, the motions pertaining the statements of the defendant and the question of those statements admissibility were filed under seal so as to help contain and control potentially unnecessary, inaccurate, inflammatory, and/or irresponsible media reporting of them. Further, whenever the prosecution addressed media outlets about this case, whether during the course of the investigation or the subsequent filing of the complaint and ensuing prosecution, the prosecution's remarks have been in accordance with the Kansas Rules of Professional Conduct and never in an attempt to try its case through the media.

Thus, the factor weighs against the presumption of prejudice.

***Skilling* Factor (3): Community Characteristics**

The third *Skilling* factor is the size and characteristics of the community in which the crime occurred. In *Carr* this factor weighed against presuming prejudice; in *Longoria* it weighed in favor of presuming prejudice. *Carr*, 331 P.3d at 601; *Longoria*,

343 P.3d at 1143. In *Carr*, the venue was located in Sedgwick County, containing the largest city in Kansas, thus having the largest population in the state to draw potential jurors. *Carr*, 331 P.3d at 601. Whereas in *Longoria*, the jury pool was selected from a relatively small population who holistically knew at least something about the case. *Longoria*, 343 P.3d at 1143. The Kansas Supreme Court in *Longoria* found that the county was not large enough to diminish the potential for a prejudicial jury, thus weighing this factor in favor of presuming prejudice. *Id.*

The prosecution acknowledges that the size of the population in Franklin County is more similar to that of *Longoria*, and dissimilar to that of the population size in *Carr*. In *Longoria*, the telephone survey revealed that 97% of the Barton County population could identify the case with no cueing. *Longoria*, 343 P.3d at 1143. However, unlike in *Longoria*, only 69% of those surveyed in Franklin County could recall this case without cueing. Only 84% could recall this case with one cueing and not until two cueing's does the defense team's number reach 93%.

Thus, the factor weighs against the presumption of prejudice.

***Skilling* Factor (4): Time Elapsed**

The fourth *Skilling* factor is the amount of time that elapsed between the crime and the trial. In both *Carr* and *Longoria* the court emphasized that, generally, public interest wanes over time. *Carr*, 331 P.3d at 602; *Longoria*, 343 P.3d at 1143. The court found in both cases that, although the passage of time did not completely erase the community's memory, a surveyed percentage decreased when the surveyors asked about specific details in the cases. *Id.* The lack of memory regarding specific details

resulted from passage of time. Therefore, this factor weighed against the presumption of prejudice. *Id.*

The more time that has elapsed between the crime and the trial the more likely a trial judge will weigh this factor against the presumption of prejudice. The less time that has elapsed between the crime and the trial the more likely a trial judge will weigh this factor in favor of presuming prejudice. Because the Kansas Supreme Court has weighed this factor against presuming prejudice in cases where over a year had elapsed, this court should weigh the time elapsed in this case against presuming prejudice. *See Longoria*, 343 P.3d at 1143 (crime occurred in August 2010, while the trial court ruled on the motion to change venue in March 2012); *See Carr*, 331 P.3d at 602 (17 months passed between the first motion to change venue and the crimes were committed).

In this case, the crimes were committed in late April and early May of 2013, and the crimes discovered, investigated, and charged the second week of May 2013. Additionally, the preliminary hearing was held in March 11 and 12, 2014. This case's trial is scheduled to commence on September 14, 2015. Additionally, the survey conducted by the defense team suggests that the percentage of people who have retained specific knowledge or facts about the case has decreased.

Thus, the factor weighs against the presumption of prejudice.

***Skilling* Factor (5): Jury's Verdict**

The fifth *Skilling* factor is the jury's verdict. In both *Carr* and *Longoria* the verdict was unknown at the time the trial judge ruled on the motion. *Carr*, 331 P.3d at 602; *Longoria*, 343 P.3d at 1144. Thus, in both cases, this factor carried no weight in review.

Similarly in *State v. Flack*, no jury verdict has been rendered, therefore this factor should carry no carry no weight in this court's decision.

***Skilling* Factor (6): Crime's Impact on Community**

The sixth *Skilling* factor is the impact of the crime on the community. In both *Carr* and *Longoria*, the court found this factor in favor of presuming prejudice. In *Carr* the court found sufficient evidence of widespread public reaction to the crimes, for example, the increased numbers of security systems purchased in reaction to the *Carr* home invasion. *Carr*, 331 P.3d at 602. Sufficient evidence of community impact was also found *Longoria*. For example, hundreds of individuals attended a vigil held for the deceased while also continuously posting comments on social media revealing showing strong public sentiment. *Longoria*, 343 P.3d at 1144. Additionally, the local newspaper editor testified that he intentionally covered *Longoria* because of its high public interest. *Id.*

In evaluating this factor in relation to this case, this court should find that there is not sufficient evidence of a widespread impact on the community for this factor to weigh in favor of presumed prejudice. The prosecution concedes that arguably hundreds of people attended a candlelight vigil the weekend after the discovery of the bodies and arrest and charging of the defendant. . However, there has been an insufficient showing of facts by the defendant surrounding media postings that demonstrate strong public sentiment to the point that impartial jurors cannot be impaneled. There have been no lynch mobs at the courthouse. There have been no riots or demonstrations outside the Franklin County Jail or Sheriff's Office.

Thus, the factor weighs against the presumption of prejudice.

***Skilling* Factor (7): Codefendant's Publicized Decision to Plead Guilty**

The seventh *Skilling* factor is the effect, if any, of a codefendant's publicized decision to plead guilty. In both *Carr* and *Longoria*, this factor was not applicable because there was no confession by anyone in either case. *Carr*, 331 P.3d at 602; *Longoria*, 343 P.3d at 1144. The court found that there was no "smoking-gun" type of information in either case to be found prejudicial. Where there is "smoking-gun" evidence or a codefendant's publicized decision to plead guilty the trial judge will likely find this factor in favor of presuming prejudice. Where there is neither, this factor is not applicable or weighs against presuming prejudice.

In this case, the prosecution has filed any motions pertaining to the defendant's statements and their subsequent admissibility under seal. The Ottawa Herald's media coverage of the motions hearings concerning the defendant's statements have been largely factual and not inflammatory. The mere existence of the defendant's statements and subsequent publication of the public hearings concerning these statements does not necessarily equate to presuming prejudice. The defendant fails to outline the correlation between his statements that have been argued over in open court and any perceived negative publicity. A defendant's statements are often times inherently prejudicial and this cannot be helped. Accordingly, the prosecution in this case has made a concerted, conscientious effort to curtail harmful media exposure regarding the defendant's statements prior to impaneling a jury.

Thus, the factor weighs against the presumption of prejudice.

Presumed Prejudice Conclusion

The standard for relief of presumed prejudice claims is extremely high. *Carr*, 331 P.3d at 598. A court must find that the publicity in essence displaced the judicial process, thereby denying the defendant his constitutional right to a fair trial. *Id.* Reversal of conviction will occur only where publicity created either a circus atmosphere in the courtroom or a lynch mob mentality such that it would be impossible to receive a fair trial. *Id.*

The Kansas Supreme Court in both *Carr* and *Longoria* found in weighing the seven *Skilling* factors there was no presumed prejudice. *Carr*, 331 P.3d at 604; *Longoria*, 343 P.3d at 1144. Both courts held that the defendant failed to show a “circus atmosphere” or a “lynch-mob mentality”. *Id.* This court, when looking to both of these precedential decisions when weighing these factors, should conclude the same in this case.

Statutory Prejudice

K.S.A. § 22-2616(1) provides that a trial court should transfer venue when the defendant shows “so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that county”. *Longoria*, 343 P.3d at 1144. The defendant has the burden to show prejudice in the community significant enough that there is a reasonable certainty he cannot obtain a fair trial without a venue change. *Id.* The trial judge uses this “reasonable certainty” standard when evaluating a change of venue request. *Id.*

In evaluating whether a venue change is necessary under Kansas statute § 22-2616(1), the court will weigh nine precedential factors: “(1) the particular degree to which the publicity circulated throughout the community; (2) the degree to which the publicity or that of a like nature circulated to other areas to which venue could be

changed; (3) the length of time which elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the ease encountered in the selection of the jury; (5) the familiarity with the publicity complained of and its resultant effects, if any, upon the prospective jurors or the trial jurors; (6) the challenges exercised by the defendant in the selection of the jury, both peremptory and for cause; (7) the connection of government officials with the release of the publicity; (8) the severity of the offense charged; and (9) the particular size of the area from which the venire is drawn”.

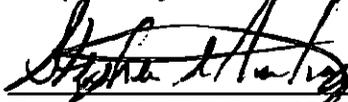
Longoria, 343 P.3d at 1145.

This court must carefully examine each statutory prejudice factor to determine whether it weighs against or in favor of statutory prejudice. The defendant maintains a high burden of proof when assessing the nine factors; it is the trial judge's sole responsibility to determine the weight carried by each. *See Longoria*, 343 P.3d at 1146 (record does not reveal any difficulties in selecting a jury in this case; the trial court rightly denied the motion); *See also Carr*, 331 P.3d at 610 (given the mix of evidence on the nine factors...we cannot say “no reasonable person” would have agreed with the trial judge's decision to deny defendant's motion for change of venue).

The defendant has not presented sufficient enough evidence to meet the high burden of proof associated with the above outline nine factors.

WHEREFORE, the State opposes the defendant's motion for change of venue and requests the court deny the defendant's motion.

Respectfully submitted,



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Attorney for the plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the original State's Response to Defendant's Motion for Change of Venue was fax filed on the 24th day of June, 2015, to:

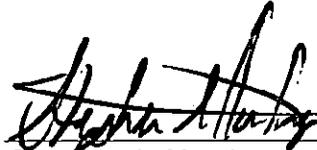
The Clerk of the Franklin County District Court
301 S. Main Street
Ottawa, KS 66067

and, I hereby certify that a true and accurate copy of the State's Response to Defendant's Motion for Change of Venue was mailed via USPS on the 24th day of June, 2015 to:

Maban Wright
Attorney for the Defendant
700 SW Jackson Street - Suite 500
Topeka, KS 66603

Timothy Frieden
Attorney for the Defendant
266 N. Main, Suite 210
Wichita, KS 67202

and, I hereby certify that a chamber copy of the State's Response to Defendant's Motion for Change of Venue was delivered to Hon. Eric Godderz on the 24th day of June, 2015 to:



Stephen A. Hunting, #21648
Franklin County Attorney