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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 RENEWED 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 Renewed 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).

Actual Prejudice

Actual prejudice occurs when “the effect of pretrial publicity manifested at jury selection is so substantial as to taint the entire jury pool”. *Longoria*, 343 P.3d at 1144. When evaluating whether there is actual prejudice, a court must “review the media coverage and the substance of the jurors’ statements at voir dire to determine whether a community-wide sentiment exists against the defendant”. *Id.* The Kansas Supreme Court also recognizes that the length of voir dire is an important factor in analyzing

actual prejudice. *State v. Grissom*, 840 P.2d 1142, 1192 (Kan. 1992). “The difficulty in selecting a fair and impartial jury is an important factor in weighing a claim for prejudice”. *Id.*

Potential jurors with preconceived notions of guilt alone do not establish a presumption of prejudice. *Carr*, 331 P.3d at 606. The court must not assess the question of “whether the community remembered the case, but rather whether the jurors at ... trial had such fixed opinions that they could not judge impartially the guilt of the defendant”. *Id.* A defendant must show more than a juror’s preconceived notion; they must show a juror’s notion is fixed. *Carr*, 331 P.3d at 606. If a potential juror has the ability to set aside his or her opinion of guilt, he or she can be deemed impartial. *Id.* at 606. For example, the court in *Carr* allowed four of the 12 jurors, who previously admitted to forming opinions of guilt, remain on the jury because they testified that they could ultimately set their opinions aside. *Id.*

In *State v. Grissom*, the Kansas Supreme Court held that pretrial media coverage alone is insufficient to establish actual prejudice. *Grissom*, 840 P.2d at 1192. In *Grissom*, the court found that at least two-thirds of the residents of Kansas had access to Wichita television stations. *Id.* When considered in conjunction with the Kansas City television markets, the court held it was clear that most of the state, if not all, had access to the extensive publicity surrounding the case. *Id.* The court emphasized that publicity was dispersed throughout a major part of the state and there was no reason to believe that a jury from another county in any adjacent district would render different verdicts. *Id.*

The defendant has not presented sufficient enough evidence for this Court to find actual prejudice exists. All of the juror's selected to decide this case have demonstrated under oath that their notions concerning the guilt of the defendant are not fixed. All have indicated that they understand and accept that the defendant is presumed innocent unless proven guilty beyond a reasonable doubt. A careful review of the record concerning the entire voir dire process clearly establishes this Court has protected the defendant's right to a fair trial by a fair and impartial jury.

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”.

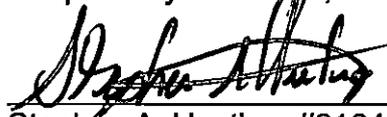
Longoria, 343 P.3d at 1145.

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 outlined 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 Renewed Motion for Change of Venue was fax filed on the 18th day of February, 2016, to:

The Clerk of the Franklin County District Court

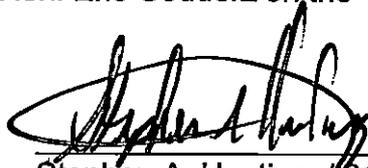
301 S. Main Street
Ottawa, KS 66067

and, I hereby certify that a true and accurate copy of the State's Response to Defendant's Renewed Motion for Change of Venue was emailed to mwright@sbids.org and tfrieden@sbids.org and via facsimile to 785-291-3979 & 316-0267-3756 and mailed via USPS on the 18th day of February, 2016 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 18th day of February, 2016 to:



Stephen A. Hunting, #21648
Franklin County Attorney