IN THE DISTRICT COURT OF FRANKLIN COUNTY, KANSAS

CRIMINAL DEPARTMENT

STATE OF KANSAS,	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 13 CR 104
	)	
KYLE FLACK,	)	
Defendant.	)	
	)	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR CHANGE OF VENUE

COMES NOW Kyle Flack, by through his attorneys, and submits this memorandum of law in support of his motion for change of venue.

I LEGAL STANDARD FOR CHANGE OF VENUE

"A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed.2d 942 (1955). It is the Defendant's Sixth Amendment right to be tried before an impartial jury. Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985). In the seminal case of Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1644, 6 L.Ed.2d 751 (1961), the Supreme Court stated:

> [A] juror must be as indifferent as he stands unsworn. His verdict must be based upon the evidence developed at trial. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender, or the station in life which he occupies. . . . The theory of law is that a juror who has formed an opinion cannot be impartial.

Doc#306

A presumption of prejudice may arise not only from publicity, but also from community prejudice. *See* United States v. Holder, 399 F.Supp 220 (D.S.D. 1975).

Kansas case law recognizes that the following factors are relevant to the determination whether venue should be changed:

> the particular degree to which the publicity circulated throughout the community; the degree to which the publicity or that of a like nature circulated in other areas to which venue could be changed; the length of time which elapsed from the dissemination of the publicity to the date of trial; the care exercised and the ease encountered in the selection of the jury; the familiarity with the publicity complained of and its resultant effect, if any upon the prospective jurors or the trial jurors; the challenges exercised by the defendant in the selection of a jury, both peremptory and for cause; the connection of government officials with the release of the publicity; the severity of the offense charged; and the particular size of the area from which venire is drawn.

State v. Jackson, 262 Kan. 119, 129, 936 P.2d 761, 770 (1997). Because of the pretrial publicity and negative community sentiment toward Mr. Flack in Franklin County, it is sufficiently clear that Mr. Flack cannot receive a fair and impartial trial in this county so as to require a change of venue.

II FRANKLIN COUNTY KANSAS JURY POOL

Franklin County had a 2013 population estimate of 25,740. *United States Census Bureau - State and County Quick Facts*[1] Of those, 24.8% were under the age of 18.[2] Those under the age of 18 are ineligible to serve as jurors.

---

[1]http://quickfacts.census.gov/qfd/states/20/20059.html (last accessed, 11/25/2014)

[2]http://quickfacts.census.gov/qfd/states/20/20059.html (last accessed, 11/25/14)

Remove from that those who are unable to understand the English language with a degree of proficiency sufficient to respond to a jury questionnaire form, those under an adjudication of incompetence, those convicted of a felony within the preceding 10 years, those who have served on a jury within the previous year, mothers who are breastfeeding and the size of the prospective pool shrinks even further. *See* K.S.A. 43-158. In Franklin County the pool shrinks still further as only those with a driver's license are eligible to be called for jury duty due to the method used by Franklin County to select jurors.

II PREJUDICIAL PRETRIAL PUBLICITY HAS GIVEN RISE TO A PRESUMPTION OF PREJUDICE

Mr. Flack is accused of the capital murder of a young woman and her18 month old daughter. He is also charged with the first degree murders of 2 men. News of the incident that form the basis of this charge has filtered down from the newsrooms to the television stations and newspapers of the community and finally to the day to day conversations of the residents of the county. The residents of this county have been exposed to a great deal of publicity concerning this case. The local newspaper has covered every major, minor, and inconsequential event remotely related to the case. This publicity, coupled with the day to day conversations of the citizens of Franklin County has created a prejudice against Mr. Flack such that he cannot obtain a fair trial. Where negative publicity permeates a community, prejudice is presumed. Coleman v. Zant, 708 F.2d 541, 544-45 (11th Cir. 1983). Courts should presume prejudice requiring a change of venue, 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. State v Longoria 301 Kan. 489 (March 6, 2015).

III BECAUSE A "REASONABLE LIKELIHOOD" EXISTS THAT COMMUNITY PREJUDICE WILL PREVENT A FAIR TRIAL, THE VENUE MUST BE CHANGED

In Sheppard v. Maxwell, 284 U.S. 333, 364, 85 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966), the Supreme Court set forth the constitutional standard for changing venue due to pretrial publicity:

> Due process requires that the accused receive a fair trial by an impartial jury free from outside influences. . . . Where there is a *reasonable likelihood* that the prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer to another county not so permeated with publicity [emphasis added].

The applicable ABA Standard provides:

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

ABA Standards, Free Trial and Free Press, Standard 8-3.3(b) (3rd ed. 1992).

This matter is currently scheduled to commence trial on September 21, 2015. Franklin County is a small enough community that the lingering effect of the pretrial publicity will not vanish. In fact, there is little question but that the filing of this motion itself will create yet more coverage of this matter within the local press. Exhibit 1 of the Memorandum in support of motion to intervene filed on May 19, 2015, in this case, with the Clerk of the District Court by the Ottawa Herald identifies over 60 articles put out in different forms of medium up to April 15, 2015. Given the strong community feelings of this case and the contentious reporting of the details of the case,

there is a reasonable likelihood that Mr. Flack cannot obtain a fair trial in Franklin County.

Pretrial publicity is not the only factor which can prejudice a potential jury and require a change of venue.

> The test is no longer whether prejudice found its way into the jury box at trial. . . . [T]he test is: Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as change of venue, to assure a fair and impartial trial.

Pamplin v. Mason, 364 F.2d 1,5 (5th Cir. 1966)(cited with approval in Groppi v. Wisconsin, 400 U.S. 505, 508 n.6, 91 S.Ct. 490, 492 n.6, 27 L.Ed.2d 571 (1971)).

K.S.A. 22-2616(1) provides:

> 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. (emphasis added)

IV VOIR DIRE WILL NOT SUFFICE TO PROVIDE THE DEFENDANT A FAIR TRIAL IN FRANKLIN COUNTY

The likelihood of assembling an impartial jury in Franklin County is very low. "A venire drawn from a fair cross-section of the community in theory and in fact is supposed to, and generally will, represent that community–and reflect biases and prejudices of that community–as every judge and lawyer who has picked a jury well knows." Fisher v. State, 481 So.2d 203 (Miss. 1985). Because of the documented prejudice against Mr. Flack, and the consequent probability of unfairness if he were to be tried in this county, this Court is required to change venue. "It is proper, and often preferable, to determine the place of trial prior to the actual trial of the case rather than afterwards." State v. Thompson, 266 Minn. 285, 386, 123 N.W.2d 378, 380 (1963). While voir

dire and jury selection are important components of due process, they are not an adequate substitute for a venue transfer.

The Supreme Court of California has debunked the notion that the availability of peremptory challenges suffice to protect against the jury partiality:

> Defense counsel . . . is placed in an unnecessarily awkward position: unless he exhausts all his peremptory challenges he cannot claim on appeal, in the absence of a specific showing of prejudice, that the jury was not impartial. Yet, convinced that he must go to trial because his motion for a venue change was at first denied and in all likelihood will not ultimately prevail, he may fail to use every peremptory challenge sensing that the jurors he has examined may be comparatively less biased than others who might be seated were his peremptory challenges exhausted.

Maine v. Superior Court, 68 Cal.2d 375, 375-76, 66 Cal.Rptr. 724, 728, 438 P.2d 372 (1968). Maine also notes the "problem of obtaining accurate answers on voir dire–is the juror consciously or subconsciously harboring prejudice against the accused resulting from widespread news coverage in the community." Maine, 68 Cal.Rptr. at 728. The latter concern has been discussed by the United States Supreme Court in several cases.

The jury selection process is "not always adequate to effectuate the constitutional guarantee" of due process of law in the face of community hostility. Groppi, 400 U.S. at 511. "[U]nder the Constitution a defendant must be given an opportunity to show that a change of venue *is* required in *his* case." Id.

In Irvin v. Dowd, 366 U.S. at 728, the Supreme Court addressed the efficacy of voir dire responses concerning the effect of pretrial publicity:

> No doubt each juror was sincere when he said he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellow is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.

Cf. Murphy v. Florida, 421 U.S. 794, 800, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975) ("the juror's assurances that he is equal to [the duty to set aside preexisting opinion] cannot be dispositive of the accused's rights.")

In Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), the Supreme Court implicitly recognized that venue transfer and voir dire do not serve the same purpose. In Rideau, a local television station three times broadcasted a 20-minute detailed confession; an estimated 24,000, 53,000, and 29,000 residents of the parish's 150,000 population watched these broadcasts. Id. at 724. The defendant's motion for change of venue was denied and he was convicted and sentenced to death. Id. at 724-25. Three members of the jury stated during voir dire that they had seen the broadcast, but the court denied the defendant's motion to strike these jurors for cause. Id. at 725. There was no indication that these jurors held a preexisting opinion as to the defendant's guilt. Id. at 732 (Clark, J., dissenting). These jurors also testified that they "could lay aside any opinion, give the defendant the presumption of innocence as provided by law, base their decision solely upon the evidence, and apply the law as given by the court." Id. Despite the jurors' protestations of impartiality, the Supreme Court ruled:

> [W]e do not hesitate to hold, without pausing to examine a particularized transcript of the voir dire examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.' Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death.

The Court reversed the conviction because venue should have been changed; the Court found the voir dire responses irrelevant. See also Coleman v. Kemp, 778 F.2d at 1543 ("we are satisfied that the conclusory protestations of impartiality in the voir dire are not sufficient to rebut the

presumption of prejudice.")

Irvin and Rideau stand for the proposition that where community hostility gives rise to a presumption of prejudice, the presumption is not rebutted by "the mere selection of twelve jurors against whom no challenge for cause may lie." Fisher, 481 So.2d at 215. The rule of presumed prejudice might require a change of venue even where other procedures could possibly result in the empanelling of a fair jury.

V JUDICIAL ECONOMY IS BEST SERVED BY A CHANGE OF VENUE

Not only does the adverse publicity prove the existence of a prejudicial community sentiment, as a practical matter, this strongly suggest the difficulty of seating a jury in this case. "Effective and economic judicial administration is not well served by calling an inordinate and unwieldy number of veniremen to see if an unbiased jury might be obtained, especially when it is already apparent that a substantial chance of intolerable prejudice exists." United States v. Engleman, 489 F.Supp. 48, 50 (E.D.Mo. 1980). At this point, 800 summons has been proposed to be sent out for the pool. If venue is changed as a result of voir dire, such logistical issues as transportation, lodging, and locating court facilities will arise, causing more expense and delay. See Id. In addition, if venue is not changed, sequestration may be required to avoid jury contamination. See Sheppard, 384 U.S. at 363 ("sequestration of the jury was something the judge should have raised *sua sponte* with counsel"); Patton v. Yount, 467 U.S. 1025, 1034, n.9, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) (sequestration of jurors noted in upholding refusal to change venue).

VI SKILLING FACTORS

In evaluating a claim of presumed prejudice a court is to review seven factors set out in Skilling v United States 561 U.S. 358, 381-85 (2010). They are:

> "(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."

State v Carr 300 Kan. 1, 62 (2014), State v Longoria 301 Kan. 489 (2015)

Media Interference: In this case, the media has been present in each proceeding in which this counsel was present. The media has been placed in the jury box. At the preliminary hearing there were numerous press personnel. A still camera was allowed and photos were taken. While the presence of the media did not disrupt proceedings, the presence was known and the sound of the camera shutter could be heard. It should be presumed the media will be present though out the trial. This factor should weigh to presumption of prejudice.

Magnitude and tone: Exhibit 1 of the Memorandum in support of motion to intervene filed by the Ottawa Herald identifies the various "articles" that the Herald has "published". It is the view of the defense in this case that some of these "articles" are inflammatory. This factor should weigh to the presumption of prejudice.

Size and characteristics of the community: The Franklin County jury pool appears to be somewhere over 15,000 and under 20, 000. See attached 2013 census. A study has been conducted of Franklin County. Defense anticipates testimony that a high number of residents are aware of the case. Further defense anticipates testimony, that there is a high level of involvement with this case by respondents in Franklin County. This factor should weigh to the presumption of prejudice.

Amount of time elapsed: The crime in this case was discovered in May of 2013. Trial is set to begin in September of 2015. Defense argues the lapse of time has not wiped out the

resident respondents of the survey memory that the crime occurred. Defense intends to present evidence regarding this through the study. Recollection of the crime is high among respondents. Personal involvement in the case is high among respondents. A high percentage of respondents currently hold the perception that Mr. Flack is guilty to some extent. Mr. flack is charged with four counts of murder with one of the victims being an 18 month old child. Crimes of this nature have staying power. This factor weighs in favor of presumed produce.

Verdict: The verdict has yet to occur and should have no impact as to the issue of presumed prejudice at this time.

Impact of the crime on the community: The case had a impact on the community. As noted in Interveners' memorandum **hundreds** attended a candlelight vigil and a small crowd stood outside the court house watching Mr. Flack being escorted to his first appearance. This factor weighs in favor of presumed prejudice.

Effect of publicity of defendant's statement: See Exhibit 1 of Memorandum in support of motion to intervene filed May 19, 2015. On March 11, 2014 the Ottawa Herald published a story entitled "Detective: Flack admitted to killing Steven White, but said someone else fired first shot". On June 14, 2014 the Herald again published a story entitled "Will statements in quadruple homicide be unsealed." Interveners' in their motion to vacate orders to seal discuss an article filed by the Lawrence World Journal relating to the sealing of a motion which contained a statement by Mr. Flack. Interveners' have sought to unseal court records. On April 9, 2015 the Ottawa Herald published an article entitled "Accused killer said fictional prison characters shot four Ottawa victims"

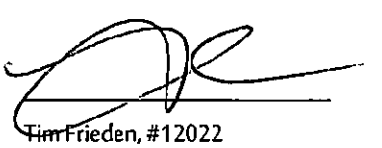
These kinds of media accounts of Mr. Flack's statement have a prejudicial effect. A high percentage of respondents to the survey believe Mr. Flack is guilty to some extent. A high

percentage of respondents agreed that the stories in the local media were accurate. The results of the study show that respondents for the most part are sure of their perceptions of the case, aware of the case, hold extreme positions regarding the guilt of Mr. Flack and are highly involved with the case and its outcome. This factor weighs in favor of presumption of prejudice.

VII CONCLUSION

Mr. Flack has been the subject of negative publicity regarding this case. The details of the case have been widely reported repeatedly. The prejudicial nature of pretrial publicity and extensive coverage of this case are such that a presumption of partiality may be found. "The nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality." Irvin, 366 U.S. at 723, quoting Reynolds v. United States, 98 U.S. 145, 156, 25 L.Ed.2d 244 (1878). The Defendant's right to a trial before an impartial jury, as guaranteed by K.S.A. 22-2616, sections 5, 10, and 18 of the Kansas Bill of Rights, and the Sixth and Fourteenth Amendments to the United States Constitution, will be violated unless venue is changed.

Respectfully submitted,



Tim Frieden, #12022
Death Penalty Defense Unit
266 N. Main, Suite 210
Wichita, Kansas 67202
tfrieden@sbids.org

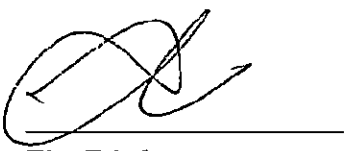
CERTIFICATE OF SERVICE

I hereby certify that on this 9 day of June 2015 a true and correct copy of the foregoing pleading was hand delivered to:

Victor Braden
Office of the Attorney General
Memorial Building
120 S.W. 10th Ave., Room 200
Topeka, Kansas 66612

Stephan Hunting
Franklin County Attorney
Ottawa, Kansas 67530

Judge Eric Godderz
Franklin County Courthouse
Ottawa, Kansas 67



Tim Frieden