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

STATE OF KANSAS,)
)
 Plaintiff,)
)
 vs.)
)
 KYLE TREVOR FLACK,)
 Defendant.)
 _____)

Case No. 13CR104

OBJECTION TO STATES #47 & 52 AND MOTION TO SUPPRESS

COMES NOW the defendant, Kyle T. Flack, by and through his attorney, Tim Frieden and pursuant to K.S.A. 22-2514 et. seq., objects to states filings #47 and 52 and moves the Court for an order suppressing the admissibility of all wire communications made by defendant while at the Franklin County jail In support of this objection and motion the defense states as follows:.

K.S.A. 22-2517 states:

“Whenever any wire.... communication has been intercepted no part of the contents of such communication and no evidence derived there from may be received in evidence in any trial, hearing or other proceeding in or before any court... if the disclosure of such information would be a violation of this chapter.”

The recorded communications of Mr. Flack’s conversations with visitors at the Franklin County jail are wire communications and are not admissible unless an exparte order is obtained or consent is given prior to the interception. No exparte order was obtained and while given some notice, any consent was not voluntarily but rather mere acquiescence to

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government imposed search.

In State v Andrews 39 Kan App. 2d 19 176 P.3d 245 (2008) the Kansas Court of Appeals addressed this issue where it was found that the defendant consented to the county jail recording his outgoing telephone calls from jail. In that case there was a warning in the inmate handbook and signs within the jail that stated telephone calls would be recorded and during the telephone calls repeated warnings advised the participants that the calls were being recorded.

The facts of this case are that when inmates are brought into the jail they are asked to sign a document where they state they have been informed of the jail rules including being informed that all of their communications with the outside world are being recorded with the exception of attorneys and clergy. The document cannot be found that Mr. Flack signed regarding being informed of the jail rules. Mr. Flack came into the jail in May of 2013 and up to November 2013 the phone visitation calls had at the beginning a notice that said "This call may be monitored and recorded" After Nov. 2013 visits to the jail were then audio and video recorded and the notice which is on the screen states "All video visitation sessions are monitored as they happen, are recorded , saved and viewable again at any time. Detention staff can stop the call at any time, and any abuse of the system may result in disciplinary action. Videos can be used in a court of law."

In Andrews, the jail hand book discusses the phone monitoring system and advises that calls are recorded. There were signs posted stating: "All calls from inmate telephones are subject monitoring recording. If you used the telephone, you are agreeing to the monitoring and recording, and if you do not agree, you may utilize U.S. mail or the inmate visitation program. In Andrews when a call was made and the recipient of the call

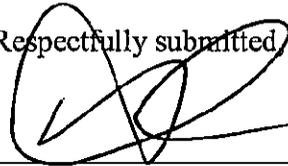
answers, a female voice interrupts the conversation and informs both parties that the call is being recorded. During the call the voice will interrupt three to four times to again inform the parties the call is being recorded.

In this case, inmates of the Franklin County jail have no alternative choice if they are to communicate with the outside world. Telephone calls are recorded, mail is monitored. Visits are audio and video recorded. The only choice if one is to disagree with the recording is to not have any communication. Consent is not voluntarily given.

In State v Jones 279 Kan. 71 (2005) it was held the state must prove by a preponderance of the evidence that consent to search was voluntary. Mere acquiescence to a preliminary breath test does not establish voluntary consent. The Jones case involved a challenge to the constitutionality of the imposition of a preliminary breath test and the implied consent statutes regarding the imposition of such test. The existence and voluntariness of consent to search is a question of fact in light of the totality of the circumstances. 279 Kan. At 77. In this case, by seeing visitors or making calls to the outside world, does not mean Mr. Flack consented to the imposition of electronic surveillance but rather acquiescence to imposition such as Jones did in the preliminary breath testing. The statements made are not being used by the State to secure the jail but rather as evidence against Mr. Flack in his current pending criminal case where the Sate is seeking to execute Mr. Flack on obtaining a finding of guilt.

WHEREFORE defendant Kyle Flack objects to states filing #47 and 52 and request this court to suppress any evidence derived from telephone visits received by Mr. Flack as illegal wire taps.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Tim Frieden, certify that I hand delivered a true and correct copy of the above and foregoing Objection to States filings #47 & 52 and Motion to Suppress to Stephen Hunting, County Attorney and Victor Braden Office of the Attorney General and a bench copy to Judge Eric Godderez on this 29 day of September, 2015.



Tim Frieden
Attorney for Defendant

NOTICE OF HEARING

The above objection to states filings #47 and 52 and motion to suppress shall come on for hearing on the 28th day of October 2015 9:00 a.m. before Judge Godderez, Franklin County Courthouse.