No.

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN D. CARR, Petitioner

v.

STATE OF KANSAS, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

CONDITIONAL CROSS PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. Whether the retroactive elimination of felony murder as a lesser included offense of capital murder violates the Ex Post Facto Clause and the Eighth Amendment.

II. Whether the Kansas Supreme Court applied the wrong standard of review in denying Petitioner's claim that the trial court erred by denying his motion for change of venue.

III. Whether the Kansas Supreme Court violated the Petitioner's right to due process under the Fifth and Fourteenth Amendments by identifying eight separate and distinct trial errors and yet still affirming his convictions?

LIST OF PARTIES

The parties in this case are, as stated in the caption, Jonathan D. Carr, Petitioner, and the State of Kansas, Respondent. In the courts below, Petitioner Carr was referred to as the defendant and the Respondent State of Kansas was referred to as the plaintiff.

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In 2013, the Kansas Legislature amended its definition of felony murder to provide that felony murder was no longer a lesser included offense of capital murder and indicated that the amendment should apply retroactively to pending cases. Petitioner had been convicted of capital murder and sentenced to death in 2002, for his alleged part in four murders that occurred in 2000.

In his direct appeal brief, Petitioner argued that the trial court erred in failing to give the jury a requested instruction on the lesser included offense of felony murder based on the underlying sexual assault of the victims. At the time of the statutory change, Petitioner's case had been briefed before the Kansas Supreme Court, but argument had not been held and no decision had been issued. The Kansas Supreme Court granted the State's request to file a supplemental brief

in which the State claimed that the 2013 amendment foreclosed the lesser included offense argument. Petitioner replied that a retroactive application of the statutory change would violate his rights under the Ex Post Facto Clause and the Eighth Amendment.

In 2014, the Kansas Supreme Court held that the 2013 statutory amendment applied to Petitioner's case and that retroactive elimination of lesser-included offenses did not offend either constitutional provision. As a result, the Kansas Supreme Court declared that the district court did not err in refusing to give a lesser included instruction on felony murder.

This Court should grant a writ of certiorari to clarify that the elimination of lesser-included offenses changes both the substantive definition of an offense, and deprives an accused of a defense and, therefore, violates the Ex Post Facto Clause. In particular, there is some split of authority on whether the ability to plead and assert lesser-included offenses is a "defense."

Because this is a capital murder case, where Petitioner has a constitutional right to relevant lesser included offense instructions, this Court should find that the lack of instruction violates the Eighth Amendment, as well.

Additionally, the Kansas Supreme Court denied Petitioner's argument that the trial court had erred by denying Petitioner's motion for a change of venue due to extensive pretrial publicity in the county where the crimes occurred. In denying Petitioner's claim, the Kansas Supreme Court reviewed Petitioner's claim that he suffered "presumed prejudice" due to the pretrial publicity under an abuse of discretion standard of review, rather than the more stringent de novo standard. While the 10th Circuit Court of Appeals favors the de novo standard, other federal circuit courts apply the discretionary standard. This Court should grant a writ of certiorari to clarify that the proper standard of review is de novo.

Finally, the Kansas Supreme Court affirmed Petitioner's convictions despite finding eight separate trial errors. This Court should grant a writ of certiorari to protect the guarantee of due process for all criminal defendants, even those charged with the most notorious crimes.

OPINION BELOW

The opinion of the Kansas Supreme Court is reported at *State v. Jonathan Carr,* 329 P.3d 1195 (2014). The slip opinion of both Petitioner's case and the more expansive opinion issued in the companion case, *State v. Reginald Carr*, 331 P.3d 544, (2014) were included in the State's Petition for Certiorari.

STATEMENT OF JURISDICTION

The judgment of the Kansas Supreme Court on direct appeal was entered on July 26, 2014.

This conditional cross-petition for writ of certiorari is filed under the authority of Supreme Court Rule 12.5. The State's petition for writ of certiorari was docketed on October 20, 2014.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) because Petitioner claimed a title, right, privilege, or immunity under the United States Constitution, Article 1, section 10, the Eighth Amendment, the Fifth Amendment, the Sixth Amendment, and the Fourteenth Amendment, and the Kansas Supreme Court denied that claim.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistant of Counsel for his defence.

The Ex Post Facto Clause provides that,

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." U.S. Const. art. 1, § 10.

The Eighth Amendment provides that,

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Jonathan Carr was found guilty of 43 counts, including 4 counts of capital murder, by a Sedgwick County (Wichita), Kansas jury. As noted by the State in its Petition for Certiorari, the case was widely considered the most notorious case Kansas had seen since the murders that Truman Capote memorialized in his most famous work, "In Cold Blood." Petitioner was tried alongside his co-defender and brother, Reginald Carr, not as an individual but as part and parcel of the reviled "Carr Brothers." Prior to trial, Petitioner sought a change of venue, arguing

the pervasive knowledge of the case in Sedgwick County made it impossible to select a fair and impartial jury. The district court denied the motion with no real explanation.

On direct appeal to the Kansas Supreme Court, Petitioner argued that district court's denial of the motion to change venue denied him a fair and impartial jury as required by the Sixth and Fourteenth Amendments. Petitioner further argued dozens of other points of error. The Kansas Supreme Court rejected the challenge to denial of a change of venue. Petitioner argued that he suffered actual prejudice as the knowledge in Sedgwick County, Kansas was pervasive, as compared to a similar urban county, Wyandotte County, where knowledge of the case was considerably less wide-spread. Petitioner further argued that he suffered presumed prejudice based on the pretrial publicity and media coverage of the case, pointing to hundreds of newspaper articles and television news stories filled with lurid details and haunting imagery portraying the plight of the victims, notably the surviving victim. The Kansas Supreme Court rejected the claim after choosing to apply an abuse of discretion standard of review to the trial court's ruling, rather than the far more stringent de novo standard of review.

The Kansas Supreme Court agreed with Petitioner on eight separate points of error that occurred during the guilt phase of his capital murder trial. These errors included instructional errors, jury selection errors, and a denial of severance from his brother co-defendant's trial. Despite finding these errors, the Kansas Supreme Court still affirmed the convictions, refusing to find that the accumulation of errors denied Petitioner's right to due process under the Fifth and Fourteenth Amendments.

The Petitioner also argued the trial court should have instructed the jury on first degree felony murder as a lesser included offense of capital murder. Petitioner had requested the

instruction be given. The state argued not that the instruction was not properly considered a lesser included offense but that there was no evidence. On direct appeal, the State conceded felony murder was a lesser included offense of capital murder. After direct appellate briefing was complete, though, the legislature passed a new statute declaring felony murder is not a lesser included offense of capital murder. Applying that statute retroactively, the Kansas Supreme Court denied Petitioner's claim.

The Kansas Supreme Court, though, did reverse Petitioner's death sentence, finding the trial court erred in instructing the jury and in refusing to sever Petitioner's guilt phase trial from his brother's in this notorious case.

REASONS FOR GRANTING THE WRIT

I. Whether the retroactive elimination of felony murder as a lesser included offense of capital murder violates the Ex Post Facto Clause and the Eighth Amendment.

In *Beazell v. Ohio,* 269 U.S. 167, 46 S. Ct. 68, 70 L. Ed. 216 (1925), this Court noted it would violate the Ex Post Facto Clause of the United States Constitution for a statute to deprive an accused of a defense that was available to him at the time the crime was committed. *Beazell* goes on to state that,

> "The constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and *that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.*" (Emphasis added.) *Beazell*, 269 U.S. at 170.

This description of legislation that would violate the Ex Post Facto Clause was reiterated by this Court in *Collins v. Youngblood*, 497 U.S. 37, 42-43, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990), and again noted in *Stogner v. California*, 539 U.S. 607, 640, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003) (Kennedy, J., dissenting).

The Kansas Supreme Court erred by holding that the retroactive application of the 2013 amendments does not deprive Petitioner of "any defense available" and that it did not alter the "legal definition of the offense . . . to the disadvantage of the accused." The court additionally erred in finding that the application of the 2013 amendments did not violated Petitioner's Eighth Amendment rights.

The 2013 amendments altered the legal definition of the offense.

The 2013 amendment explicitly altered the legal definition of the crime of felony murder in

Kansas. The 2013 amendments did not involve some evidentiary rule that applied in an evenhanded way across offenses in Kansas. K.S.A. 21-5402 defines the crime of felony murder. As the Kansas Supreme Court noted in a related case, "[l]egislators added subsections (d) and (e) *to the definition* of murder in the first degree in K.S.A. 2013 Supp. 21-5402." *State v. Todd*, 299 Kan. 263, 274-75, 323 P.3d 829, 839 (2014) *cert. denied*, No. 14-6378, 2014 WL 4743523 (U.S. Nov. 3, 2014) (finding no Ex Post Facto violation in the retroactive elimination of all lesser included offenses of felony murder). It is difficult to imagine any description of the 2013 amendments other than altering the legal definition of felony murder. Just because the elements of the offense did not change does not mean that the legal definition of the offense did not change. Prior to the 2013 amendments, felony murder was a lesser degree of capital murder. After the 2013 amendments, it was not.

The Kansas Supreme Court itself had recognized that statutory elimination of lesser-included offenses constitutes a substantive change. When considering 2012 amendments to the same statute, which purported to eliminate lesser-included offenses of felony murder but did not contain an express retroactivity clause, the Kansas Supreme Court decided that, absent a showing of explicit legislative intent, it would not apply the amendments retroactively because they would effect a substantive change:

> "In this instance, we conclude that the amendment is not merely procedural or remedial. It effectively states that no felony-murder defendant is entitled to lesser included offense instructions on that charge. In contrast, [prior case law] recognized lesser degrees of felony murder. The statutory extinguishment of these lesser included offenses is a substantive change, indeed, one that may have constitutional ramifications." *State v. Wells*, 297 Kan. 741, 761, 305 P.3d 568, 581 (2013).

Although the legislature did include explicit directions that the 2013 amendments should apply

retroactively, the 2013 amendments are no less substantive than the 2012 amendments were.

The 2013 amendments deprived Petitioner of a theory of defense.

In reaching its holding, the Kansas Supreme Court found that the 2013 amendments did not meet any of the categories set out in *Beazell*, implicitly finding that Petitioner was not deprived of a theory of defense. In support of this argument, the Kansas Supreme Court once again cited *Todd*. In *Todd*, the court relied on *Blair v. Armontrout*, 916 F.2d 1310, 1330-31 (8th Cir. 1990). *Todd*, 299 Kan. at 278-79. But the question in *Blair* was whether a statutory amendment abolishing lesser-included offenses of capital murder violated *the Due Process Clause*, not whether pleading and asserting a lesser-included offense is a defense as contemplated by *the Ex Post Facto Clause.*

In *Blair*, the defendant committed acts in August 1979. The Missouri Legislature had passed a law abolishing lesser-included offenses of capital murder effective January 1, 1979. *Blair*, 916 F.2d at 1327. The Missouri Supreme Court had held that "Blair was convicted of a crime which occurred on August 31, 1979," and therefore relied on a statutory scheme in existence at the time of the offense. *Blair*, 916 F.2d at 1327-28. *Blair* simply does not and *cannot* address the issue of whether retroactively abolishing the ability of a defendant to plead and assert a lesser-included offense is a defense as contemplated by the Ex Post Facto Clause.

This Court, however, has made it clear that the ability to plead and assert a lesser-included offense is in the nature of a defense:

> "While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect

> to an element that would justify conviction of a capital offense-the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Beck v. Alabama*, 447 U.S. 625, 637, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

Beck acknowledges the common sense application of the lesser-included offense doctrine that this Court set out in even earlier case law:

> "Although the lesser included offense doctrine developed at common law to assist the prosecution in cases where the evidence failed to establish some element of the offense originally charged, it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater. The Federal Rules of Criminal Procedure deal with lesser included offenses, see Rule 31(c),6 and the defendant's right to such an instruction has been recognized in numerous decisions of this Court." *Keeble v. United States*, 412 U.S. 205, 208 (1973).

The ability to plead and assert a lesser-included offense is often the primary strategic avenue for a defendant. *See, e.g., Washington v. Poole*, 742 F. Supp. 2d 332, 335 (W.D.N.Y. 2010) (concession-of-guilt strategy was reasonable and appropriate); *State v. Short*, 618 A.2d 316, 319 (N.J. 1993) (right to have the jury consider lesser included offenses implicates "the very core of the guarantee of a fair trial").

The Kentucky Supreme Court has recognized the fact that the ability to plead and assert a lesser-included offense is a defense: "Although a lesser included offense is not a defense within the technical meaning of those terms as used in the penal code, it is, in fact and principle, a defense against the higher charge." *Slaven v. Com.*, 962 S.W.2d 845, 856 (Ky. 1997). The Kansas Supreme Court's holding that elimination of felony murder as a lesser-included offense of capital murder does not deprive persons charged with capital murder of a defense is in conflict with the Kentucky Supreme Court's pronouncement.

In effect, the only possible purpose of the 2013 amendments is to remove the ability

of defendants charged with capital murder to plead and assert a lesser-included offense as a defense against a higher charge. Thus, the amendments acted to deny Petitioner a theory of defense.

Applying the 2013 amendments to Petitioner also violates this Court's Eighth Amendment case law.

In *Beck v. Alabama,* 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.3d 392 (1980), this Court made it clear that a defendant facing a sentence of death is constitutionally entitled to a lesser-included offense instruction on felony murder where there is evidence to support such a verdict. The specific question presented in *Beck* was, "May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?" *Beck*, 447 U.S. at 627. This Court's answer was succinct. "We now hold that the death penalty may not be imposed under these circumstances." *Beck*, 447 U.S. at 627.

Below, the State cited *Hopkins v. Reeves*, 524 U.S. 88, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998), for the proposition that there is no constitutional requirement for a trial court to instruct a jury on lesser offenses that are not lesser included offenses under state law. The state thus argues that because a statute passed years after Petitioner's trial purports to exclude a form of first-degree murder as a lesser-included offense of capital murder, no reversible error occurred in this trial. The state failed to acknowledge how this Court distinguished *Hopkins* from *Beck*. Most significantly, the state failed to acknowledge that first-degree felony murder has, under Kansas state law, been correctly understood to be a lesser-included offense of capital murder since the reinstatement of capital murder in 1994.

In *Reeves,* the trial court correctly declined to instruct a jury on an offense that for a century had not been recognized as a lesser-included offense of the charged crime. *Reeves,* 524 U.S. at 96. This Court found no error. In so doing, this Court distinguished the situation in *Reeves,* excluding instructions on an offense that has long been recognized as not being a lesser-included offense, from the situation in *Beck,* where a state legislature created an "artificial barrier" between capital murder and lesser-included offenses. *Reeves*, 524 U.S. at 96.

While *Cheaver* may have been the first capital case to explicitly state that felony murder is a lesser included offense of capital murder, Kansas has recognized that lesser included status since as early as *State v. Kleypas*, 272 Kan. 894, 938-39, 40 P.3d 139 (2001) (the first Kansas capital case after the 1994 reinstatement, recognizing that felony murder was legally a lesser included offense of capital murder, but finding it factually inappropriate given the facts of the case). Petitioner's case is not a case like *Reeves* where the trial court followed a century of established law. Rather, this is a case like *Beck*, where the legislature has tried to impose inconsistent rules on the court system. Worse than *Beck*, though, the state is now trying to impose this newly-crafted artificial barrier on Petitioner retroactively.

The reasoning behind the *Beck* decision further bolsters the notion that Petitioner has a constitutional right to jury consideration of felony murder.

> "That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense - but leaves some doubt with respect to an element that would justify conviction of a capital offense – the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. Such a risk cannot be tolerated in a case in which the defendant's life is at stake." *Beck*, 447 U.S. at 637.

The risk of a jury erring on the side of convicting on an unproven crime (premeditated, intentional killing) rather than acquitting is real in a case like Petitioner's, involving the murders of four young people. Petitioner's case is exactly the sort this Court expressed such concern about in *Beck*. Indeed, with the addition of the retroactivity provision it is worse—not only does this statute decrease the reliability of Petitioner's conviction, it was specifically targeted by the Attorney General's office to preserve his conviction years after the fact.

The Alabama statute in question in *Beck* precluded all lesser included offenses while the Kansas statute precludes only one. Under the plain language of *Beck*, though, this distinction makes no difference. In *Beck*, this Court instructed, "[I]f the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case." *Beck*, 447 U.S. at 638. The Kansas legislature is likewise prohibited from withdrawing lesser included offense options from Kansas juries in capital cases.

In summary, the Ex Post Facto Clause and the Eighth Amendment require that Petitioner's convictions be reconsidered.

Because the 2013 amendments to K.S.A. 21-5402 both alter the legal definition of the crime of felony murder and act to remove a defense as commonly understood by this Court and courts of other jurisdictions, and additionally violate his Eighth Amendment rights, Petitioner respectfully requests that this Court issue a writ of certiorari, hold that retroactive extinguishment of lesser-included offenses violates the Ex Post Facto Clause and the Eighth Amendment, vacate the judgment of the Kansas Supreme Court, and remand with directions.1

1 Of course finding an Ex Post Facto violation does not mean that Petitioner or similarly situated litigants will

II. Whether the Kansas Supreme Court applied the wrong standard of review in denying Petitioner's claim that the trial court erred by denying his motion for change of venue.

A split of authority exists in deciding what standard of review to apply when considering a trial court's refusal to change venue. The Kansas Supreme Court chose the minority view, parting from the 10th Circuit's view. To protect the Sixth and Fourteenth Amendment right to an impartial jury in Kansas, this Court must grant Petitioner Jonathan Carr's petition and insist that courts must apply the more stringent standard of review.

The Kansas Supreme Court noted that the Tenth Circuit (along with the Fifth Circuit) applies de novo review to the question of presumed prejudice. *See United States v. McVeigh*, 153 F.3d 1166, 1181 (10th Cir. 1998); *Goss v. Nelson*, 439 F.3d 621 (10th Cir. 2006); *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009). But other federal circuits review presumed prejudice claims for abuse of discretion. *See United States v. Misla–Aldarondo*, 478 F.3d 52, 58–59 (1st Cir.2007); *United States v. Sabhnani*, 599 F.3d 215, 232–34 (2d Cir.2010); *United States v. Inigo*, 925 F.2d 641, 654–55 (3d Cir.1991); *United States v. Higgs*, 353 F.3d 281, 307–09 (4th Cir.2003); *United States v. Jamieson*, 427 F.3d 394, 412–13 (6th Cir.2005); *United States v. Nettles*, 476 F.3d 508, 513–15 (7th Cir.2007); *United States v. Rodriguez*, 581 F.3d 775, 784–86 (8th Cir.2009); *United States v. Collins*, 109 F.3d 1413, 1416 (9th Cir.1997); *United States v. Langford*, 647 F.3d 1309, 1319, 1332–34 (11th Cir.2011).

This Court should grant certiorari to settle this split in authority, and declare that presumed prejudice must be reviewed under a de novo standard.

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necessarily obtain a new trial. This disposition would simply mean that the Kansas Supreme Court would have to reach the merits of the instructional claim under the law of Kansas prior to the 2013 amendments.

In Petitioner's case, the evidence in support of a change of venue was overwhelming and unmet by contrary evidence, yet the district court inexplicably denied the motion, making no mention of the proper analytical framework to be applied or the overwhelming and undisputed evidence offered in support of the motion. The Kansas Supreme Court applied a deferential standard of review and so did not reject the clearly unsupported finding, even suggesting the Petitioner had created the problem by failing to ask the trial court for further explanation. Applying a de novo standard of review would have almost necessarily resulted in a different finding

The trial court's ruling denying the motion was contrary to the only evidence presented, an extensive venue study conducted by an expert hired by the Petitioner. (See Appendix B, the full transcript of the motion hearing.) Despite finding that the study, which concluded a jury selected from residents in Wyandotte County would be far less knowledgeable and opinionated about the case than one selected in Sedgwick County, was scientifically sound and valid, the trial court ruled against the motion. The jury selection process bore out the Petitioner's concerns about a jury pool of Sedgwick County residents. Indeed, the final jury panel included 6 jurors the Petitioner had challenged for cause. The judge's ruling on the venue change motion boils down to one sentence:

> The study shows and the evidence shows and experience shows that in this particular case, having reviewed the material furnished, the law and the argument of counsel, that the venue in which defendants will be assured of the greatest number of venire persons free of bias or prejudice from whom a jury may be selected to decide the case solely on the facts in evidence, viewed by the light of the instruments of law, is Sedgwick County, Kansas. (See Appendix B, p. 33)

The district court announced this decision immediately after hearing argument from counsel, without taking even a brief recess. (Appendix B, p.33)

Due process and the Sixth Amendment required a change of venue based on the defense's pretrial showing of "presumed prejudice," in which "the influence of the news media, either in the

community at large or in the courtroom itself, pervaded the proceedings." *Murphy v. Florida*, 421 U.S. 794, 799, 44 L.Ed.2d 589, 95 S.Ct. 2031 (1976). "Presumed prejudice" requires reversal whether or not actual harm to the defendant is shown; it exists when the community's bias is so pronounced that jurors "must be presumed to have been irretrievably poisoned by the publicity." *Irvin v. Dowd*, 366 U.S. 717, 727-28, 6 L.Ed.2d 751, 81 S.Ct. 1639, (1961). In its brief ruling, the district court did not even acknowledge the existence of the "presumed prejudice" standard. A trial court judge who fails to acknowledge the correct framework for analyzing the issue is due no deference.

That either the trial court or Kansas Supreme Court should have granted Petitioner a change of venue based on the presumed prejudice standard is borne out by the jury selection process at trial. Petitioner suffered "actual prejudice" in the constitutional sense, because the record of voir dire demonstrates the pervasive bias that permeated the jury pool. *See Murphy*, 421 U.S. at 800-01; *United States v. Abello-Silva*, 948 F.2d 1168, 1177 (10th Cir. 1991). Petitioner was forced to proceed to the peremptory strike stage with numerous jurors who had knowledge of the case and had an opinion of his guilt. The final jury included six jurors Petitioner had sought to strike for cause. Pretrial publicity so permeated Sedgwick County, Petitioner could not select a final jury that was not infected.

> In order for the reviewing court to reach a presumption that inflammatory pretrial publicity so permeated the community as to render impossible the seating of an impartial jury, the court must find that the publicity in essence displaced the judicial process, thereby denying the defendant his constitutional right to a fair trial. *United States v. McVeigh*, 153 F.3d 1166, 1181 (10th Cir. 1998)

De novo review of the presumed prejudice analysis in a trial court's ruling on a change of venue motion is the best way to ensure the judicial process has not been displaced, especially in a

county like Sedgwick County, where judges are elected and thereby beholden to the public. In Petitioner's case, pretrial publicity did, in essence, displace the judicial process. As evidenced both by the venue study and the jury selection process itself, the mind of the Sedgwick County community was made up long before Petitioner stepped foot in a trial courtroom. Bias against the notorious "Carr Brothers," and thus this defendant, came into the courtroom long before the first witness. In analyzing presumed prejudice, the reviewing court is in the same position as the trial court because the supporting evidence is the record of the newspaper articles and television stories, all of which are admitted in court and recreated for any judge to view. There is no question of witness credibility.

Deferring to an elected judge who lived and worked in the very community so outraged by these crimes does nothing to protect a defendant's Sixth and Fourteenth Amendment rights to a fair and impartial jury. This is why the 5th and 10th Circuits have reviewed the presumed prejudice prong of a venue challenge de novo. De novo review of the presumed prejudice analysis is the essential final step in ensuring even the most hated defendants charged with the most notorious crimes will be judged not by pretrial publicity but by a fair and impartial jury hearing only the evidence presented in the courtroom. The trial court's unsupported ruling denying the change of venue motion could not survive any standard of review less deferential than abuse of discretion. This Court should grant the writ and settle this split of authority in favor of those circuits who apply the de novo standard of review.

III. Whether the Kansas Supreme Court violated the Petitioner's right to due process under the Fifth and Fourteenth Amendments by identifying eight separate and

distinct trial errors and yet still affirming his convictions?

In reviewing Petitioner Jonathan Carr's direct appeal of the guilt phase of his capital murder trial, the Kansas Supreme Court identified eight separate trial errors. All of the errors combined to deprive Petitioner of his right to a fair trial. In this case, the errors that occurred throughout the proceedings fed on one another, exponentially increasing the prejudice from each individual error.

A majority of the Kansas Supreme Court found at least eight major, critical errors were committed during the penalty phase of Petitioner's trial. As noted in the companion case:

> • Six members of the court agree that District Court Judge Paul Clark erred by refusing to sever.
> • All seven members of the court agree that Judge Clark committed reverse *Batson* error by seating W.B. after peremptory challenge by the defendants.
> • All seven members of the court agree that Judge Clark erred in allowing the admission of Linda Ann Walenta's statements through law enforcement testimony.
> • All seven members of the court agree that Judge Clark gave a faulty instruction on the sex-crime-based capital murders.
> • All seven members of the court agree that three of the multiple-homicide-based capital murder convictions were multiplicitous with the first.
> • All seven members of the court agree that the district court lacked subject matter jurisdiction over any sex crime charges based on coerced victim-on-victim sex acts.
> • All seven members of the court agree that Judge Clark erred by automatically excluding testimony from an expert on the reliability of eyewitness identifications.
> • All seven members of the court agree that Judge Clark erred by giving an aiding and abetting instruction that discussed foreseeable crimes. *State v. Carr*, 331 P.3d 544, 740 (Kan. 2014)

At least two of those errors standing alone, the failure to sever and the reverse *Batson* challenge, merited reversal of the convictions on their own.

The tone for the trial was set from the beginning, with the district court's refusal to move the trial out of Sedgwick County, where so much inflammatory publicity had already occurred. The public had read and heard much about "The Carr Brothers" and how the crime spree attributed to them had, in combination with another quadruple homicide that had occurred in December 2000, put the entire community on edge. The entire city of Wichita was undoubtedly eager to believe that the individuals arrested and charged with the crime spree were, in fact, the responsible parties. As demonstrated by the venue study, the residents of Sedgwick County overwhelmingly believed that Petitioner was guilty long before jury selection began. One prospective juror explained during voir dire that jurors would feel pressure to find the defendants guilty even before hearing opening statements. The cumulative effect of the multiple trial errors that occurred during Petitioner's trial must be considered within this context.

The problem of pre-trial publicity, much of which did not attempt to distinguish between the two brothers, was compounded by the trial court's refusal to sever the trials. From the first day of trial, Reginald's defense attorneys attempted to place blame on Petitioner and an unidentified third party, prejudicing Petitioner's right to a fair trial. Reginald's presence as a co-defendant continued to prejudice Petitioner's right to a fair trial throughout the proceedings as Reginald engaged in misbehavior on multiple occasions. Ten of the jurors acknowledged having heard of the case before in their juror questionnaires. A major component of the pre-trial publicity involved Reginald's early release from parole, a fact many in the community were angry about. That anger about the mistaken release from parole could only prejudice Petitioner in a joint trial, where no attempt was made to distinguish between the two and where Petitioner would be prohibited from introducing Reginald Carr's criminal records, making it clear that the parole release involved

Reginald alone.

The state's sloppy handling of the charging and instructions in this case add to the error. The state sought to charge Petitioner with anything and everything they could, resulting in charges for conduct not covered by the criminal code and for crimes that the evidence simply could not establish. The state charged four capital murders when they could only charge one. The carelessness carried on to the instructions. All of the capital murder counts predicated on the commission of sex offenses referred to the same two instructions, involving only H.G. and Heather. The rape instruction and the aiding and abetting instruction were not drawn in the words of the statutes. Furthermore, the aiding and abetting instruction on reasonably foreseeable crimes should not have been given for any specific intent crimes, most notably capital murder, but the jury was not informed of that restriction.

Yet despite finding all of these errors, the Kansas Supreme Court nonetheless maintained that the verdict was sufficiently supported by evidence so as to make it irrelevant that the trial itself was so fundamentally unsound.

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. *Beck v. Alabama*, 447 U.S. 625, 638, 100 S. Ct. 2382, 2390, 65 L. Ed. 2d 392 (1980)

The central issue in this case was the culpability of each individual co-defendant. Petitioner and his brother had been treated as one entity, "The Carr Brothers," by the prejudicial media coverage pre-trial. The community outrage about these crimes lead to sloppy and incorrect charging documents, which further lead to erroneous jury instructions. That merging of Petitioner with his co-defendant continued erroneously at trial where the Petitioner was forced to defend

against two prosecutors as his co-defendant openly pointed the finger solely at Petitioner. While acknowledging all of these errors, the Kansas Supreme Court merely found that the evidence of guilt was overwhelming without considering whether the accumulation of errors rendered Petitioner's defense (that he was less culpable than his co-defendant) "far less persuasive than it might have been," resulting in a 'substantial and injurious effect or influence' on the jury's verdict, which 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Parle v. Runnels*, 505 F.3d 922, 930 (9th Circuit, 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) and *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

Petitioner's trial was so infected with error and unfairness as to make the resulting convictions a denial of due process and so unreliable that no death sentence can be imposed. As in *Parle*, the Kansas Supreme Court's application of the cumulative error doctrine was an objectively unreasonable application of federal due process law and must be reversed. As the dissent noted, "Despite the public passion attached to this hard case—indeed, in part because of the public passion attached to this hard case—we should not begin disregarding errors that numerous or mutually reinforcing here." *State v. Carr*, 331 P.3d 544, 741 (Kan. 2014).

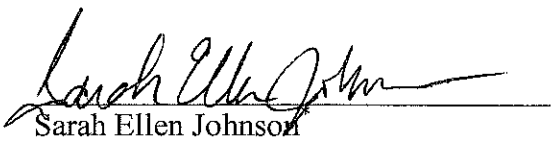
This Court should grant certiorari to protect the rights of even the most reviled criminal defendants to a fair trial as the Fifth and Fourteenth Amendments require.

Conclusion

Accordingly, this Court should grant this Petition for a Writ of Certiorari to the United States Supreme Court, hold that the Kansas Supreme Court erred in its *ex post facto* application of a substantive change in the law, in its determination of the proper standard of review for the denial of a change of venue, and in failing to find that the accumulation of errors at Petitioner's guilt

phase of trial violate the right to due process under the Fifth and Fourteenth Amendments.

Respectfully submitted,



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Appendix A

Kansas Attorney General's Written Testimony to the Kansas Legislature Regarding 2013 Statutory Amendments to K.S.A. 21-5402 (March 14, 2013)

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

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Testimony in Support of House Bill 2387
Presented to the House Committee on Corrections and Juvenile Justice
By Kris Ailslieger, Deputy Solicitor General

March 14, 2013

Chairman Rubin and Members of the Committee,

I appear today on behalf of Attorney General Derek Schmidt in support of HB 2387. This bill is intended to both clarify existing Kansas case law as well as correct what we believe is a misinterpretation of the law by the Kansas Supreme Court that occurred in *State v. Cheever*.

Under K.S.A. 21-5402, there are two alternative ways to commit the crime of First Degree Murder: (1) intentionally with premeditation, or (2) in the commission of, attempt to commit, or flight from an inherently dangerous felony ("felony murder"). Felony murder was established at common law, and then later codified, to provide prosecutors with an alternative method to prove murder and to deter inherently dangerous crimes that could result in death.

Well established Kansas case law makes clear that "Felony murder and premeditated murder are not separate and distinct crimes, but merely different theories of proving the required elements of premeditation and intent for the crime of first-degree murder." *State v. Hoge*, 276 Kan. 801, Syl. ¶ 6 (2003). Thus, felony murder has never been considered a lesser included offense of premeditated murder – they've always been considered the same crime – so the courts have held that there is no requirement to instruct a jury on felony murder in cases alleging intentional premeditated murder. *See e.g. State v. Jackson*, 280 Kan. 16, 31 (2005); *State v. McKinney*, 265 Kan. 104, 111 (1998). This bill codifies that case law.

The bill goes further, though, to clarify that because felony murder is not a separate and distinct crime from intentional premeditated murder, and thus not a lesser included offense of that crime, it is also not a separate and distinct lesser included offense of capital murder, which is nothing more than intentional premeditated murder with aggravating circumstances. This clarification is sought because in *State v. Cheever*, in spite of the case law stating that felony murder is not a separate and distinct crime from intentional premeditated murder, the Kansas Supreme Court held that it is a separate and distinct lesser included offense of capital murder that must be instructed on, even though the jury was properly instructed on intentional premeditated murder. 295 Kan. 229, 257-59 (2012).

Based on previous case law and practice, this interpretation by the Kansas Supreme Court was unexpected by the bar. Indeed, even Mr. Cheever's defense attorney at trial advised the district court that he did not believe that felony murder was on the tree of lesser included offenses of capital murder, and did not believe a felony murder instruction was required. Thus, the Supreme Court's interpretation represents an anomalous change in this area, and one that threatens the finality of many capital murder convictions throughout the state.

While exact numbers are unknown, if left uncorrected, this anomalous interpretation by the Kansas Supreme Court could result in reversal any pending capital murder case in which, consistent with prior practice and case law, a felony murder instruction was not given. This is not limited to death penalty cases – if left unchanged, the Kansas Supreme Court's new interpretation of this issue may imperil life without parole sentences as well. Even cases where the death penalty was not sought or imposed are at risk of reversal. Therefore, the Attorney General strongly urges passage of this bill to protect the validity of those verdicts.

Appendix B

Transcript of the Hearing on the Motion to Change Venue

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,

Plaintiff,

vs. Case Nos. 00 CR 2978 &
00 CR 2979

REGINALD D. CARR, JR, and
JONATHAN D. CARR,

Defendants.

TRANSCRIPT OF PRETRIAL MOTIONS

PROCEEDINGS had before the Honorable Paul W. Clark, Judge of Division 9 of the District Court of Sedgwick County, Kansas, at Wichita, Kansas, on the 13th day of June, 2002.

APPEARANCES:

For the State: Ms. Nola Foulston
Sedgwick County
District Attorney
&
Ms. Kim Parker
Assistant District Attorney
Sedgwick County Courthouse
Wichita, Kansas

For the Defendant
Reginald D. Carr, Jr.: Mr. Jay Greeno
Attorney at Law
250 N. Water, Suite 215
Wichita, Kansas 67202

and
Mr. John V. Wachtel
Attorney at Law
301 N. Main, Suite 1600
Wichita, Kansas 67202

For the Defendant Jonathan D. Carr:

Mr. Mark Manna and
Mr. Ron Evans
Death Penalty Defense Unit
112-114 W. 6th St., Suite 304
Topeka, Kansas 66603

THE COURT: There are a number of pretrial matters set today. The motion to change venue, we're ready for closing argument. Have you all discussed among yourselves in what order you want to take the matters up?

MR. WACHTEL: Actually, we have not, Your Honor, but I suspect, since it's our burden, unless anybody objects, I'll go first.

MR. MANNA: That's fine, Your Honor.

THE COURT: Which one did you want to do first?

MR. WACHTEL: Venue motion please, Your Honor.

THE COURT: Let's hear your closing argument, then.

MR. WACHTEL: Thank you. Your Honor, Val Wachtel on behalf of defendant Reginald Dexter Carr. With regard to Mr. Carr's motion to change venue, I know the Court has received briefs from all parties in this case, and I know that the Court has read them, so I will not spend a lot of time discussing the law with respect to change of venue. I would like to point out, however, that in Sheppard v. Maxwell, 384 U.S. 333, a 1996 case, the United States Supreme Court

recognized that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity," and that's Sheppard at 362.

Now, in 1971 the Court again found itself discussing continuances, pretrial publicity and changes of venue, and that was the Groppi, G-r-o-p-p-i, v. Wisconsin case, 400 U.S. 505. At page 510 of that opinion, the United States Supreme Court noted that "challenges to the - venire predominantly for cause - {are} not always adequate to effectuate the constitutional guarantee of a fair trial." The Court then noted with regard to changes of venue the following: "This Court has" specifically -- excuse me, "explicitly held that only a change of venue was constitutionally sufficient to assure the kind of impartial jury that is guaranteed by the Fourteenth Amendment. That was in the case of "Rideau," R-i-d-e-a-u, "v. Louisiana. We held that `it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu," C-a-l-c-a-s-i-e-u,

"Parish had been exposed repeatedly and in depth to the prejudicial publicity there involved." That's at page 511.

Now, I would remind the Court that Judge Owens found in pretrial hearings on this case that the pretrial publicity in this case is, indeed, prejudicial. So, I think there's no more room for debate here on that issue. And, again, we would ask the Court to take judicial notice of that finding.

Now, Kansas has a statutory scheme pursuant to which venue can be changed, and that can be found at K.S.A. 22-2616, and I'm not going to bother the Court with repeating what that statute says.

I think the important things to notice with regard to change of venue is that it is incumbent upon us -- as the parties moving to change venue, we have to prove to a demonstrable reality that there's prejudice in the community against our client, and we find that at State v. Ruebke, R-u-e-b-k-e, 240 Kan. 493 at 498-499. That Court instructed that it is -- that the accused -- excuse me, that the prejudice existing in the community must be so great that it is reasonably

certain that the accused could not obtain a fair trial. That's at 499 of that case. Therefore, the burden -- and I would also point out that the burden of what we must prove since that case is, in fact, unchanged.

There have been a number of venue cases -- excuse me, change of venue cases go up in Kansas lately, and those cases are all cited in our initial memorandum, and they clearly set out with the burden is. I would, however, call the Court's attention to State v. Verge, V-e-r-g-e, which, I think, is found now at 34 P.3rd 449. And the Court said in Verge the following: "In the past we have not relied on statistics but, rather, we have focused on the difficulties encountered in impaneling a competent and unbiased jury. In Higgenbotham we stated that in Jackson, Swaford and Anthony the respective defendants did not experience undue difficulties in impaneling their juries, under facts comparable to our present case," and that's really interesting as far as it goes. But the Verge court was also quick to point out that Higgenbotham, which is the case that Verge relied on, wasn't a death penalty case. So, we are

persuaded that the court has signaled the trial courts that there -- that the Supreme Court is going to look at death penalty cases much more under a statistical analysis. That's the law as we view it in the State of Kansas.

Now, there was a hearing on change of venue presented in this case and an evidentiary hearing. Mr. Carr presented the testimony of Lisa Dahl of Litigation Consultants, Incorporated from Lawrence, Kansas, and Ms. Dahl testified that the venue study, which we presented to the Court as Exhibit L, was prepared under her supervision and, in fact, by her. She supervised the telephone callers who did the polling. She trained them. She tested them. She controlled them, and she wrote the venue study which we provided to you based on the results of the telephone polling that took place in Sedgwick and Wyandotte Counties.

We also presented to the Court -- and forgive me because I do not remember the exhibit numbers. I do remember dropping one of the exhibits, but we presented to the Court two exhibits containing a stack of pretrial publicity that we had collected at the time Ms. Dahl

commenced preparation of her study that included articles from newspapers. It included television and radio tapes. My recollection is that it also included information taken from the internet. And it was from that -- those media reports that Ms. Dahl, following the -- following the Standards for Survey Research in Connection with Motions to Change Venue, May 24th, 1999, following the standards set out in that document, which was Exhibit K, Ms. Dahl prepared her study. Now, 401 persons were questioned in Sedgwick County and 200 persons were questioned or surveyed in Wyandotte County. My recollection of the testimony is that a survey of 401 persons gives you a margin for error. It's going to be of a plus or minus five percent, and surveying 200 people gives you a margin of error plus or minus seven percent.

Now, Ms. Dahl testified that the results of the survey were as follows: First, she testified that there was an immediate awareness of this case and that the immediate awareness was overwhelming of the 401 persons polled in Sedgwick County. 96 percent reported knowing about the circumstances of the alleged crimes.

In Wyandotte County, citizen awareness was 29.5 percent. Now, Your Honor could find the details of Ms. Dahl's testimony by looking at Book 1 of Exhibit L under the tab marked Summary of Findings, and specifically commencing at page 5 thereof titled Detail of the Findings.

Ms. Dahl went on. She testified that prejudgment of the defendant's guilt is heightened in the mind of the citizens of this county. In fact, she testified that 74.1 percent or almost three-fourths of the citizens polled with regard to this case believed that the accused were either probably or definitely guilty and that in Wyandotte County those opinions amounted to only 19 percent of the people polled. She also testified that in Sedgwick County the citizens hold extreme opinions of guilt regarding the accused. Poll results indicated and Ms. Dahl testified that of the Sedgwick County citizens who are aware of the case they expressed much more extreme beliefs as to guilt than did their counterparts in Wyandotte County. In Sedgwick County the citizens in the case -- excuse me. In Sedgwick County citizens aware of the case believed that the defendants were definitely

guilty at a rate nearly twice that of Wyandotte County.

Ms. Dahl also testified that the prejudgment of the strength of the evidence in this case was significantly elevated in this county. She said, the Court will recall, that in this county 72.3 percent of the people polled believed that the evidence against the defendants was either strong or overwhelming, and that can be found in the survey detail section of Book 1 of the survey at page 9. The number of citizens holding that opinion in Wyandotte County was 16 percent.

Ms. Dahl went on to testify that we also hold extreme opinions in this county on the strength of the evidence, and the detail of that opinion can be found at page 10. She also testified that knowledge of the specific details about the crime exist in this county and that Sedgwick County residents are significantly more aware of the nine specific media details that were contained within the survey than are those in Wyandotte County. She testified that Sedgwick County citizens have a comprehensive knowledge of the details of the case. Excuse me. Not only

the people in this county recall more of the nine details, perhaps each of the nine details, they also know more about those details than do their counterparts in Wyandotte County. More than half of the citizens, 54 percent of those polled in Wichita who recognize the case were also aware of the four or more details. Ms. Dahl testified that in Sedgwick County comprehensive and specific knowledge of the case and the crime details is directly related to the prejudgment of the case. She testified that when a citizen of Sedgwick County knows more details about the case, he or she is more likely to prejudge the guilt. 56 percent of the Sedgwick County people who know one of the reported details have prejudged the defendants as either probably or definitely guilty. If people know three of the reported details, that percentage rises to 74 percent. And when people know four or more details, the percentage of people who believe that the accused are definitely or probably guilty rises to a level of 86 percent.

She also reported that knowledge of the crime and the people involved is closely associated with prejudgment of the strength of

the evidence against the defendants. She concluded in the survey and the survey supports that a citizen who knows one of the reported details, 46 percent believe the evidence is strong to overwhelming; that 64 percent of the people who know two or three details believe that the evidence against the accused is strong to overwhelming, and when citizens of this county know four or more details of the -- about the case, 90.3 percent have prejudged the evidence as strong or overwhelming.

She also testified about citizens in this county's reliance on different sources of information. The more sources that a citizen has relied on, the greater is the percentage of those persons who have a belief of the strength of the evidence. If a person has relied on information from three or more sources, 80 percent believe that the defendants are probably guilty. And if they've relied on four or more sources, 86 percent of the people have prejudged the case. And this is also true, Your Honor, with regard to multiple sources of information.

Where the information came from. Ms. Schueler (sic) reported that the community is

talking about the case. 59.1 percent of the people studied indicated they had talked with others about the case, and 56.4 percent overheard others discussing the case, but the majority of the citizens who have talked about this case in Sedgwick County, 86 percent have the opinion that the defendants are guilty and 85 percent believe that the evidence is strong to overwhelming, and those were the results of the survey contained therein. The backup documentation exists for it, and that's what Ms. Schueler testified about. Now, you'll recall the State presented no evidence in response to this survey. All the State did was cross-examine Ms. Schueler, and the State is under no burden to present a survey of its own to counter the results of the survey presented by Ms. Schueler.

Now, Ms. Schueler was more than qualified to conduct this survey and to testify about it. So, let's talk about some of the telling things that Ms. Schueler provided to the Court in addition to the results of the survey. The Court will recall that Ms. Schueler brought with her a Summary of Venue Studies in Kansas completed by her company, and that is in the record.

I'm sorry. I'm thinking about something else. We're talking about Ms. Dahl. Mr. Greeno reminded me that I have goofed it up yet again. We're talking about Ms. Dahl, and I apologize to Court and counsel.

In any event, Ms. Dahl brought a Summary of Venue Studies in Kansas and the results thereof. Those studies were prepared by her company, and she brought the results. And those results are interesting and they're contained within Exhibit N. The first case that was addressed in that exhibit was the Kleypas case. It was in Crawford County. The total recall of the Kleypas case was 98 percent. Percentage of those surveyed who had combined opinion of guilt, strong, very strong, probably guilty, likely guilty was 86 percent. People who believed that the defendant was probably guilty was 31 percent, and the people who -- percent believed definite guilt was 54 percent. In that particular case a change of venue was granted. Kleypas was a death penalty case.

Ms. Schueler's (sic) company also did the change of venue study in State v. Donald Ayres, which is an Ottawa County case. In that case

95 percent of the people surveyed recalled the case. 79 percent of the people had combined opinions of guilt, that is to say, that 40 percent believed that Mr. Ayres was probably guilty, and 39.5 percent believed that he was definitely guilty. That was not a death penalty case, and change of venue in that particular case was denied.

The third item on Exhibit N is this case. 401 people surveyed in Sedgwick County. 96 percent of those people recalled the case. 36.7 percent believed that the accused are probably guilty, and 37.4 percent believed that the defendants are definitely guilty for a combined total of 74.1 percent.

Now, compare that with State v. Scotty Adam in Morris County. 94 percent of the people were aware of the case. 28.5 percent of the people believed that Mr. Adam was probably guilty, and 43.5 percent believed that he was definitely guilty. Combination of those two is 72 percent, and change of venue was granted.

But you also need to consider State v. Alan White, a Saline County case, a death penalty case in Saline County, the survey, I believe, of 300

people. 51 percent believed that Mr. White was probably guilty, and 15 percent believed that he was definitely guilty. Combined total, 66.7 percent. Change of venue was granted in that case.

There's also the case of State v. Lorenzo Jones in Haskell County. 33.5 percent of the people surveyed believed that Mr. Jones was probably guilty, and 31 percent believed he was definitely guilty, the combination thereof being 64.5 percent. Change of venue granted.

And then there's the truly telling case of State v. DellaMarie Moore, Clark County, Kansas. 97.5 percent of the residents of Clark County, Kansas, were aware of that case. 30.8 percent of those people believed that the evidence against DellaMarie Moore -- excuse me, 30.8 percent believed that DellaMarie Moore was probably guilty. 16.4 percent believed that Ms. Moore was definitely guilty, for a combined total of 47.2 percent. Change of venue granted.

Among those cases that I have discussed, Mr. Carr's -- in order of opinions of probable to definite guilt, Mr. Carr's case ranks third. I think that the law in Kansas on change of venue

is transforming. I think in death penalty cases that the Court's going to start looking at the percentages and basing its decisions on appeal on those percentages. I have looked high and low, and I've not been able to find one case, not one case in Kansas or elsewhere in which a trial court was ever reversed for granting a motion for change of venue. Now, they do get reversed from time to time by failing to grant those motions, but the simple matter of fact is the discretion is yours. By and large what you decide is going to hold up.

I suggest this to the Court: That the community survey, the empirical evidence shows that we're not going to be able to seat a jury in this case. And I think what -- something that happened in cross-examination -- excuse me, cross-examination bears that out. You may recall that Ms. Parker asked Ms. Dahl whether or not by September of this year the strength of these opinions would subside, and Ms. Dahl's testimony, at least to the best I can recall it, was that she was surprised, given the length of time between these crimes occurring and the time that the survey was conducted, that the numbers were

as high as they were. She thought the survey would show lower numbers. Her opinion was that we can continue this, that those numbers aren't going to change in September, they're not going to change in October, they're not going to change in December, they're not going to change. And part of the reason for that, I think, is because much of this information is what's called bias -- excuse me, emotionally biasing publicity, and we've talked with Your Honor about that, and I'm not going to go into it here. Emotionally biasing publicity doesn't abate with time. What's going to happen in this case, I believe -- first, without discussing what's going to happen, I think that the evidence is clear that there is prejudice in the community against Mr. Carr and that Mr. Carr is not going to be able to receive a fair trial in this county.

Now, the case law suggests that we wait and see what happens. Let's call in jurors, voir dire them individually and sequester them and see whether or not we can get a jury. Now, I forget how many hundreds of people that's going to require that we pull in and give juror questionnaires to. I have no idea how many days

individually sequestered voir dire is going to take, but the end of that result is going to be that we will have spent thousands and thousands and thousands of dollars, we're not going to find a jury and we're going to transfer this case someplace else. I say rely on the study, believe what it says, change venue, give my client a fair trial and, in the process thereof, let's save the citizens of Sedgwick County a little money. I'm sure that they won't object to that. That's all I have to say at this time, unless the Court has questions.

THE COURT: I have none at this time. Thank you.

MR. WACHTEL: I'll clean up my mess, Your Honor.

THE COURT: Go right ahead. Mr. Manna.

MR. MANNA: May it please the Court. Your Honor, Mr. Johathan Carr appears in person and in custody this morning by and through counsel, Mark Manna and Ron Evans with the Death Penalty Defense Unit. Your Honor, we would simply join in the arguments made by codefendant's counsel, Mr. Wachtel. We would

simply have nothing further to add. We would ask that the Court take into consideration the testimony of Ms. Dahl from May 28th, take into consideration the marked exhibits moved into the record, take into consideration the listed cases and the enumerated statutes in our previously filed written motion and sustain the defense request for change of venue. Thank you.

THE COURT: Thank you very much. Miss Parker.

MS. PARKER: Thank you. Your Honor, the defendants, Reginald and Jonathan Carr, chose their venue when they committed the crime in this community, and the law provides that a case be tried where the crime is committed. The State believes that there are 12 citizens in this community that can fairly try this case, and we have faith in the citizens of this community that they can do so. This community is not unfamiliar with cases that have drawn significant local, state media attention and also national attention. The Court will remember, because you have been on the bench for some time, a number of those cases, including the Rochelle Shannon case, in which this courthouse was packed, has

continued to have national attention; the case of Leroy Hendricks that went to the United States Supreme Court for final decision; Doil Lane and Donnie Wacker, national attention; the recent Bell, Oliver case that was tried here in Sedgwick County by 12 Sedgwick County citizens; the Shaktur case, the individual who took his children across to Amsterdam on his way to Jordan; the Amanda Shaffer case that happened years ago receiving national attention even in the form of a T.V. movie; including also the Mark Warden case, the young child who was molested at the Institute of Logopedics, and his case received significant national attention prior to that trial and afterward.

Those that have received local significant attention would include death penalty cases: The Gavin Scott case; the Michael Marsh case; the Stanley Elms case; the St. John Tyler case; the Sakone Donesay case where law enforcement officers were killed; and cases even as old as the Dayton Street murders; the Washington-Tucker-Ferguson-Evans case, which is sometimes referred to as the flower shop case; the Best Cleaners case where Donald Barksdale was

tried fairly by 12 citizens in this community. All of those cases have been upheld on appeal because the jury that was picked was determined to be fair and impartial.

What difficulties -- and I think counsel mentioned there at the end of his argument to the Court, the Kansas courts, typical with other courts across the United States, and the Supreme Court have said that basically the proof is in the pudding, that it is necessary to determine whether or not a jury, an unbiased jury can be selected upon attempting to select them. What difficulties remain to be seen in selecting a jury here in Sedgwick County.

The courts have noted in Murphy v. Florida, Florida-qualified jurors need not be totally ignorant of facts and issues in order to be selected as jurors. Instead, the Court needs an assurance from these jurors that are under oath that they are equal to the task. In State v. Verge, the most recent case in this state that has commented on that, they have -- again, state statistics is not the determining factor. The Court should, in fact, determine whether -- once a jury is brought in, whether or not they can be

unbiased. And in the Verge case, a capital case, the court upheld the court's ruling, the local court's ruling not to change venue in that matter. This determination under the law is within the sound discretion of this Court, and it will not be disturbed upon appeal. The burden is on the defendant, and they have not met that burden. They have only brought to the Court media publications, which are not unlike other media events that have occurred in other cases throughout this state and throughout the United States. There is nothing in the current media, as noted in the Verge case, that would be detrimental, nothing that has come out in such a way, for example, a confession, an offer to reply, any type of polygraph results, et cetera, that kind of information has not been introduced in the media in any fashion. This Court is also trusted in a sense that you would significantly make every effort to remove those jurors that are not qualified, that would not be able to hear this case in a fair and impartial way.

Just briefly, I want to point out some of the things about the evidence that was produced before you. I would suggest to the Court that

this survey cannot be relied upon for several reasons. I think the Court can look at the evidence before you and the questions that were posed by these pollers, the adjectives that were used, the inflammatory nature of those adjectives, the inflammatory nature of the information that they were given, the suggestive questions that they were asked, the failure by this company to follow the preferred method of asking questions, which were open-ended, something that would be quite unlike what the lawyers in this case would be doing in selecting a jury where our questions would not only be more open-ended, but, in fact, these jurors would already be placed under oath that their answers must be truthful and, of course, placing them under oath, they would then, of course, be facing perjury if they were not answering in such a manner. This survey also surveyed a very small number of people, 400 in a community of 400,000. Even so, the statistics bear, according to this poll, if they're accepted as reliable by this Court, that 25 percent of those individuals had no opinion or they had formed an opinion of not guilty.

If this Court were to pull in a thousand people, that means you would have 250 people available, by their own statistics, from which to select 12. If the Court were to pull in 800 people, 200 of those people would be eligible, by their statistics, for us to select 12. And if the Court pulls in 600, we still would remain with a figure of 150 from which to pick 12 qualified citizens in this community. From the thousands of potential jurors that are here and available in Sedgwick County, there are surely 12 that can afford these defendants a fair trial.

This survey is an artificial setting. It's over the phone. It's casual, and, as I mentioned before, it's not under oath. It is not face to face. The individuals answering these questions are not facing perjury. They were never asked if they were called upon to serve as jurors, could they promise to eliminate from the information that they have in making their final conclusion any evidence or any information or facts that they heard from the media or outside the courtroom. That is something that the courts in our state always ask jurors before allowing them to serve.

There are no studies that exist that indicate that people cannot change their opinions when called upon to do so or eliminate prejudgments that they may have formed. And I think that that truly is just a matter of common sense that people have the ability to do that. One might suggest that, for example, if I were to go to a movie and see a preview of another or have read a movie review, I might form an initial opinion that that movie might be good or I would like that movie based on a preview or review. But once I've seen the actual movie, my opinion may change. Same with reading a book where the title does not strike me as good, and I form an initial opinion that the book may not be good. However, once the facts and information or the evidence, so to speak, of the book presents itself to me as I observe and read it, that opinion changes. The presidential pollings that we watch every four years and how public opinion is swayed when they receive more facts and information, I think it's unfair to suggest that individual human beings cannot fairly set and take a position that they will decide a case only on the facts and evidence presented before them

in the courtroom. We rely on that promise from jurors every day in this courthouse.

The final case where our Kansas Supreme Court -- State v. Verge -- has addressed this issue. They have indicated strongly that in those many cases that a change of venue has been requested, the court's discretion in this matter has been upheld, and I would ask the Court to allow this community in which the defendants committed their crime to stand as the proper venue.

THE COURT: Thank you. Rebuttal, Mr. Wachtel?

MR. WACHTEL: Thank you, Your Honor. I was -- As I sat listening to Ms. Parker, I was wondering whether the other shoe was going to drop. For a moment I thought it would not, but it did. So, let's talk about the standards that Ms. Dahl followed in preparing her survey. And actually, I don't need them because I wrote this down. Now, the Court will recall there was lengthy cross-examination of Ms. Dahl regarding whether or not she had used open-ended questions or closed-ended questions. And during that cross-examination, Ms. Parker stressed the

commentary 18 to section B6 of that -- those standards, and that comment stated, "Reaction. Open-ended questions designed to let respondents express their feelings about the case, the defendant and/or the victims" was recommended in part that open questions be used, but what didn't happen -- I mean, what didn't happen in that cross-examination was Ms. Parker didn't read the rest of the comments. I don't think you can -- to Ms. Schueler -- Ms. Dahl and ask her about that. I don't think you can just pick a comment at random and, therefore, say that the survey conducted was unfair. There are other parts of the commentary to that section. Commentary 18 also -- Excuse me. Commentary 18 also suggests, and it's in the alternative, that close-ended questions designed to determine whether or not respondents have retained specific knowledge can, in fact, be used. So the commentary is in the alternative. Either way is okay. And Ms. Dahl followed the standards in this survey to a T. So, I urge Your Honor and I'm -- in fact, I'm sure you have done it, and urging you to do it is redundant. You have to read all of the commentary to determine whether or not the

prosecution is correct in its theory that the questions must be open-ended, and when you do that, I think you're going to find that their position is simply not the case.

Ms. Parker talked about the Stanley Elms case. She was mentioning cases in Sedgwick County that received massive amounts of publicity. Now, I'm not familiar with a lot of the cases that Ms. Parker talked about, but I sure as blazes am familiar with the Stanley Elms case, and you simply cannot compare the elements in that case to this case. What you have to do with Elms, you have to contrast it. There was, by way of contrast, virtually no publicity surrounding the Elms case. To put it in what I'm going to term news media parlance, there was nothing sexy about the Elms case. It didn't involve a quadruple homicide. It did not involve black-on-white crime. It did not involve all of those things that makes news newsworthy. Ms. Parker also misspoke when she suggested that the courts had concluded that Mr. Elms got a fair trial. I happen to know that the appellate briefs in the Elms case haven't been filed yet. But, more importantly to the -- this case is the

fact that there was no venue study done in Elms. We don't know what the community thought, and based on the publicity in that case, of which I was aware, intimately aware, no change of venue motion was filed. So relying on Elms is just silly.

Ms. Parker criticizes this study. She says, why, the study wasn't done under oath. You don't have the ability to do the study under oath, Your Honor, and we didn't do it under oath, but she criticizes the results, yet she relies on the results to tell you that 25 percent of the people didn't have any opinion. She relies on the results to do a mathematical computation to tell the Court why you can be sure that if you draw in X number of people you're going to have X number of people who have no opinion or who opine that somehow or other my client might be innocent. And that may or may not be so. I have no idea what we're going to get when 800 people are brought through the door and fill out the surveys. I just have no idea whatsoever. I do know that this community has prejudged this case to a degree that ranks third in the number of surveys that Ms. Dahl's company has done and that

were relied upon by district courts to change venue. And if the proof is in the pudding, then this is the pudding. The district courts of this state have relied on studies compared -- done by Litigation Consultants, Inc. and have determined in cases in which the publicity is much less than in this case, much less than in this case, that the only way a fair trial is going to happen is if you change venue.

Now, Ms. Parker says that if you don't change venue, that that decision is going to be upheld on appeal. Well, maybe so. Maybe not. But I don't reckon that that's the test that courts ought to follow. Courts ought not worry in venue matters of whether or not they're going to be upheld or denied on appeal. What we need to worry about are -- is the empirical evidence, and the empirical evidence is that my client is not going to get a fair trial; that we're going to spend hours, days, weeks trying to select a jury, and we're not going to get there. I simply encourage the Court to do the right thing, to accept the venue study as accurate and as prepared by Ms. Dahl and change venue. If you do that, Your Honor, if you do that, then we're not

going to be guessing about whether or not we're going to be able to find a jury. We're not going to be trivializing this case by comparing it to movies and book titles and previews of motion pictures. We're going to exercise that concern that the Constitution places on you to make sure and, in fact, I think duty sua sponte to make sure that Mr. Carr gets a fair trial, and you can discharge that duty at least in part by granting the motion to change venue. If the Court has no questions, I am finished.

THE COURT: I have none at this time. Thank you.

MR. WACHTEL: Thank you, Your Honor.

THE COURT: Mr. Manna?

MR. MANNA: Nothing further to add, Your Honor.

THE COURT: Let me find, first, Miss Dahl is qualified to render opinions based on studies done of public opinion on a particular subject. The study done and introduced here in evidence was properly done in an acceptable manner in that field. Thus, it's one based in science. It tests the percentile of people in the community who have heard of the case, that

is, have knowledge of it, and it tests opinion of those who have knowledge of the case. The argument then comes to the emotionally biasing publicity. The purpose in selecting a jury is not to find a jury free of knowledge. It's to find a jury free of bias or prejudice. The study shows and the evidence shows and experience shows that in this particular case, having reviewed the material furnished, the law and the argument of counsel, that the venue in which defendants will be assured of the greatest number of venire persons free of bias or prejudice from whom a jury may be selected to decide the case solely on the facts in evidence, viewed by the light of the instruments of law, is Sedgwick County, Kansas. The motion is overruled for both defendants. Which motion do you want to take up next?

MR. GREENO: It's all right with me if we address them in the order that they are on Ms. Marquez's list. To be quite honest with Your Honor -- I apologize for taking up the Court's time -- I'm not sure how many of these motions the State of Kansas actually is in opposition to.

THE COURT: Let's start out with -- First one I have is the motion of Mr. Reginald

Appendix C

Summary of Jury Questionnaire Responses

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The jury questionnaires provide support for the findings presented by Ms. Dahl. On 92% of the questionnaires, jurors indicated having prior knowledge of the case. (R. 210, 211, 212, 213, 214). On the questionnaires, jurors were not asked to indicate if they had an opinion on guilt. Instead, they were only asked if their opinions were so set that they would not be able to set them aside. 67% answered no. (R. 210-214). The jury questionnaires and the voir dire, consisting mostly of closed-ended questions, did little to root out any deeply-held, even subconscious, biases that infected the jury pool. But given that Ms. Dahl's study matched the questionnaires in terms of knowledge of the case, it is reasonable to infer that her survey responses represented the honest views of the community.

In the end, Jonathan Carr proceeded to the peremptory strike stage with numerous jurors who had expressed an opinion of his guilt. Only two of the individuals who ultimately served on the jury claimed on their jury questionnaires not to have heard of the case. (R. 210-214). Jurors D. M., J. S., and D. Ge. professed belief in Jonathan's guilt. (R. 41: 24-25; R. 123: 15; R. 39: 135). Multiple other jurors who did not end up on the final jury also expressed the opinion that Jonathan Carr was guilty. Juror T. W. was convinced they were guilty (R. 115: 139). Juror S. T. "already believe[d] these men are guilty of these hideous crimes." (R. 42: 29). Candidly, Juror V. S. admitted during voir dire that "people of Wichita and this county are going to be looking for, you know, guilty verdict." (R. 121: 130). She even suggested it could be uncomfortable for jurors to face their community if they were to return not guilty verdicts. (R. 121: 131).