QUESTION(S) PRESENTED

1. Whether the Kansas Supreme Court's presumed prejudice standard of review is in contrary to *Skilling v. United States,* 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010) and *State v. Kingman*, 362 Mont. 330, 264 P.3d 1164 (2011)?

2. Whether the Kansas Supreme Court erred by determining that the autopsy photographs presented by the State were not unduly prejudicial.

3. Whether the Kansas Supreme Court applied the wrong standard of review on the lesser-included charge of Manslaughter where the charge actually conflicted with Petitioner's autonomy under *McCoy v. Louisiana,* 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018).

TABLE OF CONTENTS

QUESTION(S) PRESENTED ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES CITED iv
PETITION FOR WRIT OF CERTIORARI 1
LIST OF PARTIES 1
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE FACTS 3
REASONS FOR GRANTING THE PETITION 9

I. THE KANSAS SUPREME COURT ERRED THAT THERE WAS NO PRESUMED PREJUDICE IN THE VENUE OF ROOKS COUNTY. 9

A. THIS COURT'S SKILLING FACTORS WEIGH IN FAVOR OF PRESUMED PREJUDICE 10

B. THE ANSWERS TO THE JURY QUESTIONNAIRE WERE PRESUMPTIVELY PREJUDICIAL EVEN WITHOUT AID OF A VENUE STUDY 20

C. ACTUAL PREJUDICE RENDERED THE JURY VERDICT PRESUMPTIVELY UNRELIABLE 23

II. THE KANSAS SUPREME ERRED BY DETERMINING THAT THE AUTOPSY PHOTOGRAPHS WERE NOT UNDULY PREJUDICIAL 24

III. THE KANSAS SUPREME COURT APPLIED THE WRONG STANDARD OF REVIEW ON THE LESSER INCLUDED CHARGE OF MANSLAUGHTER 29

CONCLUSION 38
APPENDIX 39
PROOF OF SERVICE 40

TABLE OF AUTHORITIES CITED

CASES

Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) 20, 21, 22

California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) 20, 23

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 37

Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) 23

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 25

Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) 10

McCoy v. Louisiana, 138 S.Ct. 1500, 1511, 200 L.Ed.2d 821 (2018) 37

Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963) 9

Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) 9

Skilling v. United States, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010) 10, 11

State v. Bernhardt, 304 Kan. 460, 372 P.3d 1161 (2016) 18

State v. Boyd, 216 Kan. 373, 532 P.2d 1064 (1975) 28

State v. Breitenbach, 483 P.3d 448, 458 (Kan. 2021) 21

State v. Carr, 300 Kan. 1, 56, 331 P.3d 544, 595 (2014), rev'd and remanded on other grounds, 577 U.S. 108, 136 S.Ct. 633, 193 L.Ed.2d 535 (2016) 9, 11, 12

State v. Dupree, 304 Kan. 43, 371 P.3d 862 (2016) 26

State v. Gentry, 310 Kan. 715, 449 P.3d 429 (2019) 30

State v. Jones, 279 Kan. 395, 109 P.3d 1158 (2005) 30

State v. Kettles, 299 Kan. 448, 325 P.3d 1075 (2014) 32, 33, 36

State v. Kingman, 362 Mont. 330, 264 P.3d 1164 (2011) 12

State v. Lloyd, 299 Kan. 620, 325 P.3d 1122 (2014) 25

State v. Logsdon, 371 P.3d 836, 304 Kan. 3 (2016) 18

State v. Longoria, 301 Kan. 489, 343 P.3d 1128 (2015) 13

State v. Loyd, 325 P.3d 1122, 299 Kan. 620 (2014) 18

State v. Miller, 308 Kan. 1119, 1127, 427 P.3d 907 (2018) 10

State v. Mireles, 297 Kan. 339, 301 P.3d 677 (2013) 26

State v. Soto, 322 P.3d 334, 299 Kan. 102 (2014) 18

STATUTES

28 U.S.C. § 1257(a) 1

K.S.A. 21-5401 ..... 2, 25

K.S.A. 21-5402 ..... 2, 7, 25, 30

K.S.A. 21-5403 30

K.S.A. 21-5404 2

K.S.A. 21-6620 ..... 8, 18

K.S.A. 22-4508 21

CONSTITUTIONAL PROVISIONS

Kansas Const. Bill of Rights § 10 ..... 2, 9

Kansas Const. Bill of Rights § 5 ..... 2, 30

U.S.C.A. Const. amdt. VI 1, 9, 32

U.S.C.A. Const. amdt. XIV 2, 20

PETITION FOR WRIT OF CERTIORARI

Petitioner, Alifonso Eduardo Garcia, (hereinafter "Petitioner" or "Mr. Garcia") respectfully prays that a writ of certiorari issue to review the judgment of the Kansas Supreme Court below.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

OPINIONS BELOW

The date on which the highest states court decided my case was April 29, 2022.

The opinion of the highest state court to review the merits appears at Appendix 1a - 24a to the petition and is reported at State of Kansas v. Alifonso Eduardo Garcia, 508 P.3d 394 (Kan. 2022).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part, that "[i]n 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."

The Fourteenth Amendment provides, in pertinent part, that "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny t any person within its jurisdiction the equal protection of the laws."

The Kansas Constitution's Bill of Rights, § 5 provides that "[t]he right of trial by jury shall be inviolate."

The Kansas Constitution's Bill of Rights, § 10 provides, in relevant part, that "[i]n all prosecutions, the accused shall be allowed ... a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Kansas Statute 21-5402(a) provides that "[m]urder in the first degree is the killing of a human being committed (1) intentionally, and with premeditation; or (2) the commission of, attempt to commit, or flight from any inherently dangerous felony."

Kansas Statute 21-5401(a) provides that "[m]urder in the second degree is the killing of a human being committed (1) intentionally; or (2) unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life."

Kansas Statute 21-5404(a) provides that "[v]oluntary manslaughter is knowingly killing a human being committed (1) upon a sudden quarrel or in the heat of passion; or (2) upon an unreasonable but honest belief that circumstances

existed that justifies use of deadly force under K.S.A. 21-5222, 21-5223 or 21-5225, and amendments thereto."

STATEMENT OF THE FACTS

The Kansas State Forensic Pathologist, Dr. Lyle Noordhoek testified that he arrived at the scene—the residence of 411 Commercial Street—about 6:00 p.m but did not enter the residence until "7:00 p.m.ish." App. 27a[1]. Dr. Noordhoek further testified that "[t]here was evidence of death, and there was also evidence that the body had been dead for at least 12 or more hours; 12 to 18 hours, somewhere in that range." App. 28a. On cross examination, Dr. Noordhoek testified that "the bruising occurred in the last 12 to 24 hours," and this calculation was based upon the 6:00 p.m. time when he arrived at the house. "So 6:00 pm., so [the time of death] would be somewhere between 6:00 p.m. and 6:00 a.m." App. 29a.

On March 18, 2018, at 16:59:40 (4:59 p.m.), the surveillance[2] cameras at Mr. Garcia's house shows him leaving with his daughter. App. 30a.

On the same date, at 21:57:48 (9:57 p.m.), the surveillance cameras show Petitioner returning to his house. App. 30a. Petitioner noticed a strong odor of alcohol and cigarettes and signs that the living room had been disturbed. He also

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[1] Mr. Garcia affirms that the photocopied transcripts are true and correct as provided by Peter Maharry from the Kansas Appellate Defender Office. App. 25a, 26a.

[2] Mr. Garcia testified that he installed the surveillance videos because "we were having people coming in the house. People was breaking in the house. We were finding four front door sometimes unlocked, stuff around the house moved around. So we decide to buy the cameras." Trial Transcripts Fifth Day December 10, 2019 at 260. The PPD as well as one of Alexis' friend, Joshua Barnhart was aware of the "multiple" break-ins.

found that the lights were not working and called out for Alexis. When Alexis did not respond, Petitioner checked the house and found Alexis unresponsive on the floor of one of the bedrooms. Petitioner moved Alexis from the floor to the bed and attempted C.P.R. When the C.P.R. was not working Petitioner used his phone to dial for help.

At 22:15:25 (10:15 p.m.) Petitioner called his father, Jose Refugio Garcia.

At 22:16:04 (10:16 p.m.) Petitioner received an incoming call from his brother, Rufgio Jovany Garcia. App. 30a.

After talking to Petitioner, Jovany called the Plainville Police Department. App. 31a - 37a.

At 11:11 PM, Dispatcher Brandy Wilkinson advised to Part Time Plainville Police Officer David Hovis to respond to 413 S. Commercial Street, Plainville, Rooks County, Kansas 67663 for a welfare check. App. 31a.

"Due to the circumstances, [K9 Sergeant Nolan Weiser] opened the screen door to the residence and attempted to open the front door to the residence. The front door was locked and would not open. During this time, Ofc. Hovis stated he believed he saw movement inside of the house ... At one point, [Weiser] belived [he] heard movement inside of the residence." App. 32a.

At the same time, Petitioner "was coming out the room. I saw a shade, like, in the floor. I saw the shade moving, and right away I got hit on the top of my head.

I don't, I'm not sure if somebody throw something at me or if somebody hit me." App. 37a.

Jovany gave the officers permission to enter the house but the officers did not feel they had a basis for doing so. Instead, the officers waited for Jovany's arrival—a minimum two-hour drive from Abilene to Plainville—in order to gain entry into Petitioner's house. When Jovany arrived at the house, Plainville Police Department ('PPD") had to wait an extra 20 minutes for another deputy to show up because PPD wanted two officers there when the door was broken in. Once the officer arrived, Jovany kicked in the front door of the residence and PPD made entrance into the house. App. 34a.

Upon entry of the house, PPD found signs that there had been a struggle/fight within the house. Petitioner was laying on the floor in one of the bedrooms with his throat cut. PPD found Alexis on her back on the bed with her throat cut. Alexis had bruises on her face and hands, injuries to her face and lips, and a laceration across her neck. App. 40a.

Officers immediately suspected Petitioner and Mr. Garcia "was considered to be in custody." That is, Sergeant Weiser immediately "believed that this [case] was a homicide-suicide attempt." App. 36a.

On March 21, 2018, Kansas Bureau of Investigation ("KBI") Senior Special Agent ("SSA") Mark Kendrick took photographs of Petitioner's body including all injuries in the course of executing a search warrant on Petitioner's body. During

that interaction, Mr. Garcia told SSA Kendrick about two guys present at his house. SSA Kendrick stopped Petitioner and told him if Petitioner wanted to talk he needed to contact an attorney. Without SSA Kendrick's knowledge, Plainville, KS Police Captain Chris Davis audio recorded the process of the search warrant execution. However, the recording does not include Petitioner's statement about the two men. App. 42a. It was SSA Kendrick's opinion that he recognized other lacerations on the left side of Petitioner's neck as "hesitation marks." App. 42a.

SSA Kendrick was the lead investigator in Mr. Garcia's case. During the execution of the search warrant, Mr. Garcia tried to talk with SSA Kendrick about his case. SSA Kendrick told Garcia he could not talk about the case because he had previously asked for an attorney. Mr. Garcia continued talking and did finally tell SSA Kendrick that there were two guys. SSA Kendrick stopped Garcia and told him if he wanted to talk he needed to contact his attorney. SSA Kendrick would then be glad to speak with him. Without SSA Kendrick's knowledge, Plainville, KS Police Captain Chris Davis audio recorded the process of the search warrant execution. After the search warrant execution Captain Davis advised SSA Kendrick he had a recording what was said and he would provide the recording to SSA Kendrick. The recording does include Garica's statement about the two men. App. 42a.

However, at trial, SSA Kendrick was not factually truthful about the "two different conversations" that took place between himself and the Petitioner. App.

43a. SSA Kendrick was less than truthful when he testified Mr. Garcia did not try to speak to him and gave a statement. App. 44a. The State stated for the record that Petitioner never gave a statement to SSA Kendrick (App. 43a, 45a) but, to the contrary, Petitioner did and it was recorded by Plainville Kansas Police Captain Chris Davis. App. 42a.

The State of Kansas subsequently charged Petitioner with first-degree premeditated murder in violation of Kansas Statute Annotated (K.S.A.) 21-5402(a)(1).

Petitioner submitted a motion in the trial court of Rooks County for a change of venue because the "nature of the crime, the low population in Rooks County, and the pretrial publicity through 'talk of the town.'" App. 46a. The trial court denied the motion and Petitioner's counsel moved for a venue study. The district court authorized a study and for a juror questionnaire to be sent out. However, funds for a study were never provided by the Board of Indigent Defense Services (BIDS).

Petitioner submitted another motion for change of venue without any additional information through a venue study. The district court noted the burden was on Petitioner to show prejudice in the community that would warrant a change of venue. It did not find sufficient indication that prejudice existed and voir dire could address any issues of bias. Subsequently, the trial court denied the motion to change venue.

Mr. Garcia renewed his motion to change venue at trial. Petitioner also objected to the venire panel. Petitioner noted that "45% of the jurors that have either been excused or that have voiced or answered the question that they have already formed an opinion concerning the guilt of Mr. Garcia." App. 47a. For the State, the question was not whether the potential jurors came in with an opinion, but whether they could set their opinion aside and decide the case based on the evidence at trial. *Ibid.* The district court again denied the motion.

After the close of the case, the State requested an instruction on second degree murder. Petitioner objected, but the State asserted that the district court was obligated to instruct the jury on second degree murder. The district court agreed with the State and instructed the jury on second degree murder. As the district court opted to instruct the jury on second degree murder, Petitioner requested an instruction on voluntary manslaughter. The district court, however, denied Petitioner's request for an instruction on voluntary manslaughter as a lesser included offense. App. 48a - 49a.

The jury returned a verdict of guilty on first degree murder.

The district court sentenced Mr. Garcia to the Hard 50, life imprisonment without the possibility of parole for fifty (50) years, pursuant to K.S.A. 21-6623[3]. App. 50a.

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[3] Petitioner did not waive his right to a jury trial for sentencing. In the sentencing proceeding, the State "believe that the proper sentence in this case is defined by K.S.A. 21-6623, life

REASONS FOR GRANTING THE PETITION

I. THE KANSAS SUPREME COURT ERRED THAT THERE WAS NO PRESUMED PREJUDICE IN THE VENUE OF ROOKS COUNTY.

The Sixth Amendment guarantees an accused "[i]n all criminal prosecutions" the right to trial by "an impartial jury of the county or district in which the offense is alleged to have been committed." *State v. Carr*, 300 Kan. 1, 56, 331 P.3d 544, 595 (2014), rev'd and remanded on other grounds, 577 U.S. 108, 136 S.Ct. 633, 193 L.Ed.2d 535 (2016).

In addition, the Fourteenth Amendment also guarantees a criminal defendant a right to a trial by an impartial jury free from outside influences. *See Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). In some cases, a court may presume prejudice to the defendant such as "[w]here media or other community reaction to a crime or a defendant endangers an atmosphere so hostile and pervasive as to preclude a rational trial process." *Id.*

Likewise, the Kansas Constitution guarantees a trial "by an impartial jury of the county or district in which the offense is alleged to have been committed." Kan. Const. Bill of Rights § 10.

This Court examines Sixth Amendment venue challenges based on pretrial publicity in two contexts: presumed prejudice, *Rideau v. Louisiana,* 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963) and actual prejudice, *Irvin v. Dowd,* 366

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in prison without the possibility of parole for 50 years." App. 50a. The trial court did not consider *any* mitigating factors.

U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). *See also State v. Miller,* 308 Kan. 1119, 1127, 427 P.3d 907 (2018).

However, in *Skilling v. United States,* 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010), this Court found a number of considerations to be relevant in determining whether there is presumed prejudice: "First, we have emphasized in prior decisions the size and characteristics of the community in which the crime occurred ... Second, although news stories about Skilling were not kind, they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight ... Third, unlike cases in which trial swiftly followed a widely reported crime, [ ] over four years elapsed between Enron's bankruptcy and Skilling's trial ... Finally, *and of prime significance,* Skilling's jury acquitted him of nine insider-trading counts. [ ] In *Rideau, Estes,* and *Sheppard,* in marked contrast, the jury's verdict did not undermine in any way the supposition of juror bias." *See* 561 U.S. at 382 - 84 (emphasis added).

A. THIS COURT'S SKILLING FACTORS WEIGH IN FAVOR OF PRESUMED PREJUDICE.

The Kansas Supreme Court determined that the Kansas District Court of Rooks County did not abuse his discretion when denying Petitioner's motion for a change of venue before trial began. This determination is unreasonable in light of the facts of Mr. Garcia's case. Most incredible is that other the obvious—pretrial

publicity through public media and by the general talk of the town—Petitioner's Sixth Amendment right did not protect him from failing to document or provide any supporting articles which would provide the district court with any factual basis.

The Kansas Supreme Court applied a variant of this Court's standard in *Skilling v. United States,* 561 U.S. 358, 381 - 85 (2010), when considering whether to presume prejudice. App. 6a. *See generally State v. Carr,* 331 P.3d 544, 598 - 599[4].

In reviewing a trial court's decision on whether presumed prejudice existed the Kansas Supreme Court applied a "bifurcated standard of review." App. 7a. The Kansas Supreme Court "considers whether substantial competent evidence supports the trial court's findings of fact ... [and] review any legal conclusions de novo." *Ibid.* In reviewing whether actual prejudice existed, the Kansas Supreme Court "reviews the district court's conclusions for an abuse of discretion." *Ibid.*

In the Kansas Supreme Court's view, "a mixed standard of review, must apply to a presumed prejudice challenge on appeal. The factors enumerated by [this Court] in *Skilling* require fact findings, whether explicit or necessarily implied,

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[4] The *Carr* Court found that "the United States Supreme Court has identified seven relevant factors to be evaluated: (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. *See Skilling v. United States,* 561 U.S. 358, 381 -385, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010)." *Id.*

that we must review for support by substantial competent evidence in the record. If such evidence exists, we defer on the fact finding. However, overall weighing of the factors calls for a conclusion of law, and we must review the conclusion of law under a de novo standard." *Carr, supra,* 331 P.3d 544, 599.

However, the Kansas Supreme Court "disagree with the Montana Supreme Court and the apparent majority among the federal appellate courts." *Ibid.* The Kansas Supreme Court "see[s] room for difference in the standard of review applied to presumed prejudice and actual prejudice claims, because presumed prejudice does not consider voir dire conducted in the presence of the trial judge. But we also disagree with the Tenth and Fifth Circuits." *Ibid.* That is, the Montana Supreme Court took the contrary position that "[f]or this reason, and because there is no clearly established law under the United States Constitution mandating 'de novo' review of 'presumed prejudice' claims we will continue to review for abuse of discretion a trial court's ruling on motion for change of venue." *State v. Kingman,* 362 Mont. 330, 347, 264 P.3d 1164 (2011).

1. THE SIZE AND CHARACTERISTICS OF PLAINVILLE IN ROOKS COUNTY

Under a similitude of Court's *Skilling* factors, the Kansas Supreme Court determined the "only the size and characteristics of the community and the impact of the crime on the community weigh in favor of finding presumed prejudice. The

remaining factors are neutral, weigh against such a finding, or are inapplicable." App. 9a.

Under this Court's first factor, the size and characteristics of the community in which the crime occurred, Rooks County has a population of 4,920 as of July 1, 2019[5].

The "relatively small population" in the community of Plainville contains only 1,801 people. In that small population, the demographics heavily weigh against Petitioner's Hispanic heritage. Rooks County is made up of 96.1% white, with only 2.4% as Hispanic. In Plainville, the number of Hispanic residents is drastically smaller.

The Kansas Supreme Court has determined that under the *first* factor, Rooks County's "relatively small population" weighs in favor of presumed prejudice. *See* App. 9a (On review, only the size and characteristics of the community and the impact of the crime on the community weigh in favor of finding presumed prejudice.); *see also State v. Longoria,* 301 Kan. 489, 506, 343 P.3d 1128 (2015) (The **third *Skilling* factor**—the size and characteristics of the community—weighs in favor of presumed prejudice ... The jury pool for Longoria's case consisted of 20,546 residents, which is a relatively small population.) (emphasis added).

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[5] *See* United States Census Bureau, https://www.census.gov/quickfacts/fact/ table/ rookcouty kansas,KS/ PST045219.

Because of the small population and demographics—Mr. Garcia is Hispanic, whose racial makeup is less than 1% and Alexis Garcia is Caucasian, whose racial makeup is roughly 96%—this Court must find, under this factor alone, that being tried in Plainville for the crime of first-degree premeditated murder where the State of Kansas was seeking a sentence enhancement (the Hard 50) is presumptively prejudicial. *See also* App. 9a (On review, only the size and characteristics of the community and the impact of the crime on the community weigh in favor of finding presumed prejudice.).

2. NEWS STORIES ABOUT PETITIONER WERE NOT KIND AND WERE SPREAD THROUGH THE SMALL COMMUNITY OF PLAINVILLE THROUGH THE VEHICLES OF TOWN TALK AND SOCIAL MEDIA.

This Court described the "second" *Skilling* factor as "news stories ... contain[ing] confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Id.* 561 U.S. at 382.

In Mr. Garcia's case, the Kansas Supreme Court took notice that Rooks County "is a small community, *however*, any publications were minimal."

The Kansas Supreme Court rejected the theory that Petitioner could not receive a fair trial in Rooks County because of the nature of the crime, the low population in Rooks County, and the pretrial publicity through "talk of the town." Given the relatively small population of Plainville, the Kansas Supreme Court gave

little or no weight to the "talk of the town" to include social media publications as well. Nevertheless, the district court did not make specific findings on each of the factors. The Kansas Supreme Court found that "the court's factual findings were minimal, Garcia does not challenge those findings as insufficient. Consequently, we accept them as they appear in the record." App. 9a. However, a statement from Gary Scacchi reveals that Mr. Scacchi "went to the Stockton Fire dept to pick up an application for fireman. He stated there were 3 people there and that there was a cell phone laying on the desk that was on and a photo of Alexis Garcia was showing. He stated the photo showed her laying down with a sheet covering her chest and her throat appeared to sewn up like a morgue photo. He did not know the names of the men at the fire dept." App. 51a and 52a. Of course, such a picture of the deceased Alexis posted on the "social media platform" by the fire department is something a reasonable viewer can not "easily shut from sight."

Even under the "minimal" facts—predominantly the juror questionnaires—the Kansas Supreme Court unreasonably applied the second *Skilling* factor. The pretrial coverage and "town talk" did predispose the community against Petitioner and the potential jury pool showed this bias. The trial court granted the "State's Motion for use of Juror Questionnaire." The Questionnaire is submitted in the Appendix pp. 54a - 65a. App. 54a - 65a.

There were 100 juror questionnaires that were returned. Out of that number, only 29 had not "seen, read or heard news reports or personal

discussions" of the case. App. 60a, Question #24. The remaining 71 had seen news coverage or heard about the case from another source. Most notable is approximately a third of the jury panel had formed an opinion on the case. App. 61a, Question #25. The questionnaires also "indicated over two-thirds of the jury pool remembered stories about the case." App. 11a.

Furthermore, postmortem pictures of Alexis were leaked in the community and the Kansas Bureau of Investigation began an investigation.

Nevertheless, the Kansas Supreme Court's agreement with Petitioner's limited factual findings resulted in a *somewhat* favorable analysis: "Here, most survey respondents were aware of the Garcia case. Many had heard of the details from friends and acquaintances. One respondent indicated she had made t-shirts in memory of Alexis by request from community members. **These facts, along with the small size of the community, suggest this factor weighs in favor of presuming prejudice.**" App. 13a (emphasis added).

This Court should find that in favor of presumed prejudice as well.

3. MR. GARCIA'S TRIAL TOOK PLACE AROUND 20 MONTHS AFTER THE DEATH OF ALEXIS BUT THERE WAS STILL A HIGH DEGREE OF RECOGNITION OF THE CASE.

Under the *third* factor, Alexis was killed in March 2018. Petitioner submitted his "Motion for Change of Venue" and "Motion for Use of Juror Questionnaire" on December 5, 2018. On May 1, 2019, the trial court denied

Petitioner's motion to change venue. Before trial, Mr. Garcia renewed his motion for a change of venue. The trial court denied that motion. Petitioner's trial began on December 4, 2019.

In respect to the questionnaires, the Kansas Supreme Court found that "[m]ost of the 100 completed surveys indicated awareness of the case, but the surveys did not inquire about specifics. However, there was still a high degree of case recognition 14 months after the killing. This could suggest a neutral result, but Garcia's failure to show the community members remembered specific details about the case pushes it out of his favor. This factor weighs slightly against finding presumed prejudice." App. 12a.

However, the Kansas Supreme Court distinguished the second and third *Skilling* factors differently. The Kansas Supreme Court agreed with the factual finding of a "high degree of case recognition" but the "minimal publications and town talk" did not amount to a presumption of prejudice. In a different course, as argued above, the "facts" contained in the juror questionnaire's, "along with the small size of the community" *suggest* this factor [which considers the impact of the crime on the community] weighs in favor of presuming prejudice." App. 13a (emphasis added).

4. PETITIONER'S JURY RETURNED A VERDICT OF GUILTY

Of *prime significance* is that Mr. Garcia's jury returned a verdict of guilty to the crime of first-degree premeditated murder and the trial judge, in contrary to Mr. Garcia's Sixth Amendment right, sentenced Petitioner to the "maximum" sentence allowed under K.S.A. 21-6623 of 50 years without the possibility of parole. *State v. Loyd,* 325 P.3d 1122, 299 Kan. 620 (2014); *see also State v. Bernhardt,* 304 Kan. 460, 372 P.3d 1161 (2016); *State v. Soto,* 322 P.3d 334, 299 Kan. 102, denial of post-conviction relief reversed 445 P.3d 1161, 310 Kan. 242 (2014); *State v. Logsdon,* 371 P.3d 836, 304 Kan. 3, denial of post-conviction relief reversed in part 466 P.3d 491 (2016), unpublished.

The State of Kansas premised their theory of the killing of Alexis on "marital discord" after Petitioner was placed in "custody." The State utilized the March 6, 2018, phone call to the Plainville Police Department as a signature of a domestic disturbance and buttressed that "Lexie advised she had told Eduardo on the morning of March 5, 2018, she wanted a divorce." App. 38a. To buttress support for their theory, the State also provided that "[a]round March 10, 2018, Lexie told her mother, Christie McLain, she had decided to leave Eduardo. In addition, Lexie told her mother on March 17, 2018, she had a place to live in Stockton, Kansas, and was planning on moving with S.L.G. on May 1, 2018. Lexie stated she was fed up with Eduardo's drinking and the fact that he did not help with anything around the house. App. 38a. The State relied on the opinion of SSA

Kendrick based on his "observations." SSA Kendrick observed a laceration on the front of Eduardo's neck extending from below his left ear to the right side of his neck/throat. Associated with that laceration were a number of other lacerations on the left side of Eduardo's neck. Those smaller, linear lacerations are what SSA Kendrick recognized as hesitation marks. Hesitation marks are multiple, usually superficial wounds that are associated with a final cut in a suicide or suicide attempt. These wounds may represent the individual testing their resolve before the final act, or slowly building up their mental response to the pain of the wound infliction." The State even went as far as moving in the trial court for Notice of Intent to Introduce Evidence of Marital Discord.

The guilty verdict, even in light of the requested lesser-included second degree murder charge by the State, shows that the jury was predisposed to finding Petitioner guilty of premeditated murder as initially requested by the State.

Under this Court's *Skilling* factors, Petitioner has demonstrated his burden that Plainville's population of less than 2,000 people is a "relatively small community" with a disproportionate demographic percentile of whites to Hispanics; the killing of Alexis Garcia, a correctional officer, negatively impacted the community; the crime had a "high degree of recognition" more than 20 months after it occurred; and the jury found Petitioner guilty, even with the request of a lesser included charge by the State of Kansas.

B. THE ANSWERS TO THE JURY QUESTIONNAIRE WERE PRESUMPTIVELY PREJUDICIAL EVEN WITHOUT AID OF A VENUE STUDY.

The Kansas Supreme Court acknowledged that even the State concedes "such a small community [as Plainville] weighs in favor of finding prejudice." App. 11a. Petitioner moved for a change of venue and the district court authorized a study to be done in support of the motion to change venue. *See* App. 52a, 53a. However, the Board of Indigent Defense Services ("BIDS") refused to pay for such a study.

Without benefit of the venue study Petitioner argued that he could not present a full and complete defense in contrast to defendants that have means to obtain a venue study. Petitioner argued, without bringing the claim in the district court, that the denial of funds for a venue study implicated his fundamental rights to equal protection of the law under the Fourteenth Amendment and the fundamental right to present a complete defense protected by the Due Process Clause. *See generally Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); *California v. Trombetta,*467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

The State argued that the district court neither decided whether the study was necessary nor ordered BIDS to fund it. Instead, the State posits, the court authorized Mr. Garcia to seek a study if BIDS agreed to fund it. The State agrees

that BIDS declined to fund the study but argued that this did not violate Mr. Garcia's constitutional rights. App. 15a - 16a.

The Kansas Supreme Court declined to apply a de novo review because that court declined to consider Mr. Garcia's claim for the first time on review. App. 15a.

In *Ake v. Oklahoma,* this Court found that "Oklahoma's waiver rule does not apply to fundamental error." *Id.,* 470 U.S. at 75. Furthermore, this Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." *Id.,* 470 U.S. at 76. Undoubtedly the Kansas Supreme Court has said there is no constitutional right to an expert. *See State v. Breitenbach,* 483 P.3d 448, 458 (Kan. 2021); K.S.A. 22-4508 (An attorney other than a public defender who acts as counsel for a defendant who is financially unable to obtain investigative, expert or other services necessary to an adequate defense in the defendant's case may request them in an *ex parte* application addressed to the district court where the action is pending.).

To further support Mr. Garcia's motion for venue change, a venue survey was a "basic tool of an adequate defense" to be tried by an "impartial jury" where the questionnaire revealed that 71 of the 100 answered that they had seen news coverage or heard about the case from another source.

Nevertheless, the Kansas Supreme Court found that the "record fails to confirm either position," "doubt[ed] whether the lack of venue study [where the

demographics is over 90% white and less than 1% Hispanic] affected Garcia's [Hispanic] fundamental rights [to an impartial jury]," and "it is unlikely Garcia was denied a fundamental right." App. 16a.

Because the Kansas Supreme Court did not determine that the "limited" facts presented in the "jury questionnaires" were adequate, that court found that no constitutional error occurred. Regardless of the "questionnaires" the Kansas Supreme Court acknowledged that "pretrial publicity was still pervasive." App. 11a. In the instant case, the Kansas Supreme Court erred that the finding that the venue study was necessary to an adequate defense and, most critical, Petitioner was financially unable to obtain those services. *See* K.S.A. 22-4508. Under *Ake v. Oklahoma,* Mr. Garcia was denied a "fundamental" right. Similarly, the Kansas Supreme Court's "waiver rule does not apply to a fundamental trial error." *Id.* 470 U.S. 74. It is asserted that venue study where the demographics is radically disproportionate of more than 90% whites to a little more than 1% Hispanic is "basic tool of an adequate defense" where the Petitioner, of Hispanic descent—the only suspect according to law enforcement—is accused of murdering his *white* wife.

Therefore, this Court should find it not harmless that the limited facts before the Kansas Supreme Court were enough to determine that Petitioner was denied the fundamental right to a full and fair defense where benefit of the venue study would have *provided substantial evidence* to support the limited but

prejudicial facts revealed in the jury questionnaires. *See Crane v. Kentucky,* 476 U.S. 683, 691, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)*; see also California v. Trombetta, supra,* 467 U.S. 484 (We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.).

C. ACTUAL PREJUDICE RENDERED THE JURY VERDICT PRESUMPTIVELY UNRELIABLE

The Rooks County jury convicted Mr. Garcia first degree premeditated murder. Trial counsel concluded from the jury questionnaires over 50 percent of the jury members had an opinion about the case. Alexis Garcia was a correctional officer employed at Norton Correctional Facility's satellite unit in Stockton, Kansas. In this respect, Alexis would have been viewed as similarly as law enforcement. This prejudice is evinced by the fact the State of Kansas transferred Mr. Garcia to the State of Oklahoma after his conviction and during his direct appeal process. The Kansas Supreme Court affirmed Petitioner's conviction on April 29, 2022.

Petitioner was tried and convicted in a county where the populous was over 90% white and most had already formed an opinion about the "murder-suicide attempt" of Alexis Garcia, an opinion meted out by law enforcement for the onset of entering into Petitioner's home. Furthermore, this Court cannot ignore that actual prejudice occurred when Petitioner was transferred to a different state while

exercising his right to appeal, or that Mr. Garcia's state conviction was not final and, although not denied the right to appeal, Petitioner's Kansas Appellate Lawyers could not effectively assist him in Oklahoma.

II. THE KANSAS SUPREME ERRED BY DETERMINING THAT THE AUTOPSY PHOTOGRAPHS WERE NOT UNDULY PREJUDICIAL

The Kansas Supreme Court erred in determining that the photographs of the deceased Alexis were not unduly prejudicial because they were relevant and had a reasonable tendency to prove a material fact in the case. App. 17a.

Before trial Petitioner stipulated to the cause and manner of Alexis's death. Mr. Garcia's defense is that he did NOT commit the murder and could provide an accurate alibi of his whereabouts during the time in which the medical examiner determined Alexis's death occurred. However, the State sought to introduce the photographs to support its theory of "premeditation." From the record, Petitioner's counsel failed to "object" to the "vivid crime scene" photos—Exhibits 105 and 106 (App. 66a and 67a)—introduced through the examination of KBI senior special agent, Brian Carroll. Trial counsel did object to the introduction of postmortem photographs of Alexis—Exhibits 75 through 89. App. ___a - ___a.

Mr. Garcia asserted that the 15 photographs were introduced to inflame the passions of the jury and irrelevant, to the opposite, the State argued that none of the autopsy photographs were neither gruesome nor inflammatory.

The Kansas Supreme Court concluded that "caselaw makes it clear the autopsy photographs were relevant. They tended to prove the violent nature of the crime and helped explain and corroborate the pathologist's testimony and report." App. 17a.

Fundamental to the trial process is that "under the Due Process Clause of the 14th Amendment, no person may be convicted of a crime unless every fact necessary to establish the crime with which he is charged is proven beyond a reasonable doubt." *In re Winship,* 397 U.S. 358, 368, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In the instant case, the elements for first-degree premeditated murder are (1) intentionally and (2) with premeditation. K.S.A. 22-5402. The element for second-degree murder is only intentionally. K.S.A. 22-5401.

The Kansas Supreme Court found Petitioner's argument that the state had to prove only the elements of the crime "unpersuasive" because that court determined that the photographs support the alleged cause of death and the violent nature of the crime are relevant evidence in a murder trial. App. 18a. However, Kansas bifurcates the guilt phase from the penalty phase when the State seeks to enhance the minimum term of 25 years to the maximum term of 50 years incarceration without possibility of parole. *See generally State v. Lloyd,* 299 Kan. 620, 325 P.3d 1122 (2014) (Statutory procedure for imposing a hard 50 sentence violates the Sixth Amendment because it permits a judge to find by preponderance of the evidence the existence of one or more aggravating factors necessary to

impose an increased mandatory minimum sentence, rather than requiring a jury to find the existence of the aggravating factors beyond a reasonable doubt.).

As a threshold, the Kansas Supreme Court held that "the State must prove the manner of death and violent nature of the crime even when the defendant concedes the cause of death." App. 18a. However, the introduction of the **15** autopsy photographs objected to and the **2** crime scene photographs not objected to were not relevant and more prejudicial than probative. The Kansas Supreme Court determined that the pictures can depict "injuries" in a way that a coroner's testimony cannot. App. 18a. *See also State v. Dupree,* 304 Kan. 43, 65, 371 P.3d 862, 870 (2016). That court further explained that "autopsy photographs that assist a pathologist in explaining the cause of death are relevant and admissible ... however, admitting gruesome pictures simply to inflame the minds of the members of the jury is error ... We have also often said that the admission of unduly repetitious photographs can constitute an abuse of discretion ... the key, as with prejudice, is the word unduly." *State v. Mireles,* 297 Kan. 339, 357, 301 P.3d 677 (2013).

In Mr. Garcia's case, the State argued that the photographs 76-80 (App. 69a – 73a) and 83-89 (App. 76a - 82a) were neither gruesome nor inflammatory but only merely show bruises, cuts, markings, or clothing on Alexis' body. One of these is a photo of Alexis, unclothed from the waist up, that shows bruising and marks on her torso. Nine of the photos show close-up pictures of cuts and bruises

on various parts of Alexis' body. Three of the pictures depict close-up views of Alexis' bloodied face. The remaining photo is a close-up picture of the laceration on Alexis' neck. These were all admitted along with the autopsy report during the testimony of Dr. Lyle Noordhoek, the forensic pathologist who conducted the autopsy. App. 17a.

The Kansas Supreme Court erred in determining that the photos helped explain the cause of death. However, those pictures—as described by the Kansas Supreme Court above—cannot support "the cause of death is hypoxia due to asphyxia due to compressive forces and anterior compression of face and mouth against surface or soft items." Moreover, the State concedes that those pictures were not "gruesome" or "inflammatory" so the repetitive basis cannot be due to the "violent nature of the crime." In this case, those pictures were more prejudicial than probative because their purpose was to further inflame the passions of a jury that was predisposed to prejudice against Mr. Garcia. *See* Proposition I, *supra.*

The pictures do not prove any "material facts." The repetitive *postmortem* pictures show cuts and bruises on Alexis' face and body but cannot support the inference that Petitioner *actually* caused those wounds. Those pictures shown to the jury without probative value to the cause and manner of death is "unduly prejudicial" evidence. The Kansas Supreme Court acknowledged that the pictures are "certainly prejudicial to Garcia's case." App. 19a. However, that court erred that those pictures, without probative value, inflamed the minds of the members of

the jury." The Kansas Supreme Court distinguished Petitioner's case from *State v. Boyd,* 216 Kan. 373, 377, 532 P.2d 1064 (1975). App. 19a. In *Boyd,* the use of **one** postmortem picture was enough for the Kansas Supreme Court to find prejudice. In Petitioner's case, the use of 17 "prejudicial" photographs in a repetitive manner did not rise to the level of one photograph. Furthermore, the Kansas Supreme Court found that "the extensive nature of Alexis' many wounds, as depicted in the pictures, helped support the State's theory of premeditation." App. 17a. However, Petitioner admitted to moving Alexis' body *after* Mr. Garcia found her unresponsive. Dr. Lyle Noordhoek testified that Alexis had to have been deceased prior Petitioner returning home at 9:57:48 P.M. See 28a - 29a (There was evidence of death, and there was also evidence that the body had been dead for at least 12 or more hours ... So [the death] would be somewhere between 6:00 P.M. and 6:00 A.M.; correct? ... Somewhere in that timeline, yes.)

The State also tried to implicate the time of death occuring before Petitioner left to his parents' home in Abilene, Kansas. The State introduced the March 18, 2018 phone call to Petitioner's brother to establish an inaccurate fact that "During that phone call you told him that you had been feeding Sophia tacos, and you heard Lexi fall and die; isn't that correct?" App. 83a - 84a. Under such circumstances, the photographs do not support either "premeditated" theory.

Therefore, the evidence used in Mr. Garcia's case is unduly prejudicial rather than probative to the State's theory of the case and that specific evidence further inflamed the members of an already presumptively prejudicial jury.

III. THE KANSAS SUPREME COURT APPLIED THE WRONG STANDARD OF REVIEW ON THE LESSER INCLUDED CHARGE OF MANSLAUGHTER

The distinguishing factor before this Court is that the State of Kansas requested the lesser jury instruction of second-degree murder of which the trial court granted. Because the second-degree murder instruction was granted, Petitioner's counsel requested that voluntary manslaughter be included in the jury instructions as a matter of course. The district court denied the request. The issue was preserved for appeal and the Kansas Supreme Court found the district judge did not abuse his discretion. App. 20a.

The State of Kansas amended the charge against Petitioner to Murder in the First Degree. In support of the Complaint/Information the State of Kansas provided a "Probable Cause Affidavit." App. 38a - 41a. Based on the State's theory of the case, Alexis' death was the result of a "domestic dispute arising from Alexis' decision to leave Petitioner." *Id.*

The State's theory admitted both Alexis and Petitioner had "injuries." Most notable is both had knife wounds to their necks—however, the knives taken as evidence from the house were inconclusive as to causing the injury to Petitioner or Alexis. The Medical Examiner testified to the bruises on Alexis face and body. The

Kansas Supreme Court accepted the theory that the medical examiner utilized the photographs to depict the violent nature of the crime and the extensive nature of Alexis' many wounds, as depicted in the pictures" helped support the State's theory of premeditation." App. 17a.

Nominally, intentional murder in the second-degree is a lesser-included offense of premeditated murder in the first degree. K.S.A. 21-5402; 21-5403; *State v. Knox,* 301 Kan. 671, 681, 347 P.23d 656, 664 (2015). While both second-degree intentional murder and first-degree premeditated murder are intentional crimes, first-degree murder has the additional element of premeditation. *See State v. Jones,* 279 Kan. 395, 401, 109 P.3d 1158 (2005). Nonetheless, such instructions—when not requested by the defendant—are within the *province* of the trial judge and not *usually* the prosecuting attorney, who *normally* prosecutes the "information" based upon the "sworn affidavit."

In respect to the instruction on voluntary manslaughter, the Kansas Supreme Court agrees that "voluntary manslaughter is a lesser included offense of premeditated first-degree murder and thus, legally appropriate in this case." App. 20, *citing State v. Gentry,* 310 Kan. 715, 720 - 22, 449 P.3d 429 (2019). Moreover, the State "concedes there was evidence of a physical fight ... but argues *this is not enough* ... because there is no evidence of a sudden quarrel." App. 22a (emphasis added). However, in contrary to the finding that voluntary manslaughter is a lesser included offense of premeditated first-degree murder, the Kansas

Supreme Court rejected Mr. Garcia's appeal because the "record is absent any evidence of a sudden quarrel or other form of legally sufficient provocation." App. 22a.

In rejecting "provocation" the Kansas Supreme Court did not fully consider the evidence of "blood throughout the house consistent with Alexis' injuries." Instead, the Kansas Supreme Court took notice that "Garcia had used his fists to beat Alexis while she attempted to defend herself." *Id.* Of course, the Kansas Supreme Court unreasonably accepted this theory and did not allow the actual trier of the fact to develop a theory that supported voluntary manslaughter from the circumstantial evidence. The Kansas Supreme Court took notice that "the doctor who treated Garcia at the hospital and a forensic nurse who examined him found swelling and abrasions on Garcia's hands but, apart from the laceration to his neck, found no trauma to any other part of Garcia's body." App. 22a. However, the photographs (App. ___a, App. ___a, App. ___a) of Mr. Garcia's hands do not arise to the "level" of swelling and abrasions required to cause the physical trauma to Alexis as described by the medical examiner. In fact, Karen Groot, a forensic nurse employed at Salina Regional Health Center, testified that "[m]ostly at that point they were bloody." App. 88a. Ms. Groot further explained that "there were swelling and abrasions" but trial counsel objected as to the "expert" level of her testimony. App. 89a. Nonetheless, Ms. Groot only took "before" pictures of Petitioner's hands. Other than the "dried" blood, Petitioner's hands were without

"bruises or abrasions." Of course, in the pictures presented "it's hard to tell on here, because there's blood on the hands as well." *Id.*

Petitioner asserted ACTUAL INNOCENCE at trial. Mr. Garcia testified in his own defense that an intruder[6] killed Alexis and left him for dead after slitting his throat. Due to ineffective assistance of trial counsel, the requested lesser included instruction of second-degree murder from the State was ERROR and that error was further invited when Petitioner's counsel requested a voluntary instruction. It is disingenuous for the State to "point out" Petitioner's trial testimony to nullify the voluntary manslaughter instruction when the State *dramatically* lessen the burden of proof to *less than reasonable doubt* in actively promoting the lesser included charge *because* the State lacked the required elements for premeditation under Kansas law. *State v. Kettles,* 299 Kan. 448, 325 P.3d 1075 (2014). Trial counsel's failure to object to this *specific* violation of lessening the burden of proof was in contrary to Petitioner's guarantee to *effective assistance of competent counsel* under the Sixth Amendment to the United States Constitution.

In requesting the instruction the State lessen its burden of proof beyond a reasonable doubt to an already presumptively prejudicial jury (See Proposition I, *supra*). Under Kansas law, "[p]remeditation means to have thought the matter over beforehand and does not necessarily mean an act is planned, contrived, or schemed

[6] Mr. Garcia told SSA Kendrick about two guys present at his house. App. 42a.

beforehand; rather premeditation indicates a time of reflection or deliberation." *State v. Kettles,* 299 Kan. 448, 466, 325 P.3d 1075 (2014). To meet this burden, the Kansas Supreme Court utilizes a number of factors: (1) the nature of the weapon used; (2) lack of provocation; (3) the defendant's conduct before and after the killing; (3) threats and declarations of the defendant before and during the occurrence; and (5) the dealing of lethal blows after the deceased was felled and rendered helpless." *Id.* 229 Kan. at 467, 325 P.3d 1075.

In Mr. Garcia's case the State lacked sufficient "premeditation" elements. Alexis' cause of death was "asphyxia caused by pressure to the face." App. 22a. Although the 2 knives (one broken) were taken as evidence, the nature of the weapon used is inconclusive as to the neck wounds. Furthermore, the knife in which the State introduced as causing "hesitation" marks is NOT compatible with the knife introduced as evidence from the State.

The time of death is also inconclusive. On March 18, 2018, the date of Alexis's death, video cameras from Mr. Garcia's house show that at approximately 16:59:40 hours (4:59 P.M.) Petitioner left his house with his daughter. App. 30a. During this time Alexis was still alive. On cross-examination, the State insinuated that during "that phone call you told him [Jovany] that you had been feeding Sophia tacos, and you heard Lexi fall and die[.]" App. 83a - 84a. However, that assertion does not coincide in any material way in which Alexis was killed.

Mr. Garcia stopped at an ALTA gas station to purchase cigarettes and a bag of chips for his daughter. The cameras at the gas station were not working when law enforcement inquired. The gas station clerk told law enforcement that Mr. Garcia was a regular customer, did not have any overt wounds and that there was nothing suspicious in Petitioner's behavior. Mr. Garcia then drove his daughter to his parents home in Abilene, Kansas.

In Abilene, Petitioner stopped at a liquor store and purchased an "8-pack" of beer. Law enforcement did not interview the liquor store clerk. Petitioner stayed in Abilene for an hour. Mr. Garcia then received a phone call from Joshua Johnson. App. 30a. After receiving the call, Petitioner left his parents house and drove to Pasta Jay's restaurant in Hays, Kansas.

Mr. Garcia drove home when he left Pasta Jay's. The footage from the video cameras show Petitioner arriving at his house at 21:57:48 hours (9:57 P.M.). Upon arriving in the house and discovering that Alexis was unresponsive on the bedroom floor Petitioner moved her and attempted CPR. When the CPR proved unsuccessful Petitioner attempted to call his father, Jose Refugio Garica at 22:15: 25 hours (10:15 P.M.). App. 30a. Unsuccessful, Petitioner then called his brother Jovany, who had better understanding and command of the English language, for help at 22:15:43 hours. Petitioner then spoke with his father, his brother Jovany, and his other brother Noel Garcia.

By the time Petitioner arrived at the house to when Jovany called the Plainville Police Department to when Plainville Police Department arrived at Petitioner's house Alexis had already been deceased.

Plainville Police Department initially arrived at 23:17:43 hours (11:17 P.M.). From the information provided through the "body camera" narrative, PPD Ofc. Hovis and K9 Sergeant Weiser believed they heard someone inside. However, after the "welfare check" Sgt. Weiser "felt that instinctually something was not wrong and [he] was worried about the situation." After "attempting to make contact for approximately **one hour**. [He] went home and went to sleep[.]" App. 33a.

Around four hours later, at approximately 04:26:36 hours, Jovany arrived at the scene and he kicked in the door so PPD could effect entry. App. 34a.

From the onset, the PPD and KBI investigated Petitioner's case as an attempted "murder-suicide." From this basis, law enforcement developed a flawed theory that Petitioner's wife was a victim of domestic violence, Petitioner had a problem with alcohol, and that news that Petitioner's wife was going to divorce him caused him to kill her. However, there is no evidence that Alexis had ever been

a victim of domestic violence[7] nor evidence that Petitioner had a drinking problem, or that Petitioner got violent when he was drunk.

The circumstances placed Petitioner next to his deceased wife with both their throat cut. The circumstances do no prove, beyond a reasonable doubt, that Petitioner committed the "intentional and premeditated" killing of Alexis. It was the State's position to "ask the court to deny the request to give a lesser-included of voluntary manslaughter, but give the lesser-included of second intentional given the facts that have been presented *thus far.*" App. 49a (emphasis added).

Wherefore, the Kansas Supreme Court erred that denying the voluntary manslaughter instruction was not erroneous when the error was invited by the State of Kansas. In other words, the State of Kansas haled Mr. Garcia to court on the charge of first-degree premeditated murder, the State of Kansas argued and presented evidence to support the charging information and the buttressed by the probable cause affidavit, however, when the State rested its case, it requested a lesser included charge in the case that the theory it presented did not satisfy ALL the elements under "premeditation." *State v. Kettles,* 299 Kan. 448, 325 P.3d 1075 (2014).

Wherefore the Kansas Supreme Court did not apply the correct standard in assessing whether prejudice resulted from the invited error. It is asserted that this

[7] The State predominantly relies on the phone call Alexis made to Rooks County Sheriff's Office on Tuesday 03/06/2018 at approximately 12:05 A.M. as "signal" of domestic dispute. The State does not include that Alexis had reported several break-ins into the house.

ERROR is of constitutional significance and not "harmless beyond a reasonable doubt." *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

This Court has determined that "[b]ecause of client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence, *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) or *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) to McCoy's claim. [ ] To gain redress for attorney error, a defendant ordinarily must show prejudice. *See Strickland,* 466 U.S., at 692, 104 S.Ct. 2052. Here, however, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative." *McCoy v. Louisiana,* 138 S.Ct. 1500, 1511, 200 L.Ed.2d 821 (2018).

In the case at bar, Mr. Garcia's defense was and is ACTUAL INNOCENCE, when the court allowed counsel to usurp control of that issue and allowed counsel to argue—after objecting to the trial court's granting of the State's request for the lesser included second-degree murder instruction—for a voluntary manslaughter (predicated upon the "facts" the State presented) it *completed* the violation of Mr. Garcia's protected autonomy right under the Sixth Amendment. *McCoy, supra,* 138 S.Ct., at 1511, 200 L.Ed.2d 821 (2018).

CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully submitted,

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