Probable Cause Affidavits Open in Kansas

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For 35 years, Kansas law enforcement officers made arrests and conducted searches on the basis of probable cause affidavits that generally were closed to public view.[1] In 2014, however, the Kansas Legislature opted for openness and made the affidavits a matter of public record. The Legislature accomplished the change by amending K.S.A. 22-2302 and K.S.A. 22-2502, which relate to arrests and searches, respectively. The amendments established a presumption that the probable cause information contained in affidavits executed after July 1, 2014, is accessible to members of the public upon request.[2]

The Legislature imposed on courts a somewhat complicated process for responding to requests for affidavits[3]—a process that was destined to result in controversy and litigation.[4] Nevertheless, when the amendments were enacted, the news media hailed them as a major victory for open government. Indeed, the Legislature's action brought Kansas law generally into line with a presumption in other states that probable cause affidavits should not be secret.[5] The purpose of opening such records is to increase accountability of officials and public confidence in government.[6]

However, the change in Kansas law came as something of a surprise. For many years, Kansas media had called upon the Legislature to allow public inspection of probable cause affidavits.[7] Still the call for openness had little impact until 2012, when a Leawood couple publicly disputed how and why Johnson County sheriff's deputies searched their home for illegal drugs in 2012.[8] The couple made headlines when they complained that the search was groundless, fruitless, and alarmingly aggressive, as in "some sort of police state."[9] They further complained that, under Kansas law, they could not gain access to the probable cause affidavit filed in support of the search.[10] They wanted the warrant to learn why they had been targeted and, after litigating, eventually gained access to it.[11] A state legislator took interest in their cause and introduced a bill to open probable cause affidavits.[12] It was examined at legislative hearings before the House and Senate Judiciary committees[13] and was opposed by prosecutors, criminal defense attorneys and members of law enforcement.[14] The bill nearly died in committee[15] but, following 11th hour negotiations, the Legislature passed it by a vote of 123-1 in the House and 40-0 in the Senate.[16]

The resulting amendments to K.S.A. 22-2302 and 22-2502 reverse statutory language that had been in effect since 1979 and that presumed closure of probable cause information. The 1979 language required a court order for anyone to obtain an affidavit, other than the defendant in the criminal case to which the arrest or search was related.[17]

The purpose of this article is to analyze the intent behind the newly amended statutes and their provisions, as well as to shed light on the reasons for controversy over their implementation. It is hoped that the analysis will be helpful to prosecutors, defense counsel, and judges when notified that members of the public, including journalists, seek access to affidavits. The analysis will focus on considerations that, under the statutes, must be taken into account when a member of the public requests access to an affidavit.

I. The Presumption of Openness

Under K.S.A. 22-2302 and 22-2502 as amended, when a member of the public requests an affidavit, prosecution and defense attorneys may oppose the request. However, they bear the burden to show a judge why the affidavit should be withheld altogether or released only with redactions.

The presumption that an affidavit is open can be overcome, and probable cause information can be either sealed or redacted before disclosure, but only if the defense or prosecution provides "reasons" for sealing or redaction, and if the judge finds it "necessary to prevent public disclosure of information that would" cause at least one of nine harms enumerated in the statutes as amended."[18] The enumerated harms include, for example, disclosure of an affidavit that would "interfere with any prospective law enforcement action, criminal investigation or prosecution."[19] Thus, under the newly amended statutes, disclosure of affidavits will occur, unless opponents meet the statutory requirement to submit reasons for no-disclosure and if the judge finds that disclosure "would" cause a harm listed in the statutes and that sealing or redaction is "necessary" to prevent the harm. Proper application of the newly

amended statutes balances the public's interest in open government with the interests of others, including the prosecution, defendant, and law enforcement.

The presumption that affidavits are open is in keeping with a long line of U.S. Supreme Court decisions reflecting the widely recognized public right to know about judicial matters.[20] A presumption of openness for court records and proceedings was specifically established in Kansas in *Kansas City Star v. Fossey* in 1981 and reaffirmed in *Wichita Eagle-Beacon Co. v. Owens* 20 years later.[21] The Kansas Supreme Court held that "a trial court . . . may seal the record of . . . proceedings. However, such closure is permitted only if the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means."[22] Moreover, "[t]he burden of proof is on the party making the motion" to seal.[23]

II. Legislative History

In 2014, the Legislature's enactment of a presumption of openness for affidavits reversed a limit on access that had lasted for 35 years. During that period, because the public's access to affidavits had depended on convincing a judge to order disclosure, affidavits generally remained inaccessible.

A. Thirty-five years of presumed closure

Before 1979, probable cause information was more or less freely available to courthouse reporters for newspapers.[24] However, in that year, the Legislature amended the statutes that governed access to probable cause affidavits. The amended statues provided that the probable cause information was not "made available for examination without a written order of the court."[25] As a result, the statutory amendments presumptively precluded anyone from obtaining affidavits other than the defendant in the criminal case to which the arrest or search was related. Their enactment followed a controversy involving a murder case in Douglas County that the Topeka Daily Capital was covering. A reporter for that newspaper "obtained the names of the two persons for whom warrants were issued by going into the office of the clerk of the district court.The criminal appearance docket was on a table in the back of the room. The room was divided by a counter and a swinging gate. It was the general practice for reporters from the news media to go through the gate, proceed to the table where the criminal appearance docket was kept and look through its pages. It is a public document or record which is kept by the clerk of the district court."[26] The paper published the names of two suspects in the murder case prior to their apprehension on the warrants.[27] Although one was tried and convicted, the other was never apprehended.[28]

For disclosing the arrest warrants, the newspaper suffered a backlash, particularly from the law enforcement community. Stauffer Communications Inc., owner of the Daily Capital, was convicted of violating a statute that prohibited disclosure of warrants before they were executed and returned, and the company successfully appealed the conviction.[29] In the context of the controversy over disclosure of the arrest warrants, a fateful development occurred in the form of a letter from the Sedgwick County District Attorney's Office to the chairman of the state Senate Judiciary Committee.[30] The letter called the committee's attention to a ruling in *Wilbanks v. State*, 224 Kan. 66 (1978), in which the Kansas Supreme Court said that establishing probable cause for an arrest required more than generalizations couched in the language of a criminal statute."[31] Instead, "sufficient factual information must be presented to enable the magistrate to make an independent finding of probable cause before a warrant is issued.[32] The letter from the Sedgwick County prosecutor expressed disappointment in the ruling because it "of course overrules 100 years of case law whereby, a verified complaint charging an offense which stems from the language of an [sic] statute was sufficient to support a warrant for arrest."[33] Although the author of the letter said that his office would not "argue" with the new probable cause requirement, he said that he was aware of instances where "names of witnesses and victims have been published in the paper, and are available to friends of the defendant or defendant's [sic] themselves prior to arrest."[34]

Like those who had criticized the Daily Capital for publicizing arrest warrants not yet executed, the author voiced concern related to dissemination of information about alleged perpetrators before they were apprehended.[35] However, the author did not simply propose preventing premature disclosure of probable cause affidavits. Instead, he proposed that affidavits not be disclosed at all, except by written court order.[36] The wording of the author's proposal was essentially the same as the legislative amendments that, later in 1979, established a presumption of closure of affidavits regardless of whether they had been executed or not.

The amendments allowed the presumption of closure to be overcome only if one who requested an affidavit could convince a judge that its disclosure would be in the public interest.[37] Because the 1979 amendments placed the burden on the requester to hire counsel and go before a judge to even have a chance to obtain it, probable cause affidavits were effectively sealed from public view for 35 years.

B. Catalyst for change

However, the presumption of closure came under intense scrutiny in 2012 when the Johnson County Sheriff's Department officers executed a search warrant at the home of a Leawood couple. The warrant "turned out to be based on faulty information contained in the probable cause affidavit supporting the warrant . . . . The search failed to yield any . . . evidence of a crime, and the [couple was] never charged with any crime."[38] The couple asked for the information supporting the warrant, but had to wait a year before obtaining a copy, and only after the couple "hired a lawyer and incurred over $25,000 in expenses in litigation."[39]

The couple's circumstances caught the attention of Kansas House Rep. John Rubin. He worked with them, like-minded legislators, and other open-government advocates to lobby the Legislature, seeking amendment of the statutes governing the accessibility of the probable cause information. Those efforts were opposed by Kansas law enforcement agencies, the Kansas County and District Attorneys Association (KCDAA), and the Kansas Association of Criminal Defense Lawyers (KACDL).[40] At hearings on the proposed amendment before the House and Senate judiciary committees in February and March 2014, those opponents raised concerns related to harm

they believed the disclosure of probable cause affidavits could cause. They argued that release of probable cause information, even if redacted, could compromise a defendant's right to a fair trial, tip off criminals regarding the status of an investigation or confidential investigative techniques, and discourage witnesses from testifying.[41] They also suggested that the time spent on redacting information would be overly burdensome for both prosecutors and judges. Finally, the KCDAA also argued that disclosure of probable cause information could cause prosecutors to violate Kansas Rules of Professional Conduct 3.6 and 3.8.[42]

Rubin countered those arguments in part with research showing that other states presume openness of affidavits, whereas "Kansas has some of the country's most restrictive laws regarding public release of criminal records, including in particular probable cause affidavits and sworn statements. Of the 40 other states whose laws in this area were reviewed by research staff, 39 presumptively make probable cause affidavits supporting search and/or arrest warrants available to the public at some point, usually after execution, or execution and return, of the warrant. Most if not all of these jurisdictions make provision for the continued sealing or confidentiality by redaction of the warrant or supporting affidavit by court order for good cause shown, such as protection of a confidential informant, an ongoing investigation, or personal identifying information regarding innocent third parties."[43]

Rubin also noted that his experience as a federal agency attorney informed him that the federal system also presumes openness of affidavits.[44] He had a "fundamental belief that, as a matter of good public policy, all governmental entities and instrumentalities in Kansas . . . should provide full transparency and accountability to the public in all their actions and function, except to the extent that confidentiality is required for legitimate law enforcement purposes."[45]

Supporters of Rubin's bill to open affidavits questioned whether opposition by the KCDAA and others was well founded. For example, the written testimony by opponents cited no legal authority in support of the proposition that disclosure of probable cause information actually causes such harms as juror prejudice.[46] Also, although opponents suggested that the time spent on redacting sensitive information from affidavits would be overly burdensome for both prosecutors and judges, a Fiscal Note dated February 12, 2014, found that no additional funds would be allotted for implementing the procedure set forth in the statute in the next fiscal year because it is "not possible to predict how complex and time consuming" the process would be.[47] In addition, although the KCDAA argued that disclosure of probable cause information would put prosecutors at risk of violating ethics rules designed to prevent prejudicial pretrial publicity, the rules limit extrajudicial statements made by attorneys, not the release of court documents.[48] In addition, proponents said that, for many years, probable cause affidavits related to arrests were open under a long-standing court order in the 5th Judicial District, comprising Lyon and Chase counties. Openness in that district, according to the proponents, had not been problematic.[49]

Ultimately, the efforts of Rubin and others resulted in the passage of the 2014 amendments to K.S.A. 22-2302 and K.S.A. 22-2502 that went into effect on July 1, 2014.

III. The Amendments to K.S.A. 22-2302 and K.S.A. 22-2502

The amendments prescribe a procedure that allows "any person" to request that the clerk provide the probable cause affidavit to that person.[50] Once that request is made, the clerk is required to promptly notify the defendant or the defendant's counsel, the prosecutor, and the judge.[51] Within five days of receiving the notification, the counsel for the defendant and the state may propose redactions or make a motion to seal, along with "reasons" supporting any proposed redactions or seal.[52]

Then the judge who issued the warrant is required to review the affidavit in support of that warrant, and the proposed redactions or motions to seal, and make redactions or order the sealing of the affidavit "as necessary to prevent public disclosure of information that would: (A) jeopardize the safety or well-being of a victim, witness, confidential source or undercover agent, or cause the destruction of evidence; (B) reveal information obtained from a court-ordered wiretap or from a search warrant for a tracking device that has not expired; (C) interfere with any prospective law enforcement action, criminal investigation or prosecution; (D) reveal the identity of any confidential source or undercover agent; (E) reveal confidential investigative techniques or procedures not known to the general public; (F) endanger the life or physical safety of any person; (G) reveal the name, address, telephone number or any other information which specifically and individually identifies the victim of any sexual offense . . . . (H) reveal the name of any minor; or (I) reveal any date of birth" or other personal identifying information.[53]

It should be noted that the rules of statutory construction indicate that the only available bases to seal are those set forth in this enumerated list.[54] Accordingly, the only "reasons" that may be considered for redacting or sealing an affidavit are the nine that are specifically enumerated in K.S.A. 22-2302(c)(4)(A) through (I) and K.S.A. 22-2502(e)(4)(A) through (I).[55]

Finally, the judge who issued the warrant is required to make appropriate redactions and disclose a redacted version of the affidavit or order the affidavit sealed within five business days after receiving the proposed redactions or within 10 days after receiving notice of the request for disclosure, whichever is earlier.[56]

Although the statutes do not expressly state that the same judge who issued the warrant must be the one to review the

request for disclosure, other provisions of the Code of Criminal Procedure suggest that when the Legislature means any magistrate (as opposed to a specific magistrate) it uses the term "a magistrate."[57] In contrast, when the legislature intends to refer to the specific magistrate who signed the warrant, it referred to the magistrate as "the magistrate."[58] Thus, when the Legislature refers to "the magistrate" in the amended statutes on affidavits,[59] it means the magistrate who issued the original warrant, not just any magistrate. Any other reading would lead to the unreasonable conclusion that the prosecution or defense could shop for a judge who would be inclined to grant the motions to seal or redact.

IV. Magistrate Review to Determine Whether Disclosure "Would" Cause the Harms Outlined in the Statutes

The statutes provide that the "magistrate shall review the requested affidavits or sworn testimony and any proposed redactions or motion to seal submitted by the defendant, the defendant's counsel or the prosecutor."[60] They further provide that the magistrate "shall make appropriate redactions, or seal the affidavits or sworn testimony, as necessary to prevent public disclosure of information that would" constitute a specified harm.[61]

The statutes are in line with the large body of case law that recognizes court records as being open to the public. In general, when a member of the media or the public requests a court record, a presumption of access applies, and courts must make specific, on the record findings if they opt for closure.[62]

Moreover, the Kansas Supreme Court has stated: "In making a decision of either closure or nonclosure, the trial judge should make findings and state for the record the evidence upon which the court relied and the factors which the court considered in arriving at its decision."[63] Requiring the trial judge to state the findings and a basis for them "will protect both the right of the defendant to a fair trial and the right of the public and news media to have access to court proceedings."[64] Blanket restrictions are unconstitutional "unless proper inquiry and findings are made by the trial judge in advance of entering the order."[65] The district court's findings must be "supported by substantial competent evidence and . . . sufficient to support the district court's conclusions of law. Substantial competent evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion."[66]

When the Legislature amended the statutes to presume openness of affidavits, it was in alignment with overwhelming precedent in favor of open court records. As amended, the statutes promote the "fundamental and widespread principle favoring public disclosure, accountability and transparency regarding probable cause affidavits, with appropriate confidentiality safeguards."[67] A principal reason given for now presuming openness, as documented in legislative hearings, was to enable citizens, including the media, to monitor law enforcement's exercise of the police power in making arrests and conducting searches.[68]

Because of the legislative intent to establish a presumption of openness for affidavits, and because affidavits may be withheld only if disclosure "would" cause one or more harms listed,[69] movants who oppose disclosure must not submit "reasons" for sealing or redaction that are speculative. The reasons for non-disclosure are insufficient to justify redaction or sealing unless they demonstrate that disclosure "would" result in adverse effects listed in the statute. The Legislature's use of the term "would"—as opposed to "could"—signifies an intent to require more than just mere conjecture. With the passage of the 2014 amendments, the Legislature adopted the approach in case law[70] that, before court records can be closed, the judge must find that disclosure "would" be harmful.[71] Moreover, even if movants for sealing are in agreement, as can be the case, judges are not relieved of their obligation to consider whether closure is legally justified.[72]

Thus, in considering "reasons" to seal under the statutes, judges ideally are cognizant of First Amendment-based precedent requiring them to make specific findings when seeking to close court records or proceedings. The precedent makes clear that an order to seal records must be supported by specific findings based on evidence that no reasonable alternative would be effective in preventing a harm. Judges are to "make findings and state for the record the evidence upon which the court relied and the factors which the court considered in arriving at its decision."[73] The trial judge may close a record only if harm "cannot be avoided by any reasonable alternative means."[74] Under the statutes on access to affidavits, the alternative to sealing is redaction. Thus, a judge who is acting in accordance with the statutes and relevant precedent first determines whether full disclosure of a requested affidavit "would" cause an enumerated harm. If the harm "would" result from full disclosure, the judge next considers whether the alternative to non-disclosure, namely, release of a redacted affidavit, also "would" cause an enumerated harm. Only if redaction would not prevent the harm, does the judge consider sealing the affidavit and withholding it entirely from public view.

V. "Reasons" for Redaction or Sealing

Although the affidavits are presumed available for disclosure upon request, the statutes as amended include a framework within which prosecution and defense may propose reasons for redaction or sealing if they deem it necessary, or in some instances, if they are legally required to do so.

A. Interfering with a prospective law enforcement action or criminal investigation

One "reason" the prosecution likely would offer for sealing is that disclosure of an affidavit would "interfere with any prospective law enforcement action [or] criminal investigation."[75] However, construing the word "prospective" may be problematic. The prosecution may argue that sealing or redaction is necessary because the affidavit relates to an investigation that is "continuing" or "ongoing," and is thus "prospective."[76] However, the term "prospective" may be distinguished from "continuing" or "ongoing." As ordinarily defined, a "prospective" condition is in the future, not one rooted in the present.[77]

A continuing or ongoing investigation into a charged offense is not one of the specifically enumerated reasons for sealing or redacting an affidavit. The statute stipulates that to be eligible for sealing or redaction, the affidavit must relate to a "prospective" investigation. One might argue that affidavits generally only relate to a continuing or ongoing investigation,

not any future investigation. If "prospective" is construed only to means "future," affidavits generally will never be eligible for sealing or redaction, an absurd result that the Legislature could not have intended.

Still, redacting or sealing an affidavit to protect a continuing or ongoing investigation, rather than a future one, does not necessarily make sense in the context of the statue. It authorizes the defendant to obtain a copy of the affidavit, and the defendant is the one most likely to have an interest in interfering with an investigation. If the defendant with a copy of the affidavit can use it to interfere with the investigation, withholding the affidavit from the public does not accomplish the purpose of protecting the investigation.

Even if a "prospective" investigation can be considered a continuing investigation into the case in which the request for disclosure was made, the mere fact that an investigation is ongoing does not relieve the movants to seal of the burden to show the court that a disclosed or reasonably redacted affidavit necessarily would—not merely could— interfere with that investigation.

B. Interfering with a prospective prosecution

A "reason" for a motion to seal or redact that could be made by either the prosecution or defense is that disclosure of the information would "interfere" with the prosecution, or in other words, disclosure would result in a biased jury and impinge on the defendant's right to a fair trial.[78] However, the idea that disclosure of the affidavit would interfere with the fairness of a criminal trial is unsupported by applicable case law. There is no Kansas Supreme Court case where the Court found that the defendant failed to receive a fair trial because of pretrial publicity alone, even though the contention has been frequently advanced.[79]

The precedent indicates that the Kansas Supreme Court has been extremely consistent in finding that pre-trial publicity did not prevent fair trials. Not only that, the Court thoroughly re-examined its approach to the issue in a very recent case, *State v. Carr*.[80] Although no appellate court at the time of this publication has interpreted whether or to what extent disclosure of probable cause affidavits would interfere with the fairness of the trial, certain factors reviewed in *Carr* could be helpful in determining whether disclosure of an affidavit would interfere with the prosecution as contemplated in the governing statutory provisions.[81]

Carr involved heinous crimes committed in Wichita in December 2000 that included rape, robbery, and execution-style killings on a local soccer field. The case is well known for the Kansas Supreme Court's reversal due to the trial judge's failure to sever the defendants' sentencing phases. However, the *Carr* Court also conducted a lengthy analysis of whether pretrial publicity deprived the defendants of a fair trial.[82] The Court did so at least in part because it believed it had "not previously been precise about how analysis of presumed prejudice differs from analysis of actual prejudice, how the two theories are supported by and applied under the federal and state constitutions and in concert with our state venue change statute, or about how our standard of review on appeal may be affected."[83] The Court's ultimate finding that the trials were fair involved a "discussion of the defendants' venue challenge by tearing apart and then reassembling these concepts."[84]

As actual prejudice only takes place once the jury has been impanelled, the relevant inquiry in an early stage of proceedings appears to be whether the defendant suffers presumed prejudice that would prevent a fair trial. The Court's thorough approach to presumed prejudice in *Carr* provides a possible framework for analyzing whether disclosure of an affidavit would "interfere with any prospective law enforcement action, criminal investigation or prosecution."[85]

Presumed prejudice occurs "where the pretrial publicity is so pervasive and prejudicial that we cannot expect to find an unbiased jury pool in the community. We 'presume prejudice' before trial in these cases, and a venue change is necessary."[86] Federal courts since then "have refined the parameters of presumed prejudice claims, setting an extremely high standard for relief."[87] "A 'court must find that the publicity in essence displaced the judicial process, thereby denying the defendant his constitutional right to a fair trial.' Reversal of a conviction will occur only 'where publicity "created either a circus atmosphere in the court room or a lynch mob mentality such that it would be impossible to receive a fair trial."'"[88]

In *Carr*, the Court identified factors based on *Skilling v. United States*[89] that a judge should take into account in deciding whether a change of venue is warranted because of publicity. The *Skilling* factors are: "media interference with courtroom proceedings," "the magnitude and tone of the coverage," "the size and characteristics of the community in which the crime occurred," "the amount of time that elapsed between the crime and the trial," the jury's verdict," "the impact of the crime on the community," and "the effect, if any, of a codefendant's publicized decision to plead guilty."[90]

Factors involving the verdict or the guilty plea of any codefendant are typically irrelevant at the early stage of the proceedings when the affidavit is most likely to be requested, although those factors could be considered if circumstances dictate doing so. The factors that generally could apply to a request for an affidavit are: (1) media interference with courtroom proceedings; (2) the magnitude and tone of the coverage; (3) the amount of time that elapsed between the crime and the trial; (4) the size and characteristics of the community in which the crime occurred; and (5) the impact of the crime on the community. A magistrate who receives a request for an affidavit could apply those factors if a movant claims disclosure would interfere with the case as provided in the statute[91] and ultimately prevent trial fairness.

1. Media interference with courtroom proceedings

In *Carr*, there was "no suggestion . . . that any media representative interfered with courtroom administration in this case at any time . . . . In each of the cases in which the United States Supreme Court has presumed prejudice and overturned a conviction, it did so in part because the prosecution's 'atmosphere . . . was utterly corrupted by press coverage.'"[92] Unless a media outlet behaves in an unquestionably unprofessional manner, this factor should ordinarily weigh in favor of disclosure of the requested affidavit.

2. The magnitude and tone of the coverage

Carr sets a very high standard for when the magnitude and tone of pretrial publicity can prejudice a trial. In *Carr*, when the Court considered the "magnitude and tone" of the media coverage in the context of presumed prejudice, it found they

were "extremely high."[93] However, the Court's "review of at least the mainstream press coverage likely to reach a wide audience leads us to the conclusion that it was more factual than gratuitously lurid."[94] Negative news about the defendants included "especially intense" coverage "immediately after . . . the defendants' arrests" and later, a local television campaign advertisement supporting Phill Kline for attorney general that identified the defendant by name and "labeled him a murderer."[95] Regardless, the trial judge cited the "factual tone of the press coverage" as a reason the Court found the "factor did not weigh in favor of presumed prejudice."[96]

In a 2014 case, *State v. Roeder*,[97] the Court endorsed the presumed-prejudice analysis in *Carr*, although the Court declined to apply the analysis. The reason was that the defendant, who had been convicted of killing Wichita doctor George Tiller in 2009, did not "make a constitutional presumed prejudice challenge."[98] Nevertheless, in endorsing the presumed-prejudice analysis, the *Roeder* Court commented instructively about the relationship between publicity and trial fairness. Tiller had survived at least two serious attempts on his person when his medical clinic was bombed in 1986 and when he was shot in both arms in 1993.[99] On June 1, 2009, the day after the defendant shot and killed the victim while the victim was acting as an usher during a church service, seven articles in the Wichita Eagle regarding the murder appeared on that day alone, including three on the front page.[100] Moreover, "[s]everal articles identified Roeder as the suspect in Dr. Tiller's murder."[101] The case generated much additional publicity, which included an interview with the Kansas City Star "where Roeder admitted killing Dr. Tiller and discussed his trial strategy."[102] In response, the defendant filed a pretrial "motion for change of venue based on the long history of public conflict and controversy surrounding the abortion portion of Dr. Tiller's medical practice and, more particularly this homicide case."[103]

Even given the extensive media coverage in *Roeder*, the Court found that the defendant had "not met his burden simply by establishing the existence of a large amount of pretrial publicity. This court has opined that media publicity alone *never* establishes prejudice."[104]

Thus, as long as a mainstream media outlet is publishing factual articles that do not create either a "circus atmosphere in the court room" or a "lynch mob mentality" as contemplated in *Carr*, this factor should ordinarily weigh in favor of disclosure of a request for an affidavit.

3. The time that elapsed between the crime and the trial

In *Carr*, there was a 17-month lapse between when the crimes were committed and when the motion to change venue was filed.[105] "In the ordinary case, one might expect these time frames to mean that public interest in the crimes and defendants had begun to wane and that it would continue to do so."[106] Indeed, "[t]he substantial lapse of time between peak publicity and the trial also weighs against a finding of prejudice. Specifically, the Kansas Supreme Court has held that a three-month time lapse between when information is disseminated and trial "would ordinarily be sufficient to dissipate any pretrial publicity arising at the preliminary hearing."[107]

A request for an affidavit made at the outset of the case, well before trial, ordinarily would weigh in favor of disclosure.

4. The size and characteristics of the community in which the crime occurred

The prosecution, defense, or the court could have a greater concern that media publicity will prejudice the trial if the community in which the trial is taking place has a small population from which to draw a jury pool. But even in small jurisdictions, a change of venue has not been necessary because of pretrial publicity. For example, a relatively recent murder conviction in Labette County was not overturned even though "there was widespread publicity regarding the victim's murder throughout the community."[108] There, the Court considered "the severity of the offense and the relatively small size of the community," and "firmly conclude[d] the district court did not abuse its discretion in denying the defendant's motion for change of venue."[109]

Kansas communities generally would seem to be within the range of population where courts have found publicity was not prejudicial. In light of the Kansas precedents, an argument that the outright sealing of the requested affidavit is necessary to protect the purity of the jury pool risks overestimating the effect of pretrial publicity and underestimating the ability of the citizens of Kansas to be fair. This factor ordinarily would weigh in favor of disclosure of the requested affidavit.

5. The impact of the crime on the community

In *Carr*, the defense presented evidence of "strongly hostile statements by members of the public in response to press coverage of the crimes and prosecution."[110] Taking into account specific pretrial news reports about "widespread public reaction to the crimes," the Court found that the impact factor favored a change in venue, but did not weigh heavily enough for it to find the trial court erred in denying the motion.[111] At the same time, the Court noted that judges "'have properly denied'" requests for a change of venue in "cases involving substantial pretrial publicity and community impact, for example, the prosecutions resulting from the 1993 World Trade Center bombing . . . and the prosecution of John Walker Lindh, referred to in the press as the American Taliban."[112]

Even in *Carr*, that animosity was insufficient to find that the defendants had been denied a fair trial. Absent evidence of hostility beyond what took place in *Carr*, this factor ordinarily would weigh in favor of disclosure of the requested affidavit.

With reference to those five foregoing factors adapted from the presumed prejudice analysis in *Carr*, courts could assess whether disclosure of the requested affidavit "would" interfere with the proceedings as contemplated in the statutes.[113] As indicated *supra*, the factors are likely to weigh in favor of disclosure. If the movants for sealing fail to meet their burden to show otherwise, courts could be comfortable in not finding that disclosure "would" cause a specific harm listed in the statute and that sealing is necessary.

C. Jeopardizing the safety or well-being of a victim, witness, confidential source or undercover agent, causing the destruction of evidence, or endangering the life or physical safety of any person

Further, both statutes on arrests and searches allow movants for sealing or redaction to cite these above "reasons" in support of their motions.[114] Indeed, in order for arrests and searches to be supported by sufficient probable cause, affidavits often include the statements of victims and witnesses. The safety of those individuals and ensuring that they are able to testify at trial if necessary is an integral component of the rule of law in our society. However, the mere fact the names of those individuals appear in the probable cause information does not relieve the movants for sealing of the burden to show the court that even a reasonably redacted affidavit would necessarily jeopardize the safety or well-being of any of those individuals. In the absence of a showing to the contrary, a magistrate would be obligated under the statutes to find that disclosure of the affidavit with redactions of all relevant names would be sufficiently protective.

At the same time, weighing in favor of disclosure, is the fact that the defendant represents the greatest likely threat to the safety of persons related to the case and has statutory authorization to receive a copy of the probable cause information. Thus, redacting or sealing information already in possession of the defendant would not necessarily prevent harm to those listed in the affidaivt.

D. Revealing information from a search warrant or wiretap that has not expired

The statutes on arrests and searches both provide for redaction or sealing of information that would reveal a wiretap that has not been executed.[115] Further, both statutes also provide that probable cause information is available to the public upon request, but only "after the warrant or summons has been executed."[116] Thus, if any movant can show that the reason for redaction or sealing is based on the fact that a search warrant or wiretap has yet to be executed, preventing that information from being disclosed to the public ordinarily would be justifiable.

E. Revealing the identity of any confidential source or undercover agent

Maintaining the confidential identity of a source or undercover agent can be a necessity depending on the circumstances of a given case. In such instances, references to such individuals are likely to be made in a probable cause affidavit. The statutes provide for redaction or sealing of information that would reveal such references.[117] In the absence of a showing to the contrary, a magistrate comfortably could find that redaction of those individuals' names and other identifying information is sufficient to protect those identities in the vast majority of instances.

F. Revealing confidential investigative techniques or procedures not known to the general public

The statutes on arrests and searches appropriately are protective of information about confidential investigative techniques. If any movant who opposes full disclosure of an affidavit can show that a confidential technique would be revealed,[118] a magistrate is authorized by the statutes to consider either redaction or sealing the information. If the movant fails to show that sealing of the entire affidavit is necessary, the magistrate is free to order disclosure with redaction of the portions that identify confidential investigative techniques.

G. Revealing the name or contact information of a victim of a sexual assault; revealing the name of any minor; and revealing personal identifiers, such as date of birth and Social Security number

Movants who oppose full disclosure of an affidavit are authorized to cite the need to protect a sexual assault victim

or minor or to protect the privacy of personally identifiable information.[119] This provision essentially expands the burden placed on attorneys and parties pursuant to the Kansas Supreme Court's requirement[120] that personal identifiers be redacted from court filings, including Social Security number, birth date, and bank account number. If any movant can show that an affidavit contains statutorily protected identifying information, a magistrate would be justified in ordering redaction of the information before release of the affidavit to the public.

Because the statutes regarding arrest- and search-related affidavits presume that they are open court records, those who request access to an affidavit reasonably may anticipate that it will be disclosed either fully or with redactions, rather than withheld altogether under seal.

VI. Conclusion

The presumption of openness that has existed in Kansas since the Kansas Supreme Court's 1981 ruling in *Fossey* has now been applied to the statutes governing arrest and search warrants. The amendments reverse the longstanding statutory presumption that affidavits in support of those warrants are closed, and bring the law governing the disclosure of these documents into alignment with the long established presumption at both the state and federal levels that court records are open. In considering "reasons" for redaction or seal offered by the prosecution or defense, judges should order redaction or seal only if the movant or movants for redaction or seal can demonstrate that one of the nine enumerated statutory harms "would" occur. Proper application of the amendments should allow for the disclosure of affidavits with reasonable redactions in the vast majority of instances, thereby achieving an equilibrium between the interests of the public, the defendant, and law enforcement. ■

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Endnotes

1. *See*, *e.g.*, K.S.A. 1983 Supp. 22-2302; K.S.A. 1981 Supp. 22-2502.
2. K.S.A. 22-2302(c)(1)(B); K.S.A. 22-2502(e)(1)(B).
3. K.S.A. 22-2302(c)(4); K.S.A. 22-2502(e)(4).
4. *See*, *e.g.*, *The World Company, d/b/a the Lawrence Journal-World v. The Honorable B. Kay Huff*, Kansas Supreme Court Case No. 14-113027-S.
5. Kansas Legislative Research Department, Testimony Before the House Judiciary Committee (Feb. 12, 2014), *retrieved from* http://kslegislature.org/li_2014/b2013_14/committees/ctte_h_jud_1/documents/testimony/20140212_27.pdf.
6. *See Kansas City Star v. Fossey*, 230 Kan. 240, 247 (1981) (establishing a presumption of openness for court proceedings and records, stating, "It has been said that the reason for requiring all court proceedings to be open, except where extraordinary reasons for closure are present, it is to enhance the public trust and confidence in the judicial process and to insulate the process against attempts to use the courts as tools for persecution." S*ee also State ex rel. Stephan v. Harder*, 230 Kan. 573, 581, 641 P.2d 366 (1982) (holding that records of public funds used for abortions were open and saying, "Sunshine is the strongest antiseptic—its rays may penetrate areas previously closed.").
7. 1980 SB 776; 2006 SB 415; 2007 SB 39; 2007 SB 47; 2006 HB 2742; 2007 SB 132; and 2009 HB 2204. *See*, *e.g.*, Report of the Judicial Council Criminal Law Advisory Committee on 2009 HB 2204, *retrieved from* http://www.kansasjudicialcouncil.org/Documents/Studies%20and%20Reports/2009%20Reports/Report%20on%20HB2204_arrest%20warrants_.pdf.
8. Lindsay Shively, *Family believes tea leaves may have led to fruitless 4/20 pot raid of their Leawood home*, 41 KSHB Kansas City (May 3, 2013), http://www.kshb.com/news/local-news/did-tea-spark-failed-pot-bust.
9. Melissa Yeager, *THE DARK STATE: Discarded tea leaves, false positive drug tests prompt search warrant of family home*, 41 KSHB Kansas City (quoting Adlynn Harte) (Mar. 21, 2014), http://www.kshb.com/news/local-news/investigations-extras/discarded-tea-leaves-false-positive-drug-tests-prompt-search-warrant-of-joco-familys-home.
10. Andy Marso, *JoCo couple tells legislators story of police raid*, The Topeka Capital-Journal (Jan. 15, 2014), http://cjonline.com/news/2014-01-15/joco-couple-tells-legislators-story-police-raid.
11. *Id.*
12. Melissa Brunner, *Lawmakers hear case for opening search warrants*, WIBW 13 Topeka (Feb. 12, 2014), http://www.wibw.com/home/headlines/Lawmakers-Hear-Case-For-Opening-Search-Warrants-245307251.html.
13. Minutes, H. Judiciary Comm. Meeting (Feb. 12, 2014), *retrieved from* http://kslegislature.org/li_2014/b2013_14/committees/ctte_h_jud_1/documents/minutes/20140212.pdf; Minutes, S. Judiciary Comm. Meeting (Mar. 13, 20140, *retrieved from* http://kslegislature.org/li_2014/b2013_14/committees/ctte_s_jud_1/documents/minutes/20140313.pdf.
14. *Id.*
15. *HB 2555 appeared dead but rises again*, Kansas Press Association (Apr. 2, 2014), http://kspress.com/790/hb-2555-appeared-dead-rises-again.
16. *Governor signs probable cause affidavits bill*, Kansas Press Association (May 14, 2014), http://kspress.com/810/governor-signs-probable-cause-affidavits-bill.
17. *See*, *e.g.*, K.S.A. 1983 Supp. 22-2302; K.S.A. 1981 Supp. 22-2502.
18. *See* K.S.A. 22-2302(c)(1)(3); K.S.A. 22-2302(c)(1)(4)(C)
19. *Id.*
20. *See Nixon v. Warner Comm'ns*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980) ("We are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice."); *Accord Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982); *Davis v. Reynolds*, 890 F.2d 1105, 1109 (10th Cir. 1989); *United States v. Storey*, 956 F. Supp. 934, 938 (D. Kan. 1997); *Stephens v. Van Arsdale*, 227 Kan. 676, Syl. ¶ 4(1980) ("The right of the press or any other person to access court records . . . is based on common law.").
21. *Kansas City Star v. Fossey*, 230 Kan. 240, 630 P.2d 1176 (1981); *Wichita Eagle-Beacon Co. v. Owens*, 271 Kan. 710, 27 P.3d 881 (2001).
22. *Fossey*, 230 Kan. at 247-8, cited by *Owens*, 271 Kan. at 712 (2001).
23. *Fossey*, 230 Kan. at 249.
24. *State v. Stauffer Comm'ns Inc.*, 225 Kan. 540, 548 (1979).
25. *See* K.S.A. 1983 Supp. 22-2302(2); K.S.A. 1981 Supp. 22-2502(d).
26. *Stauffer Comm'ns*, 225 Kan. at 542.
27. *Id.*
28. *Id.*
29. *Id.* The Kansas Supreme Court reversed the conviction, holding that criminal liability could not be imposed under K.S.A. 21-3827 "for publishing truthful information properly obtained from public records," citing the First Amendment and Section 11 of the Bill of Rights of the Kansas Constitution. *See* 225 Kan. 540, 547-548.
30. Letter from Paul W. Clark, assistant district attorney for Sedgwick County, to Elwaine F. Pomeroy, Senate Judiciary chairman (Feb. 13, 1979). Vern Miller, former state attorney general, was the district attorney for Sedgwick County at that time.
31. *Wilbanks*, 224 Kan. at 75.
32. *Id.* at 72.
33. Letter, *supra*, note 28.
34. *Id.*
35. *Id.*
36. *Id.*
37. *See* K.S.A. 1979 Supp. 22-2302; K.S.A. 1979 Supp. 22-2502.
38. John Rubin, Testimony Before the Senate Judiciary Committee (Mar. 13, 2014), *retrieved from* http://kslegislature.org/li_2014/b2013_14/committees/ctte_h_jud_1/documents/testimony/20140212_06.pdf.
39. *Id.*
40. Minutes, H. Judiciary Comm. Meeting (Feb. 12, 2014), *retrieved from* http://kslegislature.org/li_2014/b2013_14/committees/ctte_h_jud_1/documents/minutes/20140212.pdf; Minutes, S. Judiciary Comm. Meeting (Mar. 13, 2014), *retrieved from* http://kslegislature.org/li_2014/b2013_14/committees/ctte_s_jud_1/documents/minutes/20140313.pdf.
41. Kansas County and District Attorneys Association, and the Kansas Association of Criminal Defense Lawyers, Testimony Before the House Judiciary Committee (Feb. 12, 2014), *retrieved from* http://kslegislature.org/li_2014/b2013_14/committees/ctte_h_jud_1/documents/testimony/20140212_19.pdf and http://kslegislature.org/li_2014/b2013_14/committees/ctte_h_jud_1/documents/testimony/20140212_20.pdf; Kansas Association of Chiefs of Police, Kansas Sheriffs Association, and Kansas Peace Officers Association, Testimony Before the Senate Judiciary Committee (Mar. 13, 2014), *retrieved from* http://kslegislature.org/li_2014/b2013_14/committees/ctte_h_jud_1/documents/testimony/20140212_21.pdf.
42. Marc Bennett and Steve Howe, Testimony Before the Senate Judiciary Committee (Mar. 13, 2014), *retrieved from* http://kslegislature.org/li_2014/b2013_14/committees/ctte_s_jud_1/documents/testimony/20140313_03.pdf and http://kslegislature.org/li_2014/b2013_14/committees/ctte_s_jud_1/documents/testimony/20140313_11.pdf.
43. John Rubin, Testimony Before the Senate Judiciary Committee (Mar. 13, 2014).
44. *Id.*
45. *Id.*
46. *See* Testimony, *supra*, notes 38 and 39.
47. Fiscal Note RE HB 2555, *retrieved from* http://kslegislature.org/li_2014/b2013_14/measures/documents/fisc_note_hb2555_00_0000.pdf.
48. *See* KRPC 3.6 and 3.8. For an illustrative opinion on probable cause affidavits and extrajudicial comment by prosecutors, *see In re Brizzi*, 962 N.E.2d 1240, 1247 (Ind. 2012) (per curiam) (finding that a probable cause affidavit was a public record and that a prosecutor may speak extrajudicially within a "safe harbor" as long as he or she does "not provide information beyond quotations from or references to the contents of the public record.").
49. Ron Keefover, Testimony Before the House Judiciary Committee (Feb. 12, 2014), *retrieved from* http://kslegislature.org/li_2014/b2013_14/committees/ctte_h_jud_1/documents/testimony/20140212_16.pdf. Kansas Press Association and Kansas Broadcasters Association, Testimony Before Senate Judiciary Committee (Mar. 13, 2014), *retrieved from* http://kslegislature.org/li_2014/b2013_14/committees/ctte_s_jud_1/documents/testimony/20140313_04.pdf and http://kslegislature.org/li_2014/b2013_14/committees/ctte_s_jud_1/documents/testimony/20140313_08.pdf.

50. K.S.A. 22-2302(c)(1)(B); K.S.A. 22-2502(e)(1)(B).
51. K.S.A. 22-2302(c)(2); K.S.A. 22-2502(e)(2).
52. K.S.A. 22-2302(c)(3)(A) and (B); K.S.A. 22-2502(e)(3)(A) and (B).
53. K.S.A 22-2302(c)(4)(A)-(I); K.S.A 22-2502(e)(4)(A)-(I).
54. *See Cole v. Mayans*, 276 Kan. 866, 878 (2003).
55. *See State v. Herrman*, 33 Kan. App. 2d 46, 50 (2004) (applying doctrine to limit claims to those specifically set forth in statutory list).
56. K.S.A. 22-2302(c)(5)(A) and (B); K.S.A. 22-2502(e)(5)(A) and (B).
57. *See*, *e.g.*, K.S.A. 22-2202(20) ("'Warrant' means a written order made by a magistrate directed to any law enforcement officer commanding the officer to arrest the person named or described in the warrant."); K.S.A. 22-2304(a) ("The warrant shall command that the defendant be arrested and brought before a magistrate . . . ."); K.S.A. 22-2404(3) ("[the arresting officer] shall without unnecessary delay take the person arrested before a magistrate . . . ."); K.S.A. 22-2408(I) ("[If] such person is not immediately taken before a magistrate . . . .").
58. *See*, *e.g.*, K.S.A. 22-2304(a) ("The warrant shall be signed by the magistrate . . . .); K.S.A. 22-2305(5) ("At the request of the prosecuting attorney any unexecuted warrant shall be returned to the magistrate by whom it was issued . . . .").
59. K.S.A. 22-2302 and K.S.A. 22-2502
60. K.S.A. 22-2302(c)(1)(4); K.S.A. 22-2502(e)(1)(4).
61. K.S.A. 22-2302(c)(1)(4)(A)-(I); K.S.A. 22-2502(e)(1)(4)(A)-(I).
62. *See Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 13-14 (1986).
63. *Fossey*, 230 Kan. at 250.
64. *Id.*
65. *State v. Alston*, 256 Kan. 571, 578 (1994), citing *Nebraska Press Association v. Stuart*, 427 U.S. 539, 562 (1976).
66. *Hodges v. Johnson*, 288 Kan. 56, 65 (2009), citing *Owen Lumber Co. v. Chartrand*, 283 Kan. 911, 915-16 (2007).
67. John Rubin, Testimony Before the Senate Judiciary Committee (Mar. 13, 2014), *retrieved from* http://kslegislature.org/li_2014/b2013_14/committees/ctte_h_jud_1/documents/testimony/20140212_06.pdf.
68. Kansas Press Association and Kansas Broadcasters Association, Testimony Before Senate Judiciary Committee (Mar. 13, 2014), *retrieved from* http://kslegislature.org/li_2014/b2013_14/committees/ctte_s_jud_1/documents/testimony/20140313_04.pdf and http://kslegislature.org/li_2014/b2013_14/committees/ctte_s_jud_1/documents/testimony/20140313_08.pdf.
69. K.S.A. 22-2302(c)(1)(4)(A)-(I); K.S.A. 22-2502(e)(1)(4)(A)-(I).
70. *See State v. Reese*, 333 P.3d 149, 153 (Kan. 2014) ("courts generally presume that the legislature acts with full knowledge of existing law").
71. *See Fossey*, 230 Kan. 240, 247-48 (A judge "'may seal the record only if . . . the dissemination of information . . . *would* create a clear and present danger to the fairness of the trial . . . .'" (Emphasis added.)
72. *See Bryan v. Eichenwald*, 191 F.R.D. 650, 652 (D. Kan. 2000) ("The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it). He may not rubber stamp a stipulation to seal the record."); *Owens*, 271 Kan. at 712-713 ("We believe an integral part of the rule announced in *Fossey*, however, is the need for a trial court, when considering the sealing of a record or the closure of a proceeding, to consider also the societal interest the public has in open criminal proceedings and records.").
73. *Fossey*, 230 Kan. at 250.
74. *Id*. at 248.
75. K.S.A. 22-2302(c)(4)(C).
76. Caitlin Doornbos, *Prosecution and defense both ask to seal probable cause affidavits in KU rape case*, The Lawrence Journal-World (Oct. 21, 2014), http://www2.ljworld.com/news/2014/oct/21/prosecutor-defense-asks-seal-probable-cause-affida/.
77. *See* Merriam-Webster Dictionary ("Prospective—likely to be or become something specified in the future"). Retrieved from http://www.merriam-webster.com/dictionary/prospective). This argument previously appeared in a Motion to Intervene filed by Lathrop & Gage LLP in *State v. Nelson,* Leavenworth County Dist. Ct., Case No. 2014 CR 1136.
78. K.S.A. 22-2302(c)(1)(4)(C) and K.S.A. 22-2502(e)(1)(4)(C).
79. *See*, *e.g.*, *State v. Higgenbotham*, 271 Kan. 582 (2001); *State v. Cravatt*, 267 Kan. 314 (1999); *State v. Jackson*, 262 Kan. 119 (1997); *State v. Shaw*, 260 Kan. 396 (1996); *State v. Knighten*, 260 Kan. 47 (1996); *State v. Shannon*, 258 Kan. 425 (1995); *State v. Brown*, 258 Kan. 374 (1995); *State v. Swafford*, 257 Kan. 1023 (1995), modified on other grounds, 257 Kan. 1099 (1996); *State v. Anthony*, 257 Kan. 1003 (1995); *State v. Butler*, 257 Kan. 1043 (1995), modified on other grounds, 251 Kan. 1110 (1996); *State v. Wacker*, 253 Kan. 664 (1993); *State v. Grissom*, 251 Kan. 851 (1992); *State v. Tyler*, 251 Kan. 616 (1992); *State v. Mayberry*, 248 Kan. 369 (1991); *State v. Goss*, 245 Kan 189 (1989); *State v. Hunter*, 241 Kan. 629 (1987); *State v. Ruebke*, 240 Kan. 493, *cert. denied*, 483 U.S. 1024 (1987); *State v. Bird*, 240 Kan. 288 (1986), *cert. denied*, 481 U.S. 1055 (1987); *State v. McKibben*, 239 Kan. 574 (1986); *State v. McNaught*, 238 Kan. 567 (1986); *State v. Haislip*, 237 Kan. 461, *cert. denied*, 474 U.S. 1022 (1985); *State v. Boan*, 235 Kan. 800 (1984); *State v. Crispin*, 234 Kan. 104 (1983), *State v. Crump*, 232 Kan. 265 (1982); *State v. Moore*, 229 Kan. 73 (1981); *State v. May*, 227 Kan. 393 (1980); *State v. Soles*, 224 Kan. 698 (1978); *State v. Filder*, 223 Kan. 220 (1977); *State v. Black*, 221 Kan. 248 (1977); *Green v. State*, 221 Kan. 75 (1976); *State v. Ayers*, 198 Kan. 467 (1967); *State v. Poulus*, 196 Kan. 253, *cert. denied*, 385 U.S. 827 (1966); *State v. Furbeck*, 29 Kan. 532 (1883); *State v. Arculeo*, 29 Kan. App. 2d 962 (2001); *State v. Moss*, 7 Kan. App. 2d 215, *rev. denied*, 231 Kan. 802 (1982); *State v. Allen*, 4 Kan. App. 2d 534, *rev. denied*, 228 Kan. 807 (1980). These citations previously appeared in a Memorandum in Support of Motion to Intervene and for Release of Sealed Documents filed by Fleeson, Gooing, Coulson & Kitch LLC in *State v. Rader*, Sedgwick County Dist. Ct., Case No. 2005 CR 498.
80. 300 Kan. 1 (Kan. 2014). On March 30, 2015, the U.S. Supreme Court accepted the Kansas Attorney General's petition for Certiorari on issues unrelated to the discussion here. *See State v. Carr*, Petition for Certiorari. Retrieved from http://ag.ks.gov/docs/default-source/documents/carr-jonathan-petition-%282%29.pdf?status=Temp&sfvrsn=0.26841902571327114; U.S. Supreme Court Order List (Mar. 30, 2015), *retrieved from* http://www.supremecourt.gov/orders/courtorders/033015zor_5iek.pdf.
81. K.S.A. 22-2302(c)(4)(C) and K.S.A. 22-2502(e)(4)(C)
82. *See Carr*, 300 Kan. at 48-84; Syl. ¶¶ 1-11.
83. *Id.*, 300 Kan. at 58.
84. *Id.*
85. K.S.A. 22-2302(c)(4)(C).
86. *Carr*, 300 Kan. at 58, citing *Gross v. Nelson*, 439 F.3d 621, 628 (10th Cir. 2006) (citing *Rideau v. Louisiana*, 373 U.S. 723 (1963)).
87. *Carr*, 300 Kan. at 62.
88. *Id.* (citations omitted).
89. 561 U.S. 358, 381-85 (2010).
90. *Carr*, 300 Kan. at 62.
91. K.S.A. 22-2302(c)(4)(C).
92. *Carr*, 300 Kan. at 65, citing *Skilling*, 561 U.S. at 380.
93. *Carr*, 300 Kan. at 65.
94. *Id.*, 300 Kan. at 66.
95. *Id.*, 300 Kan. at 52.
96. *Id.*, 300 Kan. at 67.
97. 336 P.3d 831 (Kan. 2014)
98. *Roeder*, 336 P.3d at 841.
99. *Id.* at 838.
100. *Id.* at 841.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 842 (2014) (emphasis in original), citing *State v. Verge*, 272 Kan. 501, 508 (2001); *see also Higgenbotham*, *supra* note 79, at 593 quoting *State v. Ruebke*, 240 Kan. 493, 500, *cert. denied* 483 U.S. 1024 (1987) ("Media publicity alone has never established prejudice per se.").
105. *See Carr*, 300 Kan. at 68.
106. *Id.*
107. *State v. Boan*, 235 Kan. 800, 805 (1984).
108. *State v. Krider*, 41 Kan. App. 2d 368, 373 (2009).
109. *Id.*, at 373, 374.
110. *Carr*, 300 Kan. at 68.
111. *Id*. at 69.
112. *Id.* (citation omitted)
113. *See* K.S.A. 22-2302(c)(4)(C) and K.S.A. 22-2502(c)(4)(C).
114. *See*, *e.g.*, K.S.A. 22-2302(c)(4)(A) and (F).

115. *See, e.g.*, K.S.A. 22-2302(c)(4)(B).
116. K.S.A. 22-2302(c)(1); K.S.A. 22-2502(e)(1).
117. *See, e.g.*, K.S.A. 22-2302(c)(4)(D).
118. *See* K.S.A. 22-2302(c)(4)(E) or K.S.A. 22-2502(e)(4)(E)
119. K.S.A. 22-2302(c)(4)(G)(H) and (I); K.S.A. 22-2502(e)(4)(G)(H) and (I).
120. Kan. Sup. Ct. R. 123.