

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUITCOUNTY OF SPARTANBURG¹)RENEE S. BEACH, PHILLIP BEACH,
ROBIN BEACH, SAVANNAH
TUTEN and SETH TUTEN,

CASE NO. 2026-CP-42-04208

Plaintiffs,

v.

GREGORY M. PARKER, GREGORY
M. PARKER, INC., d/b/a PARKER'S
CORPORATION, BLAKE GRECO,
JASON D'CRUZ, VICKYWARD,
MAX FRATODDI, HENRY ROSADO
and PRIVATE INVESTIGATIONS
SERVICES GROUP, LLC,

Defendants.

**PLAINTIFFS' MOTION TO RECONSIDER
PURSUANT TO RULES 52 AND 59, SCRCP,
THE COURT'S ORDER GRANTING
DEFENDANTS' MOTION FOR TRANSFER
OF VENUE TO SPARTANBURG COUNTY**

Plaintiffs Renee S. Beach, Phillip Beach, Robin Beach, Savannah Tuten and Seth Tuten (Plaintiffs) respectfully move the Court pursuant to Rules 52 and 59, SCRCP, and *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004) (construing Rules 52 and 59 to permit a request to reconsider any order) to reconsider its Order granting the motion by the Defendants Gregory M. Parker, Gregory M. Parker, Inc. d/b/a Parker's Corporation, Blake Greco, and Jason D'Cruz (collectively, "Parker's Defendants") and joined in by the Defendants Max

¹ Rule 62(a), SCRCP, provided an automatic stay of this Court's order entered on August 12, 2026. The stay "gives the litigant a short time to consider procedural options such as post-trial motions or appeal without immediately facing enforcement of the judgment." James F. Flanagan, *South Carolina Civil Procedure* 739 (4th ed. 2020). The rule contemplates the ability to file motions pursuant to Rules 52, 59, or 60, absent an exception. *Id.* For some reason, however, the Hampton County Clerk transferred the entire case before Plaintiffs had a chance to file this timely motion. This explains why Plaintiffs filed this motion in Spartanburg County and not in Hampton County.

Fratoddi, Henry Rosado and Private Investigations Services Group, LLC (“Investigators”)² to transfer venue of this matter from Hampton County to Spartanburg County pursuant to S.C. Code Ann. § 15-7-100(A)(2) (Supp. 2025). The reasons for this Motion are stated below.

On August 12, 2026, the Court entered its Order granting the Motion to Change Venue and ordering the case transferred from Hampton County, which is in the 14th Judicial Circuit, and to Spartanburg County, which is in the 7th Judicial Circuit. Plaintiffs contend that the Court’s Order failed to follow the mandates of both statutory and case law in transferring venue without attempting to first select and seat a jury in Hampton County, and then by transferring the matter outside of the 14th Judicial Circuit in violation of S.C. Code Ann. § 15-7-110 (Supp. 2025). Furthermore, the Court’s Order failed to consider convenience of witnesses and parties in transferring the case over 180 miles and completely to the other side of the State.

Also, while the Court’s Order outlined Plaintiffs’ arguments (Order, pp. 6-7), the Order failed to address *any* of those arguments or explain why the Court rejected them or refused to follow the law. This Motion, therefore, seeks a specific ruling as to each argument Plaintiffs made in response to the motion to transfer venue to Spartanburg County. *Elam*, at 24 n. 4, 602 S.E.2d at 780 n. 4 (“If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review”).

Plaintiffs respectfully request that the Court reconsider its Order, withdraw the Order, and enter a new Order either (1) denying the motion to transfer venue until after an attempt at seating a jury in Hampton County pursuant to *State v. Manning* and its progeny as well as the

² The Investigators actually requested a transfer to Beaufort County as an alternative.

overwhelming foreign authority the Court's Order relied upon, or (2) transferring the matter to a County within the 14th Judicial Circuit as mandated by Section 15-7-110. Plaintiffs also request that the Court provide specific rulings on the arguments Plaintiff made in their opposition to the motion to transfer venue.

ARGUMENTS

In South Carolina, Plaintiff is the architect of the lawsuit both in pleading and forum selection. *Cf. Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017) (reaffirming that a plaintiff may choose whom to sue); *Austin v Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010) (noting under election of remedies “[w]hen an identical set of facts entitle the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both”); *Sanders v. Allis Chalmers Mfg. Co.*, 235 S.C. 259, 111 S.E.2d 201 (1959) (noting plaintiff has a right to elect the county in which plaintiff brings the action against a foreign corporation but this privilege is subject to the court's right to change venue for reasons set forth in the venue statutes). Thus, Plaintiff initially had the right to choose Hampton County in this matter, subject to this Court's right to change venue pursuant to law. The Court may entertain a motion to transfer venue but must abide by procedures and requirements set forth in statutory and case law.

The South Carolina Constitution provides, “[i]t shall be the duty of the General Assembly to pass laws for the change of venue in all cases, civil and criminal, *upon proper showing, supported by affidavit*, that a fair and impartial trial cannot be had in the county where such action ... was commenced.” S.C. Const. art. V, § 23 (emphasis added). This provision has remained nearly unchanged for over a century. *McCown v. Northeastern R. Co.*, 55 S.C. 384, 33 S.E. 506

(1899).

As noted, Plaintiffs properly brought this matter in Hampton County pursuant to S.C. Code Ann. § 15-7-30(F)(1), (C)(2), (D)(1) and (E)(2) (Supp. 2025) (describing that a civil action “must” be brought where the alleged act or omission giving rise to the cause of action occurred against a resident individual, a nonresident individual, and a domestic corporation). However, Section 15-7-100 provides:

(A) The court may change the place of trial if:

(2) there is reason to believe that a fair and impartial trial cannot be had there...

S.C. Code Ann. § 15-7-100(A)(2). The Parker Defendants, joined by the Investigators, relied upon this subpart of the statute to seek venue change.

This basis for change of venue then *mandates* that the Court apply Section 15-7-110, which provides:

When the ground for a change of place of trial in a circuit court in a case in which such court has original jurisdiction is that a fair and impartial trial cannot be had in the county in which such action was commenced the application for removal must be made by some party interested to the judge sitting in regular term. Such application must be supported by an affidavit that a fair and impartial trial cannot be had in such county. Four days’ notice of such application shall be given to the adverse party, but such adverse party shall have the right to waive such notice. The circuit judge shall have the power, upon application made to him by either party and upon proper cause shown, to shorten or extend the time for the hearing of such application. *If a change is ordered it shall be to a county in the same judicial circuit, and the judge shall order the record to be removed to such county.*

S.C. Code Ann. § 15-7-110 (Supp. 2025) (emphasis added) (the italicized language was at one time found in Constitution article V, § 2; see *McCown* at 388, 33 S.E. at 507).

1. THE COURT MUST FIRST TRY TO SEAT A JURY IN HAMPTON COUNTY

Although Plaintiffs pointed out that the Court must first attempt to seat a jury before

entertaining a motion to transfer venue under Section 15-7-100(A)(2) in order to satisfy the formidable burden of such a motion, the Court's Order is completely silent on the point other than to acknowledge Plaintiff's argument. The Court's Order does not address the argument or explain why it completely disregarded settled precedent, including *State v. Manning*, 329 S.C. 1, 8, 495 S.E.2d 191, 194 (1997) ("If a change of venue is sought on the basis of pretrial publicity, the general practice is to postpone ruling on that motion until a jury panel is *voir dired*") and the other cases discussed below. The Order gives no explanation for bypassing this procedure.

In *State v. Fowler*, 266 S.C. 203, 222 S.E.2d 497 (1976), the trial court deferred its ruling until the court had the opportunity to conduct *voir dire* examination of the prospective jurors. The Supreme Court approved this procedure, noting that it was in accordance with the approach the Court followed in *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379 (1972) (death penalty case). This procedure has been approved and followed since *Crowe* without exception. *State v. Copeland*, 278 S.C. 572, 300 S.C. 63 (1982) (death penalty case); *State v. Neeley*, 271 S.C. 33, 244 S.E.2d 522 (1978) (death penalty case); *Stevens v. Sun News*, 267 S.C. 63, 70, 226 S.E.2d 236, 240 (1976) (noting "[t]he impact of pretrial publicity at the time of trial would be the focus of any inquiry concerning prejudicial publicity," citing *State v. Fowler*); *State v. Easler*, 322 S.C. 333, 352, 471 S.E.2d 745, 756-757 (Ct. App. 1996) ("If a change of venue is sought on the basis of pretrial publicity, the general practice is to postpone ruling on that motion until the jury panel is *voir dired*"). The Court should withdraw the Order and issue a new Order consistent with this precedent or addressing this argument.

State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982), provides even more direct South Carolina authority. There, the defendant in a capital murder case sought a change of venue before

voir dire based upon extensive pretrial publicity and supported the motion not merely with media reports and other evidence, but with a public-opinion survey conducted by a University of South Carolina professor for the purpose of establishing presumed community prejudice that would obviate any need to conduct *voir dire* of prospective jurors. *Id.* at 371-73, 296 S.E.2d at 530-31. The Supreme Court addressing the issue with the “aim[] of clarity and finality,” *Id.*, declined to permit survey evidence to substitute for the jury-selection process, explaining that South Carolina has no per se rule of presumptive prejudice. More importantly, the Court specifically declined to adopt one. *Id.* The Court instead held that, on the showing presented--a much stronger showing than the Defendants made here--, “to grant a change of venue in such circumstances *would be an abuse of discretion.*” *Id.* at 372, 296 S.E.2d at 503 (emphasis added).

The Court in *Truesdale* recognized that only in rare and extraordinary circumstances is prejudice so overwhelming before jury selection that attempting to impanel a jury would amount to a “hollow formality.” *Id.* at 371, 296 S.E.2d at 530 (citing *Rideau v. Louisiana*, 373 U.S. 723 (1963), where a filmed confession made under extraordinary circumstances was repeatedly televised throughout the trial community). Nothing comparable has been demonstrated here. Further, despite the Defendants’ desire to conflate this case with all things Alex Murdaugh, it is not. Alex Murdaugh is not a defendant or party to this case and never has been. More importantly, *Truesdale* documents the Supreme Court’s clear and final thoughts on this issue: In South Carolina, *voir dire* is the ordinary and presumptively proper means of determining whether pretrial publicity prevents selection of an impartial jury.

Furthermore, the venue cases from other jurisdictions upon which the Court relied actually followed a procedure similar to the procedure set forth in *Manning* and *Truesdale*. Those cases are

discussed in detail below.

2. THE COURT OVERLOOKED THAT THE PARKER DEFENDANTS FAILED TO PRODUCE ADEQUATE EVIDENCE TO MEET THEIR FORMIDABLE BURDEN TO SUPPORT VENUE CHANGE

The Court's Order relied upon two primary pieces of evidence proffered by the Parkers' Defendants. However, the Order failed to address Plaintiff's arguments that each piece of evidence lacked a sufficient basis to support the motion to transfer venue.

A. DEFENSE COUNSEL'S AFFIDAVIT WAS INSUFFICIENT TO SUPPORT THE MOTION TO CHANGE VENUE

The Court found the affidavit by the Parker Defendants' counsel, Rhett Ricard, sufficient to support the venue transfer. His affidavit did not satisfy either the Constitutional provision or Section 15-7-110. The Motion therefore lacked an essential component - an affidavit, based on personal knowledge and not hearsay, that a fair and impartial trial cannot be had in Hampton County. Mr. Ricard's untested affidavit merely affirms "that the facts in the Parker's Defendants' Motion to Transfer Venue (filed on April 7, 2026), as well as their Memorandum in support of the same (filed simultaneously herewith), are true and correct *to the best of my knowledge*." (Exh. A, ¶ 4 (emphasis added)). That "knowledge" cannot be firsthand – at best it can only be what Mr. Ricard has read or been told by others. He does not live in Hampton County, nor did he attest that he has spoken with anyone from Hampton County. They are conclusory statements and opinions at best. Plaintiffs pointed this out in their response, but the Court's Order accepted it without ruling on the objections.

The Court's Order also failed to address that in *Stevens v. Sun News*, the Supreme Court affirmed a circuit court order denying a motion for change of venue under this subpart of the predecessor statute. 267 S.C. 63, 226 S.E.2d 236 (1976). In *Stevens*, the Court noted that the motion

was supported only by affidavits of the movant's counsel and agreed with the trial court that such conclusory statements and opinions were not sufficient to support a change of venue. The Supreme Court stated:

The trial court would have abused its discretion had he granted appellants' motion because it lacked adequate supporting affidavits. As the moving party, the appellant has the burden of establishing its entitlement to a change of venue. When a party moves for change of venue based on unfair publicity or substantial influence of an opponent which would deprive it of a fair trial, *the burden is formidable*. It is universally recognized that a keystone to efficient and responsible adjudication is trial by jury of the vicinage; in *Utsey v. Charleston, etc., R.R. Company*, 38 S.C. 399, 405, 17 S.E. 141, 143 (1893) this Court held, '(t)he very object of our jury system, in requiring jurors from the vicinage to pass upon the credibility of witnesses, is the promotion of the ends of justice.' See also *Graham v. Beverly*, 235 S.C. 222, 110 S.E.2d 923 (1959) which modified the holding of *Utsey* but restated the desirability of conducting the trial by a jury *of the vicinage*. Also, see *Bouvy v. N.W. White & Co.*, [254 S.C. 164, 167, 174 S.E.2d 347, 348 (1970)]. Therefore, a party seeking a change of venue must persuade the court of the necessity to remove the trial from a local jury.

Stevens v. Sun News, at 68-69, 226 S.E.2d at 239 (emphasis added). The Supreme Court also rejected the "naked assertion" by the movant's counsel that publicity "so inflamed or contaminated the prospective jurors as to warrant a change of venue." *Id.*, at 70, 226 S.E.2d at 240. This Court's Order mentioned *Stevens* but gave it no analysis, essentially ignoring its instructions. More importantly, the Order ignores the very object of our jury system requiring jurors from the vicinage to pass upon the credibility of the witnesses since there are no witnesses from or around Spartanburg County.

Further, the Court's Order ignored Plaintiffs' contention that Mr. Ricard's affidavit added nothing to the inquiry and did not satisfy the statutory or Constitutional requirement. See *Davenport v. Summer*, 269 S.C. 382, 383 237 S.E.2d 494, 495 (1977) (observing that "counsel's affidavit does not bear the degree of neutrality expected to persuade a court of the necessity for a

change of venue,” citing *Stevens v. Sun News*). The Court should have given no weight to this “evidence.” At minimum, the Court should expressly address and rule upon Plaintiff’s arguments under *Stevens* and *Davenport*.

B. MR. REPASS’S REPORT WAS FLAWED AND PROVIDED AN INSUFFICIENT BASIS TO TRANSFER VENUE

As the Court is aware, the Parker Defendants provided the “expert report” by Rex L. Repass of Research America. Mr. Repass was apparently given the questionable task of doing a “Change of Venue Survey” of citizens in Hampton, Allendale and Spartanburg counties.³ The Court should have rejected this “evidence” or, at minimum, performed a “gatekeeping” analysis of Mr. Repass’s qualifications, methodology, execution, and opinions as required by Rule 702, SCRE.

As Plaintiffs pointed out, Mr. Repass produced nothing to verify the validity of the methodology he used, the validity of the sample size, the validity of his several “hypotheses,” and his assumptions, including that a juror who has knowledge of this case or been exposed to media coverage is unqualified *per se*. Mr. Repass did not provide the scripts he used for the surveys in any of the counties or the method he used to select the particular “eligible” jurors to survey (and the Parker Defendants refused to provide this information when Plaintiffs subpoenaed it). Mr. Repass’s work lacked any semblance of reliability and certainly failed to consider either Beaufort or Jasper Counties (both within the 14th Circuit) as viable and less burdensome alternatives than Spartanburg County. Yet this Court’s Order accepted it without performing a reliability analysis mandated by Rule 702, SCRE, and *State v. Wallace*, 440 S.C. 537, 544, 892 S.E.2d 310, 313 (2023)

³ See *State v. Truesdale*, discussed above (Supreme Court declined to permit survey evidence to substitute for the jury-selection process and held that it is an abuse of discretion to rely upon such a concocted report that does not satisfy the required legal certainties).

(“To admit expert testimony under Rule 702, the proponent ... must demonstrate, *and the trial court must find*, the existence of three elements: ‘the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.’”) (emphasis added) (quoting *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999)). Although Plaintiffs challenged the validity of Mr. Repass’s methodology, execution and result, the Court failed to perform its gatekeeping function pursuant to Rule 702 and the cases cited above. *E.g.*, *K.S. v. Richland School Dist. Two*, 445 S.C. 111, 912 S.E.2d 240 (2025) (“A party seeking to present expert testimony must demonstrate, and the trial court acting as gatekeeper *must find*, that the evidence will assist the trier of fact, the expert is qualified, and the basis of the expert’s opinion is reliable”) (emphasis added).

Further, although the Parker Defendants had this information in April 2026 (before the discovery cutoff) they withheld it until June 5, 2026, and Plaintiffs were refused to be provided with the information they subpoenaed from Mr. Repass by the Parker’s Defendants, eliminating any opportunity to effectively depose Mr. Repass to test his qualifications, methodology or conclusions as required by Rule 702, SCRE.⁴

Next, Plaintiffs pointed out Mr. Repass’s opinions attempted to usurp this Court’s role in determining whether an impartial jury can be selected in Hampton County or any of the other four (4) counties in the Judicial Circuit. *Cf. Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003) (upholding a trial court’s refusal to accept an expert’s affidavit that read “as if it could have been [the proponent’s] oral argument to the trial court”). *Dawkins* rejected a sworn affidavit of this type - Mr. Repass’s “report” was not verified nor was it in the form of an affidavit until Plaintiff’s

⁴ Plaintiffs also have not had the opportunity to depose Mr. Ricard, who has inserted himself into this case as a witness on this issue through his affidavit.

counsel pointed out the lack of the required affidavit on June 29, 2026.⁵ He claims his work goes “well beyond speculation.” However, his affidavit is a rehash of his report and suffers the same defects in methodology and execution prevalent in that report. The Court should have tested that affidavit to determine whether it provided a reliable basis for the Court to ignore the statutory mandate and well settled precedent and whether his conclusions improperly attempted to usurp this Court’s function under Section 15-7-110. Although the Court’s Order noted this argument, the Court failed entirely to analyze the argument and explain why *Dawkins* did not preclude Mr. Repass’s opinions. The Court should not have adopted Mr. Repass’s opinions without first analyzing them for reliability, *see, e.g., Watson v. Ford Motor Co.*, 389 S.C. 434, 449, 699 S.E.2d 169, 177 (2010) (“The trial court must examine the substance of the testimony to determine if it is reliable, regardless of whether the expert evidence is scientific, technical, or other specialized knowledge. *See [State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009)]* (holding that all expert evidence must satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter); *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L.Ed.2d 238 (1999) (holding that in determining the admissibility of evidence pursuant to Rule 702, FRE, the same reliability requirements apply to all types of expert evidence)”), and second, analyzing them under *Dawkins v. Fields*.

⁵ It is telling that Mr. Repass ignored Colleton County, where the Circuit Court previously determined Alex Murdaugh could get a fair trial in his murder case and a jury was selected and seated. He also ignored Jasper and Beaufort Counties. Mr. Repass also ignored that these Defendants made a venue transfer motion in the “Boat Crash” case that Judge Dan Hall denied. Finally, Mr. Repass coincidentally chose Spartanburg County as his “control” county, which happens to be in the home judicial circuit of Your Honor. He considered no other counties within the State which would impose less of a burden on the Plaintiffs who are here through no fault of their own. It should be noted that two of the named Plaintiffs, Savannah Tuten and Seth Tuten, have three very small children who will have to be taken care of during the multiweek trial.

Again, while the Order mentioned Plaintiffs' cite to *Dawkins*, the Order did not address the argument that Mr. Repass's untested opinion violated the *Dawkins* rule. Instead, the Court's Order relied solely upon its view that Plaintiffs "failed to offer evidence to rebut the survey conducted by Mr. Repass and failed to persuasively challenge the testimony of Mr. Waisenhofer and the exhibits offered through this testimony...." (Order, p. 7). But just because evidence that lacks a proper foundation or reliability under Rule 702 is not rebutted does not mean the evidence is undisputed and must be accepted. *E.g., Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 694 S.E.2d 1 (2010), citing *Black v. Hodge*, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991) ("The fact that testimony is not contradicted directly does not render it undisputed.").

Nor were Plaintiffs required to commission a competing public-opinion poll to "rebut" Mr. Repass. *Truesdale* teaches that actual *voir dire* is the superior means of testing whether citizens of the county can sit impartially. In adopting the reasoning of *United States v. Haldeman*, 559 F.2d 31, 64 (D.C. Cir. 1976), the South Carolina Supreme Court approved giving no weight to a privately commissioned poll than to a recorded, comprehensive *voir dire* conducted by the judge in the presence of the parties and counsel. *Truesdale*, 278 S.C. at 371-72, 296 S.E.2d at 530-31. The relevant answer to speculation about what Hampton County jurors might say is to ask actual Hampton County jurors, under oath, during *voir dire*.

That point is independent of the Rule 702 defects discussed above. Even assuming Mr. Repass's survey were methodologically sound and admissible - which Plaintiffs dispute - *Truesdale* forecloses treating a privately commissioned survey as a substitute for the jury-selection process itself.⁶ The survey therefore could not supply a sufficient basis to bypass *voir dire* merely

⁶ It should be noted that even if the Repass survey were reliable, it does not support the Court's

because Plaintiffs did not retain a competing pollster. More importantly, *Truesdale* holds it would be an abuse of discretion to do so in this case.⁷

Plaintiffs argued further that the Court should have rejected the Parker Defendants' motion and Mr. Repass's information because it was based upon a faulty foundation. Contrary to a basic premise of Mr. Repass's work, as erroneously adopted in the Court's Order, under South Carolina law "[m]ere exposure to pretrial publicity does not automatically disqualify a prospective juror."⁸ *State v. Manning*, 329 S.C. 1, 7, 495 S.E.2d 191, 194 (1997); *State v. Fowler*, 266 S.C. 203, 207, 222 S.E.2d 497 (1976), citing *Irvin v. Dowd*, 366 U.S. 717 (1961). As the *Irvin* Court observed 65 years ago:

It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the

conclusion or the Defendants' assertion that a fair and impartial trial cannot be had in Hampton County. Stated differently, assuming Repass is correct that a large percentage of prospective jurors have heard about this case, his sampling supports a conclusion that since a significant percentage of the population has not (again this is not the test), it is possible to select a panel who will decide this matter based on the evidence presented at trial.

⁷ It is also significant that the Supreme Court in *Truesdale* noted: "An equally profound difficulty lies in the standards of proof applied in scholarly as opposed to judicial inquiries. Whereas academic criticism of survey data looks to the design and explanatory power of the work, assuming the integrity of its implementation, a court of law must at the threshold establish to a legal certainty that each interview was conducted in accordance with the survey plan. Again, in the same instant case, Professor Jacoby described a short training course given to all interviewers but could only assume they followed instructions. He produced only two of seventeen participants, not counting defense counsel, to so testify in court. The fact that defense counsel conducted a part of the interview is so obviously compromising, at least from a judicial point of view, that the resulting data hardly warrants hearing by the court." *State v. Truesdale*, 296 S.E.2d at 531, 278 S.C. at 373. That is precisely what the Repass report does here and why it is an abuse of this Court's discretion to rely on it.

⁸ As further pointed out during the hearing, Mr. Repass and the Parker's Defendants conflate Alex Murdaugh and all his infamous cases with this case. Alex Murdaugh is not and never has been a party to this case.

public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.

Irvin, at 722. The Court in *Stevens v. Sun News* held “[t]he impact of pretrial publicity at the time of trial would be the focus of any inquiry concerning prejudicial publicity.” *Stevens v. Sun News*, at 68-69, 226 S.E.2d at 239. *Accord State v. Manning*, 329 S.C. 1, 8, 495 S.E.2d 191, 194 (1997) (“If a change of venue is sought on the basis of pretrial publicity, the general practice is to postpone ruling on that motion until a jury panel is *voir dire*d”). Mr. Repass’s opinions are therefore not reliable on this basis alone.

The Court’s Order also overlooked, and did not discuss, that for unexplained reasons, Mr. Repass ignored the other counties in the 14th Judicial Circuit. Mr. Repass did not telephone anyone in Jasper, Beaufort, or Colleton Counties. Further, he did not look at any contiguous counties to the 14th Circuit, such as Bamberg, Barnwell, Dorchester, Orangeburg or Charleston. Instead, Mr. Repass was instructed to look only at Spartanburg County, a county in the 7th Judicial Circuit. There is no basis in this record for moving this trial as far from the 14th Judicial Circuit as possible. As discussed below, Section 15-7-110 commands that this case remain in the 14th Circuit.

3. IF THE COURT ORDERS TRANSFER THE LEGISLATURE HAS MANDATED THE TRANSFER BE WITHIN THE JUDICIAL CIRCUIT

Section 15-7-110 provides if a change of venue is ordered “it *shall* be to a county in the same judicial circuit....” (emphasis added). In determining legislative intent, the prevailing rule of statutory interpretation is that the “use of words such as ‘shall’ or ‘must’ indicates the legislature’s intent to enact a *mandatory requirement*.” *Strickland v. Richland County Legislative Delegation*, 440 S.C. 438, 442-443, 892 S.E.2d 288, 290 (2023) (emphasis added), *citing Richland Cnty. v. S.C. Dep’t of Revenue*, 422 S.C. 292, 309, 811 S.E.2d 758, 767 (2018). Accordingly, the General

Assembly has instructed the Court to choose a different County within the 14th Judicial Circuit, which means Jasper, Beaufort, Allendale, or Colleton.

Plaintiffs contend the Court's Order erred in determining that the Parker Defendants met the "formidable" standards set forth in Section 15-7-100(A)(2). *Stevens v. Sun News*. But assuming the Court disagrees, Section 15-7-110 *mandates* that the transfer then be within the 14th Judicial Circuit. Yet the Court moved the case to the 7th Judicial Circuit, some 180 miles away. Assuming the Court still believes it may transfer the matter without first attempting to seat a qualified jury, the Court should transfer this matter to another county within the 14th Judicial Circuit, as the General Assembly mandated through Section 15-7-110 in accordance with Constitution art. V, § 23.

The Court's Order stated the Supreme Court "has recognized that, in appropriate circumstances, transfer to an out-of-circuit venue may be necessary to secure a fair trial," relying upon *Lancaster v. Fielder*, 305 S.C. 418, 409 S.E.2d 375 (1991). (Order, p. 3). The Court overlooked, however, that *Lancaster* is meaningfully distinct and does not support this characterization.

In *Lancaster*, plaintiff sued a physician and hospital for medical negligence and wrongful death. Plaintiff moved to transfer venue on the first day of trial but the trial court denied the motion.

The Supreme Court then described what happened next:

Both sides submitted expanded voir dire to the trial judge. There were forty-six (46) members on the jury panel. Fifteen (15) members of the jury venire were excused for cause. Out of the remaining jury venire, fourteen (14) jurors had a direct or indirect doctor-patient relationship with Dr. Fielder. Although respondent exercised all of her strikes against patients of Dr. Fielder, eight (8) of the jurors seated were either Dr. Fielder's patients or had family members treated by Dr. Fielder.

After selection of the jury, respondent renewed her motion for change of venue, but the trial judge denied the motion. During the course of the trial, respondent made two motions for mistrial based on the discovery that one of the jurors was the mother of an operating room technician at Wallace Thomson Hospital, and that another juror was the aunt of a testifying witness who was an employee of Wallace Thomson Hospital. These motions for mistrial were also denied.

The case resulted in a mistrial because the jury was deadlocked. Immediately following the mistrial, respondent renewed her motion for change of venue. The trial judge granted the motion, over the objection of petitioners. While preserving their right to appeal the trial judge's decision to transfer venue, *petitioners agreed to try the case in Laurens County.*

When the case came up for trial in Laurens County, petitioners moved that venue be transferred back to Union County on the ground that the case had been improperly transferred. The motion was denied. The trial resulted in a verdict against both petitioners in the sum of \$50,000 in actual damages. Petitioners moved for a new trial on the ground that venue had been improperly transferred to Laurens County. The trial judge denied the motion.

Lancaster, at 419-420, 409 S.E.2d at 376.

The Supreme Court affirmed, stating:

* * * There are several reasons why the trial judge may have decided to transfer venue. First, eight jurors were seated who had direct or indirect relationships with Dr. Fielder. Furthermore, it was later discovered that two other jurors who were seated had connections with Wallace Thomson Hospital. Finally, the jury was unable to agree, resulting in a mistrial. It could have been the culmination of all of these factors which caused the trial judge to decide to transfer venue. Based on the foregoing, we cannot conclude that the trial judge abused his discretion in finding that a transfer of venue was necessary in order to obtain an impartial jury.

Id. at 422-423, 409 S.E.2d at 378. The point is that even under these circumstances, where ties to the defendants were prevalent in Union County, the circuit court followed the proper procedure of *voir dire* and seating a jury. On reflection following a mistrial, the trial court used Section 15-7-100(A)(2) to transfer venue to Laurens County **with the defendants' consent**. *Lancaster* therefore supports precedent that requires that the Court first attempt to seat a jury before entertaining a

motion to transfer venue.

Importantly, other than indicating that the “petitioners agreed to try the case in Laurens County” while reserving the right to appeal the transfer to Union County, neither the circuit court nor the Supreme Court explained why the matter was not transferred to York County within the 16th Circuit as mandated by Section 15-7-110 or whether that was even a consideration. The only analysis either Court performed was over the propriety of a transfer in the first instance. That is the *only* holding in *Lancaster* and it certainly does not support the proposition that this Court can ignore the plain language of the statute requiring the transfer “shall” be to a county in the same judicial circuit. After all, venue by consent has always been proper.

Furthermore, although there was a transfer from the 16th Circuit (Union) to the 8th Circuit (Laurens), those circuits (and counties) are contiguous. The Supreme Court engaged in *no* discussion of transferring the case out of the Circuit, primarily because no one in the case argued the point since the transfer to Laurens County was by consent. This Court has over-read the holding in *Lancaster v. Fielder* so as to ignore the mandate of Section 15-7-110 and done so in a manner that rewrites the Code Section against the plain and unambiguous language of the statute. *See, e.g., Henderson v. Evans*, 268 S.C. 127, 130, 232 S.E.2d 331, 333 (1977) (“‘When, as here, the statute is plain and unambiguous, it becomes the duty of the court to apply it literally because the legislative design is unmistakable.’ *Martin v. Ellisor*, 266 S.C. 377, 381, 223 S.E.2d 415, 417 (1976). Any other construction of the statute would be amendatory; certainly it is not the province of this Court to perform legislative functions. *Coker v. Nationwide Ins. Co.*, 251 S.C. 175, 161 S.E.2d 175 (1968)”).

Accordingly, if the Court does not change its mind about transferring venue from Hampton

County before attempting to seat a jury, the Court is required by statute to transfer it to Jasper County, Beaufort County, Allendale County, or Colleton County.

4. THE COURT SHOULD CONSIDER THE CONVENIENCE OF THE PARTIES AND WITNESSES

Another factor this Court should consider is the convenience of the witnesses and the parties in this case. *See* S.C. Code Ann. § 15-7-100(A)(3) (permitting a court to change the place of trial if “the convenience of witnesses and the ends of justice would be promoted by the change.”). Although this will be taken up by subsequent motion should the Court not reconsider its ruling, Plaintiffs point out this factor here and respectfully request the Court consider it in deciding this Motion for Reconsideration. The Court’s Order currently requires the parties and witnesses, none of whom have a connection with Spartanburg County, to travel an exceptional distance to attend the trial (about 180 miles)⁹. The expense of travel, including accommodations and fuel, mitigates in favor of either returning this case to Hampton County, moving it to a county within the 14th Judicial Circuit, or at least to a county that is contiguous with Hampton County as was done in *Lancaster* (although Plaintiffs do not consent to this Court disregarding Section 15-7-110).

5. THE CASES THE COURT’S ORDER RELIED UPON DO NOT SUPPORT THE COURT’S RULING

The Order the Court entered cited to a number of cases from South Carolina and from foreign jurisdictions that do not support or advance the Court’s ruling. Each is distinct from this case in very meaningful ways.

A. *Patterson v. People*, 205 U.S. 454, 462 (1907). The Court’s Order relied upon the

⁹ The Court should note that there is no possibility of resolving this matter short of a trial if the case is transferred to Spartanburg County.

following language from *Patterson*: “The theory of our system is that the conclusion to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.” (Order, p. 2). *Patterson*, however, was not a venue case, but involved review of an information for contempt arising out of the publication of articles and political cartoons lampooning the Supreme Court of Colorado. The petitioner claimed a number of defects in the finding of contempt under Colorado state law governing “criminal libel.” Justice Holmes explained that the First Amendment had yet to be incorporated to the States through the Fourteenth Amendment. (*Id.* at 462). Justice Holmes then stated:

In the next place, the rule applied to criminal libels applies yet more clearly to contempts. A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. *The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.*

Patterson, at 462. Thus, placed back into context, the language has *nothing* to do with venue determinations or an attempt to seat a jury; the “outside influence” had to do with the prosecutor in the case seeking to become a judge, and the trial judge seeking a new term. *See, also, Sheppard v. Maxwell*, 384 U.S. 333 (1966) (Court cited the language from *Patterson* in the high profile murder prosecution involving Dr. Sam Sheppard; Court noted that a jury was selected but due to the “carnival atmosphere” during the trial, and juror exposure to news reports, a new trial was required; the Court suggested a number of curative measures the trial court could have considered, and on remand *did not mandate a change of venue*).

The Supreme Court of South Carolina cited to the emphasized language from *Patterson* and *Sheppard* in *State v. Salters*, 273 S.C. 501, 257 S.E.2d 502 (1979), where the trial court

denied a criminal defendant's request to poll jurors during his prosecution for arson to see if any had read daily articles containing damaging reports in The Columbia Record, an afternoon newspaper covering the trial. The Court reversed the conviction and instructed that the trial court should have examined the jurors and "invoke[d] appropriate curative measures." *Id.* at 507, 257 S.E.2d at 505. Importantly, the Court said *nothing* about changing venue, but suggested proper jury instructions would have cured any problems. *Patterson* therefore does not support this Court's ruling but supports Plaintiffs' argument that the proper way to address publicity is by adequate *vior dire* during an attempt to seat a qualified jury and adequate jury instructions.

B. *Skilling v. United States*, 561 U.S. 358, 378 n. 11 (2010). The Court's Order cited to *Skilling* for the statements "The Constitution requires transfer 'if extraordinary local prejudice will prevent a fair trial'" (Order, p. 2) and "the judge may base the evaluation on the Court's 'own perception of the depth and extent of news stories that might influence a juror.'" (Order, p. 5). These statements have been plucked out of context. As footnote 11 to the *Skilling* opinion explains, the criminal case involved a Sixth Amendment claim and application of Fed.R.Crim.P. 21.¹⁰ No

¹⁰ The full text of the footnote this Court's Order referenced is as follows:

Venue transfer in federal court is governed by Federal Rule of Criminal Procedure 21, which instructs that a "court must transfer the proceeding ... to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." As the language of the Rule suggests, district-court calls on the necessity of transfer are granted a healthy measure of appellate-court respect. *See Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245, 84 S.Ct. 769, 11 L.Ed.2d 674 (1964). Federal courts have invoked the Rule to move certain highly charged cases, for example, the prosecution arising from the bombing of the Alfred P. Murrah Federal Office Building in Oklahoma City. *See United States v. McVeigh*, 918 F.Supp. 1467, 1474 (W.D. Okla.1996). They have also exercised discretion to deny venue-transfer requests in cases involving substantial pretrial publicity and community impact, for example, the prosecutions resulting from the 1993 World

similar rule applies to civil matters in State court anywhere, much less in South Carolina.

The facts and actual decision in *Skilling* are also instructive. Jeffrey Skilling was convicted of conspiracy, securities fraud, making false representations to auditors, and insider trading arising out of his involvement in the Enron Corporation *Ponzi* scheme that bilked investors nationwide out of millions of dollars. He sought a change of venue from Enron's home city of Houston, Texas, but the trial court instead engaged detailed *voir dire* and qualified a jury. Skilling was convicted. The Fifth Circuit found Skilling received a fair trial, and the Supreme Court granted review and *affirmed* on this issue (they reversed his conviction on another ground). The Supreme Court first noted:

Prominence does not necessarily produce prejudice, and juror impartiality, we have reiterated, does not require ignorance. *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L.Ed.2d 751 (1961) (Jurors are not required to be "totally ignorant of the facts and issues involved"; "scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case."); *Reynolds v. United States*, 98 U.S. 145, 155–156, 25 L.Ed. 244 (1879) ("[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits."). A presumption of prejudice, our decisions indicate, attends only the extreme case.

Skilling, at 381. The Court then reviewed the *voir dire* and its prior venue transfer decisions and

Trade Center bombing, see *United States v. Salameh*, No. S5 93 Cr. 0180 (KTD) (SDNY, Sept. 15, 1993); *United States v. Yousef*, No. S12 93 Cr. 180 (KTD) (SDNY, July 18, 1997), *aff'd* 327 F.3d 56, 155 (C.A.2 2003), and the prosecution of John Walker Lindh, referred to in the press as the American Taliban, see *United States v. Lindh*, 212 F.Supp.2d 541, 549–551 (E.D. Va. 2002). Skilling does not argue, distinct from his due process challenge, that the District Court abused its discretion under Rule 21 by declining to move his trial. We therefore review the District Court's venue-transfer decision only for compliance with the Constitution.

Skilling, at 378 n. 11.

held:

In sum, Skilling failed to establish that a presumption of prejudice arose or that actual bias infected the jury that tried him. Jurors, the trial court correctly comprehended, need not enter the box with empty heads in order to determine the facts impartially. “It is sufficient if the juror[s] can lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court.” *Irvin*, 366 U.S., at 723, 81 S. Ct. 1639. Taking account of the full record, rather than incomplete exchanges selectively culled from it, we find no cause to upset the lower courts’ judgment that Skilling’s jury met that measure. We therefore affirm the Fifth Circuit’s ruling that Skilling received a fair trial.

398-399. *Skilling*, therefore, supports Plaintiffs’ contention that this Court must first conduct *voir dire* and attempt to seat a qualified jury before considering a venue transfer.

C. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The Court’s Order relied upon *Irvin* for the general statement that “A fair trial in a fair tribunal is a basic requirement of due process.” (Order, p. 2). As noted above, the *Skilling* Court cited to *Irvin* in support of affirming the Fifth Circuit’s decision that Skilling did not establish presumptive prejudice from pre-trial publicity so as to require a change of venue.

On its facts, *Irvin* supports Plaintiffs’ contention that the Court must first attempt to seat a jury before considering a change of venue. *Irvin* involved an Indiana statute that permitted a criminal defendant only one change of venue motion, and *Irvin* challenged the statute as a violation of due process. The Supreme Court disagreed, stating:

At the outset we are met with the Indiana statute providing that only one change of venue shall be granted ‘from the county’ wherein the offense was committed. Since petitioner had already been afforded one change of venue and had been denied further changes solely on the basis of the statute, he attacked its constitutionality. The Court of Appeals upheld its validity. However, in the light of *State ex rel. Gannon v. Porter Circuit Court*, 239 Ind. 637, 159 N.E.2d 713 [(1959)], *we do not believe that argument poses a serious problem*. There the Indiana Supreme Court held that if it was ‘made to appear *after attempt has actually been made to secure an impartial jury* that such jury could not be obtained in the county of present venue * * * it becomes the duty of the judiciary to provide to

every accused a public trial by an impartial jury, even though to do so the court must grant a second change of venue and thus [contravene] (the statute) * * *.' 239 Ind at page 642, 159 N.E.2d at page 715. The prosecution attempts to distinguish that case on the ground that the District Attorney there conceded that a fair trial could not be had in La Porte County and that the court, therefore, properly ordered a second change of venue despite the language of the statute. Inasmuch as the statute says nothing of concessions, we do not believe that the Indiana Supreme Court conditions the duty of the judiciary to transfer a case to another county solely upon the representation by the prosecutor - regardless of the trial court's own estimate of local conditions - that an impartial jury may not be impaneled. As we read *Gannon*, it stands for the proposition that the necessity for transfer will depend upon the totality of the surrounding facts. Under this construction the statute is not, on its face, subject to attack on due process grounds.

England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. This right has become as much American as it was once the most English. Although this Court has said that the Fourteenth Amendment does not demand the use of jury trials in a State's criminal procedure, *Fay v. People of State of New York*, 332 U.S. 261, 67 S. Ct. 1613, 91 L.Ed. 2043 [(1947)]; *Palko v. State of Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L.Ed. 288 [(1937)], every State has constitutionally provided trial by jury. See Columbia University Legislative Drafting Research Fund, Index Digest of State Constitutions, 578-579 (1959). In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 [(1948)]; *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 [(1927)]. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 [(1955)]. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson v. City of Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 [(1960)]. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 *Burr's Trial* 416 (1807). 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' *Reynolds v. United States*, 98 U.S. 145, 155, 25 L.Ed. 244 [(1878)].

Irvin, at 720-722 (emphasis added). Thereafter, the *Irvin* Court cited to the language the Supreme Court quoted in *Skilling* regarding the lack of any requirement that a juror "be totally ignorant of

the facts and issues involved” to be qualified. *Irvin*, at 722

Furthermore, *In re Murchison*, the case from which *Irvin* quoted the language this Court’s Order uses, also does not support the Court’s ruling. The case involved an unusual Michigan procedure which permitted a trial judge to act as a grand jury of one (a “judge-grand jury”) which the Supreme Court found violated due process. The quoted language, placed back into context, was as follows:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that ‘Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.’ *Tumey v. State of Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 [(1927)]. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way ‘justice must satisfy the appearance of justice.’ *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 [(1954)].

In re Murchison, at 136. Thus, the issue was not venue but the validity and appearance of impropriety of the same judge deciding whether the State had presented a sufficient case to proceed to trial and then presiding over that trial. See *Murchison* at 137 (“It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations.”).

Irvin, therefore, supports Plaintiffs’ position and not this Court’s decision to transfer venue without first attempting to seat a qualified jury in Hampton County.

D. *Lancaster v. Fielder*, 305 S.C. 418, 409 S.E.2d 375 (1991). As discussed above, the Court’s Order cited to *Lancaster* to support disregarding the legislative mandate in Section 15-

7-110 that any venue transfer shall be to a County within the same judicial circuit. (Order, p. 3). Whether the case had to remain in the Judicial Circuit and why the matter was sent to the adjacent county of Laurens instead of York County was not discussed (and not argued) in *Lancaster* since the defendants consented to a transfer to Laurens County. Also, as discussed above, *Lancaster* actually supports precedent that requires that this Court to first attempt to seat a jury in Hampton County before entertaining a motion to transfer venue.

E. **State v. Law, 265 S.C. 111, 217 S.E.2d 22 (1975).** The Court's Order cited to *State v. Law* for the statement "the impact of television and newspaper coverage generating pretrial publicity has been recognized as a basis for finding that a defendant cannot obtain a fair trial within the circuit." (Order, p. 4). *Law*, however, does not control or stand for the broad proposition for which the Court's Order cited the case.

In *Law*, a criminal defendant in Florence County¹¹ requested a change of venue and the circuit court transferred the case to Marion County, the only other county in the 12th Judicial Circuit. Thereafter, the criminal defendant requested a change from Marion County and the trial court moved the case to Kershaw County. The State appealed, claiming the statute mandated trial within the judicial circuit.

Importantly, the Supreme Court stated:

Although the case is factually distinguishable, the rationale of the opinion in *State v. Harvey*, 128 S.C. 494, 122 S.E. 860 (1924), is dispositive of the appeal. That case arose in Charleston County, *which was then the only county in the Ninth Judicial Circuit*, and even though it was found that the defendant could not obtain a fair trial in Charleston County, the State contended that the court had no power to order a change of venue to a county beyond the Ninth Judicial Circuit, relying upon statutory language similar to that contained in the present code section and upon a similar provision in section 2, Article 6 of the 1895 Constitution, since deleted.

¹¹ The case was a death penalty case. *State v. Law*, 270 S.C. 664, 244 S.E.2d 302 (1978).

In brief summary, the court held that the defendant, under Article 1, section 5 of the Constitution of South Carolina and the Fourteenth Amendment to the United States Constitution, was entitled to an impartial trial; that the power to order a change of venue to accomplish a fair and impartial trial was a common law power of the court and that the provision contained in section 2, Article 6 of the 1895 Constitution was intended primarily to preserve and guarantee the common law right to a change of venue rather than to limit it and that such a provision could not be construed so as to deprive a defendant of his constitutional guarantees as to an impartial trial and the equal protection of the laws.

In the present case there are two counties in the circuit while in *Harvey* there was only one, *but the point is, that it is unchallenged that the defendant cannot obtain a fair trial in the Twelfth Circuit* and under the rationale of *Harvey* to construe the statutory language relied upon by the State as preventing a change of venue beyond the circuit would be an impermissible construction in violation of the constitutional right of the defendant to a fair and impartial trial.

State v. Law, at 112-113, 217 S.C. at 23 (emphasis added). Thus, in this criminal case the State conceded Mr. Law could not get a fair trial in either Florence or Marion, the only two counties in the 12th Judicial Circuit. No such concession exists in this case.¹²

Also important to this case is that the opinion in *Law* does not state whether the court tried to seat a jury in either Florence County or Marion County before transferring venue to Kershaw County. Further, *Law* has not been cited by *any* subsequent cases, and other than *Lancaster* (in which there was an attempt to seat a jury and the issue of inter-circuit transfer was by agreement

¹² The criminal venue statute at the time, S.C. Code Ann. § 17-458 (1962), provided:

The circuit courts shall have the power to change the venue in all criminal cases pending therein, and over which they have original jurisdiction, by ordering the record to be removed to another county in the same circuit.

State v. Law, at 112, 217 S.E.2d at 23. This language is now found in S.C. Code Ann. § 17-21-80 (1976 as amended), which provides further, “if a change is ordered, it shall be to a county in the same judicial circuit; *provided, further, that such adverse party to whom notice is given shall have the right to waive it.*” (emphasis added). No such waiver language appears (or has ever appeared) in the civil venue statute, § 15-7-110.

and therefore not raised or ruled upon), there are no other cases in which a Circuit Court transferred a matter outside of the Judicial Circuit in violation of the statute. Finally, unlike the 12th Circuit which had only two counties, or the situation in *Harvey* where the 9th Circuit had only one county, the 14th Circuit has five counties (three of which Mr. Repass ignored when he did his survey).

Law, therefore, does not stand for the broad proposition the Court's Order describes.

F. *Estes v. State of Texas*, 381 U.S. 532 (1965). The Court's Order cited *Estes* for the statement "'The media's overzealous reporting efforts, we observed, 'led to considerable disruption' and denied the 'judicial serenity and calm to which [the defendant] was entitled.'" (Order, p. 4). The issue in *Estes*, however, was *not* venue transfer but media access to the proceedings. The Supreme Court reaffirmed its holding in *Rideau v. Louisiana*, 373 U.S. 723 (1963), in which the "Court constructed a rule that the televising of a defendant in the act of confessing to a crime was inherently invalid under the Due Process Clause of the Fourteenth Amendment even without a showing of prejudice or a demonstration of the nexus between the televised confession and the trial." *Estes* at 538. The Supreme Court in *Skilling* later described *Estes* as follows:

* * * In *Estes v. Texas*, 381 U.S. 532, 538, 85 S. Ct. 1628, 14 L.Ed.2d 543 (1965), extensive publicity before trial swelled into excessive exposure during preliminary court proceedings as reporters and television crews overran the courtroom and "bombard[ed] ... the community with the sights and sounds of" the pretrial hearing. The media's overzealous reporting efforts, we observed, "led to considerable disruption" and denied the "judicial serenity and calm to which [Billie Sol Estes] was entitled." *Id.*, at 536, 85 S. Ct. 1628.

Skilling, at 379-380. *Estes*, then, does not support the Court's Order transferring venue. Venue had already been transferred in *Estes* before the "media blitz" issue arose, and nothing in the decision describes how the venue transfer took place.

G. *McCown v. Northeastern R. Co.*, 55 S.C. 384, 33 S.E. 506 (1899). The Court's Order cited to *McCown* for the statement "the status or prominence of a party within the county has been found sufficient to support the finding that a fair and impartial trial cannot be had there." (Order, p. 4). The Court in *McCown*, however, actually observed that the venue transfer had to be within the same judicial circuit. In that case, the transfer was from Florence County to Williamsburg County, both of which were in the 3rd Judicial Circuit at that time.

Furthermore, *McCown* involved a tort case in which the clerk of court, who had summoned the very jurors as a member of the board of jury commissioners, was also the administrator for the plaintiff's estate. The circuit court in Florence brought forth a jury array which the defendant in the case challenged, resulting in the venue transfer (within the Judicial Circuit) after the court noted the jurors had all been summoned by the plaintiff/clerk.

Next, the Supreme Court observed first that the order was not appealable but affirmed on that basis that the circuit court's order followed the venue transfer statute and sent the case to a county within the same judicial circuit. Even so, *McCown* has not been cited by any court since its publication 127 years ago.

McCown, therefore, does not stand for the broad proposition for which the Order cites to it. *See, also, Davenport v. Summer*, 269 S.C. 382, 385, 237 S.E.2d 494, 496 (1977) (noting the question on appeal was "whether a person's good name, position as a holder of public office, and family ties, without more, demonstrate local prejudice in favor of a party sufficient to justify a change of venue"; the Supreme Court reversed an order changing venue following the granting of a new trial, noting "the standard is strict and the burden on the moving party is formidable").

H. *Patterson v. Charleston & W.C.Ry Co.*, 190 S.C. 66, 1 S.E.2d 920 (1939). The

Court's Order cited to *Patterson* for the statement that "an affirmative showing by a party that a fair and impartial trial could not be had in the county, when not traversed by the opposing party, weighs heavily in favor of granting the motion." (Order, p. 4). *Patterson*, however, does not stand for such a broad proposition.

In *Patterson*, Mrs. Patterson sued the Railroad Company in Hampton County for damage to her automobile at a railroad crossing collision in Laurens County. Her husband brought a separate action for personal injuries, also in Hampton County. The Railroad Company sought to change venue to Laurens County for "convenience of witnesses and the ends of justice" pursuant to the venue transfer statute governing inconvenient forum. The cases were consolidated for the motions and the trial court refused both.

The Supreme Court noted that the Railroad demonstrated the wreck occurred in Laurens, most witnesses were from Laurens or Augusta, Georgia, and that Hampton was 145 miles away by road and 163 miles away by rail. Mr. Patterson had put forth a counter-affidavit that he had been in serious trouble in Laurens and his life was endangered should he return, and he had agreed with authorities to leave Laurens County and not return. The trial court stated:

It appears that the convenience of witnesses would best be subserved by a change of venue; and the motion for change of venue would be granted but for the affirmative showing by plaintiffs to the effect that it would not be in the furtherance of justice to make the change. *This showing is not traversed.*

190 S.C. at 70, 1 S.E.2d at 922 (emphasis added). The narrow issue before the Supreme Court was whether the trial court's refusal to transfer venue for "the convenience of witnesses and the ends of justice" was an abuse of discretion. The Supreme Court reversed, finding the "ends of justice" required a transfer to Laurens, stating:

The causes of action arose in Laurens County, and the [Railroad] has established by overwhelming proof that the convenience of witnesses would be subserved by a transfer of this case to that county.

Id. at 72, 1 S.E.2d at 922, Importantly, the Supreme Court added:

The very object of our jury system, *in requiring jurors from the vicinage to pass upon the credibility of witnesses*, is the promotion of the ends of justice.

Id. at 72, 1 S.E.2d at 923(Emphasis added), citing *Utsey v. Charleston, S.&N.R.Co.*, 38 S.C. 399, 17 S.E. 141, 143 (1893). The Court added that the Pattersons were not left “remediless” as they could then seek to move the case back out of Laurens County.

Patterson, then, supports holding the trial of this case where “jurors from the vicinage” can “pass upon the credibility of witnesses,” which is not in Spartanburg County.

I. Unger v. Cauchon, 73 P.3d 1005 (Wash. App. 2003). The Court’s Order cites to the Washington State case of *Unger* for nine factors the Court may consider. (Order, p. 4). *Unger*, however, is distinct from this case in very meaningful ways.

The Washington Court cited to an earlier decision, *State v. Crudup*, 524 P.2d 479 (Wash. Ct. App. 1974), which based its affirmance of a venue transfer on the nine factors stated in this Court’s Order that the Washington Court stated the trial court “must” consider. The *Crudup* Court described these factors as “generally utilized” and cited to Annot. 33 A.L.R.3d 17, 33 (1970) and *Pretrial Publicity-Fair Trial*, Annot. 10 L.Ed.2d 1243 (1964). Importantly, neither *Unger* or *Crudup* stated whether Washington follows a procedure similar to *State v. Manning*, that a court must first attempt to seat a qualified jury in the venue selected before considering a venue change. The fact is, however, that Washington’s Supreme Court has held that conducting *voir dire* is a means to determine whether an impartial jury can be impaneled, unless media coverage is so pervasive that bias can be presumed. *State v. Jackson*, 76 P.3d 217, 228 (2003).

South Carolina has never adopted a set of mandatory factors similar to those adopted in Washington. Even so, Washington's courts suggest attempting *voir dire* first before transferring venue, which is consistent with *State v. Manning* and its progeny.

J. Sicor, Inc. v. Hutchinson, 266 P.3d 608 (Nev. 2011) (Sicor I). The Court's Order recited *Sicor I* for the following statement:

The issue for the trial court is not whether the potential jurors have learned information about the case outside the courtroom, as an ignorant jury is neither the hallmark nor the *sine qua non* of a constitutionality qualified jury; rather, the question is whether there is a reason to believe that the community in which the case has been brought will not yield a jury qualified to deliberate impartially and upon competent trial evidence.

(Order, p. 5). Importantly, however, the Nevada Supreme Court in *Sicor I* was addressing a post-*voir dire* motion for venue transfer, and *affirmed* the denial of that post-*voir dire* motion. The Court added that a contemporaneously filed opinion in *Sicor v. Sacks*, 266 P.3d 618 (Nev. 2011) (*Sicor II*), the Court acknowledged that the trial court had authority to delay ruling on a pre-*voir dire* motion for a change of venue until after it has attempted to seat a fair and impartial jury. *Sicor*, at 613. The Court described its decision in *Sicor II* as "recognizing the propriety of deferring consideration of such motions until after the completion of *voir dire*...." *Sicor I*, at 609. The Court focused its discussion on "the proper standard for evaluating the post-*voir dire* renewal of a motion to change venue. *Sicor I*, at 613.

In *Sicor II*, contrary to this Court's Order, the Supreme Court of Nevada stated:

Most courts determine whether a change of venue is appropriate only after jury selection efforts have been made. *See, e.g., People v. Hamilton*, 48 Cal.3d 1142, 259 Cal. Rptr. 701, 774 P.2d 730, 737 (1989); *Gonzalez v. State*, 222 S.W.3d 446, 448 (Tex. Crim. App.2007); *Unger v. Cauchon*, 118 Wash. App. 165, 73 P.3d 1005, 1007–08 (2003); *Central Auto Co. v. Reichert*, 87 Wis.2d 9, 273 N.W.2d 360, 363 (Wis. Ct. App.1978). Only rarely will the pertinent factors so overwhelmingly weigh in favor of a venue change that granting it before jury selection is attempted

is appropriate. See, e.g., *Jerry Harmon Motors v. First Nat. Bank*, 440 N.W.2d 704 (N.D. 1989) (affirming pretrial change of venue when evidence was presented that significant proportion of small community either had deposits or loans with the bank who was a party or had purchased or repaired an automobile at the car dealer who was the other party). Generally, courts have concluded that more accurate information will be obtained by attempting to impanel a jury. *Corbetta Const. Co., Etc. v. Lake Cty. Public Bldg.*, 64 Ill. App.3d 313, 21 Ill. Dec. 431, 381 N.E.2d 758, 768 (1978) (affirming denial of venue change when trial court excused for cause potential jurors affected by the publicity and movant did not exhaust its peremptory challenges); *Burns v. Prudential Securities, Inc.*, 167 Ohio App.3d 809, 857 N.E.2d 621, 641–42 (2006) (holding that venue change was properly denied when trial court allowed extensive voir dire and all but one of the prospective jurors who recalled reading the relevant news articles was excused for cause and the last was not challenged for cause by movant); *Little v. Kobos by and through Kobos*, 877 P.2d 752, 757-58 (Wyo.1994) (affirming trial court’s actions in denying a venue change pretrial, without prejudice to a renewed motion, and then, following return of jury questionnaires, concluding that a fair trial could not be had and at that time granting a change in venue).

Indeed, in Nevada, such an effort is required in criminal cases. In *State v. Alsup*, 68 Nev. 45, 226 P.2d 801 (1951), this court adopted the rule that an attempt must be made to impanel an impartial jury in a criminal case before considering a change of venue based on the contention that a fair and impartial trial cannot be had in the county where the action is pending. Eighteen years later, in 1969, the Legislature codified our holding in *Alsup*, when it amended NRS 174.455, 1969 Nev. Stat., ch. 222, § 1, at 378, which prohibits a court from granting a motion to change venue in a criminal action on such grounds until after *voir dire* has been conducted “and it is apparent to the court that the selection of a fair and impartial jury cannot be had in the county” where the action is pending. NRS 174.455(2). In civil cases, the district court “may, on motion, change the place of [a civil] trial ... [w]hen there is reason to believe that an impartial trial cannot be had therein.” NRS 13.050(2); see also *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 113 Nev. 610, 612–13, 939 P.2d 1049, 1051 (1997) (considering an interlocutory appeal from a district court order denying a change of venue before trial had begun and discussing when pretrial publicity may have a prejudicial effect sufficient to warrant a change of venue). Although the difference between the timing of appellate review in civil versus criminal cases is relevant, it is significant that the standard for changing the place of trial - that an impartial jury cannot be had in the county - is the same.

Sicor II, at 621-622. The Court then discussed *Skilling*:

Last year’s opinion by the United States Supreme Court in *Skilling v. United States*, 561 U.S. —, 130 S. Ct. 2896, 177 L.Ed.2d 619 (2010), is particularly illustrative of why jury selection efforts are appropriate before granting a venue

change based on pretrial publicity. There, Jeffrey Skilling, a former officer of Enron Corporation, was criminally charged with several counts of financial misconduct in Houston, Texas, where Enron was headquartered. *Id.* at —, 130 S. Ct. at 2907–08. The Supreme Court affirmed the decision to deny a change of venue based on pretrial publicity. *Id.* at —, 130 S. Ct. at 2907. The Court began its discussion by noting the sources of Skilling’s right, as a criminal defendant, to a fair trial: the Sixth Amendment’s guarantee of a trial before an impartial jury and the Due Process Clause’s “‘basic requirement’” of a fair trial. *Id.* at —, 130 S. Ct. at 2912–13 (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L.Ed. 942 (1955)). In rejecting Skilling’s argument that prejudice should be presumed in light of the publicity’s magnitude, the Court commented that “juror impartiality, we have reiterated, does not require ignorance.” *Skilling*, 561 U.S. at —, 130 S. Ct. at 2914–15; *see also Kaplan v. State*, 96 Nev. 798, 800, 618 P.2d 354, 355–56 (1980). The size of the community was also deemed relevant; there, Houston was the state’s largest metropolitan area and the fourth largest in the nation. *Skilling*, 561 U.S. at —, 130 S. Ct. at 2915. Juror questionnaires and voir dire examination, the Court concluded, were “well suited” to the task of carefully identifying prospective jurors’ connection with Enron. *Id.* at —, 130 S. Ct. at 2917. The Court therefore held that an impartial jury had been impaneled. *Id.* at —, 130 S. Ct. at 2925.

Sicor II, 266 P.3d at 622. The Court then held:

In this civil action, appellants’ right to a “fair trial in a fair tribunal” is likewise protected by the Due Process Clause. *Murchison*, 349 U.S. at 136, 75 S. Ct. 623. Las Vegas is the largest metropolitan area in Nevada, and Clark County is the most populous county, with a correspondingly large jury pool. Jury questionnaires had already been distributed and returned by the time the district court conducted its preliminary review of appellants’ motion and were in fact relied upon by the district court, and the record indicates that extensive *voir dire* was contemplated. Appellants retained the right to file an immediate appeal following the district court’s final decision following jury selection efforts, according to the expedited procedures set forth in NRAP 3A(b)(6). We therefore conclude that the rule’s purpose is in no way impaired by the district court’s deferral, and its action comports with reason and public policy, in that information regarding juror bias that may have been caused by pretrial publicity is relevant to the district court’s consideration of the motion. *Tarkanian*, 113 Nev. at 612, 939 P.2d at 1051 (listing factors to consider in civil venue decisions); *see also Gonzalez v. State*, 222 S.W.3d 446, 448 (Tex. Crim. App. 2007) (listing, among other factors, “the candor and veracity of prospective jurors during *voir dire*”); *Unger v. Cauchon*, 118 Wash. App. 165, 73 P.3d 1005, 1007–08 (2003) (considering, among other factors, “the care exercised and the difficulty encountered in the selection of the jury”; “the familiarity of the prospective or trial jurors with the publicity and the resultant effect upon them”; and “the challenges exercised by the defendant in selecting the jury, both peremptory and for cause”); *Central Auto Co. v. Reichert*, 87 Wis.2d 9,

273 N.W.2d 360, 363 (Wis. Ct. App. 1978) (including, among other factors, “the degree of care exercised, and the amount of difficulty encountered, in selecting the jury”; “the extent to which the jurors were familiar with the publicity”; and “the defendant’s utilization of challenges, both peremptory and for cause, available to him on voir dire”). Accordingly, we decline to equate the district court’s deferral of its final decision on appellants’ motion to change venue with a denial of that motion.

Sicor II, at 622.

Therefore, the characterization of *Sicor I* in the Court’s Order does not account for the context or the actual holdings of the Supreme Court of Nevada in *Sicor I* (affirming the trial court’s *post-voir dire* denial of a change of venue) and *Sicor II* (recognizing the propriety of deferring venue transfer motions until after completion of *voir dire*). These decisions are consistent with *State v. Manning* and the other cases discussed above and support Plaintiffs’ argument that the Court must first attempt to seat a jury in Hampton County before taking up the motion to transfer venue.

CONCLUSION

The Court should have denied the motion to transfer venue before attempting to seat a jury in Hampton County. Should an attempt to seat an impartial jury fail, then the Court could entertain another motion to transfer venue, but not until that attempt has been made. For the reasons stated the Court should grant this Motion for Reconsideration, withdraw its Order, and enter a new order denying the Parker Defendants’ Motion to Transfer Venue. The Court should postpone ruling on any motion to transfer venue until an attempt has been made to seat a qualified jury in Hampton County, as contemplated by *State v. Truesdale*, *State v. Manning*, and *Lancaster v. Fielder*, and consistent with the overwhelming weight of authority discussed above.

If the Court ultimately determines that a venue transfer is appropriate, then the Court must transfer venue within the judicial circuit as mandated by law.

Finally, the Court should specifically address in the Order all of the arguments Plaintiffs have made in order to preserve these issues and arguments for appellate review.

Respectfully submitted,

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