

06/27/2007 15:00 FAX 801 532 7753

PARR WADDOUPS LAW

004/014

Jeffrey J. Hunt, Esq. (5855)
David C. Reymann, Esq. (8495)
PARR WADDOUPS BROWN GEE & LOVELESS
185 South State Street, Suite 1300
Salt Lake City, Utah 84111
Telephone: (801) 532-7840
Facsimile: (801) 532-7750

FILED
JUN 28 2007

2007 JUN 28 AM 8:24

WASHINGTON COUNTY

BY sm

Attorneys for Media Intervenor Associated Press,
CNN, *Deseret Morning News*, *The Salt Lake
Tribune*, *The Spectrum*, *The Daily Herald*, KSL-TV,
KUTV 2 News, the Utah Media Coalition, and
the Utah Headliners Chapter of the Society of
Professional Journalists

IN THE FIFTH DISTRICT COURT IN AND FOR WASHINGTON COUNTY

STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

WARREN STEED JEFFS,

Defendant.

**REPLY MEMORANDUM IN
SUPPORT OF MOTION FOR
ENTRY OF ORDER
CONCERNING BRIEFING AND
HEARING ON CLOSURE
MOTIONS, AND REQUEST FOR
EXPEDITED CONSIDERATION
AND RULING**

ASSOCIATED PRESS, CNN, DESERET
NEWS PUBLISHING COMPANY, publisher
of the *DESERET MORNING NEWS*, *THE
SALT LAKE TRIBUNE*, *THE SPECTRUM*,
THE DAILY HERALD, BONNEVILLE
INTERNATIONAL CORPORATION d/b/a
KSL-TV, FOUR POINTS MEDIA GROUP
OF SALT LAKE CITY, INC. d/b/a KUTV 2
NEWS, THE UTAH MEDIA COALITION,
and THE UTAH HEADLINERS CHAPTER
OF THE SOCIETY OF PROFESSIONAL
JOURNALISTS,

Intervenors.

Criminal No. 061500526

Judge James L. Shumate

Media Intervenors the Associated Press, CNN, *Deseret Morning News*, *The Salt Lake Tribune*, *The Spectrum*, *The Daily Herald*, KSL-TV, KUTV 2 News, the Utah Media Coalition, and the Utah Headliners Chapter of the Society of Professional Journalists (collectively the "Media Intervenors"), through their undersigned counsel, respectfully submit this Reply Memorandum in Support of their Motion for Entry of Order Concerning Briefing and Hearing on Closure Motions, and Request for Expedited Consideration and Ruling.

ARGUMENT

Defendant spends much effort attempting to justify his insistence that the Media Intervenors litigate these courtroom closure issues in the dark. Conspicuously absent from his lengthy opposition, however, is any attempt to explain how he would be harmed by allowing counsel for the Media Intervenors access to the information he claims justifies closure of presumptively public court files and hearings. This explanation is missing because there is no harm. The procedure prescribed by *Kearns-Tribune* and *Bullock*, and set forth in the proposed Order, completely safeguards Defendant's interests while allowing a full and fair adjudication of the closure issue.

Because counsel for the Media Intervenors have *voluntarily agreed* not to disclose the allegedly prejudicial information revealed in Defendants' closure motions and any *in camera* hearing on same—and have memorialized that agreement in a proposed Court order that is enforceable under penalty of contempt—the arguments made in Defendant's opposition wholly

miss the point. There is no risk of prejudicial "publicity" because the information will not be disclosed to the media. Defendants' claim of harm, if any, must be based on an assertion that counsel for the Media Intervenors cannot be trusted to comply with the Court's Order. Such an assertion is insulting and should be summarily rejected. Compliance with the trial court's Order should be presumed by an officer of the court. *See, e.g., DeBry v. Godbe*, 1999 UT 111, ¶ 20, 992 P.2d 979 ("In addition to representing a party to a lawsuit, attorneys act as officers of the court."); *Applied Medical Techs., Inc. v. Eames*, 2002 UT 18 ¶ 20, 44 P.2d 699 ("Lawyers, as attorneys and counselors of law, are officers of the courts in this state . . .").

In addition, Defendant is simply confused on the law. He spends pages of his memorandum insisting that *Kearns-Tribune* does not require that he serve his closure motion on counsel for the media, regardless of whether counsel has agreed to keep that information confidential. But the language of *Kearns-Tribune* on this point is not ambiguous. The Media Intervenors' voluntarily stipulation to the closure hearing Order *precludes* the trial court from excluding those parties from full participation in the closure hearing and access to unredacted versions of Defendants' closure motions:

Second, if disclosure of the allegedly prejudicial material is essential to the conduct of the hearing on the motion for closure, the court should first seek a *voluntary agreement* from the parties who wish to be present that they will not disclose the allegedly prejudicial information until it is disclosed at the trial or the trial has concluded. *Absent such an agreement*, the court may close the courtroom in order to conduct in camera whatever proceedings cannot be conducted without disclosure of the allegedly prejudicial information.

Kearns-Tribune Corp. v. Lewis, 685 P.2d 515, 524 (Utah 1984) (emphasis added) (citations omitted). See also *id.* at 529 (Daniels, J., concurring and dissenting) ("If media representatives voluntarily agree not to disclose information learned at the *in camera* hearing, they may also be allowed to attend[.]"); *Soc'y of Prof'l Journalists v. Bullock*, 743 P.2d 1166, 1178 (Utah 1987) ("the Court may close that [closure] hearing *only after first attempting unsuccessfully* to procure a voluntary nondisclosure agreement among the parties") (emphasis added). If the law were otherwise, then the mandate that the media "must be afforded an opportunity to participate in the proceedings upon the motion to the *maximum extent possible*" would be meaningless. *Id.* (emphasis added).¹

Notably, this conclusion is also consistent with the requirements of Rule 4-202.04, which expressly requires that motions for closure be served on members of the media that have requested notice:

Motions shall be filed under Utah Rule of Civil Procedure 7 and served under Utah Rule of Civil Procedure 5. *The person filing the motion shall serve any representative of the press who has requested notice in the case.*"

Rule 4-202.04(2)(D), Utah Code of Judicial Administration (emphasis added). Contrary to Defendant's puzzling assertion, this rule does not merely require notice that a closure motion has

¹ If there were no such agreement, the court might indeed decide to restrict access to avoid "render[ing] the issue of closure moot before it is heard." *Kearns-Tribune*, 685 P.2d at 523. But that is not this case.

been filed; it requires service of the motion itself under Rule 5. That is precisely what the proposed Order is designed to accomplish.²

Finally, Defendant seems to place great weight on the fact that he bears the burden of proving that closure is warranted, as if this somehow entitles him to unilateral access to evidence. This assertion makes no sense. The fact that Defendant bears the burden of proof does not mean that he can force those opposing closure to litigate these issues in the dark. Every case involves burdens on proof borne by one party or another, but it does not follow that only the party with that burden has the right to see relevant evidence. Indeed, the entire purpose of the Rule 5 service requirements, and the adversary system as a whole, is to allow full and fair adjudication of issues by all interested parties to give the Court the benefit of complete and meaningful advocacy. That is all the Media Intervenorers seek here, and that is what Defendant seeks to prevent.

Because there is no reason to prohibit counsel for the Media Intervenorers from having access to the information Defendant claims justifies his closure motions, and Defendant has offered none, the Court should allow such access consistent with the procedure set forth in the proposed Order.

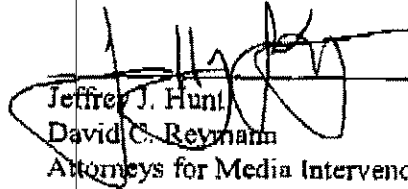
²As noted in the Media Intervenorers' opening memorandum, the procedure specified in the proposed Order has been followed by other Utah trial courts adjudicating closure motions in high-profile criminal cases, including the *State v. Mitchell* and *State v. Weitzel* cases. Defendants' opposition ignores this fact.

CONCLUSION

For the foregoing reasons, the Court should grant the Media Intervenor's Motion and enter the proposed Order.

DATED this 27 day of June 2007.

PARR WADDOUPS BROWN GEE & LOVELESS



Jeffrey J. Hunt
 David C. Reynham
 Attorneys for Media Intervenor

CERTIFICATE OF SERVICE

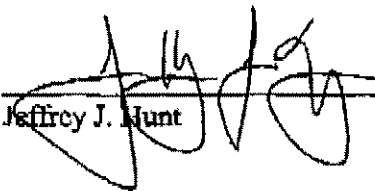
I HEREBY CERTIFY that on the 27 day of June 2007, a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF ORDER CONCERNING BRIEFING AND HEARING ON CLOSURE MOTIONS, AND REQUEST FOR EXPEDITED CONSIDERATION AND RULING was sent via United States mail, postage prepaid, to:

Brock R. Belnap
Ryan Shaum
WASHINGTON COUNTY ATTORNEY'S OFFICE
178 North 200 East
St. George, UT 84770

Richard A. Wright
WRIGHT, JUDD & WINCKLER
Bank of America Plaza
300 South Fourth Street, Suite 701
Las Vegas, Nevada 89101

and served via hand-delivery to:

Walter F. Bugden
Tara L. Isaacson
BUGDEN & ISAACSON, LLC
445 East 200 South, #150
Salt Lake City, UT 84111


Jeffrey J. Munt