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IN THE FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

WARREN STEED JEFFS,

Defendant.

MEMORANDUM IN OPPOSITION TO THE MOTION FOR ENTRY OF ORDER CONCERNING BRIEFING AND HEARING ON CLOSURE MOTIONS

Case No. 061500526

Judge James L. Shumate

The Defendant, Warren S. Jeffs, by and through counsel, and in response to the motion and memorandum filed by the Media Intervenors, hereby submits this Memorandum in Opposition to the Motion for Entry of Order Concerning Briefing and Hearing on Closure Motions.

INTRODUCTION

The Attorneys for Media Intervenors 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 ("Media Intervenors"), recently filed a motion for entry of an order that would impose certain requirements on the Defendant in seeking to close pretrial hearings from the public. The Defendant largely agrees with the provisions of the order as correct statements of the law, except to the extent that such order would require service of unredacted closure motions upon counsel for Media Intervenors. Such a requirement is not mandated by any controlling law, and the Defendant seeks an order that would require service of notice only.

ARGUMENT

I. Utah Law Imposes No Legal Obligation To Serve Unredacted Closure Motions On Counsel For The Media, And Closure Hearings Are Designed To Compensate For The Disparity In Information.

The proposition for "a procedure that would allow counsel for Media Intervenors (and only counsel) to have the same access and opportunity to review the closure motions as the State and Court will have," (Mem. Supp. Of Mot. Entry Order Concerning Brief'g and Hr'g on Closure Motions, 2), is absolutely unsupported by any controlling law. In the case of *Kearns-Tribune Corp., Publisher of Salt Lake Tribune v. Lewis*, 685 P.2d 515 (Utah 1984), the Supreme Court of Utah held that the public, and thus the media, has a constitutionally guaranteed "right of access [that] applies to preliminary hearings in criminal cases." *Id.*, 685 P.2d at 520. Because "the right is subject to

exceptions," *Id.*, 685 P.2d at 522, the *Kearns-Tribune* Court set fourth certain procedures for a trial court to follow when determining whether it should "restrict or deny access altogether," *Id.* Nowhere in its opinion, however, did the *Kearns-Tribune* Court require any party to a criminal proceeding to file unredacted copies of its closure motions on counsel for the media. See *Id.*, 685 P.2d at 524.

Contrary to the assertions of the Media Intervenors, it is readily apparent that the *Kearns-Tribune* Court did not contemplate full access to closure motions by counsel for the media. The burden of proof at a closure hearing has been placed squarely on the party seeking closure. *Id.*, 685 P.2d at 523 (citing *State v. Williams*, 93 N.J. 39, 64, 459 A.2d 641, 654 (N.J. 1983)). The reason for this is that such a rule "imposes the burden on the party or parties with best access to evidence or information that can be used to sustain the burden." *Id.*, 685 P.2d at 523. The *Kearns-Tribune* Court further elaborated:

> If the media had the burden of proving that an open hearing would not deny the defendant a fair trial, this would either doom their efforts to automatic failure (by requiring proof ***without access to evidence***) or necessitate cumbersome and controversial prehearing discovery of evidence to the media, which could well render the issue of closure moot before it is heard.

Id. (emphasis added). The rationale of the *Kearns-Tribune* opinion shows that the court clearly anticipated disproportionate access to sensitive pretrial information by counsel for members of the media. To allow the media's counsel equal access to unredacted documents prior to a closure hearing would render the reasoning of the *Kearns-Tribune* Court senseless at best, and at worst, might require a shift in the burden of persuasion.

Yet the Media Intervenors contend that allowing counsel to have full access to unredacted closure motions and memoranda would give this Court "the benefit of informed briefing and advocacy on this critical issue '*to assure that the issues pertinent to closure are fleshed out...*'" (Mem. Supp. Of Mot. Entry Order Concerning Brief'g and Hr'g on Closure Motions, 8) (citing *Society of Professional Journalists v. Bullock*, 743 P.2d 1166, 1178 n.15 (Utah 1987)). This contention relies on an out-of-context quote from the Supreme Court of Utah. In context, the foregoing quote refers only to the requirement that written notice of a closure hearing be served on the media:

> Advance written notice also will serve to promote the real reason for the notice requirement – encouraging participation in the closure proceedings by any interested parties, including members of the public and the media. The purposes of such participation are to assure that the issues pertinent to closure are fleshed out and to minimize the likelihood of collusive closure motions.

Bullock, 743 P.2d at 1178 (Utah 1987). Thus the reasoning of the *Bullock* Court was that fleshing out the issues pertinent to closure was the purpose, not of allowing access to unredacted closure motions, but simply of encouraging participation in the *closure proceedings themselves*, by any interested parties, including members of the public and the media. *Bullock*, 743 P.2d at 1178 n.15. The foregoing passage should not be misconstrued to allow counsel for the media to gain access to unredacted closure motions and memoranda. The fact is that the media has a right only to notice of, and participation in, a closure hearing.

In a closure hearing, as with any other hearing, it is the trial court, and not the media or any of the parties, that makes the determination of closure. There are numerous examples in the law where the trial court makes such decisions regarding

sensitive or privileged information without giving any access whatsoever to the party seeking disclosure. For example, a trial court may conduct an *in camera* review of medical records without disclosing the contents to the party seeking to gain access. See *State v. Cramer*, 2002 UT 9, P7 (Utah 2002) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)). Internal affairs documents are similar, in that a "trial court must balance the competing interests through an *in camera* examination of the materials for which the official information privilege is claimed." *Madsen v. United Television*, 801 P.2d 912, 915 (Utah 1990). In the present case, the extent to which the media may participate in a closure hearing, and gain access to sensitive information therein, is greater than in these other areas of the law. The media has a right to be notified of, and a right to be heard at, the closure hearing. But that right does not give them access to the unredacted closure documents.

Regarding the notice requirement, the *Bullock* Court further explained that "[a]ny responsible person who wishes to participate in a closure hearing can do so to the extent consistent with orderly court procedures," *Bullock*, 743 P.2d at 1178, and that "[t]he filing of a written notice of a closure motion will assure that those truly interested can make themselves aware of the hearing and can appear," *Id.* The Media Intervenors draw no distinction between the right to participate in the closure hearing and the right to access the closure documents. Yet without such a distinction, the *Bullock* Court's statement that any interested party could participate would mean that any general member of the public expressing interest in the closure hearing would be entitled to unredacted copies of the motions. The Defendant asks this Court instead to recognize

the distinction and to give access to the Media Intervenors only to the proceedings themselves, and not the unredacted closure documents.

The Media Intervenors also rely on Rule 4-202.4 of the Utah Rules of Judicial Administration to support the contention that closure documents must be served upon counsel for the media. The Defendant maintains that this contention is without merit. Rule 4-202.4 merely mandates the same notice requirements and closure hearing participation requirements that have been set forth in *Kearns-Tribune* and its progeny. See Utah R. Judicial Admin. Rule 4-202.04(D) ("The person filing the motion shall serve any representative of the press who has requested *notice* in the case.") (emphasis added). Nowhere in the various sources of authority relied upon by the Media Intervenors does the Defendant have a legal obligation to serve unredacted closure motions on counsel for the media.

It is rather paradoxical that the Media Intervenors rely so heavily on the holding of *Kearns-Tribune* for the assertion that counsel may access unredacted closure motions. The *Kearns-Tribune* case was, at heart, about the rights of "the public at large," *Id.*, 685 P.2d at 521, although the court recognized that "the media often act as surrogates in asserting the public's constitutional right of access," *Id.*, 685 P.2d at 521-22. In other words, any right that the media has to access pretrial hearings, and to thus be heard at closure hearings, stems from the rights of the public at large, and the obligations of the media to the public. Yet the Media Intervenors seek to use the rights of the public to gain access to unredacted, sensitive information, promising in turn not to disseminate that information to the public. If the entire rationale for media access to pretrial hearings and closure hearings is the right to gather and disseminate information

to the public, then that rationale would be rendered moot by an agreement to refrain from disseminating information.

Access to unredacted closure motions is not mandated by law, and would actually run counter to the procedure set forth in *Kearns-Tribune*. Moreover, it is unnecessary, since the party seeking closure carries the burden of proof. The Defendant maintains that *Kearns-Tribune* mandates only that "a closure order must be preceded by notice and hearing." *Id.*, 685 P.2d at 524. The requirement that members of the media "must be afforded an opportunity to participate in the proceedings upon the motion," *Id.*, does not extend unrestricted access to the motions themselves. In spite of the Media Intervenors' assertions to the contrary, a party seeking closure in a criminal case need only "serve advance written *notice* of a closure motion upon... any media representatives who have requested such notice... [which] should satisfy the notice requirement of Kearns-Tribune." *Bullock*, 743 P.2d at 1178 n.15 (emphasis added). The Defendant maintains that mere written notice, and not a full unredacted copy of the motion for closure, will comply with the laws of the State.

II. The Defendant's Right To A Fair Trial Is Best Safeguarded By Limiting Access To Unredacted Closure Motions.

Throughout its opinion, the *Kearns-Tribune* Court expressed concern for the safeguarding of potentially prejudicial material during closure hearings. The court stated that, "[I]f an open hearing can be conducted without disclosing the content of the allegedly prejudicial material, this should be done." *Kearns-Tribune*, 685 P.2d at 524 (citing *State v. Burak*, 37 Conn. Supp. 627, 431 A.2d 1246 (1981)). The *Kearns-Tribune* Court established the closure hearing procedure "to prevent disclosure of the allegedly

prejudicial material before the issue of closure can be resolved." *Id.*, 685 P.2d at 524. By its very design, then, the closure hearing should limit and prevent disclosure of any potentially prejudicial material.

In the present case, most of the remaining pretrial motions and hearings which the Defendant will seek to close involve evidentiary matters. "The whole purpose of such hearings is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury." *Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (U.S. 1979) (citation omitted). Such evidentiary issues have an especially high risk of "influenc[ing] public opinion against a defendant and inform[ing] potential jurors of inculpatory information wholly inadmissible at the actual trial." *Id.*, 443 U.S. at 378. Whereas the case of *Kearns-Tribune* arose from the right to access a preliminary hearing wherein "[n]o evidence was proffered or received," *Kearns-Tribune*, 685 P.2d at 517, the present case will involve "the added risks of prejudice through pretrial disclosure of evidence targeted in a motion to suppress," *Id.*, 685 P.2d at 521.

By their nature, the closure motions filed by the Defendant will rely on the potentially prejudicial information sought to be closed. If any prejudicial, inadmissible evidence were to be disseminated to the jury pool, the Defendant believes his right to a fair trial would be compromised beyond remedy. As Judge Daniels noted in his partial concurrence and dissent in *Kearns-Tribune*, "In a pretrial proceeding, the jury is not yet known," *Kearns-Tribune*, 685 P.2d at 527 (Daniels, concurring and dissenting), and "[t]here is no possible way that information reported at a pretrial proceeding and disseminated into the community can be kept from potential jurors," *Id.* Of course, "persons who hear or read prejudicial information thus disseminated can be excluded

from the jury." *Id.* Nevertheless, "dissemination of such information into the community biases the jury panel in that it becomes necessary to exclude citizens who carefully read news reports or who are interested in following current events." *Id.* The Defendant does not wish to limit the jury pool to disinterested or uninformed citizens, nor does he wish to bias the remainder of the potential jury against his position.

Since pretrial suppression hearings and evidentiary matters present the most significant risk to his right to a fair trial, the best way to safeguard against potential dissemination of potentially harmful information is to limit the access to unredacted documents to those who absolutely need the information. The media does not have the burden of persuasion, and the media's interests to be asserted at a closure hearing stem, not from the nature of the evidence to be closed, but from the rights of the public. Thus access to unredacted closure motions by counsel for the media is completely unnecessary, and any reason for allowing such access is far outweighed by the risk of irreparable harm towards the Defendant.

CONCLUSION

Contrary to the assertions of the Media Intervenors, counsel for the media has no legal right to access unredacted copies of closure motions and memoranda. The closure hearing is designed to compensate for this disparity in access to pretrial information. The media has no need to access such information, since it does not carry the burden of proof, and since its interests to be asserted at a closure hearing stem from the rights of the public at large, and not from the nature of the information to be closed. Moreover, the interests of the Defendant in safeguarding potentially prejudicial

and inadmissible evidence is the highest at a suppression hearing, and the irreparable harm that could come from disclosure is not worth the risk of providing the information to counsel for the media. For the foregoing reasons, the Defendant asks this Court to recognize that counsel for the Media Intervenors are entitled only to the public file and redacted copies of closure motions.

DATED this 26th day of June, 2007.

BUGDEN & ISAACSON, L.L.C.

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that, on the 26 day of June, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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