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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.

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.

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

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 Memorandum in Support of their Motion for Entry of Order Concerning Briefing and Hearing on Closure Motions, and Request for Expedited Consideration and Ruling.

INTRODUCTION

To ensure an orderly and fair procedure for briefing and hearing of any closure motions filed in this case, the Media Intervenors proposed, consistent with controlling Utah law, that the parties stipulate to briefing deadlines and 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, while permitting redacted versions to be filed in the public court file. Counsel for Media Intervenors also would be entitled to participate, again consistent with controlling law, in any *in camera* hearings on the closure motions. A true and correct copy of the Media Intervenors’ proposed Stipulation is attached as Exhibit “A” to their Motion filed concurrently herewith.

By employing this procedure, counsel for the Media Intervenors would be fully and fairly apprised of the factual bases upon which closure was sought, the Court would have the benefit of informed advocacy on this issue, and the information asserted by Defendant to justify closure of

public court records and hearings would remain sealed until the Court ruled otherwise. This imminently reasonable procedure is, not surprisingly, fully consistent with Utah law and routinely has been employed by other Utah district court judges adjudicating court access issues in high-profile criminal cases.

The State has no objection to the briefing and hearing procedure proposed by Media Intervenors. Counsel for Defendant, however, has refused to stipulate to the proposed procedure. In particular, counsel for Defendant refuses to provide unredacted copies of his closure motion and memoranda to counsel for Media Intervenors on an “attorney’s-eyes-only” basis, and refuses to allow counsel for Media Intervenors to participate in any *in camera* hearings concerning the information Defendant claims justifies closure. In short, Defendant is asking the Court to accept his asserted justification for closure of presumptively public court records and hearings without allowing the parties opposing closure to know the asserted factual basis for closure, question it, and argue against it.

Defendant’s objection is not well taken. It is neither fair to Media Intervenors nor helpful to the Court to force the Media Intervenors to litigate this critical issue in the dark. Counsel must have access to the information Defendant claims justifies closure to fully and fairly litigate this issue. The procedure agreed to by the Media Intervenors and the State is fully consistent with Utah law, provides for a full and fair adjudication of the closure issue, and completely safeguards the interests of the Defendant. Accordingly, the Court should enter the Media Intervenors’

proposed Order, which tracks the stipulation agreed to by the Media Intervenors and State, a true and correct copy of which is submitted concurrently herewith.

ARGUMENT

I. **THE PROPOSED CLOSURE HEARING PROCEDURE IS FULLY CONSISTENT WITH, AND MANDATED BY, UTAH LAW.**

The briefing and hearing procedure proposed by the Media Intervenors for the closure hearing is fully consistent with, and mandated by, Utah law. In *Kearns-Tribune Corp. v. Lewis*, 685 P.2d 515 (Utah 1984), the Utah Supreme Court specified the procedure to be followed to resolve a motion seeking to close judicial records and proceedings. The Court stated that “[r]epresentatives of the media . . . must be afforded an opportunity to participate in the proceedings *to the maximum extent possible.*” *Kearns-Tribune*, 685 P.2d at 524.¹ To ensure such maximum participation, while preventing public disclosure of the allegedly prejudicial material until the closure issue can be resolved, the Court outlined the following procedure:

First, the hearing on the motion for closure should be open to the public to the greatest extent possible. “If an open hearing can be conducted without disclosing the content of the allegedly prejudicial material, this should be done.” *Id.*

¹ For the Court’s ease of reference, a copy of the *Kearns-Tribune* case is attached hereto as Exhibit “A”.

Second, if disclosure of the allegedly prejudicial material is essential to the conduct of the hearing, the court should first seek a voluntary agreement (or stipulation) from the parties that they will not disclose such material until it is disclosed at trial or the trial has concluded. *Id.*

Third, the public and the press may only be excluded from that portion of the closure hearing that the court finds to be necessary to protect countervailing interests, such as the defendant's right to a fair trial. *Id.*

Fourth, in the event that any portion of the proceeding is closed, the transcript of the proceeding should be made available to the public at the earliest time consistent with the preservation of the interests that required the hearing to be closed. *Id.*

Finally, any order of closure must be accompanied by suitable findings so that the parties seeking access may seek immediate appellate review. *Id.*

The procedure agreed to by the Media Intervenors and State, and reflected in the proposed Order submitted herewith, is fully consistent with this procedure. It allows the Media Intervenors to participate in the closure hearing "*to the maximum extent possible*," as mandated by the Utah Supreme Court; it contains the voluntary agreement of counsel for the Media Intervenors not to disclose the allegedly prejudicial material without permission of the Court; and it allows the public to observe the closure hearing to the "*greatest extent possible*" by having access to redacted versions of the closure motions and the right to attend the closure hearing except that

portion which the court deems necessary to conduct *in camera* to protect the Defendant's right to a fair trial until the closure motion is resolved.

In *Society of Professional Journalists v. Bullock*, 743 P.2d 1166 (Utah 1987), the Utah Supreme Court re-emphasized the importance of these procedural requirements, including the value of allowing maximum participation by the news media and other interested parties opposing closure. As the Court explained:

The purpose of this participation are to assure that the issues pertinent to closure are fleshed out and to minimize the likelihood of collusive closure motions. To that end, Kearns-Tribune does not limit participation in the closure hearing to those receiving formal notice; instead, it states that members of the media and 'other interested parties' are to be permitted to participate 'to the maximum extent possible.'

Society of Professional Journalists, 743 P.2d at 1178 n. 15.² Because it is the law, this procedure routinely has been followed by other Utah trial courts adjudicating closure motions in high-profile criminal cases, including Third District Judge Judith Atherton in the *State v. Brian David Mitchell* case and Second District Judge Thomas L. Kay in the *State v. Weitzel* case. True and correct copies of the trial court orders in the *Mitchell* and *Weitzel* cases, in which counsel for the Media Intervenors participated, are attached hereto as Exhibits "C" and "D," respectively. This procedure also is consistent with Rule 4-202.04 of the *Utah Code of Judicial Administration*, which requires the person seeking to close a court record to serve the closure motion on "any

² For the Court's ease of reference, a copy of *Society of Professional Journalists v. Bullock* is attached hereto as Exhibit "B".

representative of the press who has requested notice in the case.” See Utah Code Jud. Admin. R-4202.04. The rule also requires the Court to conduct a hearing on the closure motion. *Id.*

Because the procedure set forth in the Media Intervenors’ proposed Order reflects and is fully consistent with the constitutionally required procedure specified by *Kearns-Tribune* and *Society of Professional Journalists*, the Court should adopt the procedure and enter the Order.

II. THE CLOSURE HEARING PROCEDURE ALLOWS FULL AND FAIR LITIGATION OF THE CLOSURE MOTIONS WHILE SAFEGUARDING THE DEFENDANT’S FAIR TRIAL RIGHTS.

The procedure proposed by Media Intervenors and agreed to by the State not only has the benefit of being the law, it completely safeguards the Defendant’s fair trial rights while the closure motion is litigated. Under the required procedure, access to Defendant’s complete, unredacted closure motions and memoranda is restricted to the State, the Court, and counsel for Media Intervenors only, on an “attorney’s-eyes-only” basis, until the Court orders otherwise. Any briefing by the Media Intervenors that discloses information the Defendant claims is prejudicial and for which closure is sought would be submitted under seal. At the same time, redacted versions of such motions and memoranda would be filed in the public court file, consistent with the mandate of *Kearns-Tribune* of allowing the public access to as much information as possible concerning the closure proceeding. *Kearns-Tribune*, 685 P.2d at 524.

In addition, and just as important, the procedure safeguards the proper functioning of the adversarial process. By allowing counsel for the Media Intervenors to have the same access and

opportunity to review the closure motions and memoranda as the State and Court, and to participate fully in any *in camera* hearing, the Court will have the benefit of informed briefing and advocacy on this critical issue “*to assure that the issues pertinent to closure are fleshed out . . .*” . *Society of Professional Journalists*, 743 P.2d at 1178 n. 15. Where, as here, the issue is of constitutional magnitude – whether Defendant has carried his heavy burden for closure of presumptively public judicial records and hearings – the need for full and fair ventilation of the issues is critical. Full and fair litigation of the issues can hardly occur if the news media is not even allowed access to the information and evidence Defendant claims justifies closure of the courthouse doors.

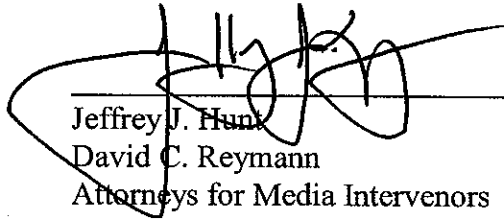
The Media Intervenors are entitled to test Defendant’s assertions, the Court is entitled to informed advocacy, and the public is entitled to a process that is seen as fair. The stipulated procedure agreed to by the Media Intervenors and State, and reflected in the proposed Order submitted herewith, provides a fair procedure that is consistent with, and mandated by, Utah law. The Court should adopt it.

CONCLUSION

For the foregoing reasons, the Court should grant the Media Intervenors’ Motion and enter the proposed Order, submitted herewith.

DATED this 22 day of June 2007.

PARR WADDOUPS BROWN GEE & LOVELESS



Jeffrey J. Hunt
David C. Reymann
Attorneys for Media Intervenors

CERTIFICATE OF SERVICE

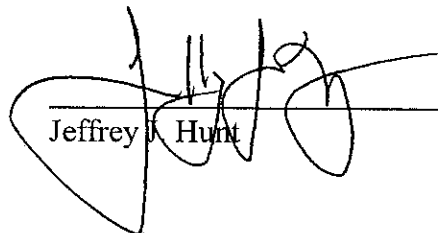
I HEREBY CERTIFY that on the 22 day of June 2007, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF ORDER CONCERNING BRIEFING AND HEARING ON CLOSURE MOTIONS, AND REQUEST FOR EXPEDITED CONSIDERATION AND RULING** was sent via United States mail, postage prepaid, to:

Brock R. Belnap
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Richard A. Wright
WRIGHT, JUDD & WINCKLER
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and served via hand-delivery to:

Walter F. Bugden
Tara L. Isaacson
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