

12-10-00-000 Sally S. Kautsch (785) 842-3039 p.1

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## FAX COVER SHEET

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Interim's Supplemental memo - BCR 104

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IN THE DISTRICT COURT OF FRANKLIN COUNTY, KANSAS  
FOURTH JUDICIAL DISTRICT

STATE OF KANSAS,

Plaintiff,

v.

KYLE TREVOR FLACK,

Defendant.

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Case No. 2013 CR 104

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**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTIONS FOR RELEASE  
OF SEALED DOCUMENTS AND TO VACATE ORDERS TO SEAL**

COMES NOW Intervenor, Harris Enterprises, Inc., doing business as The Ottawa Herald, by and through counsel Kautsch Law, LLC, and hereby submits the following supplemental memorandum to address issues raised by the Court at the June 9, 2015 hearing at which Intervenor's Motion to Intervene was granted and Intervenor's remaining motions were scheduled to be heard on June 30, 2015.

**ARGUMENTS AND AUTHORITIES**

- A. **Kansas Supreme Court precedent applicable to the closure of court hearings applies equally to the seal of court documents.**

In *Kansas City Star v. Fossey*, 230 Kan. 240, Syl. ¶ 2 (1981), the Court set forth the following test for the closure of hearings and records in criminal proceedings: "A trial court may close a preliminary hearing, bail hearing, or any other pretrial hearing, including a motion to suppress, and may seal a record only if:

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- Jun 12 10:00:00a Gary S. Fossey (705)542-5055 p.3
- (1) The dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and
  - (2) the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means.”

“Before pretrial proceedings can be closed *or any record sealed*, the two-part test of the standard must be met.” *Fossey*, 230 Kan. at 249 (emphasis added). The Supreme Court applied that same test, known as “the *Fossey* rule,” to the sealing of records in *The Wichita Eagle Beacon Company v. Owens*, 271 Kan. 710, 27 P.3d 881 (2001). There, the Court held that “[w]e believe an integral part of the rule announced in *Fossey*, however, is the need for a trial court, *when considering the sealing of a record* or the closure of a proceeding, to consider also the societal interest the public has in open criminal proceedings and records. The result here effectuates the *Fossey* rule.” *Owens*, 271 Kan. at 713 (emphasis added).

Thus, according to the Kansas Supreme Court, the records at issue here may be sealed only if this Court finds that (1) the release of the documents would create a clear and present danger to the fairness of the trial and (2) there are no reasonable alternative means to prevent that harm except to seal them. If the Court decides to seal records, it is obligated to “make findings and state for the record the evidence upon which the court relied and the factors which the court considered in arriving at its decision.” *Fossey*, 230 Kan. at 250.

**B. In order to make such a finding, *Fossey* requires the movants to seal to carry the burden of proof.**

A motion to seal “cannot be granted unless the court affirmatively concludes that the requirements of the clear and present danger and least restrictive alternative tests have been met. The burden of proof is on the party making the motion. The burden of proof is on the party making the motion.” *Fossey*, 230 Kan. at 249.

Thus, as Intervenor suggested at the hearing on June 9, the upcoming June 30 hearing would be an opportunity for movants to seal to argue in support their motions on the record, and for this Court to apply the *Fossey* make specific findings on whether to vacate any orders to seal and/or release documents.

- 1. In its response to Intervenor's motions, the State properly applied the *Fossey* rule in arguing that the Court should find the State's Motions to Admit the Defendant's Statements and Motion to Admit Redacted Statements should remain sealed.**

The State's Response to Intervenor's motions indicates how a movant to seal might go about carrying its burden under *Fossey*. In accordance with the *Fossey* rule, the State argues that the State's Motions to Admit the Defendant's Statements and the State's Motion to Admit Redacted Statements should remain sealed because the documents include "a transcript of the defendant's interviews with law enforcement and the subject of the motion is admissibility, the dissemination of this information would create a clear and present danger to the fairness of the trial and the prejudicial effect of such information cannot be avoided by any reasonable alternative means." State's Response, p. 6.

As the State's argument demonstrates, a movant may attempt to carry its burden under the *Fossey* rule without detailing the specific content of a document. Moreover, because of the State's approach, it now is in a position, at the forthcoming hearing, to make the kind of argument in support of sealing that could be appropriate under *Fossey*. Such an argument might invoke precedent recognizing danger that could be posed, in certain circumstances, by pre-trial publicity about a defendant's self-incriminating statements. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 552 (1971) (reviewing cases including *Rideau v. Louisiana*, 373 U.S. 723 (1963)). In addition, at the forthcoming hearing, the State may identify alternatives to sealing

and show why it believes they are unreasonable. Alternatives include release of records with sensitive information redacted, as acknowledged by the State in paragraph 7 of its motion. Various other alternatives include those listed by the *Fossey* court. See *Fossey*, 230 Kan. at 249.

**2. Intervenor accepts the State's position that inquisition testimony may remain sealed.**

The State opposes the dissemination of inquisition testimony. Although the State does not indicate the basis for its position, in this case, Intervenor does not challenge the secrecy of inquisitions. See K.S.A. 22-3101(1); *State v. Cathey*, 741 P.2d 738, 744 (Kan. 1987) (An inquisition is like a "one-person grand jury" and may be closed.). Intervenor therefore concurs with the State that the inquisition testimony may remain sealed.

**3. Intervenor also accepts the State's position that the probable cause affidavit may remain sealed.**

The State also opposes dissemination of the probable cause affidavit, alluding to law that governs access to such an affidavit. Intervenor does not dispute that the probable cause affidavit in this matter was filed before July 1, 2014, and that it therefore is presumptively closed. However, because probable cause information was disclosed at an open preliminary hearing in this case, maintaining the seal on the affidavit arguably is no longer justified. Nevertheless, Intervenor accepts the State's position that the affidavit may remain sealed, because Intervenor is willing to expedite this matter and already has had access to probable cause information through the preliminary hearing.

**C. Rather than rule on whether each sealed document should be unsealed, the Court could find whether or not to unseal categories of pleadings set forth in the State's motion.**

Intervenor appreciates the concerns the Court outlined at the June 9 hearing regarding the logistics of ruling on motions to seal or unseal various documents contained in a voluminous record. As a possible solution, Intervenor suggests that the Court consider whether *Fossey* would allow it to seal or unseal categories of documents, rather than rule on each individual document.

For example, in its response to Intervenor's motions, the State listed several pleadings that it regards as disclosable and that could be placed in various categories. Those pleadings include "State's Notice of Intent to Issue Business Records Subpoenas, Waivers, Returns, subject to proposed redactions by the State and defense that protect personal account information;" its motion to "perform consumptive DNA testing;" and "proposed jury instructions, proposed jury questionnaire, and proposed procedures for having potential jurors complete the juror questionnaire." State's Response, page 5. Presumably, the State does not oppose disclosure of documents, because it concluded it cannot carry its burden to have them sealed under the *Fossey* rule.

Intervenor submits that the hearing on June 30 would be an opportunity for any movants to seek closure of categories of pleadings, and the Court could rule whether dissemination of documents from each category meets the *Fossey* test. Moreover, it could find that any subsequent pleadings fitting into a given category would be sealed or released. For example, if the Court finds that the State has met its burden with regard to maintaining the seal on the pleadings regarding the admissibility of defendant's statements, the Court could reasonably rule that any other motion that includes the defendant's statements would also be subject to seal, released or disclosed with redactions. It could also find, for example, that

movants to seal are unable to show that the dissemination of information related to the issuance of subpoenas would not create a clear and present danger to the fairness of the trial, and as such, any subsequent pleadings related to subpoenas would not be sealed.

**D. The Kansas Supreme Court very recently reaffirmed its consistent holdings that pretrial publicity does not prevent jurors from being fair.**

In determining whether a clear and present danger to the fairness of the trial exists under *Fossey*, it would appear that a movant to seal could unequivocally meet its burden if it could prove that dissemination of a court record would result in pretrial publicity that would inflame the community to such an extent that the defendant could not be afforded a fair trial in the community in which the case originated. However, “Defendants face a high burden...generally a defendant can obtain a change of venue only upon showing that publicity has displaced the judicial process entirely or that the courtroom proceedings more resemble a circus or a lynch mob.” *State v. Longoria*, 301 Kan. 489, Syl. ¶ 2 (2015). As there appears to be no factual basis for alleging that this case has resulted in a “lynch mob mentality” in Franklin County, any motion to change venue seems likely to fail. *Longoria* is consistent with the Kansas Supreme Court’s rulings in *Carr* and elsewhere as set forth in Intervenor’s prior memorandum.

By that same token, movants to seal applying the *Fossey* rule cannot show a clear and present danger to the fairness of the trial unless they can show that dissemination of the record would result in a lynch mob mentality. Thus, except in extremely rare instances, the Kansas Supreme Court requires the court records in criminal proceedings to be open.

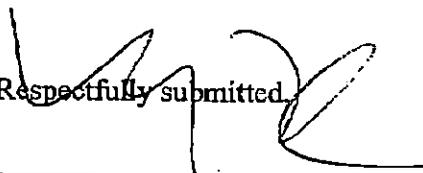
### CONCLUSION

The Kansas Supreme Court “has opined that media publicity alone *never* establishes prejudice.” *Roder*, 336 P.d 3d at 842 (emphasis in original), *citing State v. Verge*, 272 Kan.

501, 508 (2001). “[M]edia publicity alone has never established prejudice per se.” *State v. Jorrick*, 269 Kan. 72, 77 (2000); *see also State v. Higgenbotham*, 271 Kan. 582, 593 (2001), quoting *State v. Ruebke*, 240 Kan. 493, 500, cert. denied 483 U.S. 1024 (1987). Unless the movants to seal can establish on the record that the dissemination of sealed documents would create a clear and present danger to the fairness of the trial, and that danger cannot be avoided by any alternative means, and unless the Court specifies in findings that movants have indeed carried their burden, all sealing orders that Intervenor contests should be vacated, and sealed documents should be released.

WHEREFORE, Intervenor respectfully requests that the sealing orders it contests in this case be vacated; that the sealed records be ordered disclosed; and that any future requests to seal documents be heard in open court preceded by notice to the Intervenor so it might be heard on such requests.

Respectfully submitted,



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### CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2015 a true and correct copy of the preceding was delivered by first-class mail to the following:

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A handwritten signature in black ink, appearing to read 'M. E. Kautsch', written over a horizontal line.

Maxwell E. Kautsch