IN THE ELEVENTH JUDICIAL DISTRICT
DISTRICT COURT OF LABETTE COUNTY, KANSAS

STATE OF KANSAS,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Case No. 13 CR 263 PA
	*	
DAVID CORNELL BENNETT, JR.,	*	
	*	
Defendant.	*	

MOTION TO INTERVENE AND FOR RELEASE OF SEALED DOCUMENTS

COMES NOW Intervenors Kansas Newspapers, LLC, d/b/a the Parsons Sun; Taylor Newspapers, Inc., d/b/a the Montgomery Chronicle; and Saga Quad States Communications, LLC, d/b/a KOAM-TV, by and through counsel Maxwell E. Kautsch of Kautsch Law, LLC, and hereby move the court for an order allowing them to intervene in this matter for the limited purpose of filing their Motion for Release of Sealed Documents, and to request an order vacating all sealing orders in this case.

In support of their motions, Intervenors submit their memorandum of law filed simultaneously herewith.

Respectfully submitted,

Kautsch Law, L.L.C.
By Maxwell E. Kautsch, #21255
16 E. 13th St.
Lawrence, KS 66044

(785) 840-0077
kautschlaw@yahoo.com
Attorney for Intervenors

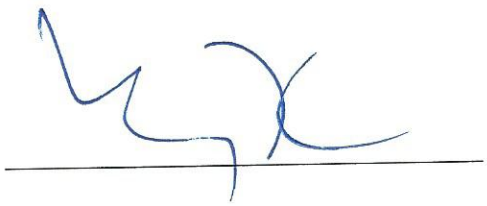
CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2014 a true and correct copy of the preceding was delivered by first-class mail to the following:

Amy Hanley
Assistant Attorney General
Attorney General's Office
120 SW 10th, 2nd Floor
Topeka, KS 66612

Ron Evans
Attorney for the Defendant
Indigent Defense Services
700 SW Jackson, Ste. 500
Topeka, KS 66603

Hon. Robert J. Fleming
Labette County District Court
201 S. Central
Parsons, KS 67357



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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AND FOR RELEASE OF SEALED DOCUMENTS

COMES NOW Intervenors Kansas Newspapers, LLC, d/b/a the Parsons Sun; Taylor Newspapers, Inc., d/b/a the Montgomery Chronicle; and Saga Quad States Communications, LLC, d/b/a KOAM-TV, by and through counsel Kautsch Law, LLC, and hereby submit the following memorandum in support of their motions to intervene and vacate the orders sealing documents previously filed in this matter. Intervenors are members of the local news media, and have been reporting on this case since its inception. Intervenors are in the business of gathering and reporting newsworthy information and have a compelling interest in any effort to restrict access to information or court proceedings. Intervenors' access is also important to the public. *See e.g.,* Exhibit 1, Affidavit of Ron Keefover, President, Kansas Sunshine Coalition for Open Government. Intervenors have a right to intervene for the limited purpose of filing and arguing their Motion For Release of Sealed Documents in this matter.

BACKGROUND

On November 25, 2013, the bodies of a Parsons mother and her three children were found in the family's home during a welfare check when the mother did not arrive to work as scheduled. Hundreds mourned the family's passing, and both local and Wichita media covered the crime. In news reports, the mother was characterized as a devoted nurse who possessed an overwhelming passion for motherhood. Her slain children were ages 9, 6, and 4 years of age.

The defendant was identified as a suspect and arrested on November 26, 2013. On Tuesday, December 3, 2013, the defendant was charged with capital murder, rape, and criminal threat, as well as four alternative counts of premeditated first-degree murder. The statutory penalty section of the Compliant/Information filed by the State that same day alleged that the crimes were committed "in an especially heinous, atrocious or cruel manner." Local media outlets, including Intervenors, published or produced reports on or about December 3, 2013, identifying the defendant and the charges.

Then, as reported by Intervenor the Parsons Sun in an article posted on its website on January 21, 2014, the State, prior to a January 17, 2014, status hearing, filed a request to seal documents that would otherwise be available to the public, and this Court granted that request the same day in chambers. Exhibit 2, *Judge seals info on Bennet Case*, Parsons Sun, January 21, 2014. According to the Parsons Sun, the order provides that factual pleadings may be filed under seal and held in the confidential file that accompanies this case. Id. Also according to the Parsons Sun, the State argued in its request that effectively all subsequent filings in the case should be added to the confidential file to protect the privacy concerns of a

"litigant" in this case as well as to preserve the parties' right to a fair trial and "prevent public dissemination of the alleged facts contained therein." Id. Ultimately, the Parsons Sun reported that in granting the request to seal, this Court held that after considering the "safety, property, or privacy interests of a litigant, or a public or private harm that predominates the case" the degree of harm that may come from releasing these public documents "outweighs the strong public interest in access to the court record." Id.

On May 6, 2014, counsel for Intervenors requested a copy of the file in this case, which counsel received on May 12, 2014. The contents did not include any motions or orders to seal from January 17, 2014, but did contain an Order Sealing Or Redacting Court Records Pursuant to (2013 Supp.) K.S.A.-2617 dated May 1, 2014. The May 1, 2014 order provides that "after...considering the safety, property, or privacy interests of a litigant, or a public or private harm that predominates the case, and further, after determining that such interest or harm outweighs the strong public interest in access to the Court record, finds and Orders that the above referenced pleading should be filed under confidential seal and be kept in a confidential court file unavailable to the public. Said pleading shall not be publically disclosed without the written permission of the Court." Exhibit 3.

The effect of this May 1, 2014 order, and any order with substantially similar language entered January 17, 2014, or on any other date, is that any significant subsequent filing in this case, even one that ordinarily would be available to the public, is now instead available only on this Court's written order. In other words, the public's access to information regarding the progress of this case has been chilled. This case is proceeding in secret.

ARGUMENTS AND AUTHORITIES

A. Intervenors are Entitled to Intervene for the Limited Purpose of Seeking to Vacate the Sealing Order or Orders

Intervenors are members of the local news media, who seek to intervene for the limited purpose of requesting that the Court vacate any and all sealing orders in this case, including but not limited to the sealing order of May 1, 2014. The Intervenors' right to intervene under these circumstances is established by the Kansas Supreme Court's decision in *The Wichita Eagle Beacon Company v. Owens*, 271 Kan. 710, 27 P.3d 881 (2001). In that case, the Court held that "the news media, as a member of the public, may intervene in a criminal proceeding for the limited purpose of challenging a pretrial request, or order, to seal a record or close a proceeding in that case, even without an express statutory provision allowing such intervention." 271 Kan. at Syl. ¶ 2, at 713.

Given this clear authority, Intervenors' motion to intervene should be granted.

B. The Sealing Orders Entered in this Case, Including but not Limited to the Order of May 1, 2014, Should be Vacated.

The Kansas Supreme Court has recognized a presumption of openness in criminal cases. Taking into account the First Amendment freedom of the press, the Court first stated the presumption in *Kansas City Star v. Fossey*, 630 P.2d 117 (Kan. 1981). Then, in *Owens*, the Court reaffirmed Fossey and held that records and proceedings may be closed "only if 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 the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means." *Owens* at 883.

The Kansas Supreme Court's decision in *Fossey* reflects a widely recognized public

right to know about judicial matters. It is well established that the press and public have a common law right of access to court records. This right has been recognized by both the United States and Kansas Supreme Courts. *See Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978)("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); *Stephens v. Van Arsdale*, 227 Kan. 676, Syl. ¶ 4(1980)("The right of the press or any other person to access court records...is based on common law.").

In addition, in Kansas the right of access to court records is established by statute. The Kansas Open Records Act (KORA) states:

> It is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy.

K.S.A. 45-216(a). Although KORA exempts judges from its coverage pursuant to K.S.A. 45-217(e)(2)(B), courts are not excluded, and the Act is applicable to court records. See Kansas Attorney General Opinions 94-7 and 87-145. The Kansas Judicial Branch explains the applicability of KORA to Kansas courts in an online "Guide to Judicial Branch Open Records Requests" that can be found at www.kscourts.org/rules-procedures-forms/open-records-procedures/.

Moreover, several courts have held that the right of access to court records is also guaranteed by the First Amendment to the United State Constitution. *See, e.g., Hartford Courant Co., v. Pellegrino*, 380 F.3d 83, 91 (2nd Cir. 2004); *In re Providence Journal Company, Inc.*, 293 F.3d 1 (1st Circuit 2002). While the Kansas Supreme Court in *Stephens* originally did not view access is constitutional in nature (227 Kan. at 686), a more recent

decision of the Court agreed with the proposition that the public right of access to judicial records and proceedings "'has its bases, constitutional law, the common-law and public policy grounds.'" *Unwitting Victim v. C.S.*, 273 Kan. 937, 947 (2002) (quoting *Doe v. Provident Life and Acc. Ins. Co.*, 176 F.R.D. 464, 466-67 (E.D. Pa. 1997)).

In *Fossey*, the Kansas Supreme Court took the First Amendment into account as it addressed the restrictions that may permissibly be placed on the flow of information in highly publicized criminal trials. In so doing, the Court expressly adopted the American Bar Association's Fair Trial and Free Press Standard 8-3.2 (1978), and held that the standard would "govern the closure issues in future cases." 230 Kan. at 251.

Based on the ABA standard, the Court set forth the following test for the closure of hearings or records:

> 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:
>
> (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.

230 Kan. at 240, Syl. ¶ 2. *Cited by Wichita Eagle Beacon Co. v. Owens*, 271 Kan. 710, 712 (2001); *State v. Alston*, 256 Kan. 571, 583-584 (1994); *State v. Cheun-Phon Ji*, 251 Kan. 3, 30 (1992); *State v. Bean*, 235 Kan. 800, 805 (1984).

Among the "reasonable alternative means" that the trial court must consider before sealing a record are:

> (1) continuance, (2) severance, (3) change of venue, (4) change of venire, (5) intensive voir dire, (6) additional peremptory challenges, (7) sequestration of the jury, and (8) admonitory instructions to the jury.

230 Kan. at 249.

Compliance with the directives of *Fossey* is not optional. A motion to seal records "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." *Fossey*, 230 Kan. at 249.

Underlying the holding in *Fossey* "is a strong presumption in favor of open judicial proceedings and free access to records in a criminal case." 230 Kan. at 248. As the United States Supreme Court has stated, "we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980); *Accord Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982); *Davis v. Reynolds*, 890 F. 2d 1105, 1109 (10th Cir. 1989); *United States v. Storey*, 956 F. Supp. 934, 938 (D.Kan. 1997).

Given this presumption of openness, the closing of hearings or sealing of documents is justified only in the rarest of circumstances. As explained in *Fossey*, even if the defendant desires to waive his Sixth Amendment right to public criminal proceedings, this is insufficient to overcome the presumption:

> The sixth amendment speaks in terms of the right of the accused to a public trial, but this right does not belong solely to the accused to assert or forgo as he or she desires. Many courts have recognized that the public generally has an overlapping and compelling interest in public trials. The defendant's interest, primarily, is to ensure fair treatment in his or her particular case. While the public's more generalized interest in open trials includes a concern for justice to individual defendants, it goes beyond that. **The transcendent reason for public trials is to ensure efficiency, competence, and integrity to the overall operation of the judicial system.** Thus, the defendant's willingness to waive the right to a public trial in a criminal case cannot

> be the deciding factor. This holds true no matter how personally beneficial private proceedings in a criminal case might be to the defendant. It is just as important to the public to guard against undue favoritism or leniency as to guard against undue harshness or discrimination.

Fossey, 230 Kan. at 248 (emphasis added).

The *Fossey* court also made clear that any decision to close court proceedings or seal records must be made pursuant to a hearing on the record, and accompanied by sufficient, well-supported findings that justify the action:

> To insure compliance with this standard, a record of the hearing where the issue of closure is determined should be prepared. In making a decision of either closure or nonclosure, the trial judge should 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. Such a procedure will protect both the right of the defendant to a fair trial and the right of the public and news media to have access to the court proceedings.

230 Kan. at 250. *See also United States v. McVeigh*, 119 F.3d 806, 814 (10th Cir. 1997)("[S]ealing is only appropriate if the district court makes 'specific, on the record findings demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest."'"[citations omitted]); *Providence Journal* 293 F.3d at 13 ("the First Amendment right of public access is too precious to be foreclosed by conclusory assertions or unsupported speculation.").

In addition to the requirement that a trial court make on the record findings supporting its decision, the most recent version of ABA Standard 8-3.2 also provides that "(a) court may issue a closure order to deny access to the public to specified portions of a judicial proceeding or related document or exhibit only after reasonable notice of and an opportunity to be heard on such proposed order has been provided to the parties and the public..." ABA Standard 8-3.2(b)(1).

Even if a defendant does not oppose a sealing order, as in this case, the trial court is not relieved of its obligation to consider whether closure is legally justified. For example, in *State ex rel. The Missoulian v. Montana Twenty-First Judicial District*, 933 P.2d 829, 834 (Mont. 1997), the judge issued a closure order with the consent of counsel for the State and the defendant but without hearing media arguments in favor of openness. The Supreme Court of Montana found that the judge had failed to comply with that state's codification of ABA Standard 8-3.2 and said:

> In fairness to the trial court, it should be noted that the order was entered with the consent of counsel for the State and for the defendant. Thus, given the consent of the parties, there would appear to be no basis for faulting the court for failure to hold an evidentiary hearing and make appropriate findings. However, consent of the parties cannot serve to override the clear intent of § 46-11-701, MCA, to balance the public's right to know with the defendant's right to a fair trial. This balancing can only be accomplished by including the media in the process even though the media is not a "party" to the proceeding in the usual sense of that term.

See also Bryan v. Eichenwald, 191 F.R.D 650, 652 (D.Kan. 2000)("The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it). He may not rubber stamp a stipulation to seal the record."); *Owens*, 271 Kan. 710, 712-713 (2001)("We 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.")

Here, the sealing order of May 1, 2014, refers to the harm to "a litigant" relative to the "strong public interest in access to the Court record," and relies on K.S.A. 60-2617 as its basis to seal the record. While K.S.A. 60-2617 may operate to allow the parties to make motions to seal

or unseal records, that statute is inapplicable to Intervenors. *Fossey* requires a public hearing in which Intervenors are allowed to participate. At such a hearing, the parties' and Intervenors' positions can be advanced by counsel. At the conclusion of the hearing, the Court can make on the record well-supported findings that specifically identify whether the dissemination of the court record would constitute a clear and present danger to a fair trial and whether alternative means should first be employed.

Without such a hearing, and in light of the one or more orders to seal, this case is proceeding under a presumption of secrecy rather than a presumption of openness. The notion that the integrity of criminal proceedings can only be protected through secrecy, or that there is a right to confidentiality in such proceedings, is directly contrary to the basic principles underlying the American judicial system. *See, e.g., State v. Osborne*, 102 P. 62, 65 (Or. 1909), *quoting Williamson v. Lacey*, 29 A. 943 (Me. 1983)("[T]he flagrant abuses extant in England, as well as in this country, prior to our Revolution, impressed upon the founders of our national and state governments the importance of providing against them by inserting in our fundamental laws the express provision that every person charged with a crime shall have a public trial....'History brings us too vivid pictures of the oppressions endured by our English ancestors at the hands of arbitrary courts ever to satisfy the people of this country with courts whose doors are closed against them.'"

Intervenors assume that the desire of the parties to seal virtually everything of substance in this case stems in large part from a concern that openness would interfere with impaneling an impartial jury. Without more, this concern is unwarranted. "Media publicity alone has never established prejudice per se." *State v. Jorrick*, 269 Kan. 72, 77 (2000). High profile cases on

both a national and state level have demonstrated that it is possible to impanel an unbiased jury even in the light of pretrial publicity well beyond the scope of pretrial publicity in this case. *See Columbia Broadcasting Systems, Inc. v. United State Dist. Court for Cent. Dist.*, 729 F.2d 1174, 1179 (9th Cir. 1983)("Recent highly publicized cases indicate that even when exposed to heavy and widespread publicity many, if not most, potential jurors are untainted by press coverage.").

Intervenors are aware of no Kansas case in which it was found that the defendant failed to receive a fair trial because of pertrial publicity alone[1], even though the contention has been frequently advanced. *See, e.g., State v. Higgenbotham*, 271 Kan. 582 (2001); *State v. Cravatt*, 267 Kan. 314 (1999); *State v. Jackson*, 262 Kan. 119 (1997); State v. Shaw, 260 Kan. 396 (1996); *State v. Knighten*, 260 Kan. 47 (1996); *State v. Shannon*, 258 Kan. 425 (1995); *State v. Brown*, 258 Kan. 374 (1995); *State v. Swafford*, 257 Kan. 1023 (1995), *modified on other grounds*, 257 Kan. 1099 (1996); *State v. Anthony*, 257 Kan. 1003 (1995); *State v. Butler*, 257 Kan. 1043 (1995), *modified on other grounds*, 251 Kan. 1110 (1996); *State v. Wacker*, 253 Kan. 664 (1993); *State v. Grissom*, 251 Kan. 851 (1992); *State v. Tyler*, 251 Kan. 616 (1992); *Cheun-Phon Ji, supra*; *State v. Mayberry*, 248 Kan. 369 (1991); *State v. Goss*, 245 Kan 189 (1989); *State v. Hunter*, 241 Kan. 629 (1987); *State v. Ruebke*, 240 Kan. 493, *cert. denied*, 483 U.S. 1024 (1987); *State v. Bird*, 240 kan. 288 (1986), *cert. denied*, 481 U.S. 1055 (1987); *State v. Mckibben*, 239 Kan. 574 (1986); *State v. McNaught*, 238 Kan. 567 (1986); *State v. Haislip*, 237 Kan. 461, cert. denied, 474 U.S. 1022 (1985); *State v. Boan, 235 Kan. 800 (1994)*; *State v. Crispin*, 234 Kan. 104 (1983), *State v. Crump*, 232 Kan. 265 (1982); *State v. Moore*, 229 Kan.

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[1]In State v. Lumbrera, 252 Kan. 54 (1002), the defendant was granted a new trial based on cumulative errors, one of which was the failure to change venue due to pretrial publicity. She was convicted again on retrial. State v. Lumbrera, 257 Kan. 144 (1995).

73 (1981); *State v. May*, 227 Kan. 393 (1980); *State v. Soles*, 224 Kan. 698 (1978); *State v. Filder*, 223 Kan. 220 (1977); *State v. Black*, 221 Kan. 248 (1977); *Green v. State*, 221 Kan. 75 (1976); *State v. Ayers*, 198 Kan. 467 (1967); *State v. Poulus*, 196 Kan. 253, *cert. denied*, 385 U.S. 827 (1966); *State v. Furbeck*, 29 Kan. 532 (1883); *State v. Arculeo*, 29 Kan.App.2d 962 (2001); *State v. Moss*, 7 Kan.App.2d 215, *rev. denied*, 231 Kan. 802 (1982); *State v. Allen*, 4 Kan.App.2d 534, *rev. denied*, 228 Kan. 807 (1980).

As indicated in *Fossey*, fears over jury impartiality provide an insufficient basis for sealing records unless and until this Court has, first, found the publicity poses a clear and present danger to the fairness of the trial, and second, considered alternative measures such as change of venue, chance of venire, intensive voir dire and additional peremptory challenges. Given the skill of this Court and the attorneys representing the parties in this matter, Intervenors have little doubt that the jury ultimately seated in this case will have been sufficiently screened in voir dire so as to assure that they will decide the matter based solely on the evidence presented at trial. Simply stated, any argument that the indiscriminate sealing of documents is necessary to protect the purity of the jury pool overestimates the effect of pretrial publicity and underestimates the ability of the citizens of Labette County to be fair.[2]

Although the sealing order entered in this case on May 1, 2014 cites concern for public or private harm, there is no indication that this Court made specific findings of fact to support the order, as *Fossey* requires. Without specific findings to support the blanket sealing of records in this case, the extent to which the records may include sensitive information is an entirely open

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[2]The fact that trial in this matter is not even scheduled yet further minimizes any concern over the impact of information released today. *See Boan*, 235 Kan. at 805 (three month time lapse "would ordinarily be sufficient to dissipate any pretrial publicity arising at the preliminary hearing.").

question. For all the public knows, the sealed records contain information even less sensitive than that originally released by the State, which included its belief, coupled with the identify of the defendant, that the crimes were committed "in an especially heinous, atrocious or cruel manner." It is uncertain that there is anything in the documents sealed by the court that would have as significant an impact on the potential jury pool as the unequivocal reporting from multiple news media outlets identifying the defendant as the suspect and the nature of the crime. Moreover, the preliminary hearing is not scheduled until October 8, 2014, and any jury trial would presumably take place some time after that. As in *State v. Boan*, the time lapse between public access to information and any public hearing would be many months, giving plenty of time for any alleged prejudice to dissipate.

Regardless, now that Intervenors have made their motion, the *Fossey* hearing is required to take place, and the Court will have an opportunity to consider on the record whether public access to information in this case creates a clear and present danger to the fairness of the trial and alternatives to closure.

CONCLUSION

The citizens of Labette County and the 11th Judicial District are entitled to a presumption of openness in this case. The crimes at issue in these proceedings impacted citizens in multiple counties and the precedents make clear that such proceedings should not be hidden from public view. As the Untied States Supreme Court has observed:

> Criminal acts, especially violent crimes, often provide public concern, even outrage and hostility; this in turn generates a community urge to retaliate and a desire to have justice done. See T. Reik, the Compulsion to Confess 288-295, 4080 (1959). Whether this is viewed as retribution or otherwise is irrelevant. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for

> these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims of the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.

Press-Enterprise, 464 U.S. at 508-509.

In *Richmond Newspapers*, the U.S. Supreme Court stressed the importance of an open judicial system. "Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice." 448 U.S. 555, 589. Continuing the secrecy of these proceedings can only breed suspicion, distrust and cynicism. Intervenors submit that the only way to truly protect the integrity of the proceedings is to return to the presumption of openness mandated by law. Accordingly, Intervenors request that the Court schedule a hearing so that, through counsel, they may explain why the sealing orders entered in this case should be vacated and why all documents that apply to that order should be released. Intervenors further request that, in accordance with *Fossey*, any future requests to seal documents be heard in open court preceded by notice to the Intervenors so they might be heard on such requests.

WHEREFORE, Intervenors respectfully request that an opportunity to be heard be granted, that a hearing date be set as soon as possible, that the sealing orders in this case be vacated, and that any future requests to seal documents be heard in open court preceded by notice to the Intervenors so they might be heard on such requests.

Respectfully submitted,

Kautsch Law, L.L.C.
By Maxwell E. Kautsch, #21255
16 E. 13th St.
Lawrence, KS 66044
(785) 840-0077
kautschlaw@yahoo.com
Attorney for Intervenors

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2014 a true and correct copy of the preceding was delivered by first-class mail to the following:

Amy Hanley
Assistant Attorney General
Attorney General's Office
120 SW 10th, 2nd Floor
Topeka, KS 66612

Ron Evans
Attorney for the Defendant
Indigent Defense Services
700 SW Jackson, Ste. 500
Topeka, KS 66603

Hon. Robert J. Fleming
Labette County District Court
201 S. Central
Parsons, KS 67357