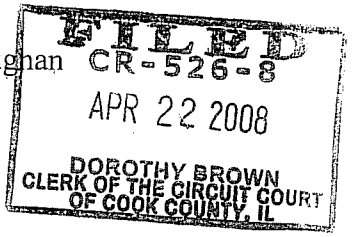
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Case No. 02 CR 1495201
Plaintiff,	)	
v.	)	Judge Vincent Gaughan
	)	
ROBERT KELLY,	)	Room 500
	)	
Defendant.	)	



NOTICE OF EMERGENCY MOTION

TO: Shauna Boliker Andrews, Esq.
States Attorney of Cook County, Illinois
2600 South California Avenue, Rm. 500
Chicago, Illinois 60608

Edward M. Genson, Esq.
Genson & Gillespie
53 West Jackson Blvd., Suite 1420
Chicago, Illinois 60604

PLEASE TAKE NOTICE that on Thursday, **April 24, 2008**, at 9:00 a.m., or as soon thereafter as counsel can be heard, the undersigned counsel will appear before the Honorable Vincent Gaughan in Room 500 at the Criminal Court Building, 2600 South California Avenue, Chicago, Illinois, and there and there present the attached **Emergency Motion of Chicago Sun-Times, Inc. and Tribune Company to Intervene and Obtain Access to Sealed Court Records and Court Proceedings and to Vacate Decorum Order.**

Dated: April 22, 2008

Respectfully submitted,

CHICAGO SUN-TIMES, INC. and
TRIBUNE COMPANY

By: _____
One of their attorneys

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused copies of the **Emergency Motion of Chicago Sun-Times, Inc. and Tribune Company to Intervene and Obtain Access to Sealed Court Records and Court Proceedings and to Vacate Decorum Order along with Notice and Memorandum in Support thereof,** to be served upon:

Shauna Boliker Andrews, Esq.
States Attorney of Cook County, Illinois
2600 South California Avenue
Chicago, Illinois 60608
Facsimile: (312) 869-2382

Edward M. Genson, Esq.
Genson & Gillespie
53 West Jackson Blvd., Suite 1420
Chicago, Illinois 60604
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by faxing same from the Law Offices of Funkhouser Vegosen Liebman & Dunn Ltd., Facsimile No. **(312) 701-6801**, before the hour of 5:00 p.m. on Tuesday, April 22, 2008.

The undersigned, an attorney, hereby certifies that he caused copies of the **Emergency Motion of Chicago Sun-Times, Inc. and Tribune Company to Intervene and Obtain Access to Sealed Court Records and Court Proceedings and to Vacate Decorum Order along with Notice and Memorandum in Support thereof ,** to be served upon Shauna Boliker and Edward M. Genson via Messenger:

Shauna Boliker Andrews, Esq.
States Attorney of Cook County, Illinois
2600 South California Avenue
Chicago, Illinois 60608

Edward M. Genson, Esq.
Genson & Gillespie
53 West Jackson Blvd., Suite 1420
Chicago, Illinois 60604

before the hour of 5:00 p.m., on April 22, 2008.

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	)	Case No. 02 CR 1495201
Plaintiff,	)	
v.	)	Judge Vincent Gaughan
	)	
ROBERT KELLY,	)	Room 500
	)	
Defendant.	)	

EMERGENCY MOTION OF CHICAGO SUN-TIMES, INC. AND TRIBUNE COMPANY TO INTERVENE AND OBTAIN ACCESS TO SEALED COURT RECORDS AND COURT PROCEEDINGS AND TO VACATE DECORUM ORDER

NOW COME nonparties CHICAGO SUN-TIMES, INC. and TRIBUNE COMPANY (collectively, the "Media Petitioners"), by and through their undersigned attorneys, and move this Court to permit the Media Petitioners to intervene in the above-captioned action (the "Action") for the purposes of asserting their First Amendment, statutory and the common law rights of access to judicial records and proceedings in this Action, and in support thereof, submit their attached Memorandum of Points and Authorities setting forth the Media Petitioners' grounds for intervention and relief sought and state as follows:

1. The Court has effectively sealed the record in the Action by, among other things, maintaining documents filed under seal, closing pretrial proceedings and issuing a "decorum order" restricting the lawyers' ability to discuss the case.

2. The public has a nearly absolute right of access to Court records and proceedings under the United States Constitution and common law. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 12-13 (1986); *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 230-31, 730 N.E.2d 4, 15-16 (2000); *People v. LaGrone*, 361 Ill.App.3d 532, 537, 838 N.E.2d 142, 147 (4th Dist. 2005).

3. The Media Petitioners have a right to intervene in the Action to the extent necessary to protect their direct and enforceable access rights to the public record. *See* 735 ILCS 5/2-408; *Maiter v. Chicago Bd. of Ed.*, 82 Ill. 2d 373, 415 N.E.2d 1034 (1980).

4. Absent specific factual findings that demonstrate in each instance how secrecy serves a compelling interest overriding the essential right to access and that no other less restrictive alternative is available, public access cannot be denied. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984); *A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 996, 821 N.E.2d 1238, 1247 (1st Dist. 2004).

5. Similarly, without specific factual findings of a clear and present danger or a serious and imminent threat to the fairness and integrity of the trial, the decorum order constitutes an unconstitutional prior restraint on freedom of speech. *Kemner v. Monsanto Co.*, 112 Ill.2d 223, 492 N.E.2d 1327 (1986).

6. No compelling interest can justify denial of access to the records and proceedings in this Action, given the available alternative means of ensuring Defendant a fair trial. *Press Enterprise*, 478 U.S. at 15 (the right of access to pretrial hearings "cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [his fair trial] right.").

WHEREFORE, for all the foregoing reasons and those stated in the attached Memorandum of Points and Authorities, the Media Petitioners request that this Court grant their Emergency Motion for the following relief:

a) Order unsealed all documents previously sealed or held *in camera*, including but not limited to the State's Motion to Allow Evidence of Other Crimes, the State's supplemental answer to discovery, and each party's witness list, and order these documents returned to the Court file;

b) Amend the Court's docket to apprise the public and the press of all filings and proceedings in the Action;

c) Vacate the Decorum Order;

d) Make available transcripts of all proceedings from which the public was excluded, including but not limited to the hearings of April 11, 2008, April 15, 2008, and April 21, 2008; and

e) Grant the Media Petitioners access to all proceedings, beginning April 25, 2008, at 11:00 a.m., and close no further proceedings without first (i) entering the requisite factual findings of a compelling reason for denying the Media Petitioners access that cannot be remediated by any other method and (ii) granting the Media Petitioners a reasonable opportunity to be heard on the question of their exclusion.

Dated: April 22, 2008

Respectfully submitted,

CHICAGO SUN-TIMES, INC. and
TRIBUNE COMPANY

By: _____
One of their attorneys

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Attorneys for Media Petitioners

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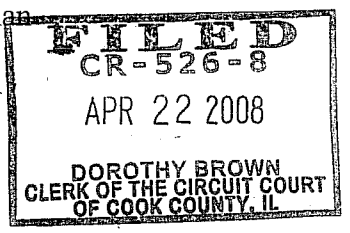

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION OF CHICAGO SUN-TIMES, INC. AND TRIBUNE COMPANY TO INTERVENE AND OBTAIN ACCESS TO SEALED COURT RECORDS AND COURT PROCEEDINGS AND TO VACATE DECORUM ORDER

NOW COME nonparties CHICAGO SUN-TIMES, INC. and TRIBUNE COMPANY (collectively, the "Media Petitioners"), by and through their undersigned attorneys, and in support of their Emergency Motion to permit Media Petitioners to intervene in the above-captioned action (the "Action") and obtain access to sealed court records and proceedings and to vacate the Decorum Order, submit the attached Declaration of Eric Herman and state as follows:

INTRODUCTION

In this Action, the public has been denied access to the record and proceedings because documents have been sealed or held *in camera* and pretrial proceedings have been closed to the public. See generally, attached Declaration of Eric Herman ("Herman Decl."). The record does not reflect any written findings justifying such drastic secrecy in this Action, let alone findings that satisfy the multiple requirements for closure articulated by the Supreme Court of the United States and the Supreme Court of Illinois. As discussed below, there is no compelling interest in this Action that can justify closure in light of the controlling precedents.

With due respect, when this Court sealed past proceedings and records in the Action, it lacked the benefit of the arguments and legal precedent on behalf of the public and media—presented here—in support of the important constitutional and common law rights of public access. Given that the judge is "the primary representative of the public interest in the judicial process," this Court deserves a full record and opportunity to reconsider the merits of its prior closure orders. *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 946 (7th Cir. 1999).

ARGUMENT

I. The Press and Public Have a Right of Access to Court Proceedings and Records Under The United States Constitution, the Common Law, and Illinois Statute

"It would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). The public's rights of access to court proceedings are firmly rooted in the common law and the First Amendment to the United States Constitution. *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 230-31, 730 N.E.2d 4, 15-16 (2000). This right is "essential to the public's right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system." *Id.* at 230, 730 N.E.2d at 16 (internal citations omitted).[1] See also *People v. LaGrone*, 361 Ill.App.3d 532, 537, 838 N.E.2d 142, 147 (4th Dist. 2005) (reversing on constitutional grounds a trial court's finding that hearing of *in-limine* motion in criminal case should be closed because press might publish potentially inadmissible evidence).

[1] In Illinois, the right to view court records is codified by Section 16(6) of the Clerks of the Court Act (705 ILCS 105/16(6)):

> All records, dockets and books required by law to be kept by such clerks shall be deemed public records, and shall at all times be open to inspection without fee or reward, and all persons shall have free access to inspection and examination of such records.

Particularly during pre-trial criminal proceedings, "the absence of a jury, long recognized as an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge, makes the importance of public access . . . even more significant." *Press-Enterprise Co. v. Superior Court* ("*Press Enterprise II*"), 478 U.S. 1, 12-13 (1986) (internal cites omitted). As a part of our country's rich history of public access to criminal trials and fundamental belief that transparency is at the heart of justice, the United States Supreme Court has long recognized a First Amendment and common law *presumption* of public and press access to criminal court proceedings – including specifically pretrial pleadings and hearings, which often are as important as the trial itself. *See Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise I*"), 464 U.S. 501, 509-510 (1984) (right of public access to *voir dire*); *Press-Enterprise II*, 478 U.S. 1 (right of public access to preliminary hearing); *Waller v. Georgia,* 467 U.S. 39, 46 (1984) (right of access to suppression hearings because such pretrial "hearings often are as important as the trial itself.")

Consequently, in order to seal records or hold *in camera* proceedings, a court must find either a "compelling interest" or "improper purpose" overriding these essential rights. *Skolnick*, 191 Ill.2d at 233, 730 N.E.2d at 17. Moreover, the sealing must be narrowly tailored to achieve this compelling interest. *Id.* at 232, 730 N.E.2d at 16. Finally, in order to deny access to records or proceedings, a trial court must find that no less restrictive way to serve the compelling interest exists. *Press Enterprise II*, 478 U.S. at 14 (*voir dire*, not sealing of records, is the proper means to insure an impartial jury).

Before any trial court can impose secrecy, it must first enter written findings setting forth the basis for the sealing of records that are "specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I*, 464 U.S. at 510; *see also LaGrone*, 361 Ill.App.3d at 537, 838 N.E.2d at 147 ("vague and conclusory" findings did not

justify closing pre-trial hearing). Even then, "the court should limit sealing orders to particular documents or portions thereof which are directly relevant to the legitimate interest in confidentiality." *A.P. v. M.E.E.*, 354 Ill.App.3d 989, 1001, 821 N.E.2d 1238, 1251 (1st Dist. 2004); *see also Press-Enterprise II*, 478 U.S. at 15.

Finally, prior to any closure, "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (*quoting Gannett Co. v. DePasquale,* 443 U.S. 368, 401 (1979)). Closure motions must be docketed sufficiently in advance of disposition to permit the press and the public an opportunity to intervene and present objections to the court. *In re Washington Post Co.*, 807 F.2d 383, 392 (4th Cir. 1986).

II. The Press Has Standing to Intervene to Protect its Right of Access

"If the constitutional right of the press and public to access is to have substance, representatives of these groups must be given an opportunity to be heard on the question of their exclusion." *Gannett,* 443 U.S. at 401 (Powell, J., concurring). By reporting on court proceedings, the press serves as "surrogates for the public." *Richmond Newspapers,* 448 U.S. at 573. Citizens seeking information about the criminal justice system acquire knowledge "chiefly through the print and electronic media." *Id.* Therefore, the right to access for the press is even broader than that of the general public. For example, in Juvenile Court, a statutory exception guarantees news media access even when proceedings are closed to the public. *See* 705 ILCS 405/1-5(6) ("The general public *except for the news media* and the crime victim . . . shall be excluded from any hearing") (emphasis added).

To intervene, the press needs to demonstrate only that it possesses "an enforceable or recognizable right" affected by the litigation. 735 ILCS 5/2-408; *A.P.*, 354 Ill.App.3d at 993, 821 N.E.2d at 1244 (ruling in favor of newspaper-interveners); *In re Associated Press*, 162 F.3d

503, 507-08 (7th Cir. 1998) (press may intervene because it has a recognizable "right of access"); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994). *See also* 735 ILCS 5/2-408(a)(2) (intervention permitted as a right when the representation of the applicant's interests by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action).[2]

III. No Compelling Interest in this Action Outweighs the Near Absolute Right of Access to Court Documents and Proceedings

Only in the most extraordinary circumstances can courts shut out the public. "Closed proceedings, although not absolutely precluded, must be rare." *Press Enterprise I*, 464 U.S. at 509; *see also Skolnick*, 191 Ill.2d at 236; 730 N.E.2d at 19 (*quoting Levenstein v. Salafsky,* 164 F.3d 345, 348 (7th Cir.1998) ("in all but the most extraordinary cases-perhaps those involving matters of weighty national security-complaints must be public.")). "Indeed, at the time of [the Supreme] Court's decision in *In re Oliver,* 333 U.S. 257 (1948), the presumption [of openness] was so solidly grounded that the Court was 'unable to find a single instance of a criminal trial conducted in camera in any federal, state or municipal court during the history of this country.'" *Globe,* 457 U.S. at 606 (1982) (quoting *In re Oliver*, 33 U.S. at 266). To defeat this presumption, the need for closure must be demonstrably "compelling," *id.*; *Skolnick*, 191 Ill.2d at 233, 730 N.E.2d at 17, "overriding" and "essential," and the closure must be narrowly tailored to serve the compelling interest. *Press Enterprise I*, 464 U.S. at 510; *Skolnick*, 191 Ill.2d at 232, 730 N.E.2d at 16.

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[2] Intervention in a criminal trial is the proper procedure to assert rights of access to judicial records. *Hearst Corp v. State*, 294 Md. 30, 45, 447 A.2d 1264, 1272 (1982). As one state court aptly held, denying a media entity's motion to intervene "would recognize [the entity's] right of access, while denying it the opportunity to enforce this right in the face of an effort . . . to obtain a protective order which, if granted, would squarely usurp this right. *Hutchinson v. Luddy*, 398 Pa. Super. Ct. 505, 581 A.2d 578, 581 (1990).

Because the Court has not entered any findings in this Action, the public and reviewing courts can only speculate as to the interests that the Court is seeking to serve. *Cf. Press Enterprise I*, 464 U.S. at 510 (trial court must state its reasons "specific[ally] enough that reviewing court can determine whether the closure order was properly entered."). Regardless, there is no justification for blanket secrecy because, even if there could be a compelling interest for withholding some fact or another, less restrictive means are available to serve any such interest. *See Press Enterprise II*, 478 U.S. at 14; *LaGrone*, 361 Ill.App.3d at 537-38, 838 N.E.2d at 147.

A. Preventing potential jurors from exposure to publicity is not a sufficiently compelling interest to justify closure

Pretrial publicity is virtually never a legitimate, let alone compelling reason for closure. The United States Supreme Court has made abundantly clear that a trial court's concerns that potential jurors may be prejudiced by media coverage of pre-trial proceedings does *not* justify holding them *in camera*. *Press Enterprise II*, 478 U.S. at 15. The right of access to pretrial hearings "cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [his fair trial] right." *Id.* As explained in *LaGrone*, findings regarding prejudicial pretrial publicity are disfavored and must be grounded in specific facts (361 Ill.App.3d at 536-37, 838 N.E.2d at 146-47) (emph. in original):

> The trial court's finding that the inadmissible evidence in the hands of the media would "tend" to create "more than a potential problem" selecting a jury is not a fact-specific finding showing a substantial probability that an impartial jury could not be chosen. Nor is it a finding that provides this court with sufficient factual material to conduct a meaningful review of the trial court's decision.
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> ***
>
> The potential *always* exists that the media will misuse, misstate, or misconstrue the facts in reporting. A concern that the press will misuse inadmissible information is not sufficient to support a finding that a substantial probability exists that the defendant's fair-trial rights will be impinged.

Indeed, there is no judicial or empirical support for finding pretrial publicity will prejudice potential jurors. The Supreme Court has held that, in any "important case,"

> [s]carcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irwin v. Dowd, 366 U.S. 717, 722-23 (1961) (internal citations omitted). More recently, the Supreme Court explained that:

> Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court. Voire dire can play an important role in reminding jurors to set aside out-of-court information, and to decide the case upon the evidence presented at trial.

Gentile, 501 U.S. at 1054-55 (internal citations omitted).

Moreover, speculation that potential jurors may be prejudiced by publicity in a particular case also cannot rise to a compelling interest because alternative means, such as *voir dire*, can neutralize any prejudice.[3] *LaGrone*, 361 Ill.App.3d at 537-38, 838 N.E.2d at 147 ("the trial court's factual findings must show that the pretrial publicity would inflame and prejudice the entire community such that even through *voir dire,* an unbiased jury could not be seated."); *United States v. Peters*, 754 F.2d 753, 762-63 (7th Cir. 1985) (extensively discussing jury research and concluding that "studies and conclusions of scholars and practitioners reinforce the Supreme Court's determination that alternatives to closure are effective in guaranteeing an impartial jury"). "Through *voir dire,* cumbersome as it is in some circumstances, a court can

[3] In addition to voire dire, the Supreme Court has stated that courts should consider alternatives to closure including "(a) change of trial venue to a place less exposed to the intense publicity that seemed imminent in the county; (b) postponement of the trial to allow public attention to subside; (c) [voir dire]; and (d) the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court." *Nebraska Press Ass'n,* 427 U.S. at 563-64; *see also Richmond Newspapers*, 448 U.S. at 600 n.4 (Stewart, J., concurring).

identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict." *Press Enterprise II*, 478 U.S. at 15; *see also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 564 (1976).

Finally, if, after considering all less restrictive alternatives, this Court believes that *some in camera* proceedings are necessary to protect the defendant's right to a fair trial, the Court is obligated to enter specific factual findings in advance for each instance in sufficient detail to allow an appellate court to review whether closure was proper. *Press Enterprise I*, 464 U.S. at 510; *A.P.*, 354 Ill.App.3d at 996, 821 N.E.2d at 1247. The Defendant is a multi-platinum recording artist and national celebrity subject to widespread publicity for over five years. It is improbable that the next article published will be the one that turns a potential juror's opinion for or against the defendant.

B. Shielding persons from the revelation of embarrassing information is not a compelling interest justifying denial of access

It also is an abuse of discretion to seal court documents or close a hearing in order to save persons from embarrassment. *Skolnick*, 191 Ill. 2d at 234; 730 N.E.2d at 18. "The mere fact that a person may suffer embarrassment or damage to his reputation as a result of allegations in a pleading does not justify sealing the court file." *Id.* In *Doe v. Doe*, 282 Ill.App.3d 1078, 668 N.E.2d 1160 (1st Dist. 1996) (discussed in *Skolnick*, 191 Ill.2d at 234-35; 730 N.E.2d at 18), the defendant, accused by his niece of sexual molestation, sought an order that the court use pseudonyms for both parties because exposure of his identity would damage the reputations of him and his family. The court refused, noting that any lawsuit has the potential to damage reputations. *Doe*, 282 Ill.App.3d at 1088; 668 N.E.2d at 1167.

The *Doe* court's reasoning is even more compelling here where the nature of the allegations against the Defendant already are widely known. Thus, the possibility of damage to the Defendant's reputation cannot justify closure.

C. The privacy interests of alleged victims do not justify a full closure where a limited closure or other alternative means would protect these interests

Protecting the privacy interests of an under age sexual assault victim may, in limited circumstances, justify the closure of "*certain aspects* of a criminal proceeding." *Press Enterprise II*, 478 U.S. at 9 n.2 (emphasis added). Blanket closure, however, is impermissible. *Globe*, 457 U.S. at 608 (invalidating Massachusetts statute requiring judges to exclude press during testimony of underage sexual assault victims because trial judges must determine on a case-by-case basis whether closure is necessary).

Instead, trial courts must consider factors including "the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives" to determine whether closure is necessary. *Id.* If the court does decide closure is the only option, its reasoning must be "*articulated in findings*." *Id.* at 609, n. 20 (quoting *Richmond Newspapers*, 448 U.S. at 581) (emphasis in original). This approach "ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest." *Globe,* 457 U.S. at 609.

Furthermore, courts in the pretrial context have multiple options for protecting the privacy of underage victims. For example, "redacting the names . . . could serve to protect the minors' privacy interests without resorting to the overly broad measure of sealing entire documents." *A.P.*, 354 Ill.App.3d at 1003, 821 N.E.2d at 1253. The Court also could instruct attorneys to refer to the alleged victims by pseudonyms. Such less restrictive options must be explored before closing proceedings. *Press Enterprise II*, 478 U.S. at 14 (closure only

appropriate when no less restrictive means is available). Should the Court find that no less restrictive means would protect a victim's privacy interests, it must enter specific factual findings explaining its conclusion. *Press Enterprise I*, 464 U.S. at 510. Moreover, it must limit the closure to documents and proceedings that are directly related to the victim's privacy interests. *A.P.*, 354 Ill.App.3d at 1001, 821 N.E.2d at 1251; *see also Press-Enterprise II*, 478 U.S. at 15.

IV. An order barring lawyers from talking to the media must serve a substantial government interest

The United States Supreme Court has recognized that an attorney's communications with the press enjoy "the full protection of the First Amendment." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1058 (1991). "Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion." *Id.* at 1056 (*quoting Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975)). Though a court can, at times, gag attorneys, such restrictions can only follow a "proper weighing of dangers" posed by the attorney's speech and only when necessary to serve a "substantial government interest" *Id.* at 1057-58.

A broad Decorum Order is "an extreme example of a prior restraint upon freedom of speech and expression." *Kemner v. Monsanto Co.*, 112 Ill.2d 223, 246, 492 N.E.2d 1327, 1338 (1986) (order barring litigant from discussing case in any manner was "just too broad to pass constitutional muster"). Thus, "a trial court can restrain parties and their attorneys from making extrajudicial comments about a pending civil trial *only* if the record contains sufficient specific findings by the trial court establishing that the parties' and their attorneys conduct poses a *clear and present danger or a serious and imminent threat to the fairness and integrity of the trial.*" *Id.* at 244, 492 N.E.2d at 1337 (emphasis in original). The mere possibility of a threat to the integrity of the trial is not enough. *Id.* at 245, 492 N.E.2d at 1337. After such findings are made,

the order must be "drawn narrowly so as not to prohibit speech which will not have an effect on the fair administration of justice." *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970) (citing *Zwickler v. Koota*, 389 U.S. 241 (1967)); *see also Kemner,* 112 Ill.2d at 244, 492 N.E.2d at 1337 (finding order vague and overbroad).

Similarly, Illinois Rule of Professional Conduct 3.6(a) restricts an attorney's right to speak to the press only when the "lawyer knows or reasonably should know that it would pose a serious and imminent threat to the fairness of an adjudicative proceeding." *Id.* Rule 3.6(d) explicitly recognizes an attorney's right to "make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." Given the attention the Action has already received, an attorney might reasonably believe that communication with the press is necessary to protect his or her client from the prejudicial effect of previous publicity, as permitted by Illinois Rule of Professional Conduct 3.6(d).

A broad restriction of all communication relating to anything but the technical details of the case is unconstitutional. Furthermore, "the gag order is unnecessary because less restrictive alternative measures are available to the trial court to preserve the integrity of the proceedings before it," including the trial court's inherent power to punish contemptuous conduct. *Kemner*, 112 Ill.2d at 249, 492 N.E.2d at 1339.

V. The Court should release transcripts of all *in camera* hearings

Absent findings showing a compelling reason for secrecy, a trial court must immediately make transcripts available for all hearings from which the press has been already excluded. Access to transcripts is mandated by both constitutional and common law as well as by Illinois statute. 705 ILCS 105/16(6); *Globe*, 457 U.S. at 603; *Peters*, 754 F.2d at 758-59. Even when some part of the proceedings can be closed out of necessity, a transcript of the closed portion

must be released as soon as the perceived threat of harm subsides. *See Gannett*, 433 U.S. at 400 (Powell, J., concurring); *id.* at 446 (Blackmun, J., concurring in part and dissenting in part).

In future proceedings, however, transcripts will not suffice to protect the First Amendment right to access. *Richmond Newspapers*, 448 U.S. at 597 n. 22 (Brennan, J., concurring). The inherent delay in providing transcripts defeats a core purpose of the access requirement, because "[t]imeliness of publication is the hallmark of 'news' and the difference between 'news' and 'history' is a matter of hours." *United States v. Dickinson*, 465 F.2d 496, 512 (5th Cir. 1972), *cert. denied*, 414 U.S. 561.

CONCLUSION

For the foregoing reasons, denial of access in this Action violates the First Amendment, the common law, and Illinois statute. Even if a compelling interest could exist to justify secrecy, which it cannot, the blanket denial of access is not narrowly tailored and there are no written factual findings that specifically justify each denial of access to the document and proceeding in question and state why alternative means are insufficient.

Dated: April 22, 2008

Respectfully submitted,

CHICAGO SUN-TIMES, INC. and
TRIBUNE COMPANY

By: _____
One of their attorneys

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Case No. 02 CR 1495201
Plaintiff,	)	
v.	)	Judge Vincent Gaughan
	)	
ROBERT KELLY,	)	
	)	
Defendant.	)	

DECLARATION OF ERIC HERMAN

I, Eric Herman, declare as follows:

1. I am a reporter for the Chicago Sun-Times, a daily newspaper of general circulation published throughout Chicago and Illinois. I have been covering criminal courts proceedings, including the Robert Kelly case, as part of my assignments for the newspaper. I am over eighteen years of age and have personal knowledge of the facts stated herein.

2. The Robert Kelly case has been ongoing since 2002 and the trial is scheduled for May 9, 2008. Mr. Kelly is a prominent entertainer and the case has been the subject of news coverage for many years because it is a matter of public interest.

3. Recently, many of the proceedings and documents in the Robert Kelly case have been kept secret from the press and the public. In most cases, no reasons have been given why the proceedings have been held *in camera* and the documents sealed.

4. For example, the Court has placed several documents under seal. Those documents include, but are not limited to, the Prosecution's Motion to Allow Evidence of Other Crimes filed April 1, 2008, the Prosecution's supplemental answer to discovery, and lists of witnesses to be called by both sides. It is not clear how many documents and pleadings are under seal, because the docket sheet does not list all of them. The Court has not issued a written

order sealing the documents, held a hearing about the issue of sealing them, or made factual findings supporting their being placed under seal.

5. I am informed and believe that on Friday, April 11, 2008, the Court ordered the courtroom cleared of reporters and other members of the public so that an *in camera* hearing could be conducted. The courtroom doors were locked and sheriff's deputies stationed by the door. The hearing lasted approximately two hours. Although I was not present on April 11, another *Sun-Times* reporter was there, and he reported that he was barred from the courtroom. Anticipating the hearing, I asked the presiding judge in advance if I could get a transcript. He said no.

6. On Tuesday, April 15, 2008, at 10:45 a.m., the Court again ordered the courtroom cleared for a closed-door hearing, without offering an explanation. The courtroom doors were locked and Sheriff's deputies stationed outside. The courtroom remained closed for one hour. Afterward, I asked the Judge's Clerk if I could get a transcript of the hearing, and she said no.

7. The Court has issued a "decorum order" barring lawyers from talking to the media about anything beyond the charges, scheduling, and basic details about Defendant Kelly.

8. At status dates, the lawyers usually meet with the Judge in chambers for a half hour to an hour before emerging and briefly discussing scheduling matters in public. To my knowledge, there is no court reporter present for the closed-door portion of these sessions.

9. The next scheduled court date is April 25, at 11:00 a.m.

I declare under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure that the statements set forth above are true and correct.

Executed at Chicago, Illinois on April 20, 2008.

Eric Herman