No. 122261

IN THE
SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	On leave to appeal from the Appellate Court of Illinois, Fourth District, No. 4-17-0055.
Plaintiff-Appellee,	)	
-vs-	)	
KIRK P. ZIMMERMAN,	)	There on appeal from the Court of the Eleventh Judicial Circuit, McLean County, No. 2015-SF-0894.
Defendant-Appellant,	)	
-vs-	)	
THE PANTAGRAPH, WGLT FM, and THE ILLINOIS PRESS ASSOCIATION,	)	Honorable Scott Drazewski, Judge Presiding.
Intervenors-Appellees.	)	

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT
KIRK P. ZIMMERMAN

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POINTS AND AUTHORITIES

NATURE OF THE CASE

This case is before the Court on an interlocutory appeal of a circuit court order sealing Defendant's fourth and fifth motions *in limine*, which requested the exclusion of prejudicial and irrelevant evidence from his murder trial. Upon the media Intervenors' appeal from that order, the Fourth District Court of Appeals reversed the trial court's order and remanded for further proceedings. No questions are raised on the pleadings.

ISSUE PRESENTED FOR REVIEW

Does the presumption of public access under the First Amendment apply to motions *in limine* identifying prejudicial and irrelevant evidence and requesting it be excluded from trial where the trial court granted the motions and ordered them to be sealed until the jury is impaneled?

STATEMENT OF FACTS

In October 2016, Defendant filed a motion for leave to file his fourth and fifth motions *in limine* under seal. A22. Those motions *in limine* sought to exclude the admission of highly sensitive, inflammatory evidence about himself and other potential witnesses or persons connected to Defendant. *Id*.

In November 2016, the media Intervenors filed a petition to intervene and objections to Defendant's motion to close the proceedings and to file the motions *in limine* under seal. A30, A34. On November 21, 2016, Defendant filed a response to Intervenors' petition and, the same day, the circuit court entered an order granting Defendant leave to file his fourth and fifth motions *in limine* under seal. A43, A51. The order provided: "Documents are filed for 90 days. The documents shall not be unsealed up to and until the court orders the same." A51.

After allowing the Intervenors' petition to intervene, the circuit court held the hearing on defendant's fourth and fifth motions *in limine* on December 22, 2016. *Id*.; *see also* A52-A76. At the hearing, it was undisputed that the State did not intend to raise the matters addressed in Defendant's fourth and fifth motions *in limine* in its case in chief. A56. Because no hearing was required on the admissibility of the evidence at issue,

Defendant withdrew his motion asking to seal the courtroom for that hearing. *Id*. Thus, the sealing of the fourth and fifth motions *in limine* remained as the only contested matter. A56-A57.

Defendant requested the motions continue to be sealed until the jury in his case was impaneled, and the State took no position on that request. A58. After hearing argument, including from Intervenors, the court granted Defendant's fourth and fifth motions *in limine* and ordered that the motions *in limine* and any order *in limine* related to those motions would remain sealed until jury selection. A12. The court, in making its order, reasoned that the presumption of access did not apply to the motions *in limine* at issue, and thus did not reach any question of whether the presumption had been rebutted. A71, A11. On January 3, 2017, the circuit court issued its written order granting the motions *in limine* and ordering them sealed until after jury selection. A12.

On or about January 19, 2017, the media Intervenors filed a notice of appeal and memorandum in support. A77. Defendant timely filed his response, and, on March 31, 2017, the Court of Appeals issued its Opinion, holding that "the circuit court erred by finding the presumption did not attach to the documents at issue," and that, "[s]ince the presumption did attach to the documents at issue, the next step is to determine whether the presumption has been rebutted." A11. Because the circuit court did not address that issue, the Court of Appeals remanded to the circuit court for further proceedings. *Id.*

STANDARD OF REVIEW

Whether the presumption of access applies to the motions *in limine* at issue here is a question of law that is reviewed *de novo*. *People v. Kelly*, 397 Ill. App. 3d 232, 255 (2009) (citing *Willeford v. Toys "R" US–Delaware, Inc.*, 385 Ill. App. 3d 265, 272

(2008). However, to the extent the trial court made factual findings, those must be given deference, and the court's resulting order should be reviewed for abuse of discretion. *A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 994 (2004) (citing *Skolnick*, 191 Ill. 2d at 231–33) ("An order denying a motion to unseal a court file or document is reviewed for an abuse of discretion, regardless of whether a purported right of access is based on the common law or the first amendment.")

ARGUMENT

I. The Court of Appeals Erred in Holding that Motions *in Limine* seeking Exclusion of Prejudicial Evidence–Which Have Been Granted by the Trial Court–are Subject to the Presumption of Public Access Under the First Amendment.

While the First Amendment, as well as Illinois statutory and common law, establish a coextensive presumption of public access to *certain* court records and proceedings, that presumption is limited to those records that "have 'historically been open to the public' and disclosure of which would further the court proceeding at issue." *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 232 (2000), quoting *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989). The motions and proceedings at issue here were evidentiary in nature and sought exclusion of inflammatory and sensitive evidence—including prior bad acts evidence—from trial on the ground that the evidence was more prejudicial than probative. The prosecution asserted at hearing on the motions that it did not intend to offer the evidence at issue, and the trial court granted the motions and excluded the evidence at issue. The court further ordered that the motions *in limine*–

which specifically identified the now-excluded prejudicial evidence–would remain under seal until the jury was impaneled. *See* A12.

Motions *in limine* seeking exclusion of inflammatory and prejudicial evidence are not the sort of records or proceedings that have "historically been open to the public." *See People v. Kelly*, 397 Ill. App. 3d 232, 236-37 (1st Dist. 2009) (presumption did not apply to the State's motion to admit other crimes evidence, the State's supplemental answer to discovery, and both parties' witness lists, and pretrial hearings on those items); *People v. Pelo*, 384 Ill. App. 3d 776, 781 (1st Dist. 2008) (evidentiary deposition was not "a 'judicial record' or part of the 'criminal proceeding itself'" to which the presumption applies); *but see People v. LaGrone*, 361 Ill. App. 3d 532, 537-38 (4th Dist. 2005) (reversing trial court's order sealing motions in limine to exclude prejudicial evidence and the hearing thereupon, finding the trial court failed to make specific findings of fact that would justify sealing the motions and proceedings). "[R]estraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." *Statland v. Freeman*, 112 Ill. 2d 494, 500 (1986), quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-33 (1984). Moreover, in this case the disclosure of the motions *in limine* would hinder, rather than further, the court proceedings at issue because it would publicize–well in advance of trial–evidence prejudicial to the Defendant that will not be introduced at trial. *Skolnick*, 191 Ill. 2d at 232; *Kelly*, 397 Ill.App.3d at 259; *see also People v. Stevenson*, 2014 IL App (4th) 130313, ¶ 29 (quoting *People v. Owen*, 299 Ill. App. 3d 818, 824 (1998)) (where decision on a motion in limine is deferred until trial, the court should issue "an order requiring that the matter be brought to

the attention of the court prior to being disclosed in any fashion to the jury") (internal quotation marks and citation omitted, emphasis added).

In *Kelly*, the First District engaged in a detailed analysis of whether the presumption of access applied to motions concerning potential evidence, the State's discovery, and the parties' witness lists, having distinguished the First Circuit's decision in *LaGrone* because the court in that case did not first determine whether the presumption of public access applied to the proceedings and motions in question. *Kelly*, 397 Ill. App. 3d at 258 (citing *LaGrone*, 361 Ill. App. 3d at 537) (in discussing *LaGrone*'s failure to discuss whether the presumption applied, stating, "[w]e have no way of knowing if this issue was conceded by the parties."). Relying instead on *Pelo*, the *Kelly* court reasoned that the media intervenors in that case "did not have a right to a potential exhibit that had not yet been introduced into evidence; similarly, in the case at bar, the media intervenors did not have a right to discovery, ***other crimes' evidence***, or a list of witnesses, because none of it had been introduced into evidence." *Id*. at 259 (emphasis added). *See also Pelo*, 384 Ill.App.3d at 782–83. The *Kelly* court further found that "the subject matter of these proceedings are not ones that have been historically open to the public or which have a purpose and function that would be furthered by disclosure" because "the States' other crimes evidence has historically not been accessible to the public prior to its introduction at trial." *Kelly*, 397 Ill.App.3d at 259. In so holding, the First District recognized that "the function of the hearing could be undermined, if the public and potential jurors received access to the information, even if the circuit court ruled that the state was not entitled to use it." *Id*.

In its Opinion in this case, the Fourth District expressly disagreed with the First District's holding in *Kelly*: "we disagree with the Kelly court's suggestion [that] motions in limine and their related hearings have traditionally not been accessible to the public." A10. In disagreeing, the Fourth District reasoned simply that "once the circuit court granted defendant leave to file the two legal documents, they became court records" and that "motions *in limine* are generally related to the criminal trial proceedings and not the criminal investigation, which has historically been private." A10.

The Fourth District erred in failing to recognize and give deference to a court's traditional discretion to file sensitive information under seal, and in failing to consider the private nature of the information it deemed subject to a presumption of public access. *See Skolnick*, 191 Ill.2d at 231, 235; *Nixon v. Warner Comm's, Inc.*, 435 U.S. 589, 598 (1978). Doing so upsets the balance between the public's right to information and the court's discretion—and duty—to protect witnesses and other parties' sensitive information, as well as the Defendant's right to a fair trial by a jury that is not prejudiced. Instead, the Fourth District suggests broadly that any document filed with the court, under seal or not, automatically becomes a "court record" that is presumptively open to the public. A7. It also disregards the fact that Defendant's purpose in requesting leave to file under seal before filing the motions at issue was to ensure that the potential evidence detailed within the motions would not be unnecessarily exposed to public scrutiny; had the court denied leave to file the motions under seal, Defendant likely would not have filed them and would have waited to address the issues at trial or would have substantially edited their content. Thus, the evidence at issue would not have become a

"court record" and would not have been publicized unless, and until, that evidence was offered at trial.

Moreover, the Fourth District's assertion that "motions *in limine* are generally related to the criminal trial proceedings and not the criminal investigation, which has historically been private" is an arbitrary one: motions *in limine* are related to both criminal trial proceedings and the criminal investigation. As here, they are often used to assure prior to trial that harmful and inadmissible evidence obtained through the criminal investigation is not admitted, inadvertently or intentionally, into the criminal trial proceedings. Importantly, the circuit court's ruling here was not general to all motions *in limine* in the case—only those related to the highly sensitive materials in the sealed fourth and fifth motions *in limine*. *Skolnick*, 191 Ill.2d at 231 ("whether court records in a particular case are opened to public scrutiny rests with the trial court's discretion, which must take into consideration all facts and circumstances unique to that case."). The trial court's determination of the facts and circumstances relating to those motions and the evidence within them is entitled to deference. *A.P.*, 354 Ill. App. 3d at 994.

Here, Defendant's motions *in limine* were granted without objection. None of the evidence at issue in Defendant's motions has been, or will be, entered into the record. Indeed, the purpose of the motions, and effect of the circuit court's rulings, was to *prevent* any such inadmissible evidence from being entered into the judicial record. Allowing the media Intervenors to have access to confidential and sensitive materials that will not be part of the trial proceedings frustrates the purpose of the court's order excluding the evidence from trial because it allows the public information that has no

place in the criminal trial and gives the public ***more*** access than that granted to the jury or a courtroom observer.

CONCLUSION

For the foregoing reasons, Defendant Kirk Zimmerman respectfully requests this Court reverse the court of appeals' decision and remand the cause for further proceedings consistent with the trial court's order dated January 3, 2017, granting Defendant's fourth and fifth motions *in limine* and ordering them sealed until after jury selection.

Respectfully submitted,

/s/ John P. Rogers

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CERTIFICATE OF COMPLIANCE WITH RULES 341(a) AND (b)

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 8 pages.

/s/ John P. Rogers
John P. Rogers

APPENDIX TO APPELLANT'S BRIEF

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2017 IL App (4th) 170055

NO. 4-17-0055

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
KIRK P. ZIMMERMAN,	)	No. 15CF894
Defendant-Appellee	)	
(The Pantagraph, WGLT FM, and the Illinois Press	)	Honorable
Association, Intervenors-Appellants).	)	Scott Daniel Drazewski,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court, with opinion.

Justices Holder White and Pope concurred in the judgment and opinion.

OPINION

¶ 1 Pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2016), intervenors—the Pantagraph, WGLT FM, and the Illinois Press Association—appeal the McLean County circuit court's January 3, 2017, order denying the intervenors' request to open for public inspection the fourth and fifth motions *in limine* filed under seal by criminal defendant, Kirk P. Zimmerman. On appeal, the intervenors contend the circuit court erred by finding the presumption of public access to judicial documents did not apply to the documents at issue. We reverse and remand for further proceedings.

¶ 2 I. BACKGROUND

¶ 3 In this case, the supporting record is scant, and thus this court has very limited

facts. Notably, we lack the documents at issue.

¶ 4 According to defendant's pleadings, the State charged him with the first degree murder of Pamela Zimmerman, his former spouse. In October 2016, defendant filed a motion for leave to file motions *in limine* under seal. The document referred to the motions at issue as his fourth and fifth motions *in limine*. Defendant noted his fourth and fifth motions *in limine* sought to exclude the admission of evidence that was sensitive, private, and/or inflammatory about himself and others who may be called as witnesses or who are otherwise connected to him. According to defendant, given the high level of media attention to his case, the evidence sought to be excluded would taint the jury pool if it became public and his right to a fair trial depended on the motions being sealed. Additionally, defendant noted he was prepared to provide the circuit court with advance copies of the motions at issue for an *in camera* examination in the event the court needed additional facts. Defendant also filed a motion to close the proceedings on the motions *in limine*.

¶ 5 In November 2016, the intervenors filed a petition to intervene and objections to defendant's motion to close the courtroom and to file the motions *in limine* under seal. The intervenors also filed a supporting memorandum of law. On November 21, 2016, defendant filed a response to the intervenors' petition. On that same day, the circuit court entered an order, granting defendant leave to file his fourth and fifth motions *in limine*. The order further stated the following: "Documents are filed for 90 days. The documents shall not be unsealed up to and until the court orders the same."

¶ 6 On December 22, 2016, the circuit court held the hearing on defendant's fourth and fifth motions *in limine*. An excerpt of the hearing is included in the supporting record. The court noted at the beginning of the hearing that it had allowed the intervenors' petition to

intervene at an earlier court date. At the hearing, it was noted the State did not intend to raise the matters addressed in defendant's fourth and fifth motions *in limine* in its case in chief. Defendant withdrew his motion asking to seal the courtroom, leaving the continued sealing of the fourth and fifth motions *in limine* as the only remaining contested matter. Defendant requested the motions continue to be sealed until the jury in his case was impaneled. The State took no position on the continued sealing of the motions. After hearing the parties' arguments, the court allowed, without objection, defendant's fourth and fifth motions *in limine*. The court further ordered the fourth and fifth motions *in limine* to remain sealed until jury selection and noted any order *in limine* related to those motions would also be sealed. The court reasoned the presumption of access did not apply to the motions *in limine* and ended its analysis with that conclusion.

¶ 7 On January 3, 2017, the circuit court entered a written order, granting the fourth and fifth motions *in limine* and ordering those motions to remain sealed until after the selection of a jury.

¶ 8 On January 19, 2017, the intervenors filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015). See Ill. S. Ct. R. 307(a) (eff. Nov. 1, 2016) (providing "the appeal must be perfected within 30 days from the entry of the interlocutory order by filing a notice of appeal designated 'Notice of Interlocutory Appeal' conforming substantially to the notice of appeal in other cases"). Thus, this court has jurisdiction of this appeal pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2016). See *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 221, 730 N.E.2d 4, 11 (2000) (noting an interlocutory order that circumscribes the publication of information is reviewable as an interlocutory injunctive order under Rule 307(a)(1)).

¶ 9 II. ANALYSIS

¶ 10 The United States Supreme Court has recognized the existence of a common law right of access to " 'judicial records and documents.' " *Skolnick*, 191 Ill. 2d at 230, 730 N.E.2d at 15 (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978)). Additionally, in Illinois, section 16(6) of the Clerks of Courts Act (705 ILCS 105/16(6) (West 2014)) provides for the public's right to review judicial records. See *Skolnick*, 191 Ill. 2d at 231, 730 N.E.2d at 16. Specifically, that provision provides, in pertinent part, the following:

> "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 for inspection and examination to such records, docket and books, and also to all papers on file in the different clerks' offices and shall have the right to take memoranda and abstracts thereto." 705 ILCS 105/16(6) (West 2014).

Moreover, embedded in the first amendment to the United States Constitution (U.S. Const. amend. I) is a right of access to court records. *Skolnick*, 191 Ill. 2d at 231-32, 730 N.E.2d at 16. "The first amendment right presumes a right to inspect court records which have 'historically been open to the public' and disclosure of which would further the court proceeding at issue." *Skolnick*, 191 Ill. 2d at 232, 730 N.E.2d at 16 (quoting *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989)). However, under all three sources of the right to access court records, the right is not absolute. *Skolnick*, 191 Ill. 2d at 231-32, 730 N.E.2d at 16. In recognizing the common law right to access, the Supreme Court noted "[e]very court has supervisory power over its own records and files, and access [may be] denied where court files might *** become a vehicle for improper purposes." *Nixon*, 435 U.S. at 598. As to the constitutional right to access,

our supreme court has noted the presumption of access can be rebutted by demonstrating "suppression is 'essential to preserve higher values and is narrowly tailored to serve that interest.' " *Skolnick*, 191 Ill. 2d at 232, 730 N.E.2d at 16 (quoting *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994), *superseded on other grounds by* Fed. R. Civ. P. 5. Additionally, the first amendment right of access does not attach unless it passes the tests of experience and logic. *Press-Enterprise Co. v. Superior Court of California for the County of Riverside*, 478 U.S. 1, 9 (1986) (*Press II*). The experience test examines whether "there has been a tradition of accessibility" to that kind of proceeding, and the logic test examines whether "public access plays a significant positive role in the functioning of the particular process in question." *Press II*, 478 U.S. at 8, 10.

¶ 11 We begin our analysis by determining whether the presumption of access applied to defendant's fourth and fifth motions *in limine*. *In re Gee*, 2010 IL App (4th) 100275, ¶ 26, 956 N.E.2d 460. That determination presents a purely legal question, and thus our review is *de novo*. *People v. Kelly*, 397 Ill. App. 3d 232, 255, 921 N.E.2d 333, 354 (2009). If we find the presumption does not apply, then our analysis ends there. *Gee*, 2010 IL App (4th) 100275, ¶ 26, 956 N.E.2d 460. If the presumption does apply, then we examine the propriety of the circuit court's denial of access. *Gee*, 2010 IL App (4th) 100275, ¶ 26, 956 N.E.2d 460. In this case, the circuit court found the presumption did not apply and ended its analysis there. On appeal, the intervenors assert the circuit court erred by finding the presumption did not attach to defendant's fourth and fifth motions *in limine*.

¶ 12 In *Skolnick*, 191 Ill. 2d at 232, 730 N.E.2d at 17, our supreme court found that, whether it proceeded under the common law or constitutional standards, the counterclaim in that case became part of the court file once the circuit court granted leave to file it, and at that time,

the presumption of the right of public access attached to the counterclaim. Moreover, this court has held, "the right of access extends to the documents filed with the court." *In re Marriage of Johnson*, 232 Ill. App. 3d 1068, 1074, 598 N.E.2d 406, 410 (1992). We explained our holding as follows: "Once documents are filed with the court, they lose their private nature and become part of the court file and 'public component[s]' of the judicial proceeding [citation] to which the right of access attaches. This right also applies to transcripts of hearings as they are records of trial court proceedings." *Johnson*, 232 Ill. App. 3d at 1074, 598 N.E.2d at 410. However, this court emphasized the right did not extend to a settlement document because it was never submitted to the court, despite the fact the terms of the agreement were discussed at a hearing for which the transcript was subject to the presumption. *Johnson*, 232 Ill. App. 3d at 1074, 598 N.E.2d at 410.

¶ 13 In the context of criminal cases, in *People v. LaGrone*, 361 Ill. App. 3d 532, 534-35, 838 N.E.2d 142, 145 (2005), we addressed whether the circuit court erred by closing the pretrial hearings on the defendant's motions *in limine* to suppress (1) the statements of two of the victims and (2) evidence of certain character attributes of the defendant. This court concluded the circuit court's specific findings did not constitute a sufficient basis for closure of the pretrial hearings and reversed the circuit court's judgment. *LaGrone*, 361 Ill. App. 3d at 536, 838 N.E.2d at 146. While this court did not expressly address whether the presumption of access attached, we still find the case is instructive on the issue, as it is indicative of the public nature of motions *in limine*.

¶ 14 Next, in *People v. Pelo*, 384 Ill. App. 3d 776, 781, 894 N.E.2d 415, 419 (2008), this court held an unedited evidence deposition, which had neither been submitted into evidence nor played in open court, was not "a 'judicial record' or part of the 'criminal proceeding itself' to which the public has a constitutional, common-law, or statutory right of access." Moreover, in

Gee, 2010 IL App (4th) 100275, ¶ 36, 956 N.E.2d 460, we held the right of access did not apply to an affidavit supporting a search warrant and the inventory and return of search warrant. This court explained the warrant application process had historically not been open to the public and was an extension of the criminal investigation itself. Thus, it was entitled to the same confidentiality accorded other aspects of the criminal investigation. *Gee*, 2010 IL App (4th) 100275, ¶ 36, 956 N.E.2d 460.

¶ 15 In *Kelly*, 397 Ill. App. 3d at 236-37, 921 N.E.2d at 339-40, the appellants challenged the circuit court's closure of four pretrial hearings and its filing under seal of the State's pretrial motion to allow evidence of other crimes, the State's supplemental answer to discovery, and both parties' witness lists. Applying our decision in *Pelo* and the United States Supreme Court's decision in *Waller v. Georgia*, 467 U.S. 39, 47 (1984), the First District found the presumption of access did not attach to the challenged documents and related hearings. *Kelly*, 397 Ill. App. 3d at 259, 921 N.E.2d at 358. The *Kelly* court explained as follows: "As in *Pelo*, the media intervenors did not have a right to a potential exhibit that had not yet been introduced into evidence; similarly, in the case at bar, the media intervenors did not have a right to discovery, other-crimes evidence, or a list of witnesses because none of it had been introduced into evidence." *Kelly*, 397 Ill. App. 3d at 259, 921 N.E.2d at 358. Moreover, "the hearings at issue bore no resemblance to the hearing in *Waller*, where the presumption of access applied."

Kelly, 397 Ill. App. 3d at 259, 921 N.E.2d at 358. The *Kelly* court further found "the subject matter of these proceedings is not one that has been historically open to the public or which have a purpose and function that would be furthered by disclosure." *Kelly*, 397 Ill. App. 3d at 259, 921 N.E.2d at 358.

¶ 16 In this case, the intervenors are seeking to examine defendant's fourth and fifth

motions *in limine*. As in *Skolnick*, once the circuit court granted defendant leave to file the two legal documents, they became court records. See *Skolnick*, 191 Ill. 2d at 232, 730 N.E.2d at 17. Moreover, in criminal cases, the purpose of a motion *in limine* is both to (1) "determine prior to trial what, if any, evidence ought to be admitted at trial" and (2) "establish whether any such evidence that would ordinarily be admissible is inadmissible because of improper police proceedings." *People v. DeJesus*, 163 Ill. App. 3d 530, 532, 516 N.E.2d 801, 802 (1987). Thus, unlike the search warrant documents in *Gee*, motions *in limine* are generally related to the criminal trial proceedings and not the criminal investigation, which has historically been private. Additionally, we disagree with the *Kelly* court's suggestion motions *in limine* and their related hearings have traditionally not been accessible to the public. Despite the fact motions *in limine* address *potential* evidence for trial, they are contained in the general criminal case file and in the general record on appeal. The hearings on such motions are generally not closed. Further, we find *Kelly*'s reliance on our decision in *Pelo* was misplaced, as that case addressed an evidence deposition, which had not yet been presented at trial, and not a legal document filed with the court that mentioned the evidence deposition. Accordingly, we find the motions *in limine* pass the experience test.

¶ 17 As to the logic test, we find access to motions *in limine* plays a significant positive role in the functioning of the criminal justice process. Sometimes, such motions expose improper police action, as noted in *DeJesus*, or attorney conduct (*i.e.*, discovery violations). Moreover, public access to evidentiary decision making " 'enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system,' " *Press II*, 478 U.S. at 9 (quoting *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 508 (1984) (*Press I*)). Additionally, just as "suppression

hearings often are as important as the trial itself" (*Waller*, 467 U.S. at 46), motions *in limine* can also be critical to the course of a criminal trial. Thus, we find motions *in limine* also pass the logic test.

¶ 18 Accordingly, we find the presumption of access attaches to motions *in limine* filed with the court in criminal proceedings. In this case, when the circuit court granted defendant leave to file his fourth and fifth motions *in limine*, the presumption of access attached. See *Skolnick*, 191 Ill. 2d at 232, 730 N.E.2d at 17. Thus, the circuit court erred by finding the presumption did not attach to the documents at issue. Since the presumption did attach to the documents at issue, the next step is to determine whether the presumption has been rebutted. The circuit court did not address that issue, and thus we remand the cause to the circuit court for further proceedings on the intervenors' objection to defendant's fourth and fifth motions *in limine* being under seal.

¶ 19 III. CONCLUSION

¶ 20 For the reasons stated, we reverse the McLean County circuit court's judgment ordering defendant's fourth and fifth motions *in limine* to remain sealed and remand the case for further proceedings.

¶ 21 Reversed; cause remanded with directions.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
MCLEAN COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. KIRK P. ZIMMERMAN, Defendant v. THE PANTAGRAPH, WGLT FM, and THE ILLINOIS PRESS ASSOCIATION, Interveners.	))))))))))))))))	NO. 2015-CF-0894

FILED
JAN 03 2017
McLEAN COUNTY
CIRCUIT CLERK

ORDER

Cause coming on for hearing on Defendants Fourth and Fifth Motions *in Limine*, and Interveners' request for access to hearings on those Motions, and for access to the Motions filed with the Court, the Court orders as follows:

1. The state acknowledges in open court that the materials in Defendant's Fourth and Fifth Motions *in Limine* will not be used in the State's case in Chief. Defendant's Fourth and Fifth Motions *in Limine* are granted without objection.

2. Interveners Motion that the Court open to public inspection the Motions filed under seal is denied. The Motions were filed under seal for the purpose of allowing the court to review the motions *in camera*, subject to review at a hearing to be held this date. The Court orders that those motions will remain sealed in the court record, until after selection of a jury in this cause. At that time the Court will review the Motion to Unseal and will have a hearing on the same.

Entered this 30 day of January, 2017.

Circuit Judge

Approved as to form only:

States Attorney
Defendant
Interveners

C-065

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF MCLEAN

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	No. 2015-CF-0894
v.	)	
KIRK ZIMMERMAN,	)	
Defendant.	)	

DEFENDANT'S MOTION TO CLOSE PROCEEDINGS ON MOTIONS IN LIMINE

COMES NOW the Defendant, Kirk Zimmerman, by and through undersigned counsel, and files the following Motion seeking to close proceedings on Defendant's Fourth and Fifth Motions in Limine in this matter because sensitive and/or inflammatory personal information about Defendant and about others who are not party to these proceedings will be the subject of those proceedings. In support of this motion, Defendant states the following:

I. Introduction

Mr. Zimmerman is charged with First Degree Murder, arising from the death of Mr. Zimmerman's former spouse, Pamela ("Pam") Zimmerman, who apparently died from gunshot wounds sustained on or about the evening of November 3, 2014.

Defendant has filed motions in limine in this matter to exclude certain evidence from trial. The evidence at issue in Defendant's Fourth and Fifth Motions in Limine includes sensitive, private, and/or inflammatory information about Defendant and about others who may be called as witnesses or who are otherwise connected to Defendant. Defendant and these other individuals have privacy rights concerning the sensitive information that must be protected by the Court. Given the amount of media attention this case has attracted, Defendant has moved to have the

motions in limine and any responses thereto filed under seal to protect the witnesses' privacy rights and to ensure Defendant's right to a fair trial is preserved. Because the motions seek exclusion from trial of the evidence at issue, and because it is Defendant's position that the evidence is inadmissible, publication of that same information before trial would irreparably taint the jury pool for this case.

The same considerations that warrant filing the motions under seal also require closure of the hearings on the motions in limine. The sensitive information described in the motions will inevitably be discussed at hearings on those motions, and permitting public and/or media access to the hearings will defeat the purpose of sealing the motions in the first place. Given the amount of media attention this case has attracted, the privacy rights at issue and Defendant's right to a fair trial are almost certain to be violated through publication of the sensitive information if the proceedings are not closed.

II. Statement of Facts

The motions at issue seek to exclude evidence at trial, including evidence that is extremely inflammatory, personal, and sensitive, and will be more prejudicial than probative. Defendant seeks closure of the hearings on the motions in limine for the similar reasons as those for which he sought that the motions in limine at issue be filed under seal, including to protect identities and sensitive personal information concerning potential witnesses, and to protect Defendant's right to a fair trial by avoiding jury contamination due to the high level of publicity this case continues to receive.

III. Principles of Law and Argument

There is a presumptive right to public access to many court proceedings and documents, based in three sources of law. *People v. Pelo*, 384 Ill.App.3d 776, 780-81 (2008). These sources

include freedom of press as granted by both the U.S. and Illinois Constitutions, a traditional common-law right of access, and a statutory right of access through the Illinois Clerks of Courts Act. *People v. Kelly*, 397 Ill.App.3d 232, 242 (2009), citing *Pelo*, 384 Ill.App.3d 780-81; U.S. Const. amend. I; Ill. Const. art. I, § 4; 705 ILCS 105/16 (6) (West 2008).

"The constitutional presumption applies to court proceedings and records (1) which have been historically open to the public; and (2) which have a purpose and function that would be furthered by disclosure." *Kelly*, 397 Ill.App.3d at 256, citing *Skolnick v. Altheimer & Gray*, 191 Ill.2d 214, 232 (2000). "Although the presumptions under common law and state statutory law have different sources, our supreme court has held that they are 'parallel' to the first amendment presumption and thus has analyzed the three presumptions together." *Id.*, citing *Skolnick*, 191 Ill.2d at 231-33. "If the presumption applies to a certain type of proceeding or record, the trial court cannot close this type of proceeding or record, unless it makes specific findings demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve those values." *Id.* at 261, citing *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 12-13 (1986).

"A holding that the presumption applies is only one step in the analysis. The presumption provides only a qualified right of access. . . . That right still must be balanced against competing interests, such as the defendant's right to a fair trial and the privacy right of a victim . . . ." *Id.* at 260-61, citing *A.P. v. M.E.E.*, 354 Ill.App.3d 989, 998 (2004).

> If the value asserted is the defendant's right to a fair trial, then the trial court's findings must demonstrate, first, that there is a substantial probability that defendant's trial will be prejudiced by publicity that closure will prevent; and second, that reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.

Id. at 261, citing *Press-Enterprise II*, 478 U.S. at 13-14. "Although 'voir dire is the preferred method for guarding against the effects of pretrial publicity,' we have recognized that there are 'circumstances' where voir dire cannot remove the taint." *Id.*, quoting *People v. LaGrone*, 361 Ill.App.3d 532, 536 (2005). "These 'rare cases' occur when there has been media saturation" in regard to the case. *Id.*, quoting *LaGrone*, 361 Ill.App.3d at 537.

a. No Presumption of Public Access Applies to the Proceedings

The *Kelly* case was a prominent criminal trial involving allegations of statutory rape against the singer R. Kelly. Several documents were filed under seal and several hearings regarding those documents were closed to the public, by order of the court, due to the concern that media coverage would affect the jury pool. *Kelly*, 397 Ill.App.3d at 233-34. The appellate court found that no presumption of public access applied to the proceedings and documents at issue in that case—including the State's motion to admit other crimes evidence, the State's supplemental answer to discovery, and both parties' witness lists, as well as pretrial hearings on those items (*id.* at 236-37)—and that even if the presumption did apply, the trial court's order sealing the documents and closing the proceedings was not an abuse of discretion. *Id.* at 270. Specifically, the court stated that "[a]s in *Pelo*, the media intervenors did not have a right to a potential exhibit that had not yet been introduced into evidence; similarly, in the case at bar, the media intervenors did not have a right to discovery, other crimes' evidence, or a list of witnesses, because none of it had been introduced into evidence." *Id.* at 259, citing *Pelo*, 384 Ill.App.3d at 782-83. Moreover, because the proceedings at issue concerned juror questionnaires and the State's other crimes evidence, the court found that the proceedings "are not ones that have been historically open to the public or which have a purpose and function that would be furthered by disclosure." *Id.*

The *Kelly* court also distinguished *Waller v. Georgia*, 467 U.S. 39, 47 (1984), which had found that the presumption of public access attached to a suppression hearing to determine the admissibility of wiretap evidence. In so holding, the Supreme Court noted that "the need for a public hearing is 'particularly strong' when the issue is suppression pursuant to the fourth amendment, since the public has 'a strong interest in exposing substantial allegations of police conduct to the salutary effects of public scrutiny.'" *Kelly*, 397 Ill.App.3d at 258, citing *Waller*, 367 U.S. at 47. Because no questions of police conduct were at issue in *Kelly*, the court found that the concerns motivating *Waller* were not present, and that no presumption of public access applied.

Like in *Kelly*, the presumption of the public right of access does not apply here. The proceedings that are the subject of this Motion—hearings on motions in limine to exclude prejudicial and inflammatory evidence from trial—"are not ones which have been historically open to the public, or which have a purpose and function that would be furthered by disclosure." *Kelly*, 397 Ill.App.3d at 259. In fact, as to the second part of the analysis, the proceedings have a purpose and function that would actually be impaired by disclosure. The purpose of the hearings is to determine whether the inflammatory evidence discussed in the sealed motions in limine, which is overwhelmingly more prejudicial than probative, should be excluded from trial. Public access to that information would taint the jury pool and defeat the purpose of keeping the information out of the jury's hands, since any potential jury member would have already been exposed to the information prior to trial. Additionally, since nothing at issue in the motions in limine has been entered into evidence yet, and may never be entered into evidence, the media and the public have no right to the information at this time. *Id.*, citing *Pelo*, 384 Ill.App.3d at 782-83. Further, no public concerns regarding police misconduct are at issue in the motions in

limine that contain the inflammatory, sensitive information sought to be protected here. *See Waller*, 367 U.S. at 47. Because the presumption of public access does not apply to any proceedings on the motions in limine, which have already been filed under seal, the Court is well within its discretion to order the proceedings on the motions in limine be closed to the public and to the media.

b. Even if the Presumption Applied Here, the Balancing of Interests Favors Sealing the Documents

Even assuming the presumption of public access were to apply here, though, the *Press-Enterprise II* analysis also favors closing the hearings on the sealed motions. The *Kelly* court applied the analysis to the facts in that case, even though it had already found the presumption did not apply. *Kelly*, 397 Ill.App.3d at 262. That court weighed the Defendant's right to a fair trial heavily in balancing the competing interests of the parties. Importantly, because this was a case in which the defendant asserted his right to a fair trial, rather than the right to a public trial, "if the trial court had opened the proceedings, it would have had to do so over the defendant's voiced concerns for his constitutional right to a fair trial." *Id.* at 262-63, citing *Waller*, 467 U.S. at 47. And perhaps most tellingly, the court stated, "[t]his court is confident that if defendant Kelly had been convicted, we would be presented with an allegation by the defendant that a media-circus atmosphere precluded him from receiving a fair trial." *Id.* at 263, citing *Waller*, 467 U.S. at 46 ("[t]he central aim of a criminal proceeding is to try the accused fairly"); *Press-Enterprise Co. v. Superior Court of Cal.* (*Press-Enterprise I*), 464 U.S. 501, 508 (1984) ("No right ranks higher than the right of the accused to a fair trial."). The court also considered other factors weighing in favor of closure, including that the case involved a victim who was a minor, and that media "hordes" were attending the courthouse related to the case. *Id.* at 263. It found

that the trial court did not abuse its discretion in ordering the documents sealed and the proceedings closed to the public. *Id.* at 265.

Likewise in this case, the Defendant's right to a fair trial, as well as the privacy concerns of potential witnesses must take precedence over any right the public has to the information to be discussed at the hearings on the motions in limine. *Id.* at 263, quoting *A.P.*, 354 Ill.App.3d at 998 ("a trial court must exercise 'great care' when faced with a media petition for access" in a case in circumstances like these). Bloomington-Normal is a relatively small, tight-knit community, and the case has already been highly publicized to the point of saturation. The exposure to the public of the inflammatory information contained in the motions in limine, which Defendant asserts is not admissible at trial and thus will not otherwise be subject to public scrutiny, would not only violate the privacy of potential witnesses but would jeopardize Defendant's ability to receive a fair trial due to jury pool contamination. In fact, the State will likely concur in the importance of avoiding any appeal based on Defendant's failure to receive a fair trial due to the media scrutiny of his case. *See id.* at 263.

Furthermore, it is highly unlikely that any measures short of closing the proceedings, such as use of pseudonyms, change of venue, or questioning during *voir dire* will be able to effectively protect Defendant's right to a fair trial, should publicity of the inflammatory information to be discussed at the proceedings occur. *See id.* at 264, quoting *LaGrone*, 361 Ill.App.3d at 536-37 ("[W]e have recognized that there are 'circumstances' where voir dire cannot remove the taint. . . . These 'rare cases' occur when there has been media saturation, as the trial court found in the case at bar."). The proceedings cannot be conducted without explicitly describing and discussing the inflammatory, sensitive information at issue in the sealed motions in limine.

Likewise, change of venue and *voir dire* will not be effective to neutralize the harm that publicity of the inflammatory information will cause, nor to protect the fairness of the trial in this matter. Defendant does not desire a change of venue, and a change of venue at this point would hamper the efforts of both parties and considerations of judicial economy, and would result in prejudice. A change of venue at this late stage could itself violate Defendant's right to a fair trial. *Voir dire* will also be ineffective in addressing the release of this sensitive information. Thus, no alternative to closing the hearings will be effective to protect Defendant's right to a fair trial in this case. *Id.* The balancing test thus favors closing the proceedings on the motions in limine, and even if the motions are denied, the Defendant's right to a fair trial requires that the motions and any transcripts from the hearings remain sealed until after jury selection in this matter.

IV. Conclusion

For the foregoing reasons, Defendant respectfully requests that this Court enter its Order closing the proceedings on Defendant's motions in limine to any public or media access.

Respectfully submitted,

ROSENBLUM, SCHWARTZ, ROGERS & GLASS, PC

By: _____

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CERTIFICATE OF SERVICE

Signature above is also certification that a true and correct copy of the above and foregoing document has been mailed via U.S. Postal Service this 14th day of October, 2016, to: Office of the State's Attorney, McLean County, 104 W. Front Street, Room 605, Bloomington, Illinois 61701.

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF MCLEAN

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	No. 2015-CF-0894
v.	)	
KIRK ZIMMERMAN,	)	
Defendant.	)	

DEFENDANT'S MOTION FOR LEAVE TO FILE MOTIONS IN LIMINE UNDER SEAL

COMES NOW the Defendant, Kirk Zimmerman, by and through undersigned counsel, and files the following Motion seeking to seal his Fourth and Fifth Motions in Limine to be filed in this matter because they contain sensitive and/or inflammatory information about Defendant and about others who are not party to these proceedings. In support of this motion, Defendant states the following:

I. Introduction

Mr. Zimmerman is charged with First Degree Murder, arising from the death of Mr. Zimmerman's former spouse, Pamela ("Pam") Zimmerman, who apparently died from gunshot wounds sustained on or about the evening of November 3, 2014.

Defendant expects to file motions in limine in this matter to exclude certain evidence from trial. These motions will necessarily describe the evidence Defendant seeks to exclude. The evidence at issue often includes sensitive, private, and/or inflammatory information about Defendant and about others who may be called as witnesses or who are otherwise connected to Defendant. Defendant and these other individuals have privacy rights concerning the sensitive

information that must be protected by the court. Given the amount of media attention this case has attracted, these privacy rights are almost certain to be violated through publication of the sensitive information if the motions are not filed under seal.

Moreover, given the high level of media saturation regarding this case in the Bloomington-Normal area, any publicity given to the sensitive, inflammatory topics addressed in the Motions in Limine is bound to taint the jury pool for Defendant's case. Defendant's right to a fair trial depends on keeping this information out of the media until after the jury is selected, even if the court denies the Motions in Limine and finds the evidence admissible at trial.

II. Statement of Facts

Defendant intends to promptly file his Fourth and Fifth motions in limine, seeking to exclude evidence at trial, including evidence that is irrelevant, inflammatory, and sensitive, and that will be more prejudicial than probative. While Defendant is unable to provide additional facts without disclosing the evidence at issue, Defendant is prepared to provide the Court with advance copies of these motions in limine for *in camera* examination in the event the Court needs additional facts about the content of these motions to render its decision on this Motion.

III. Principles of Law and Argument

There is a presumptive right to public access to court proceedings and documents, based in three sources of law. *People v. Pelo*, 384 Ill.App.3d 776, 780-81 (2008). These sources include freedom of press as granted by both the U.S. and Illinois Constitutions, a traditional common-law right of access, and a statutory right of access through the Illinois Clerks of Courts Act. *People v. Kelly*, 397 Ill.App.3d 232, 242 (2009), citing *Pelo*, 384 Ill.App.3d 780-81; U.S. Const. amend. I; Ill. Const. art. I, § 4; 705 ILCS 105/16 (6) (West 2008).

"The constitutional presumption applies to court proceedings and records (1) which have been historically open to the public; and (2) which have a purpose and function that would be furthered by disclosure." *Kelly*, 397 Ill.App.3d at 256, citing *Skolnick v. Altheimer & Gray*, 191 Ill.2d 214, 232 (2000). "Although the presumptions under common law and state statutory law have different sources, our supreme court has held that they are 'parallel' to the first amendment presumption and thus has analyzed the three presumptions together." *Id.*, citing *Skolnick*, 191 Ill.2d at 231-33. "If the presumption applies to a certain type of proceeding or record, the trial court cannot close this type of proceeding or record, unless it makes specific findings demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve those values." *Id.* at 261, citing *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 12-13 (1986).

"A holding that the presumption applies is only one step in the analysis. The presumption provides only a qualified right of access. . . . That right still must be balanced against competing interests, such as the defendant's right to a fair trial and the privacy right of a victim . . . ." *Id.* at 260-61, citing *A.P. v. M.E.E.*, 354 Ill.App.3d 989, 998 (2004).

> If the value asserted is the defendant's right to a fair trial, then the trial court's findings must demonstrate, first, that there is a substantial probability that defendant's trial will be prejudiced by publicity that closure will prevent; and second, that reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.

Id. at 261, citing *Press-Enterprise II*, 478 U.S. at 13-14. "Although 'voir dire is the preferred method for guarding against the effects of pretrial publicity,' we have recognized that there are 'circumstances' where voir dire cannot remove the taint." *Id.*, quoting *People v. LaGrone*, 361 Ill.App.3d 532, 536 (2005). "These 'rare cases' occur when there has been media saturation, as the trial court found in the case at bar." *Id.*, quoting *LaGrone*, 361 Ill.App.3d at 537.

The *Kelly* case was a prominent criminal trial involving allegations of statutory rape against the singer R. Kelly. Several motions were filed under seal and several hearings were closed to the public, by order of the court, due to the concern that media coverage would affect the jury pool. *Kelly*, 397 Ill.App.3d at 233-34. The appellate court found that no presumption of public access applied to the proceedings and documents at issue in that case—including the State's motion to admit other crimes evidence, the State's supplemental answer to discovery, and both parties' witness lists, as well as pretrial hearings on those items (*id.* at 236-37)—and that even if the presumption did apply, the trial court's order sealing the documents and closing the proceedings was not an abuse of discretion. *Id.* at 270. Specifically, the court stated that "[a]s in *Pelo*, the media intervenors did not have a right to a potential exhibit that had not yet been introduced into evidence; similarly, in the case at bar, the media intervenors did not have a right to discovery, other crimes' evidence, or a list of witnesses, because none of it had been introduced into evidence." *Id.* at 259, citing *Pelo*, 384 Ill.App.3d at 782-83. Moreover, because the proceedings at issue concerned juror questionnaires and the State's other crimes evidence, the court found that the proceedings "are not ones that have been historically open to the public or which have a purpose and function that would be furthered by disclosure." *Id.*

The *Kelly* court also distinguished *Waller v. Georgia*, 467 U.S. 39, 47 (1984), which had found that the presumption of public access attached to a suppression hearing to determine the admissibility of wiretap evidence. In so holding, the Supreme Court noted that "the need for a public hearing is 'particularly strong' when the issue is suppression pursuant to the fourth amendment, since the public has 'a strong interest in exposing substantial allegations of police conduct to the salutary effects of public scrutiny.'" *Kelly*, 397 Ill.App.3d at 258, citing *Waller*, 367 U.S. at 47. Because no questions of police conduct were at issue in *Kelly*, the court found

that the concerns motivating *Waller* were not present, and that no presumption of public access applied.

Like in *Kelly*, the presumption of the public right of access does not apply here. The motions in limine that are the subject of this Motion "are not ones which have been historically open to the public, or which have a purpose and function that would be furthered by disclosure." *Kelly*, 397 Ill.App.3d at 259. In fact, as to the second part of the analysis, the motions have a purpose and function that would actually be impaired by disclosure. The purpose of the motions is to exclude from trial inflammatory evidence that is more prejudicial than probative, and should not be put before the jury. Public access to that information would taint the jury pool and defeat the purpose of keeping the information out of the jury's hands, since many potential jury members would have already been exposed to the information prior to trial. Additionally, since nothing at issue in the motions in limine has been entered into evidence yet, and may never be entered into evidence, the media and the public have no right to the information at this time. *Id.*, citing *Pelo*, 384 Ill.App.3d at 782-83. Further, no public concerns regarding police misconduct are at issue in the motions in limine that contain the inflammatory, sensitive information sought to be protected here. *See Waller*, 367 U.S. at 47. Because the presumption of public access does not apply in this instance, the Court is well within its discretion to order the motions in limine filed under seal.

Even assuming the presumption of public access were to apply here, though, the *Press-Enterprise II* analysis also favors sealing the motions in limine and closing the hearings on those motions. The *Kelly* court applied the analysis to the facts in that case, even though it had already found the presumption did not apply. *Kelly*, 397 Ill.App.3d at 262. That court weighed the Defendant's right to a fair trial heavily in balancing the competing interests of the parties.

Importantly, because this was a case in which the defendant asserted his right to a fair trial, rather than the right to a public trial, "if the trial court had opened the proceedings, it would have had to do so over the defendant's voiced concerns for his constitutional right to a fair trial." *Id.* at 262-63, citing *Waller*, 467 U.S. at 47. And perhaps most tellingly, the court stated, "[t]his court is confident that if defendant Kelly had been convicted, we would be presented with an allegation by the defendant that a media-circus atmosphere precluded him from receiving a fair trial." *Id.* at 263, citing *Waller*, 467 U.S. at 46 ("[t]he central aim of a criminal proceeding is to try the accused fairly"); *Press-Enterprise Co. v. Superior Court of Cal.* (*Press-Enterprise I*), 464 U.S. 501, 508 (1984) ("No right ranks higher than the right of the accused to a fair trial."). The court also considered other factors weighing in favor of closure and sealing documents, including that the case involved a victim who was a minor, and that media "hordes" were attending the courthouse related to the case. *Id.* at 263. It found that the trial court did not abuse its discretion in ordering the documents sealed and the proceedings closed to the public. *Id.* at 265.

Likewise in this case, the Defendant's right to a fair trial, as well as the privacy concerns of potential witnesses must take precedence over any right the public has to the information contained in the motions in limine. *Id.* at 263, quoting *A.P.*, 354 Ill.App.3d at 998 ("a trial court must exercise 'great care' when faced with a media petition for access" in a case involving circumstances like these). Bloomington-Normal is a relatively small, tight-knit community, and the case has already been highly publicized to the point of saturation. The exposure to the public of the inflammatory information contained in the motions in limine, which Defendant asserts is not admissible at trial, would not only violate the privacy of potential witnesses but would jeopardize Defendant's ability to receive a fair trial due to jury pool contamination. In fact, the

State will likely concur in the importance of avoiding any appeal based on Defendant's failure to receive a fair trial due to the media scrutiny of his case. *See id.* at 263.

Furthermore, it is highly unlikely that any other measures such as redaction, use of pseudonyms, change of venue, or questioning during *voir dire* will be able to effectively protect Defendant's right to a fair trial, should publicity of the inflammatory information in the motions in limine occur. *See id.* at 264, quoting *LaGrone*, 361 Ill.App.3d at 536-37 ("[W]e have recognized that there are 'circumstances' where voir dire cannot remove the taint. . . . These 'rare cases' occur when there has been media saturation, as the trial court found in the case at bar."). Particularly because of the media saturation already existing regarding this case, and the irrelevance and inflammatory and very sensitive nature of the information discussed in the motions in limine, no alternative to sealing the motions will be effective to remedy publicity of such information. *Id.* The balancing test thus favors sealing the motions and closing all hearings as to those motions.

IV. Conclusion

For the foregoing reasons, Defendant respectfully requests that this Court enter its Order directing that Defendant's Fourth and Fifth Motions in Limine and any exhibits or responses thereto to be filed under seal of the Court.

Respectfully submitted,

ROSENBLUM, SCHWARTZ, ROGERS & GLASS, PC

By: _____

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CERTIFICATE OF SERVICE

Signature above is also certification that a true and correct copy of the above and foregoing document has been mailed via U.S. Postal Service this 14th day of October, 2016, to: Office of the State's Attorney, McLean County, 104 W. Front Street, Room 605, Bloomington, Illinois 61701.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
MCLEAN COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
v.	)	NO. 2015-CF-0894
KIRK P. ZIMMERMAN,	)	
Defendant	)	
v.	)	
THE PANTAGRAPH, WGLT FM, and THE ILLINOIS PRESS ASSOCIATION,	)	
PROPOSED PETITIONERS.	)	

PETITION TO INTERVENE AND
OBJECTIONS TO DEFENDANT'S MOTION TO
CLOSE COURTROOM AND TO FILE MOTIONS IN LIMINE UNDER SEAL

COME NOW several news organizations, including THE PANTAGRAPH, WGLT FM, and THE ILLINOIS PRESS ASSOCIATION, by and through their attorney, Donald M. Craven, P.C., and for their Petition to Intervene and in strong opposition to the defendant's motions state the following:

PETITION TO INTERVENE

1. The Pantagraph is a general circulation daily and Sunday newspaper published in Bloomington and distributed throughout McLean County and beyond by Pulitzer Community Newspapers, Inc.

2. WGLT FM is a public radio station owned by Illinois State University and broadcasting on 89.1 MHz at Normal, Illinois. It broadcasts primarily news, jazz and blues.

3. The Illinois Press Association ("IPA") is a state newspaper association representing more

than 500 daily and weekly newspapers. The IPA is dedicated to promoting and protecting the First Amendment interests of newspapers and citizens before the Illinois legislature and Illinois courts.

4. These news organizations serve their readers, listeners and members by covering the proceedings and cases of the McLean Circuit County, including trial and pre-trial hearings of general interest. These news organizations have covered developments concerning the filing, prosecution and trial of defendant Zimmerman in connection with the death of Pamela Zimmerman. All intend to continue covering this case as it proceeds through trial, and object vigorously to defendant's effort to deny them access to the proceedings of this court and the trial participants who are most knowledgeable about those events.

5. News organizations have constitutional, statutory and common law rights to have access to and to inspect the records of this Court, which rights should not be limited in the absence of certain specific factual findings by this Court.

6. Intervention is the appropriate method to allow these news organizations to present their objections and be given notice or any efforts to limit the news gathering process. *In re Associated Press*, 162 F. 3d 503 (7th Cir. 1998); *People v. LaGrone*, 361 Ill. App. 3d 532 (4th Dist. 2006).

7. Defendant's motions are nearly identical and incredibly bare-bones, with just the slimmest of conclusory allegations and no supporting facts. It does not begin to allege, let alone demonstrate a proper basis either for sealing documents or closing criminal proceedings to the press and public.

8. Defendant's motions fall far short of what the U.S. Supreme Court and the Illinois Supreme Court have held must be established by evidence, not just conclusory pleading, and thus

should be denied. The issues relating to Defendant's motions are addressed in the attached Memorandum.

WHEREFORE, petitioners pray that this court enter orders:

a. allowing Petitioners to intervene for the limited purposes set forth herein, and for purposes of receiving notice of motions and hearings relating to the matters set forth herein; and

b. Denying Defendant's motion to close pretrial proceedings and restricting extrajudicial statements of counsel.

Respectfully Submitted,
All Petitioners,

BY: _____
Donald M. Craven, Attorney for Petitioners

Donald M. Craven (#6180492)
Donald M. Craven, P.C.
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PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was forwarded to:

John P. Rogers
120 S. Central Avenue, Suite 130
Clayton, Missouri 63105

Office of the State's Attorney
McLean County
104 W. Front Street, Room 605
Bloomington, Illinois 61701

by depositing the same in a United States Post Office box in Springfield, Illinois, enclosed in an envelope, address as identified above, with proper postage fully prepaid on November 14, 2016.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
MCLEAN COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
v.	)	NO. 2015-CF-0894
KIRK P. ZIMMERMAN,	)	
Defendant	)	
v.	)	
THE PANTAGRAPH, WGLT FM, and THE ILLINOIS PRESS ASSOCIATION,	)	
PROPOSED PETITIONERS.	)	

MEMORANDUM OF LAW IN SUPPORT OF PETITION TO INTERVENE AND OBJECTIONS TO DEFENDANT'S MOTION TO CLOSE COURTROOM AND TO FILE MOTIONS *IN LIMINE* UNDER SEAL

Petitioners, THE PANTAGRAPH, WGLT FM, and THE ILLINOIS PRESS ASSOCIATION, have filed a Petition to Intervene in this matter for the purpose of asking this Court to deny Defendant's Motions to close courtroom and to file motions *in limine* under seal.

The press has often been granted the right to intervene in proceedings in order to protect the constitutional, statutory and common law rights relating to access to courts, court hearings and court records. The press successfully used intervention as a means of access to a settlement agreement in *Carbondale Convention Center v. City of Carbondale*, 614 N.E. 2d 539 (5th Dist. 1993); see also *People v. Kelly*, 397 Ill. App. 3d 232, 248 (1st Dist. 2009) (the Court found that "petition to intervene is the appropriate vehicle in Illinois for the media to seek access to closed court proceedings"). The federal courts have engaged in a more involved discussion on this issue, and have held that intervention [pursuant to Fed R. Civ. P 24 (b)] is the appropriate procedure to follow in this

instance. See, generally, *Jessup v. Luther*, 227 F. 3d 993 (7th Cir. 2000), and *Doe v. Marsalis*, 202 F.R.D. 233 (N.D. Ill. 2001).

The United States Supreme Court has held that criminal pretrial proceedings may be closed "only if specific findings are made demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's free trial rights." *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1 (1986), quoting *Press-Enterprise I*, 464 U.S. 501, 510 (1984). Defendant must present this Court with a strong evidentiary record that closure and the denial of access are "necessitated by a compelling governmental interest, and [are] narrowly tailored to serve that interest." *Id.*

A. FIRST AMENDMENT PRESUMPTION OF ACCESS

The constitutional presumption of access applies to court proceedings and records which (a) have historically been open to the press and public; and (b) have a purpose and function that would be furthered by disclosure. *Id.*

In a case dealing with access to court proceedings and court records, the Fourth District Appellate Court articulated the theory of presumption of access in this way:

> The most direct expression of this right of access may be stated this way—the court is a part of government and what goes on in court is the business of the people. Courts function best and most effectively when they are open to the public view. When courts are open, their work is observed and understood, and understanding leads to respect.

In Re Marriage of Johnson, 232 Ill. App. 3d 1068, 1074 (4th Dist. 1992).

The California Supreme Court in *Press-Enterprise II* found that the first amendment right of access to criminal proceedings in a murder trial applied to preliminary hearings. This standard set by the Court "has been viewed as the appropriate standard for 'fair-trial' closures of all parts of the

criminal process to which the [f]irst [a]mendment [r]ight of access applies." *People v. LaGrone*, 361 Ill. App. 3d 532 (4th Dist. 2005) (quoting W. LaFave, J. Israel & N. King, Criminal Procedure § 23.1(e), at 412-13 (2d ed. 1999).

Further, it should be noted in determining the accused right to a fair-trial that "[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions...." *Gannett Co. V. DePasquale*, 443 U.S. 368, 380 (1979).

In this case the Defendant cites heavily to the *Pelo* case and the *Kelly* case, which are distinguishable from the case at hand. Neither of those case dealt with matters that have historically been open to the public. First, the *Pelo* concerned a criminal defendant who was accused of stalking and sexually assaulting several victims. *People v. Pelo*, 384 Ill. App. 3d 776, 777 (4th Dist. 2008). The newspaper was attempting to gain access to a video tape of a evidence deposition that was not submitted into evidence and not played in open court. *Id.* at 781. The Court found that the evidence deposition was not a judicial record, nor was it part of the criminal proceeding. *Id.*

The *Kelly* case concerned a high-profile child pornography prosecution "where the minor victim was alleged to have participated in three-way sex, lesbian sex and other various sex acts." *Kelly*, at 265. In addition to the highly sensitive nature of the alleged crime, the defendant, R. Kelly was an internationally known celebrity and was described by the media as "a prominent entertainer." *Id.* at 233. The newspapers were attempting to gain access primarily to questionnaires for potential jurors and the State's other crimes evidence, proceedings that have not "historically open to the public" nor do they "have a purpose and function that would be furthered by disclosure." *Id.* at 259.

The Defendant's reliance on *Pelo* and *Kelly* is misplaced. Both cases concerned documents

and proceedings that are not historically accessible to the public prior to its introduction to the court. The document sought in *Pelo* was a pretrial evidence deposition as it was not yet introduced into evidence and the public historically does not have the right to discovery materials or evidence before it is admitted into the judicial record or played in open court. *Pelo*, at 781. Similarly, *Kelly* was seeking questionnaires not yet used in court and the State's motion to use evidence of other uncharged crimes. *Kelly*, at 237. The Court's findings for closing the proceedings was because "the elicited testimony concerned participation in different sex acts with a minor", the "trial is under great public scrutiny" and the proximity of the jury selection. *Id.* at 239.

Here, unlike *Pelo* and *Kelly*, the requested access is not to discovery not entered in to the court record, there is no special protections due to a sex crime or a crime involving a minor, nor does Mr. Zimmerman possess the "celebrity" status to create the "media saturation" he claims. Rather, there are other cases that are more on point.

Illinois is clear that the right of access attaches to documents that are filed with the court and "they lose their private nature and become part of the court file and "public component[s] of the judicial proceeding to which the right of access attaches." *Johnson*, at 1074. (See also *Wilson v. American Motors Corp.* (11th Cir.1985), 759 F.2d 1568, 1570-71; *In re Continental Illinois Securities Litigation* (7th Cir.1984), 732 F.2d 1302, 1308-09; *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n* (6th Cir.1983), 710 F.2d 1165, 1177-79; *Publicker Industries, Inc. v. Cohen* (3d Cir.1984), 733 F.2d 1059, 1067-71; *Rushford v. New Yorker Magazine, Inc.* (4th Cir.1988), 846 F.2d 249, 253.) Once the right of access is attached "only a compelling reason, accompanied by specific factual findings, can justify keeping them from public view." *Johnson*, at 1075. This right of access cannot be overcome by mere conclusory assertions that the information is inflammatory, sensitive or personal, evidence could be inadmissible, or the case has been subject

to some publicity, without fact-specific reasons. *LaGrone*, at 536-37.

B. BALANCING OF INTERESTS FAVORS ACCESS

The Defendant attempts to argue that his right to a fair trial outweighs the presumption of access here. However, the Defendant fails to make any specific factual arguments that his right to a fair trial would be deprived and further failed to show make specific factual arguments showing that no alternatives to closure exists.

Again, Defendant cites mostly to *Kelly* to support his argument that he would be denied a fair trial. However, he failed to state any specific facts that support this argument. To be sure, the facts in the case as hand fall far short to the facts that the court used in *Kelly* in ordering the documents sealed and the proceedings closed.

In *Kelly*, the media interveners reported that "[c]elebrity-obsessed culture will turn its eyes toward the R. Kelly trial next month" and that "hordes of reporters and cameramen [are] expected to decend [on the courthouse]" and that "[m]ore than 330 reporters have expressed interest in covering the case with news agencies from as far away as France, Japan, Australia and England indicating they'll attend." *Id.* at 263. The intense publicity was an undisputed fact in the *Kelly* case. *Id.* The Court determined that no alternatives, including redactions, use of pseudonyms, *voir dire* questioning, nor change of venue could protect the defendant's right to a fair trial due to the international media saturation. *Id.* at 264. Additionally, the Court felt that the proximity of the jury selection, that was two weeks away, could be contaminated or prejudiced unduly from the publicity. *Id.* at 239. The Court determined that even if the presumption applied," . . . "the privacy right belonging to the victim as both a minor and an alleged sex crime victim" outweighed the media's right to free speech and free press. *Id.* at 265.

In this case, Defendant Zimmerman falls far short of the famous celebrity status of defendant

R. Kelly in the *Kelly* case. Defendant Zimmerman, a system analyst employed at State Farm, does not quite reach the same celebrity status as an internationally known recording artist. Further, the details of the case, while tragic, are not extraordinary, leading to the widespread media coverage as in *Kelly*. Defendant also failed to give any factual information to support this, as was given in *Kelly*, other than a conclusory statement that "Bloomington-Normal is a relatively small, tight-knit community, and the case has already been highly publicized to the point of saturation." See Defendant's Motion to Close Proceedings on Motions in Limine, at p. 7. Bloomington-Normal is a relatively large community of nearly 180,000 people with numerous colleges, including Illinois State University and Illinois Wesleyan University. See http://www.visitbn.org/about/. No evidence has been presented to show that this case has been publicized more than the average murder case in a given community that would bring it to the same standard used in *Kelly* to show that *voir dire* or a change of venue would not be an effective alternative to closure. And, as the Court in *LaGrone* held, a change of venue is preferred over closing any part of these proceedings.

Defendant states that the information is inflammatory and would violate the privacy of potential witnesses, he also states that they should only remain sealed until after jury selection in this matter. Defendant's Motion to Close Proceedings on Motions in Limine, at p. 8. Although Defendant offered no details, it can not be assumed that this information does not satisfy the heavy burden of establishing "a compelling interest" or "a compelling reason" why access should be restricted by the public if the Defendant feels it can be released after the jury is selected. *Johnson*, at 1075.

This case is far more similar to the facts in *LaGrone*. In *LaGrone*, the murder defendant sought to close proceedings on his motion *in limine* regarding the admissibility of certain evidence and statements. *LaGrone*, at 533. The defendant argued that (1) if the evidence was made public but ruled inadmissible, it would present a problem in selecting a jury; (2) the media was likely to repeat

the inadmissable evidence due to the publicity in the case; and (3) there was no alternative to closure. *Id.* at 536. The Court found that these reasons did not constitute a sufficient basis for closure. The Court acknowledged that "[t]he potential *always* exists that the media will misuse, misstate, or misconstrue the facts in reporting," however opined that "[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." *Id.* at 537. In finding that the information would taint potential jurors the Court stated that "[w]idespread publicity does not necessarily result in widespread knowledge among potential jurors of the facts reported." *Id.*

There is no basis in law or fact for defendant to claim that the extraordinary remedy of barring the press and public from hearings is the only way he can hope to get a fair trial. Barring the press and public from attending and observing pretrial proceedings, particularly on this record, would be an incredibly undue restriction upon the First Amendment and common law rights of access to judicial proceedings.

Defendant's motion falls far short of what the U.S. Supreme Court and the Illinois Supreme Court have held must be established by evidence, not just conclusory pleading, and thus should be denied.

WHEREFORE, petitioners pray that this court enter orders:

a. allowing Petitioners to intervene for the limited purposes set forth herein, and for purposes of receiving notice of motions and hearings relating to the matters set forth herein; and

b. Denying Defendant's motion to close pretrial proceedings and to file certain motions under seal.

Respectfully Submitted,
THE PANTAGRAPH, WGLT FM, and THE ILLINOIS PRESS ASSOCIATION,
Petitioners,

BY: _____
Donald M. Craven, Attorney for Petitioners

Donald M. Craven (#6180492)
Donald M. Craven, P.C.
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PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was forwarded to:

John P. Rogers
120 S. Central Avenue, Suite 130
Clayton, Missouri 63105

Office of the State's Attorney
McLean County
104 W. Front Street, Room 605
Bloomington, Illinois 61701

by depositing the same in a United States Post Office box in Springfield, Illinois, enclosed in an envelope, address as identified above, with proper postage fully prepaid on November 14, 2016.

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF MCLEAN

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	No. 2015-CF-0894
v.	)	
KIRK ZIMMERMAN,	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO MEDIA INTERVENORS' PETITION TO INTERVENE AND OBJECTIONS TO DEFENDANT'S MOTION TO CLOSE COURTROOM AND TO FILE MOTIONS IN LIMINE UNDER SEAL

NOW COMES Defendant Kirk Zimmerman, by and through undersigned counsel, and for his response to The Pantagraph's, WGLT FM's, and The Illinois Press Association's (together, "Media Intervenors'") Petition to Intervene and Objections to Defendant's Motion to Close Courtroom and to File Motions in Limine Under Seal, respectfully states as follows:

I. Background and Procedural History

Mr. Zimmerman is charged with First Degree Murder, arising from the death of Mr. Zimmerman's former spouse, Pamela ("Pam") Zimmerman, who apparently died from gunshot wounds sustained on or about the evening of November 3, 2014.

Weeks ago, Defendant filed a Motion to Seal Motions in Limine, and a Motion to Close Proceedings on Motions in Limine. The motions in limine at issue seek to exclude certain evidence, which is not yet on the record, from trial due to its prejudicial and sensational nature. The evidence at issue includes sensitive, private, and/or inflammatory information about Defendant and about others who may be called as witnesses or who are otherwise connected to Defendant. Defendant and these other individuals have privacy rights concerning this sensitive

information that must be, and have historically been, protected by the Court. This case has been subject to intense media scrutiny, and therefore Defendant seeks sealing of the motions and closure of the proceedings on those motions to protect the privacy rights of the individuals involved and because Defendant's right to a fair trial is almost certain to be violated through publication of the inflammatory information at issue.

The hearing on Defendant's Motions to seal the motions in limine and to close the proceedings on the motions in limine is set for Monday, November 21, 2016. Just a week prior to that hearing, the Media Intervenors filed their Motion to Intervene and Objections to Defendant's Motion to Close Courtroom and to File Motions in Limine Under Seal.

II. Law and Arguments

a. The Media Intervenors Cannot Escape the Fact That the "Presumption of Access" Does Not Apply to the Motions and Proceedings at Issue

While it is true that the First Amendment, as well as Illinois statutory and common law, establish a coextensive presumption of public access to court records and proceedings, the Media Intervenors ignore in their Motion that the presumption is limited to those records that "have 'historically been open to the public' and disclosure of which would further the court proceeding at issue." *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 232 (2000), quoting *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989). The motions and proceedings at issue here, which are evidentiary in nature and seek exclusion of inflammatory and sensitive evidence—including prior bad acts evidence—from trial on the ground that the evidence is more prejudicial than probative, are not the sort of records or proceedings that have "historically been open to the public." *See People v. Kelly*, 397 Ill.App.3d 232, 236-37 (2009) (presumption did not apply to the State's motion to admit other crimes evidence, the State's supplemental answer to discovery, and both parties' witness lists, and pretrial hearings on those items); *People v. Pelo*, 384 Ill. App.

3d 776, 781 (2008) (evidentiary deposition was not "a 'judicial record' or part of the 'criminal proceeding itself'" to which the presumption applies). "[R]estraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." *Statland v. Freeman*, 112 Ill. 2d 494, 500 (1986), quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-33 (1984).

Notably, none of the evidence at issue in Defendant's motions has yet been entered into the record, and the purpose of the motions is to *prevent* any such evidence, which Defendant maintains is inadmissible and unduly prejudicial—from being entered into the judicial record, as will be detailed in the Motions in Limine in question. Permitting open media access to such information would defeat the purpose of the motions and the interests of justice in this case by permitting the media to publish information regarding prejudicial evidence which is sought to be excluded, and if excluded, would not be presented at trial. *See id.*

Although the Media Intervenors make much of the obvious fact that *Kelly* involved a celebrity and that Mr. Zimmerman has no equivalent celebrity status, the court's decision that the presumption did not apply to the documents and proceedings at issue in *Kelly* had nothing to do with the defendant's celebrity. Whether the person requesting closure of the documents and proceedings is a public figure is not part of the analysis as to whether the presumption of access exists. The only questions are whether the documents or proceedings are such that have been historically open to the public, and whether those documents or proceedings have a purpose and function that would be furthered by disclosure. *Skolnick*, 191 Ill. 2d at 232; *Kelly*, 397 Ill.App.3d at 256. *Kelly* and *Pelo* both clearly stand for the proposition that evidence not entered into the record, and proceedings concerning the admissibility of such evidence, are not subject to the presumption of public access. It is obvious that the purpose of proceedings to seek exclusion of

prejudicial, inadmissible evidence would not be furthered by, and in fact would be entirely undermined by, public access and publication of those proceedings. The Media Intervenors' attempts to distinguish *Kelly* and *Pelo* changes nothing about the inapplicability of the presumption here.

Because no presumption of public access applies, this Court has full discretion over the decision to seal the motions and to conduct closed hearings on those motions. "[W]hether court records in a particular case are opened to public scrutiny rests with the trial court's discretion, which must take into consideration all facts and circumstances unique to that case." *Skolnik*, 191 Ill. 2d at 231, citing *Nixon*, 435 U.S. at 599; *see also In re Marriage of Johnson*, 232 Ill. App. 3d 1068, 1072 (1992) (the court's power of control over its own records "has been held, in the proper case, to be superior to a public right of access to court records"). The Media Intervenors have stated no law or argument tending to show that the presumption of access should apply here, and the Court should exercise its discretion accordingly.

b. Even if the Presumption Applies, the Balance of Interests Weighs in Favor of Sealing the Motions and Closing Those Proceedings

The presumption of public access does not apply in this case because the motions and proceedings at issue are not those historically open to the public, and their disclosure would not further the purposes of proceedings like these to exclude inadmissible and prejudicial evidence. *Skolnick*, 191 Ill. 2d at 232. However, even if the presumption did apply here, the balance of interests weighs in favor of closure. "The presumption can be rebutted by demonstrating that suppression is 'essential to preserve higher values and is narrowly tailored to serve that interest.'" *Id.* at 232, quoting *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). Here, the "higher value" asserted is Defendant's Sixth Amendment right to a fair trial. U.S. Const. am. VI. Thus, the Court must balance Defendant's right to a fair trial with

the public's right to the information at issue—here, the motions in limine to exclude evidence and proceedings on those specific motions. *Kelly*, 397 Ill. App. 3d at 256.

Moreover, the presumption is not absolute. "[E]very court has supervisory power over its own records and files, and access [may be] denied where court files might[] become a vehicle for improper purposes." *Id.* at 231, quoting *Nixon v. Warner Comms.*, 435 U.S. 589, 598 (1978); *see also Goldstein v. Forbes (In re Cendant Corp.)*, 260 F.3d 183, 194 (3d Cir. 2001) (same). "In order to override the common law right of access, the party seeking the closure of a hearing or the sealing of part of the judicial record 'bears the burden of showing that the material is the kind of information that courts will protect' and that 'disclosure will work a clearly defined and serious injury to the party seeking closure.'" *Id.*, quoting *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3rd Cir. 1994).

To that end, Illinois Supreme Court Rule 201(c)(1) states, "[t]he court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." Ill. Sup. Ct. R. 201(c)(1); *see also Skolnick*, 191 Ill. 2d at 223-24. "The parameters of protective orders are entrusted to the court's discretion." *Id.*, citing *Statland*, 112 Ill. 2d at 499. The court's power of control over its own records "has been held, in the proper case, to be superior to a public right of access to court records." *Johnson*, 232 Ill. App. 3d at 1072. "In order to overcome the presumption of access, the moving party bears the burden of establishing a compelling interest why access should be restricted and that the protective order is drafted 'in the manner least restrictive of the public's interest.'" *Id.* at 1072-73, quoting *Shenandoah Publishing House, Inc. v. Fanning*, 235 Va. 253, 259, 368 S.E.2d 253, 256 (1988).

The Media Intervenors again misapprehend Defendant's argument, as well as the holding of *Kelly*, in arguing that this case is distinguishable from the closure of proceedings that was found appropriate in *Kelly* because Defendant is not a "celebrity." The "celebrity" of the individual seeking closure is not part of the court's analysis under Illinois law. Instead, Defendant argues that the same considerations in *Kelly* which militated in favor of closure of proceedings (which in fact were merely *dicta* because that court had already held the presumption not to apply to the proceedings therein) are present in this case as well.

There has been heavy media scrutiny of this case in the Bloomington-Normal media market since Ms. Zimmerman's death. The Media Intervenor's interest in these pretrial proceedings is reflective of the continuing interest in this case and the extensive coverage they have provided to this case. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976) (to assess "the probable extent of publicity," the trial court properly relied on "newspapers demonstrating that the crime had already drawn intensive news coverage"); *Kelly*, 397 Ill. App. 3d at 263 (citing *Stuart* and noting that the extensive media coverage of the case was undisputed and properly weighed by the court in deciding to close the proceedings). The disclosure to the media of the evidence Defendant seeks to exclude from trial would almost certainly result in public disclosure of that evidence, in violation of Defendant's and witnesses' privacy rights. *Kelly*, 397 Ill. App. 3d at 263.

Most important, however, is the concern for Defendant's right to a fair trial, which will be jeopardized by any media coverage of the sensitive, inflammatory evidence Defendant seeks to exclude from trial. *Id.* at 262-63 ("if the trial court had opened the proceedings, it would have had to do so over the defendant's voiced concerns for his constitutional right to a fair trial. . . . This court is confident that if defendant Kelly had been convicted, we would be presented with

an allegation by the defendant that a media-circus atmosphere precluded him from receiving a fair trial."). *See Press-Enterprise Co. v. Superior Ct. of Cal.* (*Press-Enterprise I*), 464 U.S. 501, 508 (1984) ("No right ranks higher than the right of the accused to a fair trial."). In this investigation as in many other murder investigations, law enforcement has cast a broad net in attempting to gather evidence about suspects and the victim. If Defendant is correct and the evidence at issue in Defendants Motions in Limine is inadmissible and unduly prejudicial, no harm to the media or the public can thus be inferred by the closure of these evidentiary proceedings to the media. If Defendant does not prevail, such evidence as the prosecution seeks to offer will be part of the public record at trial.

It is true that a court must consider alternatives to closure, but again, like in the *Kelly* case, none of the available alternatives will be sufficient to deter the harm to privacy interests to third parties and Defendant's fair trial right. *See Kelly*, 397 Ill. App. 3d at 264 (having considered alternatives including redaction, use of pseudonyms, use of *voir dire* to eliminate jurors exposed to media coverage, and change of venue, the court determined no alternative would avoid the harms contemplated).

Here, Defendant's right to a fair trial must be weighed against the public's interest in the information subject to closure, and in this case because the evidence at issue is not yet part of the record and it is argued should not ever be part of the record, the public's interest in the information is minimal. The public's interest is far outweighed by privacy concerns for third parties, and by Defendant's right to a fair trial. The Court is entitled to use its discretion to make an appropriate ruling to protect those concerns in this case. Under the facts, sealing of the motions in limine and closure of the proceedings on those motions is the most effective and least restrictive manner of accomplishing that goal.

III. Conclusion

For the foregoing reasons, Defendant respectfully requests that this Court enter its Order granting Defendant's Motion to Seal Motions in Limine and Defendant's Motion to Close Proceedings on Motions in Limine, and directing that Defendant's Fourth and Fifth Motions in Limine and any exhibits or responses thereto to be filed under seal of the Court, and that all proceedings on those motions be closed to the public.

Respectfully submitted,

SCHWARTZ ROGERS, LLP

By: _____

JOHN P. ROGERS, #6220204
Attorney for Mr. Zimmerman
120 S. Central Avenue, Suite 130
Clayton, Missouri 63105
(314) 862-4332
Facsimile 862-8050
john@schwartzrogers.com

CERTIFICATE OF SERVICE

Signature above is also certification that a true and correct copy of the above and foregoing document has been mailed via U.S. Postal Service this __th day of November, 2016, to: Office of the State's Attorney, McLean County, 104 W. Front Street, Room 605, Bloomington, Illinois 61701.

STATE OF ILLINOIS
COUNTY OF McLEAN

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT

PEOPLE
Plaintiff/Petitioner,

vs

KIRK ZIMMERMAN
Defendant/Respondent.

No. 2015 CF 0894

FILED
NOV. 21 2016
CIRCUIT CLERK
McLEAN COUNTY

ORDER

Defendants MOTION FOR LEAVE TO FILE MOTIONS IN LIMINE #4, 5 IS GRANTED.

DOCUMENTS ARE FILED FOR 90 DAYS. ~~CAL~~ THE DOCUMENTS SHALL NOT BE UNSEALED ~~RELEASED~~ UP TO AND UNTIL ~~A~~ THE COURT ORDERS SAME.

Form
ASA-ALW. GLF
Intervenors DM Cam

DATE: 11-21-16

Judge

Name
Attorney for
Address
City
Telephone

C-039

1 IN THE CIRCUIT COURT

2 FOR THE ELEVENTH JUDICIAL CIRCUIT

3 McLEAN COUNTY, BLOOMINGTON, ILLINOIS

4 THE PEOPLE OF THE STATE OF) ILLINOIS,)
5)
Plaintiff,)
6 vs.) No. 15 CF 894
)
7 KIRK P. ZIMMERMAN,)
)
8 Defendant.)

9 HEARING ON MOTIONS - (EXCERPT)

10 TRANSCRIPT OF PROCEEDINGS

11 BE IT REMEMBERED and CERTIFIED that on, to wit:
12 the 22nd day of December, 2016, the following proceedings
13 were held in the aforesaid cause before The Honorable
14 SCOTT D. DRAZEWSKI, Circuit Judge.

15

APPEARANCES:

16

17 MR. ADAM W. GHRIST
Assistant State's Attorney
18 On behalf of the People

MR. BRADLY RIGDON
Assistant State's Attorney
On behalf of the People

19 MS. MARY KOLL
Assistant State's Attorney
20 On behalf of the People

MR. JOHN P. ROGERS
Attorney at Law
On behalf of the Defendant

21 MR. DONALD M. CRAVEN
Attorney at Law
22 On behalf of the Intervenors

23

24

Amy J. Jennings, RPR, CRR
Official Court Reporter
104 West Front Street
Bloomington, IL 61701
IL CSR No. 084-004135

1 THE COURT: Okay, the next matter is 15 CF 894,
2 People versus Kirk Zimmerman.
3 Matter comes on for previously scheduled motions,
4 more specifically, at the last court date, November 21st,
5 2016, the hearing on the Motions to Seal the Defendant's
6 Fourth and Fifth Motions in Limine as Well as to Close the
7 Courtroom were set for hearing on today's date.
8 We had started a hearing with respect to a
9 modification of the defendant's bond that was -- modified
10 conditions of release, I'm sorry -- that was also continued
11 over for today's date.
12 Present at this time would be the defendant along
13 with his attorney, Mr. Rogers; Mr. Ghrist appears for the
14 State; Mr. Craven appears on behalf of Intervenors, that
15 designation as well as authority to intervene having been
16 allowed also at the last court date.
17 We do have representatives from Court Services
18 here today as well. Randi, what's your --
19 MS. STORM (Adult Court Services): Storm.
20 THE COURT: You know what I wanted to say.
21 Anyway, Ms. Storm and Ms. Ledlow, okay, for Adult Court
22 Services. And then Ms. Storm has filed in a compliance
23 report and I'm sure shared with counsel.
24 I want to address what was actually scheduled

1 today first, and I'm not sure what that means as far as
2 Court Services, but I don't want to get bogged down in
3 anything new that could or might detract from what was
4 actually scheduled for today.
5 So, although we can and will be addressing, if
6 necessary, what relief may be sought by one or both of the
7 parties here as it relates to the compliance report that was
8 just filed, but we are going to not have the tail wag the
9 dog and we are going to deal with that if there's time, and
10 probably it's going to be appropriate during the hearing on
11 the Motion to Modify Conditions of Release, okay.
12 All right, at the last hearing, I believe at the
13 end of same, I had asked counsel, more specifically
14 Mr. Ghrist and Mr. Rogers, to ascertain in the interim
15 period whether or not there could or may be an agreement
16 that would be reached solely as it would relate to the
17 issues raised within the Defendant's Fourth and Fifth
18 Motions in Limine without the necessity of a hearing. And,
19 if so, that could or might obviously negate the need to have
20 an argument on the motion to seal the motions on a
21 continuing basis, they having been ordered sealed through
22 and including today's date, and/or whether or not there
23 would need to be argument on whether to seal the courtroom,
24 for argument on those motions only.

1 I'm sure that counsel have done that. Who wants
2 to report what, if any, progress was made as to that charge?
3 MR. ROGERS: Your Honor, I called Mr. Ghrist this
4 week. He was gracious enough to return my call with an
5 e-mail stating that it's his intention, while reserving the
6 right to revisit the issue depending on what is brought up
7 during cross examination and in my direct case, but it's the
8 State's position at this time that the State does not intend
9 in their case in chief to get into any of the areas raised
10 by me in Defendant's Fourth Motion in Limine and Defendant's
11 Fifth Motion in Limine.
12 Therefore, I anticipate if the Court issues an
13 order, simple order, Defendant's Fourth and Fifth Motions in
14 Limine are sustained at this time, any effort to revisit the
15 contents of those motions will be raised in trial at sidebar
16 if the need arises, but they are sustained at this time.
17 Then it would be my intention to withdraw my motion asking
18 to seal the courtroom, because I don't think it's needed.
19 THE COURT: Okay. Mr. Ghrist.
20 MR. GHRIST: That's correct.
21 THE COURT: Mr. Craven, your position based upon
22 the representations made by counsel?
23 MR. CRAVEN: That leaves only the question of
24 access to the Motions in Limine that have previously been

1 filed.
2 THE COURT: Okay.
3 MR. ROGERS: I agree.
4 My further request, your Honor, at this time is to
5 continue to deny the press's access to the subject matters
6 detailed in Fourth and Fifth Motions in Limine. We can
7 revisit it at the conclusion of voir dire. I anticipate my
8 request would be to continue to suggest that those motions
9 are not available to the media until the conclusion of
10 trial, but I understand the Court's -- the Court may want to
11 revisit it slightly before that.
12 In support of my suggestion, I think now more than
13 ever, because the State agrees with the inflammatory nature
14 and potential irrelevant nature of the contents of Four and
15 Five, that access to the subject matter raised -- and the
16 Court's had the ability to inspect these -- would result in
17 the publication of inflammatory, prejudicial, irrelevant
18 materials that could contaminate the jury pool and make it
19 difficult for us to pick a jury in this matter.
20 That is our position.
21 THE COURT: Mr. Ghrist.
22 MR. GHRIST: First, let me respond by saying as to
23 the State's agreement with the Fourth and Fifth Motions in
24 Limine, we are agree ing we are not offering those in our

1 case in chief, and that concludes that. I don't want to say
2 I'm agreeing to, you know, the reason we are not doing that.
3 It could be trial strategy. It could be any number of
4 things, relevance and all of those things.
5 I take no position on whether the Court continues
6 to seal these. I will only say that this is a little
7 frustrating because we are not, nor did we, intend on
8 offering these things in our case in chief. During a big
9 case like this, there may be any number of things the
10 State's aware of through an investigation that the press
11 would never become privy of because the State never intends
12 on offering those things as evidence. These things fall
13 into that vein. But for these motions filed, I don't think
14 the public would have ever known these things. And so
15 that's the State's frustration as to where we are at in this
16 crossroads. But as to whether the Court decides to seal
17 indefinitely or not, we'll leave that to the Court.
18 THE COURT: All right. There appears to be an
19 objection that would remain then as it relates from the
20 defendant's perspective, the State taking no position, and
21 the intervenors with regard to whether the Fourth and Fifth
22 Motions in Limine ought and remain sealed until a later
23 time, more specifically what Mr. Rogers has suggested would
24 be following the impaneling of a jury in this case.

1 And so, Mr. Craven, let me hear your legal
2 argument then with respect to why you would oppose that
3 request.
4 MR. CRAVEN: Thank you, your Honor.
5 We believe that the Fourth District Appellate
6 Court set out standards applicable to motions such as this
7 in the *LaGrone* case in finding that the trial court, in
8 order to seal records, as is suggested in this case, must
9 make specific factual findings showing that, first, a
10 substantial probability exists that defendant's right to a
11 fair trial would be prejudiced by publicity that closure
12 would prevent and that reasonable alternatives to close
13 could not adequately protect defendant's fair trial rights.
14 There -- Judge Peters, in *LaGrone,* in the trial
15 proceedings went on to articulate that he thought that the
16 publication of the material at issue in those motions would
17 make it -- would make it difficult to select a jury in
18 DeWitt County, and for that reason -- and the potential
19 misuse and inflammatory nature of the materials -- and for
20 that reason granted the motions.
21 The Appellate Court reversed, finding that the
22 standards of *Press-Enterprise* articulated by the Supreme
23 Court require more than that and, in fact, the trial
24 courts -- the Appellate Court ruled that the trial court's

1 factual findings must show that the pretrial publicity would
2 inflame and prejudice the entire community such that even
3 through voir dire an unbiased jury could not be seated.
4 That's a pretty high standard. And the court
5 found that even though change of venue is a pain --
6 THE COURT: An option.
7 MR. CRAVEN: -- it is an option, and it is an
8 alternative -- it is a less onerous alternative to the
9 constitutional rights being protected than sealing the court
10 files. We don't think that the -- we obviously don't know
11 what the Fourth and Fifth Motions contain, but the burden
12 imposed on the Court in order to sustain a Motion to Seal
13 those records is incredibly high and requires specific
14 factual findings that the entire community would essentially
15 be disqualified during voir dire.
16 It took a morning to pick a trial -- to pick a
17 jury for O.J. Simpson.
18 THE COURT: I was unaware of that.
19 MR. CRAVEN: And, you know, the thought that the
20 entire community of McLean County is going to be, A, aware
21 of the nature of these proceedings, B, the specifics to be
22 disclosed by way of these two motions, and hence the entire
23 community would be disqualified from jury service is, unless
24 there's something in there that is extraordinary, we think

1 that it's a burden that simply can't be met.
2 We'd ask the Court to deny the motions.
3 THE COURT: All right. Thank you, counsel.
4 Even though, Mr. Rogers, you indicated what you
5 were seeking, I'll give you the opportunity to respond to
6 the argument made by Mr. Craven, including the authority
7 that you believe ought or should be persuasive to the Court
8 with respect to your request.
9 MR. ROGERS: Sure. Let me first take -- make a
10 response to the shot taken by Mr. Ghrist as to the decision
11 that I made to file the motions.
12 We discussed this issue with your Honor. And the
13 Court was not comfortable, and, first of all, I am not
14 comfortable trusting witnesses called by the State to comply
15 with directives given by State's Attorneys. So, in order
16 to -- I'm put in a challenging situation, even though I
17 trust Mr. Ghrist and that he would adhere in an oral
18 conversation between the two of us to the Motions in Limine
19 and to keep out prejudicial information, the type that the
20 Court has seen that is listed in great detail in Limine
21 Motion Four and Five, the decision to file the motions is
22 based on one that allows me to move for a mistrial when a
23 direct court order is violated by a potential witness and
24 I'm not put in a position to say -- to get into an argument

1 at sidebar during the middle of a trial about a conversation
2 that we had a year earlier where Mr. Ghrist told me he was
3 not -- he was going to direct his witnesses to avoid a
4 particular area.
5 Two, with respect to my position to continue to
6 seal the documents, the Court is in the best position, as
7 the Court has asked to receive the motions and asked that
8 they be filed under seal, suggested that was an appropriate
9 way for us to proceed.
10 So, while counsel doesn't have the -- and, of
11 course, it's not his fault -- the ability to specifically
12 rely on, nor at this time do I choose to emphasize the
13 inflammatory and overly prejudicial nature of the subject
14 matter in those motions, if the Court's decision is to deny
15 my request and to proceed further by allowing the subject
16 matter to be unsealed in those motions, even though we've
17 agreed upon them, then I have to renew my request to make a
18 detailed argument, which I don't intend to do at this
19 moment, but to preserve the record and to articulate as to
20 why I think the venire panel will be -- Motions for Change
21 of Venue would be appropriate if this got out and the
22 inflammatory nature of the subject matter would prejudice a
23 potential jury pool. I think it is -- I do not think -- I
24 agree, the *LaGrone* case and counsel's recitation of the law

1 is applicable.
2 I also cited in my motion the *R. Kelly* case as
3 well as the *Press-Enterprise versus Superior Court*
4 *California* dicta, which suggests no right ranks higher than
5 the right of the accused to a fair trial. I certainly think
6 that the suggestions that I made that there is no public
7 right of access in this case with the case law that I cited
8 and the motions that I contained that the information and
9 facts in the Motions in Limine are not historically open to
10 the public. In other words, whether Mr. Ghrist agrees with
11 me or not, that this is -- that his decision not to get into
12 Four and Five is a matter of trial strategy, I disagree. I
13 don't think he can make an argument to suggest that the
14 information is admissible when using the balancing test,
15 among other things, that I have cited as law in both of
16 those motions.
17 So, again, your Honor, I would just simply ask for
18 the simple request that I started with, which is for you to
19 continue to make the most cautious approach to allowing my
20 client to have a fair trial moving forward by sustaining --
21 by allowing the documents to continue to be sealed.
22 Contrary, if you choose not to do that, I think I need to
23 revisit and would have to ask for a hearing on the issue of
24 making an additional record in private by asking for a

1 closed hearing to do so.
2 THE COURT: I think you have pretty much addressed
3 the issues raised by Mr. Craven, and I think probably, from
4 my perspective, the better way to do it, particularly since
5 both of you, among other things, have dealt with the impact
6 that it could or might have upon the defendant's right to a
7 fair trial, but rather than proceed in stages or going from
8 point A to point B and then if necessary going from point B
9 to point C, not the least of which is that Mr. Craven,
10 although he is always welcome as a member of the public to
11 monitor this proceeding and any other, but at this point in
12 time his only interest in the case relates to whether or not
13 I would seal the Motions in Limine and/or seal the
14 courtroom.
15 So what I'd rather have you do at this time would
16 be to make that argument that you wish the Court to consider
17 about why I should keep those documents under seal and raise
18 any additional issue which you haven't or argument that you
19 wish to advance in support of your position.
20 MR. ROGERS: With respect to the continued
21 sealing, without getting into the specific subject matters
22 of the motions that the Court has reviewed, I think my
23 record is complete.
24 THE COURT: Okay, all right.

1 As counsel know, and I do appreciate the
2 authorities and citations that were provided to the Court in
3 support of and in opposition to the request to seal the
4 records as well as the courtroom, depending upon your
5 perspective, there isn't a lot of case law on this
6 particular subject, or there appears to be a lot of case law
7 as it might or could arise out of the Fourth District for
8 one reason or another relating to some cases that have drawn
9 attention because of the nature of the crimes.
10 In any event, there aren't a lot of cases, but,
11 nonetheless, there are some general rules, and obviously
12 there are general rules pertaining to constitutional
13 principles, there are general rules relating to statutes,
14 there are general rules relating to case precedent, and that
15 would include certain U.S. Supreme Court decisions as well.
16 So let's start out with the general rule, which is
17 that there is a constitutional presumption of access under
18 the First Amendment that applies to court proceedings and
19 records which, first, have historically been open to the
20 public and, second, which have a purpose and function that
21 would be furthered by disclosure.
22 One of the cases that neither counsel have at
23 least stated in oral argument, may have been referenced in
24 one or more of your memorandums, would be the case of *In Re:*

1 *Gee*, G E E, which is cited at 2010 Ill. App. Fourth 100275.
2 And in the *R. Kelly* case, which was referred to, and that's
3 R period Kelly, K E L L Y, 397 Ill. App. 3d 232, in each of
4 those cases, the Fourth and the First District Appellate
5 Courts in the State of Illinois stated that, first, the
6 Court must determine whether the presumption of access
7 applies to the court proceedings and records at issue. And,
8 if the presumption does not apply, the analysis ends there.
9 In the *Gee* case, the Fourth District Appellate
10 Court determined that there was no right of access by the
11 public and/or intervenors in that case to either the
12 affidavits in support of certain search warrants as well as
13 the return of the search warrant inventory.
14 In another case, *People versus Pelo*, P E L O, 384
15 Ill. App. 3d 776, the Fourth District Appellate Court held
16 that there was no right of public access to an unedited
17 evidence deposition that was taken prior to trial which had
18 not been submitted into evidence nor played in open court.
19 In the *LaGrone* case, L A G R O N E, 361 Ill. App.
20 3d 532, the Fourth District Appellate Court determined that
21 the presumption applied to a pretrial hearing to determine
22 the admissibility of certain statements in a criminal trial.
23 And understandably from the intervenors' standpoint of the
24 *LaGrone* case is the case that I would be focusing in on,

1 too.

2 The *R. Kelly* case came after that, though. And in

3 the *R. Kelly* case, the First District Appellate Court

4 criticized the analysis that was employed, or lack thereof,

5 by the Fourth District in *LaGrone*. The First District,

6 noting that the Fourth District Appellate Court never

7 considered whether the presumption applied, specifically

8 stating, quote:

9 The Fourth District skipped over the question of

10 whether the presumption applied and jumped to the question

11 of whether the trial court appropriately balanced the

12 presumption against other concerns. The Appellate Court

13 held that the trial court failed to make the specific

14 findings needed to rebut the presumption.

15 And if I could place this particular sentence in

16 bold, I would, but it's not in bold in the opinion, but the

17 First District Appellate Court then said, quote:

18 As a result, the *LaGrone* case provides little

19 guidance in determining whether the presumption applies,

20 unquote.

21 This Court also notes that there are U.S. Supreme

22 Court decisions which have also been referred to. One of

23 those was the *Press-Enterprise* case, and another is *Waller*

24 *versus Georgia,* although it wasn't cited by counsel in your

1 oral argument, it was included within your written
2 materials. And in *Waller versus Georgia,* 467 U.S. 39, the
3 U.S. Supreme Court held that the presumption of a public
4 trial under the Sixth Amendment applied to a hearing to
5 determine the admissibility of wiretap evidence, also noting
6 that that hearing was akin to a full-scale bench trial, as
7 that hearing lasted seven days.
8 The Supreme Court held that that presumption
9 applied to a suppression hearing, reasoning that, first, in
10 many cases a suppression hearing will be in effect the only
11 trial if the defendant subsequently pleads guilty pursuant
12 to a plea bargain.
13 Second, that a suppression hearing often resembles
14 a bench trial with testimony by witnesses, arguments by
15 counsel and determinations by the trial court.
16 And, third, that the need for a public hearing is
17 particularly strong when the issue is suppression pursuant
18 to the Fourth Amendment since the public has a strong
19 interest in exposing substantial allegations of police
20 conduct to the salutory -- or salutary, excuse me -- effects
21 of public scrutiny.
22 In the case referred to by counsel, more
23 specifically the formal citation, *Press-Enterprise Company*
24 *versus Superior Court of California,* 478 U.S. 1, the U.S.

1 Supreme Court also held that the presumption applied to a
2 preliminary hearing that lasted 41 days. Once again, the
3 preliminary hearing functioning much like a full-scale
4 trial.
5 Applying *Pelo* and *Waller* to the proceedings and
6 records more specifically that is before the Court at this
7 time, the *Kelly* court stated that the presumption did not
8 attach to the hearings held by the trial judge in the *R.*
9 *Kelly* case or to the State's motion concerning potential
10 evidence. Also did not apply to the State's discovery.
11 Also did not apply to the parties' witness lists.
12 As in *Pelo*, the intervenors didn't have a right to
13 a potential exhibit that had not yet been introduced into
14 evidence. And they noted similarly in the case at bar that
15 the intervenors didn't have the right to discovery to other
16 crimes evidence, because none of it had been introduced into
17 evidence.
18 Those hearings that were held by the trial judge
19 in *R. Kelly* were no resemblance to the type of hearing in
20 *Waller* where the presumption of access applied.
21 In addition, the First District Appellate Court
22 found that the subject matter of the proceedings, and the
23 subject matter of the proceedings in *R. Kelly* related to one
24 issue that isn't before us, which relates to juror

1 questionnaires, but the other would relate to other crimes
2 evidence or bad acts, as it could or might be as well, and
3 the Appellate Court found, again, that that was not a type
4 of proceeding or issue that was historically open to the
5 public or which had a purpose and function that would be
6 furthered by disclosure.
7 The *R. Kelly* court also found that the State's
8 other crimes evidence in that case has historically not be
9 accessible to the public prior to introduction at trial, as
10 potential evidence doesn't carry a presumption of access
11 until or unless it's used in court.
12 In addition, the function of a hearing could be
13 undermined if the public and potential jurors receive access
14 to the information even if the trial court ruled that the
15 State was not entitled to use it.
16 And although the United States Supreme Court held
17 that this reason didn't automatically justify refusing
18 access specifically in the case of Fourth Amendment
19 suppression hearings or California preliminary hearings, it
20 did find public access to an admissibility hearing posed
21 special risks of unfairness where publicity could undermine
22 the whole purpose of such a hearing which is to screen out
23 unreliable or illegally obtained evidence. And, for those
24 reasons, the *R. Kelly* court found that the presumption of

1 access did not apply.
2 In addition, the Court acknowledges the common law
3 right of access to court records. However, *In Re: Gee* also
4 held as to those matters, which were not subject to
5 disclosure or availability to the public at large, that the
6 public's right of access to court proceedings and records is
7 not absolute, and the court has supervisory power over its
8 own records and files and may deny access at its discretion.
9 For the same reasons, I find that the presumption
10 of access does not apply to the Fourth and Fifth Motions in
11 Limine and, as a result, the Motions in Limine will remain
12 sealed and, in addition, will indicate, although not
13 requiring counsel to do so, that if you desire or if you
14 wish to submit a specific Order in Limine which addresses
15 particular items which may or may not be inquired about or
16 which may not be referenced to by either of the parties at
17 the trial, the Court will entertain such an order and also
18 seal the order.
19 MR. CRAVEN: Seal the order, your Honor?
20 THE COURT: Seal the order. If counsel desire to
21 submit an Order in Limine which addresses each of those
22 matters contained within the Fourth and Fifth Motions in
23 Limine, yes.
24 MR. CRAVEN: Seal the -- I -- I just mean to

1 clarify. Seal the motion? Or seal the Court's order?
2 THE COURT: Both. The Motions in Limine will
3 remain sealed until jury selection, and any Order in Limine
4 that is submitted as it relates to the Fourth and Fifth
5 Motions in Limine will also be sealed by the Court until
6 following jury selection.
7 MR. GHRIST: Your Honor, I agree with Mr. Rogers,
8 and I think the Court can simply order that, you know, the
9 orders -- or the motions are granted at this time. I mean,
10 that's fine for the State. Mr. Rogers and I are of
11 agreement we have no intention of offering those in our case
12 in chief, that if the need arises due to something that
13 happens outside our case in chief, we'll bring that to the
14 Court's attention --
15 THE COURT: You can.
16 MR. GHRIST: -- outside the presence of the trier
17 of fact.
18 THE COURT: And I'm sorry for interrupting. And
19 I'm not trying to suggest to you that you switch gears or
20 that you look at things in a different light, as much as one
21 thing that perhaps counsel -- this is Mr. Rogers in
22 particular -- wouldn't be aware of but Mr. Ghrist is, is
23 that I don't do sidebars for a variety of reasons, not the
24 least of which is that although this isn't Carnegie Hall,

1 the jurors can and do hear from counsel when they are
2 arguing in a voice loud enough to be heard by the court
3 reporter and myself, but the Court has not yet made a
4 determination on whether that evidence ought or should be
5 received. So what occurs then is that the jury is taken
6 outside of the courtroom when any such issue arises, and
7 counsel's afforded the opportunity to make your arguments,
8 and then I rule and then advise the jury of the Court's
9 ruling.
10 So, to that extent, it may well be, as in any
11 case, that if you see, for example, a problem area coming
12 down the road, that you might say, Judge, can we approach?
13 And say this might be an appropriate time for you to have
14 the jury taken out because I believe we are getting into an
15 area that could or might be prohibited either under the
16 existing Order in Limine or which I wish to be heard on as
17 it relates to the admissibility of such evidence.
18 But to the extent that there would be an Order in
19 Limine that, again, would be sealed until such time as jury
20 selection would be concluded. That would afford counsel an
21 opportunity to specifically instruct any witness or
22 witnesses as to what it is that they can talk about and what
23 they can't talk about, either for fear of being held in
24 contempt of court for violating any such order and/or

1 sanctioned in another manner, but also to avoid the
2 possibility of any mistrial occurring in the case.
3 So, you don't have to decide that now. I've just
4 granted the Motion to Allow the Fourth and Fifth Motions in
5 Limine to Remain Sealed until after jury selection has
6 concluded. And if there is a submission of an order that is
7 specific in nature, I will have it sealed. If there is not,
8 then, again, the motions themselves will remain sealed.
9 Okay.
10 MR. ROGERS: And, I'm sorry, Judge, the -- while I
11 make a determination as to whether or not to give you a more
12 specific order, those -- those Motions in Limine -- the
13 order of this Court today, generally speaking, are those
14 motions are sustained --
15 THE COURT: Yes.
16 MR. ROGERS: -- by agreement of the parties?
17 Well, sustained in their present form, and parties agree.
18 THE COURT: Oh, yeah, I'm sorry. You are talking
19 about the motions themselves.
20 Other than the Motions in Limine Fourth and Fifth
21 only remaining sealed over objection of Mr. Craven, that the
22 Motion in Limine Fourth and Fifth, as it pertains to defense
23 counsel and the State's Attorney, that it is allowed without
24 objection, meaning the State has agreed not to introduce the

1 types of information or evidence which is contained within
2 those motions.
3 MR. GHRIST: That's my understanding.
4 THE COURT: Okay.
5 Now, Mr. Craven, you are welcome to stay. I want
6 to make sure though, is there any other issue that you wish
7 to address?
8 MR. CRAVEN: No. I believe that, for the moment,
9 my role here is temporarily suspended.
10 THE COURT: Okay. Then you may take leave, and
11 you are welcome anytime.
12 MR. CRAVEN: Thank you, your Honor.
13
14 * * * * * * * * * *
15
16
17 WHICH WERE ALL THE PROCEEDINGS REQUESTED TO BE
18 MADE OF RECORD IN THIS CAUSE ON SAID DATE
19
20
21
22
23
24

CERTIFICATE

I, Amy J. Jennings, Official Court Reporter in and for the County of McLean and State of Illinois, Eleventh Judicial Circuit, do hereby certify the foregoing to be a true and accurate transcript of the proceedings had in the before-entitled cause on said date.

Dated this _____ day of _____, 2016.

_____

AMY J. JENNINGS, RPR, CRR
Official Court Reporter
IL CSR No. 084-004135

APPEAL TO THE FOURTH DISTRICT APPELLATE COURT

FROM THE CIRCUIT COURT FOR THE ELEVENTH JUDICIAL CIRCUIT MCLEAN COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellees,	)	Case No. 2015-CF-0894
	)	
-vs-	)	Judge Scott Drazewski, Presiding
	)	
KIRK P. ZIMMERMAN,	)	
	)	
Defendant-Appellees,	)	
	)	
-vs-	)	
	)	
THE PANTAGRAPH, WGLT FM, and THE ILLINOIS PRESS ASSOCIATION,	)	
	)	
Intervenors-Appellants.	)	

NOTICE OF INTERLOCUTORY APPEAL

YOU ARE HEREBY NOTIFIED that Intervenors-Appellants, The Pantagraph, WGLT FM, and The Illinois Press Association hereby appeals to the Appellate Court of Illinois, Fourth Judicial District from the order of the Circuit Court for the Eleventh Judicial Circuit in McLean County, entered and filed on January 3, 2017, allowing Defendant-Appellee's Motion to Seal the Fourth and Fifth Motions *In Limine*. See Ex. A (Order).

This order effectively sealed Intervenors-Appellants and the public from viewing documents filed with the court and is appealable as of right pursuant to Illinois Supreme Court Rule 307(a)(1). See *A.P. v. M.E.E.*, 354 Ill. App. 989, 990-91 (1st Dist. 2004); *Skolnick v. Altheimer & Gray*, 191 Ill.

2d 214, 221 (2000).

Intervenors-Appellants pray that the Appellate Court reverse said order; order the Circuit Court to unseal and release the Fourth and Fifth Motions *In Limine* to Intervenors-Appellants as well as to the public and press; and grant such other relief from this order as the Court may deem just and proper.

THE PANTAGRAPH, WGLT FM and THE ILLINOIS PRESS ASSOCIATION, Intervenors-Appellants.

By: _____
Donald M. Craven, Their Attorney

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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
MCLEAN COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
v.	)	NO. 2015-CF-0894
KIRK P. ZIMMERMAN,	)	
Defendant	)	
v.	)	
THE PANTAGRAPH, WGLT FM, and THE ILLINOIS PRESS ASSOCIATION,	)	
Interveners.	)	

FILED
JAN 03 2017
McLEAN COUNTY
CIRCUIT CLERK

ORDER

Cause coming on for hearing on Defendants Fourth and Fifth Motions *in Limine*, and Interveners' request for access to hearings on those Motions, and for access to the Motions filed with the Court, the Court orders as follows:

1. The state acknowledges in open court that the materials in Defendant's Fourth and Fifth Motions *in Limine* will not be used in the State's case in Chief. Defendant's Fourth and Fifth Motions *in Limine* are granted without objection.

2. Interveners Motion that the Court open to public inspection the Motions filed under seal is denied. The Motions were filed under seal for the purpose of allowing the court to review the motions *in camera*, subject to review at a hearing to be held this date. The Court orders that those motions will remain sealed in the court record, until after selection of a jury in this cause. At that time the Court will review the Motion to Unseal and will have a hearing on the same.

Entered this 3rd day of January, 2017.

Circuit Judge

Approved as to form only:

States Attorney
Defendant
Interveners

EXHIBIT
C-068

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was forwarded to:

John P. Rogers
ROSENBLUM, SCHWARTZ, ROGERS & GLASS, PC
120 S. Central Avenue, Suite 130
Clayton, Missouri 63105
jrogers@rsrglaw.com

Office of the State's Attorney
McLean County
104 W. Front Street, Room 605
Bloomington, IL 61701

David Robinson
SAAP
725 S. Second Street
Springfield, IL 62701
Drobinson@ilsaap.org

by placing the same in an envelope clearly addressed, with postage fully pre-paid and by placing said envelope in a U.S. Mailbox in Springfield, Illinois on January 20, 2016.

TABLE OF CONTENTS
Record on Appeal

No. 122261

IN THE
SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	On leave to appeal from the
Plaintiff-Appellee,	)	Appellate Court of Illinois,
	)	Fourth District, No.
-vs-	)	4-17-0055.
	)	
KIRK P. ZIMMERMAN,	)	There on appeal from the
	)	Circuit Court of the Eleventh
Defendant-Appellant,	)	Judicial Circuit, McLean
	)	County, Illinois, No.
-vs-	)	2015-SF-0894.
	)	
THE PANTAGRAPH, WGLT FM, and	)	Honorable
	)	Scott Drazewski,
THE ILLINOIS PRESS ASSOCIATION,	)	Judge Presiding.
	)	
Intervenors-Appellees.	)	

PROOF OF SERVICE/NOTICE OF FILING

TO: Donald M. Craven, 1005 North Seventh Street, Springfield, IL 62702, don@cravenlawoffice.com

David Robinson, SAAP, 725 S. Second Street, Springfield, IL 62701, drobinson@ilsaap.org

Adam Ghrist, Office of the State's Attorney, McLean County, 104 W. Front Street, Room 605, Bloomington, IL 61701, Adam.Ghrist@mcleancountyil.gov

Attorney General of Illinois – Criminal Division, 100 West Randolph Street, Chicago, IL 60601

PLEASE TAKE NOTICE that on October 31, 2017, the undersigned submitted for electronic filing the BRIEF AND APPENDIX OF DEFENDANT-APPELLANT KIRK P. ZIMMERMAN to the Office of the Clerk of the Supreme Court of Illinois, served the same on the

above-named parties via email at the email addresses shown, and served one copy on the Attorney General of Illinois, Criminal Division, at the address shown above by depositing the same in the U.S. Mail, proper postage prepaid, before 5:00 p.m. in Clayton, Missouri.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

Date: October 31, 2017

Respectfully Submitted,

ROGERS SEVASTIANOS & BANTE, LLP

By: *<u>/s/ John P. Rogers</u>*

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