GODFREY & KAHN S.C.

ONE EAST MAIN STREET, SUITE 500 • POST OFFICE BOX 2719
MADISON, WISCONSIN 53701-2719

TEL • 608.257.3911 FAX • 608.257.0609

www • GKLAW.COM

Direct: 608-284-2606
rdreps@gklaw.com

October 8, 2013

BY HAND DELIVERY

Diane Fremgen
Clerk
Court of Appeals
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701

RE: State of Wisconsin v. Rindfleisch
Case No. 2013-AP-362-CR
File No. 061298-0068

Dear Ms. Fremgen:

Enclosed for filing in the above appeal is the original and five copies of a Motion To Intervene And Request For Argument on behalf of Journal Sentinel, Inc., Capital Newspapers, Inc., The Associated Press, Wisconsin Newspaper Association, Wisconsin Broadcasters Association, Wisconsin Freedom of Information Council, The Reporters Committee for Freedom of the Press and the American Society of Newspaper Editors. Please file-stamp the additional copy of the motion and return it to the messenger.

We have today served a copy of this motion on all counsel of record, by e-mail and U.S. mail.

Sincerely,

GODFREY & KAHN, S.C.

Robert J. Dreps

RJD:jlb
Enclosures

cc: Christopher G. Wren (w/enc)
Franklyn M. Gimbel (w/enc)
10210774.1

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

APPEAL NO. 2013-AP-362-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KELLY M. RINDFLEISCH,

Defendant-Appellant.

MOTION TO INTERVENE AND REQUEST FOR ARGUMENT
Wis. Stat. § 803.09

TO:

Christopher G. Wren
Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, WI 53707

Franklyn M. Gimbel
Gimbel, Reilly, Guerin & Brown LLP
Two Plaza East
Suite 1170
330 East Kilbourn Avenue
Milwaukee, WI 53202

Journal Sentinel, Inc., publisher of the *Milwaukee Journal Sentinel,* Capital Newspapers, Inc., publisher of the *Wisconsin State Journal*, The Associated Press, Wisconsin Newspaper Association, Wisconsin Broadcasters Association, Wisconsin Freedom of Information Council, The Reporters Committee for Freedom of the Press and the American Society of Newspaper Editors, by their counsel, Godfrey & Kahn, S.C., move the Court to intervene in this criminal appeal for the sole purpose of opposing the Defendant-Appellant's Motion to Seal the documents identified in the Court's September 26, 2013 Order granting the State's motion to supplement the record.

In support of their motion, the proposed intervenors assert their rights -- under the First Amendment, under Article I, section 3, of the state constitution, under Wisconsin's Open Records Law and under common law -- to have complete access to materials and documents in the record before this Court concerning an appeal of a conviction of a former public employee involving the use of public resources. The newspaper further states that:

GROUNDS

1. The proposed intervenors ("the movants") are publishers and news media organizations with an interest in maintaining public access to judicial records.

2. This controversy arose when the Defendant-Appellant, Kelly M. Rindfleisch, moved the Court on October 1, 2013 to "seal all documents contained in the supplemental record as set forth in the Court's September 25, 2013 order." ("Defendant's Motion to Seal"). That followed the State's motion to supplement the appellate record with

materials that included records originated and maintained (at least for a time) by Milwaukee County.

3. The movants have a protectable legal interest, on behalf of themselves and the public, in maintaining public access to all documents in the record of this appeal, an interest that is not adequately represented by existing parties.

INTERVENTION

4. The movants claim the right to intervene under Wis. Stat. § 803.09(1), for the sole purpose of preventing secrecy of court proceedings and records, ensuring public access to them. In the alternative, the movants seek permissive intervention. They assert this right on their own behalf and that of the public. *See State ex rel. Journal Co. v. County Court for Racine County*, 43 Wis. 2d 297, 308, 168 N.W.2d 836 (1969).

5. The Wisconsin Supreme Court has expressly recognized that the news media have "a protectable legal interest in opening [court] documents to public examination" that can only be advanced by permitting intervention. *State ex rel. Bilder v. Delavan Township*, 112 Wis. 2d 539, 549, 334 N.W.2d 252 (1983).

6. Timeliness is not a critical factor. Briefing by the parties has not been completed and no final decision on the merits of the appeal has been made. Even if it had been, the final resolution of a case "does not in any sense militate against the public's right to prosecute a substantiated right to see the records...." *Mokhiber v. Davis*, 537 A.2d 1100, 1105 06 (D.C. 1988). In fact, where a right of access to public records exists, "it exists today for the records of cases decided

a hundred years ago as surely as it does for lawsuits now in the early stages of motions litigation." *Id.*

7. This motion would be timely, moreover, even if this Court had already granted Defendant's Motion to Seal. "The right to intervene to challenge a closure order is rooted in the public's well established right of access to public proceedings....Having roots in both common law traditions and the First Amendment, the right 'serves to (1) promote community respect for the rule of law, (2) provide a check on the activities of judges and litigants, and (3) foster more accurate fact finding.'" *Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000) (Jessup I) (citations omitted).

A. "'[T]he First Amendment provides a presumption that there is a right of access to proceedings and documents...,'" like judicial records, that "have historically been open to the public...." *Id.*

B. "[T]o preserve the right of access, 'those who seek access to [sealed] material have a right to be heard in a manner that gives full protection to the asserted right.'" *Id.* (citations omitted).

8. The movants have established the right to intervene:

A. The movants' interest is directly related to the disposition of this criminal case. Sealing any part of the record in this appeal would impair their ability to inform the public and impede the public's ability to evaluate the Court's ultimate ruling on the merits of this appeal.

B. The sealing of court records -- "clearly impairs the [movants'] ability to examine those documents." *C.L. v. Edson*, 140 Wis. 2d 168, 177, 409 N.W.2d 578 (Ct. App. 1989).

C. None of the original parties adequately represents -- nor could they adequately represent -- the movants' interests in opening the sealed documents. The Defendant-Appellant brought the motion to seal the records at issue and the State of Wisconsin has, to date, taken no position on that motion.

9. Intervention by the news media, asserting their rights particularly and the public's right of access generally, is the appropriate procedure for enforcing constitutional and statutory rights of access. *See Bilder*, 112 Wis. 2d at 549; *In re Associated Press*, 162 F.3d 503, 507 (7th Cir. 1998).

10. In addition to the procedural right to intervene, the movants have a substantive statutory, common law and constitutional right of access to the record in this appeal.

CONSTITUTIONAL RIGHTS TO PUBLIC ACCESS

11. The U.S. Supreme Court has established the general rule that the records of a judicial proceeding, state or federal, are presumptively public under the common law and the First Amendment. *Press Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 509 10 (1984) (Press-Enterprise I); *see Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

12. This rule is premised on the fact that "[court] records often concern issues in which the public has an

interest, in which event concealing the records disserves the values protected by the free speech and free press clauses of the First Amendment." *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (Jessup II).

13. Moreover, when those court records are kept secret, "the public cannot monitor judicial performance adequately," including the performance of appellate judges. *Id.* While "[p]eople in an open society do not demand infallibility from their institutions,...it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

14. The constitutional presumption that documents in judicial files are open to the public "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press Enterprise I*, 464 U.S. at 510.

15. The public's right of access to the records at issue is entitled to full First Amendment protection because, no less than attendance at jury selection, the record and any oral argument in criminal appeals has "historically been open to the press and the general public" and because "public access plays a significant positive role in the functioning" of the appellate process. *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 9 (1986) (Press-Enterprise II).

16. The rights guaranteed by Article I, section 3, of the state constitution are at least as extensive as the rights guaranteed by the First Amendment. In light of the state's historic commitment to open government, the public's state constitutional rights should be construed at least as broadly as the First Amendment right, providing yet another basis for

full access to the records the Defendant-Appellant has moved to seal.

17. "The courts have been the great repositories of personal liberty, and their obligation is not only to see that the conduct and performance of executive and legislative officials is open to public scrutiny, but to maintain for themselves the high standards that they prescribe for others." *State ex rel. Journal Co.*, 43 Wis. 2d at 312 13.

STATUTORY AND COMMON LAW RIGHTS TO PUBLIC ACCESS

18. The records at issue also are presumed public under Wisconsin's Open Records Law, which expressly applies to "any court of law." Wis. Stat. 19.32(1). To enforce this "presumption of complete public access," the state's official policy provides that "[t]he denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." Wis. Stat.§ 19.31.

19. Wisconsin law has provided since 1849 that "[t]he sittings of every court shall be public and every citizen may freely attend the same." Wis. Stat. § 757.14. The presumption of openness arising from this statute can be overcome only when the "court determines, after hearing and the making of explicit findings, that overwhelming public values connected with the administrative of justice will be subverted by public trial." *State ex rel LaCrosse Tribune v. Circuit Court*, 115 Wis. 2d 220, 241-42, 340 N.W.2d 460 (1983).

20. These statutory presumptions of openness apply equally to this Court and the entire record in this proceeding. "[T]he great virtue in our Anglo-American court system is that it is open to the public so that all will know that the courts, as instruments of government, are defending the rights of the people and are not suppressing them." *Id.*

21. Wisconsin's common law also protects the public's right of access to court records. Even a search warrant issued by a John Doe judge during an ongoing criminal investigation is presumptively public:

> [B]efore a judge decides to seal a search warrant, he must balance the State's reasons for desiring secrecy against the public's right of access. Due to the fact-specific nature of such an inquiry, this balancing is appropriately committed to the sound discretion of the circuit court. The court, though, must make specific enough findings of fact on the record to allow for appellate review.

State v. Cummings, 199 Wis. 2d 721, 741-42, 546 N.W.2d 406 (1996) (citations omitted). Here, the John Doe investigation has concluded, and the John Doe judge has specifically authorized the use of previously secret materials in a variety of settings, including the prosecution that culminated in the Defendant-Appellant's conviction and sentencing and this appeal.

PRELIMINARY RELIEF REQUESTED

22. The movants request that the Court set a briefing schedule and hear oral argument on Defendant-Appellant's Motion to Seal and, if necessary, on this intervention motion. Counsel's affidavit submitted in support

of that motion does not address the legal standard for sealing judicial files. *See Press-Enterprise I*, 464 U.S. at 510 (the constitutional presumption that documents in judicial files are open to the public "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest").

23. The Motion to Seal is skeletal. Counsel's affidavit, while a bit more substantive, relies on factual errors. First, counsel's affidavit mistakenly assumes that the public's right of access to judicial files is premised solely on Wisconsin's Open Records Law. *See* Affidavit Supporting Motion to Seal Supplemental Record ("Counsel's Affidavit"), ¶ 8. In fact, the public's common law and constitutional rights of access to judicial files predate that statutory right and are equally well established. *See* ¶¶ 11-17, above.

24. Counsel's affidavit also mistakenly assumes that the record in this appeal is subject to the John Doe judge's secrecy order. *See* Counsel's Affidavit, ¶ 5. It is not. The John Doe judge has expressly authorized "the District Attorney's Office and any agency assisting the District Attorney's Office...to use and disseminate information, materials, and transcripts obtained and/or gathered in these proceedings as may be reasonably necessary in connection with the...prosecution of Kelly Rindfleisch...." Affidavit in Support of Motion of Plaintiff-Respondent for an Order to Supplement the Appellate Record, Exhibit 1.

25. Counsel's affidavit further mistakenly assumes that this appeal is subject to the same level of secrecy as a supervisory writ proceeding challenging the conduct of a John Doe judge while an investigation is ongoing. *See* Counsel's Affidavit, ¶ 8. It is not. This is the culmination of

a criminal prosecution, authorized by the John Doe judge, in which the public's presumptive right of access is protected by the common law, statute and the state and federal constitutions.

WHEREFORE, the proposed intervenors request that the Court enter an order granting them the right to intervene for the limited purpose of disputing Defendant-Appellant's Motion to Seal, setting a briefing scheduling and scheduling oral argument on that motion and, if necessary, the action.

Dated: October 8, 2013.

Godfrey & Kahn, S.C.
Robert J. Dreps
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
608-257-3911

Attorneys for Journal Sentinel, Inc., publisher of the *Milwaukee Journal Sentinel*, Capital Newspapers, Inc., publisher of the *Wisconsin State Journal*, The Associated Press, Wisconsin Newspaper Association, Wisconsin Broadcasters Association, Wisconsin Freedom of Information Council, the Reporters Committee for Freedom of the Press and the American Society of Newspaper Editors

10202471.1