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STATE OF IDAHO
County of Fremont

IN THE MATTERS OF

State v. Chad Guy Daybell

Case Number CR22-21-1623

State v. Lori Norene Vallow NKA Daybell

Case Number CR22-21-1624

MEMORANDUM IN SUPPORT OF
MOTION TO INTERVENE
MOTION TO UNSEAL ALL DOCUMENTS
MOTION FOR INJUNCTIVE RELIEF

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STANDING

17 The Intervenor, Lori A.G. Hellis, is a credentialed author who is writing a book about the
18 Daybell case. Therefore, she is a media member and has standing to petition the court for
19 intervenor status for the limited purpose of challenging the court's decisions for the wholesale
20 sealing of documents and court proceedings in the above-captioned matter.

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FACTS

This matter came before the court when Defendants Chad and Lori Daybell were charged in case numbers CR22-20-0755, CR22-21-1623, CR33-20-0302, CR22-20-0838, and CR22-21-1624.

The sealing of court documents began almost immediately. The following entries in the court record indicate sealed documents or closed proceedings:

Case Number	Date	Entry
CR22-20-0838	7/10/20	Order to Seal Records
	12/17/20	Order to Seal Records
	12/18/20	Closed Hearing
	3/11/21	Order to Seal Records
	5/7/21	Order to Close Hearings and Seal Record
	6/18/21	Order to Seal
	6/28/21	Order to Seal
	6/25/21	Order Unsealing June 18, 2021 Orders
	7/29/21	Case Dismissed Without Prejudice
	CR22-21-1624	7/27/21
9/14/21		Order to Close Hearing and Seal Record
9/19/21		Order to Seal
10/21/21		Order to Close Hearing and Seal Record
11/26/21		Order to Seal
12/08/21		Order to Close a Portion of the Hearing and Seal Record
12/28/21		Order Authorizing Disclosure of Sealed Information
1/13/22		Order Sealing IDHW Competency Report
2/09/22		Order Close Hearing and Seal Record
2/11/22		Order to Seal
2/11/22		Order to Seal
2/16/22		Order to Seal
2/16/22		Order to Seal
3/02/22		Decision and Order (Sealed)
3/03/22		Order Sealing IDWH Competency Reports
3/11/22		Order to Seal
3/11/22		Order to Close Hearing and Seal Record
3/18/22	Order to Seal	

	3/22/22	Order to Close Hearing and Seal Record
	4/01/22	Order to Seal
	4/06/22	Order to Close Hearing and Seal Record
CR22-20--755	12/17/20	Order to Seal Records
	3/11/21	Order to Seal Records
CR22-21-1623	7/15/21	Order Sealing ExParte Motion for Protective Order and Declaration in Support of ExParte Motion
	7/26/21	Objection to Protective Order – Under Seal
	7/26/21	Request for Discovery – Under Seal
	7/26/21	Motion to Oppose Use and Motion to Preserve Fingerprint Samples – Under Seal
	7/27/21	Order Sealing State’s Motion and Memorandum Objecting to the Entry of Appearance of Counsel and for a Finding of Conflict
	8/20/21	Objection to State’s Motion re Waiver of Conflict – Under Seal
	8/25/21	Motion for Intervention (Under Seal)
	8/26/21	Order to Close Hearing and Seal Record
	9/17/21	Order to Close Hearing and Seal Record
	9/20/21	Order to Seal Records
	9/20/21	Order on Sealed Motion to Intervene
	10/05/21	Order to Close a Portion of the Hearings and Seal Records and Exhibits
	12/08/21	Order to Close a Portion of the Hearing and Seal Record
	3/08/22	Order to Seal
	3/15/22	Order to Seal
	4/07/22	Order to Seal
	4/21/22	Order to Seal
	5/13/22	Order to Seal State’s Objection
	5/18/22	Order to Close Hearing and Seal Record
	5/20/22	Order to Seal State’s Supplemental Request for Discovery as to Defendant Chad Daybell’s Motions to Disqualify APA Smith, Wood, and/or Dismiss
	5/24/22	Order to Seal State’s Objections and Briefs in Response
	5/24/22	Order to Seal
	5/24/22	Order to Seal
	5/25/22	Order to Close Hearing and Seal Record
	5/25/22	Order to Seal
	5/25/22	Order to Seal
	6/01/22	Order to Seal
	6/06/22	Order to Seal
	6/06/22	Order to Seal

1 There are many additional proceedings where the court convened a hearing and then
2 adjourned to chambers or video breakout sessions to conduct the bulk of the proceeding with no
3 public scrutiny.

4 LAW

5 The historic and unassailable right of the public and the press to witness criminal
6 proceedings and to view court documents and records is often best described by Justice Louis
7 Brandeis’s statement that “sunlight is the best disinfectant. Or, as Ralph Waldo Emerson said, “A
8 gas-light is found to be the best nocturnal police, so the universe protects itself by pitiless
9 publicity.” The Constitution’s founders contemplated an open and transparent criminal court
10 process.

11 Since its drafting, the U.S. Supreme Court has consistently recognized that the Constitution
12 conveys a presumptive First Amendment right of access to judicial proceedings to the public and
13 press, finding that “a presumption of openness inheres in the very nature of a criminal trial under
14 our system of justice.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980)
15 (plurality opinion).

16 The United States Court of Appeals for the Ninth Circuit, which includes Idaho, also
17 recognized a constitutional right of access to court records, noting that “the public and press have
18 a [F]irst [A]mendment right of access to pretrial documents in general.” *Associated Press v.*
19 *District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983). When considering whether a constitutional
20 presumption of access applies to a particular proceeding or record, courts apply the “logic and
21 experience test,” also called the “Press-Enterprise test.” The test considers “*whether the place and*
22 *process have historically been open to the press and general public*” and “*whether public access*

1 *plays a significant positive role in the functioning of the particular process in question.*” Press-
2 Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986) (citations omitted).

3 In Idaho, access to civil and criminal court proceedings is also broadly provided for in the
4 state constitution. “Courts of justice shall be open to every person, and a speedy remedy afforded
5 for every injury of person, property or character, and right and justice shall be administered without
6 sale, denial, delay, or prejudice.” Idaho Const. art. I, § 18. In addition, Article I, Section 13 of the
7 Idaho Constitution specifically ensures that criminal trials are to remain open: “In all criminal
8 prosecutions, the party accused shall have the right to a speedy and public trial; to have the process
9 of the court to compel the attendance of witnesses in his behalf, and to appear and defend in person
10 and with counsel.”

11 There are no Idaho cases interpreting the “open court” provision of Article I, Section 18 of
12 the Idaho Constitution other than to say that Idaho Code section 19-811 (which allows a criminal
13 defendant to request that his preliminary hearing be closed) is not unconstitutional under Article
14 I, Section 18 so long as the magistrate court issuing such closure order complies with the
15 requirements of Press-Enterprise. See Cowles Publ’g, 118 Idaho at 761, 800 P.2d at 648. Instead,
16 the few cases that address access to court proceedings rely on the rights of a criminal defendant to
17 a public trial under the Sixth Amendment to the U.S. Constitution or on the qualified right of the
18 media and public to access court proceedings under the First Amendment to the U.S.
19 Constitution. *Id.*; see also *State v. Overline*, 154 Idaho 214, 217 n.2, 296 P.3d 420, 423 n.2 (*Id.*
20 App. Ct. 2013) (“The press and the public also possess, via the First Amendment, an enforceable
21 right to an open and public trial proceeding, which can be foreclosed over their objection only in
22 *limited circumstances.*”) (Emphasis added) (citing *Press-Enterprise*, 464 U.S. at 509–10).

1 Although Idaho courts have not explicitly recognized a constitutional right of access to court
2 records, Idaho Courts Administrative Rule 32, promulgated by the Idaho Supreme Court and
3 grounded in First Amendment principles, provides broad access rights and procedural protections
4 for the public. *State v. Allen*, 156 Idaho 332, 336, 325 P.3d 673, 677 (Ct. App. 2014). That Rule
5 provides: “The public has a right to examine and copy the judicial department’s declarations of
6 law and public policy and to examine and copy the records of all proceedings open to the
7 public.” I.C.A.R. 32(a). Idaho Code §74-101 et seq. memorializes Idaho’s Public Records Act.
8 Noting in that act or its exemptions entitles the court to seal and thereby deny the public access to
9 court records. The statute reads:

10 I.C.A.R. 32(i) Other Prohibitions or Limitations on Disclosure and Motions Regarding the
11 Sealing of Records. Physical and electronic records may be disclosed, or temporarily or
12 permanently sealed, or redacted by order of the court on a case-by-case basis.

13 (1) Any person or the court on its own motion may move to disclose, redact, seal or unseal a
14 part or all of the records in any judicial proceeding. The court shall hold a hearing on the
15 motion after the moving party gives notice of the hearing to all parties to the
16 judicial proceeding and any other interested party designated by the court. The court may
17 order that the record immediately be redacted or sealed pending the hearing if the court
18 finds that doing so may be necessary to prevent harm to any person or persons. In ruling on
19 whether specific records should be disclosed, redacted or sealed by order of the court, the
20 court shall determine and make a finding of fact as to whether the interest in privacy or public
21 disclosure predominates. If the court redacts or seals records to protect predominating

1 privacy interests, it must fashion the least restrictive exception from disclosure consistent
2 with privacy interests.

3 (2) Before a court may enter an order redacting or sealing records, it must also make one or
4 more of the following determinations in writing:

5 (A) That the documents or materials contain highly intimate facts or statements, the
6 publication of which would be highly objectionable to a reasonable person, or

7 (B) That the documents or materials contain facts or statements that the court finds
8 might be libelous, or

9 (C) That the documents or materials contain facts or statements, the dissemination or
10 publication of which may compromise the financial security of, or could reasonably result
11 in economic or financial loss or harm to a person having an interest in the documents or
12 materials, or compromise the security of personnel, records or public property of or used
13 by the judicial department, or

14 (D) That the documents or materials contain facts or statements that might threaten or
15 endanger the life or safety of individuals, or

16 (E) That it is necessary to temporarily seal or redact the documents or materials to
17 preserve the right to a fair trial, or

18 (F) That the documents contain personal data identifiers that should have been redacted
19 pursuant to Idaho Rule of Electronic Filing and Service 15, Idaho Rule of Civil Procedure
20 2.6, or Idaho Rule of Family Law Procedure 218 in which case the court shall order that
21 the documents be redacted in a manner consistent with the provisions of that rule.

22 23 **ARGUMENT**

24 1. A court's decision to seal documents and court proceedings should be made sparingly and
25 with due consideration because such a decision hides critical information about the workings

1 of government and, specifically, the criminal justice system from the defendants, the victims,
2 and the public. Proceedings conducted openly under the eye of the public discourage
3 corruption, graft, bias, and prejudice. Without the disinfection of public scrutiny, the American
4 courts simply become Star Chambers, filled with actions intended to please authorities rather
5 than administer justice. In the case at hand, the public, including the victims, cannot ascertain
6 that the case is progressing fairly because they have no access to half of the documents and
7 proceedings conducted in this case. As a result, victims, defendants, and the public can have
8 no confidence going forward that the case will be conducted fairly and transparently.

9 2. Idaho law requires pursuant to I.C.A.R 32(i)(1) that the court hold a hearing after the
10 moving party gives notice of the hearing to all parties to the judicial proceeding *and any other*
11 *interested party designated by the court* (italics added) to consider the sealing of documents.

12 The court's decision to close court proceedings and seal documents without court findings and
13 without attempting to fashion the least restrictive alternative is unconstitutional, illegal, and
14 counter to public policy. I.C.A.R 32(i)(2) requires:

15 (2) Before a court may enter an order redacting or sealing records, it must also
16 make one or more of the following determinations in writing:

17 (A) That the documents or materials contain highly intimate facts
18 or statements, the publication of which would be highly objectionable to a
19 reasonable person, or

20 (B) That the documents or materials contain facts or statements that
21 the court finds might be libelous, or

22 (C) That the documents or materials contain facts or statements, the
23 dissemination or publication of which may compromise the financial
24 security of, or could reasonably result in economic or financial loss or harm
25 to a person having an interest in the documents or materials, or

1 compromise the security of personnel, records or public property of or
2 used by the judicial department, or

3 (D) That the documents or materials contain facts or statements
4 that might threaten or endanger the life or safety of individuals, or

5 (E) That it is necessary to temporarily seal or redact the documents or
6 materials to preserve the right to a fair trial, or

7 (F) That the documents contain personal data identifiers that should have
8 been redacted pursuant to Idaho Rule of Electronic Filing and Service 15,
9 Idaho Rule of Civil Procedure 2.6, or Idaho Rule of Family Law Procedure
10 218 in which case the court shall order that the documents be redacted in
11 a manner consistent with the provisions of that rule.

12
13 The drafters intended the process to be onerous. The purpose of the specific
14 procedures outlined in the statute encourages the process to be used sparingly and with due
15 consideration.

16 There is no indication that the court even considered the factors in I.C.A.R 32(i)(2)
17 because the court did not conduct a hearing as required by statute. Neither did he document
18 his findings on the record and in writing as the rule requires. There is no proof that the
19 court considered whether any exceptions to Rule 32 applied. In fact, there is no indication
20 that the documents or materials contain highly intimate facts or statements, the publication
21 of which would be highly objectionable to a reasonable person. The documents may likely
22 contain facts or statements that defendants and/or the lawyers for the state and defense may
23 find embarrassing. No provision in the rule permits the court to consider that when deciding
24 which records to seal. There is also no indication that the documents or materials contain
25 facts or statements the court finds might be libelous. Likewise, there is no suggestion that

1 the documents or materials contain facts or statements, the dissemination or publication of
2 which may compromise the financial security of, or could reasonably result in economic
3 or financial loss or harm to a person having an interest in the documents or materials, or
4 compromise the security of personnel, records or public property of or used by the judicial
5 department. There has been no suggestion that the documents or materials contain facts or
6 statements that might threaten or endanger the life or safety of individuals. The court has
7 made a single finding that it is necessary to seal or redact the documents or materials to
8 preserve the right to a fair trial. The court has never expressly indicated how the defendant's
9 rights may be at risk and has never said his decision to seal the records is temporary.

10 The public's First Amendment right to access public records regarding this case has
11 clearly been violated. The court decided to seal documents without a hearing, without
12 notifying interested parties, and without making written findings necessary to seal. Further,
13 the court made no effort to avoid sealing by using a less restrictive method such as
14 redaction. The rule is clear that even when documents contain personal data identifiers, the
15 remedy is redaction pursuant to Idaho Rule of Electronic Filing and Service 15, Idaho Rule
16 of Civil Procedure 2.6, or Idaho Rule of Family Law Procedure 218, not wholesale
17 sealing.

18 The court's decisions violate Idaho Statutes and rules, including Title 74 Chapter 1
19 of the Public Records Act, codified at IS 74-102, and Idaho Court Administrative Rule
20 32(i)(1). To date, the court has not published any public findings indicating what privacy
21 interest is being protected, how that privacy right predominates the public's right to
22 disclosure, or what alternatives to wholesale sealing were considered.

1 Further, the court has not, under the “Press-Enterprise test,” considered “*whether*
2 *the place and process have historically been open to the press and general public*” and
3 “*whether public access plays a significant positive role in the functioning of the particular*
4 *process in question.*” Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986)
5 (citations omitted). Of course, pretrial public access always plays a significant role in
6 assuring that defendants receive fair trials and competent representation. In fact, public
7 access is at the very heart of it.

- 8 3. Neither the court nor the litigants have provided evidence that actual damage or prejudice
9 will occur if the sealed documents and proceedings are unsealed. The state’s motions to
10 seal simply state that the intention is to limit undue prejudicial publicity. The fact that the
11 media are interested in the case and desire to report on it is not sufficient to prove that the
12 defendants will be unduly prejudiced by releasing pretrial documents or opening pretrial
13 proceedings, especially when venue has already been changed to a larger population center
14 to facilitate finding an unbiased jury. The court has chosen to deny access to entire
15 documents and proceedings rather than, as required, to examine whether there is a less
16 restrictive alternative, such as redacting sensitive information.

17 This is a death penalty case. This court has previously pointed out that such cases
18 are different and require higher care and scrutiny. Nowhere is that truer than in the case of
19 sealed documents and proceedings. How can the public or the victims be assured that such
20 a sensitive matter is being prosecuted appropriately and fairly without access to the
21 proceedings and documents? Moreover, that higher level of care requires that the court take
22 the time to fashion a less restrictive way to balance the rights of the defendants and the
23 rights of the public.

1 The court is responsible to ensure that protected patient health information and
2 other sensitive personal information such as birthdates, social security numbers, and
3 financial information are protected from public release. The court has neither the authority
4 nor the responsibility to hide information from the public because it might embarrass
5 someone or otherwise tarnish their reputation. The court may not withhold information
6 simply because some potential jurors may be incensed by the information or otherwise
7 form an opinion about the case. This case has already garnered international attention and
8 prime-time coverage. There is no proof that releasing reasonably redacted documents and
9 hearing transcripts will prejudice the jury further. The court has neither the ability nor the
10 authority to keep the jury pool pristine, and the abhorrent practice of wholesale sealing of
11 documents and hearings is harmful to the full and fair administration of justice.

12 I.C.A.R 32 states that the “public has a right to access the judicial department’s
13 declarations of law and public policy, and to access the records of all proceedings open to
14 the public.” Nothing in the rule limits the obligation of the court to apply the least
15 restriction possible to provide those records, and nothing in the rule excuses the court from
16 doing so or makes the release contingent on resources.

17 **CONCLUSION**

18 The legal presumption in both Idaho law and the U.S. Constitution is for the release
19 of court records, with the court sparingly applying the exceptions to the rule; the court, to
20 date, has been doing the reverse, sealing court records and waiting for someone to object.

21 The court’s actions to date violate the victim’s and the public’s First Amendment rights.

22 The wholesale sealing of court records does not comport with the law in Idaho, the
23 court rules, or the Constitutions of the State of Idaho and the United States of America.

1 The court is legally bound to find the least restrictive treatment of the information that has
2 to date, been sealed. The remedy will require time and attention. First, the court must redact
3 all sensitive individual patient health information and all personal data identifiers pursuant
4 to Idaho Rule of Electronic Filing and Service 15, Idaho Rule of Civil Procedure 2.6, or
5 Idaho Rule of Family Law Procedure 218. The court should further redact the names of
6 minors and any other documents pursuant to I.C.A.R. 32(g). If closed hearings contain
7 protected information, the recordings or transcripts of those hearings should be
8 appropriately reviewed and redacted. Once the redactions are completed, the court should
9 immediately order all documents and recordings of proceedings unsealed.

10 In the future, every time the court considers the sealing of a document or the closure
11 of a proceeding, the court should be required to notify all interested parties, then hold a
12 scheduled hearing in advance, and make written findings regarding the reasons the record
13 must be sealed or the hearing must be closed. Rule 32 contains a provision for the
14 temporary protection of documents until a hearing can be conducted.

15 Respectfully Submitted July 29, 2022.

16 Lori A.G. Hellis
17 Proposed Intervenor

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CERTIFICATE

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2 I HEREBY CERTIFY that on this 30th day of July 2022, a copy of the preceding was served as

3 follows:

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/s/ Lori A. G. Hellis

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