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IN THE DISTRICT COURT FOR THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

IN THE MATTERS OF

State v. Chad Guy Daybell

Case Number CR22-21-1623

MEMORANDUM IN SUPPORT OF MOTION TO UNSEAL DOCUMENTS

STANDING

The Non-Party Movant, Lori A.G. Hellis, is a member of the public and a credentialed author who is writing a book about the Daybell case. Therefore, she is a media member and has standing to challenge the court's decisions for the wholesale sealing of documents and court proceedings in the above-captioned matter.

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FACTS

This matter came before the court when Defendant Chad Daybell was charged in case number CR22-21-1623 on May 24, 2021. The wholesale sealing of documents and court proceedings began almost immediately. There are many proceedings where the court convened a hearing and then adjourned to chambers or video breakout sessions to conduct the bulk of the proceeding with no public scrutiny.

LAW

The historic and unassailable right of the public and the press to witness criminal proceedings and to view court documents and records is often best described by Justice Louis Brandeis's statement that "sunlight is the best disinfectant. (What Sunlight Can Do, Harper's Weekly. December 20, 1913) Or, as Ralph Waldo Emerson said, "A gas-light is found to be the best nocturnal police, so the universe protects itself by pitiless publicity." (Worship, Pg. 214 1860). It is irrefutable that the Constitution's founders contemplated an open and transparent criminal court process. The U.S. Supreme Court has consistently held that the Constitution conveys a presumptive First Amendment right of access to judicial proceedings to the public and press, finding that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) (plurality opinion).

The United States Court of Appeals for the Ninth Circuit, which includes Idaho, also recognized a constitutional right of access to court records, noting that "the public and press have a [F]irst [A]mendment right of access to pretrial documents in general." *Associated Press v. District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983). When considering whether a constitutional

presumption of access applies to a particular proceeding or record, courts apply the "logic and experience test," also called the "Press-Enterprise test." The test considers *"whether the place and process have historically been open to the press and general public"* and *"whether public access plays a significant positive role in the functioning of the particular process in question." Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (citations omitted).

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

While there are no Idaho cases directly interpreting the "open court" provision of Article I, Section 18 of the Idaho Constitution, the few cases that address access to court proceedings rely on the rights of a criminal defendant to a public trial under the Sixth Amendment to the U.S. Constitution or on the qualified right of the media and public to access court proceedings under the First Amendment to the U.S. Constitution. Id.; see also State v. Overline*, 154 Idaho 214, 217 n.2, 296 P.3d 420, 423 n.2 (Id. App. Ct. 2013)* ("The press and the public also possess, via the First Amendment, an enforceable right to an open and public trial proceeding, which can be foreclosed over their objection only in *limited circumstances*.") (Emphasis added) (citing *Press-Enterprise, 464 U.S. at 509–10).*

Although Idaho courts have not explicitly recognized a constitutional right of access to court records, Idaho Courts Administrative Rule 32 was promulgated by the Idaho Supreme Court and is firmly grounded in First Amendment principles. It provides broad access rights and procedural protections for the public. *State v. Allen, 156 Idaho 332, 336, 325 P.3d 673, 677 (Ct. App. 2014).* That Rule provides: "The public has a right to examine and copy the judicial department's declarations of law and public policy and to examine and copy the records of all proceedings open to the public." I.CA.R. 32. Idaho Code §74-101 et seq. memorializes Idaho's Public Records Act. Nothing in that act or its exemptions entitles the court to seal unilaterally and thereby deny the public access to court records. The statute reads:

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

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

privacy interests, it must fashion the least restrictive exception from disclosure consistent with privacy interests. (Emphasis added)

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

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

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

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

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

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

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

ARGUMENT

A court's decision to seal documents and court proceedings should be made sparingly and with due consideration, because such a decision hides critical information about the workings of government and, specifically, the criminal justice system from the defendants, the victims, and the public. *State v. Overline*, 154 Idaho 214, 217 n.2, 296 P.3d 420, 423 n.2 (Id. App. Ct. 2013) makes this clear when it says, "The press and the public also possess, via the First Amendment, an enforceable right to an open and public trial proceeding, which can be foreclosed over their objection only in *limited circumstances*." (Emphasis added) (citing *Press-Enterprise, 464 U.S. at 509–10).* Proceedings conducted openly under the eye of the public discourage corruption, graft, bias, self-interest, and prejudice. Without the disinfection of public scrutiny, the American courts become like Star Chambers of history, conducted in secret, with no public oversight to discourage the powerful from seeking their own ends rather than justice. Likewise, in the case at hand, the public, including the victims, cannot ascertain that the case is progressing fairly because they do not have access to half of the documents and proceedings conducted in this case. As a result, victims, defendants, and the public can have no confidence going forward that the case is being conducted fairly and transparently.

Idaho law requires, pursuant to I.C.A.R 32(i)(1) that the court hold a hearing on motions to seal after the moving party gives notice of the hearing to all parties to the judicial proceeding *and any other interested party designated by the court* (italics added). The rule further requires that if the court determines the document or proceeding contains information that should not be disclosed, the court must make written findings and fashion the least restrictive exception from disclosure that is consistent with privacy interests.

This court's decision to close court proceedings and seal documents without a hearing, without specific court findings, and without any attempt to fashion the least restrictive alternative is unconstitutional, illegal, and against public policy.

I.C.A.R 32(i)(2) requires that "Before a court may enter an order redacting or sealing records, it must also make one or more of the following determinations in writing:

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

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

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

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

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

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

To enact Idaho Code §74-101 et seq., the drafters of I.C.A.R. 32 intended the process by which documents are sealed to be onerous. Therefore, the specific procedures outlined in the statute are to cause the process to be used sparingly, in limited circumstances, and with due consideration.

There is no proof that the court ever considered the factors in I.C.A.R 32(i)(2) because the court did not conduct a hearing as required by statute. Neither did he document his findings in writing as the rule requires. There is no proof that the court considered whether any exceptions to Rule 32 applied.

In fact, there is no indication that every sealed document or proceeding contains highly intimate facts or statements, the publication of which would be highly objectionable to a reasonable person. Instead, the documents likely contain facts or statements that defendants and/or the lawyers for the state and defense may find embarrassing. No provision in the rule permits the court to consider embarrassment when deciding which records to seal. In fact, insofar as they touch on the qualifications of public servants, the documents may be of keen interest to any reasonable citizen.

There is also no indication that the documents or materials contain facts or statements the court finds might be libelous. Likewise, there is no suggestion that the documents or materials contain facts or statements, the dissemination or publication of which may compromise the financial security of, or could reasonably result in economic or financial loss or harm to a person having an interest in the documents or materials, or compromise the security of personnel, records or public property of or used by the judicial department. Finally, there has been no suggestion that the documents or materials contain facts or statements that might threaten or endanger the life or safety of individuals.

The court made a single blanket statement, affirming the Movant's claim that sealing is "necessary to preserve the defendant's right to a fair trial." The court has never expressly indicated

how the defendant's rights might be at risk, has never stated the sealing of the records is temporary or suggested when the court might unseal the documents and proceedings.

The public's First Amendment right to access public records regarding this case has clearly been violated. The court decided to seal documents without a hearing, without notifying interested parties, and without making written findings necessary to seal. Further, the court made no effort to avoid sealing by using a less restrictive method such as redaction. The rule is clear that even when documents contain personal data identifiers, the remedy is redaction pursuant to I.C.A.R. 32, Idaho Rule of Electronic Filing and Service 15, Idaho Rule of Civil Procedure 2.6, or Idaho Rule of Family Law Procedure 218, not wholesale sealing.

The court's Order in response to the Non-Party Movant's (proposed Intervenor's) prior filing includes this statement, "The court has considered that I.C.A.R. 32 permits the public, as expressly set forth under the rule, "to examine and copy all records of all proceedings **open to the public**." I.C.A.R. 32(a) (emphasis added). Hellis' [sic] motion is a request to unseal records previously sealed in two separate criminal cases (Case numbers omitted) many of which related to proceedings not open to the public." The court's circular argument is ludicrous. What the court argues is that because he previously illegally sealed proceedings, including in other case numbers, without holding a hearing or making written findings, those hearings are now no longer "open to the public," so he is therefore within his authority to deny their unsealing. I agree with the court that *if* he had followed the proper legal process, a process where interested parties had the opportunity to contest the closing of those proceedings, and *if* the court made findings on the record, the court would be well within his authority to declare the proceedings off limits. That is not the case in this instance. I also agree that there are some proceedings, specifically those dealing with Ms. Vallow Daybell's mental health status and commitment, that the court properly

conducted under seal. However, the fact that those proceedings and documents were justifiably sealed does not relieve the court of the obligation to follow the law, hold a hearing, and make written findings.

The court's decisions violate both the spirit and the black letter law of Idaho Title 74 Chapter 1 of the Public Records Act, codified as IS 74-102, and implemented by Idaho Court Administrative Rule 32(i)(1). To date, the court has not published any public findings indicating what, if any, privacy interest is being protected, how that privacy right predominates the public's right to disclosure, or what alternatives to wholesale sealing were considered.

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

Neither the court nor the litigants have provided evidence that actual damage or prejudice will occur if the sealed documents and proceedings are unsealed. The state's motions to seal simply say that he wants to limit unduly prejudicial publicity. The fact that the media are interested in the case and desire to report on it is insufficient to prove that the defendants will be unreasonably prejudiced by releasing pretrial documents or opening pretrial proceedings. The venue in this case has already been changed to a larger population center to facilitate finding an unbiased jury.

This is a death penalty case. As the court has previously pointed out, such cases are different; they require higher care and scrutiny. Nowhere is that truer than in the case of these sealed documents and proceedings because nowhere is the scrutiny of the public and the press more

critical. How can the public, including the victims' families, be assured that such a sensitive matter is being prosecuted appropriately and fairly without access to the proceedings and documents? Moreover, that higher level of care requires that the court take the time to fashion a less restrictive way to balance the rights of the defendants and the rights of the public. Instead, the court has chosen to deny access to entire documents and proceedings rather than examine whether there is a less restrictive alternative, such as redacting sensitive information.

The court is responsible to ensure that protected patient health information and other sensitive personal information such as birthdates, social security numbers, and financial information are protected from public release. Still, the court has neither the authority nor the responsibility to hide information from the public because it might embarrass someone or otherwise tarnish their reputation. The court may not withhold information simply because some potential jurors may be incensed by the information or otherwise form an opinion about the case. This case has already garnered international attention and prime-time coverage. No proof exists that releasing reasonably redacted documents and hearing transcripts will further prejudice the jury pool. The defendants are entitled to a jury of their peers who have not previously formed an opinion about the case. The court has neither the ability nor the authority to give them a pristine jury pool.

The court's practice of wholesale sealing of documents and hearings is harmful to the full and fair administration of justice. I.C.A.R 32 states that the "public has a right to access the judicial department's declarations of law and public policy, and to access the records of all proceedings open to the public." Nothing in the rule limits the obligation of the court to apply the least restriction possible and provide those records, and nothing in the rule excuses the court from doing so or makes the release contingent on resources. The court, in his August 18, 2022, Order in response to Non-Party Movant's prior filing, says, "The purpose of I.C.A.R. 32(a) is to promulgate

rules and regulations to control access to court records and to establish the procedural requirements for both the public and the judiciary when individuals seek to access court records. The rule contemplates public access in a matter that:

1. Promotes accessibility to court records;
2. Supports the role of the judiciary;
3. Promotes governmental accountability;
4. Contributes to public safety;
5. Minimizes the risk of injury to individuals;
6. Protects individual privacy rights and interests;
7. Protects proprietary business information;
8. Minimizes reluctance to use the court system;
9. Makes the most effective use of court and clerk of court staff;
10. Provides excellent customer service; and
11. Avoids unduly burdening the ongoing business of the judiciary.

(I.C.A.R. 32(a)(1-11) …The Court finds Hellis' [sic] request as pled fails to honor many of the policies set forth in I.C.A.R. 32, which includes providing express procedures for the public to gain court records that "makes the most effective use of court and clerk staff" and "avoids unduly burdening the ongoing business of the judiciary." I submit that nothing in I.C.A.R. 32 suggests it is within the court's responsibility or authority to *control access*. Just the opposite. The first entry in I.C.A.R. 32(a) is "(1) Promotes accessibility to court records;" Further, while the rule encourages judicial efficiency, there is nothing in it that suggests that if it's hard, the court and staff don't have to do it. If that were the case, there would be no need for the I.C.A.R. 32(g) provisions that outline the specific process for sealing, unsealing, and redacting documents.

Conveniently, the court attempts to rely on I.C.A.R 32 "to establish the procedural requirements for both the public and the judiciary when individuals seek to access court records" while ignoring the inconvenient provisions that require the court to hold a hearing, make findings and redact documents.

A case in point is *Saint Alphonsus v. St. Luke's Health Sys., ltd., 788 F.3d 775 (2015)*. In this antitrust case, the parties stipulated to a discovery order, designating some items of discovery as "attorney eyes only" (AEO). Before trial, the discovery order was transformed into a pretrial order that allowed AEO documents to be read at trial as sealed exhibits and redacted depositions and to close the courtroom when any reference was made to those AEO documents. The litigation involved the two major hospital systems in the Boise, ID metropolitan area and greatly interested the public and press. The trial judge denied the media organizations repeated attempts to open the documents and proceedings. The media filed an interlocutory appeal to the Ninth Circuit. The appeals court instructed the trial court to determine whether "compelling reasons exist for the continued sealing of trial materials." The appeals court notes "a strong presumption in favor of access and that a party seeking to seal judicial records must identify "compelling reasons" that outweigh public interest in understanding the public process." 214 WL 314472, at *1 (D. Idaho Jan 28, 2014). The result was that 628 documents were unsealed, 122 of them with redactions. No question unsealing hundreds of documents and redacting thousands of pages, including lengthy depositions, was cumbersome for the trial court, but if the merger of two health systems is of sufficient public interest to warrant unsealing and redacting hundreds of documents, how much greater must the public's interest be in understanding the public process of a death penalty case?

CONCLUSION

The legal presumption in both Idaho law and the U.S. Constitution is for the release of court records, with sparingly applied exceptions, and in the least restrictive manner possible; the court, to date, has been doing the reverse, sealing court records and waiting for someone to object. The court's actions to date violate the public and the media's First Amendment rights.

The wholesale sealing of court records does not comport with the law in Idaho, the court rules, or the Constitutions of the State of Idaho and the United States of America. First, the court must hold a hearing to review each and every decision to seal a document or proceeding. Then, if the court determines a document contains protected information and makes written findings, the court is still legally bound to find the least restrictive treatment of the protected information. The remedy will require time and attention to redact all sensitive individual patient health information and all personal data identifiers pursuant to Idaho Rule of Electronic Filing and Service 15, Idaho Rule of Civil Procedure 2.6, or Idaho Rule of Family Law Procedure 218, as well as all information that falls within an exception to I.C.A.R. 32. The same process should apply to previously closed hearings. The court must hold a hearing, make written findings, and then redact any protected or exempt information from the record before releasing transcripts or recordings. Once the redactions are complete, the court should immediately order all documents and recordings of proceedings unsealed in their redacted form.

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In the future, whenever the court considers the sealing of a document or the closure of a proceeding, the court should first notify all interested parties, hold a hearing, and make written findings regarding the nature of the information to be sealed and the reason for sealing. Rule 32

contains a provision for the temporary protection of documents until such a hearing can be conducted.

Respectfully Submitted August 25, 2022.

/s/
Lori A.G. Hellis
Non-Party Movant

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CERTIFICATE

I HEREBY CERTIFY that on August 25, 2022 a copy of the preceding was served as follows:

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/s/ Lori A. G. Hellis