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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. Lori Norene Vallow (nka Daybell) Case Number CR22-21-1624

MEMORANDUM IN SUPPORT OF POSTTRIAL MOTION TO UNSEAL ALL DOCUMENTS AND TRANSCRIPTS OR RECORDINGS OF HEARING RELATED TO THIS MATTER WITH NECESSARY REDACTIONS

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 Vallow Daybell case. Therefore, as the court has previously found, she is an interested person with standing to move the court for unsealing documents and court proceedings in the above-captioned matter.

FACTS

This matter came before the court when Defendant Lori Norene Vallow Daybell was charged first in case number CR22-20-0838 on June 29, 2020 (subsequently dismissed without prejudice on July 12, 2021) and later in case number CR22-21-1624 on May 24, 2021. The 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 in secret, including making substantive rulings, 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. 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

The court previously rejected the Non-Party Movant's pretrial motions to unseal most of the sealed documents and records of proceedings, based on the finding that. "1) The interests in privacy are predominant over the public's interest in disclosure. 2) Sealing said documents is the least restrictive measure consistent with the privacy interests at issue. 3) Sealing these documents during the pendency of this criminal investigation is in the best interest of justice and will preserve the right to a fair trial."

The defendant, Lori Vallow Daybell, was tried on the charges contained in CR22-21-1624 in a trial that began on April 3, 2023, and concluded on May 12, 2023, with a guilty verdict. She is presently awaiting sentencing. The evidence against Ms. Vallow Daybell was presented in court during a trial that was open to the public and available to the public at large via daily audio recording. Any interest the defendant may have had in privacy is, at this point, moot. Sealing the documents was never the least restrictive measure consistent with Ms. Vallow Daybell's privacy interests; redaction of private information before release was, and continues to be, the least restrictive measure to balance the public's right to access and the defendant's right to privacy. Finally, the court's finding that "Sealing these documents during the pendency of this criminal investigation is in the best interest of justice and will preserve the right to a fair trial." is no longer operative now that the trial is completed.

The Non-Party movant renews her request that all court filings and closed proceedings be reviewed, that all private information relative to the defendant be redacted, and that the documents and recordings be released to the public. 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 was conducted 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 was 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 unseal 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 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 consistent with those privacy interests.

I.C.A.R 32(i)(1) reads, *"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."

I.C.A.R 32(i)(2) further states, *"(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. (3) In applying these rules, the court is referred to the traditional legal concepts in the law of the right to a fair trial, invasion of privacy, defamation, and invasion of proprietary business records as well as common sense respect for shielding highly intimate material about persons."

If these are the threshold questions required to seal documents, logically, these same questions apply when considering unsealing documents. At a minimum, the court must ask whether these findings still apply in the present circumstances. The Non-Party Movant contends, given the current posture of the case, they do not. The Non-Party Movant has consistently and clearly agreed that "intimate facts or statements," including personal data identifiers, should be excluded from release. That information includes all the exemptions in I.C.A.R 32(g). Beyond that, there is no evidence to suggest the documents or materials contain facts or statements that the court finds might be libelous; or 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 that the documents or materials contain facts or statements that might threaten or endanger the life or safety of individuals; or that it is necessary to temporarily seal or redact the documents or materials to preserve the right to a fair trial.

The court determined it was necessary and appropriate to close some proceedings; however, those proceedings were recorded. 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."

While I 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 sealed, not all of those proceedings involved her mental health status. For example, the court held closed hearings on a challenge to the indictment based on an issue arising in the grand jury. While it is true that I.C.A.R. 32(g)(7) has an exemption regarding grand juries, which reads, "Except as provided by Idaho Criminal Rules or statutes, records of proceedings and the identity of jurors of grand juries," not every proceeding that mentions the grand jury is exempt. The Non-Party Movant's request neither asks for nor entertains receiving the identity of any grand juror or the record of the grand jury proceedings in this case. The basis for the challenge to the grand jury and the reason for the court's denial are of interest to the public and clearly within the purview of records the legislature intended to be open to the public.

In 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), before the court can permanently seal most court records, there must be written 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 sealing were considered.

Further, the court should consider, under the "Press-Enterprise test," *"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), because public access is fundamental in ensuring defendants receive fair trials and competent representation.

In his response to the Non-Party Movant's earlier motions, the court states. “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(i) provisions that outline the specific process for sealing, unsealing, and redacting documents. Conveniently, the court attempted 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." At the same time, he ignored the inconvenient provisions that require the court to hold a hearing, make findings and redact documents.

Saint Alphonsus v. St. Luke's Health Sys., ltd., 788 F.3d 775 (2015) is a case in point. In this antitrust case, the parties stipulated to a discovery order, designating some discovery items 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 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 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 murder 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 did not comport with the law in Idaho, the court rules, or the Constitutions of the State of Idaho and the United States of America. The posttrial procedure is the same as for a pretrial motion; the court must hold a hearing to review every

decision to continue sealing 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. This request 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. This same process applies 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.

Respectfully Submitted May 19, 2023.

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

CERTIFICATE

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

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