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IN THE FIFTH DISTRICT COURT

WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. WARREN STEED JEFFS, Defendant.	**DEFENDANT'S MEMORANDUM ON PUBLIC ACCESS TO SEALED RECORDS** **Case No. 061500526** **Judge James L. Shumate**

The Defendant, Warren Steed Jeffs, by and through his attorneys, respectfully submits the following memorandum to generally address constitutional issues raised in the Media Interveners' response to this Court's Minute Entry Order dated April 20, 2007, which directed the parties to address Mr. Jeffs' federal medical privacy rights under the Health Insurance Portability and Accountability Act ("HIPAA"). Mr. Jeffs reserves the

right to further brief constitutional issues pertaining to specific records to which the press seeks access in accordance to the procedures to be determined by the Court. He reserves the right to meet *in camera* to further support the need for continued sealing of certain records.

By way of overview, the First Amendment right of access does not attach to competency reports when the defendant does not contest the presumption of competency. Alternatively, if the right to access attaches to competency reports and associate records, a substantial probability exists that disclosure of the sealed records would jeopardize Mr. Jeffs' fair trial and privacy rights given the facts and circumstances of this highly publicized case in a small venue. To adequately protect the absolute right of fair trial, the court may properly continue the seal on the private records. Furthermore, the right of access does not mean immediate and complete access. To adequately protect the competing rights, this Court has the authority to delay the release of judicial records until after the pending criminal cases against Mr. Jeffs are resolved. The Court also has the authority to redact portions of judicial records before release.

ARGUMENT

I. THE QUALIFIED RIGHT OF ACCESS TO JUDICIAL PROCEEDINGS AND RECORDS

The First Amendment affords a qualified right of public access to certain judicial proceedings. *Press Enterprises Co, v. Superior Court of California*, 478 U.S. 1, 8 (1986)(*Press Enterprise II*). In determining whether a right of public access attaches to a particular type of proceeding, a court must first apply the "experience and logic" test

announced in *Press Enterprise II*: (1) is there a tradition of public accessibility to the desired information; and (2) would public access serve as a "significant positive role" in the functioning of the judicial process involved? 478 U.S. at 8.; *State v. Archuleta*, 857 P.2d 234, 237 (Utah 1993).

The right of access is not absolute and, therefore, a court must continue the analysis to determine if other interests override the right of access. *Press Enterprise II*, 478 U.S. at 9-10. A court may properly close a hearing if it finds that, in the light of the particular facts and circumstances of the case, a "substantial probability" exists that the competing interest will be prejudiced by a public proceeding and reasonable alternatives to closure are inadequate to protect the competing interests. Id. at 13-14. Competing interests include the defendant's right to fair trial; privacy rights of the defendant and third parties; and privileged and confidential communications. *See, United States v. McVeigh*, 918 F.Supp. 1452, 1466 W.D. Okla. 1996)(*McVeigh I*), *affd.*, 119 F.3d 806 (10th Cir. 1997) *McVeigh II* (defendant's privacy interests and attorney-client relationship); *United States v. Gerena*, 869 F.2d 82, 85 (2d Cir. 1989)(defendant's financial privacy); *Archuleta*, 857 P.2d at 237-38 & 240-41 (fair trial right). A court may properly seal records in which a detained defendant has a privacy interest, including records containing information pertaining to physical and mental health. *McVeigh I*, 918 F.Supp. at 1466.

While the First Amendment right of access is well established in connection with judicial hearings, it is still evolving with respect to judicial records. The United States Supreme Court and Tenth Circuit have not ruled on whether a First Amendment right of access attaches to judicial records. *McVeigh II*, 119 F.3d at 811-12. The Utah

Supreme Court, however, has ruled that the First Amendment right of access attaches to certain judicial documents. *Archuleta*, 857 P.2d at 237-39. Both federal and state law have long recognized a common law right of access to certain judicial records. Id. at 240-41. Like the First Amendment right, the common law right is qualified and subject to a balancing test against competing interests. Id. Application of the balancing test in the instant case is more fully discussed below.

II. COMPETENCY REPORTS ARE HISTORICALLY PRIVATE JUDICIAL RECORDS SUBJECT TO LIMITED USE AND DISCLOSURE

Applying the historical and logic tests of *Press Enterprise II*, competency evaluation reports are historically private judicial records to which public access plays no significant role in the functioning of competency evaluations. *See, People v. Atkins*, 514 N.W.2d 148, 149-50 (Mich. 1994, *affirming in part sub. nom. Detroit News v. Recorder's Court Judge*, 509 N.W.2d 894 (Mich. App. 1994). In *Adkins*, the trial court ordered a competency evaluation of the defendant in a highly publicized murder case pursuant to the request of the defense. 509 N.W.2d at 895. The psychiatrist concluded that the defendant was competent to proceed to trial and the parties so stipulated. Id. Based on the report and parties stipulation, the court found that the defendant was competent and recited on the record only the ultimate conclusions of the psychiatrist without disclosing the remainder of the report. Id. 895 & n. 1.

The Michigan Supreme Court affirmed the denial of the media's motion for access to the entire competency report, finding that no right to access attached to the competency report under the circumstances and facts of the case. *Atkins*, 514 N.W.2d at 149-50. In do doing, the Michigan Supreme Court approved of the appellate court's

application of the *Press-Enterprise II* analysis. Id. In applying the "historical" prong of the *Press-Enterprise II*, the appellate court found that the state statute providing for competency evaluations limited accessibility to the court and parties. *Detroit News*, 509 N.W.2d at 897. Under the "logic" test, the appellate court found that giving the press access to the entire competency report would seriously undermine the process of competency determinations:

> Additionally, we believe that the consideration of "whether public access plays a significant positive role in the functioning of the particular process in question, [citation omitted] weighs against a finding that a right of access applies to the undisclosed portions of the competency report. The possibility that the entire contents of a competency report, including those portions not dealing with competency itself, could be disseminated to the public at large, would seriously undermine the process. *A defendant, without the guarantee of confidentiality, might be reluctant to speak candidly with the examining psychiatrist. In certain situations, defendants may even choose not to raise the issue of competency and forgo a competency evaluation to avoid public disclosure. In either situation, the flow of necessary information to the examining psychiatrist and ultimately to the court would be hindered by unrestricted access to competency reports.*

Id. at 898. [Emphasis added.]

The Utah competency statute, like the one in *Atkins*, restricts access to competency reports. Only the court, prosecuting attorney, and defense counsel are authorized to receive the competency report. § 77-15-5(6). As previously briefed, the Utah Judicial Administration Rule 4-202.02(4)(J), classifies court records which contain "medical, psychiatric, or psychological records" as "private records."

Furthermore, the Utah competency statute prohibits the admission of the defendant's statements made during the competency evaluation, as well as expert testimony or other evidence derived therefrom, at trial unless the defendant raises the

issue of mental condition. § 77-15-5(8)(a). The defendant's statements and evidence derived therefrom may be admitted where relevant to determine the defendant's competency. Id. The purpose of limiting the use of a defendant's communications to the examiner is to promote the objectives of an accurate evaluation and further protect the defendant's Fifth Amendment right against self-incrimination. *Court v. Whitney*, 885 A.2d 1200, 1207 (Vt. 2005)(dissent)

Should a competency hearing convene, certain procedural rules apply as set forth Section 62A-15-631(9)(b)-(f), which relate to involuntary commitment procedures. § 77-15-5(9). Under these procedures, a competency hearing must be conducted in accordance with the rules of evidence. Id.; § 62A-15-631(9)(e). A defendant is presumed competent unless the proponent of incompetency at the hearing establishes, by a preponderance of evidence, that the defendant is incompetent. § 77-15-5(10).

Like the Defendant in *Atkins*, Mr. Jeffs does not dispute competency and, therefore, a litigated competency hearing is not required and his protected health information will not be introduced into evidence. As such, he is presumed to be competent. § 77-15-5(10). Any records pertaining to his mental health should remain private and confidential in adherence to the above authority. The press has no right of access to such records pursuant to the experience and logic tests in *Press Enterprise II*. 478 U.S. at 8. In Utah, competency reports are historically treated as private records and filed under seal by the Clerk's Office.[1]

[1] The same is true with presentence reports and the psychological reports that accompany presentence reports.

As to the logic test, granting public access to competency reports in cases where no dispute of competency exists would only serve to undermine the competency evaluation process. Public disclosure of the entire report would cast a chilling effect on future Defendants' willingness to participate in such evaluations. Moreover, without the historical safeguard of privacy, a defense counsel would face a Hobson's choice between providing effective assistance of counsel to ensure competency and appropriate medical care for a client versus risking public disclosure of private health information and prejudicial pre-trial publicity. *Cf.*, *McVeigh II*, 119 F.3d at 814 (upholding substantial redaction of severance motion to avoid chilling effect on effective representation of counsel).

In support of their arguments for access, the Media Interveners rely heavily on *State v. Bullock*, 743 P.2d 1166 (Utah 1987), which held that a right to access attached to competency hearings. *Bullock* is distinguishable in that the trial court there held three closed competency hearings and, ultimately, found the defendant to be competent. Id. at 1169-70. Without discussing the *Press Enterprise II* analysis, the *Bullock* Court held that a First Amendment right of access attaches to competency hearings because they constitute a significant pretrial proceeding in which courts determine whether a person is competent to proceed to trial. Id. at 1177-78. As such, it concluded that public access would foster the policy against trying incompetent people for criminal offenses. Id. at 1178. The issue of whether competency reports or other inadmissible evidence should be disclosed to the press was not before the *Bullock* Court. Unlike *Bullock*, the issue of competency is not disputed in the instant case and the presumption of competency remains applicable to Mr. Jeffs.

III. EVEN IF QUALIFIED RIGHT OF ACCESS ATTACHES TO COMPETENCY REPORTS, THE COMPETING RIGHTS TO FAIR TRIAL AND PRIVACY DICTATE AGAINST UNFETTERED ACCESS TO SEALED RECORDS

Assuming, *arguendo*, that this court were to find that the First Amendment provides a right of access to competency reports, the facts and circumstances in this case present a substantial probability that Mr. Jeffs' fair trial and privacy rights will be jeopardized. In evaluating whether there is a substantial probability that access to a judicial proceeding or document will impair a defendant's Sixth Amendment right to fair trial, a court should consider the nature of the crime, along with the following factors: "the nature and extent of the publicity, (2) the amount of information already in the public domain (3) the existence of prejudicial information not yet released to the public, (4) the size of the county from which the prospective jurors will be drawn, and (5) whether potential voir dire or other measures could eliminate any prejudice caused by the publicity." *People v. Jackson*, 27 Cal. Rptr. 3d 596, 607 (Cal. App. 2005); *see cf., State v. James*, 767 P.2d 549, 552 (Utah 1989)(listing similar factors for assessing impact of pretrial publicity on fair trial for purposes of change of venue).

In his motion for change of venue, the Defendant submitted arguments and evidence pertaining to the above factors. He, therefore, incorporates by reference herein the arguments and exhibits previously filed in his motion for change of venue.

In denying the Defendant's motion for change of venue, this Court expressed great concern that the pre-trial publicity surrounding this case, especially in the local press, could impact on Mr. Jeffs' right to fair trial. Despite the Court's genuine concern, the press used digital technology to enhance a photograph of a note written by Mr. Jeffs in court and displayed only to his counsel. The contents of the note could not be read

by the naked eye of those in the audience without the digital enhancements. The Media Interveners explained that the note corroborated information obtained from a confidential law enforcement source and they deemed the matter newsworthy. The enhancement of the photograph, along with the continual and intense media coverage demonstrates that unfettered access to the sealed materials in the instant case will further exasperate the prejudice already generated against the Defendant in the small community of Washington County.

Additionally, unfettered access to the sealed material will likely interject into the public domain facts which are inadmissible and inflammatory facts. In *Archuleta*, the Utah Supreme Court held that the trial court properly sealed documents associated with a preliminary hearing in a highly publicized murder case. 857 P.2d at 239. The *Archuleta* Court found the inflammatory and speculative nature of the documents created a substantial probability that alternatives to closure were unavailable to adequately protect the defendant's right to fair trial. Id.

Furthermore, a court may properly redact information from motions and documents to avoid creating a Hobson's choice for counsel in providing effective assistance of counsel and disclosure of prejudicial information. *McVeigh II*, 119 F.3d at 814. "'The court, in applying the balancing test mandated by the First Amendment, should give added weight to fair trial and privacy interests where requiring disclosure will have a potential chilling effect on future movants.'" Id., *quoting Matter of New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987).

To protect the privacy of a detained defendant, the court may properly seal records which contain information pertaining to the defendant's physical or mental

health. *McVeigh I*, 918 F.Supp. 1452, 1466. In the absence of a challenge to a competency determination, only the ultimate conclusions of the examiner with respect to a defendant's present capacity to comprehend the proceedings, appreciate the pending charges, and render assistance to counsel are relevant. The private health information and protected communications with the examiner are not public record merely because an evaluation may have been undertaken.

Finally and significantly, the Utah Supreme Court and other courts have ruled that a trial court may properly delay the release of sealed records or portions thereof until such time that the risk of prejudice to the defendant's fair trial right have abated. *See, Bullock*, 743 P.2d at 1178; *Kearns-Tribune v. Lewis*, 685 P.2d 515, 524 (Utah 1984); *McVeigh I*, 918 F.Supp. At 1464. The court observed in *McVeigh I*: "The timing of the disclosure is also a significant factor in the balancing of the affected interest. The stage of the proceeding may determine the question of access." 918 F. Supp. At 1464.

The Media Interveners cite *United States v. Kaczynski*, 154 F.3d 930 (9th Cir. 1998), to support the disclosure of any competency report. In that case, the trial court found that the defendant was competent based on the parties' stipulation and submitted competency report. 154 F.3d at 931. Two days later, the defendant pleaded guilty. Id. Thereafter, the press moved to unseal the competency reports. The *Kaczynski* Court found that the public had a legitimate interest in the report to inform the public of the competency determination and the defendant's motivation for committing the crimes. Id. at 931-32. The Court ordered the unsealing of a redacted version of the report to remove information concerning private information about third parties and the defendant. Id. at 932. This case demonstrates that the timing of the release of

redacted records after the disposition of a case may adequately address the public's right to know about competency determination.

CONCLUSION

This Court is duty-bound to protect the Defendant's right to fair trial and privacy. It may properly continue to seal judicial records which are historically private. Alternatively, if it concludes that the right of access applies, it should redact portions of the sealed records, after *in camera* review, and delay release until after this and other criminal proceeding against Mr. Jeffs are concluded. The Media Interveners right of access is not absolute. The Defendant's right to fair trial is absolute.

DATED this 23 day of May, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 23 day of May, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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