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IN THE FIFTH DISTRICT COURT IN AND FOR WASHINGTON COUNTY

STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. WARREN STEED JEFFS, Defendant.	**MEDIA INTERVENORS' MEMORANDUM REGARDING HIPAA AND SEALED DOCUMENTS** Criminal No. 061500526 Judge James L. Shumate

The Court has asked the parties to address whether the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") has any bearing on the Media Intervenors' pending Motion for Limited Intervention. The answer to this question is no. HIPAA does not apply to

courts or to court records. When documents are filed with the court, a presumptive right of access attaches that requires a party to meet a stringent constitutional test before documents may be placed under seal. Even if HIPAA were applicable to court records (which it is not), it would be trumped by this constitutional right of access. Because courts routinely release medical records and competency-related documents in cases like this one where the documents concern a criminal defendant and are material to a public criminal trial, the Media Intervenors respectfully request that the documents filed under seal in this case be immediately released.

I. HIPAA DOES NOT APPLY TO COURTS OR COURT RECORDS.

HIPAA, which establishes national standards for protection of the privacy of individually identifiable health and medical information, *MacArthur v. San Juan County*, 416 F. Supp. 2d 1098, 1192 (D. Utah 2005), narrowly applies to health plans and health providers—not courts. By its clear statutory and regulatory terms, HIPAA only applies to three types of covered entities: (1) a health plan, (2) a health care clearing house, and (3) a health care provider who transmits any health information in electronic form as defined by the statute.[1] 42 U.S.C. § 1320d-1(a); 45

[1] A "health plan" is generally defined as "an individual or group plan that provides, or pays the cost of, medical care." 42 U.S.C. § 1320d(5); 45 C.F.R. § 160.103. A "health care clearing house" is defined as "a public or private entity that processes or facilitates the processing of nonstandard data elements of health information into standard data elements." 42 U.S.C. § 1320d(2); 45 C.F.R. § 160.103. A "health care provider" includes "a provider of medical or health services," 42 U.S.C. § 1320d(3), and "any other person or organization who furnishes, bills, or is paid for health care in the normal course of business." 45 C.F.R. § 160.103. Courts do not fall within any of these definitions.

C.F.R. § 160.102(a) (2006); 45 C.F.R. § 164.104(a) (2006). HIPAA was never intended to, nor does it, govern or regulate the actions of the judiciary with respect to the disclosure of medical records or other private health information filed in the courts, even if such records were subject to HIPAA prior to reaching the court file. Indeed, the Assistant Secretary for Planning and Evaluation of the Department of Health and Human Services has made clear that HIPAA's privacy rule "regulates the ability of health care clearing houses, health plans, and covered health care providers to use and disclose health information. ***It does not regulate the behavior of law enforcement officials or the courts***." Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462, 82680 (Dec. 28, 2000) (emphasis added); *see also id.* at 82524 (noting the agency eliminated language from the final rule addressing the uses of protected health information by government entities conducting judicial or administrative proceedings because it "no longer believe[d] that there would be any situations in which a covered entity would also be a judicial or administrative tribunal").

This issue was addressed just weeks ago by the Appellate Court of Illinois in one of the only reported decisions to discuss the applicability of HIPAA to court records. In *Coy v. Washington County Hospital District*, No. 5-06-0140, 2007 Ill. App. LEXIS 343 (Ill. App. Ct. Apr. 9, 2007), the court examined and unequivocally rejected the argument that access to medical information contained in court files is governed in any way by HIPAA. *See id.* at *5-11. There, the appellant newspaper intervened in an action arising out of the suspension of a doctor's

medical privileges and requested that the trial court unseal an order containing the names of several of the doctor's patients. *See id.* at *1. The trial court denied the request, reasoning it was obligated to comply with HIPAA regulations when issuing court orders and that granting the request to unseal the order would violate HIPAA. *Id.* at *4.

On appeal, the Appellate Court of Illinois held that the trial court "erred as a matter of law in concluding that the court would violate HIPAA by unsealing its order." *Id.* at *7. The court noted that because the application of HIPAA's privacy rule is limited to defined health plans, health care clearing houses, and qualified health providers, "***the plain language of HIPAA demonstrates that the judiciary, which is not a health plan, a health care clearinghouse, or a qualified health care provider, is not subject to HIPAA's privacy rule.***" *Id.* at *9 (emphasis added). In reaching this conclusion, the court explained there "is a good reason" a court is not a covered HIPAA entity:

> [G]iven its nature as a vehicle for the settlement of disputes, rather than as an entity that generates, stores, transmits, or analyzes medical data, **a court could not be in possession of covered medical information to disclose unless that information had been provided, for whatever reason, by parties that already had access to that information.**

Id. at *9-10 (emphasis added). Because courts are not covered entities under HIPAA, *Coy* held that HIPAA does not apply to requests seeking access to court records.[2] *See id.* at *10-11.

[2] Although *Coy* ultimately affirmed the trial court's refusal to unseal the portions of the order containing the names of the patients, the court did so on grounds that the information at issue concerned patients who were *nonparties* to the lawsuit and did not consent to the disclosure

As a result, HIPAA is irrelevant to the Media Intervenors' Motion for Limited Intervention. The Media Intervenors are not attempting to subpoena protected health records from Mr. Jeffs' health care provider or obtain access to records that are not part of the public court file. Rather, the Media Intervenors simply seek access to court documents Mr. Jeffs himself disclosed when he filed those documents with this Court. Access to those documents, once they reach the court file, is governed by the public's constitutional right of access, not HIPAA. As explained below, Mr. Jeffs has not met and cannot meet the heavy burden necessary to file documents under seal in this case.

II. THE PUBLIC AND THE MEDIA HAVE A PRESUMPTIVE CONSTITUTIONAL RIGHT OF ACCESS TO THE DOCUMENTS FILED IN MR. JEFF'S CRIMINAL PROCEEDINGS.

A. Public Access to Documents Filed in Connection with Criminal Pretrial Proceedings Is Important Because Access Safeguards the Integrity of the Judicial Process.

The public and the press enjoy a presumptive constitutional right of access to pretrial criminal proceedings and the documents filed in relation to those proceedings, including competency proceedings. The United States Supreme Court and the Utah Supreme Court have affirmed this constitutional right of access in a variety of contexts. *See, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S. Ct. 2735 (1986) (*"Press-Enterprise II"*) (preliminary

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of that information. *See* 2007 Ill. App. LEXIS 343 at *14-16. That holding does not apply here because the records at issue apparently concern Mr. Jeffs, the defendant in this case.

hearings); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819 (1984) ("*Press-Enterprise I*") (criminal voir dire proceedings); *Waller v. Georgia*, 467 U.S. 39 (1984) (applying First Amendment open courts analysis to pretrial suppression hearing); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S. Ct. 2613 (1982) (criminal trial involving child victim of rape); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814 (1980) (criminal trial); *State v. Archuleta*, 857 P.2d 234 (Utah 1993) (court records filed in connection with preliminary hearing); *Society of Professional Journalists v. Bullock*, 743 P.2d 1166 (Utah 1987) (competency hearing); *Kearns-Tribune v. Lewis*, 685 P.2d 515 (Utah 1984) (preliminary hearings).

The open court fosters and protects important societal values. It enhances the quality and safeguards the integrity of the fact-finding process, *Globe Newspaper Co.*, 102 S. Ct. at 2619, enhances basic fairness and the appearance of fairness in the proceedings, *Press-Enterprise II*, 106 S. Ct. at 2743, fosters public confidence in the judicial process and acceptance of its results, *Press-Enterprise I*, 104 S. Ct. at 822, acts as a check on the judiciary, *Richmond Newspapers*, 100 S. Ct. at 2823, and allows the public to participate in government. *Id.* at 2833 (Brennan, J., concurring). Although members of the public may not attend criminal proceedings in large numbers, the news media acts as the public's surrogate in attending such proceedings and reporting to the public, thus educating the public. *Id.*, 100 S. Ct. at 2825.

Conversely, denying public access to judicial proceedings precludes public scrutiny of the judicial process, creating an impression of unfairness and secrecy, even though the proceedings may in fact be imminently fair. See M. Fowler & D. Leit, Media Access to the Courts: The Current Status of the Law (American Bar Association, Section of Litigation, 1995) at 1; *see also Soc'y of Prof'l Journalists v. Sec'y of Labor*, 616 F. Supp. 569, 576 (D. Utah 1985) (Winder, J.) ("Openness safeguards our democratic institutions. Secrecy breeds mistrust and abuse."), *appeal dismissed and remanded on other grounds*, 832 F.2d 1180 (10th Cir. 1987).

In *Society of Professional Journalists v. Bullock*, the Utah Supreme Court directly addressed the importance of public access to pretrial competency proceedings. *Bullock* involved a high-profile prosecution of a defendant whose competency to stand trial was a central issue in the case. The Utah Supreme Court found that the trial court erred in excluding the press and public from the defendant's competency hearing, commenting at length on the "importance of public access" to such hearings. *Bullock*, 743 P.2d at 1177. The Court specifically noted as follows:

> The determination made at such a competency proceeding nonetheless involves issues of fundamental importance to the criminal process. . . . Given this strong public policy against trying an incompetent person for a criminal offense, it seems plain that the proceeding at which competency is determined is a significant one in the criminal process. The public should be entitled to scrutinize the implementation of this policy, unless strong countervailing considerations warrant closure.

Id. at 1177-78. Other courts that have addressed these issues have repeatedly rejected attempts to close pretrial competency hearings for failure to meet the rigorous constitutional standard. *See Miami Herald Publ'g Co. v. Chappell*, 403 So. 2d 1342 (Fla. Ct. App. 1981) (trial court erred in closing competency proceeding based on mistaken reading of confidentiality statute); *In the Matter of Westchester Rockland Newspapers, Inc. v. Leggett*, 399 N.E. 2d 518 (N.Y. 1979) (trial court erred in closing competency hearing in absence of showing that right to fair trial would be prejudiced); *In re Times-World Corp.*, 488 S.E.2d 677, 682 (Va. Ct. App. 1997) (the public has "a right to know that the incompetent are not tried and that the competent do not evade trial").

The Utah Supreme Court has also held that the presumptive right of access to criminal pretrial proceedings, including competency hearings, applies to documents filed in connection with criminal pretrial proceedings. *See Archuleta*, 857 P.2d at 238-39. As the court explained in *Archuleta*, access to such documents plays a critically important role in the functioning of the criminal process:

> "Access to pretrial documents furthers the same societal needs served by open trials and pretrial civil and criminal proceedings. . . . The availability of documents means that graft and ignorance will be more difficult to conceal." Disclosing documents used by courts in reaching a decision in a preliminary hearing will discourage decisions based on improper means and will promote conscientious performance by all officials involved in the criminal justice system. Therefore, providing a presumptive right of access to documents filed in connection with preliminary hearings can play a significant positive role in the functioning of that process.

Id. (ellipses in original; citation omitted).

B. A Party May Not File Documents Under Seal Unless He Establishes Both a "Substantial Probability" or "Realistic Likelihood" of Prejudice to His Right to a Fair Trial and that No Reasonable Alternatives to Sealing the Documents Exist.

In light of the compelling constitutional interests in open criminal proceedings and access to documents filed in criminal proceedings in general, and pretrial competency hearings in particular, the United States Supreme Court and Utah Supreme Court have imposed a heavy burden on a party seeking to file documents under seal. Under the First Amendment, documents may be filed under seal only if the party seeking closure shows that upholding the public's presumptive right of access would create a ***"substantial probability that the defendant's right to a fair trial will be prejudiced*** by the publicity that closure would prevent," and that "reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Archuleta*, 857 P.2d at 238 (emphasis added) (quoting *Press-Enterprise II*, 478 U.S. at 14 (further citation omitted)). Similarly, under the Utah Constitution, documents may be filed under seal only if the party seeking closure demonstrates that access "poses ***'a realistic likelihood of prejudice' to an accused's right to a fair trial.***"[3] *Id.* at 240 (quoting *Kearns-Tribune*, 685 P.2d at 520-22). In

[3] The United States Supreme Court in *Press-Enterprise II* established the controlling constitutional standard by which attempts to close pretrial criminal proceedings must be measured. A court may deny public access to pretrial criminal proceedings only if three substantive requirements are met: (i) closure serves a compelling governmental interest; (ii) there is a "substantial probability" that, in the absence of closure, the compelling interest will be harmed; and (iii) there are no less-restrictive alternatives to closure that would adequately protect the compelling interest. *Press-Enterprise II*, 106 S. Ct. at 2742-43. To the extent there is any difference between the "substantial probability" of prejudice standard established by the United

applying these standards, the proponent of closure has the "significant" burden of establishing that the constitutional requirements are satisfied. *Kearns-Tribune*, 685 P.2d at 523.[4]

III. MR. JEFFS HAS NOT SATISFIED HIS BURDEN FOR FILING DOCUMENTS IN THIS CASE UNDER SEAL.

Mr. Jeffs has not carried his significant burden in demonstrating either that filing documents under seal is necessary to protect his right to a fair trial or that less restrictive alternatives to closure are unavailable to protect that right. Indeed, to the Media Intervenors' knowledge, Mr. Jeffs has failed to make any effort to meet his burden whatsoever, much less presented the type of compelling evidence necessary for such an extraordinary measure. Instead, Mr. Jeffs simply filed documents under seal without any explanation or justification, depriving

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States Supreme Court in *Press-Enterprise II* and the "realistic likelihood" of prejudice standard established by the Utah Supreme Court in *Bullock* and *Kearns-Tribune*, this Court must apply the United States Supreme Court standard. U.S. Const. Art. VI, Sec. 2. Mr. Jeffs has failed to carry his burden under either standard in any event. In addition, Article I, section 15 of the Utah Constitution affords at least the same, and perhaps greater, free speech and free press protections as are found under the First Amendment to the United States Constitution. *See KUTV v. Conder*, 668 P.2d 513, 521 (Utah 1983); *West v. Thomson Newspapers*, 872 P.2d 999, 1015 (Utah 1994). Therefore, the First Amendment standard governing public access to pretrial criminal proceedings established by the United States Supreme Court in *Press-Enterprise II*, and since developed by the lower courts, is at least coextensive with the standard governing access to such proceedings and documents under Article I, section 15 of the Utah Constitution.

[4] Other courts have emphasized the rigorous nature of this constitutional standard. *See, e.g., Miami-Herald*, 403 So. 2d at 1345 (movant must show "a serious and imminent threat to the administration of justice"); *Westchester Rockland Newspapers*, 399 N.E.2d at 524-25 (must show "strong likelihood" of prejudice to fair trial rights); *Times-World*, 488 S.E.2d at 683 (must show "substantial probability" of prejudice to right to a fair trial).

the public of any meaningful way to assess, let alone challenge, the appropriateness of the decision to seal the documents. Mr. Jeffs' actions have left the Media Intervenors with nothing more than speculation as to the content of the documents (which appear to relate to Mr. Jeffs' competency) and the reasons why those documents should not be disclosed to the public.[5]

Even more egregious, documents continue to be filed under seal in this case without any notice to the Media Intervenors and without any opportunity for the Media Intervenors to be heard prior to sealing, despite the fact that notice and a hearing are unequivocally required under Utah law. *See Bullock*, 743 P.2d at 1178 n.15; *Kearns-Tribune*, 685 P.2d at 524. The Media Intervenors are presently aware of at least four documents that have been placed under seal, one of which was filed just yesterday, May 9, 2007, entitled "Report of a Competence to Proceed Evaluation." This is in addition to the "Petition" and "Order" filed under seal on April 3, 2007, and a "Sealed Report" filed April 23, 2007. The Media Intervenors' Request for Notice was filed on April 18, 2007 and unambiguously applies to these latter two filings. Even aside from the substantive reasons the documents should be unsealed, addressed below, these procedural deficiencies alone require that the documents be unsealed.

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[5] The burden for closing preliminary hearings or sealing documents is on the proponent of closure precisely because of this situation presented in this case. As the party seeking closure, Mr. Jeffs necessarily bears the burden because he has best access to the evidence or information used to sustain the burden. *See Kearns-Tribune*, 685 P.2d at 523. As the court explained in *Kearns-Tribune*, it is "unfair and unworkable to impose the burden on the members of the public, such as the media" because such a burden "doom[s] [the media's] efforts to automatic failure" by "requiring proof without access to evidence." *Id.*

A. Mr. Jeffs Has Not and Cannot Show that Public Access to His Petition Will Pose a Substantial Risk to His Right to a Fair Trial.

Assuming the sealed documents relate to Mr. Jeffs' present physical or mental health, there is no probability or likelihood that releasing such information could prejudice Mr. Jeff's right to a fair trial—*especially* if the documents relate to Mr. Jeffs' competency. Any risk of prejudice to an accused's right to a fair trial is substantially *lower* in the context of competency proceedings than it is in other pretrial proceedings, which makes the defendant's burden in seeking closure substantially higher. As the Utah Supreme Court has explained:

> As a general proposition, pretrial competency proceedings present fewer inherent dangers of prejudice than preliminary hearings. As noted above, a competency proceeding focuses narrowly on a defendant's present mental capacity, rather than on a defendant's mental state at the time the crime charged was committed. Ordinarily, "evidence relevant and admissible to establish the defendant's [present] capacity to understand the legal proceedings and to assist his attorney would . . . reveal little or nothing about his possible guilt of the crimes charged."

Bullock, 743 P.2d at 1178 (quoting *Westchester Rockland Newspapers*, 399 N.E.2d at 524); *see also Miami Herald*, 403 So. 2d at 1344-45 (in a competency hearing, "[i]t is . . . unlikely that testimony jeopardizing a defendant's right to a fair trial would be elicited"); *Times-World*, 488 S.E.2d at 683 (much lower risk of prejudice in competency hearing context).

Courts routinely allow public access to medical records or evaluations in criminal proceedings where, as here, the records filed are those of the criminal defendant, and especially where the filings concern his or her competency. *See, e.g., State v. Whitney*, 885 A.2d 1200, 1201-04 (Vt. 2005) (affirming trial court's refusal to seal a court ordered competency report

based on the state rules governing public access to court records); *United States v. Curran*, No. CR-06-227-PHX-EHC, 2006 U.S. Dist. LEXIS 36255, *1, 6-9 (D. Ariz. June 2, 2006) (granting media's motion to unseal defendant's competency report with redactions to protect third parties and private matters that were irrelevant to the competency determination); *United States v. Sattar*, 471 F. Supp. 2d 380, 383-89 (S.D.N.Y. 2006) (disclosing to media redacted portions of a psychiatric report defendant had previously filed under seal); *United States v. Kaczynski*, 154 F.3d 930, 931-32 (9th Cir. 1998) (affirming trial court's decision to unseal and disclose court ordered psychiatric report, with exception for redactions relating to private information of third parties, based on the media's common-law right to inspect judicial records and documents).

In fact, this exact issue was recently decided by Judge Judith Atherton of Utah's Third Judicial District Court in the highly publicized criminal prosecution of Brian David Mitchell for his alleged abduction of Elizabeth Smart. *See State v. Mitchell*, Case No. 031901884 (Utah 3rd Dist. Ct.). That case, which generated at least as much media attention as the prosecution of Mr. Jeffs, also involved the issue of whether Mr. Mitchell was competent to stand trial. As in this case, Mr. Mitchell's attorneys made repeated attempts to file documents under seal and to close Mr. Mitchell's competency hearing to the public and press. After extensive briefing, a full hearing, and lengthy consideration, Judge Atherton denied Mr. Mitchell's closure motion and upheld the public's constitutional right of access, ruling that Mr. Mitchell had failed to carry his

burden to overcome the stringent constitutional test and requiring that his competency hearing remain open to the public. A copy of Judge Atherton's Order is attached hereto as Exhibit "A".

The same result should govern here. Mr. Jeffs cannot carry his substantial burden of showing that preserving the public's right of access will result in a "substantial probability" that he cannot receive a fair trial. The documents should be unsealed.

B. Less Restrictive Alternatives to Closure Are Available To Protect Mr. Jeffs' Rights.

Even assuming that public disclosure of the sealed documents could create a substantial probability of prejudice to Mr. Jeff's fair trial rights, any number of less restrictive alternatives are available to adequately protect those rights, including the time-tested judicial tools of voir dire, juror questionnaires, an enlarged jury venire, peremptory challenges, admonitions to the jury, continuance, or change of venue. All of these alternatives are preferable to sacrificing the public's right to observe the judicial process.

Of these available and effective alternatives, courts have found that careful and searching voir dire, coupled with carefully crafted juror questionnaires, are the preferred methods of revealing juror exposure to prejudicial pretrial publicity. *See United States v. Martin*, 746 F.2d 964, 973 (3d Cir. 1984) ("Testing by voir dire remains a preferred and effective means of determining a juror's impartiality and assuring the accused a fair trial."); *State v. Schaefer*, 599 A.2d 337, 345 (Vt. 1991) ("As a basic principle, voir dire is the normal and preferred method of

combating the effects of pretrial publicity."). As the United States Court of Appeals for the Fourth Circuit observed:

> The reason that fair trials can coexist with media coverage is because there are ways to minimize prejudice to defendants without withholding information from public view. *With respect to 'the potential prejudice of pretrial publicity,' . . . voir dire is of course the preferred safeguard against this particular threat to fair trial rights . . . [and] can serve in almost all cases as a reliable protection against juror bias however induced.*

In re Search Warrant, 923 F.2d 324, 329 (4th Cir. 1991) (emphasis added). In fact, voir dire of prospective jurors was exactly the procedure recommended by the United States Supreme Court in *Press-Enterprise II*. "Through voir dire, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict." *Press-Enterprise II*, 106 S. Ct. at 2735.

Judicial reliance on voir dire instead of closure of court records rests on several grounds. First, "there is somewhat of a tendency to 'frequently overestimate the extent of the public's awareness of news.'" *In re Search Warrant*, 923 F.2d at 329 (quoting *United States v. Myers*, 635 F.2d 945, 953 (2d Cir. 1980)). Trial courts have successfully selected juries despite extensive, even massive, pretrial publicity. *See, e.g., State v. Pierre*, 572 P.2d 1338, 1349 (Utah 1977), *cert. denied*, 439 U.S. 882 (1978) (extensive pretrial publicity surrounding Ogden Hi-Fi torture-slayings did not prevent impaneling of impartial jury for defendants); *In re Nat'l Broadcasting Co.*, 635 F.2d 945, 953 (2d Cir. 1980) (extensive publicity about "Abscam" case would not prevent selection of impartial jurors); *United States v. Haldeman*, 559 F.2d 31, 61-62 (D.C. Cir.

1976) (publicity surrounding Watergate scandal did not prevent fair trial), *cert. denied sub nom.*, *Ehrlichman v. United States*, 431 U.S. 933 (1977).

Second, even potential jurors aware of a case are not automatically disqualified from sitting so long as they can set aside their impressions and judge the case on the basis of the evidence presented at trial. *In re Search Warrant*, 923 F.2d at 329. The Fourth Circuit said the following in upholding the trial court's use of voir dire to detect juror exposure to pretrial publicity in the case of a defendant charged with abducting a five-year-old girl:

> The judicial system is entitled to respect the critical faculties of those citizens who give their time as jurors. *It verges upon insult to depict all potential jurors as nothing more than malleable and mindless creations of pretrial publicity.* Jurors can be skeptical about the sort of information contained in the paragraph at issue here [an affidavit in support of a search warrant] and are not necessarily naive to the fallibility of various police investigative techniques. They are also quite capable of concentrating on the evidence presented before them in open court, especially when admonished by appropriate instructions of their sober responsibility to do so.

Id. at 330 (emphasis added).

Finally, even assuming that thorough voir dire, a detailed juror questionnaire, and an enlarged jury venire proved inadequate to protect against prejudicial pretrial publicity in this case, other options, such as continuance or change of venue, are still available to the Court. Although such procedures may be inconvenient and entail additional cost, they have the benefit of preserving the defendant's right to a fair trial without eviscerating the First Amendment right of the public and the news media to attend criminal judicial proceedings. *See id; see also Seattle*

Times v. United States District Court, 845 F.2d 1513, 1518 (9th Cir. 1988) ("The issue is not whether a potential juror is ignorant of the case, but whether he had a preconceived idea of the defendant's guilt or innocence. Moreover, if voir dire fails to impanel an impartial jury, the options of continuance or change of venue are still open.").

The use of these time-tested judicial tools in this case is a far wiser course of action than compromising the constitutional rights of access based on speculative and unsubstantiated assertions of prejudice. Because such less restrictive alternatives to closure are available, Mr. Jeffs cannot satisfy his constitutional burden to file documents under seal. Accordingly, under the governing constitutional standard, the Court should unseal the documents that have been placed under seal in this case.

CONCLUSION

"People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 2825 (1980). The trial of Mr. Jeffs is an event of substantial public interest that has drawn national media attention. Any documents filed with the court, especially documents relating to Mr. Jeffs' competency to stand trial, are public records subject to a constitutional right of access. Because Mr. Jeffs has not made any showing sufficient to overcome this constitutional right, the Court should unseal the documents in this case.

RESPECTFULLY SUBMITTED this 10 day of May 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of May 2007, a true and correct copy of the foregoing **MEDIA INTERVENORS MEMORANDUM REGARDING HIPAA AND SEALED DOCUMENTS** was sent via United States mail, postage prepaid, to:

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EXHIBIT "A"

Order Denying Defendant's Motion to Close Competency Hearing to the Public and the Press

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IN THE THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH, SALT LAKE DEPARTMENT

STATE OF UTAH,

Plaintiff,

vs.

BRIAN DAVID MITCHELL,

Defendant.

DESERET NEWS PUBLISHING COMPANY, publisher of the *DESERET MORNING NEWS*, *THE SALT LAKE TRIBUNE*, BONNEVILLE INTERNATIONAL CORPORATION d/b/a KSL-TV, THE ASSOCIATED PRESS, and THE UTAH HEADLINERS CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS,

Intervenors.

ORDER DENYING DEFENDANT'S MOTION TO CLOSE COMPETENCY HEARING TO THE PUBLIC AND THE PRESS

Case No. 031901884 FS

Judge Judith S.H. Atherton

Defendant Brian David Mitchell's motion and/or request to close his competency hearing and the objections thereto and/or motions for public access to the competency hearing filed by various news media organizations came on for hearing before the Court, the Honorable Judith S.H. Atherton presiding, at 9:00 a.m. on August 3, 2004, Clark Harms and Jeffrey Hall of the Salt Lake District Attorney's Office appearing on behalf of the State of Utah ("State"); Kimberly A. Clark, Heidi A. Buchi, Patrick W. Corum, Heather Brereton, and Mark A. Helm appearing on behalf of the Defendant, Brian David Mitchell ("Mitchell"); Michael Patrick O'Brien appearing on behalf of media intervenor *The Salt Lake Tribune*; and Jeffrey J. Hunt appearing on behalf of media intervenors the *Deseret Morning News*, KSL-TV, the Associated Press, and the Utah Chapter of the Society of Professional Journalists (the foregoing media entities are hereinafter referred to collectively as the "Media Intervenors"); the Court having carefully reviewed and considered the legal memoranda and other materials submitted by the parties and the Media Intervenors, as well as the other materials contained in the file; having received and considered additional information and proffers of evidence from counsel for the State and the Defendant during a 90-minute *in camera* session during which counsel for the Media Intervenors were present; having heard and considered the arguments of counsel during the *in camera* session and in open court, being fully advised in the premises and good cause appearing therefor, hereby makes the following Findings, Conclusions, and Order:

FINDINGS AND CONCLUSIONS

1. Mitchell is charged with multiple felony counts arising out of the June 5, 2002 abduction of E. S. from her Salt Lake City home.

2. The abduction of E. S., the subsequent search for her by local and federal law enforcement and by hundreds of volunteers, and the eventual discovery of E. S. in March 2003, all generated extensive local and national media coverage.

3. Since E. S.'s return and the arrest of Mitchell and co-defendant Wanda Eileen Barzee ("Barzee"), the criminal prosecutions of Mitchell and Barzee have attracted substantial media coverage.

4. Mitchell has requested that his competency hearing, scheduled for August 31, 2004, be closed to the public and the news media, including the Media Intervenors.

5. Pursuant the Court's Orders dated January 30, 2004 and April 12, 2004, the Court conducted a 90-minute *in camera* hearing during which counsel for Mitchell presented information and proffers of evidence they claimed may be disclosed during Mitchell's competency hearing and which, if disclosed, would create a substantial probability of prejudice to Mitchell's fair trial rights.

6. Counsel for the State also presented *in camera* information and proffers of evidence that may be disclosed during Mitchell's competency hearing.

7. Criminal pretrial proceedings are presumptively open to the public and the news media under the First Amendment to the United States Constitution and Article I, section 15 of the

Utah Constitution. *See, e.g., Press-Enterprise v. Superior Court*, 478 U.S. 1, 106 S. Ct. 2735 (1986) ("*Press-Enterprise II*") (preliminary hearings); *Press-Enterprise Co.v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819 (1984) ("*Press-Enterprise I*") (voir dire proceedings); *Waller v. Georgia*, 467 U.S. 39 (1984) (pretrial suppression hearings); *State v. Archuleta*, 857 P.2d 234 (Utah 1993) (court records filed in connection with preliminary hearings); *Kearns-Tribune v. Lewis*, 685 P.2d 515 (Utah 1984) (preliminary hearings).

8. Of particular relevance here is *Society of Professional Journalists v. Bullock*, 743 P.2d 1166 (Utah 1987), in which the Utah Supreme Court held that the constitutional presumption of openness applies to a criminal defendant's pretrial competency proceedings.

9. Under *Press-Enterprise II* and *Bullock*, the standard for closing a criminal defendant's competency proceeding is clear. The defendant must present evidence demonstrating that three substantive requirements are met: (i) that closure serves a compelling governmental interest; (ii) that, in the absence of closure, there is a substantial probability that the compelling interest will be harmed; and (iii) that there are no less restrictive alternatives to closure that would adequately protect the compelling interest. *Press-Enterprise II*, 106 S. Ct. at 2743; *Bullock*, 743 P.2d at 1178.

10. The proponent of closure, in this case Mitchell, has the burden of establishing that the foregoing constitutional requirements for closure have been met. *Press-Enterprise I*, 104 S. Ct. at 824; *Kearns-Tribune*, 685 P.2d at 523.

11. Mitchell's right to a fair trial by an impartial jury is guaranteed under the Sixth Amendment to the United States Constitution and Article I, section 12 of the Utah Constitution. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507 (1966); *Singer v. United Sates*, 380 U.S. 24, 85 S. Ct. 783 (1965); *State v. Aase*, 762 P.2d 1113, 1115 (Utah Ct. App. 1988); *State v. Cayer*, 814 P.2d 604, 608 (Utah Ct. App. 1991).

12. Mitchell's Sixth Amendment right to a fair trial is a compelling governmental interest under the *Press-Enterprise II* test.

13. Mitchell has failed to make the required showing, however, on the second and third prongs of the *Press-Enterprise II* test. Specifically, the Court finds that Mitchell has failed to demonstrate a substantial probability that, in the absence of closure, his right to fair trial will be prejudiced. Mitchell also has failed to show that less restrictive alternatives to closure, including, in particular, use of juror questionnaires, voir dire, and perhaps an enlarged jury venire, will not adequately protect his constitutional right to a fair trial.

14. The Court is mindful and remains vigilant of Mitchell's constitutional right to a fair trial, and concludes that right can be adequately safeguarded without denying the public and the news media, including the Media Intervenors, the ability to attend and observe Mitchell's competency hearing.

ORDER

1. Mitchell's motion and request to close his competency hearing to the public and the press is denied.

2. Mitchell's competency hearing shall be open to the public and the news media, including Media Intervenors, in its entirety.

DATED this 26 day of August 2004.

BY THE COURT:

The Honorable Judith S.H. Atherton
Third District Judge

APPROVED AS TO FORM:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3 day of August 2004, a true and correct copy of the foregoing **ORDER DENYING DEFENDANT'S MOTION TO CLOSE COMPETENCY HEARING TO THE PUBLIC AND THE PRESS** was sent via facsimile and United States mail, postage prepaid, to:

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