

Duane M. Swinton
Joel P. Hazel
WITHERSPOON, KELLEY,
DAVENPORT & TOOLE, P.S.
1100 U.S. Bank Building
422 West Riverside Avenue
Spokane, WA 99201-0300
(509) 624-5265

Attorneys for Media Representatives

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO
(HONORABLE EDWARD J. LODGE)

In re

THE SPOKESMAN-REVIEW, THE
ASSOCIATED PRESS, THE IDAHO
STATESMAN, THE IDAHO PRESS CLUB,
IDAHO NEWSPAPER FOUNDATION,
IDAHOANS FOR OPENNESS IN
GOVERNMENT, IDAHO ALLIED DAILIES,
IDAHO STATE BROADCASTERS
ASSOCIATION, BOISE STATE RADIO,
KHQ-TV, KREM-TV, KXLY-TV, KTVB-TV,
KTRV-TV, KBCI-TV and KIVI-TV,

Movants.

MC 08-6420

Related Case: CR-07-23-N-EJL

MOTION OF THE SPOKESMAN-REVIEW
FOR ACCESS TO COURT RECORDS

COMES NOW, The Spokesman-Review, acting by and through its attorneys,
Witherspoon, Kelley, Davenport & Toole, P.S., and respectfully moves the Court for an order
providing public access to the following documents that have been (or will be) filed with the
Court under seal in the above-referenced matter:

1. Document No. 63, which is described in the criminal docket for this matter (hereinafter "Docket") as "sealed document" but is referred to in the United States' Response to the Motion of The Spokesman-Review for Access to Court Proceedings (hereinafter "Response") as "a sealed stipulated motion agreeing to certain conditions for S.G.'s testimony, including closure of the courtroom;"
2. Document No. 112, described in the Docket as a "sealed motion as to Joseph Edward Duncan III," but described in the Response as "a motion for protective order filed by S.G.'s Guardian ad Litem," including affidavits from two counselors who were working with S.G.;
3. Document No. 159, described in the Docket as "sealed document re 112 sealed motion," but described in the Response as the Government's response to the Guardian ad Litem's motion for protective order;
4. Document No. 171, described in the Docket as a "sealed motion United States joint motion for protective order by USA as to Joseph Edward Duncan, III," and described in the Response as a joinder in the motion for protective order;
5. The competency evaluation that is to be filed with the Court by Dr. Robert Engle, which the Court indicated in its Order of April 21, 2008 would be sealed by the Court; and
6. The Affidavit of Steven V. G. in opposition to Memorandum of Points and Authorities of Media Representatives, which apparently was filed under

seal with the Court on April 30, 2008 and a copy of which was electronically served on counsel for The Spokesman-Review on that date.

This Motion is based on and incorporates the position and argument of The Spokesman-Review concerning access to court records as set out in the Motion of The Spokesman-Review for Access to Court Records dated April 23, 2008, and in particular the cases cited therein. In addition, the Motion is based on Civil Rule 5.3 of the Local Rules for Idaho Federal District Court, which is incorporated into criminal procedure by Criminal Rule 1.1 of the Local Rules for Idaho Federal District Court.

Local Civil Rule 5.3 provides that, as to either electronically filed documents or paper format documents, counsel seeking to file a document under seal shall file an ex-parte motion to seal, along with supporting memorandum and proposed order, and file the document with the clerk of the court. "Said motion must contain 'MOTION TO SEAL' in bold letters in the caption of the pleading."

A review of the Docket in this case indicates only two motions (Document Nos. 21 and 410) to seal court records have been filed (although 173 of the 414 group of records docketed refer to sealing of court records), neither of which motions apply to the records at issue in this Motion. Nor does the Docket reflect that any general protective order has been entered by the Court, upon public notice, that states the reasons, supported with specific findings, for any decision to seal documents and also stating why alternatives to sealing were rejected.

Specifically, as to the proposed sealing of the competency exam, an Ohio District Court in *Ashworth v. Bagley*, 351 F.Supp.2d 786 (D.C.S.D. Ohio 2005), held that it did not know of any tradition of withholding from the public competency evaluations that were introduced as part of a habeus corpus proceeding in a death-penalty case. The court determined that it was

"satisfied that there are notable benefits to be gained from public access to reports prepared by mental health experts regarding petitioner's competency. Further, the court is not persuaded that public access will have any negative impact on the process." *Id.* at 790. The competency report that will be filed with the Court in the case at bar will be a key consideration for the Court in determining whether to allow Mr. Duncan to proceed in this death penalty case pro se and the consequent significant impact such pro se representation could have on how the case is handled in the courtroom, including confrontation of witnesses.

Concerning the Affidavit of Steven V. G., counsel for The Spokesman-Review has reviewed the Affidavit and attached letter. If the Court is concerned about public court records identifying S.G. and D.G. and their relatives, that issue can be addressed by redaction of names, although, as it has been previously pointed out, the identities of S.G., D.G. and their relatives are already widely known. The balance of the Affidavit and attached letter do not appear to implicate any specific privacy issues in arguing that the courtroom be closed.

As cited to the Court previously, the decision whether to close courtrooms to the public and seal court documents from public view has serious constitutional implications, and records submitted by the parties in support of closure themselves help educate the public as to how the judicial process works and significant judicial decisions are rendered. Documents identified as Docket Nos. 63, 112 and 159 have been cited in the Response as supporting closure of the courtroom during the testimony of S.G. and showing of the video to the jury. These documents apparently constitute prior written advocacy by the Government and S.G.'s Guardian ad Litem for closure of the courtroom. While they were filed under seal, no determination has been made as to why sealing is necessary and redaction (for instance of names) was not an available

alternative, and, of course, responding to these documents as to arguments contained therein why the courtroom should be closed is an impossibility since the documents are sealed.

The Spokesman-Review respectfully requests that public access to the above-referenced court records be granted.

DATED this 2nd day of May, 2008.

WITHERSPOON, KELLEY, DAVENPORT
& TOOLE, P.S.

By: /s/ Joel P. Hazel
DUANE M. SWINTON
JOEL P. HAZEL
Attorneys for Media Representatives