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FILED
IN THE DISTRICT COURT
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WASHINGTON COUNTY

**IN THE FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH**

STATE OF UTAH,

Plaintiff,

vs.

WARREN STEED JEFFS,

Defendant.

**MOTION OPPOSING PUBLIC
RELEASE OF SEALED RECORDS**

Case No. 061500526

Judge James L. Shumate

Warren S. Jeffs, by and through counsel, respectfully opposes the recently filed requests seeking release of records previously sealed during his criminal trial. A memorandum of law in support of this motion is filed contemporaneously herewith.

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**IN THE FIFTH DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH**

STATE OF UTAH,

Plaintiff,

vs.

WARREN STEED JEFFS,

Defendant.

**MEMORANDUM IN SUPPORT OF
MOTION OPPOSING PUBLIC
RELEASE OF SEALED RECORDS**

Case No. 061500528

Judge James L. Shumate

INTRODUCTION

Since the end of Mr. Jeffs' recent criminal trial, various third parties, including members of the news media, have filed requests seeking the release of all sealed records related to Mr. Jeffs' case. Some of the requests specifically seek certain portions of audio and video recordings of conversations between Mr. Jeffs and his

visitors during his incarceration. These recordings were created by correctional officials at the Purgatory Correctional Facility and offered into evidence by the State prior to being deemed inadmissible, excluded from evidence, and placed under seal by this Court. The recently filed requests seek more than just these jailhouse statements, however, asking for all sealed records on file in Mr. Jeffs' case. This broad request would also include other sensitive information, such as certain private dictations and recorded conversations that were made prior to incarceration. Mr. Jeffs respectfully asks this Court to keep sealed from public access all sealed records, including the jailhouse conversations and all other audio and video recordings made during or prior to his incarceration.

ARGUMENT

Some of the requests to access sealed records have been made pursuant to the Utah Rules of Judicial Administration, while others have been made pursuant to the Government Records Access and Management Act (GRAMA). The distinction between these two types of requests is negligible. Courts in Utah are required to promulgate and follow rules that are "substantially consistent" with the provisions of GRAMA, Utah Code Ann. § 63-2-702(4), and the Utah Rules of Judicial Administration were created, in relevant part, to fulfill this purpose, see Utah R. Judicial Admin. Rule 4-202.04 (intended "[t]o establish the process for accessing a court record associated with a case"). Moreover, while GRAMA provides guidelines for disclosure of a record "based on the equitable weighing of the pertinent interests...", Utah Code Ann. § 63-2-102(3)(d), the Rules of Judicial Administration provide that Utah courts, when determining whether to

seal or disclose a record, must "identify and balance the interests favoring opening and closing the record," Utah R. Judicial Admin. Rule 4-202.04(3)(B), and in doing so, they "may consider any relevant factor, interest or policy presented by the parties," *Id.* Rule 4-202.04(3). Ultimately, then, GRAMA and the Rules of Judicial Administration both require this Court to weigh the interests favoring disclosure against the interests favoring nondisclosure. Mr. Jeffs treats the two types of requests as substantially similar for purposes of this memorandum of law, and maintains that the interests favoring nondisclosure far outweigh those favoring public access to the recordings.

I. MR. JEFFS' CONSTITUTIONAL RIGHT TO A FAIR TRIAL FAVORS NONDISCLOSURE OF THE SEALED RECORDINGS.

During Mr. Jeffs' recent trial, this Court excluded his recorded jailhouse statements from evidence, and agreed to keep those statements under seal. The Court closed the recorded conversations from public access to avoid the risk of unfairly prejudicing the jury pool, which would violate Mr. Jeffs' right to a fair trial by an impartial jury. Of course, the right to an impartial jury is constitutionally guaranteed, USCS Const. Amend. 6, but Mr. Jeffs' recent Utah case is not the only trial to which this guarantee applies. Mr. Jeffs has also been indicted and is awaiting trial for criminal charges in Arizona. Some of the pending charges involve the very same parties and allegations as the recent Utah case, and public dissemination of the sealed recordings would raise the same concerns for those cases that were present in the recent Utah trial.

The records that are currently under seal, including the private recordings and the jailhouse conversations in their entirety, contain highly inflammatory statements and information the public release of which would carry a high risk of unfair prejudice. Mr. Jeffs believes that the parties seeking access to the sealed records include both local and national news media outlets. Release of the records to national news organizations would allow Mr. Jeffs' inflammatory statements to reach news viewers and readers well beyond the local Utah community, and would create the risk of biasing the jury pools in Mr. Jeffs' remaining criminal trials.

[A]t the very least, dissemination of such information into the community biases the jury panel in that it becomes necessary to exclude citizens who carefully read news reports or who are interested in following current events.

Kearns-Tribune, 685 P.2d at 527 (Daniels, J., concurring and dissenting). By keeping the recordings under seal, highly inflammatory and prejudicial statements will not be disseminated to future jury pools in other states by the national media.

Recently, this Court unsealed various court documents that, in part, summarized portions of one of Mr. Jeffs' recorded conversations during his incarceration. As a result, portions or summaries of some of the jailhouse conversations have already been distributed publicly by the media. Yet the remainder of the jailhouse recordings, as well as the private recordings made prior to incarceration, remain under seal. The recent release of court documents should not persuade the Court to further jeopardize Mr. Jeffs' right to a fair trial in Arizona by releasing all sealed records. Public access to the jailhouse recordings in their entirety, and public access to all other sealed recordings, would allow dissemination of inflammatory and unfairly prejudicial information to jury

pools in other states, impeding Mr. Jeffs' constitutional right to an impartial jury in his upcoming trials. Mr. Jeffs' constitutional right to a fair trial by an impartial jury weighs heavily in favor of nondisclosure of all sealed recordings.

II. THE PRIVACY INTERESTS OF MR. JEFFS AND THIRD PARTIES FAVOR NONDISCLOSURE.

The public release of recordings made by correctional officials would raise serious constitutional privacy concerns. The United States Supreme Court has held that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1989)) (alteration in original). Incarcerated individuals "retain their First Amendment rights to communicate with family and friends," *Washington v. Reno*, 35 F.3d 1093, 1100 (6th Cir. 1994) (citing *Morgan v. LaVallee*, 526 F.2d 221, 225 (2d Cir. 1975)), and free citizens clearly have a constitutional right to communicate with incarcerated persons, *Thornburgh*, 490 U.S. at 407.

Because of the constitutional rights of prisoners and their visitors, correctional authorities may properly restrict the First Amendment only where the restrictions are rationally related to a legitimate penological interest. *Turner*, 482 U.S. at 89. The recordings sealed in Mr. Jeffs' case were made by officials at the Purgatory Correctional Facility in accordance with routine security measures. Routinely recording and monitoring conversations is consistent with the First Amendment because it is rationally related to the penological interest of maintaining security, order, and discipline in a correctional facility. *United States v. Vasta*, 649 F. Supp. 974, 990 (S.D.N.Y. 1986). It

naturally follows that the government's use of an inmate's recorded conversations for non-penological purposes would violate the First Amendment rights of the inmates and their family and friends. While the government advanced a legitimate penological interest in creating the recordings of Mr. Jeffs' conversations, public dissemination of those recordings would not further any legitimate government interest, and would thus run afoul of the First Amendment.

In *Swope v. United States DOJ*, 439 F. Supp. 2d 1 (D.D.C.2006), the Bureau of Prisons, in accordance with Exemption 7(C) of the Freedom of Information Act (FOIA), denied an inmate's request for copies of telephone conversations. *Id.*, 439 F. Supp. 2d at 3. Exemption 7(C) of FOIA, like GRAMA and the Rules of Judicial Administration at issue in the present case, "concerns the privacy interests of third parties and requires the Court to balance such privacy interests against the public interest in disclosure of the records." *Id.* at 5 (citing *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 171 (2004); *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773-75 (1989)). The *Swope* Court underwent such a balancing test, finding that the Bureau of Prisons had "properly withheld the recordings under Exemption 7(C)," *Id.* at 7, and ultimately rejecting the notion that "third parties waived any expectation of privacy because they were aware that the telephone calls were being monitored....", *Id.* at 6. Likewise, while Mr. Jeffs' visitors would have been on notice that the conversations were recorded for security purposes, they would have nevertheless retained an expectation of privacy vis-à-vis the public. That privacy expectation would be violated by public dissemination of the jailhouse recordings.

Finally, both GRAMA and the Utah Rules of Judicial Administration treat the correctional facility's recordings as protected. The recordings were "created or maintained for... criminal... enforcement purposes," Utah R. Judicial Admin. Rule 4-202.02(5)(K); Utah Code Ann. § 63-2-304(9), and could reasonably be expected to interfere with Mr. Jeffs' upcoming trials, Utah R. Judicial Admin. Rule 4-202.02(5)(K)(ii); Utah Code Ann. § 63-2-304(9)(c), due to the risk of prejudicing the jury pools in other states. Because the jailhouse recordings are protected, and because the various privacy interests of Mr. Jeffs and third parties weigh in favor of nondisclosure of all sealed recordings, the records should remain under seal with this Court.

III. THE PUBLIC'S INTERESTS FAVOR NONDISCLOSURE.

The public interests that are most typically cited to justify media access to court records are "to promote an informed discussion of government affairs," *Keams-Tribune Corp., Publisher of Salt Lake Tribune v. Lewis*, 685 P.2d 515, 518 (Utah 1984); see also Utah R. Judicial Admin. Rule 4-202(1)(B) & (C), and "to ensure the fairness of the criminal trial," *Keams-Tribune*, 685 P.2d at 518; see also Utah R. Judicial Admin. Rule 4-202(1)(D). Neither justification applies to the recordings sealed in this case. The jailhouse conversations were ruled inadmissible during the course of Mr. Jeffs' recent Utah trial, and the remaining recordings were never even proffered by either party. Thus none of the recordings were ever introduced into evidence, and they ultimately had no effect on the outcome of the trial. At most, portions of the jailhouse recordings were the subject of a motion in limine hearing, but "[a]ccess to inadmissible evidence is not necessary to understand [a] suppression hearing...." *United States v. McVeigh*, 119

F.3d 806, 813 (10th Cir. 1997). The role of the sealed recordings in promoting an informed public discussion of the trial proceedings would be de minimis at best.

Nor would public release of the recorded statements ensure fairness in the criminal process. The recent Utah trial has already concluded, so that public access to the statements could have no safeguarding affect on that proceeding at this juncture. And public access would do little to ensure the fairness of Mr. Jeffs' upcoming trials in Arizona. While some portion of the jailhouse conversations have already been disseminated to the public, the majority of the jailhouse recordings, along with other recordings never introduced at trial, all remain under seal. The undisclosed recordings contain highly prejudicial information beyond what has been recently disseminated, and public disclosure of these recordings "would play a negative role in the functioning of the criminal process, by exposing the public generally, as well as potential jurors, to incriminating evidence that... may not be used to support a conviction." *McVeigh*, 119 F.3d at 813. The public's interests in having informed discussions of government affairs and ensuring the fairness of criminal trials would not be furthered by releasing the sealed records for public access.

Of course, the interests of the public are not limited merely to understanding the judicial process and ensuring fairness. In enacting GRAMA, the legislature "recognize[d] a public policy interest in allowing a government to restrict access to certain records... for the public good." Utah Code Ann. § 63-2-102(2). Mr. Jeffs maintains that the public good in this case would be served by allowing the records to remain sealed. As the Tenth Circuit Court of Appeals has held,

[t]he public has an interest... in seeing that judicial processes are efficient and that defendants are given the "basic tools" and "raw materials integral to" the presentation of an adequate defense so as to ensure a fair trial.

United States v. Gonzales, 150 F.3d 1246, 1261 (10th Cir. 1998) (quoting *United States v. Kennedy*, 64 F.3d 1465, 1473 (10th Cir. 1995) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985))). In other words, the public has an interest in seeing that defendants are ensured fair trials, and this interest sometimes necessitate the sealing of evidence to avoid public disclosure of materials that may prejudice the jury pool.

Finally, the public also has an interest in protecting personal privacy. Utah R. Judicial Admin. Rule 4-202(2)(A). As previously discussed, Mr. Jeffs and the persons to whom he spoke during his incarceration retained some expectation of privacy, at least in regards to the public. The public has an interest in preserving those privacy interests, and releasing the sealed records for wide-spread public dissemination would frustrate that interest.

So while the interest of the public in gaining access to information in order to promote understanding and ensure fairness cannot be ignored, public release of the sealed records in this case would do little to further that interest. As the Tenth Circuit Court of Appeals has noted,

"[e]very judicial proceeding, indeed every governmental process, arguably benefits from public scrutiny to some degree...." Yet... "claims of 'improved self-governance' and 'the promotion of fairness' cannot be used as an incantation to open these proceedings to the public."

Gonzales, 150 F.3d at 1260 (quoting *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213 (9th Cir. 1989)). The promotion of understanding, improved-self governance and

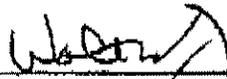
scrutiny of the government are not interests that automatically mandate the unsealing of records in every case, and they are also not the only interests of the public regarding the sealed recordings. The public also has an interest in ensuring fairness in Mr. Jeffs' pending criminal trials, and in protecting personal privacy. The interests of the public actually weigh in favor of nondisclosure.

CONCLUSION

In considering the various interests involved, in accordance with GRAMA and the Rules of Judicial Administration, the records and recordings sealed in Mr. Jeffs' recent case should not be subject to public access and distribution. First, the risk that public disclosure of all sealed records would violate Mr. Jeffs' constitutional right to an impartial jury in his pending trials weighs strongly in favor of nondisclosure. Second, release of the sealed records would risk running afoul of the constitutional rights and privacy interests of Mr. Jeffs and various third parties, and would be contrary to the legislature's intent to treat the jailhouse recordings as "protected." And finally, allowing public access to the recordings, while neither aiding in an informed public discussion or safeguarding the judicial process, would frustrate other public interests, such as ensuring fairness in Mr. Jeffs' pending trials and protecting personal privacy interests. It bears repeating that the publication of one statement does not alleviate the risk associated with publicizing the recorded jailhouse conversations in their entirety, or with releasing all sealed recordings on file with this Court. When weighing the competing interests under GRAMA and the Utah Rules of Judicial Administration, the sealed records should not be made available for public access.

DATED this 1st day of November, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 1 day of November, 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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