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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,

vs.

CHRISTIAN GUTIERREZ,

Defendant.

CR. NO. 16-1-1916

OBJECTION TO CLOSURE OF
COURTROOM DURING
DEFENDANT'S SENTENCING
HEARING; CERTIFICATE OF SERVICE

JUDGE: Hon. Jeannette H. Castagnetti

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N. ANAYYA
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FIRST CIRCUIT COURT
STATE OF HAWAII
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**OBJECTION TO CLOSURE OF COURTROOM
DURING DEFENDANT'S SENTENCING HEARING**

Pursuant to the right of public access provided by the First Amendment to the U.S. Constitution and article I, section 4 of the Hawai'i Constitution, Honolulu Civil Beat Inc. (Civil Beat) objects to this Court closing the courtroom during the July 6, 2017 sentencing hearing for Defendant Christian Gutierrez. Defendant Gutierrez has not and cannot meet the high burden to justify excluding the public from such a critical court proceeding as sentencing a criminal defendant. Moreover, Defendant's passing reference to closure—without a corresponding motion and explanation—does not preserve the basic procedural steps required to safeguard this constitutional right. To ensure fair administration of our system of criminal justice, our constitutions guarantee

that the public be able to observe the evidence that may aggravate or mitigate sentencing.

I. STATEMENT OF FACTS

On May 17, 2017, Defendant Gutierrez filed a Notice of Intent to Play Video of Juvenile Identified as "RJ" Brandishing a Machete at Sentencing. In that filing, "Defendant Christian Gutierrez respectfully asks that the Court be cleared out during the presentation of the video to preserve the juvenile's identity." According to the filing, a copy of the video has been provided to the State of Hawai'i.

II. THE PUBLIC HAS A CONSTITUTIONAL RIGHT TO OBSERVE DEFENDANT'S SENTENCING HEARING.

In *Oahu Publications Inc. v. Ahn*, the Hawai'i Supreme Court reaffirmed and clarified the public's constitutional right to observe criminal proceedings, rooted in the Hawai'i judiciary's long "tradition of public access." 133 Hawai'i 482, 495, 331 P.3d 460, 473 (2014). "Open courts are a fundamental component of our system of law." *Id.* Open access serves several societal interests: (1) "providing the public with a more complete understanding of the judicial system, serving an 'educative' interest"; (2) "perception of fairness"; (3) "'significant community therapeutic value' because it provides an 'outlet for community concern, hostility, and emotion'"; (4) "discouraging decisions based on secret bias or partiality"; and (5) "discourages perjury." *Id.* at 502, 331 P.3d at 480.

In *Oahu Publications*, the Hawai'i Supreme Court held that the constitutional right of access applies when closing a courtroom for mid-trial questioning of a juror about potential juror misconduct. *Id.* at 504, 331 P.3d at 482. The constitutional right of

access applies equally to evidentiary hearings for sentencing. *United States v. Alcantara*, 396 F.3d 189, 198-99 (2d Cir. 2005) (“Members of the public have a strong interest in attending sentencing proceedings, and their attendance is important to the proper functioning of the judicial proceedings.”); accord *Hearst Newspapers, L.L.C. v. Cardenas-Guillen*, 641 F.3d 168, 177 (5th Cir. 2011) (noting importance of public access to sentencing particularly when defendant accepts a plea, rather than going to trial); *United States v. Eppinger*, 49 F.3d 1244, 1253 (7th Cir. 1995) (noting special importance of public access to evidence submitted in sentencing hearings because “unlike other aspects of criminal proceedings, it is the distinct province of the court to determine what constitutes proper sentence”); *In re Washington Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986); *CBS, Inc. v. U.S. Dist. Ct.*, 765 F.2d 823, 825 (9th Cir. 1985) (Kennedy, J.) (“The primary justifications for access to criminal proceedings . . . apply with as much force to post-conviction proceedings as to the trial itself.”).

Any person advocating for closure must prove that a “weighty” justification overcomes the constitutional right of access. *Id.* at 496, 331 P.3d at 474. “Closed proceedings, although not absolutely precluded, *must be rare and only for cause shown that outweighs the value of openness.*” *Id.* (emphasis added). “[T]he qualified right of public access provided by the First Amendment and article I, section 4 can be overcome ‘only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.’” *Id.* The court must find: (1) closing the courtroom serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there

are no alternatives to closure that would adequately protect the compelling interest. *Id.* at 498, 331 P.3d at 476.

Juvenile privacy is not a mantra that justifies automatic closure of court proceedings. *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596 (1982). In *Globe Newspaper*, the U.S. Supreme Court struck down a Massachusetts statute that barred public access to testimony of minors who were victims of sexual offenses. *Id.* at 610-11. The Court recognized that there is a compelling interest in “safeguarding the physical and psychological well-being” of such victims. *Id.* at 607-08. The young girls in *Globe Newspaper* were 16 and 17 years old at the time of trial and testifying about “forcible rape and forced unnatural rape.” *Id.* at 598. But the Supreme Court held that the compelling interest in safeguarding the well-being of these children did not justify the blanket closure of courtrooms when vulnerable victims of heinous crimes testify. *Id.* at 608. Courts must weigh the circumstances on a case-by-case basis and consider, among other relevant factors, “the minor victim’s age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives.” *Id.*

Here, unlike the minors in *Globe Newspaper*, “RJ” is not a young innocent victim. Defendant Gutierrez seeks to mitigate his sentence by introducing evidence that “RJ” was the architect of the crime spree at Ka`ena Point to murder and mutilate over a dozen Laysan Albatross. Def. Sentencing Mem., filed July 3, 2017, at 4; State of Hawaii’s Sentencing Mem., filed June 26, 2017, at 3-4. He argues that:

“RJ” organized and perpetrated the incident “RJ” obtained the permit to Kaena Point, “RJ” kept the stolen equipment, “RJ” boasted the

tags he retrieved from the Albatross birds, “RJ” posted pictures of the Albatross birds tied up on social media, and “RJ” bragged about his sole participation in the event.” Mr. Gutierrez’s participation in this incident does not compare to the actions of his co-defendants during and after this incident.

Def. Sentencing Mem. at 4 (emphasis omitted). Moreover, the crime spree occurred almost three years ago, and it is questionable whether “RJ” is even a minor at this point based on the photographs of “RJ” committing the crimes, attached as Exhibit A to Defendant’s Sentencing Memorandum.

Defendant Gutierrez cannot justify closing the courtroom by simply claiming that he wants to “preserve [RJ’s] identity.”

III. THE COURT HAS NOT PROVIDED ADEQUATE NOTICE AND MEANINGFUL OPPORTUNITY FOR THE PUBLIC TO OBJECT.

“[I]f the court is contemplating whether closure of the courtroom is necessary, it must provide a reasonable opportunity for the public to object.” *Oahu Public’s*, 133 Hawai’i at 497, 331 P.3d at 475. As the supreme court observed, “providing the public notice and an opportunity to be heard ensures that the trial court will have a true opportunity to weigh the legitimate concerns of all those affected by a closure decision.” *Id.* at 498, 331 P.3d at 476. When the court is aware that particular members of the public have an interest in proceedings, the Hawai’i Supreme Court required specific notice to those individuals that the courtroom may be closed. *Id.* at 497, 331 P.3d at 475.

Public attention to this case—and this sentencing hearing—has been strong. *E.g.*, Denby Fawcett, Pushing for Tough Penalty in Albatross Killings, *Civil Beat* (May 23, 2017); Susan Essoyan, Man Faces Prison and Fines for Attack on Seabird Colony, *Honolulu Star-Advertiser* (July 4, 2017). As reflected in filings, Defendant Gutierrez knew

that Civil Beat was interested in this sentencing proceeding. Transmittal of May 25, 2017 Letter from M. Breiner to P. Epler, filed June 7, 2017 (responding to *Civil Beat* commentary about Defendant's sentencing); *see also* Def. Sentencing Mem. at 2-3 (seeking mitigation because of the public "backlash" against Defendant Gutierrez for his crimes).

Nevertheless, Civil Beat did not receive specific notice of the potential courtroom closure. No party has made a motion for closure or sought to justify such closure. The only reference to closure is a passing sentence in Defendant's notice of intent to play a video at sentencing. Nothing in the title of that Notice or any subsequent docket or minute entries would signal to the public that this Court may close the courtroom for Defendant's sentencing. Even though Defendant announced his intent to play the video over a month ago, Civil Beat was not notified and only learned about the potential closure shortly before this proceeding.

If the Court expects to close the courtroom for the Defendant's sentencing, the sentencing should be continued until Defendant makes a proper motion to justify such closure, and Civil Beat has a meaningful opportunity to respond to that motion.

CONCLUSION

Civil Beat respectfully requests that this Court deny any request to close the courtroom for Defendant Gutierrez's sentencing hearing or, in the alternative, continue the hearing until Defendant files a motion for closure with some modicum of justification for abridging the constitutional right of public access and that motion can be heard.

DATED: Honolulu, Hawai'i, July 5, 2017



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CERTIFICATE OF SERVICE

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I, R. Brian Black, certify that on July 5, 2017, I will serve a copy of the foregoing Objection to Closure of Courtroom During Defendant's Sentencing Hearing on the following parties by U.S. mail, postage prepaid and electronic mail:

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DATED: Honolulu, Hawai'i, July 5, 2017


ROBERT BRIAN BLACK
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