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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

STATE OF HAWAI‘I v. GERHARDT KONIG, Defendant.	CASE NO. 1CPC-25-0000373 ATTEMPTED MURDER IN THE SECOND DEGREE (§705-500, 707-701.5 AND 706-656 HRS) (REPORT/CITATION NO. 25110958-001) MEMORANDUM OF LAW CONCERNING SEALING RECORDS IN A CRIMINAL PROCEEDING Hearing Date: February 5, 2026 Time: 9:00 AM Judge: Hon. Paul B.K. Wong

MEMORANDUM OF LAW CONCERING SEALING RECORDS IN A CRIMINAL PROCEEDING

The STATE OF HAWAI‘I, by and through JOEL R. GARNER, Deputy Prosecuting Attorney, City and County of Honolulu, State of Hawai‘i, submits the following memorandum of law concerning the applicable standard and substantive requirements for sealing records in a criminal case. The Court requested briefing on this matter on January 26, 2026. The State respectfully requests that the Court take judicial notice of the records and files in this case.

A. The applicable standard for the court to close proceedings or seal records in a criminal matter.

The Hawai‘i Supreme Court has stated in very clear terms, “this court has indicated that the public has a constitutional right of access to criminal proceedings generally, as well as the records thereof.” *Grube v. Trader*, 142 Hawai‘i 412, 422, 420 P.3d 343, 353 (Haw. 2018). This is not a mere slogan, but a tradition that dates back to the 1820s. *See Oahu Publications v. Ahn*, 133 Hawai‘i 482, 494-95, 331 P.3d 460, 472-73 (Haw. 2014). Public access to the criminal justice system is not just an important constitutional right in Hawai‘i – it has also been the subject of several United States Supreme Court decisions. In fact, the First Amendment right of access to criminal trials is an incredibly rare area in which the United State Constitution was found to provide *greater* protections than the Hawai‘i State Constitution. *See id*. at 496, 331 P.3d at 474 (“to the extent that *Gannett Pac. Corp.* declined to expressly recognize the public's right of access in terms of the protection of the First Amendment, this restricted application has been superseded by the decisions of the United States Supreme Court.”) (citations omitted).

The courts have also noted that although the tradition and policy of Hawai‘i and the United States require open proceedings, “[t]here will be situations, however, where this right of the public to know must yield to the overriding requirements of due process.” *Gannet Pacific Corp. v. Richardson*, 59 Haw. 224, 230, 580 P.2d 49, 55 (Haw. 1978), *see also Press-Enterprise v. Superior Court of California*, 478 U.S. 1, 9, 106 S.Ct. 2735, 2741 (1986) (“the trial court must determine whether the situation is such that the rights of the accused override the qualified First Amendment right of access.”) (hereinafter *Press-Enterprise II*).

The first step is to examine the particular proceeding in question to determine if a “qualified First Amendment right of public access attaches” by examining a test of (1)

experience and (2) logic. *Press-Enterprise II*, 478 U.S. at 9, 106 S.Ct. at 2741. The "experience" prong, as applied by the U.S. Supreme Court in *Press-Enterprise II*, is a question of "whether the place and process have historically been open to the press and general public." *Id*. at 8, 106 S.Ct. at 2740. The "place and process" identified in this case is the filing of a Notice of Intent to Introduce Evidence pursuant to HRE Rule 404(b). But given the necessity of the parties to argue the admissibility of the notice at a future Motions in Limine hearing, this motion to seal the docket is also a motion to seal the hearing on the Motions in Limine.

It is clear that Notices of Intent and the accompanying hearings have traditionally been open to the public. In one of the most notable trials of the past twenty years, where Donald Trump was prosecuted and convicted of thirty-four felony counts of falsifying business records, the Manhattan District Attorney's office filed publically a notice of intent to introduce evidence to impeach Trump's credibility should he testify. This notice of intent was open to the media, and received coverage. Katrina Kaufman, Graham Kates, *Prosecutors intend to bring up fraud, sexual abuse cases if Trump Testifies in New York criminal trial*, April 17, 2024, (accessed at: https://www.cbsnews.com/news/donald-trump-if-testifying-new-york-criminal-trial-alvin-bragg-filing/). Even a simple search of news articles regarding a "notice of intent" shows that these notices are routinely filed publically and routinely open to the media.[1] Finally, while there is very little appellate case law examining this issue, there is at least one case, *Vindicator Printing v. Wolff*, where the Supreme Court of Ohio considered an issue from a public corruption case on whether a trial court judge could presumptively seal court records such as 404(b) notices, a Bill

[1] https://www.thealpenanews.com/news/2025/12/defense-and-prosecution-prepare-for-trial-in-pokorzynski-csc-case/
https://mountain-topmedia.com/feds-announce-plans-to-introduce-evidence-of-additional-alleged-crimes-by-hall/
https://www.click2houston.com/news/local/2025/08/22/fort-bend-prosecutors-reveal-more-insight-as-to-what-they-plan-to-introduce-at-county-judge-kp-georges-trial/

of Particulars, or a factual recitation in a memorandum in opposition due to "fair trial concerns". *See* 132 Ohio St.3d 481, 486, 974 N.E.2d 89, 96 (Ohio 2012). The Ohio Supreme Court made their ruling based on a statute rather than First Amendment concerns, but still found that a codified public right of access meant that filings such as a bill of particulars, 404(B) notices, and recitations of fact in a motion to dismiss could not be presumptively sealed by a judge without "clear and convincing evidence of a higher interest." *Id*. at 492, 974 N.E.2d at 100-01.

The second prong in determining whether a qualified First Amendment right of access attaches is the "logic" prong, where the Court is to determine "whether public access to the [proceeding] plays a particularly significant positive role in the actual functioning of the process." *Press-Enterprise II*, 478 U.S. at 11, 106 S.Ct. at 2742. The factors that the *Press-Enterprise* court examined to determine whether California preliminary hearings passed this "logic" prong were first, the role of the preliminary hearing in the justice system, the lack of a jury present, and the community therapeutic value of public access. *Id*. at 12-13, 106 S.Ct. at 2742-73.

In the criminal justice system the importance of notices of intent, and the subsequent hearings with argument, is clear. The hearing on the motions in limine, which Defendant's motion to seal the record naturally implicates, is an important step in any criminal trial. The motions in limine hearing requires a trial judge to receive argument from attorneys and weigh the proposed evidence before determining if it is admissible – which is clearly an important step in the criminal justice system. Although, like a preliminary hearing, it does not determine a defendant's guilt, the importance of the step is a logical reason in favor of public access.

The second factor in *Press-Enterprise II*, whether a jury is present or not, also weighs in favor of public access in this case. The Supreme Court reasoned that since a jury was not present,

"the importance of public access to a preliminary hearing [is] even more significant", noting that for "people in an open society . . . it is difficult for them to accept what they are prohibited from observing." *Id*. at 13, 106 S.Ct. at 2742. This factor also weighs in favor of a qualified right of public access attaching in this case.

The last "logic" factor in *Press-Enterprise II* was the "'community therapeutic value' of openness", where the Supreme Court found that "when the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for understandable reactions and emotions." *Id* at 13, 106 S.Ct. at 2742-2743. Again, this factor weighs in favor of finding that a qualified First Amendment right to access has attached.

Once the qualified First Amendment right attaches, the *Press-Enterprise II* court determined a test that "if the interest asserted is the right of the accused to a fair trial, the [proceeding] shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a trial will be prejudiced by publicity that closure would present and second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Id*. at 14, 106 S.Ct. at 2743.

Ultimately the test that the Hawai'i Supreme Court adopted was "when the overriding interest asserted is the protection of defendant's right to a fair trial, the test proscribed by *Press–Enterprise II* appropriately balances those competing constitutional interests." *Oahu Publications v. Ahn*, 133 Hawai'i 482, 494-95, 331 P.3d 460, 472-73 (Haw. 2014).

Under *Oahu Publications v. Ahn*, "[t]he requirements that must be satisfied by a court in order to overcome the qualified right of the public to access criminal trials may be divided into procedural and substantive elements."

B. The procedural requirements that the Court must follow for the Court to close proceedings or seal records in a criminal matter.

In *Oahu Publications v. Ahn*, the Hawai‘i Supreme Court stated, “[t]he circuit court was required to provide notice regarding its intention to deny access to the transcript and to hold a hearing allowing objections and alternatives to be presented if any person wished to be heard.” This is a common procedural requirement often called “notice and the opportunity to be heard”. They are also the same as the procedural requirements in federal matters. *See Phoenix Newspapers v. U.S. District Court for District of Arizona*, 156 F.3d 940, 949 (9th. Cir. App. 1998) (“if a court contemplates sealing a document or transcript, it must provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives.”) (hereinafter *Phoenix Newspapers*).

The procedural requirements are “not mere punctilios, to be observed when convenient”, but are critical because “[a]ll too often, parties to the litigation are either indifferent or antipathetic to disclosure requests.” *Id*. at 951. That is much the situation in this case, where Defendant is clearly against open access and the State’s primary interest in filing this document was 1) to provide notice to the defendant of the State’s intention to use evidence and 2) have a clear record regarding such notice. As the State’s main goals are accomplished whether or not this record is sealed, the State’s interest in public access is simply that the State does not want to assist in running afoul of the First Amendment. The State wants to be exactly clear – the State’s position in this paragraph is unequivocally not an endorsement of Defense counsel’s attempts to force the State into dealing with these matters in off-record letters by challenging the State to

"put its money where its mouth is"[2]. The State's position is that these types of notices and the arguments regarding their admissibility should always be conducted on-the-record.

Lastly, both the Hawai'i Supreme Court and federal courts have opined that "individual notice may be practicable under certain circumstances." *Oahu Publications v. Ahn*, 133 Hawai'i 482, 497, 331 P.3d 460, 475 (Haw. 2014) (*citing U.S. v. Brooklier*, 685 F.2d 1162, 1168 (9th Cir. 1982). One of those circumstances is when "the court has been made aware of the desire of specific members of the public to be present". *Brooklier*, 685 F.2d at 1168. And as Footnote 19 of *Oahu Publications v. Ahn* states, "a reasonable attempt should be made to notify entities or person who have requested 'Extended Coverage' of a case" and that when there is more than one media entity who has requested extended coverage, there should be a representative to work with the coordinator "which may facilitate providing notice when contemplating closure." *Oahu Publications v. Ahn*, 133 Hawai'i 482 at FN 19. Therefore, in order to satisfy the procedural requirements to seal the record, this court should at the very least provide notice, through the media representative, of the hearing.

C. The substantive requirements that the court must meet before closing proceedings or seal records in a criminal matter.

Before sealing any court record where there is a qualified First Amendment right of access, the trial court must first make specific findings on the record 1) identify the compelling interest that is threatened to be harmed 2) demonstrate that a "substantial risk" of irreperable harm to the compelling interest would occur due to the public access and 3) identifying any alternatives to denial of public access that the court considered but found insufficiently protective. *See Oahu Publications v. Ahn,* 133 Hawai'i at 508, 331 P.3d at 460. For each finding,

[2] Defendant's counsel, January 26, 2026

the trial court must not "base its decision on conclusory assertions alone." *See Grube v. Trader*, 142 Hawai'i 412, 427, 420 P.3d 343, 358 (Haw. 2018).

The "compelling interest" asserted by Defendant in his motion to seal the record in this case is the 6th Amendment right to a fair trial, along with the parallel right to the same under the Hawai'i Constitution in Article 1, Section 14. It is not in controversy that this right may be a compelling interest. However, as *Press-Enterprise II* stated, "the risk of prejudice does not automatically justify refusing public access", noting that "[t]hrough *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." 478 U.S. at 15, 106 S.Ct. at 2743.

Next, before sealing a court record the court must find that there is "substantial probability" that disclosure would create *irreparable* harm to the interest. *Grube v. Trader*, 142 Hawai'i at 426, 420 P.3d at 357. As the *Grube* court noted:

> It is not enough that damage could possibly result from disclosure, nor even that there is a "reasonable likelihood" that the compelling interest will be impeded; there must be a "substantial probability" that disclosure will harm the asserted interest. Further, the potential harm cannot be fleeting or readily curable through remedial measures; it must be irreparable in nature.

Id.

This is a high bar for any specific finding by a court. The purpose of such specific findings is so that an appellate court can conduct a "meaningful review". *Phoenix Newspapers*, 156 F.3d at 950.

Lastly, the Court must place on record the less restrictive alternatives that the court considered and rejected. The main alternative, as previously stated is *voir dire* to examine what exposure the potential jurors had to media coverage, what they learned from that coverage, and to determine if despite that coverage the potential juror can still be fair and impartial. Other

alternatives include the exercise of peremptory and challenges for cause, as well as clear and express admonitions to the jury once selected. *Gannet Pacific Corp. v. Richardson*, 59 Haw. 224, 234 580 P.2d 49, 57 (Haw. 1978). Although extreme, the court may also consider the possibility of trial continuances. *Id*. Again, the court must make specific findings with regards to this last factor identifying each alternative and articulating why the alternative does not appropriately mitigate the harm. *See Grube*, 142 Hawai‘i 412, 427, 420 P.3d 434, 358 (Haw. 2018).