STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK, DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff,

vs.

JASON CURTIS MCGOVERN,

Defendant.

Case No. **CRF 2010 10620**

MEMORANDUM DECISION AND ORDER DENYING ASHLEY KIESBUY'S MOTION FOR DISCLOSURE OF POLYGRAPH EXAMINATION

On October 13, 2010, Defendant Jason Curtis McGovern (McGovern) pled guilty to Possession of Sexually Exploitative Material, I.C. § 18-1507 and 18-1507A, for events that occurred on July 10, 2007. McGovern was sentenced on December 7, 2010, to a total unified sentence of six years, with two fixed and four indeterminate, and was sent on a period of retained jurisdiction for up to a year. Sentence Disposition for Jason Curtis McGovern, p. 2.

On March 8, 2011, attorney Betsy Black, on behalf of Ashley Kiesbuy, filed a "Limited Notice of Appearance, Motion for Disclosure of Polygraph Examination, Psychological and/or Psychosexual Evaluation/Report and Notice of Hearing." Oral argument was scheduled for March 23, 2011. In that pleading, there is no explanation of "who" Ashley Kiesbuy is. Since the pleading states "This matter [Kiesbuy v. McGovern, CV

2008-3667] involves custody of minor children…" (Limited Notice of Appearance, Motion for Disclosure of Polygraph Examination, Psychological and/or Psychosexual Evaluation/Report and Notice of Hearing, p. 1, 3), the Court assumes Ashley Kiesbuy is somehow involved in that custody matter.

In the "Limited Notice of Appearance, Motion for Disclosure of Polygraph Examination, Psychological and/or Psychosexual Evaluation/Report and Notice of Hearing", there is no explanation as to *why* Kiesbuy has standing in the present case. Kiesbuy is not the victim in the criminal matter. At oral argument, counsel for Kiesbuy finally admitted her client was not the victim in the present matter, except that she is a member of the public. Given the nature of the crime at hand (Possession of Sexually Exploitative Material), there are no "victims" other than those depicted in the sexually exploitative material and society in general. Essentially, this is an attempt by one party in a child custody matter to obtain evidence that has been sealed in this criminal matter, a criminal matter apparently involving the other party in the child custody dispute. But even that (McGovern's involvement in the child custody matter) hasn't been made clear by counsel for Kiesbuy or counsel for McGovern in their briefing. At oral argument there was no testimony, no exhibits and no request for judicial notice, so apparently counsel for McGovern and Kiesbuy are content to keep the Court in the dark as to who the participants are in the child custody matter.

At oral argument, counsel for Kiesbuy seemed to argue I.C.R. 32(h) provides standing. This is an odd position because in Kiesbuy's brief, counsel for Kiesbuy argued I.C.R. 32(h) did not apply. Limited Notice of Appearance, Motion for Disclosure of Polygraph Examination, Psychological and/or Psychosexual Evaluation/Report and Notice of Hearing, p. 3, ¶ 5. Apparently Kiesbuy's counsel's argument at oral argument (ignoring

for the moment the contrary argument in her brief) is that, since Idaho Criminal Rule 32(h)(2) mentions "third parties", and since her client is a "third party"; Kiesbuy has standing. That simplistic argument is not persuasive. At oral argument, McGovern's attorney indicated he argued lack of standing in his brief. He did not. Motion to Object to the Disclosure of Polygraph Examination, Psychological and/or Psychosexual Evaluation/Report, pp. 1-2. McGovern's brief does not say anything, except to claim that I.R.E. 503, I.C.R. 32(G)(12), (H)(1) and (2) and I.A.R. 32(G)(1) and (2) are somehow applicable. No argument at all was made by McGovern in his briefing. The Court has had to do its own research, as all Kiesbuy cited was 45 CFR 164.512(c), which is of no assistance at all.

Back to the standing issue. *United States v. Schlette* 842 F.2d 1574, 1576 (9th Cir.1988), specifically held that third parties do not have standing. This Court finds Kiesbuy has no standing. Alternatively, this Court finds that even if Kiesbuy has standing, the "Limited Notice of Appearance, Motion for Disclosure of Polygraph Examination, Psychological and/or Psychosexual Evaluation/Report and Notice of Hearing" filed by Kiesbuy, has no merit.

Kiesbuy argues Idaho Criminal Rule 32(h)(2) does not apply because that rule only discusses "presentence reports." Limited Notice of Appearance, Motion for Disclosure of Polygraph Examination, Psychological and/or Psychosexual Evaluation/Report and Notice of Hearing, p. 3, ¶ 5. Kiesbuy's argument ignores the fact that on October 13, 2010, this Court ordered McGovern to furnish the psychosexual evaluation to the presentence investigator. Order for Evaluations and Setting Sentencing, p. 1. That order is available to the public in the Court file. Kiesbuy should have known that fact prior to making this motion. Kiesbuy's argument ignores the fact that it is this Court's discretion as to whether

or not a psychological (and by analogy, a psychosexual) evaluation is part of a presentence report. *State v. Bylama,* 103 Idaho 472, 474, 649 P.2d 1228, 1230 (Ct.App. 2982); I.C.R. 32(d). On October 13, 2010, this Court in the instant case, McGovern's felony case exercised its discretion and ordered the psychosexual evaluation as part of McGovern's presentence investigation. Thus, contrary to Kiesbuy's argument, I.C.R. 32(h)(2) applies.

Therefor, this Court finds I.C.R. 32 applies as a matter of law. Idaho Criminal Rule 32(h)(2) governs the disclosure of presentence reports, of which McGovern's psychosexual evaluation is a part. Idaho Criminal Rule 32(h)(2) reads:

> (2) Availability of presentence report to third parties. With the permission of the sentencing judge, the presentence report may be available to persons or agencies having a legitimate professional interest in the information likely to be contained therein, if it appears that such availability will further the plan or rehabilitation of the defendant or further the interests of public protection, and that appropriate safeguards for the confidentiality of information contained in the presentence report will be provided by the persons or agencies receiving such information. Such persons or agencies may include a physician or psychiatrist appointed to assist the court in sentencing, an examining facility, a correctional institution, a probation or parole department, or the supervisors of a public or private rehabilitation program.

Thus, the presentence report is "available" to third parties only by court order if the court finds each of the following are present: 1) a professional interest in the information contained in the report, 2) the information contained in the report will further public protection and 3) safeguards for ensuring the confidentiality of the report are put in place. Examples of such third persons or agencies are then given in the rule, and *all* the examples listed are third-party professionals *who would assist the Court in sentencing*. Since McGovern was sentenced over three months ago, Kiesbuy *cannot* fit into that *category* of a professional who would assist the Court in sentencing. And, while Kiesbuy apparently has a *personal* interest in the information, Kiesbuy has no "*professional* interest"

in the information, as required by I.C.R. 32(h)(2). From an analysis of the language of I.C.R. 32(h)(2) alone, Kiesbuy's motion must be denied.

While no Idaho Appellate Court has addressed this issue, *State v. Cianci***,** 485 A.2d 565 (R.I.1984), interpreting Rhode Island's similar Rule 32, is instructive:

> Although the rule is explicit with respect to the disclosure of the report's contents to defendants, it is silent concerning disclosure to third persons. However, the courts that have considered this question have decided, in light of the history of the rule and the fear of a hindrance in the flow of information to the trial justice, that the rule imposes an airtight prohibition on disclosure of the reports to third persons. *United States v. Mayse,* 467 F.Supp. 1339 (E.D.Tenn.1979). **No reported case indicates a contrary result.**
>
> A recent case to consider the question, *United States v. Charmer Industries, Inc.,* 711 F.2d 1164 (2d Cir.1983), unequivocally held that "in light of the nature of the presentence report as a court document designed and treated principally as an aid to the court in sentencing, we conclude that the report may not properly be disclosed without authorization by the court." *Id.* at 1176. Since our own rule explicitly states that only the court, the Attorney General, the defendant's counsel, or the defendant himself shall have access to the report, we do not hesitate to declare the report confidential and certainly not to be disclosed to third persons.

485 A.2d 565, 566-67. (bold added). While *Cianci* is twenty-seven years old, the only two cases this Court was able to find that changes the statement: "No reported case indicates a contrary result," are discussed below. One deals with a specific statute, one deals with very unusual facts. Both cases give excellent discussion about rules similar to I.C.R. 32, and that discussion in both cases mandate this Court deny Kiesbuy's motion.

A case from California is distinguishable due to a different statute, California Penal Code § 1203.05. That statue mandates probation reports are open to the public 60 days after a person is placed on probation. In *People v. O'Connor*, 115 Cal.App.4th 669. 9 Cal.Rptr.3d 521, (Cal.App.6th Dist. 2004), the trial court granted the request of the San Jose Mercury News' request for such information beyond the sixty-day period. The appellate court reversed. In analyzing California's unique rule, an excellent discussion of

Federal Criminal Rule 32 was given:

> Next, we find defendant's reliance on federal cases and practice to be misplaced. The federal view of probation reports and access to them contrasts sharply with California's tradition of open access. In the federal system, probation reports-called presentence investigative reports (see Fed. Rules Crim. Proc., rule 32, 18 U.S.C.)-are kept confidential from the start. (See Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts* (1980) 93 Harv.L.Rev. 1613, 1683-1685 (hereafter Fennell); Annot., Disclosure to Third Party of Presentence Report under Rule 32(c), Federal Rules of Criminal Procedure (1989) 91 A.L.R. Fed. 816.) Indeed, at one time, presentence reports were not even disclosed to the defendant. (See *U.S. v. Trevino* (4th Cir.1996) 89 F.3d 187, 190; *U.S. v. Corbitt* (7th Cir.1989) 879 F.2d 224, 229.) Over the years, however, rule 32(c) of the Federal Rules of Criminal Procedure (the Rule), which governs all aspects of presentence reports, was amended to require disclosure to the defendant, defense counsel, and government attorneys. (See *United States Dept. of Justice v. Julian* (1988) 486 U.S. 1, 9, 108 S.Ct. 1606, 100 L.Ed.2d 1; *U.S. v. Schlette* (9th Cir.1988) 842 F.2d 1574, 1578.)
>
> Although the Rule has always been silent concerning disclosure to third parties, federal courts have been "very reluctant to give third parties access to the presentence investigation report prepared for some other individual or individuals. [Citations.]" (*United States Dept. of Justice v. Julian, supra,* 486 U.S. at p. 12, 108 S.Ct. 1606, italics omitted; see *U.S. v. Smith* (5th Cir.1994) 13 F.3d 860, 867 ["general presumption that courts will not grant third parties access to the presentence reports of other individuals"]; *U.S. v. Schlette, supra,* 842 F.2d at p. 1579 ["a strong presumption in favor of confidentiality"].) Despite the lack of an express prohibition against such disclosure, courts have deferred to the long tradition of strict confidentiality. Some have prohibited any disclosure to third parties. Most courts, however, take a less absolute approach and permit disclosure if, balanced against the desirability of confidentiality, disclosure is *necessary* to serve the ends of justice. (*U.S. v. Corbitt, supra,* 879 F.2d at p. 229; *U.S. v. Schlette, supra,* 842 F.2d at p. 1579; *United States v. McKnight* (8th Cir.1985) 771 F.2d 388, 390; *United States v. Charmer Industries, Inc.* (2d Cir.1983) 711 F.2d 1164, 1173, and cases collected there; see *United States Dept. of Justice v. Julian, supra,* 486 U.S. at p. 12, 108 S.Ct. 1606 ["[C]ourts have typically required some showing of special need before they will allow a third party to obtain a copy of a presentence report"]; see also Fennell, *supra,* 93 Harv.L.Rev. at pp. 1683-1685.) Even under this approach, most courts have denied access, finding disclosure unnecessary to meet the ends of justice. (*United States v. Charmer Industries, Inc., supra,* 711 F.2d 1164; but see *U.S. v. Schlette, supra,* 842 F.2d at p. 1579 [permitting access].)
>
> Federal cases cite two main policy reasons for keeping presentence reports strictly confidential. First, confidentiality is

considered necessary to ensure the full and free flow of relevant information from a variety of other people, including the defendant, informants, and family members, whose willingness to provide information would be inhibited if they feared disclosure.[FN8]

FN8. There is, however, disagreement concerning whether this consideration reasonably justifies keeping reports from third parties. (Compare *U.S. v. Schlette, supra,* 842 F.2d at pp. 1580-1581 [questioning the analytical and empirical validity of this consideration] with *U.S. v. Corbitt, supra,* 879 F.2d at pp. 232-235 [rejecting *Schlette* and affirming reliance on this policy consideration].)

(*United States Dept. of Justice v. Julian, supra,* 486 U.S. at p. 12, 108 S.Ct. 1606; *United States v. Huckaby* (5th Cir.1995) 43 F.3d 135, 138; *U.S. v. Corbitt, supra,* 879 F.2d at pp. 229, 232-234; *U.S. v. Schlette, supra,* 842 F.2d at p. 1579; *United States v. McKnight, supra,* 771 F.2d at p. 390; *United States v. Charmer Industries, Inc., supra,* 711 F.2d at pp. 1170, 1173; see Fennell, *supra,* 93 Harv.L.Rev. at p. 1684.) Second, maintaining strict confidentiality protects the privacy interests of the defendant, his family, and the victim because the presentence report may contain information about defendant's health, family ties, education, financial status, mental and emotional condition, prior criminal history, and uncharged crimes as well as personal information about the victim. (*United States v. Huckaby, supra,* 43 F.3d at p. 138; *U.S. v. Corbitt, supra,* 879 F.2d at pp. 229-232, 235; see *United States Dept. of Justice v. Julian, supra,* 486 U.S. at p. 12, 108 S.Ct. 1606.) [FN9]

FN9. Many other states also consider probation reports confidential and restrict access by third parties. (See, e.g., *State v. Fair* (1985) 197 Conn. 106, 496 A.2d 461; *Halacy v. Steen* (Me.1996) 670 A.2d 1371; *Germain v. State of Maryland* (2001) 363 Md. 511, 769 A.2d 931; *State v. Backus* (Minn.Ct.App.1993) 503 N.W.2d 508; *State v. Ferbert* (1973) 113 N.H. 235, 306 A.2d 202; *State v. De George* (1971) 113 N.J.Super. 542, 274 A.2d 593; *In re Conduct of Collins* (1989) 308 Or. 66, 775 P.2d 312; *Com. v. Herrick* (1995) 442 Pa.Super. 412, 660 A.2d 51; *State v. Cianci* (R.I.1984) 485 A.2d 565; *State v. Casarez* (Utah 1982) 656 P.2d 1005; *State of Vermont v. LaBounty* (1997) 167 Vt. 25, 702 A.2d 82.)

Not all of the circumstances that have led federal courts to recognize a presumption of confidentiality and impose a high burden on third party access exist in California. We do not have a long tradition of strict confidentiality; and the confidentiality that section 1203.05 confers was not designed to promote the flow of information. Although the statute and federal practice share the goal of protecting privacy, the statute does so only after permitting public access to reports for 60 days. Thus, the level of protection for this shared interest is different. Under the circumstances, defendant fails to convince us that it is either necessary or appropriate to adopt the federal approach to access by third parties.

115 Cal.App.4th 669. 688-90, 9 Cal.Rptr.3d 521, 535-36. Thus, *O'Connor* shows *United States v. Schlette* 842 F.2d 1574 (9th Cir.1988), is the only case which allowed disclosure to third parties, at least as of 2004, when *O'Connor* was authored. There are very unusual circumstances in *Schlette*. Malcolm Schlette walked into the office of William Weissich, the attorney who had years earlier, successfully prosecuted Schlette. Schlette shot and killed Weissich. Later that day, to avoid capture by the police, Schlette committed suicide. Weissich's estate and the Marin Independent Journal then petitioned the Court to release the presentence report. 842 F.2d 1574, 1576. The key distinguishing feature of *Schlette* is when the request for Schlette's presentence report was made, Schlette was no longer around, having long since previously assumed ambient temperature at his own hand. On the other hand, in the present case, McGovern is still alive. Schlette being dead, the Ninth Circuit Court of Appeals reasoned: "No legitimate reason for preserving the secrecy of the Schlette presentence report, the psychiatric report, or the postsentence probation report has been articulated by the district court or by the government." 842 F.2d 1574, 1583. Weissich's estate wanted the presentence information to determine if a negligence action by the estate against the probation department was warranted. The Ninth Circuit Court of Appeals found that interest of Weissich's estate trumped any confidentiality interest Schlette might have as a dead man. Essentially, the Ninth Circuit Court of Appeals found there was a lack of any reason to preserve the secrecy of that report. 842 F.2d 1574, 1584. For that same reason (no reason to preserve the secrecy of a dead man), the newspaper's interest in being able to disseminate public information, prevailed. *Id.* The discussion by the Ninth Circuit Court of Appeals in *Schlette* is instructive:

> 2. Disclosure to Third Parties
>
> Rule 32(c)(3)(A) does not address release of the report to third parties. *Julian v. United States Dep't of Justice,* 806 F.2d 1411, 1418-19

(9th Cir.1986), *cert. granted,* 482 U.S. 926, 107 S.Ct. 3209, 96 L.Ed.2d 695 (1987); *accord United States v. McKnight,* 771 F.2d 388, 390 (8th Cir.1985), *cert. denied,* 475 U.S. 1014, 106 S.Ct. 1194, 89 L.Ed.2d 309 (1986); *United States v. Anderson,* 724 F.2d 596, 597 (7th Cir.1984); *United States v. Charmer Indus., Inc.,* 711 F.2d 1164, 1173 (2d Cir.1983); *United States v. Figurski,* 545 F.2d 389, 391 (4th Cir.1976). Because the rule says nothing about third-party disclosure, "most district courts rely on custom and case law in responding to third-party requests." Fennell & Hall, *supra,* 93 Harv.L.Rev. at 1684. In general, most courts explain that disclosure to a third party is appropriate if disclosure "is necessary to serve the ends of justice." *Berry v. Department of Justice,* 733 F.2d 1343, 1352 (9th Cir.1984) (collecting cases). **But because most courts also consider presentence reports confidential, there are no reported cases in which disclosure of the report to a third party has been found necessary to serve the ends of justice.** *United States v. Charmer Indus., Inc.,* 711 F.2d 1164, 1173 (2d Cir.1983) (collecting cases).[FN1]

> FN1. The Second Circuit in the *Charmer* case concluded that a presentence report should not be released to a third party "unless that person has shown a *compelling need for disclosure* to meet the ends of justice." *Charmer,* 711 F.2d at 1176 (emphasis added). The Second Circuit rested its analysis on the nature of presentence reports, which it analogized to grand jury materials, and the decision in *Hancock Bros. v. Jones,* 293 F.Supp. 1229 (N.D.Cal.1968). We need not decide whether the Second Circuit's burden of proof standard is in conflict with our standard in third-party disclosure cases, *see, e.g., Berry v. Department of Justice,* 733 F.2d 1343, 1352 (9th Cir.1984) (observing that courts will order disclosure when "necessary to serve the ends of justice"). Even under the arguably higher "compelling need" standard set by *Charmer,* as we discuss hereafter, a sufficient threshold showing has been made in the present case to warrant disclosure, absent a legitimate reason to maintain confidentiality.

When called upon "to balance the desirability for confidentiality against the need of the moving party for disclosure," *id.,* **a strong presumption in favor of confidentiality has been established by the courts**. *See, e.g., id.* at 1174 (observing that many courts use a "standard approaching that for the release of grand jury materials" as a benchmark for assessing third-party disclosure requests); *see also United States v. McKnight,* 771 F.2d 388, 390 (8th Cir.1985) ("Generally, pre-sentence reports are considered as confidential reports to the court and are not considered public records, except to the extent that they or portions of them are placed on the court record or authorized for disclosure to serve the interests of justice."), *cert. denied,* 475 U.S. 1014, 106 S.Ct. 1194, 89 L.Ed.2d 309 (1986); *United States v. Anderson,* 724 F.2d 596, 598-99 (7th Cir.1984) (reiterating "ends of justice" standard for third-party requests; observing that **secrecy of presentence reports is of "critical**

importance" and that "[a]ny broader disclosure requirement ... would upset the delicate balance underlying Rule 32(c)(3). Confidentiality of presentence reports is vitally important to the efficacy of the sentencing process.").

In the case now before us, the district court explained that if presentence reports generally are not kept confidential, courts will not receive sufficient information on which to make informed sentencing decisions. The court denied disclosure because it concluded that the confidentiality principle outweighed the need of the estate and the newspaper to see the requested documents.

This "free flow of information" rationale is one commonly asserted by courts in support of nondisclosure of presentence reports. *E.g., McKnight,* 771 F.2d at 390; *Anderson,* 724 F.2d at 598 (citing *United States v. Greathouse,* 484 F.2d 805, 807 (7th Cir.1973), which concluded that confidentiality is necessary to protect the "sentencing court's ability to obtain data on a confidential basis from the accused and from sources other than the accused for use in the sentencing process"); *Charmer,* 711 F.2d at 1171. **Without confidentiality, so the argument runs, courts will not receive "as complete a set of facts as is possible for fashioning an appropriate sentence.**" *McKnight,* 771 F.2d at 390; *see Charmer,* 711 F.2d at 1171. Encompassed within the "completeness of the information" argument are several subsets of objections to disclosure of presentence reports. **Confidentiality, it is said, ensures that sources of confidential information do not dry up.** *Charmer,* 711 F.2d at 1171; *Greathouse,* 484 F.2d at 807. A related argument is that confidentiality helps prevent retaliation by the defendant against those who provide confidential information. *Charmer,* 711 F.2d at 1175 (quoting *Hancock Bros. v. Jones,* 293 F.Supp. 1229, 1234 (N.D.Cal.1968), which explained that "[r]eprisal by the defendant is only one event to guard against in promoting free and untrammeled disclosures by persons who have information necessary for sentencing ... purposes"). Finally, the argument has been made that routine disclosure will cause the quality of presentence reports to decline. *See* Comment, *Proposed Changes in Presentence Investigation Report Procedures,* 66 J.Crim.L. & Criminology 56, 58 (1975).

Those who opposed the 1974 revision of Rule 32(c) to require mandatory disclosure of presentence reports to defendants made each of these arguments against disclosure. *See* Fennell & Hall, *supra,* 93 Harv.L.Rev. at 1632; McLauchlan, *Privacy and the Presentence Report,* 54 Ind.L.J. 347, 352-53 (1979); Comment, *supra,* 66 J.Crim.L. & Criminology at 58. Each of the arguments has been proven empirically false. The Federal Judicial Center's study of Rule 32(c)'s mandatory disclosure provision, which led to the 1983 amendment of the rule to further increase disclosure of reports to defendants, reached the following conclusions:

> In general, we found that disclosure has been achieved without the serious repercussions predicted by opponents of the mandatory disclosure rule. The character

> of the sentencing proceeding has not changed, the sources of information have not diminished appreciably, and the effectiveness of the presentence report has not decreased. To the contrary, mandatory disclosure has had a positive impact on many aspects of the presentence investigation and report, and, most important, it has brought greater objectivity to the entire sentencing process.

Fennell & Hall, *supra,* 93 Harv.L.Rev. at 1689. The results of this study have been endorsed by the Rules Advisory Committee, *see* Fed.R.Crim.P. 32 advisory committee notes on 1983 amendments, and have influenced this court, too.

In *Berry v. Dep't of Justice,* 733 F.2d 1343 (9th Cir.1984), we considered a request for disclosure of a presentence report in the hands of the Bureau of Prisons and Parole Commission. The request was made under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). Citing the Fennell & Hall study, we rejected the notion that "disclosing presentence reports will chill sources of information for the report and decrease the report's accuracy." *Id.* at 1355. We observed that "this contention has been raised for decades, and has now been disproved, both analytically and empirically." *Id.* Our rejection of the "free flow of information" argument rested on empirics, *see id.* (citing Fennell & Hall, *supra*), and on common sense. *Id.* Because Rule 32(c) mandates disclosure of significant portions of the presentence report to the defendant, we concluded that "[i]f any chilling of sources were to occur, this disclosure would certainly trigger it." *Id.*

In *Berry,* we also rejected the argument that disclosure to third parties will result in "an avalanche of requests." *Berry,* 733 F.2d at 1352. Relying on the experience of those jurisdictions in which presentence reports either are routinely made part of the public record or are subject to FOIA disclosure, we observed that "[e]xperience suggests that third party requests for presentence reports would not be common." *Id. &* n. 14. Similarly, we rejected the notion that disclosure to third parties might intrude improperly on a defendant's privacy interest. *Id.* at 1352. In rejecting the privacy argument, we suggested that harm from violation of privacy interests was speculative. *Id.* at 1352 n. 14. But we did not discount the privacy interest entirely. We observed that under exemption 6 to the FOIA, disclosure of a defendant's "previous criminal record, early life and developmental history, school and employment record, mental and physical condition, religion, habits, attitudes, associates and other pertinent factors" cannot be revealed to third parties seeking disclosure under the FOIA if such disclosure would constitute "a clearly unwarranted invasion of privacy." *Id.* at 1353 (citations and footnote omitted) (considering 5 U.S.C. § 552(b)(6)).[FN2]

> FN2. We also affirmed, under the FOIA, a district court's order for disclosure of a presentence report in the hands of the Parole Commission in *Julian v. United States Dep't of Justice,* 806 F.2d 1411 (9th Cir.1986), *cert. granted,* 482 U.S. 926, 107 S.Ct. 3209, 96 L.Ed.2d 695 (1987). Because

> we conclude that disclosure is warranted in the present case without reference to the FOIA, we decline to reach the estate's and the newspaper's arguments that presentence reports in the hands of the court's probation service should be subject to FOIA disclosure.
>
> Thus, privacy concerns still may militate against disclosure in a given case. But when the defendant is dead, as in the present case, this ground for nondisclosure is foreclosed. Privacy interests are personal to the defendant and do not survive his death. *Cf. Wehling v. Columbia Broadcasting Sys.,* 721 F.2d 506, 509 (5th Cir.1983) ("In Texas, a suit for defamation is personal to the one about whom statements are made."); *Stein-Sapir v. Birdsell,* 673 F.2d 165, 167 (6th Cir.1982) (concluding that under Ohio law, "actions for libel or slander abate with the death of either party"); *Gruschus v. Curtis Publishing Co.,* 342 F.2d 775, 776 (10th Cir.1965) (defamation action did not survive death of defamed party). And there is no evidence in this case that the privacy interests of anyone other than the dead defendant may be implicated by disclosure of the contents of the presentence report and related documents.

842 F.2d 1574, 1578-81. (bold added). While the retained jurisdiction program is rigorous, this Court must assume McGovern remains among the living. In briefing, and at oral argument on March 23, 2011, Kiesbuy's counsel said nothing about how disclosure of the information in McGovern's presentence report "is necessary to serve the ends of justice." 842 F.2d 1574, 1578, citing *Berry v. Department of Justice,* 733 F.2d 1343, 1352 (9th Cir.1984). Kiesbuy is asking this Court to jeopardize the confidentiality of *all future presentence reports*, and all that those confidential reports do to help the sentencing courts in the State of Idaho protect the public and make the best possible decision about who is sent to prison and who is placed on probation. For obvious reasons, this Court is not inclined to do this. Kiesbuy is asking this Court to "upset the delicate balance of these confidential reports" and to put this source of confidential information at risk of "drying up", for the singular reason to help Kiesbuy in her child custody matter against McGovern. For equally obvious reasons, this Court is not so inclined.

IT IS HERBY ORDERED THAT Kiesbuy's "Limited Notice of Appearance, Motion for Disclosure of Polygraph Examination, Psychological and/or Psychosexual

Evaluation/Report and Notice of Hearing" filed March 8, 2011, is DENIED as Kiesbuy has no standing to bring that motion.

IT IS FURTHER ORDERED THAT Kiesbuy's "Limited Notice of Appearance, Motion for Disclosure of Polygraph Examination, Psychological and/or Psychosexual Evaluation/Report and Notice of Hearing" as such is completely lacking in merit.

DATED this 24th day of March, 2011

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of August, 2013 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Clayton G. Andersen
Prosecuting Attorney –
Betsy Black, attorney for Kiesbuy

Honorable Penny Friedlander

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy