

**FILED IN THE COMBINED COURTS
OF TELLER COUNTY, COLORADO**

<input type="checkbox"/> County Court, <input checked="" type="checkbox"/> District Court Teller County, Colorado		FEB 08 2019 DATE FILED: February 8, 2019 SHEILA GRIFFIN CLERK OF COURT
Court Address: THE PEOPLE OF THE STATE OF COLORADO Plaintiff(s)/Petitioner(s): People of Colorado v. Defendant(s)/Respondent(s): PATRICK FRAZEE And, Non-Party Movant: KRDO-TV, Channel 13		▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Shannon Brinias KRDO-TV 399 S. 8 th St. Colorado Springs, CO 80905 Phone Number: 719-575-6285 E-mail: KRDOnews@krdo.com FAX Number: Atty. Reg. #:		Case Number: 2018CR330 Division Courtroom
MOTION TO UNSEAL COURT FILE (INCLUDING DOCKET) (With request for expedited hearing)		

Movant, KRDO-TV, Channel 13, respectfully moves this honorable Court to unseal the court file forthwith, and in particular to unseal the affidavit(s) of probable cause submitted in connection with already executed search warrants, and to make available for public inspection the docket identifying all pleadings that are on file in this case.

As grounds for this Motion, movant shows to the Court as follows:

INTRODUCTION

The Defendant in this action stands accused of a shocking murder, as well as solicitation to commit murder, in the disappearance and death of his daughter's mother, Kelsey Berreth. In addition to the accusations, the Defendant has been accused of being responsible for what Woodland Park Police Chief Miles De Young described as a "horrific death."

The District Attorney has announced that the reason for sealing the records prior was the significant danger and risk the release of records would post. That risk and danger are assumed to be nullified with the pending plea that is set to take place before this Court on Friday, February 8th, 2019 by an unindicted co-conspirator in the case.

The status quo violates the public's constitutional right of access to the records of criminal prosecutions, and undermines our nation's firm commitment to the transparency and public accountability of the criminal justice system. While the public's right of access to court records is a qualified —not an absolute—right, judicial records may be properly sealed from public inspection only

where findings of fact have been made that sealing is necessary to protect a governmental interest of the highest order. Such findings have not been made, nor could they be made, with respect to the entirety of the court file in this case. Nor could they possibly be made with respect to the Affidavit for Probable Cause for Arrest.

This Motion is supported by the televised interview of 4th Judicial District Attorney Dan May on February 8, 2019, at the Teller County Courthouse in Cripple Creek, CO, during which he is quoted as saying, “The arrest and search warrants had been sealed and remained sealed because it might endanger the investigation. That is no longer the case,” Mr. May continued, “It is no longer needed to be sealed for the investigation.”

Through this Motion, the Media Petitioner respectfully seeks the unsealing of the Register of Actions and all records currently filed with the Court, and seeks contemporaneous access to records filed in this case going forward. Such access is mandated by law and critical to the maintenance of public confidence in the criminal justice system. As Chief Justice Warren Burger once famously stated: “People in an open society do not demand infallibility from their public institutions, but it is difficult for them to accept what they are prohibited from observing.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

THE INTEREST OF THE MEDIA PETITIONERS

1. Attached as Appendix A is a statement describing the Media Petitioner. The Media Petitioner is engaged in gathering news and other information on matters of public concern, including these judicial proceedings, and disseminating it, on various platforms—broadcast, cable, internet and mobile devices—to the general public.
2. Media Petitioner appears before this Court on their own behalf, as members of the public, entitled to the rights afforded them by the Constitution of the United States, the Colorado Constitution, all applicable statutes, and the common law. In addition, they appear on behalf of the broader public that receives the news and information gathered and disseminated by this media outlet. *See, e.g. Richmond Newspapers, Inc.*, 448 U.S. at 578-74 (the print and electronic media function “as surrogates for the public”); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (in seeking out the news the press “acts as an agent of the public at large”).

ARGUMENT

I. THE MEDIA PETITIONERS HAVE STANDING TO ASSERT THE RIGHT OF PUBLIC ACCESS TO COURT RECORDS

3. The First Amendment to the United States Constitution, article II, section 10 of the Constitution of the State of Colorado, and the common law all protect the right of the people to receive information about the criminal justice system through the news media, and the right of the news media to gather and report that information.

4. Movant's standing to be heard to vindicate those rights is well established. *See Star Journal Publi'g Corp., v. Cnty. Ct.*, 591 P.2d 1028 (Colo. 1979); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982); *Times-Call Publi'g Co. v. Wingfield*, 410 P.2d 511 (Colo. 1966); see also *In re N.Y. Times Co.*, 878 F.2d 67 (2d Cir. 1989); *In re Dow Jones & Co.*, 842 F.2d 603, 606-08 (2d Cir. 1988).¹

5. The press routinely has been permitted to be heard in criminal cases in Colorado for the limited purpose of challenging the sealing of court files, and have succeeded in such challenges before both trial courts and Colorado's Supreme Court. *See In re People v. Thompson*, 181 P.3d 1143, 1148 (Colo. 2008) (granting media petitioners' emergency petition under C.A.R. 21 and ordering trial court to unseal indictment in murder trial, prior to preliminary hearing); *People v. Bryant*, No. 03-CR-204 (Eagle Cnty. Dist. Ct. Feb. 4, 2004) (granting media representatives' motion to order clerk of the court to release a docket, pursuant to Colo. R. Crim. P. 55 and §13-1-119, C.R.S.); *People v. Cox*, No. 10-SA-196 (July 22, 2011) (denying criminal defendant's C.A.R. 21 petition that sought review of district court's order granting media organizations' motion to unseal arrest warrant affidavit in sexual assault case); see also Ex. 6 (*People v. Cox*, No. 11-CR-661 at 2-4 (Douglas Cnty. Dist. Ct. June 22, 2011) (recognizing press standing to seek unsealing of court file over parties' objection to standing)); see also *infra* ¶¶ 27 & 43.

II. THE PUBLIC HAS A QUALIFIED RIGHT OF ACCESS TO JUDICIAL RECORDS

6. The public's right to inspect court documents is enshrined in the common law, *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) ('the courts of this country recognize a general right to inspect and copy... judicial records and documents'); *In re NBC*, 653 F.2d 609, 612 (D.C. Cir. 1981) ('existence of the common law right to inspect and copy judicial records is indisputable'); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006) (same). The common law access right "is

¹ In addition, the Colorado Rules of Civil Procedure authorize a motion by "any person" to review an order limiting access to a court file. Colo. R. Civ. P. 121 § 1-5(4) (2012) (provision also cited as instructive in Colo. R. Crim. P. 57(b)).

not some arcane relic of ancient English law,” but rather “is fundamental to a democratic state.” *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976), rev’d on other grounds sub nom. *Nixon*, 435 U.S. 589. The common law right of access to judicial records exists to ensure that courts “have a measure of accountability” and to promote “confidence in the administration of justice.” *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995); accord *United States v. Hubbard*, 650 F.2d 293, 314-15 (D.C. Cir. 1981).

7. Court records in criminal cases are also subject to public access under the Colorado Criminal Justice Records Act, § 24-72-301, C.R.S. (2011); see *Thompson*, 181 P.3d at 1145. Here, an order of the Court bars the custodian from releasing the criminal justice records at issue, see §24-72-305(1)(b), C.R.S., so this Court, not the custodian, must determine whether the sealing order should be lifted. See also Ex. 6 at 3 (recognizing that requiring a party seeking to lift an existing sealing order to file a separate action “is unnecessary, unduly burdensome and an inefficient use of court resources and time.”).

8. The public’s right to inspect certain court records is also protected by the First Amendment. See, e.g. *Press Enter.-Co. v. Super. Ct.*, 464 U.S. 501, 510-11 (1984) (“*Press Enterprise I*”) (transcripts of jury *voir dire*); *Associated Press v. Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983) (various pretrial documents); *In re N.Y. Times Co.*, 585 F. Supp. 2d 83, 89 (D.D.C.2008) (finding First Amendment and common law right to search warrant materials relating to the 2001 anthrax attacks).

9. When, as here, documents in the court’s file involve a matter of public concern, access to such records is also guaranteed by article II, section 10 of the Constitution of Colorado. See *Wingfield*, 410 P.2d at 513-14; *Office of State Ct. Adm’r v. Background Info. Sys.*, 994 P.2d 420, 428 (Colo. 1999).

10. Under the standard adopted by Colorado’s Supreme Court, the press and public cannot be denied access to the records of this Court unless such access would create a *clear and present danger* to the administration of justice, or to some equally compelling governmental interest, and no alternative exists to adequately protect that interest. See § 8-3.2 of ABA Standards on Criminal Justice, adopted in *Star Journal Publ’g Corp.*, 591 P.2d at 1030. Moreover, this standard requires “that the trial judge issue a written order setting forth specific factual findings in this regard.” *Id.*

11. Colorado Supreme Court Chief Justice Directive 05-01 entitled “Directive Concerning Access to Court Records” reinforces this standard by requiring a specific court order before judicial records may be withheld from the public. The Directive applies to this Court and provides that all court

records are presumed open for public inspection and copying unless specifically identified as not accessible to the public or as a result of a court order. C.J.D. 05-01 § 4.00; *see also State Court Adm'r*, 994 P.2d at 430.

III. UNDER THE CONTROLLING STANDARD, NO PROPER BASIS EXISTS FOR THE BLANKET SEALING OF THE ENTIRE CASE FILE

12. With the limited exception of the motions on file made during the Pre-Trial Hearing on January 4, 2019, and documents that have been posted on the Court's website at https://www.courts.state.co.us/Courts/County/Case_Details.cfm?Case_ID=2867, the public has no information about the ongoing activity in this case, including any supportive arguments for the arrest for this suspect; the involvement of any additional people of interest; the danger still extant to the public at large; and/or the search for the remains of the victim named in this case. Members of the public may be in possession of knowledge that would assist the investigation and may not be aware of the significance of their knowledge in order to properly provide to the appropriate authorities. On information and belief, among the records on file are one or more affidavits of probable cause in support of a warrant, or "order for production of records," issued by this Court.

13. The same rules governing public access to the ROA apply to search warrant affidavits and other records typically filed with the court in connection with a criminal prosecution. As explained in the Media Guide to Colorado Courts (6th ed. 1998), published by the Colorado Supreme Court's Committee on Public Education:

Generally, court records in criminal cases are open for public inspection. *This includes search warrants and search warrant affidavits.... And other information contained in the file.*

...The First Amendment require[s] the party seeking to seal the file to show that *there is a clear and present danger to the fairness of the trial* and that the prejudicial effect of such information on trial fairness *cannot be avoided by any other reasonable means.*

Id. At 50 (emphasis added)

A. ALL AFFIDAVITS OF PROBABLE CAUSE SHOULD BE UNSEALED

14. Regularly, and routinely, courts have held that arrest warrant affidavits must be available to the public after a defendant's arrest and initial charging. *See, e.g., Commonwealth v. Fenstermaker*, 530 A.2d 414, 418-19 (Pa. 1987); *Greenwood v. Wolchik*, 544 A.2d 1156, 1158 (Vt. 1988) ("Public

access to affidavits of probable cause is all the more important because the process of charging by information involves no citizen involvement, such as is present with juries and grand juries.”).

15. Courts similarly have found search warrant affidavits subject to the public right of access. The presumption favoring access to judicial records is at its apex for search warrant affidavits because those documents “adjudicated [] the right of individuals under the Fourth Amendment not to be subjected to government intrusision into areas in which they might reasonably have expected privacy absent a judicial determination of sufficient cause.” *In Re Sealed Search Warrant*, Nos. 04-M-370 & 04-M-388, 2006 WL 3690639, at *3 (N.D.N.Y. Dec.11, 2006). Because “[t]he judicial determination whether to permit the government to enter and search a person’s private property and possessions” is an exercise of power “at the heart of the performance of judicial functions,” the common law presumption of access to search warrant affidavits also “carries the maximum possible weight.” *Id.*

16. “Public scrutiny of the search warrant process – even after the fact – can shed light on how and why a warrant was obtained, and thereby further the public’s interest in understanding the justice system.” *United States v. Loughner*, 769 F. Supp. 2d 1188, 1194 (D. Ariz. 2011). And more importantly, “[p]ublic access to search warrants may also serve to deter unreasonable warrant practices, either by the police or the courts.” *Id.* “Permitting inspection of the search warrants [and] the accompanying affidavits... will further public understanding of the response of government officials . . . and allow the public to judge whether law enforcement functioned properly and effectively . . .” *Id.*

17. Recognizing the compelling importance of public access to such probable cause affidavits, the U.S. District Court for the Western District of North Carolina rejected a criminal defendant’s argument that the common law right of access should be abridged because a search warrant affidavit contained statements not admissible at trial and could compromise his right to a fair trial. *See United States v. Blowers*, No. 3: 05-CR-0093, 2005 WL 3830634, 34 Media L. Rep. (BNA) 1235 (W.D.N.C. Oct. 17, 2005). Courts regularly have required search warrant affidavits to be disclosed under the common law presumption of access. *See, e.g. In re Search Warrant*, No. 00-138M-01 (JMF), 2000 WL 1196327, at *1 (D.D.C. July 24, 2000) (recognizing common law right of access to affidavit filed in support of a search warrant); *In re Search Warrants Issued on May 21, 1987*, Misc. No. 87-186 (JHG), 1990 WL 113874, at *3 (D.D.C. July 26, 1990) (same); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65 (4th Cir. 1989) (common law right of inspection attaches once a search warrant affidavit is filed with the clerk); *In re Eye Care Physicians of Am.*, 100 F.3d 514, 517 (7th Cir. 1996) (same); *In re Search of 1638 E. 2nd Street*, 993 F.2d 773, 775 (10th Cir. 1993) (same); *In re Search Warrant for Secretarial Area*, 855 F.2d at 573 (same).

18. Other courts have concluded that the First Amendment independently protects public access to search warrant affidavits. As the U.S. Court of Appeals for the Eighth Circuit held:

[T]he first amendment right of public access does extend to the documents filed in support of search warrant applications. First, although the process of issuing search warrants has traditionally not been conducted in an open fashion, search warrant applications and receipts are routinely filed with the clerk of court without seal. Under the common law [,] judicial records and documents have been historically considered to be open to inspection by the public. Second, public access to documents filed in support of search warrants is important to the public's understanding of the the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct.

In re Search Warrant for Secretarial Area, 855 F.2d at 573 (emphasis added) (citations omitted). See also, *In re Application of N.Y. Times Co.*, 585 F. Supp. 2d at 89.²

19. While not expressly addressing search warrant affidavits, the Colorado Supreme Court has adopted the same premise on which these decisions are based, that the records supporting a court's actions must not be sealed from view. *P.R. v. Dist. Ct.*, 637 P.2d 346, 353 (Colo. 1981) (quoting *United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978)).

20. This conclusion is based not solely on the First Amendment right of access, but also on the broader protections conferred to free speech by article II, section 10 of the Colorado Constitution. *P.R.*, 637 P.2d at 354; see *People v. King*, 19 Media L. Rep. 1247, 1249-50 (Denver Cnty. Ct. July 29, 1991) (recognizing that the Colorado Supreme Court decision in *Star Journal* established a constitutional right of access to affidavits on file with the court); see also *People v. Blagg*, No. 02-CR-623, Affidavit in Support of Arrest Warrant (Mesa County Dist. Ct. June 5, 2002) (first-degree murder arrest affidavit unsealed before trial); *People v. Garcia-Fores*, No. 01-CR-46, Affidavit in Support of Warrantless Arrest (Pitkin County Dist. Ct. July 20, 2001) (felony sexual assault and attempted murder unsealed upon motion by news media).

21. Absent disclosure of the factual bases for the issuance of a warrant, the public cannot properly assess the propriety of the government's conduct. As Chief Justice Burger observed:

² In some instances, courts have declined to apply the constitutional access right to search warrant affidavits before charges have been brought, to avoid interference with an on-going investigation. See *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 62-65 (4th Cir. 1989); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1221 (9th Cir. 1989).

When a shocking crime occurs, a community reaction of outrage and public protest often follows, and thereafter, the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility and emotion. . . .

The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner or in any covert manner. It is not enough to say that the results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, **it is important that society's criminal process satisfy the appearance of justice and the appearance of justice can best be provided by allowing people to observe it.**

Richmond Newspapers, Inc., 448 U.S. at 571-572 (emphasis added) (citations, quotation marks, and minor alterations omitted).

B. THE PEOPLE'S "ONGOING INVESTIGATION," POST-CHARGING, DOES NOT WARRANT BLANKET SEALING OF THE COURT FILE

22. It is anticipated that the People will argue that disclosure of court records would compromise the ongoing law enforcement investigation. However, as of Monday, February 4, 2019, the People will have completed enough of its investigation to permit the formal filing of charges against the Defendant, and to enter into negotiations of a plea deal with an unindicted co-conspirator anticipated to appear in court this week.

23. Woodland Park Police Chief Miles de Young has repeatedly stated that law enforcement's conclusion was that the public was not in any danger following the arrest of the primary suspect, Patrick Frazee.

24. Bald assertions of harm to investigations have been rejected where they are made after a defendant has been formally charged and the search or arrest warrant materials have been filed with the court. *See In re Search Warrant for Second Floor Bedroom*, 489 F. Supp 207, 212 (D.R.I. 1980) *In re Grand Jury Proceedings Dated May 6, 1996*, 932 FR. Supp. 904, 905-06 (S.D. Tex. 1996), rev'd on other grounds, 115 F.3d 1240 (5th Cir. 1997); *see also United States v. Gonzales*, 927 F. Supp. 768, 779 (D. Del. 1996); *In re Search of Up N. Plastics Inc.*, 940 F. Supp. 229, 234 (D. Minn. 1996) (rejecting government's speculative assertion of compromise to ongoing criminal investigation).

C. THE RIGHT OF PUBLIC ACCESS IS A RIGHT OF CONTEMPORANEOUS ACCESS

25. It is also anticipated that the People and/or the Defendant will urge the Court to simply “postpone” releasing the judicial records at issue to the public, and will argue that “the public will be fully informed at the time of trial; the public enjoys no right to receive information now, when this information will be made available later.” Such arguments are unavailing.

26. The public’s right of access to judicial records is a right of contemporaneous access. *See Lugosch*, 435 F.3d at 126-27 (“Our public access cases and those in other circuits emphasize the importance of immediate access where a right of access is found.” (emphasis added) (citations omitted)); *Grove Fresh Distribs.*, 24 R.3d at 897 (noting that access to court documents “should be immediate and contemporaneous”).

27. Since the public’s presumptive right of access attaches as soon as a document is submitted to a court, any delays in access are in effect denials of access, even though they may be limited in time. *See, e.g. Association Press*, 705 F.2d at 1147 (even a 48-hour delay in access constituted “a total restraint on the public’s first amendment right of access even though the restraining is limited in time”); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) (“even a one to two day delay impermissably burdens the First Amendment”); *Courthouse News Serv. V. Jackson*, No. H-09-1844, 38 Media L. Rep. (BNA) 1890, 2009 WL 2163609, at *3-4 (S.D. Tex. July 20, 2009) (24 to 72 hour delay in access to civil case-initiating documents was “effectively an access denial and is, therefore, unconstitutional”).

28. As the Supreme Court observed in *Nebraska Press Association v. Stuart*, “[d]elays imposed by governmental authority” are inconsistent with the press’ “traditional function of bringing news to the public promptly.” 427 U.S. at 560-61.


29. Accordingly, any unnecessary delay in affording access to judicial records in this case constitutes an infringement of the movant’s rights under the First Amendment.

WHEREFORE, the Media Petitioner respectfully requests that the Court forthwith enter an order unsealing any affidavit (s) of probable cause in support of a warrant or order for production of records,

and any other judicial record in the court file for which no showing of necessity for continued sealing has been made.

Media Petitioner hereby respectfully requests that the Court enter an expedited briefing schedule on this Motion and further provide them the opportunity to be heard on the issues presented herein at the earliest practical time.

Date: 02/08/2019 _____


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CERTIFICATE OF SERVICE

I certify that on 02/08/2019 (date) a true and accurate copy of the Motion to Unseal Court File was served on the other party by:

Hand Delivery, E-filed, Faxed to this number 719-475-1476 and 719-686-8000, or
 by placing it in the United States mail, postage pre-paid, and addressed to the following (include name and address):

To:

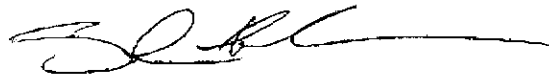
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