District Court, El Paso County, Colorado El Paso County Combined Courts 270 South Tejon Street, Colorado Springs CO 80903	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. **LETECIA STAUCH,** Defendant	DATE FILED: March 11, 2020 4:55 PM σ COURT USE ONLY σ
MEGAN A. RING, Colorado State Public Defender Kathryn Strobel (No. 42850) Deputy State Public Defender Kimberly Chalmers (No. 37860) Deputy State Public Defender 30 E Pikes Peak Ave Suite 200 Colorado Springs, Colorado 80903 Phone (720) 475-1235 Fax (719) 7475-1476 E-mail: Kathryn.strobel@coloradodefenders.us	Case No. **20CR1358** Division 15S

D-07

DEFENSE OBJECTION TO MOTION TO UNSEAL FORTHWITH THE AFFIDAVIT OF PROBABLE CAUSE IN SUPPORT OF ARREST

On March 9, 2020, numerous news media organizations filed a Motion to Unseal Forthwith the Affidavit of Probable Cause in Court File. If granted, the media's request would impinge upon Ms. Stauch's right to a fair trial by an impartial jury as protected by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article II, sections 16 and 25 of the Colorado Constitution. Therefore, Ms. Stauch, through counsel, objects. In support of this objection, she states the following:

I. Request to Unseal Affidavits of Probable Cause

1. On February 28, 2020, Judge Rotolo signed an order sealing the arrest warrant and supporting affidavits in this case at the request of the prosecution. In its requests to seal these documents, the prosecution indicated that investigation in this case was ongoing, and that if information supporting these warrants were released, it could jeopardize the continuing investigation, apprehension of suspects, and subsequent prosecution of same. Judge Rotolo ordered that these documents shall be sealed "until further order by the Court."

2. Less than a month later, multiple media petitioners have moved to unseal these documents, arguing that no proper basis exists for the continued sealing of the affidavits of probable cause. The defense disagrees, and objects.

A. Standard

3. As an initial matter, the media petitioners wrongly argue that the public has a qualified First Amendment right of access to the search and arrest warrants in this case. Neither

the United States Supreme Court, nor the Colorado Supreme Court, has ever reached this conclusion.

4. While the media and the public have a qualified First Amendment right to *attend certain proceedings* in criminal matters, *see, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 557 (1980), the public's right to *access judicial records*, including the arrest and search warrants and supporting affidavits in a criminal case, is governed by common law and the Colorado Criminal Justice Records Act. *See Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985) (noting that U.S. Supreme Court has never held that constitutional right of access to court proceedings also applies to court files and documents, and analyzing defendant's request for access to sealed court documents under common law right of access); C.R.S. §§ 24-72-301—08 (defining and establishing parameters for public access to criminal justice records).

5. The United States Supreme Court has made clear that "the right to inspect and copy judicial records is not absolute," and "[e]very court has supervisory power over its own records and files." *Nixon*, 435 U.S. at 598. Thus, "the decision as to access [to judicial records] is one best left to the sound discretion of the trial court." *Id.* at 599. *See also* C.R.S. § 24-72-305(1)(b) (allowing inspection of criminal justice records unless inspection is prohibited, *inter alia*, "by the order of any court"); Colorado Judicial Dept. 05-01 § 4.60(a) ("Information in court records is not accessible to the public if protected by . . . court order").

6. The media petitioners assert that this Court must unseal these documents 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. In support of this argument, the media cites to *Star Journal Publishing Corp v. County Court*, 197 Colo. 234, 591 P.2d 1028 (Colo. 1979), which makes reference to Section 8-3.2 of the ABA Standards for Criminal Justice Relating to Fair Trial and Free Press (2d Ed. 1978). However, S*tar Journal* involved the closure of preliminary hearings (to which the public and media have a qualified First Amendment right of access), not access to court documents (to which the public and media do not).

7. Rather, to determine whether unsealing the arrest and search warrants and supporting affidavits is warranted under the public's common law right of access and the Colorado Criminal Justice Records Act, this Court must apply a simple balancing test to evaluate whether "the public's right of access is outweighed by competing interests." *Hickey*, 767 F.2d at 708. This analysis is "necessarily fact-bound" and "there can be no comprehensive formula for decision-making." *Id.*

8. Additionally the Colorado Supreme Court has noted that the concerns a custodian of criminal justice records must take into account when considering whether to provide access to records include "the privacy interests of individuals who may be impacted by a decision to allow inspection; the agency's interest in keeping confidential information confidential; the agency's interest in pursuing ongoing investigations without compromising them; the public purpose to be

served in allowing inspection; and any other pertinent consideration relevant to the circumstances of the particular request." *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1175 (Colo. 2005); *see also Freedom Colorado Info., Inc. v. El Paso County Sheriff's Dept.*, 196 P.3d 892, 895 (Colo. 2008).

B. Application

9. There are ample "competing interests" that outweigh the public's right of access to the search and arrest warrants and supporting affidavits at this early stage in the adjudicative process in a case of this nature and magnitude. *Hickey*, 767 F.2d at 708.

10. First, disclosure of these documents is almost certain to generate even greater and more prejudicial pretrial publicity than the extensive coverage that has already occurred, which will further jeopardize Ms. Stauch's ability to receive a fair trial by an impartial jury, as guaranteed by the state and federal constitutions. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 350-51 (1966) (public scrutiny of criminal trial "must not be allowed to divert the trial from the very purpose of a court system to adjudicate controversies . . . in the calmness and solemnity of the courtroom according to legal procedures," including "the requirement that the jury's verdict be based on evidence received in open court, not from outside sources." (internal quotations and citation omitted)); *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) (reversal required where petitioner was "tried in an atmosphere [disturbed] by so huge a wave of public passion" that two-thirds of jurors admitted during voir dire to possessing a belief in his guilt); *United States v. McVeigh*, 119 F.3d 806, 815 (10th Cir. 1997) (district court properly exercised discretion to seal suppression motion in Oklahoma City bombing case because public disclosure of materials would "generate pre-trial publicity prejudicial to the interests of all parties in this criminal proceeding.").

11. This case is precisely the type of "rare" instance "in which pretrial publicity alone" has the potential to "actually deprive[] a defendant of the ability to obtain a fair trial." *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 404 n.1 (1979) (Rehnquist, J., concurring). Therefore, there is ample justification for this Court to leave Judge Rotolo's February 28, 200 orders undisturbed.

12. Second, increased media scrutiny of the arrest and search warrants and supporting affidavits in this case is likely to lead to the disclosure of information to the public that may be confidential, privileged, or ultimately otherwise inadmissible at trial, including statements made by Ms. Stauch. Because public access to these documents would potentially "have the deleterious effect of making publicly available incriminating evidence" that this Court may ultimately conclude "may not be considered in assessing the defendant's guilt," continued sealing of the court file and register of actions is warranted. *McVeigh*, 119 F.3d at 814.

13. Third, the Court has not unnecessarily shrouded this case in secrecy or closed off all avenues of public access to information. The Court has kept the proceedings in this case open to the media and the public, and even granted expanded media coverage of the most recent hearings in this case on March 5th and 11th of 2020. The Court has also indicated that it intends to create a website for publishing redacted pleadings in this case so that the public has access to the pleadings in this case. (See O-2, filed March 6, 2020).

14. Finally, it does not appear that there has been a significant change in circumstances since February 28, 2020, when Judge Rotolo signed the order sealing these documents. Other than a blanket, unsourced statement in the motion filed by the Movants, there has been no indication from law enforcement that it has concluded its investigation. *Cf. United States v. Loughner*, 769 F.Supp. 2d 1188, 1190 (D. Ariz. 2011) (granting motion to unseal warrant materials after "[t]he United States prosecutor represent[ed] that the government's active investigation of the case has now concluded, and that no additional federal charges are expected."). In fact, at the press conference announcing Ms. Stauch's arrest, Lieutenant Mitch Mihalko said "Our work is only just beginning and you will continue to see many law enforcement officials in El Paso County over the coming weeks and possibly months as we continue our relentless pursuit of justice for Gannon and his family."

15. Additionally, the preliminary hearing has not been scheduled, let alone held. The defense's opportunity to challenge the legality of the warrants is likely still months away. While the authorities have been investigating this matter for over six weeks, the Defense's investigation is just beginning. Any release of information to the public could jeopardize the Defense's ability to effectively conduct an independent investigation.

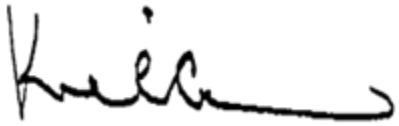
16. Indeed, while the media notes that the Arapahoe County District Court unsealed similar documents in the Holmes case, the media fails to point out that the Court only did so several months *after* the preliminary hearing had been held in that case and *nine months* after the alleged offenses occurred. *See* Exhibit 1 of Media Petitioners' Motion (Order Regarding Media Petitioners' Motion to Unseal Affidavits of Probable Cause in Support of Arrest and Search Warrants and Requests for Orders for Production of Documents), p. 10.

17. The media fails to mention that the same court denied an earlier request to unseal the warrants and affidavits in the Holmes case that preceded the preliminary hearing by several months. Likewise, the Douglas County District Court in the Perrish Cox case, also cited by media petitioners, only unsealed a redacted version of the arrest warrant affidavit *after* the defendant waived his right to a preliminary hearing in that case.

18. Finally, Ms. Stauch disputes the media's contention that this Court must make a finding that there are "no less restrictive measures available to protect the defendant's fair trial rights short of continued sealing." Media Petitioners' Motion, p. 7. This standard is only applicable where it has been established that the public has a qualified First Amendment right of access to the court proceeding at issue, in contrast to the common law right of access that applies here. However, even if this Court were to engage in such an analysis, at this point in time there are no viable "alternative measures" available to protect Ms. Stauch's fair trial rights. It is simply too early in the process to conclude that "extensive jury voir dire" or "detailed jury instructions" can mitigate the damaging publicity that will result from unsealing the arrest and search warrants and supporting affidavits and ensure Ms. Stauch receives a fair trial.

Ms. Stauch files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment,

pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.



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Dated: March 11, 2020

Certificate of Service

I hereby certify that on March 11, 2020, a true and correct copy of the motion was served via ICCES on all parties who appear of record and have entered their appearances herein according to ICCES.

/s/ Kathryn Strobel