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CLERK OF THE DOUGLAS COUNTY DISTRICT COURT
CASE NUMBER: DG-2023-CR-000823
PII COMPLIANT

IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS
SEVENTH JUDICIAL DISTRICT

STATE OF KANSAS,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Case No. 2023 CR 823
	*	
TRISTEN HOLLINS,	*	
	*	
Defendant.	*	

<u>THE *LAWRENCE JOUNRNAL-WOLRD*’S RESPONSE TO STATE’S MOTION TO SEAL PROBABLE CAUSE AFFIDAVIT</u>

COMES NOW, Ogden Newspapers, Inc., d/b/a *Lawrence Journal-World* (hereinafter “Respondent”), by and through counsel Maxwell E. Kautsch of Kautsch Law, LLC, and hereby submits the following motions to intervene and to disclose the affidavit in this case in response to the State’s motion filed August 25, 2023.

FACTUAL BACKGROUND

Journalism in the state of Kansas dates to the pre-Civil War era known as “Bleeding Kansas.” Publishers who owned the paper that would eventually become known as the *Lawrence Journal-World* began publishing during the 1850s, and the paper has been published under its current name since the early 1900s.

On August 11, 2023, the State charged the defendant with Attempted Murder in the First Degree, a Level I/Person/Felony. The charges stem from an incident at the North Lawrence

homeless camp.[1] The health and safety of those at the camp, and the Lawrence community at large since the camp's inception over a year ago, has been an issue of intense public interest and on which Respondent has published literally dozens of articles.[2]

On August 23, 2023, Respondent filed its Request for Disclosure of an Affidavit or Sworn Testimony. On August 25, 2023, the State filed its Motion to Seal Probable Cause Affidavit. In its motion, the State argued that disclosure of the affidavit would jeopardize the physical, mental or emotional safety or well-being of a victim, witness, confidential source or undercover agent, or cause the destruction of evidence; interfere with any prospective law enforcement action, criminal investigation or prosecution; reveal confidential investigative techniques or procedures not known to the general public; and/or endanger the life or physical safety of any person. See State's Motion, p. 1-2, citing K.S.A. 22-2302(c)(4)(A), (C), (E) and (F).

The State claimed that even though "delicate information at issue will be revealed through open hearings in Court", sealing the affidavit "at this time…is necessary to protect the interests enumerated at K.S.A. 22-2302(c)(4)." State's Motion, p. 2. To support its position that the affidavit should be sealed, the State offered only that "[w]hile the *Lawrence Journal-World* may claim that it requests this information because it is in the public interest, the sad reality is that the *Lawrence Journal-World* is a fledgling publication devoid of journalist [sic] integrity and constantly on the prowl for potential clickbait." *Id*., p. 3.

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[1] See Conde, C. *Lawrence Man arrested on suspicion of attempted first-degree murder, victim was walking from campsite during 'unprovoked attack,' police say*, LAWRENCE JOURNAL-WORLD, August 11, 2023.
[2] See, e.g., Lawhorn, C. *Mayor peppered with questions about homelessness, including why city can't prohibit homeless camps now; Larsen to ask for legal review*, LAWRENCE JOURNAL-WORLD, June 13, 2023; Lawhorn, C. *Longtime businessman hires private attorney to propose changes to city ordinances regarding the homeless*, LAWRENCE JOURNAL-WORLD, July 17, 2023

The State's motion also indicated it had delivered proposed redactions to opposing counsel and the Court, but did not articulate any rationale for its proposed redactions. Disclosure of a redacted affidavit is authorized under K.S.A. 22-2302(c)(5)(A). Although K.S.A. 22-2502(3)(b) allows motions such as the State's to be filed under seal, the State filed its August 25 motion to seal in open court.

ARGUMENTS AND AUTHORITIES

The State's unreasonably disparaging and inaccurate characterization of Respondent and the exercise of the newspaper's statutory right to attempt to obtain the probable cause affidavit compels Respondent to move to intervene in this matter for the limited purpose of arguing for disclosure of the affidavit.

I. Motion to Intervene

A. Intervention is Authorized under Supreme Court precedent.

The media's right to intervene under these limited circumstances is established by the Kansas Supreme Court's decision in *The Wichita Eagle Beacon Company v. Owens*, 271 Kan. 710 (2001). There, the court held that "[c]onsistent with the rule of *Kansas City Star Co. v. Fossey*, 230 Kan. 240, Syl. ¶ 2, 630 P.2d 1176 (1981), the news media, as a member of the public, may intervene in a criminal proceeding for the limited purpose of challenging a pretrial request, or order, to seal a record or close a proceeding, even without an express statutory provision allowing such intervention." *Owens*, 271 Kan. at 713.

Here, the State's allegations as to the history and motives of the paper are unfounded. Respondent has been in business reporting the news in Lawrence, Kansas, for more than a century, and has consistently reported not only on this case but also on the location at which the

crime allegedly occurred. In this matter, it is challenging a request to seal a court record, namely, the probable cause affidavit in this case. Given this clear authority under these circumstances, Respondent's motion to intervene should be granted.

B. Intervention is Authorized under K.S.A. 60-224.

Moreover, under Kansas law, courts "must permit anyone to intervene" who, upon, "timely motion," "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter substantially impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." K.S.A. 60-224(a); K.S.A. 60-224(a)(2). As such, the right to intervene "depends on the concurrence of three factors: (1) timely application, (2) a substantial interest in the subject matter of the litigation, and (3) inadequate representation of the intervenor's interest by the parties." *Gannon v. State*, 302 Kan. 739, 741-42 (2015). Where a proposed intervenor establishes these requirements, its motion "must" be granted. *Id*. at 740. Further, in resolving the question of whether a proposed intervenor has established these requirements, trial courts are reminded that "[i]t is well-established that K.S.A. 60-224(a) is to be liberally construed in favor of intervention." *Smith v. Russell*, 274 Kan. 1076, 1083, 58 P.3d 698, 703 (2002).

1. Respondent's Motion is Timely.

The State filed its motion on August 25, 2023. Respondent's response was filed on August 30, 2023, five days later. There can be little question Respondent's motion is timely.

2. The Proposed Intervenor Has a Substantial Interest in the Instant Case.

Intervention also depends on whether Respondent has a "substantial interest in the subject matter of the litigation." Respondent can demonstrate such an interest here.

The Kansas Supreme Court has previously ruled that a trial court's denial of access to court records causes injury-in-fact to a local newspaper. In *Stephens v. Van Arsdale*, 227 Kan. 676 (1980), the *Wichita Eagle* and one of its reporters filed a mandamus action after they were denied access to certain court records. The respondent opposed the action, claiming the newspaper did not suffer any actual injury because of the denial. The Kansas Supreme Court disagreed:

> [Newspapers] collect and sell news to their customers, the citizens of Kansas. The denial by the defendant to these plaintiffs of access to official court records impairs their ability to carry on their business, the collection and dissemination of information. The plaintiffs have demonstrated that they have the requisite standing to maintain this action individually. *Id*. at 683.

Moreover, in *Journal Pub. Co. v. Mechem*, 801 F.2d 1233 (10th Cir. 1986), the 10th Circuit Court of Appeals found that a newspaper not only has an interest in intervening in a criminal case to challenge a request to seal, but also has standing to initiate a lawsuit to challenge an order which restricted press contract with former jurors. The court grounded its ruling in the fact the newspaper "alleged an injury in fact because the court's order impeded its ability to gather news, and that impediment is within the zone of interest sought to be protected by the first amendment." *Journal Pub. Co.*, 801 F.2d at 1235. Under such circumstances, the news media has an interest in reporting the news and any burden on that interest, even a burden imposed by the court, must be narrowly tailored and consider reasonable alternatives. *Id.* at 1236 (citing *Branzburg v. Hayes,* 408 U.S. 665, 681 (1972) and *Globe Newspaper Co. v. Superior Ct., Cnty of Norfolk,* 457 U.S. 598 at 607 (1982)).

Here, respondent has reported generally on matters of public interest for decades and has reported specifically on matters of public safety surrounding the North Lawrence homeless

camp that have cropped up over the last several months, including the allegations giving rise to this case. Moreover, the record sought is the affidavit supporting allegations that have already been made public. Such a document is the foundation for additional fact-based reporting about a crime. An order sealing the affidavit would impair Respondent's ability to disseminate information about a matter of public safety that took place at the homeless camp: an attempted murder.

Respondent's interest in this matter for the purposes of intervention under K.S.A. 60-224 is sufficiently demonstrated under these circumstances.

3. Respondent's Interests Are Not Adequately Represented by the Parties.

Respondent is not privy to defense counsel's position on the State's motion to seal and does not know whether defense counsel has filed or plans to file a similar motion. Regardless, the State's unreasonably disparaging and inaccurate comments about Respondent suggest the State is not the strongest possible advocate for the reasonable application of Kansas law permitting members of the public, such as the news media, from obtaining affidavits in criminal cases or otherwise advancing arguments related to the presumptive right of access to court proceedings and records.

The Kansas Supreme Court has previously made clear that limited news media intervention provides a helpful counterpoint to the parties' existing positions on sealing records that "might otherwise go entirely unnoticed." *Owens*, 271 Kan. at 713. "Allowing the news media to intervene in a criminal case for the limited purpose sought here may provide a trial court with the benefit of argument on the question of closure by an advocate of First Amendment and common-law interests." *Id.* "The news media may identify, or at least be the

strongest proponent of an argument that there are, in the words of *Fossey*, 'reasonable alternative means' to closure that would avoid the prejudicial effect on the defense or prosecution of the dissemination of information contained in the record or revealed during a proceeding." *Id*.

Here, there is no evidence that either party has articulated the public's right to access records and proceedings afforded by the First Amendment or common law. And although the State has apparently proposed redactions for the affidavit, the State's motion does not illustrate why disclosure with redactions is in the public interest. As a result, it would appear that neither party adequately represents Respondent's interests.

Under K.S.A. 60-224, Respondent's intervention "must" be permitted where, as here, it is made in a timely manner; Respondent, as a longstanding member of the local media, has a substantial interest in providing the public with information about public safety related to allegations of murder at or near the North Lawrence homeless camp; and because the Respondent and its interests are not adequately represented by the State.

II. Any motion to seal the affidavit here in its entirety should be denied.

The State's motion to seal the probable cause affidavit in support of arrest, and any such motion to seal the same filed by the defense, should be denied because any movant to seal cannot articulate allegations of fact sufficient to overcome the public's presumptive right to access judicial records. This Court should order the disclosure of the affidavit, with appropriate redactions, in the instant case.

A. Legislative history suggests that courts should apply a balancing test before granting a motion to seal an affidavit.

State law governing the disclosure of affidavits affords Courts the discretion to deny access

if their disclosure "would" result in one of the enumerated harms set forth in K.S.A. 22-2302(A) through (J). According to its motion, the State apparently believes that merely asserting information in an affidavit fits the description of one of the enumerated harms "alone would be reason to seal the affidavit." State's Motion, p. 2.

But applying the statute in such a way would run counter to its legislative intent to recognize the "fundamental belief that, as a matter of good public policy, all governmental entities and instrumentalities in Kansas…should provide full transparency and accountability to the public in all their actions and function, except to the extent that confidentiality is required for legitimate law enforcement purposes." [3]

Moreover, a principal reason for amending the statutes to presume openness, as documented in legislative hearings, was to enable citizens, including the media, to monitor law enforcement's exercise of the police power in making arrests and conducting searches.[4] The statute was enacted after Johnson County Sheriff's Department officers executed a search warrant at the home of a Leawood couple "that turned out to be based on faulty information contained in the probable cause affidavit supporting the warrant….The search failed to yield any…evidence of a crime, and the [couple was] never charged with any crime." [5]

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[3] Legislative Testimony in support of 2014 HB 2555, Rep. John Rubin, S. Judiciary Comm., 2013-2014 Leg. Sess. (Kan. Mar. 13, 2014), p. 2, retrieved from http://kslegislature.org/li_2014/b2013_14/committees/ctte_s_jud_1/documents/testimony/20140313_01.pdf on August 30, 2023.

[4] See, e.g., Legislative Testimony in support of 2014 HB 2555, Kansas Press Association, H. Judiciary Comm., 2013-2014 Leg. Sess., February 12, 2014, retrieved from http://kslegislature.org/li_2014/b2013_14/committees/ctte_h_jud_1/documents/testimony/20140212_12.pdf on August 30, 2023; Legislative Testimony in support of 2014 HB 2555, Kansas Association of Broadcasters, H. Judiciary Comm., 2013-2014 Leg. Sess., February 12, 2014, retrieved from http://kslegislature.org/li_2014/b2013_14/committees/ctte_h_jud_1/documents/testimony/20140212_09.pdf on August 30, 2023.

[5] Legislative Testimony in support of 2014 HB 2555, Rep. John Rubin, S. Judiciary Comm., 2013-2014 Leg. Sess. (Kan. Mar. 13, 2014), p. 1, retrieved from http://kslegislature.org/li_2014/b2013_14/committees/ctte_s_jud_1/documents/testimony/20140313_01.pdf on August

The Leawood couple asked for the information supporting the warrant, but had to wait year before obtaining a copy, and were able to do so only after they "hired a lawyer and incurred over $25,000 in expenses in litigation." [6] Once the couple won access to the affidavit, they were mortified to learn that their home had been raided because "brewed tea leaves" obtained during a "trash pull" had "falsely tested positive" for marijuana. *Harte v. Bd. of Com'rs of County of Johnson, KS*, 864 F. 3d 1154, 1172, 1175 (10th Cir. 2017).

In response, the Legislature amended K.S.A. 22-2302 and K.S.A. 22-2502 in 2014 to establish a procedure for presumptive public access to probable cause affidavits supporting warrants for arrest and search. Under that procedure, once a request is filed under K.S.A. 22-2302(c)(2), only a court order pursuant to K.S.A. 22-2302(c)(5)(B) can prevent disclosure of the record.

Given this extensive, highly relevant legislative intent, simply sealing the affidavit on the bald assertion that it contains evidence described in the statute would render the statute meaningless. Rather, to fairly determine whether disclosure of such information "would" cause one of the enumerated harms, the State's interests must be balanced against the interests of the public, as represented here by Respondent.

B. Kansas law essentially codifies Respondent's common law right of access to judicial records, including affidavits in support of arrest.

For guidance, the Court should turn to factors courts consider under common law to determine whether disclosure of the affidavit "would" cause any the enumerated harms under the

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30, 2023.

[6] *Id.*; see also, e.g., KCTV 5, *Leawood family seeks $7 million for SWAT-style raid KMBC 9 News*, December 12, 2013; KMBC 9, *Leawood couple sues Johnson County Sheriff over pot raid*, December 12, 2013, retrieved from https://www.kmbc.com/article/leawood-couple-sues-johnson-county-sheriff-over-pot-raid/3679188# on August 30, 2023.

statute.

Members of the public, including the media, enjoy a "common-law right of access" to judicial records. *In re Epipen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation*, 545 F.Supp.3d 922, FN 3 (D. Kan. 2021), citing *Nixon v. Warner Commc'ns, Inc*., 435 U.S. 589, 599, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) and *United States v. Bacon,* 950 F.3d 1286, 1293 (10th Cir. 2020). "The common law right of access to court records has a 'long history' that has been said to 'predate even the Constitution itself.'" *United States v. Cohen*, 366 F.Supp.3d 612, 619 (S.D.N.Y. 2019) (citations omitted). And although "the public's common law right to access judicial records 'is not absolute,' there is a "'strong presumption' that the public may view the records." *U.S. v. Wecht*, 484 F.3d 194, 208 (3rd Cir. 2007), citing *Littlejohn v. BIC Corp*., 851 F.2d 673, 678 (3d Cir.1988); see also, e.g., *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs*., 800 F.2d 339, 344 (3d Cir.1986).

Thus, to determine whether the common law right of access requires disclosure of a given record, courts first consider whether the record sought is a judicial record. If so, the "strong presumption in favor of public access" to such documents can be overcome only when "countervailing interests heavily outweigh the public interests in access to the judicial record." *Bacon,* 950 F.3d at 1293 (citations and internal quotation marks omitted).

1. The affidavit is a judicial record subject to the common law privilege.

"In general, the common law right attaches to any document that is considered a 'judicial record,' which 'depends on whether [the] document has been filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings.'" *Wecht*, 484 F.3d at 208 (citations omitted).

Generally, "search warrant applications and supporting affidavits" are "judicial documents to which the common law presumption of public access applies" not only if they have been filed with the court, but also because they are "relevant to the performance of the judicial function and useful in the judicial process." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). "Because a court necessarily relies upon search warrant applications and supporting affidavits in assessing whether there is probable cause to issue a search warrant, they are certainly relevant to the performance of that judicial function." *United States v. Cohen*, 366 F.Supp.3d at 621 (citations omitted).

Here, the affidavit in support of the arrest warrant in this case was "filed" with the district court under K.S.A. 22-2302(a). An arrest warrant can only be effective upon "find[ings]" of probable cause based on the facts alleged in the affidavit. K.S.A. 22-2302(a). As such, the affidavit Respondent seeks is unquestionably a "judicial document" to which the common law presumption of access attaches.

2. The presumption of access weighs in favor of disclosure.

Simply put, "search warrant materials are entitled to a strong presumption of public access." *United States v. Cohen*, 366 F.Supp.3d at 621 (citations omitted). Indeed, "information contained in search warrant applications and affidavits necessarily plays a direct role in a court's determination of whether probable cause exists to support issuance of the warrant." *Id.* at 621, 622 (internal quotations and citations omitted). Thus, the "presumption of access attaching to search warrant materials 'carries the maximum possible weight.'" *Cohen* at 621, citing *In re Sealed Search Warrants Issued June 4 & 5, 2008 ("Sealed Search Warrants")*, 2008 WL 5667021, at *3 (N.D.N.Y. July 14, 2008).

Thus, absent an articulation of strong countervailing interests in favor of withholding the affidavit, it should be disclosed.

3. The State has failed to articulate countervailing interests sufficient to overcome Respondent's presumption of access.

As discussed above, the applicable statute sets forth a series of countervailing interests for courts to consider when determining how to respond to a request for disclosure. K.S.A. 22-2302(c)(A) through (J). But the State cannot meet its burden to overcome the public interest in disclosure simply by listing certain subsections of the statute. Moreover, its mischaracterization of Respondent as a "fledgling publication devoid of journalist [sic] integrity and constantly on the prowl for potential clickbait" is entirely irrelevant to the Court's determination of whether disclosure of the affidavit "would" cause any of the enumerated harms listed in the statute.

Rather, the State would need to offer facts to support its contentions, for example, that disclosure of the affidavit "would…interfere with any…prosecution." This could be accomplished, for example, by surveying prospective jurors. But the State offers no evidence whatsoever to support its contention that disclosure of the affidavit would cause such a harm. It cited no witness testimony or any evidence to suggest that disclosure of the affidavit would be prejudicial to a trial in any way. It offered nothing to show why reasonable alternatives to sealing the record, such as aggressive voir dire, could not be employed to address any prejudicial effect. See *Fossey*, 230 Kan. at 249 (quoting Standards Committee, Commentary on Standard 8-3.2, ABA (2d ed. Tentative Draft)). As such, any "conclusion as to the impact of such publicity on prospective jurors" that disclosure of the affidavit might have would be "speculative", as would any ruling be that were based on "factors unknown and unknowable." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 563 (1976).

The State has failed to articulate any evidence to support the countervailing interests set forth in K.S.A. 22-2302(c)(4)(A), (C), (E) and (F) purportedly applicable here. As a result, it cannot overcome the public's presumptive right to judicial records, particularly where, as here, disclosure of such records squarely advances the public interest.

CONCLUSION

Finally, in a ruling that is merely persuasive but certainly instructive, the Shawnee County District Court documented the difficult task facing proponents to seal an affidavit in its entirety. On April 8, 2021, that court ordered disclosure of the affidavit related to charges filed against former Senate Majority Leader Gene Suellentrop.[7] The affidavit alleged that he drove the wrong way on Interstate 70 in the week hours of March 16, 2021, and that after he was stopped by law enforcement his blood alcohol level was 0.17, over twice the legal limit.

Like Respondent in the instant case, "news media filed motions with the court seeking the document's release."[8] The defendant opposed the disclosure of the affidavit, but the court found that redactions would be sufficient to address any concerns about the impact of disclosure. In ordering the disclosure of the *Suellentrop* affidavit, the Shawnee County District recognized that even though disclosure of the affidavit was highly likely to produce immense pretrial publicity, as in the instant case, any reasons advanced by the proponents to seal that affidavit were insufficient to overcome the public's right to access a redacted version. The same is true here.

Ultimately, although the State has cited four bases to seal the affidavit under K.S.A. 22-2302(c)(4), it has failed to meet its obligation to set forth facts to show any countervailing interests

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[7] Smith, S., Carpenter, T., *Kansas Senate majority leader had 0.17 blood alcohol level in wrong-way pursuit*, KANSAS REFLECTOR, April 8, 2021, retrieved from https://kansasreflector.com/2021/04/08/kansas-senate-majority-leader-had-0-17-blood-alcohol-level-in-wrong-way-pursuit/ on August 30, 2023.
[8] *Id*.

that would be harmed were the requested affidavit disclosed. As such, the public interest in the affidavit outweighs the State's interest, and a redacted version of the affidavit should be disclosed under K.S.A. 22-2302(c)(5)(A).

WHEREFORE, Respondent respectfully requests that the Court permit Respondent' intervention in this matter pursuant to authority set forth by the Kansas Supreme Court in *Fossey* and *Owens* for the limited purpose of opposing any motion to seal the affidavit in its entirety; order disclosure of the probable cause affidavit in this matter with redactions limited to personally identifying information, such as the names, birth dates and social security numbers, of suspects and witnesses; and that the Court order any other relief the Court deems just and equitable.

Respectfully submitted,

/s/ Maxwell E. Kautsch

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CERTIFICATE OF SERVICE

I hereby certify that I filed a true and correct copy of the above via the efiling system, on the date as electronically indicated, and notice of filing was provided to all parties through the Kansas E-Flex notification system, and that I also hand-delivered a Chambers Copy on August 30, 2023, to the following:

Hon. Stacey L. Donovan,
Douglas County District Court
111 E. 11th Street
Lawrence, KS 66044

/s/Maxwell E. Kautsch
Attorney for Respondent