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DISTRICT COURT, TELLER COUNTY, COLORADO 101 West Bennett Avenue Post Office Box 997 Cripple Creek, Colorado 80813	
PEOPLE OF THE STATE OF COLORADO, Plaintiff v. PATRICK FRAZEE, Defendant	♦ COURT USE ONLY ♦
MEGAN RING, Colorado State Public Defender Adam P. Steigerwald (No. 40092) Deputy State Public Defender 19 North Tejon, Suite 105 Colorado Springs, Colorado 80903 Phone: (719) 475-1235 Fax: (719) 475-1476 Email: adam.steigerwald@coloradodefenders.us	Case No. 18CR330 Division 11

OBJECTION TO NON-PARTY MOVANTS KOAA NEWS 5 AND KRDO-TV MOTIONS TO UNSEAL RECORDS IN COURT FILE (D-10)

Patrick Frazee, by and through Counsel, objects to the requests from the Non-Party Movants KOAA and KRDO, separately filed on February 8, 2019, moving the Court to unseal judicial records in the court file and to unseal [the] court file (including [the] docket). If granted, these requests would impinge on Mr. Frazee's rights 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. In support of this Objection, Mr. Frazee states the following:

1. As a threshold matter, Non-Party Movant KOAA News5's Motion, signed by Ryan Hazelwood, begins with a complete misstatement of the facts and the truth, and should be dismissed summarily. In the second paragraph, before even the section labeled, "Introduction," KOAA writes, "Counsel for Movant has conferred with counsel for the People and the Defendant." This is not true. KOAA has not conferred with any attorney at the Colorado State Public Defender office regarding this case, let alone undersigned counsel or any attorney assigned to Mr. Frazee's case. Presumably KOAA's reporters are amongst the dozens of reporters who have contacted both the Colorado Springs Regional Office and the Office of the State Public Defender in Denver, but each reporter has been told there would be no comment on Mr. Frazee's case. The Motion continues,

"The People do not object to the relief requested herein. The Defendant does not oppose the relief requested herein." The final sentence, at least, is completely false. As already stated, neither Mr. Hazelwood nor any other representative of KOAA has spoken with counsel for Mr. Frazee, let alone received word that he "does not oppose the relief requested."

2. An attorney appearing before the Court who flatly provided false and misleading factual information to the Court in a Motion – not merely questionable interpretation of the law or its application, but untrue facts – would be subject to sanctions by the Court. At a minimum, KOAA's Motion should not be considered as a result.

3. The Probable Cause Affidavit was sealed at the request of the Prosecution at the outset of the case. The Prosecution filed a Request for Sealing of Arrest Warrant on December 21, 2018. The Order, signed by County Court Judge Martin on the same date, presumably granted that request – both the Request and the Order are still sealed and cannot be viewed by undersigned counsel.

4. On December 21, 2018, undersigned counsel requested the Probable Cause Affidavit be released to counsel subject to a protection order. That request was initially not opposed by the Prosecution and was granted by the Court, though a few hours later the Prosecution filed a Motion stating the attorney representing the People was "misinformed" and asked that the Probable Cause Affidavit remain sealed.

5. On December 31, 2018, in open court, the Prosecution objected to the unsealing of the Probable Cause Affidavit as it related to Mr. Frazee, requesting a protective order preventing counsel from discussing the Probable Cause Affidavit or its contents with Mr. Frazee. That request was set for a Hearing on January 4, 2019, at which point the prosecution finally consented to the unsealing of the Probable Cause Affidavit with a protection order that prevented counsel from sharing the contents with anyone outside of the defense team.

6. On January 4, 2019, the prosecution dropped their request to preclude undersigned counsel from discussing the contents of the Probable Cause Affidavit with Mr. Frazee. Certain other motions or orders remain under seal; it is unclear which documents the Non-Party Movants are requesting. This is the current state of the judicial records.

7. On February 8, 2019, during one of the press conferences given by the District Attorney's Office, it was suggested by the District Attorney that motions by the media should be filed to unseal the Affidavit, a fact noted on page two of KRDO's Motion. These two motions followed shortly thereafter, barely more than a month after the prosecution consented to allow Mr. Frazee himself to know the contents of the Probable Cause Affidavit, and with less than two weeks before the Preliminary Hearing.

8. The Non-Party Movants argue that they have a qualified First Amendment right of access to the judicial records in this case. This argument is unsupported by any decision made by the United States Supreme Court or the Colorado Supreme Court.

9. Rather, the public, through the media, has a qualified First Amendment right to attend most proceedings in criminal matters, including every hearing thus far in Mr. Frazee's case. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 557 (1980), (the public's right to access judicial records is governed by common law and the Colorado Criminal Justice Records Act.) *See also Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978); *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985) (noting that the U.S. Supreme Court has never held that the constitutional right of access to court proceedings also applies to court files and documents, analyzing defendant's request for access to sealed court documents under common law right of access); COLO.REV.STAT. §§ 24-72-301—08. KRDO also cites to Colorado Supreme Court Chief Justice Directive 05-01 in support of their request.

10. The Supreme Court has ruled 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. "[T]he decision as to access [to judicial records] is one best left to the sound discretion of the trial court." *Id*. at 599. COLO.REV.STAT. § 24-72-30(1)(b) allows the trial court the power to limit access to judicial records by its order. CJD 05-01, cited in support of KRDO's request, provides in § 4.60(a) "[i]nformation in court records is not accessible to the public if … court order … prohibits disclosure of the information."

11. KRDO's Motion argues, in Paragraph 10, that the Court should adopt the standards set forth by § 8-3.2 of the ABA Standards on Criminal Justice, and also argues that the Colorado Supreme Court's adoption of those standards in *Star Journal Publishing Corporation*, 591 P.2d 234, is controlling precedent for their request. However, *Star* concerns the closing of a Preliminary Hearing to members of the media, not access to judicial records. This is an important distinction because, as noted above, the public and

media have qualified constitutional access to a preliminary hearing, but not to access judicial records.

12. Rather than adopt the incorrect standards argued by the Non-Party Movants, 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 is a "necessarily fact-bound" analysis and "there can be no comprehensive formula for decision-making." *Id.*

13. In addition, the Colorado Supreme Court has noted that the concerns a custodian of judicial 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 Corporation*, 123 P.3d 1166, 1175 (Colo. 2005); *see also Freedom Colorado Information, Inc. v. El Paso County Sheriff's Department*, 196 P.3d 892, 895 (Colo. 2008).

14. There are enough competing interests that outweigh the public's common law right of access to judicial records at this stage in the process, as per the rule laid down in *Hickey*.

15. Disclosure of these documents will certainly generate even more prejudicial pretrial publicity than the massive amount of such publicity that already exists. This jeopardizes Mr. Frazee's ability to receive a fair trial by an impartial jury as guaranteed by the Colorado and United States Constitutions. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 350-51 (1966) (public scrutiny of criminal justice 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 atmosphere [disturbed] by so huge a wave of public passion" that two-thirds of jurors admitted during voir dire to possessing 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 material would

"generate pre-trial publicity prejudicial to the interests of all parties in this criminal proceeding.").

16. The intense local and national media coverage of Mr. Frazee's case is an example of 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). "To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary." *Id*. at 2904.

17. Information in the judicial records sought may not be later admissible at trial; a concern akin to the one addressed in *Gannett*. "After the commencement of the trial itself, inadmissible prejudicial information about a defendant can be kept from a jury by a variety of means. When such information is publicized during a pretrial proceeding, however, it may never be altogether kept from potential jurors." *Id*. at 2905.

18. These concerns are exacerbated by the extremely small size of the potential jury pool in Teller County, where the case is currently being heard. This competing interest alone is enough justification to leave the Court's previous orders undisturbed.

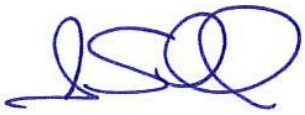
19. Non-Movant Party KRDO, in paragraph 12 of their Motion, claims the public has "no information about the ongoing activity in this case, including any supportive arguments for the arrest for this suspect; the involvement of any additional people of interest[.]" This is not the case; the Court has not shrouded the proceedings in secrecy or kept information from the public. The forthcoming Preliminary Hearing is open to the public, and subject to procedural safeguards and standards of evidence in a way that other portions of the judicial record is not. There is not a gag order in effect, Defense Motion Five, Motion to Limit Pretrial Publicity having been previously denied. Indeed, attorneys from the District Attorney's Office have held press conferences every single time there has been a court date in the above captioned case, and on other dates, answering questions for the media. There are social media groups with tens of thousands of members, including members of the named victim's family, sharing information online. There have been nationally televised interviews of friends of Kelsey Berreth and Krystal Kenney. There have been articles in nationally distributed magazines and newspapers. Contrary to KRDO's claim that there is no information about this case, the public is

Commented [a1]: Is this exactl how that motion is titled? Is it D-5 "Motion to Limit Pretrial Publicity"? If it is, that is how you should refer to it.

overwhelmed with information about this case, and the danger of unfair prejudice that jeopardizes Mr. Frazee's ability to have a fair trial is extreme.

20. Non-Movant Party KRDO, in that same paragraph, argues that lack of access to records deprives the public of information concerning "the danger still extant to the public at large." This is contrary to information provided by Woodland Park Police Chief Miles de Young and the District Attorney at a press conference held on December 21, a fact interestingly noted by KRDO in paragraph 21, when they note that Chief Miles de Young "has repeatedly stateds that law enforcement's conclusion was that the public was not in any danger following the arrest of the primary suspect, Patrick Frazee."

WHEREFORE, since all of these interests outweigh the public's common law interest in access to the Court's records at this stage in the proceedings, the documents kept from the public pursuant to the Court's order should remain so kept, and Mr. Frazee objects to any change at this point.



Adam P. Steigerwald (No. 40092)
Deputy State Public Defender
February 12, 2019

Certificate of Service

Electronically filed and served by APS on 2/12/19.