IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30063

IN THE MATTER OF AN APPEAL

BY AN IMPLICATED INDIVIDUAL.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable James A. Power
Circuit Court Judge

BRIEF OF APPELLANT IMPLICATED INDIVIDUAL

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PRELIMINARY STATEMENT

For the convenience of the Court, documents from the record of the Minnehaha County Clerk of Court, case no. 49SWA20-405 are cited as "R.___" and the Appendix is cited as "App. ___". All citations are followed by appropriate page and paragraph designations. The individual that is the subject of these proceedings is referred to as the "Implicated Individual" or the "Individual"; the State of South Dakota is referred to as "State"; and ProPublica and the Argus Leader are collectively referred to as the "Press". The June 16, 2022, Order re Motions to Unseal Affidavits in Support of Search Warrants, found at R. 1000-1027, is referred to as "Order".

JURISDICTIONAL STATEMENT

On June 16, 2022, the Circuit Court of the Second Judicial Circuit, through the Honorable James A. Power, entered an Order re Motions to Unseal Affidavits in Support of Search Warrants in the case entitled *In re Matter of the Investigation of the Implicated Individual*,[1] Nos. 49SWA19-911, 49SWA20-402, 49SWA20-403, 49SWA20-404, and 49SWA20-405 (consolidated during earlier proceedings in this matter). R. 1000-27 (App. 3-30). The Order is a final, appealable order and this Court has jurisdiction pursuant to SDCL 15-26A-3(2) and (4). In addition, the circuit court issued a ruling within a June 6, 2022, email correspondence that addressed the issue encompassed by this appeal. R. 994-95 (App. 1-2). That order is reviewable under SDCL 15-26A-7.

[1] In its Order, the circuit court noted that various captions have been used in these matters, but the court chose to "use this caption at this time because there is no true plaintiff or defendant at this stage." R. 1000 n.1 (App. 3).

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

I. **Whether the circuit court erred when denying the Individual's request to inspect the affidavits in support of search warrants prior to their unsealing so that he may invoke his rights under SDCL 15-15A-13, if necessary.**

The circuit court erred when denying the Individual's request to inspect the affidavits prior to their unsealing because SDCL 15-15A-13 grants the Individual, as a party to this matter and as the subject of the affidavits, the right to request the redaction of information within the affidavits that he is otherwise entitled to under the Fourth Amendment.

- SDCL 15-15A-13
- SDCL 15-15A-7
- Fourth Amendment of the United States Constitution
- *In re Up N. Plastics, Inc.*, 940 F. Supp. 229, 233 (D. Minn. 1996).

STATEMENT OF THE CASE

This matter is a second appeal in the case before the Honorable James A. Power, Circuit Court Judge of the Second Judicial Circuit ("circuit court" or "court") and addressed by the South Dakota Supreme Court in *In the Matter of an Appeal by an Implicated Individual*, 2021 S.D. 61, 966 N.W.2d 578. While summarized below in the Statement of the Facts, the prior procedural history and underlying facts of this case are largely set forth in the 2021 decision by this Court.

Shortly after this Court's October 27, 2021 decision, the Press filed a Motion to Unseal Affidavits and a Motion for Order Compelling Discovery from South Dakota Attorney General or Division of Criminal Investigation on December 9, 2021. R. 867; 883-85. After briefing by the parties and a hearing, the court denied the Motion to Unseal Affidavits on its merits and denied the Motion for Order Compelling Discovery as "unnecessary[.]" R. 937-38.

Subsequently, on May 27, 2022, the State of South Dakota filed a Notice of Completed Investigation. R. 941. Immediately thereafter, the Individual filed a Motion to Stay an Unsealing of Affidavits in Support of Search Warrant, arguing that the affidavits should remain sealed. R. 945-50. In the event that the court were to reject the Individual's request to continue the sealing of the affidavits, the Individual also requested that the court provide him with a copy of the affidavits so that he may participate in the redaction process and invoke the rights guaranteed to him by SDCL 15-15A-13 if necessary. R. 978, 995.

Through a ruling in its June 6, 2022 email correspondence, the court denied the Individual's requests to inspect the affidavits, concluding that only "standard redactions of personally sensitive or identifying information" would be made and those redactions would be performed by the court. R. 994 (App. 1). In its subsequent Order on June 16, 2022, the court denied the Individual's Motion to Stay an Unsealing of the Affidavits and again denied the Individual's request to inspect the affidavits. R. 1020-24 (App. 23-27). The Implicated Individual now appeals that portion of the court's decision denying the Individual's request to inspect the affidavits prior to their unsealing so that the Individual may participate in the redaction process and invoke his rights under SDCL 15-15A-13 if necessary, as well as the court's earlier Order denying the Individual's request for the affidavits.

STATEMENT OF THE FACTS

In July 2020, after becoming aware of requests to the Minnehaha County Clerk of Courts for certain search warrant documents that had been sealed pursuant to five separate court Orders, the South Dakota Attorney General's Office ("the State") and the

court exchanged emails regarding those inquiries and the court's "questions concerning the scope of [the court's] authority to seal documents related to search warrants . . . ." R. 32-36. Given the inquiries, the information had been undeniably leaked in violation of either or both of the court's Orders to Seal Search Warrant and Affidavit and its Orders of Non-Disclosure of Search Warrant that required the execution of the search warrants "not be disclosed until the investigation is terminated or an indictment/information has been filed[.]" *See, e.g.,* R. 28, 30.

Shortly thereafter, a ProPublica reporter contacted the Second Judicial Circuit requesting copies of the warrants, the returns, and the inventories, as well as confirmation that supporting affidavits were filed in the matter involving the Implicated Individual.[2] R. 41-42. After the reporter was told that a case file was under seal, ProPublica's general counsel contacted the court administrator regarding the same and was then directed to the court. R. 40-41. After receiving ProPublica's inquiry as to the records under seal, the court then emailed the Attorney General's Office and ProPublica collectively to discuss the court's authority "to seal documents in a search warrant file." *See* R. 39-40. The court requested briefing by the State on the issue and also provided ProPublica the opportunity to submit a brief. *Id.* The court later contacted Attorney Marty Jackley, who through the email exchanges had been identified as counsel for the Implicated Individual, and presented the opportunity for the Implicated Individual to submit a brief on the issue. *See* R. 43-45.

[2] Later communications by ProPublica also confirmed that it was not requesting the unsealing of the affidavits in support of search warrants pursuant to SDCL 23A-35-4.1, although ProPublica subsequently requested the affidavits under common law. *Compare* R. 62 ("We are not asking to unseal the affidavits . . .") *with* R. 617 (8:21-9:7).

Subsequent proceedings ensued involving the State, the Implicated Individual, and the Press.[3] Upon consideration of the parties' briefing and oral argument, the court ruled that SDCL 23A-35-4.1, a statute addressing public access to search warrant court records, prohibits the court from sealing all search warrants and verified inventories, and that upon the termination of an investigation or the filing of an indictment, it must release the affidavits in support of the search warrants. *See* R. 640-48. On that basis, the court amended its Orders, effectively unsealing the search warrants and verified inventories yet leaving the affidavits in support of the search warrants sealed at that time. *See, e.g.,* R. 454-55. To allow the parties to make an informed decision regarding a potential appeal, the court released the search warrants and inventories (but not the affidavits supporting the search warrant) to counsel involved in the proceeding. *See* R. 424-45.

The Implicated Individual appealed the court's Amended Orders. R. 569. This Court subsequently addressed the matter on its merits, issuing a decision on October 27, 2021, regarding the interpretation and application of SDCL 23A-35-4.1. *See In re Appeal by an Implicated Individual*, 2021 S.D. 61, 966 N.W.2d 578. The Court upheld the circuit court's unsealing of the search warrants, returns, and inventories, and also upheld the circuit court's continued sealing of the affidavits in support of search warrants. *See*

[3] During its pendency, and despite this matter remaining under court Orders of Sealing and Non-Disclosure as well as counsel for the State, ProPublica, and the Implicated Individual remaining under the court's directive to maintain the confidentiality of the proceeding, an Argus Leader reporter directly emailed the court and asked to be involved in the proceeding. *See* R. 74. Armed with information obtained through violation of the Court Orders, the Argus Leader referenced the fact that the Honorable Judge Power had been the judicial officer that signed the search warrant in this matter. *See* R. 74 ("Late last year, you signed off on a search warrant for a device . . ."). The court subsequently permitted the Argus Leader to intervene and participate in the proceeding as another representative of the media. R. 132-37.

id. ¶ 18. Notably, as related to that appeal, "there [was] no redaction question" before the Court. *Id.* ¶ 24. The Court indicated that the circuit court's decision was "to reconsider its authority to seal the search warrant files, not to determine whether certain discrete information was amenable to redaction under SDCL chapter 15-15A." *Id.*

Shortly after this Court's decision, the Press filed a Motion to Unseal Affidavits and a Motion for Order Compelling Discovery from South Dakota Attorney General or Division of Criminal Investigation on December 9, 2021. R. 867. The Press "urged the [c]ourt to find that the investigation had been terminated[.]" R. 1003 (App. 6). Alternatively, the Press sought to "require the State to update the other interested parties concerning the investigation's status[,]"[4] although failing to cite any legal authority supporting the imposition of a requirement on the executive branch law enforcement to report a status update of a criminal investigation to the judicial branch and to the media. R. 883-84; 1003 (App. 6).

The Individual opposed the Motions for various reasons, including that an unsealing of the affidavits would violate the Individual's privacy rights and other constitutional rights. R. 893-927. The Individual also urged the court to decline the Press's invitation to judicially create, or make up, new burdens such as compelling the Attorney General's Office and the Division of Criminal Investigation to produce discovery in a criminal investigation to the Press, a request contrary to at least federal

[4] This request, on its face, shows the unjust advantage that the Press seeks through these proceedings. The Press indicates its entitlement as an "interested party" to an update of the investigation. R. 883-84. Such would have led to an absurd result of every media outlet moving to intervene in search warrant matters so they may be on similar footing and have an update on any investigation.

Department of Justice policy (as applicable to joint task forces with State authorities).[5] R. 903. Regardless, the State, on its own volition, filed an affidavit by a special agent with the South Dakota Division of Criminal Investigation indicating that "investigative activities [were] ongoing" at the time. R. 1005 (App. 8). Accordingly, to protect an ongoing investigation, the State opposed the unsealing of the affidavits. R. 887-91.

At a March 14, 2022 hearing, the court denied the Press's Motion to Unseal Affidavits on its merits and did not rule upon the Press's Motion for an Order Compelling Discovery given the State's voluntary submission of the special agent's affidavit. R. 937-38. Within its ensuing Order denying the Press's Motion for Unsealing of the Affidavits, the court found that "reasonable cause to continue sealing the affidavits exists based on the substantial risks that unsealing the affidavits at this time could reveal undisclosed details that adversely and unnecessarily affect either the criminal investigation or alternatively, the implicated individual's reputational interests and constitutional rights, as explained in further detail during the [c]ourt's oral ruling." *See* R. 937-38. The Press did not appeal the court's decision.

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[5]Department of Justice Rule 1-7.400 subsection B specifically mandates:

> DOJ generally will not confirm the existence of or otherwise comment about ongoing investigations. Except as provided in subparagraph C of this section, DOJ personnel shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress before charges are publicly filed.

See Department of Justice, Justice Manual, § 1-7.400, Disclosure of Information Concerning Ongoing Criminal, Civil, or Administrative Investigations, *available at* https://www.justice.gov/jm/jm-1-7000-media-relations#1-7.400 (last visited Aug. 30, 2022).

On May 27, 2022, the State filed a Notice of Completed Investigation, indicating that "the South Dakota Division of Criminal Investigation has completed its investigation related to the above referenced search warrant files and has determined that there are no prosecutable offenses within the jurisdiction of the State of South Dakota."[6] R. 941. Immediately thereafter, the Implicated Individual filed a Motion to Stay an Unsealing of Affidavits in Support of Search Warrant and the court permitted subsequent briefing. R. 945-49. Through briefing, the Individual contended that the affidavits should remain sealed in their entirety. R. 945-49, 984-93.

In the event the court were to deny the Individual's request to continue the sealing of the affidavits in their entirety, the Individual also made multiple requests to inspect the affidavits prior to unsealing in order to afford the Individual an opportunity to participate in the redaction process and invoke his rights under SDCL 15-15A-13 if necessary.[7] R. 978; 995 (App. 2). Those requests for a copy of the affidavits were denied by the court. R. 976-77; 994 (App. 1). In its ruling set forth in its June 6, 2022 email correspondence, the court reasoned that the only redactions to be performed are those of "personal email

[6] The State of South Dakota Attorney General Office's apparent decision to make a special exception and file a "Notice of Completed Investigation" lends credence to an Equal Protection claim under the Fourteenth Amendment of the United States Constitution. Further, in its June 16, 2022 decision, the court indicated that "[t]he knowledge that the public will have access to this information creates an incentive for law enforcement and prosecutors to treat all individuals alike when deciding whether to terminate an investigation and not to provide special treatment to individuals with great wealth or political influence." R. 1017 (App. 20). Yet it seems to do quite the opposite – the prosecuting body has unfettered authority to determine which investigations are officially "terminated" for purposes of SDCL 23A-35-4.1.

[7] The Individual has continuously requested a copy of the affidavits and other search warrant court records throughout the entirety of these proceedings, including through requests to both the prosecution and to the court. *See, e.g.,* R. 46-47.

addresses, home addresses, phone numbers, and birth dates" and that the court staff would make those redactions as a task they routinely perform. R. 994 (App. 1). The court also determined that its denial of the Individual's request to inspect the affidavits did not violate the Individual's rights under SDCL 15-15A-13, indicating that the parties have had multiple opportunities to be heard throughout the proceedings and including the prior appeal. R. 994 (App. 1).

In a subsequent decision dated June 16, 2022, the court denied the Individual's Motion to Stay an Unsealing of the Affidavits in Support of Search Warrants, rejecting the Individual's various arguments in favor of a continued sealing of the affidavits in support of search warrants, as well as again rejecting the Individual's request for the affidavits so that he may participate in the redaction process. R. 1020-24 (App. 23-27). The Individual's appeal is limited to the court's denial of Individual's request to inspect the affidavits prior to their unsealing so that he may invoke his rights under SDCL 15-15A-13, if necessary.[8]

ARGUMENT

ISSUE: WHETHER THE CIRCUIT COURT ERRED IN DENYING THE INDIVIDUAL'S REQUEST TO INSPECT THE AFFIDAVITS PRIOR TO THEIR UNSEALING SO THAT HE MAY INVOKE HIS RIGHTS GUARANTEED BY SDCL 15-15A-13, IF NECESSARY.

The issue on appeal is whether the court erred in denying the Individual an opportunity to inspect the affidavits prior to their unsealing in order to analyze whether to

[8] Although the court ruled that the affidavits were to be unsealed without an opportunity by the Individual to inspect the affidavits for redaction purposes, it granted the Individual's request to stay the court decision to preserve the right to appeal. R. 1001 (App. 4); R. 1032. Thus, at this time, the affidavits in support of search warrants remain sealed pending this appeal. R. 1032.

invoke his rights under SDCL 15-15A-13, if necessary. This matter involves the interpretation and application of SDCL l5-15A-13, a Supreme Court rule, as well as implicates the Fourth Amendment. Accordingly, the court's decision is subject to de novo review by this Court. *See In re Appeal of Implicated Individual*, 2021 S.D. 61, ¶ 15, 966 N.W.2d at 583.

I. The Individual's right to inspect the affidavits prior to their unsealing is supported by the Fourth Amendment and is appropriate so that he may invoke his rights under SDCL 15-15A-13, if necessary.

A. SDCL 15-15A-13 grants the Individual a right to request redaction of information in the affidavits.

The denial of the Individual's requests to inspect the affidavits prior to their unsealing, for all intents and purposes, thwarts any opportunity for the Individual to invoke his rights provided by SDCL 15-15A-13. That statute authorizes a party or "an individual about whom information is present in the record" to "request to prohibit public access to information in a court record":

> **15-15A-13. Requests to prohibit public access to information in court records.**
>
> A request to prohibit public access to information in a court record may be made by any party to a case, the individual about whom information is present in the court record, or on the court's own motion. Notice of the request must be provided to all parties in the case and the court may order notice be provided to others with an interest in the matter. The court shall hear any objections from other interested parties to the request to prohibit public access to information in the court record. The court must decide whether there are sufficient grounds to prohibit access according to applicable constitutional, statutory and common law. In deciding this the court should consider the purpose of this rule as set forth in § 15-15A-1. In restricting access, the court will use the least restrictive means that will achieve the purposes of this access rule and the needs of the requestor.

SDCL 15-15A-13 (Emphasis added). Here, there is no question that the affidavits in support of search warrants are court records. As a party to this matter and the subject of the court records, the Individual has requested a copy of the affidavits so that he may analyze them prior to their unsealing and invoke his rights under SDCL 15-15A-13 for redaction purposes if necessary.

Regarding the type of information that may be encompassed by such redaction request, SDCL 15-15A-7 (a Supreme Court Rule) provides:

> **15-15A-7. Court records excluded from public access.**
>
> The following information in a court record is not accessible to the public:
>
> (1) Information that is not to be accessible to the public pursuant to federal law;
> (2) Information that is not to be accessible to the public pursuant to state law, court rule or case law as follows;
> …

The next section, SDCL 15-15A-8, also specifies the type of information subject to redaction:

> **15-15A-8. Confidential numbers, financial documents, and name of child victim excluded from public access.**
>
> The following information in a court record is not accessible to the public:
>
> (1) Social security numbers, employer or taxpayer identification numbers, and financial or medical account numbers of an individual.
> (2) Financial documents such as income tax returns, W-2's and schedules, wage stubs, credit card statements, financial institution statements, check registers, and other financial information.
> (3) The name of any minor child alleged to be the victim of a crime in any adult criminal proceeding.

Cf. Certain Interested Individuals, John Does I-V, Who Are Emps. of McDonnell Douglas Corp. v. Pulitzer Pub. Co., 895 F.2d 460, 467 (8th Cir. 1990) *(quoting In re Search Warrants Issued on June 11, 1988*, 710 F. Supp. 701, 705 (D. Minn. 1989)) (recognizing that redactions may be necessary to protect privacy interests in stating that "[w]hen redaction is required to protect privacy interests, it must be narrowly tailored to allow as much disclosure as possible.").

As part of the basis for its denial of the Individual's request, the court offers that no interested party has "contended that the scope of the redactions should extend beyond personally identifying information." R. 1021 (P. 24). Yet without seeing the affidavits themselves, the Individual is effectively foreclosed from requesting redaction of any of the above information.[9] "The affidavit must be seen to be effectively challenged." *In re Up N. Plastics, Inc.*, 940 F. Supp. 229, 233 (D. Minn. 1996). As SDCL 15-15A-13 is broader than SDCL 15-15A-8, and without knowing the affidavits' contents, the Implicated Individual is unable to fully analyze whether any contents of the affidavits infringe on his rights if left unredacted.

B. <u>The Individual's request is for court records that he is entitled to receive pursuant to the Fourth Amendment.</u>

Importantly, and especially given the circumstances here of a terminated investigation, case law supports that the Individual is merely seeking a court record (ie. affidavits) that he is otherwise entitled to. In *In re Four Search Warrants*, 945 F. Supp.

[9] The Individual's request for the affidavit is limited to a version of the affidavit after redactions of "personal email addresses, home addresses, phone numbers, and birth dates" to be made by the court, presumably under "its own motion" pursuant to SDCL 15-15A-13. R. 1021 (App. 24).

1563, the Northern District of Georgia noted that the subject of an investigation had obtained access to a redacted version of sealed search warrants. 945 F. Supp. 1563, 1568 (N.D. Georgia 1996) ("[the subject of the affidavit] and his counsel have been provided redacted affidavits"). In addition, and citing to Eighth Circuit Court of Appeals and United States Supreme Court precedent, the United States District Court for the District of Minnesota stated in *In the Matter of Up North Plastics, Inc.*, 940 F. Supp. 229, that "[i]ndividuals who have not been indicted in a criminal investigation, but are implicated in criminal activity in a search warrant affidavit, may have a privacy interest in the affidavit." *Id. at* 232. The District Court went on to conclude that "a person whose property has been seized pursuant to a search warrant has a right under the warrant clause of the Fourth Amendment[[10]] to inspect and copy the affidavit upon which the warrant was issued." *Id.*

In a similar vein, the District Court for the Southern District of Ohio concluded that "the Fourth Amendment right to be free from unreasonable searches and seizures includes the right to examine the affidavit that supports a warrant after the search has been conducted and a return has been filed with the Clerk of Court pursuant to [Federal Rule of Civil Procedure 41]. . . . " *In re Search Warrants Issued Aug. 29, 1994,* 889 F.

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[10] The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Supp. 296, 299 (S.D. Ohio 1995) (also noting that it is not an unqualified right). Of note, the court in that case highlighted the distinction between A) cases brought by the media for unsealing of search warrant documents which may jeopardize "the privacy interest of the person whose home has been searched"; and B) the subject of the search's "right to privacy of their home free from searches conducted without a warrant supported by probable cause[.]" *See id.*

The United States District Court for the District of Maryland followed suit in its 2004 decision of *In re Search Warrants Issued on April 26, 2004*, 353 F. Supp. 2d 584, likewise recognizing "a search subject's pre-indictment Fourth Amendment right to inspect the probable cause affidavit", although noting that a compelling governmental interest may qualify that right. 353 F. Supp. 2d 584, 591 (D. Md. 2004). Finally, the United States District Court for the Eastern District of California in 2008 highlighted that "several courts have recognized that those individuals whose property is the subject of a search pursuant to warrant have a pre-indictment right of access to search warrant materials, including the supporting affidavit grounded in the Fourth Amendment." *In re Searches & Seizures*, 2008 WL 5411772 at *3, Nos. 08-SW-0361 DAD, 08-SW-0362 DAD, 08-SW-0363 DAD, 08-SW-0364 DAD (E.D. Cal. Dec. 19, 2008) (unreported). The Eastern District of California further explained that this Fourth Amendment right to the affidavits is not an absolute right – continued sealing of the affidavits may be justified to protect an ongoing investigation. *Id.* at *4.

Pursuant to the foregoing, the Individual is entitled to inspect the affidavits under the Fourth Amendment. The court erred in denying the Individual that opportunity.

C. Unlike the Individual, the Press has no standing or rights to receive the affidavits prior to the general public and to participate in the redaction process for the affidavits.

The court concluded that if it permitted the Individual to inspect the affidavits to participate in redaction, it would also have to grant the Press the same opportunity to avoid any "improper ex parte contact." R. 1022 (App. 25). The Individual respectfully disagrees. The Individual's Fourth Amendment right to inspection of the affidavits prior to their unsealing does not extend to the Press in this matter. The Press similarly is not entitled to the affidavits for purposes of asserting any rights under SDCL 15-15A-13 because 1) the Press is not a party to the underlying criminal matter; and 2) the Press is not the subject of the information within the affidavits.

First, this Court's recent decision in *Rapid City Journal v. Callahan,* 2022 S.D. 38, 977 N.W.2d 742, supports that the Press has no standing to participate in the proceeding at this juncture. In that case, the Court explained that the media does not have standing to insert itself into a criminal case. *See id.* ¶¶ 11-14. Case law reinforces that the media's authority to intervene in a matter is generally for the limited purpose of challenging a court Order sealing information. *See, e.g., Flynt v. Lombardi*, 782 F.3d 963, 966-67 (8th Cir. 2015); *Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994) ("We agree with other courts that have held that the procedural device of permissive intervention is appropriately used to enable a litigant who was not an original party to an action to challenge protective or confidentiality orders entered in that action"); *Beckman Indus., Inc., v. International Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992); *United States v. Holmes*, 572 F. Supp. 2d 831, 833 (N.D. Cal. 2021). It is only at that point and for that limited purpose in which the

Press may participate in the proceeding. *See, e.g. Rapid City Journal v. Callahan*, 2022 S.D. 38, ¶¶ 13-14, 17, 977 N.W.2d 742, 747-48. *Cf. Overstock.com, Inc. v. Goldman Sachs Grp., Inc.,* 180 Cal. Rptr. 3d 234, 250 (Cal. Ct. App. 2014) (concluding that pursuant to California law, a third party may file a motion to unseal records but that does not grant "party" status to the third party).

Applying that principle to the case *sub judice*, the Press has standing to participate in this matter only if 1) after inspection of the affidavits, the Individual requests redaction of additional information pursuant to SDCL 15-15A-13; and 2) the court grants the Individual's request for the redactions. At that time, and not any sooner, has the Press been affected by a sealing order.

Given its conclusion to the contrary that all parties must be permitted to participate in the redaction process if the Individual were afforded that opportunity, the court emphasized its fear that the routine task of redaction that would otherwise take minutes to complete "would become a lengthy and adversarial process that would take weeks, possibly even months, and waste judicial resources." R. 1022 (App. 25). Yet again, the Press is not entitled to participate in the inspection and redaction process. An adversarial proceeding involving the Press would only ensue if the Individual requested redactions under SDCL 15-15A-13 in the proceeding with the State as a party, the court then grants that request, and the Press subsequently seeks a limited intervention to challenge the redactions.

As an aside, and even if this Court were to conclude that the Press would have standing at this juncture, there would be no ex parte communication involved by permitting the Individual, and not the Press, to inspect the affidavits for redaction

purposes. An order allowing the Individual's inspection of the affidavits would be available to the Press. Moreover, the Individual's inspection of that affidavit, outside of the court's presence, would involve no ex parte communication with the court. If the Individual's inspection supports that further redactions are necessary to prevent a violation of his rights, then such request under SDCL 15-15A-13 could be made and it may then be the prerogative of the Press to challenge or oppose such request if they are deemed to have standing. Information requested to be redacted, if any, could then be subject to an in camera review for the court to make an informed decision as to whether a basis exists for the redaction, much like the process for resolving a dispute as to privileged information.

D. SDCL 23A-35-4.1's general grant of public access to search warrant records must give way to SDCL chapter 15-15A's protection of information not subject to public access.

The existence of SDCL 23A-35-4.1 does not change the above analysis. As this Court is well aware through the prior appeal, SDCL 23A-35-4.1 addresses the general public's access to search warrant court records:

> **23A-35-4.1. Filing of affidavit--Sealing of affidavit.**
>
> If not filed earlier, any affidavit in support of a search warrant shall be filed with the court when the warrant and inventory are returned. Upon filing the warrant and supporting documents, the law enforcement officer may apply by separate affidavit to the court to seal the supporting affidavit from public inspection or disclosure. The court, for reasonable cause shown, may order the contents of the affidavit sealed from public inspection or disclosure but may not prohibit disclosure that a supporting affidavit was filed, the contents of the warrant, the return of the warrant, nor the inventory. The court may order that the supporting affidavit be sealed until the investigation is terminated or an indictment or information is filed. In cases of alleged rape, incest, or sexual contact, if the victim is a minor, the court may limit access to an affidavit pursuant to § 23A-6-22.1. However, a court order sealing a supporting affidavit may

> not affect the right of any defendant to discover the contents of the affidavit under chapter 23A-13.

Assuming *arguendo* that the rules of statutory construction apply to a perceived clash between SDCL chapter 15-15A (a Supreme Court Rule) and SDCL 23A-35-4.1, the Supreme Court Rule prohibiting public access to certain information must prevail as it was adopted after SDCL 23A-35-4.1 and is more specific than a general grant of public access. *Peterson v. Burns*, 2001 S.D. 126, ¶ 29, 635 N.W.2d 556, 567 ("[A] rule of statutory construction is that the more recent statute supercedes [*sic*] the older statute"); *In re Wintersteen Revocable Tr. Agreement*, 2018 S.D. 12, ¶ 12, 907 N.W.2d 785, 789 ("[t]he rules of statutory construction dictate that 'statutes of specific application take precedence over statutes of general application."). In other words, SDCL 23A-35-4.1 must accommodate the ability to redact information that is confidential. This Court seemed to acknowledge as much when it indicated that "[w]e perceive no tension between our rules allowing for the limited redaction of this information to protect individual privacy interests and SDCL 23A-35-4.1's requirement to allow access to the broader 'contents' of a search warrant." *In re Appeal of an Implicated Individual*, 2021 S.D. 61, ¶ 24, 966 N.W.2d at 585. Notably, to read SDCL 23A-35-4.1 in a manner that prohibits redaction of *any* information would render SDCL 23A-35-4.1 unconstitutional on its face and as applied. *See, e.g.,* S.D. Const. art. 6, § 29 (indicating that victims have "[t]he right, upon request, to prevent the disclosure to the public, or the defendant or anyone acting on behalf of the defendant in the criminal case, of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information about the victim, and to be notified of any request for such information or records."); *cf. Members of City*

Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984) (noting that a statute may be unconstitutional "on its face" when "it is unconstitutional in every conceivable application"); *State v. Rolfe*, 2013 S.D. 2, ¶ 27, 825 N.W.2d 901, 909; *see also In re A.L.*, 2010 S.D. 33, ¶ 19, 781 N.W.2d 482, 487 ("The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative.").

E. Court staff should not be tasked with the legal responsibility of redaction in this situation where the Individual is requesting the opportunity to protect (and invoke if necessary) his own rights.

Acknowledging that redaction of certain information within the affidavits is required, the court concluded that the redactions should be performed by the court and its staff, highlighting that court staff is capable of performing, and routinely performs, redactions when parties "forget to redact an exhibit or attachment[.]" R. 1022 (App. 25). The Individual recognizes (and appreciates) that "court staff routinely and frequently redact personally identifying information[.]" *See* R. 1022 (App. 25). While not doubting the capabilities of the court and court staff to accomplish this task, the court and its staff should not hold the legal responsibility (to the exclusion of the Individual) to decide which redactions are appropriate and necessary to protect the Individual's rights when the Individual is a party in the proceeding, the subject of the information, and has requested the opportunity to inspect the affidavits for redaction purposes to ensure protection of his rights. The Individual is best suited to advocate that his own rights are protected. While redactions within search warrant affidavits to protect privacy interests may often be performed by a court, that is because the parties "who may be harmed by disclosure are typically not before the court." *Cf. Application of Newsday*, *Inc.*, 895 F.2d 74 (2d. Cir.

1990) (also noting that the appellant in that case was provided "with a copy of the intercepted communications, and had ample time to formulate specific objections to disclosure"). On the contrary, in this case the Individual *is* before the court and has requested the affidavits so that he may invoke the rights granted to him in SDCL 15-15A-13, if necessary.[11]

In addition, redaction is not merely a clerical, or "administrative" task. R. 1024 (App. 27). At first blush, SDCL 15-15A-8 appears to provide a fairly simple list of information to be redacted:

> **15-15A-8. Confidential numbers, financial documents, and name of child victim excluded from public access.**
>
> The following information in a court record is not accessible to the public:
>
> (1) Social security numbers, employer or taxpayer identification numbers, and financial or medical account numbers of an individual.
> (2) Financial documents such as income tax returns, W-2's and schedules, wage stubs, credit card statements, financial institution statements, check registers, and other financial information.
> (3) The name of any minor child alleged to be the victim of a crime in any adult criminal proceeding.

While some redactions may certainly be ministerial in nature, the information subject to redaction involves further legal knowledge and analysis. SDCL 15-15A-8 itself invites judgment as to what constitutes "other financial information." Even more importantly,

[11] In its decision, the court noted that if it involved the Individual in the redaction process, it would also "need to involve other persons [who have personally identifying information within the affidavits] who have thus far had no involvement in this litigation[.]" R. 1023 (App. 26). According to the court, that involvement would, in turn, lead to a "contentious and wasteful situation" again. R. 1023 (App. 26). However, those individuals have neither appeared before the court nor made a similar request for inspection. Again, those individuals would (in all likelihood) not have a Fourth Amendment right to the affidavits like the Individual here.

and as stated above, SDCL 15-15A-7 excludes from public access: "1) information that is not to be accessible to the public pursuant to federal law; and 2) information that is not to be accessible to the public pursuant to state law, court rule or case law [followed by examples]."

Determining what information is confidential "pursuant to federal law" and "pursuant to state law" may go far beyond a clerical task. For example, federal law (Title III of the Omnibus Crime Control and Safe Streets Act of 1968) sets forth a procedure for the interception of wire, oral, or electronic communications, and includes a process for challenging the disclosure of contents of those intercepted communications in federal or state court proceedings. *See* 18 U.S.C. § 2518; *see also Application of Newsday*, *Inc.*, 895 F.2d 74 (2d. Cir. 1990) (discussing the interplay of Title III and affidavits in support of search warrants). The potential application of that federal law to the contents of a search warrant affidavit is not clerical in nature. Given the legal intricacies that may be involved in redacting information, here when the party and subject of the affidavits is a part of the proceeding and requesting to inspect court records in order to assess his rights under SDCL chapter 15-15A prior to the unsealing of the records, it is reversible error to deny his right to do so.

Notably, the court seems to recognize that the scope of authority for redactions goes beyond the information identified within the three subsections of SDCL 15-15A-8. Indeed, the court here indicated that the affidavits contain none of the above listed information; the information within the affidavits that it intended to redact was "personal email addresses, home addresses, phone numbers, and birth dates[,]" yet none of which are listed within SDCL 15-15A-8. R. 1021 (App. 24). To be clear, the Individual does

not oppose (and in fact agrees with) the court's redaction of that personally identifiable information, presumably through the court's own motion pursuant to SDCL 15-15A-13 ("A request to prohibit public access to information in a court record may be made . . . on the court's own motion."). However, in doing so, the court effectively acknowledges that redactions encompass more information than only that listed in SDCL 15-15A-8, taking it outside the realm of an otherwise clerical task.

In support of its decision for the court and its staff to perform the redactions, the court also points out that it "is concerned that if it granted access to unredacted versions of the affidavits to any or all of the parties, information from the affidavits could be leaked to media other than the current interested parties." R. 1023 (App. 26). Yet the violations of the court's sealing, non-disclosure, and protective orders by others that has undeniably occurred in this case and has gone without consequence, must not preclude the Individual from being able to assert his own rights. Such result unfairly punishes and re-victimizes the Individual for others' actions.

II. The issue regarding the Individual's right to request inspection of the affidavits for redaction purposes is now ripe.

Finally, in denying the Individual's request to inspect the affidavits for redaction purposes under SDCL 15-15A-13, the court states that the Individual has had "two years of litigation" to allow the Individual to exercise his rights under SDCL 15-15A-13. R. 1021 (App. 24). The court indicated that the parties have had multiple opportunities to be heard on the issue throughout the proceedings including the appeal. R. 994. However, the issue regarding redaction of the affidavits only recently became ripe given their imminent release.

At the outset, the prior appeal did not encompass the redaction question. In that decision, this Court addressed the circuit court's decision to "reconsider its authority to seal the search warrant files, not to determine whether certain discrete information was amenable to redaction under SDCL chapter 15-15A." *In re Appeal of an Implicated Individual*, 2021 S.D. 61, ¶ 24, 966 N.W.2d at 585. Further, the prior appeal could not have addressed the question of redaction of the affidavits in support of search warrant. The issue as to the Individual's rights to participate in redaction of the search warrant affidavits to be unsealed arose after the State's Notice of Completed Investigation, which triggered the unsealing pursuant to SDCL 23A-35-4.1.

The issue of redaction of the affidavits was only recently presented to the court given the imminent release of the affidavits. The Individual's participation in earlier litigation regarding the unsealing of other search warrant court records in this matter does not justify denial of the Individual's rights as to the redaction issue that only recently arose as to the affidavits.

CONCLUSION

This case continues to involve the rights of an individual that has never been charged with a crime, and now, a terminated investigation. The Individual appreciates the State's public acknowledgement of the conclusion of its investigation and determination of no prosecutable offenses, although it will not undo the violations of his privacy and defamation through others' use of these proceedings "to gratify private spite or promote public scandal." *See United States v. Amodeo*, 71 F.3d 1044, 1051 (2d Cir. 1995) (quoting *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 98 S. Ct. 1306 (1978)). Exercising his Fourth Amendment rights and recognizing that a triggering event

for purposes of SDCL 23A-35-4.1 has now occurred, the Individual is entitled to inspect the affidavits for redaction purposes. The Individual respectfully requests this Court reverse the circuit court's denial of the Individual's request to inspect affidavits and remand this matter to allow the Individual to inspect the affidavits prior to their unsealing and invoke his rights under SDCL 15-15A-13, if necessary.

REQUEST FOR ORAL ARGUMENT

The Implicated Individual respectfully requests oral argument.

Respectfully submitted this 1st day of September, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with SDCL § 15-26A-66(b). The font is Times New Roman size 12, which includes serifs. The brief is 24 pages long and the word count is 7,160, exclusive of the Cover Page, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated this 1st day of September, 2022.

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CERTIFICATE OF SERVICE

I certify that on September 1, 2022, a true and correct copy of the **BRIEF OF APPELLANT IMPLICATED INDIVIDUAL** was served via Odyssey and email upon the following individuals:

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IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

No. 30063

IN THE MATTER OF AN APPEAL

BY AN IMPLICATED INDIVIDUAL.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable James A. Power
Circuit Court Judge

APPENDIX OF APPELLANT IMPLICATED INDIVIDUAL

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Please file in 49SWA 20-405

Power, Judge James

From: Power, Judge James
Sent: Monday, June 6, 2022 12:24 PM
To: Stacy Hegge; Gries, Angelia
Cc: becklaw@outlook.com; jea44@aol.com; Jeremy.Kutner@propublica.org; Kempema, Brent; Marty J. Jackley; Ellis, Jonathan; Myers, Cory
Subject: RE: [EXT] In re Implicated Individual, 49SWA 19-911, 20-402 through 20-405

All:

As I mentioned in my email on Friday, Rule 16 is the discovery rule. If the implicated individual is contending that he is entitled to obtain a copy of the unredacted affidavits in support of a search warrant from the State pursuant to the discovery rule because (1) he has sent appropriate discovery requests to the State for those affidavits, (2) the State has refused to respond to those requests, and so (3) the implicated individual is now moving pursuant to 23A-13-17 to compel the State to provide such unredacted copies, then I am requiring the implicated individual to file an appropriate motion including copies of the discovery requests and the State's response(s). I also want the parties to comply with the meet-and-confer process and then set this for hearing, so that we have a proper record of the discovery dispute, including briefing on whether Rule 16 applies when no information or indictment was ever filed. Until that is done, I am treating the implicated individual's desire to obtain unredacted copies pursuant to Rule 16 as not ripe or appropriate for review.

To the extent that the implicated individual relies on SDCL 15-15A-13 to obtain access to unredacted copies, the Court disagrees that the Media and public have no interest in redactions and should not be included in proceedings related to requests to redact the affidavits. I find that not only the implicated individual but also the public, including the media, have an interest in the content of the affidavits in support of the search warrant, and that content is affected by redactions. That being said, the only redactions the Court intends to make are the standard redactions of personally sensitive or identifying information, which in this case consists of personal email addresses, home addresses, phone numbers, and birth dates. This type of limited redaction was acknowledged with approval by the SD Supreme Court. In re Implicated Individual, 2021 S.D. 61, ¶ 24 ("In addition, we have exercised our authority to determine that certain types of information within court records should be redacted in all instances. These include personal identifying information, such as social security numbers, as well as certain financial documents and the names of minor children in particular cases. *See* SDCL 15-15A-8. We perceive no tension between our rules allowing for the limited redaction of this information to protect individual privacy interests and SDCL 23A-35-4.1's requirement to allow access to the broader 'contents' of a search warrant."). I do not believe that any party needs or should be involved in the process of making those limited redactions, as they are standard redactions that court staff routinely perform.

I recognize that SDCL 15-15A-13 provides for notice and sometimes requires a hearing. But this entire litigation has effectively been an application of SDCL 15-15A-13, and all interested parties have already had multiple opportunities to be heard through briefs, previous hearings, and even an appeal. Indeed, the Supreme Court's opinion recognized that this Court had relied on SDCL 15-15A-13 in administering the hearing and briefing. ¶ 6 n.4. Moreover, the SD Supreme Court considered the interplay of SDCL 15-15A-13 and 23A-35-4.1 and rejected the argument that Section 15-15A-13 could be used to undermine the clear provisions of Section 23A-35-4.1. Id. ¶¶ 21-22. This Court therefore rejects any attempt to invoke SDCL 15-15A-13 as a basis for not following the clear statutory language of 23A-35-4.1 or the Supreme Court's opinion. I therefore find that it is not necessary to have further hearings on the implicated individual's request to be involved in redactions pursuant to SDCL 15-15A.

I have not yet had time to review all the briefs and still have not made any decision on whether a hearing is needed on the request to stay unsealing of the affidavits.

Thanks,

JAP

From: Stacy Hegge [mailto:shegge@gpna.com]
Sent: Monday, June 6, 2022 10:43 AM
To: Power, Judge James <james.power@ujs.state.sd.us>
Cc: becklaw@outlook.com; jea44@aol.com; Jeremy.Kutner@propublica.org; Kempema, Brent <Brent.Kempema@state.sd.us>; Marty J. Jackley <mjackley@gpna.com>
Subject: [EXT] In re Implicated Individual, 49SWA 19-911, 20-402 through 20-405

Your Honor,

I understand that to this point, there have been requests to provide the affidavits in support of the search warrant to the implicated individual and those requests have been denied. To the extent the Court denies the individual's Motion to Stay an Unsealing of the Affidavits in Support of Search Warrant, and for purposes of clarifying the record as to the authority relied upon for the request for the affidavits, the implicated individual respectfully requests the affidavits pursuant to Rule 16 and to invoke his rights pursuant to SDCL 15-15A-13. While all parties in this matter are cc'd to provide notice of this request, the Argus Leader and ProPublica do not have an interest in any redactions and should not be included in that process.

Thank you,

Stacy Hegge

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT
	)	
IN RE MATTER OF THE INVESTIGATON OF THE IMPLICATED INDIVIDUAL,[1]	)	49 SWA 19-911 49 SWA 20-402 to -405 ORDER RE MOTIONS TO UNSEAL AFFIDAVITS IN SUPPORT OF SEARCH WARRANTS AND TO STAY UNSEALING

This matter is once again before the Court due to the State's filing of a Notice of Completed Investigation notifying this Court that "the South Dakota Division of Criminal Investigation has completed its investigation related to the above referenced search warrant files and has determined that there are no prosecutable offenses within the jurisdiction of the State of South Dakota." (Notice of Completed Investigation (filed May 27, 2022).) The Court responded by informing counsel for the interested parties of the Court's intention to promptly unseal the affidavits in support of search warrants in the above-captioned matters "[p]er our previous hearings." The Implicated Individual moved to stay unsealing of the affidavits. Argus Leader Media and ProPublica (collectively, the "Media") moved for the affidavits to be unsealed without further delay.

The Court permitted the interested parties to file written submissions in support of their positions. The Implicated Individual filed three documents: (1) Motion to Stay an Unsealing of Affidavits in Support of Search Warrant; (2) Addendum to Motion to Stay an Unsealing of Affidavits in Support of Search Warrant; and (3) Reply Brief in Support of Motion to Stay an

[1] The interested parties and the Court have used various captions throughout this matter. Briefs and orders are rarely filed in search warrant matters, so there is no standard caption. The Court chooses to use this caption at this time because there is no true plaintiff or defendant at this stage. The Court is referring to the implicated individual as such at his request and because the investigation has been terminated without charges being filed. Because his identity can be readily discerned from other unsealed documents, the Court is not requiring the other interested parties to refrain from referring to him by name.

Unsealing of Affidavits in Support of Search Warrant. The Media filed: (1) Motion to Unseal Affidavits in Support of Search Warrants; and (2) Brief in Opposition to Motion to Stay Unsealing of Search Warrant Affidavits. The State filed a single brief captioned "State's Response (Constitutionality of Statute)." Along with the procedural history outlined below, these briefs sufficiently address the issue to be decided that the Court concludes delaying the decision to permit oral argument would serve no valid purpose and is not necessary. The Court therefore denies the Implicated Individual's request for oral argument or further briefing. For the reasons set forth below, the Court also concludes that the Implicated Individual has failed to show any basis for this Court to avoid following the clear statutory language in SDCL § 23A-35-4.1, which requires unsealing of the affidavits at issue upon termination of the State's investigation. The Court does, however, grant the Implicated Individual's request to stay this final decision pursuant to SDCL § 15-6-62(a) to preserve the Implicated Individual's right to appeal.

Procedural History and Absence of Need for Further Proceedings

Certain aspects of this matter's history provide helpful context for the current dispute and the Court's refusal to entertain oral argument or further briefing. This litigation began in summer of 2020 when the Media began requesting access to sealed documents related to search warrants concerning the Implicated Individual. Conversely, the Implicated Individual and State contended those documents should remain sealed. The dispute revolved around SDCL § 23A-35-4.1 which provides in pertinent part:

> Upon filing the warrant and supporting documents, the law enforcement officer may apply by separate affidavit to the court to seal the supporting affidavit from public inspection or disclosure. The court, for reasonable cause shown, may order the contents of the affidavit sealed from public inspection or disclosure but may not prohibit disclosure that a supporting affidavit was filed, the contents of the warrant, the return of the warrant, nor the inventory. The court may order that the supporting affidavit by sealed until the investigation is terminated or an indictment or information is filed. In cases of alleged rape, incest, or sexual contact, if the victim is a minor, the court may limit access to an affidavit pursuant to § 23A-6-22.1

SDCL § 23A-35-4.1.

After extensive briefing and oral argument, the Court concluded that it had initially sealed more documents than permitted by Section 23A-35-4.1. The Court issued an Amended Order concluding that the search warrants and verified inventories in these matters "shall be unsealed and become publicly accessible court records." (Amended Order at 2 (filed Oct. 15, 2020.) With regard to the affidavits in support of a search warrant, the Court held: "proof by affidavit has been made before me by Special Agent Jeff Kollars and during the October 14, 2020 hearing that reasonable cause exists to order the contents of the Affidavit in Support of Search Warrant be sealed from public inspection or disclosure ***until this investigation is terminated or an indictment is filed.***" (*Id.* at 1 (emphasis added).) "Following termination of the investigation or filing of an indictment, ***the document's contents will be unsealed and available to public inspection or disclosure as a publicly accessible court record."*** (*Id.* (emphasis added).) The bolded language clearly informed all interested parties in October 2020 of this Court's intent to unseal the affidavits in support of the search warrants if: (1) the investigation was terminated, or (2) an indictment or information was filed.

The Court stayed the Amended Order to permit the Implicated Individual to appeal the Amended Order.[2] The Implicated Individual's appeal combined with the other parties' right to file a notice of review gave all interested parties the opportunity to challenge this Court's conclusion that Section 23A-35-4.1 granted this Court discretion to seal the affidavits until—but only until—termination of the investigation or the filing of an indictment or information. No party, however, argued that this particular conclusion was wrong or that the statutory language on which it relied was unconstitutional. *See In re Implicated Individual*, 2021 S.D. 61, ¶ 18 ("The Press, for its part, has not sought review of the portion of the circuit court's amended orders sustaining its

[2] The State initially appealed the Amended Order, but withdrew its appeal while the appeal was still pending.

decision to seal the search warrant affidavits at this time. . . .") The South Dakota Supreme Court nevertheless expressed the same understanding of the statutory language: "The plain language of the statute provides an unmistakable expression of legislative intent. A court may seal the contents of an affidavit in support of a search warrant upon a showing of reasonable cause, ***but only until the investigation is terminated or an indictment or information is filed."*** *Id.* (emphasis added).

The Implicated Individual argued that the statute's plain meaning should not be followed and courts should have discretion to seal documents related to search warrants based on various policy and constitutional concerns. Those concerns included "protecting the privacy of uncharged individuals named in search warrants and assuring the integrity of criminal investigations," *id.* ¶ 27, and separation of powers. *Id.* ¶ 28 n.12 ("The Implicated Individual extends the claim that the judiciary possesses inherent and preeminent authority over court records into the constitutional realm by arguing that applying the text of SDCL 23A-35-4.1 as written violates the separation of powers doctrine. We do not believe that to be the case.) The Supreme Court rejected these arguments: "Under the circumstances presented here, there is no constitutional collision course between coordinate branches of state government and no tension between our court rules and a plain and unambiguous statute." *Id.* ¶ 28.

The Supreme Court's decision affirming the Amended Order was issued October 27, 2021. After receiving that decision, this Court implemented the Amended Order by unsealing the search warrants, verified inventory, correspondence, and briefing. The only documents still sealed in the above-captioned files were the affidavits in support of the search warrants.

On December 9, 2021, the Media filed a motion and brief seeking to unseal the affidavits. The Media acknowledged that no indictment or information had been filed, but urged the Court to find that the investigation had been terminated and unseal the affidavits or, alternatively, at least require the State to update the other interested parties concerning the investigation's status. On

January 10, 2022, the State responded by voluntarily filing an affidavit from DCI Special Agent Jeff Kollars stating that "investigative activities are ongoing." (Letter from Jeff Kollars at 1 (filed Jan. 10, 2022).) The State requested that the affidavits remain sealed to protect the ongoing investigation. The Implicated Individual filed a lengthy response also contending that the affidavits should remain sealed for multiple reasons, including potential harm to his privacy rights, reputational interests, and constitutional rights associated with potential criminal prosecution.

On March 14, 2022, this Court permitted oral argument and ruled from the bench that the affidavits should remain sealed. Among other things, the Court found the State's representation that its investigative activities were ongoing to be credible and thus that neither criteria requiring the affidavits to be unsealed existed. The Court then made several alternative rulings based on the assumption that, during the time period (1) before termination of an investigation or (2) filing of an indictment or affidavit, Section 23A-35-4.1's use of "may" granted the Court discretion to decide whether to seal the affidavits. The Court found that law enforcement concerns about potential harm to the investigation were sufficient by themselves to provide reasonable cause to seal the warrant. The Court also alternatively held that, during this time period, it was appropriate to consider the impact that unsealing could have on the Implicated Individual, including his reputational interests and constitutional rights related to a fair trial, such as maintaining the presumption of innocence, along with the concerns of law enforcement and public access. The Court specifically noted that it was not saying that the Implicated Individual's privacy concerns trumped the statute, i.e., Section 23A-35-4.1, so the Court's analysis would change if the investigation was terminated or an indictment or information was filed.

On May 27, 2022, the State filed its Notice of Completed Investigation representing that it had completed its investigation "and has determined that there are no prosecutable offenses within the jurisdiction of the State of South Dakota." (Notice of Completed Investigation.) On June 7,

2022, the State reaffirmed in its brief that "the South Dakota investigation has been terminated and that all investigative materials have been, or are in the process of being forwarded, to other jurisdictions who may have an interest in the investigative materials." (State's Response (Constitutionality of Statute) at 1.)

This history shows that the Court's decision not to permit oral argument or further briefing is being made almost two years after the interested parties began litigating the meaning of SDCL 23A-35-4.1. In October 2020, the Court clearly stated its intent to unseal the affidavits if (1) the investigation was terminated or (2) an indictment or information was filed. Since that time, all interested parties have had multiple opportunities to present any objections to that intent in writing and oral argument to the South Dakota Supreme Court and to this Court. If the statute or Supreme Court decision were unclear, or if the parties had not had a reasonable opportunity to identify valid grounds for not following the statute's clear language, the Court would gladly allow the parties to continue developing their arguments. The statute, however, is quite clear. Indeed, the South Dakota Supreme Court said it "provides an unmistakable expression of legislative intent." *In re Implicated Individual*, 2021 S.D. 61, ¶ 18.

The Court nevertheless has accepted and carefully considered the three briefs from the Implicated Individual seeking to stay unsealing of the affidavits. The Court concludes that this recent round of briefing, as well as the previous years of litigation, provided ample opportunity for the Implicated Individual to identify any valid basis for the Court to depart from the intent it expressed in October 2020. After considering the potential grounds identified by the Implicated Individual's three recent filings, the Court finds and concludes that no valid purpose would be served by further delay to schedule additional argument in oral or written form concerning the unsealing of the affidavits.

Analysis

The Implicated Individual's recent briefing contends the affidavits should remain sealed for a variety of reasons. Significantly, he does not contend that the Section 23A-35-4.1's text or the South Dakota Supreme Court's decision granted this Court with discretion to keep the affidavits sealed after termination of the investigation. The Court will attempt to address his arguments in the order in which they appeared in the recent filings.

The Media is not required to file a motion to unseal, and, alternatively, it has filed such a motion.

The Implicated Individual first contends that a motion to unseal the affidavits should be a prerequisite to any unsealing. (Implicated Individual's Motion to Stay an Unsealing at 1.) The Court disagrees. As the Media points out, once an investigation is terminated, nothing in Section 23A-35-4.1's text or the Supreme Court's interpretation of that text or this Court's Amended Order makes unsealing of the affidavits dependent on a formal request to unseal affidavits from the Media or member of the public. Indeed, in the Amended Order, this Court already made clear its intent to unseal the affidavits if the investigation were terminated.

Alternatively, the Media promptly responded to this argument by filing a motion to unseal the affidavits, so even assuming for the sake of argument that such a motion were required, the Court finds and concludes that the Media's May 27, 2022 motion to unseal affidavits would satisfy that requirement.

Any rights that the Implicated Individual has pursuant to Marsy's Law are irrelevant to the issue whether the affidavits should be unsealed.

The Implicated Individual contends that he has a constitutional right to preclude disclosure of the affidavits because he is a victim as defined by Marsy's Law. S.D. Const., Art. VI, § 29. He couches this as a constitutional challenge to SDCL § 23A-35-4.1. Marsy's Law provides crime victims with rights intended to "ensure the victim has a meaningful role

throughout the criminal and juvenile justice systems." *Id.* subpt. 19. Marsy's Law defines "victim" as "a person against whom a crime or delinquent act is committed." *Id.* When a victim is incapacitated for reasons including being a minor, the term "victim" includes, among others, close family members and any person "designated by the court." But it "does not include the accused or a person whom the court finds would not act in the best interests of a . . . minor or incapacitated victim." *Id.*

One of the rights granted by Marsy's Law to crime victims is the right prevent public disclosure of certain information in certain circumstances:

> The right, upon request, to prevent the disclosure to the public, or the defendant or anyone acting on behalf of the defendant in the criminal case, of information or records that could be used to locate or harass the victim's family, or which could disclose confidential or privileged information about the victim, and to be notified of any request for such information or records. This does not limit law enforcement from sharing information with the public for purposes of enlisting the public's help in solving a crime.

Id. Subpt. 5.

The Implicated Individual contends that he is a victim because his email account was hacked and his status as a victim of a hacking crime permits him to use Subpart 5 of Marsy's Law to prevent disclosure of the affidavits. In past briefing and in public comments, the Implicated Individual has asserted that this hacking would provide a defense to the crimes of possession and distribution of child pornography listed on the search warrants as the subject of the investigation related to the warrants. The Implicated Individual further contends that he did not discover the hacking until after the first appeal and so he could not have raised the Marsy's Law issue during his first appeal.

The Court expresses no opinion whether the Implicated Individual could have raised the Marsy's Law issue during his first appeal because it is clear to the Court that the Implicated Individual's Marsy Law theories fail on their merits. Assuming for the sake of argument that the

Implicated Individual has been the victim of hacking, he cannot use Marsy's Law to stop unsealing these affidavits for multiple reasons. The Court agrees with the other interested parties that the Implicated Individual is not a victim with regard to the crimes that were the subject of the search warrants. The Court acknowledges that the first sentence of the definition of victim in Marsy's Law is quite broad: "a person against whom a crime or delinquent act is committed."

But this broad language is subject to various limits, including reason and the remaining text of Marsy's Law. For example, in *In re Issuance of Summons Compelling Essential Witness to Appear and Testify in Minnesota*, 2018 S.D. 16, 908 N.W.2d 160, the South Dakota Supreme Court relied on both reason and other text from Marsy's Law to conclude that the term "victim" does not include victims of crimes or delinquent acts committed entirely in other states, even though the phrase quoted above does not expressly say that the crime or delinquent act must be committed at least partially in South Dakota. *Id.* ¶ 18 ("Based upon the plain language and stated purposes enumerated in the Amendment, we hold that the constitutional rights set forth in Article VI, § 29 are inapplicable to crimes committed wholly outside the State of South Dakota."). Similarly, the Implicated Individual's counsel of record, when he was serving as South Dakota Attorney General, issued a formal opinion recognizing that: "Rights granted by [Marsy's Law], like all constitutional rights, are subject to reasonable limitations." Official S.D. Atty. Gen. Op. No. 16-02, 2016 WL 7209783 at *3 (S.D.A.G. Dec. 5, 2016).

Here, reason and context show that the Implicated Individual's allegation of hacking does not make him a victim with regard to the investigation of distribution and possession of child pornography. Even though the definition of victim broadly refers to "a person against whom a crime" was committed, a subsequent sentence states that the term victim "does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor or incapacitated victim." S.D. Const., Art. VI, § 29, Subpt 19. Marsy's Law

thus views the roles of victim and of the accused—or even someone who would not act in the best interests of the victim—as incompatible with regard to a particular crime.

The Implicated Individual's Reply Brief acknowledges that a person who is an accused is not entitled to assert Marsy's Law rights with regard to the crime of which he is an accused, and therefore admits that he could not have asserted Marsy's Law right before the State terminated its investigation. (Implicated Individual's Reply Brief in Support of Motion to Stay Unsealing of Affidavits at 7 ("Until the State's recent acknowledgment of its determination of 'no prosecutable offenses' within the jurisdiction of the State of South Dakota, the individual has been an 'accused' and thus not entitled to the rights afforded by Article 6, Section 29 of the South Dakota Constitution (indicating that a 'victim' under that Section 'does not include the accused[.]'")).

The Implicated Individual contends that the State's termination of investigation means that he is not an accused and can now assert Marsy's Law rights with regard to the investigation underlying the affidavits. In the circumstances of this case, the Court disagrees. The crimes underlying the affidavits were distribution and possession of child pornography. Those crimes are distinct from the hacking crime allegedly committed against the Implicated Individual. Even though the Implicated Individual is no longer being investigated for possibly committing distribution or possession of child pornography, he is certainly not the victim of those particular crimes.

As the Media argues, the true victims of distribution or possession of child pornography are the minors depicted in pornographic images. And even though the Implicated Individual is no longer being investigated for distribution or possession of child pornography, the Court finds there are conflicts between his interests and the interests of the minors depicted in the images described by the affidavits. For example, the Implicated Individual's interests, including but not limited to reputational interests, would suffer no harm and could only be helped by showing that the images

were not child pornography. Conversely, the minors depicted in the images clearly have an interest in the images being found pornographic to help prevent further distribution and to punish and perhaps obtain restitution from those who created, distributed, or possessed degrading images of them. In addition, even though the possibility of some other jurisdiction conducting an investigation related to the images described in the affidavits is unknown, speculative, and theoretical, the interests of the Implicated Individual and the minors conflict with regard to that possibility. Accordingly, even now the Implicated Individual is someone the Court finds "would not act in the best interests of a . . . minor . . . victim" of the images described in the affidavits, and thus he is not a victim with regard to the crimes underlying the affidavits even though he is no longer an accused.

For similar reasons, the Court rejects the Implicated Individual's attempt to claim victim status based on alleged criminal contempt. The criminal contempt theory is based on the assertion that comments in news articles demonstrate that someone subject to the Court's protective order in this litigation must have violated that order by sharing protected information with the press. But, as discussed above, assuming for the sake of argument that highly speculative theory could be established, it would just mean that the Implicated Individual could claim victim status with regard to the crime of criminal contempt. There is no logical or textual reason why being the victim with regard to criminal contempt should allow the Implicated Individual to claim victim status with regard to the warrants and affidavits at issue concerning child pornography.

In addition and alternatively, even assuming for the sake of argument that the Implicated Individual could assert rights under Marsy's Law, the Court agrees with the State that the Subpart he cites would not preclude unsealing of the affidavits at issue. He quotes language from Subpart 5. (*See* Implicated Individual's Motion to Stay Unsealing of Affidavits at 1-2 and his Reply Brief at 5-6.) Subpart 5 permits victims to prohibit disclosure to the public of "information or records

that could be used to locate or harass the victim or victim's family." But the Court has redacted personally identifying information from the affidavits, so even assuming arguendo that the Implicated Individual could claim victim status, unsealing the affidavits will not involve public disclosure of any new information that could be used to locate or harass him or his family. Similarly, Subpart 5 permits victims to prohibit public disclosure of information "which could disclose confidential or privileged information about the victim." Again, however, the Court has reviewed the affidavits and redacted personally identifying information about the Implicated Individual and so unsealing the affidavits will not disclose any information that is still confidential or privileged information. Consequently, even if the Implicated Individual could assert Marsy's Law rights, the subpart he relies upon does not provide a basis to stay unsealing of the redacted affidavits.

In the Implicated Individual's Reply Brief, he cites a South Dakota Public Broadcasting article stating that some law enforcement officers have asserted that they can claim Marsy's Law rights when they have been assaulted even with regard to an investigation of the officer's use of force in the incident. This article does not change the Court's conclusion. First, it is merely hearsay. Second, the article does not contend that any court has recognized that law enforcement officers are entitled to use their Marsy's Law rights as an alleged victim of an assault by a suspect or person of interest in the context of an investigation into the officer's use of force against the suspect or person of interest. Third, without offering any opinion on the validity of those officers' attempts to utilize Marsy's Law, the law enforcement hypothetical does not persuade the Court that the Implicated Individual should be allowed to use his claimed status as a victim of hacking or criminal contempt to claim victim status with regard to the investigation of the distinct crimes of distribution and possession of child pornography.

There are multiple reasons why the Court concludes that being the alleged victim of hacking or criminal contempt does not transform the Implicated Individual into a victim with regard to possession and distribution of child pornography. Possession and distribution of child pornography are the only crimes listed on the caption of the warrants. When the warrants and affidavits supporting those warrants were created, the investigation did not include the alleged hacking of the Implicated Individual's email, nor had any alleged criminal contempt occurred. The Implicated Individual is the one who subsequently introduced the idea that his email was hacked as a possible defense. The Court does not dispute that he and other defendants have the right to raise such affirmative defenses, and to contend that other parties have violated protective orders. But as discussed above, there were, and continue to be, tensions between the Implicated Individual's interests and the minors who are undisputedly victims of the child pornography crimes underlying the investigation. It would turn Marsy's Law on its head and negate its original purpose of protecting crime victims throughout the criminal process if asserting the affirmative defense of hacking, or contending that other parties had committed criminal contempt by violating a protective order, or the termination of the original investigation, permitted the Implicated Individual to claim to be the victim of child pornography.

The Implicated Individual may not assert the Marsy's Law rights of other victims.

The Implicated Individual alternatively alleges that he is entitled to assert the Marsy's Law rights of minors depicted in the images at issue. (Implicated Individual's Motion to Stay Unsealing of Affidavits at 2.) The Court, along with the other interested parties, disagrees. The definition of victim in Marsy's Law does sometimes include people other than the physical victim of a crime such as the physical victim's close family members. *See* S.D. Const., Art. VI, § 29, Subpt. 19. But Marsy's Law expressly excludes from the definition of victim "the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor or incapacitated

victim." *Id.* For the reasons discussed in the previous section, the Court finds that the Implicated Individual—as the subject of the child pornography distribution and possession investigation underlying the affidavits and thus a person who was potentially an accused or defendant with regard to those particular crimes—has inherent conflicts of interest that preclude him from being someone who would act in the best interests of the minors depicted in the images at issue. He is therefore not entitled to assert those minors' Marsy Law rights.

In addition and alternatively, the Court has reviewed the affidavits and Subpart 5 of Marsy's Law. The affidavits do not contain actual images, nor do they name the victims. Only the most basic generic descriptions are used. Consequently, there is no information in the affidavits that could be used to locate or harass the minor victims or their families. Nor is there any confidential or privileged information about those victims in the affidavits. Even assuming for the sake of argument that the Implicated Individual could assert the minor victims' Marsy's Law rights under Subpart 5, there is nothing concerning the minors in the affidavits subject to Subpart 5's disclosure limitations. The minor victims' rights under Subpart 5 provide no basis to delay unsealing the redacted affidavits. The Implicated Individual has not shown that there is any tension between Marsy's Law and SDCL § 23A-35-4.1 in this case.

Section 23A-35-4.1 is not unconstitutional because it does not grant this Court discretion whether to unseal affidavits once an investigation has been terminated.

The Implicated Individual contends that, if this Court does not have discretion at this stage to consider the impact on his constitutional right to be presumed innocent when deciding whether to unseal the affidavits, then Section 23A-35-4.1 is unconstitutional on its face and as applied to him. The Court, along with the other interested parties, disagrees.

The first reason this argument fails is its incompatibility with the South Dakota Supreme Court's decision in this case. The Implicated Individual's appeal of this Court's Amended Order focused on this Court's conclusion that, while an investigation was still pending, Section 23A-35-

4.1 gave the Court no discretion to seal "the contents of the warrant, the returns of the warrant, nor the inventory." SDCL § 23A-35-4.1. The Implicated Individual argued based on policy and constitutional concerns that courts should have discretion whether to unseal the contents of the warrant and the verified inventories filed in this case. The South Dakota Supreme Court, however, concluded that the lack of discretion neither lead to absurd policy results nor did it create any constitutional concerns: "Under the circumstances presented here, there is no constitutional collision course between coordinate branches of state government and no tension between our court rules and a plain and unambiguous statute." *In re Implicated Individual*, 2021 S.D. 61, ¶ 28. "The Implicated Individual extends the claim that the judiciary possesses inherent and preeminent authority over court records into the constitutional realm by arguing that applying the text of SDCL 23A-35-4.1 as written violates the separation of powers doctrine. We do not believe that to be the case." *Id.* n.12.

The dispute has now shifted to the sentence in SDCL § 23A-35-4.1 giving this Court no discretion whether to unseal the affidavits in support of the warrant following termination of an investigation. This Court's intent to unseal the affidavits upon either termination or the filing of an indictment or information was plainly stated in the Amended Order filed on October 15, 2020. Objections to that intent due to the potential impact on any of the Implicated Individual's constitutional rights related to criminal prosecution, including the presumption of innocence, or constitutional rights related to privacy or reputational concerns (if there are any), could and should have been raised during the first appeal.

Moreover, the current dispute over unsealing the affidavits presents the same legal question as the dispute over unsealing the warrants and verified inventories: whether the Legislature's decision in Section 23A-35-4.1 not to grant any discretion to this Court in certain circumstances concerning the sealing or unsealing of records related to search warrants violates the constitution?

This Court concludes that the South Dakota Supreme Court's decision emphatically answers this question by concluding that the Legislature has such authority, and that the Legislature expressed that authority in unambiguous terms in SDCL § 23A-35-4.1. It is this Court's duty to apply the clear statutory language and to follow the Supreme Court's decision. To the extent, if any, that the Implicated Individual contends that he has additional arguments why not providing discretion in this type of case[3] in unconstitutional, this Court agrees with the Media that those arguments could and should have been raised in his first appeal along with the separation of powers argument he did pursue. Consequently, the doctrines of law of the case and res judicata and issue preclusion do not allow the Implicated Individual to have a second bite at the issue whether the Legislature violated the constitution by not providing more discretion to this Court in SDCL § 23A-35-4.1. Alternatively, even if those doctrines do not apply, the logic of the Supreme Court's decision means that the Implicated Individual's challenge to SDCL § 23A-35-4.1 based on the presumption of innocence must fail.

This Court nevertheless has carefully considered the merits of this argument and concludes that the Implicated Individual has not identified any valid reason why the absence of judicial discretion whether to unseal the affidavits at issue following termination of an investigation would be unconstitutional. "'Any legislative act is accorded a presumption in favor of constitutionality and that presumption is not overcome until the unconstitutionality of the act is clearly and unmistakably shown and there is no reasonable doubt that it violates fundamental constitutional principles.'" *Davis v. State*, 2011 S.D. 51, ¶ 16, 804 N.W.2d 618, 628 (quoting *South Dakota Ass'n of Tobacco & Candy Dist. V. State By & Through Dept. of Revenue*, 280 N.W.2d 662, 664-

[3] As the South Dakota Supreme Court noted, the statute does grant courts discretion to seal affidavits in support of search warrants in some situations, but this case is not one of the listed situations. *See* SDCL § 23A-35-4.1 ("In cases of alleged rape, incest, or sexual contact, if the victim is a minor, the court may limit access to an affidavit pursuant to § 23A-6-22.1.").

65 (S.D. 1979)). "Challengers also have the burden of persuading the court that 'there is no reasonable doubt that it violates fundamental constitutional principles.'" *Id.* (quoting *South Dakota Ass'n*, 280 N.W.2d at 664-65.

The Implicated Individual's recent motion refers by reference to his right to be presumed innocent. (*See* Implicated Individual's Motion to Stay an Unsealing of Affidavits at 4 referring to page 13 of Implicated Individual's Brief in Opposition to Motion to Unseal Affidavit filed January 10, 2022.) Assuming for the sake of argument that the South Dakota Supreme Court's decision did not foreclose this argument, this Court concludes that SDCL § 23A-35-4.1 does not violate that right. The relevant statutory text provides: "The court may order that the supporting affidavit be sealed until the investigation is terminated or an indictment or information is filed." SDCL § 23A-35-4.1. Nothing in that text directly undermines the Implicated Individual's right to be presumed innocent. Presumably, the Implicated Individual contends that this provision indirectly undermines the presumption of innocence because there are some situations where unsealing information in a filed affidavit might then be published by the media and read by the public, thereby increasing the difficulty of obtaining impartial jurors.

Courts, however, have multiple tools to preserve the presumption of innocence even in cases where there is extensive unflattering pre-trial publicity concerning a defendant. These tools include changes of venue, expanding the jury pool, allowing more extensive voire dire, granting additional peremptory strikes, and pointed jury instructions. Moreover, in this case, any impact on the presumption of innocence is particularly speculative because these affidavits are not being unsealed due to the filing of an indictment, but rather because the State's investigation has been terminated, and the State has publicly declared that "there are no prosecutable offenses within the jurisdiction of the State of South Dakota." (Notice of Completed Investigation at 1.)

Conversely, it was rational for the Legislature to require affidavits in support of a search warrant to be unsealed following termination of an investigation. This policy provides important accountability in multiple ways. The knowledge that the public will have access to this information creates an incentive for law enforcement and prosecutors to treat all individuals alike when deciding whether to terminate an investigation and not to provide special treatment to individuals with great wealth or political influence. It is likewise rational to require the affidavits to be unsealed following filing of an indictment or information. Knowing that the public has access to this information creates an incentive for prosecutors to treat all individuals alike when deciding to pursue charges and not to charge someone based on bias or for political gain. Moreover, when adopting this policy, it is clear that the Legislature considered the potential impact on the subjects of search warrant affidavits because the Legislature excepted certain types of cases from mandatory unsealing: "In case of alleged rape, incest, or sexual contact, if the victim is a minor, the court may limit access to an affidavit pursuant to § 23A-6-22.1." SDCL § 23A-35-4.1.

In light of the many tools this Court has to protect the presumption of innocence, and the rational Legislative policies reflected by the text of SDCL § 23A-35-4.1, the Implicated Individual has not come close to showing that there is no reasonable doubt that the Legislature violated the Implicated Individual's right to be presumed innocent by removing this Court's discretion whether to unseal affidavits following termination of an investigation or an indictment or information.

The tweet cited by the Implicated Individual does not create a genuine dispute whether the investigation has been terminated.

In an addendum to the original motion, the Implicated Individual contends that further investigation is required to determine whether the State's investigation has been terminated. This argument cites a May 27, 2022 tweet by Argus Leader Media reporter Jonathan Ellis stating, "You might see some people in media circles conclude that the investigation is over and there will be no charges. They would be wrong." (Implicated Individual's Addendum to Motion to Stay at 1.)

Subsequent to that tweet, the State reaffirmed in its brief that its "investigation has been terminated and that all investigative materials have been, or are in the process of being forwarded, to other jurisdictions who may have an interest in the investigative materials." (State's Response (Constitutionality of Statute) at 1.)

As an initial matter, the Court concludes no legitimate purpose would be advanced by allowing the parties additional time to investigate the source or content of Mr. Ellis's tweet. To the extent, if any, that he relied upon source(s), the identity of those sources are almost certainly privileged. *See* SDCL §§ 19-2-14 to 19-2-16. More important, regardless of the source or Mr. Ellis's intent in sending the tweet, the Court finds and concludes that a single tweet sent by reporter approximately three hours after the State had filed its Notice of Completed Investigation does not create a genuine issue whether the State has actually terminated its investigation. The Court agrees with the Media that, when pleadings have been filed in court, the State's legal representatives, who are officers of this Court, are the definitive sources concerning the status of the State's investigation. The State's legal representatives have twice unequivocally represented in court pleadings that the State has terminated the investigation at issue. The Implicated Individual has declared that he is no longer an accused. (Implicated Individual's Replay Brief in Support of Motion to Stay an Unsealing of Affidavits at 7.) No party has submitted admissible evidence credibly contradicting the State's representation. The Court accepts the State's representation and concludes that it would be futile and a wild goose chase to permit the interested parties to utilize discovery to further investigate the status of the State's investigation.

That being said, the State's representations leave open the possibility that another law enforcement agency—either federal or another state—could pursue its own investigation. The Implicated Individual's Reply Brief tip toes toward an argument that this Court should interpret "the investigation" in SDCL § 23A-35-4.1 to include investigations by other jurisdictions, and thus

that because it is possible that such investigations have been or could be undertaken, that "the investigation" has not been terminated and so the affidavits should not be unsealed. (Implicated Individual's Reply Brief in Support of Motion to Stay at 3-4.) Significantly, the Implicated Individual does not affirmatively contend that other jurisdictions are currently investigating him for the crimes underlying these affidavits, nor does he expressly ask this Court to find that "the investigation" of him has not actually been terminated.

This is not surprising. If the Implicated Individual expressly contended that "the investigation" was ongoing, that would contradict his position that he is no longer an "accused" with regard to the crimes of distribution and possession of child pornography. (*See* Implicated Individual's Reply Brief in Support of Motion to Stay an Unsealing at 7 ("Until the State's recent acknowledgement of its determination of 'no prosecutable offenses' within the jurisdiction of the State of South Dakota, the individual has been an 'accused' . . . .").) Because no party has actually argued that any law enforcement agency is currently investigating the Implicated Individual, or expressly asked the Court to stay unsealing the affidavits because other jurisdictions are still investigating the Implicated Individual, the Court concludes that the issue whether "the investigation is terminated" includes investigations by jurisdictions other than the State of South Dakota has not been presented to this Court for decision and provides no basis to stay unsealing.

Alternatively, assuming for the sake of argument that the meaning of "the investigation" presented a live issue, the Court concludes that "the investigation" refers only to the State of South Dakota's investigation, which has been terminated. In context, "the investigation" clearly refers to the investigation associated with search warrant documents that are the subject of SDCL § 23A-35-4.1. Use of the definite article "the" further indicates that this is the only investigation that the Legislature had in mind. If the Legislature had intended for courts to have discretion to keep affidavits sealed until termination of all investigations by any law enforcement agency related to

the subject matter of the search warrant documents, then it easily could have made that intent clear with language such as "until any investigation of the matter underlying the search warrant documents by any law enforcement agency is terminated."

In addition, practical problems would result from construing "the investigation" to include possible investigations by agencies other than the agency that filed the initial search warrant documents. It is always possible that some other law enforcement agency could undertake an investigation. If the Court were required to consider that possibility even though the agency that filed the initial search warrant papers had filed notice of terminating its investigation, it is hard to imagine how a court would ever find that "the investigation" had been terminated. The Court does not believe the Legislature's intent was to create a triggering event that is unlikely to ever occur.

Here, the investigation associated with the search warrant documents was undertaken by the State of South Dakota. The Court therefore concludes that one triggering event for unsealing the affidavits in support of search warrant is the termination of the State's investigation, and the State's recent filings demonstrate that triggering event has occurred.

The Implicated Individual's desire to participate in redacting personal information provides no basis to stay unsealing the redacted affidavits.

The Implicated Individual complains that SDCL § 23A-35-4.1 contains no language permitting him to review the affidavits in support of a search warrant and participate in deciding what material should be redacted. He suggests that not being able to participate in redactions violates the rights granted to him by SDCL § 15-15A-13 which permits a party "about whom information is present in the court record" to make a "request to prohibit public access to information in a court record." Section 15-15A-13 goes on to say: "The Court shall hear objections from other interested parties to the request to prohibit public access to information in the court record. The court must decide whether there are sufficient grounds to prohibit access according to applicable constitutional, statutory and common law." SDCL § 23A-35-4.1.

The Court finds and concludes that the Implicated Individual has not been denied his rights under Section 15-15A-13. The past two years of litigation have been conducted pursuant to Section 15-15A-13 with the intent of permitting all interested parties to exercise the rights granted by that section relevant to the issue whether to seal or unseal the search warrant documents. During these two years, the Implicated Individual has had the opportunity to file numerous motions, briefs, and make multiple oral arguments to this Court and even to pursue an appeal to the South Dakota Supreme Court. This is exactly what Section 15-15A-13 and due process contemplate.

The Court's denial of the Implicated Individual's request to participate in the redaction process does not change this result. The redactions that the Court intends to make are merely the removal of personally identifying information, in this case personal email addresses, home addresses, phone numbers, and birth dates. This type of redaction is authorized by, among other things, the South Dakota Supreme Court's decision in this case: "In addition, we have exercised our authority to determine that certain types of information within court records should be redacted in all instances. These include personal identifying information, such as social security numbers, as well as certain financial documents and the names of minor children in particular cases." *In re Implicated Individual*, 2021 S.D. 61, ¶ 24. No interested party, including the Implicated Individual, has argued that the Court should not make these redactions. Nor has any interested party contended that the scope of the redactions should extend beyond personally identifying information.

The Implicated Individual's objection appears to be that not allowing him to participate in the redaction process requires him to "blindly trust" the court staff to redact his personally identifying information. He cites no authority, however, that requires the Court to allow interested parties to participate in redacting personally identifying information when documents related to a search warrant are unsealed. The Court recognizes that its rules contemplate that parties will

generally redact such information before filing a document or, alternatively, ask for the document to be designated as confidential. *See* SDCL § 15-15A-9. But it is not unusual for parties to forget to redact an exhibit or attachment, and so court staff routinely and frequently redact personally identifying information. In the absence of any dispute that personally identifying information should be redacted from the affidavits, and the absence of any authority that the Court must allow the interested parties to participate in this type of routine redaction, the Court concludes that it has discretion how to accomplish this task.

After careful reflection, the Court concludes that, in this unusual situation, the Court and its staff should perform the redactions of any personally identifying information in the affidavits before revealing the contents of the affidavits to any of the interested parties. One reason is that if one of the interested parties were involved in the redactions in this case, the Court would have to involve all the parties for multiple reasons. First, the Court does not want to have ex parte contact with any of the parties, and finds that including only the Implicated Individual's counsel in the redactions would involve improper ex parte contact.

Second, in this contentious litigation, the Court has no doubt that if it allowed the Implicated Individual's counsel to see unredacted versions of the affidavit and to have input into the redactions, the Media's counsel would want to participate in that process to ensure that the Implicated Individual did not convince the Court to redact content that goes beyond personally identifying information. Indeed, the Court is confident that if it allowed all the current interested parties to participate in redactions, other media members would demand to be allowed to participate in the process. The Court finds that, in this case, allowing the parties and their counsel to participate in what should be a routine task that takes mere minutes would become a lengthy and adversarial process that would take weeks, possibly even months, and waste judicial resources.

Third, in light of the media attention given to this case, the Court is concerned that if it granted access to unredacted versions of the affidavits to any or all of the parties, information from the affidavits could be leaked to media other than the current interested parties. Alternatively, even if no leak occurred, if one party had access to the affidavit's content before the other interested parties, that party would have an unfair advantage in preparing its article or press release to be used upon the unsealing of the redacted affidavits. The Court finds it is more fair in these unusual circumstances for all of the interested parties to receive redacted versions of the affidavits from the Court at the same time when those documents are unsealed.

Fourth, the Implicated Individual is not the only person who has personally identifying information that needs to be redacted. If the Court were to involve the Implicated Individual in the redactions, it would need to involve other persons who have thus far had no involvement in this litigation, and, of course the parties who have appeared would want to be involved in that process, again leading to a contentious and wasteful situation. In contrast, each of these problems can be avoided if the Court and its staff simply make these redactions which they routinely and frequently make without any participation by the interested parties.

The Court acknowledges that no one is perfect and, even though multiple people have gone over the affidavits to make sure that all instances of personally identifying information have been found, there is some small risk that an address, email address, phone number, or birth date could be missed. The Court finds and concludes that it still makes sense for the Court to perform the redactions without the parties' assistance. First, the risk that the Court and its staff will miss one of these items is small. Second, if it did miss one of these items, the Court would redact that item as soon as it was informed about the error. Third, the Court assures all parties that this is not a situation where the documents contain information as sensitive as a social security number or account number. The redacted information literally consists only of the four items listed above,

and the Court is confident that the information it intends to redact can already be found through other public records, including the internet. The Court nevertheless takes seriously its responsibility to carefully handle personally identifying information that it is unsealing, and so intends to perform the redactions diligently and accurately. In the highly unusual circumstances of this case, however, involving the parties in what should be a routine administrative task would create undue delay and waste judicial resources.

Further delay harms the Media and public, but the Court will stay unsealing pending appeal.

The Implicated Individual contends that further delay in unsealing the affidavits would cause "little to no prejudice" to the Media. The Court disagrees. As the Media has contended, the crux of this case is access to the documents, and so further delay in unsealing the documents is effectively a ruling in favor of the Implicated Individual. This is particularly true in the current situation. The American news cycle is short. The current story is the State's decision not to pursue charges. The Media, and likely members of the public, currently are interested in having access to the affidavits to assist their own analysis of the decision to investigate the Implicated Individual as well as the current determination that there are no prosecutable offenses. Moreover, for the statute to serve its purpose of providing accountability for charging decisions, it is important for the public to have timely information concerning those decisions. The public's interest in the decision not to pursue charges will undoubtedly dissipate as time passes, so the Court finds that having access to the documents at some unknown point in the future is much less valuable to the Media and public than gaining access now, and further delay causes substantial prejudice to the Media and public.

On the other hand, the Court recognizes and finds that improperly unsealing the affidavits would cause substantial prejudice to the Implicated Individual. Moreover, unsealing the affidavits immediately would moot an appeal. In a May 30, 2022 email to counsel and the Court, the

Implicated Individual's counsel requested that the Court stay unsealing of the affidavits for "sufficient time to allow [the Implicated Individual] to request relief from the Supreme Court prior to unsealing of the affidavits." The Court interprets this as a request for the Court to stay its decision to unseal the affidavit pursuant to SDCL § 15-6-62(a). In many ways, the current circumstances are similar to October 2020, when the Court decided that Section 23A-35-4.1 required it to unseal the warrants and verified inventories, but stayed its decision to avoid mooting an appeal. For analogous reasons, the Court concludes that this decision to unseal the affidavits is final and appealable, but should be stayed 30 days from its filing to permit the Implicated Individual to exercise his appeal rights.

Because the Court has found that further delay in unsealing the affidavits would cause substantial prejudice to the Media, the Court respectfully and gently reminds the Implicated Individual and his counsel to remember the obligations imposed by Rule 11 as they contemplate an appeal. Rule 11 prohibits the use of pleadings for improper purposes including "unnecessary delay." SDCL § 15-6-11(b). It also requires that contentions be warranted "by existing law or a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishing of new law." SDCL § 15-6-11(b)(2). A Court cannot say in advance whether a filing would run afoul of Rule 11, nor can the Court give legal advice to a party or an attorney. Moreover, the Court recognizes that parties have a very different view of the Court's decisions than the Court does. The Implicated Individual clearly has the right to appeal this decision, and if the Implicated Individual and his very capable counsel decide to exercise that right, the Court intends to stay its decision pending appeal to protect that right. In this type of case, however, a stay is very powerful, which makes it all the more important not to forget about Rule 11's obligations. The Court also respectfully requests that if the Implicated Individual makes a decision either to pursue an appeal

or not to pursue an appeal before the 30-day statutory period expires, that he inform the Court and counsel of that decision when it is made.

Similarly, because the Court has found that the Implicated Individual would suffer substantial prejudice from improperly revealing the contents of the affidavits, the Court respectfully reminds the other parties to continue to respect the confidentiality of those sealed documents until this matter is finally resolved.

Conclusion and Order

In sum, the State has terminated its investigation in this matter. Section 23A-35-4.1's text clearly requires the affidavits at issue to be unsealed upon termination of that investigation. The South Dakota Supreme Court's decision in the first appeal just as clearly confirms that requirement. As explained above, the Court has carefully considered the reasons identified by the Implicated Individual in his three recent written submissions to delay unsealing the affidavits and finds and concludes that it is not necessary to conduct further briefing or hearing and that no valid basis has been identified to depart from the clear statutory directive to unseal the affidavits now that the investigation has been terminated.

The Court having considered the pleadings in this matter, including the materials and briefs submitted by the interested parties, it is hereby:

ORDERED that the Implicated Individual's motion to stay an unsealing of affidavits in support of search warrant in the above-captioned five files is DENIED and conversely that the Media's motion to unseal affidavits in support of those search warrants is GRANTED;

IT IS FURTHER ORDERED that this order to unseal the affidavits in support of the search warrants is STAYED for 30 days pursuant to SDCL § 15-6-62(a) to permit the Implicated Individual to decide whether to exercise his appeal rights concerning this order.

Dated June 16, 2022.

BY THE COURT:

James A. Power
Circuit Court Judge

ATTEST:

/S/ANGELIA GRIES

Minnehaha County Clerk of Courts
(SEAL)

South Dakota Codified Laws
Title 15. Civil Procedure
Chapter 15-15a. Unified Judicial System Court Records Rule (Refs & Annos)

SDCL § 15-15A-13

15-15A-13. Requests to prohibit public access to information in court records

Currentness

A request to prohibit public access to information in a court record may be made by any party to a case, the individual about whom information is present in the court record, or on the court's own motion. Notice of the request must be provided to all parties in the case and the court may order notice be provided to others with an interest in the matter. The court shall hear any objections from other interested parties to the request to prohibit public access to information in the court record. The court must decide whether there are sufficient grounds to prohibit access according to applicable constitutional, statutory and common law. In deciding this the court should consider the purpose of this rule as set forth in § 15-15A-1. In restricting access, the court will use the least restrictive means that will achieve the purposes of this access rule and the needs of the requestor.

Credits

Source: SL 2004, ch 333 (Supreme Court Rule 04-06), eff. July 1, 2004; SDCL § 15-15A-10; SL 2005, ch 291 (Supreme Court Rule 05-05), eff. Feb. 25, 2005.

S D C L § 15-15A-13, SD ST § 15-15A-13
Current through laws of the 2022 Regular Session and Supreme Court Rule 22-10

End of Document

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30063

In re MATTER OF AN APPEAL BY
AN IMPLICATED INDIVIDUAL

APPEAL FROM THE CIRCUIT COURT
2nd JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE JAMES A. POWER
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal Filed July 18, 2022

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JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to SDCL 15-26A-3(2), -3(4) and -7.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

DOES THE SUBJECT OF SEARCH WARRANTS HAVE A STATUTORY OR CONSTITUTIONAL RIGHT TO INSPECT AFFIDAVITS FILED IN SUPPORT OF THE WARRANTS TO REQUEST REDACTIONS PRIOR TO THE UNSEALING OF THE AFFIDAVITS PER SDCL 23A-35-4.1?

In the Matter of Search of Premises Known as L. S. Starrett Co., 2002 WL 31314622 (M.D.N.Car.)

In re Search of 1993 Jeep Grand Cherokee, 958 F.Supp. 205 (Del. 1996)

United States v. Kott, 380 F.Supp.2d 1122 (C.D.Cal. 2004)

The trial court denied appellant's motion to inspect the subject affidavits prior to unsealing per SDCL 23A-35-4.1.

STATEMENT OF THE CASE AND FACTS

Without agreeing in every particular with the statements of the case and facts in the briefs of appellant and appellees ProPublica and Argus Leader, those briefs provide this court with an adequate procedural and factual background to analyze the state's positions in this matter.

ARGUMENT

Implicated Individual claims a right to inspect and propose redactions to the subject search warrant affidavits prior to their unsealing pursuant to SDCL 23A-35-4.1.

At this time, the state has no continuing compelling interest in maintaining the subject warrant affidavits under seal under the particular circumstances of this case. Also, the state has no interest in

redacting the subject warrant affidavits beyond the statutory redactions contemplated and announced by the trial court.

But, in the interest of preserving the strong presumption that law enforcement activities and judicial functions be a matter of public record, the state does have an interest in the development and adoption of appropriate standards for determining if, when and how a court may order redactions beyond the basic redactions enumerated in court rules and statutes. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-598 (1978)(describing the citizenry's interest in "keep[ing] a watchful eye on the workings of public agencies"). The adoption of appropriate redaction standards is necessary to prevent any privacy exception from swallowing the rule of public disclosure.

1. Fed.R.Crim.P. 41(e) Authorities Are Not Inapposite

Implicated Individual extrapolates a right to inspect and propose redactions to warrant affidavits prior to statutory unsealing primarily from cases involving Fed.R.Crim.P. 41(e) proceedings.[1] These cases are not apropos of statutory unsealing proceedings after the termination of an investigation.

Like SDCL 23A-35-11, Fed.R.Crim.P. 41(e) is a pre-indictment procedure which allows the subject of a search warrant to mount a

[1] *In the Matter of Up North Plastics,* 940 F.Supp. 229 (D.Minn. 1996); *In re Search Warrants Issued April 26, 2004,* 353 F.Supp.2d 584 (N.D.Md. 2004); *In re Search Warrants Issued August 29, 1994,* 889 F.Supp. 296 (S.D. Ohio 1995); *In re Searches and Seizures,* 2008 WL 5411772 (E.D.Cal.).

challenge to the legality of a search, the probable cause for the issuance of the warrant or to seek the return of seized property during an ongoing investigation. In this context, courts reason that a subject cannot effectively challenge a warrant without first seeing the affidavit upon which it is based (subject to redactions necessary to protect the government's compelling interest in insulating an ongoing investigation from obstruction or tampering). *In re Search Warrant for Secretarial Area Outside Office of Gunn,* 855 F.2d 569, 574 (8th Cir. 1988)(unsealing denied where it would compromise ongoing investigation).

In the Fed.R.Crim.P. 41(e) context, an individual is vindicating the core 4th Amendment protection from search and seizure except upon a judicial finding of probable cause. A probable cause finding validates the invasion of privacy incident to the search. The only considerations in this context are the individual's clearly-established 4th Amendment rights *vis-à-vis* the government's interests in the integrity of its investigation. If a probable cause finding is affirmed in a Fed.R.Crim.P. 41(e) proceeding (or never challenged), the question of the validity of the invasion of privacy incident to the search is settled (unless challenged in a post-indictment motion to suppress).

Implicated Individual never brought an SDCL 23A-35-11 challenge to the legality of the subject warrants by, for example, arguing that probable cause was lacking because investigators failed to identify hacking as a possible explanation for the presence of the subject material

on his electronic device. *In the Matter of Flower Aviation of Kansas,* 789 F.Supp. 366, 369 (D.Ct.Kan. 1992)(limiting Fed.R.Crim.P. 41(e)'s application to where a subject challenges the lawfulness, scope or execution of a warrant). At this stage, the legality of the warrants, the probable cause basis for their issuance, the validity of the invasion of privacy incident to their execution, or the return of illegally-seized property are not in issue.

The 4th Amendment basis for the category of privacy interest asserted by search warrant subjects in opposition to unsealing is not clearly-established or consistently delineated.[2] As discussed in *In re Search Warrants Issued August 29, 1994,* 889 F.Supp. 296, 299/¶2 (S.D. Ohio 1995), greater deference is due to core 4th Amendment rights asserted through Fed.R.Crim.P. 41(e) proceedings than to indefinite or peripheral 4th Amendment interests in unsealing proceedings where individual interests must also be balanced against important 1st Amendment or common law interests in the open operations of government. *Nixon,* 435 U.S. at 597-598. Less deference is presumably

[2] Implicated Individual's appellate brief invokes the 4th Amendment's privacy guarantees as grounds to preview the warrant affidavits prior to statutory unsealing. This appears to be an argument raised for the first time on appeal. Implicated Individual's May 27, 2022, Motion to Stay Unsealing of Affidavits in Support of Search Warrants, May 30, 2022, Addendum to Motion to Stay Unsealing of Affidavits in Support of Search Warrants and June 3, 2022, Reply in Support of Motion to Stay Unsealing of Affidavits in Support of Search Warrants do not raise, preserve or develop any 4th Amendment argument. Nor does the order appealed from contain any findings of fact or conclusions of law on a 4th Amendment claim. To the extent Implicated Individual relies on the 4th Amendment as a ground for relief in this appeal, that ground appears waived. *Ronan v. Sanford Health,* 2012 SD 6, ¶14, 809 N.W.2d 834, 837.

due where the validity of the original probable cause finding was unchallenged and is the settled law of the case. *Flower Aviation*, 789 F.Supp. at 369.

In the context of post-investigative, statutory unsealing proceedings, an individual's privacy rights, whatever their source, are qualified by societal interests in monitoring law enforcement actions and judicial functions. The question of whether the subject of legally-issued and executed warrants has a right to inspect and propose redactions prior to statutory unsealing is an "entirely different question" than a subject's right to obtain a warrant affidavit for purposes of mounting a Fed.R.Crim.P. 41(e)/SDCL 23A-35-11 challenge. *In re Searches and Seizures*, 2008 WL 5411772, *3 (E.D.Cal.). Different considerations and standards govern statutory unsealing proceedings than Fed.R.Crim.P. 41(e) proceedings.

2. Standards For Privacy Exceptions Must Not Swallow The Rule of Public Disclosure

Implicated Individual's principal authority for a right to inspect and propose redactions to a warrant affidavit prior to statutory unsealing is *Certain Interested Individuals, John Does I-IV v. Pulitzer Publishing Co.*, 895 F.2d 460 (8th Cir. 1990). In *Certain Interested Individuals*, the court denied, on privacy grounds, media access to affidavits naming certain unindicted individuals who were the subjects of government search warrants. Without any discussion of the important societal interests at stake, *Certain Interested Individuals* ruled simply that the absence of an

indictment "tip[ped] the balance decisively in favor of the privacy interests and against disclosure." *Certain Interested Individuals,* 895 F.2d at 467. The privacy exception formulated in *Certain Interested Individuals* effectively swallows the rule of public disclosure of search warrants upon the termination of an investigation in any case where no indictment is returned.

Societal interests in having law enforcement and the judiciary operate in the public eye are not overcome simply because no indictment is returned. Society has as much interest in understanding why no indictment was returned as it does in understanding why one was. Without such comparative knowledge, society cannot know if criminal laws are being applied equally and fairly. As noted in *United States v. Kott,* 380 F.Supp.2d 1122, 1124 (C.D.Cal. 2004), the "public will be unable to learn" reasons for law enforcement and judicial action "unless it is armed with enough information to know what questions to ask."

Instead of adopting the generalized right of privacy made fashionable by *Certain Interested Individuals,* which inevitably would "swallow the common law right of access to search warrant papers," the court in *In the Matter of Search of Premises Known as L. S. Starrett Co.,* 2002 WL 31314622, *5 (M.D.N.Caro.), formulated an analysis that better balances public access, privacy interests and court supervision of judicial documents.

The *L. S. Starrett Co.* court determined "that reputation and privacy interests of potential targets or innocent third parties named in search warrants must be tied to misuse or potential misuse of the court documents, as opposed to a general and independent privacy or reputation right." *L. S. Starrett Co.,* 2002 WL 31314622 at *5. The court believed that privacy interests at the unsealing stage are necessarily shaped by the process by which search warrants are obtained, where the "[t]he focus is not on the individual, but on the process" of determining probable cause. *L. S. Starrett Co.,* 2002 WL 31314622 at *5. During this process, a court "does not examine a warrant to determine whether it invades a named individual's privacy. It examines it only to determine whether there is probable cause to issue a warrant." *L. S. Starrett Co.,* 2002 WL 31314622 at *5. For 4th Amendment purposes, *L. S. Starrett Co.* viewed a valid judicial finding of probable cause as the outer limit of a subject's right to sealing of a search warrant; thereafter, unsealing is a matter of the court's control over the use of its documents. To ensure proper public scrutiny of judicial probable cause findings, *L. S. Starrett Co.* determined that the scope of privacy in the context of warrant affidavits should be limited to situations where "the government's application strays too widely from what is necessary to establish probable cause." *L. S. Starrett Co.,* 2002 WL 31314622 at *5.

L. S. Starrett Co. was concerned that "[r]ecognizing an independent privacy right for individuals to seal search warrant papers would have

major consequences," such as "the routine sealing of all search warrants and affidavits," and putting courts in the position of gauging individual privacy and reputation interests which could "lead to, or give the appearance of, arbitrary and capricious decision-making and reduce, rather than enhance, the confidence of the public in court decisions." *L. S. Starrett Co.*, 2002 WL 31314622 at *5.

Consequently, *L. S. Starrett Co.* "reject[ed] those holdings which would suggest that in making a decision to seal search warrant documents, a court may rely on an independent, general right of privacy for potential targets or innocent third parties named in the documents. Rather, the [*L. S. Starrett Co.* court] determin[ed] that there is a presumption of public access to search warrant documents and, in conjunction with that right, [a court] may only exercise its supervisory power to prevent misuse of court documents." *L. S. Starrett Co.*, 2002 WL 31314622 at *6. "Misuse does not arise from merely being named in a search warrant, even as a target of the investigation." *L. S. Starrett Co.*, 2002 WL 31314622 at *7. Privacy interests prevail only if a court determines that disclosure will result in "intensified pain beyond mere unflattering or false comments." *L. S. Starrett Co.*, 2002 WL 31314622 at *6.

Per *L. S. Starrett Co.*, the test for determining when privacy interests should override public access "is a stringent one which looks first to the legitimacy of the information in connection with the

government's application and then the potential for the information to be misused." *L. S. Starrett Co.*, 2002 WL 31314622 at *7. The analysis starts from the premises that "the mere mention of an individual's name or activities in a search warrant" or "the mere fact that it identifies certain crimes as the basis for the warrant cannot serve as grounds for redaction." *L. S. Starrett Co.*, 2002 WL 31314622 at *7. "[T]he assertion of criminal activity by itself does not constitute unnecessary and unduly harmful or embarrassing information." *L. S. Starrett Co.*, 2002 WL 31314622 at *7. Rather, to overcome the presumption of public access, the court must find "that the information in the search warrant has marginal relevance and will be extremely and unnecessarily embarrassing or harmful because of, for example, gratuitous, demeaning, inflammatory and unsubstantiated comments not truly needed for the probable cause determination." *L. S. Starrett Co.*, 2002 WL 31314622 at *7.

In this vein, other courts have found bare privacy demands insufficient to overcome the presumption of public access where:

- **The document is a type traditionally open and available to the public.** *Kott,* 380 F.Supp.2d at 1123, 1124 (search warrant affidavits traditionally accessible to public); see also *In re Matter of an Appeal by an Implicated Individual,* 2021 SD 61, ¶ 18, 966 N.W.2d 578, 583 (search warrant documents presumptively public under state law).

- **The document is central to the exercise of judicial authority and/or forms the basis for judicial action.** *United States v. Amodeo,* 71 F.3d 1044, 1051 (2nd Cir. 1995)(low public interest in accessing report peripheral to judicial action); *In re Search of 1993 Jeep Grand Cherokee,* 958 F.Supp. 205, 211 (Del. 1996)(low expectation of privacy in documents relevant to the investigation); *Olson v. Major League Baseball,* 29 F.4th 59, 89-90 (2nd Cir. 2022)(strongest presumption of access attaches to documents that determine litigants' substantive rights); *L. S. Starrett Co.,* 2002 WL 31314622 at *7 (describing public's strong interest in the manner of issuing and executing search warrants).
- **Access to a document facilitates public monitoring of law enforcement and judicial performance.** *Kott,* 380 F.Supp.2d at 1123 (citing role of public access in "further[ing] the public interest in understanding the criminal justice system); *Olson,* 29 F.4th at 92; *Amodeo,* 71 F.3d at 1050 (looking at whether information will inform or mislead the public).
- **The subject's identity or content of the warrant are already publicly known.** *Olson,* 29 F.4th at 92; *Application of Newsday,* 895 F.2d 74, 79-80 (court properly redacted only identities of cooperating and unindicted third parties whose identities had not been "otherwise disclosed"); *1993 Jeep*

Grand Cherokee, 958 F.Supp. at 208, 211 (subject's privacy interest diminished where his "identity ha[d] never been a secret"); Exhibit A to May 27, 2022, Motion to Stay Unsealing of Affidavits in Support of Search Warrants.

- **The objecting person is before the court.** *Newsday,* 895 F.2d at 79-80 (privacy interests weigh more heavily in favor of a third party who is not before the court than a subject who has opportunity to challenge legality of warrant or assert objections to disclosure); *Amodeo,* 71 F.3d at 1050; June 3, 2022, Reply Brief in Support of Motion to Stay Unsealing at 3 (question of unsealing has been subject of "full briefing and argument").
- **Information in a document is factual.** *Kott,* 380 F.Supp.2d at 1125 (describing public interest in warrant affidavit containing "detailed explanation" of basis for application); *Amodeo,* 71 F.3d at 1050 (documents not containing "unverifiable hearsay" or "scandalous, unfounded or speculative" material more subject to unsealing); *1993 Jeep Grand Cherokee,* 958 F.Supp. at 210-211 (low public interest in information of purely intimate nature); *L. S. Starrett Co.,* 2002 WL 31314622 at *7 (low public interest in documents containing gratuitous, demeaning or inflammatory comments).

Finally, *1993 Jeep Grand Cherokee* addressed a search warrant subject's demand to preview the sealed materials prior to public disclosure. *1993 Jeep Grand Cherokee,* 958 F.Supp. at 206. As here, the subject argued that he "could not take a position regarding the . . . unseal[ing] until he reviewed the affidavits." *1993 Jeep Grand Cherokee,* 958 F.Supp. at 207. The court found that the subject's privacy rights did not outweigh the common-law right of access and unsealed the warrant documents without permitting the subject to preview them. *1993 Jeep Grand Cherokee,* 958 F.Supp. at 208, 210-211. Courts are competent to weigh the potential harm of disclosure to individuals against the public interest without extending special pre-unsealing access to subjects to preview and suggest redactions.

CONCLUSION

While, under the particular circumstances of this case, the state does not have a compelling interest in maintaining the subject warrant affidavits under seal, the state does have an interest in the development and application of appropriate standards concerning the statutory unsealing process. The redaction standard formulated in *Certain Interested Individuals* and followed in other cases creates a sweeping privacy exception for cases where no indictment is returned that swallows the rule of public disclosure in cases where no indictment is returned. *L. S. Starrett Co.* and other cases have formulated standards which better account for the important public interest in the disclosure of documents

which form the basis of law enforcement and judicial action. If, when and how search warrant documents are unsealed is best left to the "sound discretion of the trial court . . . in light of the relevant facts and circumstances of the particular case" than the recently-conceived and indefinite constitutional maxim of *Certain Interested Individuals*. *Nixon*, 435 U.S. at 599.

Dated this 14th day of October 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 2,610 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 14th day of October 2022.

Paul S. Swedlund
Paul S. Swedlund
Solicitor General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Appellee's Brief was served electronically through Odyssey File and Serve, upon Stacy Hegge, Jeff Beck and Jon Arneson at shegge@gpna.com, becklaw@outlook.com and jea44@aol.com respectively.

Dated this 14th day of October 2022.

Paul S. Swedlund
Paul S. Swedlund
Solicitor General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30063

IN THE MATTER OF AN APPEAL
BY AN IMPLICATED INDIVIDUAL

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE JAMES A. POWER
Circuit Court Judge

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Notice of Appeal filed July 18, 2022

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PRELIMINARY STATEMENT

Joint Appellees, Pro Publica, Inc., and Argus Leader Media, will be referred to in this brief as "Press," unless either is being referred to separately. The Appellant will be identified as "Sanford." The State of South Dakota will be identified as "State." Appellees will follow the Appellant's document citation format citing documents from the Minnehaha County Clerk of Court, case no. 49SWA20-405 as "405R.___" and the Appendix as "App.___." References to Appellant's Brief will be "Appellant's Brief___." The June 16, 2022, Order re Motions to Unseal Affidavits in Support of Search Warrants, found at R. 1000-1027, is referred to as "Order."

JURISDICTIONAL STATEMENT

Sanford filed a Notice of Appeal, on July 18, 2022, from the Order Re Motions to Unseal Affidavits in Support of Search Warrants [49SWA19-911, 49SWA20-402, 49SWA20-403, 49SWA20-494 and 49SWA20-405.] and to Stay Unsealing, signed, filed and entered by Second Judicial Circuit Court Judge James A. Power, on June 16, 2022. The circuit court's Order is a final appealable order, and this Court has jurisdiction of Sanford's appeal, including the June 6 email ruling on Sanford's access motion.

STATEMENT OF LEGAL ISSUE

I. Is SDCL 23A-35-4.1's explicit directive that affidavits in support of search warrants be unsealed immediately upon termination of the State's investigation subject to delay or impairment by an investigative target's SDCL §15-15A-13 claim of a right of exclusive preliminary access to the affidavits for purpose of redaction.

Circuit Court held SDCL 23A-35-4.1 is the controlling law requiring automatic disclosure of the affidavits and SDCL 15-15A-13 does not impede the public's access.

- SDCL 23A-35-4.1
- SDCL 15-15A-13
- SDCL 15-15A-1

- U.S. Const. amend 1

STATEMENT OF CASE AND FACTS[1]

This is the second appeal in a case before the Honorable James A. Power, Circuit Court Judge of the Second Judicial Circuit. Both the first appeal—*In the Matter of an Appeal by an Implicated Individual*, 2021 S.D. 61, 966 N.W.2nd 579, and this appeal challenge the application of SDCL 23A-35-4.1's requirement with respect to search warrant files in which Sanford is the subject. This appeal is confined to the affidavits filed in support of the five search warrants that Judge Power issued in the investigation.

In accordance with SDCL § 23A-35-4.1, when the State notified Judge Power on May 27, 2022, that its investigation was over, Judge Power alerted Sanford's counsel and Press's counsel that the affidavits would be unsealed and available for public inspection after the Memorial Day weekend. Sanford filed a Motion to Stay an Unsealing of Affidavits in Support of Search Warrant claiming that they should remain sealed. Sanford made multiple additional requests, including that if the court rejected his motion that he be given

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[1] At the outset the Press objects to false and irrelevant "factual" accusations in Sanford's brief. *See* Appellant Brief at n.3 (inaccurately claiming that a "violation of a court confidentiality order" led to Argus Leader's awareness of this matter and of Judge Power's involvement); n.4 (claiming that the Press has been maneuvering for an "unjust advantage...through these proceedings"). As a representative of the public, the Press has been seeking access to the court records at issue here for two years in order to fulfill its constitutionally-recognized role of informing the public about the workings of government. As the trial court held:

> The Media, and likely members of the public, currently are interested in having access to the affidavits to assist their own analysis of the decision to investigate [Sanford] as well as the current determination that there are no prosecutable offenses. Moreover, for the statute to serve its purpose of providing accountability for charging decisions, it is important for the public to have timely information concerning those decisions.

Order at 25.

advance access to the affidavits to "participate in the redaction process" purportedly under SDCL § 15-15A-13.

The court issued two orders via email on June 2 and 6 and then entered an Order on June 16, 2022. These rulings repeatedly denied Sanford's attempts to keep the affidavits under seal and to obtain exclusive preliminary inspection rights for redaction purposes. Sanford is now appealing the trial court's decisions rejecting all of his requests to obtain copies of the affidavits prior to their unsealing so that he might request redaction.

Press is providing a chronological listing of the entire procedural and factual history of this case. Although #'s 1-17 are a recapitulation through this Court's decision on the first Sanford appeal, they remain relevant.

1. On December 9, 2019, the South Dakota Department of Criminal Investigation ("DCI") requested a search warrant involving Sanford, and the circuit court approved. The search warrant documents were filed in Minnehaha County on December 16, 2019. [405R. 1]
2. On March 13, 2020, the DCI sought four more search warrants related to Sanford, all of which the circuit court issued. The warrant documents and returns were filed on May 8, 2020. [405R. 211, 272]
3. With respect to each of the five search warrants, the State initially asked for and was granted a "non-disclosure" order. [405R. 211, 272]
4. After each warrant's return, the State requested that the entire search warrant file be sealed, which the circuit court also ordered. [405R. 211, 272]
5. The State's affidavits in support of sealing referred to concerns about premature disclosure in an ongoing investigation. [405R. 211, 272]

6. In July, 2020, a ProPublica reporter contacted the Second Circuit Court Administrator to obtain copies of search warrant documents pertaining to Sanford. [405R. 69]
7. Having learned of the request, Judge Power—who had issued search warrants in 49SWA19-911, 49SWA20-403, 49SWA20-402, 49SWA20-404, and 49SWA20-405—on July 20, 2020, asked the South Dakota Attorney General's Office to brief the "scope of my authority to seal documents related to a search warrant...." [405R. 24, 26]
8. On July 23, 2020, a ProPublica reporter followed up with a written request to the Court Administrator seeking copies of search warrant files pursuant to SDCL 23A-35-4.1. [405R. 87]
9. The next day, Judge Power initiated a discussion with the South Dakota Attorney General's Office and ProPublica regarding the right of access, and, subsequently, added Sanford's counsel, who had been identified by the AG's office. [405R. 110]
10. Upon its request, Argus Leader Media was allowed to intervene. [405R. 129]
11. All parties—including Press jointly—simultaneously submitted initial briefs and reply briefs. [405R. 202, 211, 227, 272, 276, 281, 297]
12. On October 7, 2020, the circuit court heard oral arguments and issued a bench decision agreeing with Press's position that the contents of the search warrants, warrant returns, warrant inventories, and the existence of supporting affidavits be unsealed. [HT pp. 31-39]
13. On October 15, 2020, the circuit court issued five amended orders—*nunc pro tunc* to October 7, 2020—that the search warrants and the inventories "be unsealed and become publicly accessible court records." [405R 446]

14. The circuit court also ordered that "[f]ollowing termination of the investigation or filing of an indictment, the [supporting affidavits'] contents will be unsealed and available to public inspection or disclosure as a publicly accessible court record." [405R. 446]
15. Sanford and the State filed appeals from the circuit court's decision on the public accessibility to search warrant files relating to Appellant. [405R. 561, 568]
16. The State voluntarily abandoned its appeal in January, 2021. [405R. 655, 656]
17. On October 27, 2021, this Court, in a unanimous opinion, affirmed the circuit court's ruling that SDCL 23A-35-4.1 required the disclosure of all filed search warrant documents, with the exception of the affidavits in support of the search warrants. The appellate opinion agreed with the circuit court that it retained discretion to keep the supporting affidavits sealed upon a showing of good cause, but only until the investigation concluded or the person was indicted. [405R. 846]
18. On December 9, 2021, Press filed a motion to have the circuit court reconsider whether good cause remained to keep the supporting affidavits sealed and urged the court to require the South Dakota Attorney General's Office to confirm whether the investigation was on-going. [405R. 867]
19. After briefing by the parties and a hearing on March 14, 2022, the circuit court, in a March 21 order, found reasonable cause to keep the supporting affidavits under seal, based on the State's representation that the investigation was, at that time, still ongoing. [405R. 937]

20. On May 27, 2022, the State emailed the court, Sanford and Press a Notice of Complete Investigation; the circuit court then emailed the parties that the supporting affidavits would be unsealed on May 31, after Memorial Day. [405R. 941]

21. Shortly thereafter, on May 27, 2022, Sanford filed a Motion to Stay an Unsealing of Affidavits in Support of Search Warrant seeking another opportunity to challenge the application of SDCL 23A-35-4.1 in circuit court. [405R. 945]

22. Sanford contended in his stay motion that a motion to unseal would be a "prerequisite to any unsealing." To save the court the burden of dealing with this frivolous contention, Press filed a motion to unseal the affidavits on May 27, 2022.[2] [405R. 945]

23. On May 30, 2022, Sanford filed an "addendum" to his May 27 motion to stay the unsealing of the affidavits, calling into question whether the investigation was actually over, despite the State's representations. [405R. 955]

24. With the court's permission, Press filed a brief resisting Sanford's stay motion on June 1, 2022, and Sanford filed a reply brief on June 3, after his request for an additional 30 days to brief was denied. [405R. 961]

25. On June 2, 2022, Sanford requested, via email, a further opportunity to submit briefing before the court unsealed the affidavits. [405R. 976] He also requested copies of the affidavits, citing Rule 16 of South Dakota's Rules of Criminal Procedure. The Press, again, immediately objected. [*Id.*]

[2] The circuit court, in its June 16, 2022, Order, agreed that "nothing in Section 23A-35-4.1's text or the Supreme Court's interpretation of that text or this Court's Amended Order makes the unsealing of the affidavits dependent on a formal request to unseal affidavits from the Media or member of the public." [405R. 1007]

26. In two emails on June 2, the circuit court denied Sanford's request for a longer briefing schedule, adhering to the court's earlier decision to permit Sanford to submit a reply brief on June 3. [405R. 976] The court noted that during the course of this nearly two-year litigation, Sanford had had multiple opportunities to raise his current objections regarding application of § 23A-35-4.1, both before the trial court and in his previous appeal to this Court. The trial court further noted that both § 23A-35-4.1 and this Court's October 2021 decision made clear that the trial court lacks discretion to extend the sealing of search warrant affidavits past termination of the investigation, rendering irrelevant most of Sanford's arguments for delay. The trial court also denied Sanford's request for an unredacted copy of the affidavits before their unsealing, noting that Rule 16 "provides no authority" for doing so. [*Id.*]

27. Sanford filed a reply brief to his motion for a stay on June 3, 2022. Without leave of court, he then made yet another submission to the court, via email, on June 6, 2022, arguing again that Rule 16 entitled him to access to the affidavits, stating, for the first time, that he sought "to invoke his rights pursuant to SDCL § 15-15A-13." App. 2. Sanford also inexplicably claimed that the Press "do not have any interest in any redactions and should not be included in that process." *Id.*

28. The court denied Sanford's June 6 request on the same day, explaining that any request to compel discovery under Rule 16 was not ripe or appropriate for review. App. 1. The court also rejected Sanford's attempt to use SDCL § 15-15A-13 to obtain early access to the affidavits and be involved in redactions of them. *Id.* The court first recognized that the Press *does* have an interest in any redactions of the

affidavits. The court then held that the parties need not and should not be involved in the redaction process, explaining that the only redactions it intended to make were "standard redactions of personally sensitive or identifying information, which in this case consists of personal email addresses, home addresses, phone numbers, and birth dates." *Id*. The court then rejected Sanford's "attempt to invoke SDCL § 15-15A-13 as a basis for not following the clear statutory language of 23A-35-4.1 or the Supreme Court's [October 2021] opinion." *Id.* The court explained that "this entire litigation has effectively been an application of SDCL 15-15A-13, and all interested parties have already had multiple opportunities to be heard through briefs, previous hearings, and even an appeal." *Id.* The court pointed to this Court's previous decision, noting that it *already* "considered the interplay of SDCL 15-15A-13 and 23A-35-4.1 and rejected the argument that Section 15-15A-13 could be used to undermine the clear provisions of Section 23A-35-4.1." *Id.*

29. On June 7,2022, the State—in belated recognition that Sanford challenged the constitutionality of SDCL 23A-35-4.1—filed a short brief supporting the statute's constitutionality. [405R. 996.] The State reaffirmed that the South Dakota investigation of Sanford "has been terminated.' [405R. 996]

30. On June 16, 2022, the circuit court issued its 28-page Order denying Sanford's motions to stay the unsealing of the affidavits. App. 3. That Order again rejected Sanford's claim that SDCL § 15-15A-13 somehow entitles him to preliminary access to the affidavits and an ability to be involved in their redaction. The court noted that neither party should be involved in making the requisite redactions and that only including Sanford's counsel would amount to improper ex parte contact. The court

concluded that "involving the parties in what should be a routine administrative task would create undue delay and waste judicial resources." App. 27, Order at 25.

31. Although finding that Sanford's position lacked merit, as a final courtesy, the court's Order granted a temporary stay to allow Sanford to appeal the court's decision to this Court. However, the court took the unusual step of reminding Sanford and his counsel of "the obligations imposed by Rule 11" and its prohibition on using pleadings for "improper purposes including 'unnecessary delay.'" App. 28, Order at 26. The court stressed that Sanford's contentions must "be warranted by 'existing law or a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishing of new law." *Id.* (citing SDCL § 15-6-11(b)(2)).

32. Sanford filed a notice of appeal on July 25, 2022, listing as the sole issue whether he has a right of access to the supporting affidavits for the purpose of redaction, prior to their unsealing. [405R. 1033]

STANDARD OF REVIEW

As a preliminary matter, Press disputes Sanford's presumption that this appeal is subject to *de novo* review because it "involves the interpretation and application of SDCL 15-15A-13, a Supreme Court rule[.]"[3] This Court has already interpreted that rule to the extent necessary to address any issue Sanford has raised. *See In re Appeal of Implicated Individual*, *supra*, ¶'s 21-24. The Court's only task with regard to SDCL 15-15A-13 is to review the circuit court's discretionary application of the rule in the context of this case.

[3] Sanford maintains, too, that the Fourth Amendment is implicated. But for reasons discussed below, any right of access to search warrant affidavits Sanford might assert under the Fourth Amendment has absolutely no bearing on the public's discrete right of access under SDCL 23A-35-4.1.

In view of that, "abuse of discretion" is the appropriate standard.

ARGUMENT

For more than two years, the Press has asked for search warrant records that South Dakota law requires be made public. The Press has battled motion after pointless motion, including now a second appeal to this Court by Sanford, all intended to delay what the law clearly mandates. This cannot be allowed to continue. The law says that once an investigation is over—as is now the case—search warrant affidavits must be released. SDCL § 23A-35-4.1. Sanford, unsurprisingly, has invented yet a new reason for delay, claiming the general provision permitting interested parties to seek redaction of court records *subject to applicable law*, SDCL § 15-15A-13 somehow entitles him to a "sneak peek" at the affidavits and an ability to engage with the court on an ex parte basis to redact them. And—for the first time on appeal—he also now claims that his Fourth Amendment rights somehow entitle him to this relief. As the trial court explicitly warned, these arguments are so baseless that they invite Rule 11 scrutiny and sanction.

But this Court has already rejected a strikingly similar argument. In his first appeal, Sanford filed a brief with this Court that presented the following legal issue:

> Whether the circuit court erred when concluding that the South Dakota Legislature, through SDCL 23A-35-4.1, prohibited the Judicial Branch from sealing or redacting certain search warrant court records despite the Judicial Branch's authority under SDCL chapter 15-15A.

This Court unanimously and roundly rejected Sanford's contention in an opinion filed October 27, 2021. *In re Appeal of an Implicated Individual*, 2021 S.D. 61. The Court stressed that SDCL 15-15A-13 contains an important caveat, requiring the court to first "decide whether there are sufficient grounds to prohibit access *according to applicable constitutional, statutory and common law." Id.* at ¶ 21. [Emphasis in original.] The Court

also observed:

> We perceive[s] no tension between our rules allowing for the *limited* redaction of [SDCL 15-15A-8] information to protect individual privacy interest and SDCL 23A-35-4.1's *requirement to allow access to the broader 'contents'* of a search warrant."[4]

In re Appeal of an Implicated Individual, 2021 S.D. 61, ¶24. [Emphasis added.]. Now, less than one year later, Sanford apparently hopes the Court will reverse its prior reasoning on this topic.

But there is no reason for this Court to suddenly reverse its interpretation of these provisions. The only factual change over the past year has been the termination of the State's investigation that automatically triggers the unsealing of the affidavits under SDCL 23A-35-4.1. There has been no change in SDCL 23A-35-4.1, and Sanford has abandoned any challenge to the statute's validity—in particular, his baseless claim the law was unconstitutional.[5]

The trial court has now ruled at least four times that once an investigation has concluded—as is now the case—SDCL § 23A-35-4.1 *requires* search warrant affidavits to be released to the public, and the court lacks discretion to do otherwise. *See* 405R. 446 (trial court's Oct. 15, 2020 order); 405R. 976 (trial court's order, via email, on June 2, 2022); App. 1 (trial court's order via email on June 6, 2022); App. 3 (trial court's June 6, 2022 Order). This Court held the same in its prior opinion in October 2021. *Matter of*

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[4] Although the Court went on to note that redaction was not the actual issue before the Court, the unmistakable implication is that Sanford's redaction wishes do *not* take precedence over the public's right to see—and government's duty to disclose—the "broader 'contents'" of the supporting affidavits.

[5] Nor has there been any change in the First Amendment or common law either. Both support the Press's position that these affidavits must be unsealed without further interference from Sanford.

Appeal by Implicated Individual, 2021 S.D. 61, ¶ 18, 966 N.W.2d 578, 583 ("A court may seal the contents of an affidavit in support of a search warrant upon a showing of reasonable cause, but *only* until the investigation is terminated or an indictment or information is filed.") (emphasis added). And the trial court has specifically rejected Sanford's frivolous claims concerning SDCL § 15-15A-13 and variations on this invented theory multiple times as well. *See, e.g.*, 405R. 976 (trial court's order, via email, on June 2, 2022); App. 1 (trial court's order, via email, on June 6, 2022); App. 3 (trial court's June 6, 2022 Order), 405 R. 1028 (trial court's order vial email on July 15, 2022)

As was the case with the circuit court's first decision, from which Sanford appealed two years ago, the court's Order now on appeal is correct and comprehensive. Sanford has failed to put the slightest dent in the circuit court's findings and conclusions, despite his repeated and time-consuming efforts.[6]

The Court, again, will appreciate this to be a relatively straightforward issue.[7] The overt wording of a statute—in this case SDCL 23A-35-4.1—patently legislates that explicitly identified government records be unsealed and made accessible to public

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[6] The circuit court was explicitly—and rightfully—critical of Sanford for simply pressing the repeat button on his grievance recording, with the following comment:

> [Sanford] argued based on policy and constitutional concerns that courts should have discretion whether to unseal the contents of the warrant and the verified inventories filed in this case. [The S.D. Supreme Court disagreed that lack of discretion created any constitutional concern.] Moreover, the current dispute over unsealing the affidavits presents the same legal question as the dispute over unsealing the warrants and verified inventories. [405R. 1015]

[7] On the first appeal, the Court allowed that the "question we confront here is not a close one." This second appeal—another attempt to override SDCL 23A-35-4.1—does not present a question that is any closer.

inspection. In the context of the instant case, those records are the affidavits filed in support of search warrants. There is nothing vague about the statutory directive, and SDCL 23A-35-4.1 provides the definitive answer to the appellate question.

Had the South Dakota Legislature wished, it could have written SDCL 23A-35-4.1 to provide search warrant subjects an opportunity to review and redact. But the Legislature did not do that. Government officials must follow and our courts must enforce SDCL 23-35-4.1 as written. Sanford is not endowed with a superior power to shape the law to his liking. And despite Sanford's repeated attempts to postpone the application of SDCL 23A-35-4.1, he cannot escape it or skirt around it. In the words of the circuit court:

> [Sanford] contends that further delay in unsealing affidavits would cause 'little prejudice' to the Media. The Court disagrees. As the Media [have] contended, the crux of this case is access to documents, and so further delay in unsealing the documents is effectively a ruling in favor of the [Sanford]. [405R. 1025][8]

The pivotal issue for the Court is whether a statute—one that directly addresses and answers that question—should be given its intended effect.

> **23A-35-4.1. Filing of affidavit--Sealing of affidavit.**
>
> If not filed earlier, any affidavit in support of a search warrant shall be filed with the court when the warrant and inventory are returned. Upon filing the warrant and supporting documents, the law enforcement officer may apply by separate affidavit to the court to seal the supporting affidavit from public inspection or disclosure. The court, for reasonable cause shown, may order the contents of the affidavit sealed from public inspection or disclosure but may not prohibit disclosure that a supporting affidavit was filed, the contents of the warrant, the return of the warrant, nor the inventory. The court may order that the supporting affidavit be sealed until

[8] After spending a considerable amount of time reading, listening and considering the arguments posed by the parties in this case reached the point of issuing a "gentle" admonition to Sanford and his counsel of the "obligations imposed by Rule 11 as they contemplate an appeal." [405R. 1026]

> the investigation is terminated or an indictment or information is filed. In cases of alleged rape, incest, or sexual contact, if the victim is a minor, the court may limit access to an affidavit pursuant to § 23A-6-22.1. However, a court order sealing a supporting affidavit may not affect the right of any defendant to discover the contents of the affidavit under chapter 23A-13.

This Court has already stressed that unsealing search warrant records is not a matter of judicial discretion:

> The plain language [of SDCL 23A-35-4.1] provides an unmistakable expression of legislative intent. A court may seal the contents of an affidavit in support of a search warrant...but only until the investigation is terminated....The statute's text is equally clear in its command that the court "may not prohibit" the public disclosure of other specific records....[9]

In re Appeal of an Implicated Individual, 2021 S.D. 61, ¶18

Sanford has never denied the existence of SDCL 23A-35-4.1's operative wording as it would be impossible to do so. It was not lost on this Court, which noted that "[p]erhaps sensing the intransigency of SDCL 23A-35-4.1, [Sanford] foregoes any effort to construe its provisions." *Id.* ¶25.

Instead, Sanford tries to navigate his way around SDCL 23A-35-4.1 without making any plausible, let alone convincing, argument to warrant deviation from the law and its *guaranteed* right of access to the itemized search warrant documents.

The plain language of SDCL 23A-35-4.1 quite simply demands that supporting affidavits for search warrants be unsealed immediately upon termination of the State's investigation. The State's investigation is over. It is time to unseal the affidavits. In its most recent order on June 16, 2022, the trial court ruled that the affidavits must be

[9] The logical inference from this emphatic passage is that a court's discretion to redact the substance of the search warrant records—including affidavits—is restricted, as well. Allowing *anybody* the privilege of redacting the crux of those materials would subvert the legislative intent.

released, but it temporarily sealed them in order to allow Sanford to appeal this ruling. However, the court took the extraordinary step of reminding Sanford and his counsel of their Rule 11 obligations and its prohibition on pursuing an appeal based on frivolous arguments in order to improperly extend this temporary stay. Disregarding the court's admonition, Sanford filed this appeal, asserting a new theory that he never raised (and thus waived) in the previous two years of litigation and, that in any event, lacks any basis in the law. Sanford's unbelievable waste of legal and judicial resources must end. The Press respectfully requests that this Court swiftly and summarily deny this appeal and order the immediate release of the search warrant affidavits.

I. As the trial court properly held, SDCL § 23A-35-4.1 requires immediate release of these search warrant affidavits, and Sanford does not dispute that.

The law provides in relevant part: "The court may order that the supporting affidavit be sealed *until* the investigation is terminated or an indictment or information is filed."[10] SDCL § 23A-35-4.1 (emphasis added). As this Court previously explained:

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[10] The provision in its entirety states:

> 23A-35-4.1. Filing of affidavit--Sealing of affidavit.
>
> If not filed earlier, any affidavit in support of a search warrant shall be filed with the court when the warrant and inventory are returned. Upon filing the warrant and supporting documents, the law enforcement officer may apply by separate affidavit to the court to seal the supporting affidavit from public inspection or disclosure. The court, for reasonable cause shown, may order the contents of the affidavit sealed from public inspection or disclosure but may not prohibit disclosure that a supporting affidavit was filed, the contents of the warrant, the return of the warrant, nor the inventory. The court may order that the supporting affidavit be sealed until the investigation is terminated or an indictment or information is filed. In cases of alleged rape, incest, or sexual contact, if the victim is a minor, the court may limit access to an affidavit pursuant to § 23A-6-22.1. However, a court order sealing a supporting affidavit may not affect the right of any defendant to discover the contents of the affidavit under chapter 23A-13.

> The plain language of the statute provides an unmistakable expression of legislative intent. A court may seal the contents of an affidavit in support of a search warrant upon a showing of reasonable cause, but *only* until the investigation is terminated or an indictment or information is filed.

2021 S.D. 61, ¶ 18, 966 N.W.2d 578, 583 (emphasis added). As set forth above, the trial court has repeatedly recognized that once the State's investigation has concluded—as is now the case—this provision mandates the immediate release of the search warrant affidavits, and the court lacks discretion to do otherwise. Sanford has not disputed this, or the fact that the Press, like the public as a whole, is currently entitled to access the affidavits, and that each minute of delay denies the Press this clear statutory right. Instead, he attempts to evade this mandate by claiming, without any relevant authority, that the Fourth Amendment and SDCL § 15-15A-13—a provision that permits interested parties generally to seek the redaction of court records—somehow entitle him to advance access to the affidavits and an opportunity to redact them.

II. Sanford's suggestion that SDCL § 23A-35-4.1 impermissibly conflicts with SDCL § 15-15A-13 or violates the Fourth Amendment is frivolous.

As set forth above, the text of § 23A-35-4.1 is clear. And contrary to Sanford's claims, neither SDCL § 15-15A-13 nor the Fourth Amendment provide the target of a criminal investigation with a special "sneak peek" or ability to engage with the court ex parte to redact search warrant affidavits before their release.

A. SDCL § 15-15A-13 provides a search warrant subject with neither a special right of access to supporting affidavits prior to their unsealing, nor a right to redact them.

SDCL § 15-15A-13 is a general provision permitting interested parties to request restrictions on public access to court records. It specifically requires courts to "decide

whether there are sufficient grounds to prohibit access *according to applicable constitutional, statutory and common law*," and it requires courts to "use the least restrictive means" necessary, consistent with the presumption of public access to court records. *Id.* (emphasis added). There is nothing in the language of SDCL 15-15A-13 to support an assertion that it confers on Sanford—and every other criminal target or defendant—the privilege of early access to information that is specifically covered under SDCL 23A-35-4.1 for any redaction purpose. Notably, SDCL 15-15A-13 is not designed to weed out factual matter from criminal records. Instead, it provides only a general opportunity to review court records to avoid unwarranted exposure. And a redaction request must comport with constitutional, common law and statutory law before a court can even exercise its discretion to seal records. Because SDCL 23A-35-4.1, the First Amendment, and common law, all require immediate release of the affidavits, judicial discretion to withhold them is not permitted.

As the circuit court explained in its original oral ruling at the October 7, 2020 hearing, the general provision of § 15-15A-13 simply incorporates the more specific mandate requiring release of search warrant materials under § 23A-35-4.1:

> And then in 15-15A-13, I'm told I must decide whether there is sufficient grounds to prohibit access according to applicable constitutional, statutory and common law....So, that phrase, *applicable constitutional, statutory and common law* directs me to look for applicable authorities from those sources, and that brings us back to 23A-35-4.1." [and]
>
> ...15-15A-5(3) is telling me I can't be more lenient or strict in the statutory directive. So considering that chapter and purpose of its rule confirms to me that I don't have discretion to ignore the clear and unambiguous language of 23A-35-4.1. And my duty in this instance is simply to implement the clear statutory directive, and if that creates problems, the fix is not me ignoring clear statutory language. It's going back to the legislature and rewriting that statute." [and]

> So considering [15-15A and its purpose] confirms to me that I don't have discretion to ignore the clear and unambiguous language of 23A-35-4.1." [405R. 643-644]

This Court agreed. In fact, it already rejected Sanford's very similar argument that § 15-15A-13 permits courts to withhold search warrants despite § 23A-35-4.1's automatic release requirement. The Court explained that such an argument "cannot withstand a more complete reading of the rule that requires a court to consider relevant statutory authority." *In re Appeal of an Implicated Individual*,2021 S.D. 61, ¶ 21.[11] Indeed, this reading of the two provisions comports with the rule of statutory interpretation that the specific provision takes precedence over the general one. *See Peterson v. Burns*, 2001 S.D. 126, 635 N.W.2d 556; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012); *see also Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 834 (1976) ("In a variety of contexts, the Court has held that a precisely drawn, detailed statute pre-empts more general remedies.") (quoting *Preiser v. Rodriquez*, 411 U.S. 475 (1973)) and *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21 (2012) (*generalia specialibus non derogant* applies in case of conflict between laws of "equivalent dignity.")).

In the June 16, 2022, Order now being appealed, the circuit court also addressed Sanford's 11th hour redaction request that has further delayed the unsealing of the affidavits in accordance with SDCL 23A-35-4.1. The court's historical analysis was, again, comprehensive and convincing:

> In October, 2020, the [Circuit] Court clearly stated its intent to unseal the affidavits if (1) the investigation was terminated or (2) an indictment or

[11] In quoting the relevant portion of SDCL 15-15A-13, this Court took the additional step of highlighting that any redaction is performed "*according to applicable constitutional, statutory and common law."*

> information was filed. Since that time, all interested parties have had multiple opportunities to present any objections to that intent in writing and oral argument to the South Dakota Supreme Court and to this Court. If the statute or Supreme Court decision were unclear, or if the parties had not had a reasonable opportunity to identify valid grounds for not following the statute's clear language, the Court would gladly allow the parties to continue to develop their arguments. The statute, however, is clear. Indeed, the South Dakota Supreme Court said it "provides an unmistakable expression of legislative intent." [405R. 1006]

> The Court finds and concludes that [Sanford] has not been denied his rights under Section 15-15A-13. The past two years of litigation have been conducted pursuant to Section 15-15A-13 with the intent of permitting all interested parties to exercise the rights granted by that section relevant to the issue whether to seal or unseal the search warrant documents. During these two years, [Sanford] has had the opportunity to file numerous motions, briefs, and make multiple oral arguments to this Court and even to pursue an appeal to the South Dakota Supreme Court. This is exactly what Section 15-15A-13 and due process contemplate. [405R. 1022]

Sanford's second appeal raises, for the first time, the unusual argument that he has a right under SDCL §15-15A-13 to see—*and* redact—the supporting affidavits. But no matter how Sanford attempts to spin SDCL 15-15A-13, its implementation entails a reversion to SDCL 23A-35-4.1's specific statutory mandate of public access. As the circuit court and this Court have recognized, SDCL 15-15A-13 compels the court to "decide whether there are sufficient grounds to prohibit access according to applicable constitutional, statutory and common law." SDCL 23A-35-4.1 is "sufficient ground."

Sanford's critical mistake remains his misapprehension of SDCL 15-15A-13's primary function. It permits designated persons to attempt to demonstrate why access to *presumptively open* court records should be restricted. Secrecy is the exception, not the rule. And given the clear mandate that search warrant affidavits be released under SDCL

§ 23A-35.4.1 after an investigation has concluded, Sanford cannot overcome that burden. Sanford's attempt to have this Court rewrite SDCL § 23A-35-4.1 must be rejected. Even if SDCL 23A-35-4.1 did not exist, the person attempting to conceal a government record pursuant to SDCL 15-15A-13 does not have any benefit of the doubt. The burden is on that person to overcome well-established presumptions of open records.[12]

B. Any putative Fourth Amendment right of access to search warrant affidavits has no relevance or effect on the public's access under SDCL §23A-35-4.1.

As an initial matter, Sanford never raised this argument in the trial court and has thus waived it. "It is this Court's well settled position that issues not advanced at trial cannot ordinarily be raised for the first time on appeal." S*tate Cement Plant Comm. v. Wausau Und. Ins. Co.*, 2000 S.D. 116, ¶27 , 616 N.W.2d 397 (citing *State v. Henjum*, 1996 S.D. 7, ¶13, 542 N.W.2d 760, 763 (citations omitted). "If a party fails to raise an issue, it is deemed waived." *Id*. (citing *Mash v. Cutler*, 488 NW2d 642, 648 (SD 1992). Therefore, because [Sanford] never argued this theory below, it is deemed waived." In addition, he has not claimed that the mandatory release provision of SDCL § 23A-35-4.1 violates the Fourth Amendment, nor could he. There is a "strong presumption that [SDCL § 23A-35-4.1] is constitutional." *State v. Asmussen*, 2003 S.D. 102, ¶ 2, 668 N.W.2d 725, 728 (citing *State v. Allison*, 2000 SD 21, ¶ 5, 607 N.W.2d 1, 2). "In order to prevail, [Sanford] must refute this presumption beyond a reasonable doubt." *Id.* (citing *State v. McGill*, 536 N.W.2d 89, 94 (S.D. 1995)). Sanford has not even attempted to carry this burden. Moreover, the Legislature *already* considered privacy interests and struck an appropriate balance when it adopted this statute and later amended it.

[12] But, SDCL 23A-35.4.1 *does* exist, making Sanford's task here an impossible one.

The law allows the sealing of affidavits for "reasonable cause" until the investigation is over, and it permits the court to "limit access" to the affidavit "in cases of alleged rape, incest, or sexual contact, if the victim is a minor." § 23A-35-4.1 (referencing § 23A-6-22.1). As this Court previously recognized, the Legislature also provided for the redaction of certain sensitive information, such as social security numbers, certain financial documents, and the names of minor children in particular cases. 2021 S.D. 61, ¶ 24 (citing SDCL § 15-15A-8). Nor did this Court at any point in its previous detailed evaluation of the statute even suggest the possibility of constitutional infirmity. Sanford has been aware, at least since August 2020, that he was the target of a criminal investigation, in which five search warrants were issued and executed. He was never precluded from asserting a right of access to the filed search warrant materials under the Fourth Amendment. Under certain circumstances, certainly, a criminal target or defendant may have a right to examine such materials.

However, that right has no bearing whatsoever on the distinct right of the public under SDCL 23A-35-4.1, the First Amendment and common law.

Tellingly, Sanford has cited no authority to suggest otherwise. The handful of federal district court cases on which he relies are inapposite. In *In re Four Search Warrants*, a court in Georgia simply acknowledged in dicta that the subject of a criminal investigation and his counsel had been "provided redacted affidavits." 945 F. Supp. 1563, 1568 (N.D. Ga. 1996). Notably, the court in that case *granted* the public access to redacted search warrant affidavits, even though the government claimed release of the affidavits would jeopardize an ongoing investigation. *Id.* at 1568-69. In *In re Up North Plastics*, a Minnesota court simply unsealed search warrant materials at the request of a

company who had been the subject of the warrant, recognizing that the company had a Fourth Amendment right to inspect them. 940 F. Supp. 229, 234 (D. Minn. 1996). The court "borrow[ed] from the First Amendment analysis," finding that the government had failed to "make a specific showing of compelling need" justifying continued sealing. *Id.* at 233. Notably, the court did not grant an *exclusive* right of access to the materials, nor did it provide the company an opportunity to redact them. *Id.* at 234. Similarly, in *In re Search Warrants Issued Aug. 29, 1994*, an Ohio court granted a motion by the subject of a search to unseal the warrant materials, finding that the government had failed to show "a compelling governmental interest" necessitating continued sealing or that no less restrictive means would suffice. 889 F. Supp. 296 (S.D. Ohio 1995). Again, the court did not grant the subject an *exclusive* right of access to the materials or an ability to redact them prior to public access. *Id.* Likewise, in *In re Search Warrants Issued on Apr. 26, 2004*, a Maryland court also recognized a property owner's interest under the Fourth Amendment in access to search warrant materials and found that the government had failed to satisfy the high bar to justify continued sealing. 353 F. Supp. 2d 584 (D. Md. 2004). And in *In re Searches & Seizures*, a California court simply recognized that the subject of a search may have a qualified right to access search warrant affidavits, but in that case denied a motion to unseal them. No. 08-SW-0361 DAD, 2008 WL 5411772, at *4 (E.D. Cal. Dec. 19, 2008).

To reiterate, the Press is not claiming that the rights of access are mutually exclusive. They are simply not linked or dependent upon one another. Whatever claim to search warrant documents a search warrant target or criminal defendant might have in no way conflicts with or impairs the distinct right of access enjoyed by press and public

under South Dakota law, the First Amendment, and common law. There is no conflict. And it is equally important to recognize that a target's right to *see* search warrant material does not include any right of redaction—and certainly not one that would eviscerate the public's right to know.

C. Pro Publica and Argus have a First Amendment, common law, and statutory interest in access to these court records and unquestionably have standing to object to Sanford's continued attempts to block public access to them.

As the circuit court properly held, the Press has "an interest in the content of the affidavits in support of the search warrant" and must "be included in proceedings related to requests to redact the affidavits." App. 1. (trial court's June 6, 2022 order via email). Indeed, SDCL § 23A-35-4.1 guarantees automatic public access to these affidavits, making clear the Press has standing to assert denials of such access.

Sanford makes two mistakes with his assertion that Press lacks standing. First, as previously noted, he misapprehends the Press's function, purpose and position. The Press is serving as a representative of the public, seeking access to court records, in order to inform the public about the workings of government. *See* fn.1.

Second, despite Sanford's arguments to the contrary, how the Press became involved in this case is of absolutely no consequence. Sanford asserts Press has no business meddling in his effort to carve out special rights of access to material in order to prevent its public disclosure. For over two years, the Press has been actively raising and defending the public's right of access to that same material, primarily on the basis of a law that positively places this material in the public domain. This is a distinction without a difference.

Ironically, the statute upon which Sanford relies so heavily, SDCL 15-15A-13, expressly empowers a court to notify "others with an interest" and an opportunity to object. That point was not lost on the circuit court at any stage of this case. In its Order, the court stressed that the "Media, and likely members of the public, currently are interested in having access to affidavits to assist their own analysis of the decision to investigate [Sanford] as well as the current determination" by the State to terminate its investigation.[13]

Contrary to Sanford's erroneous claims, the Press also unquestionably has standing to assert its right of access to court records on behalf of itself and the public under the First Amendment and common law. *See infra* Part F (discussing the Press's right of access to search warrant affidavits under the First Amendment and common law). The U.S. Supreme Court has long recognized this, as have many other courts. *See*, *e.g.*, *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982) (recognizing that "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion'") (*quoting Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring)); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994) (finding that the press had standing to "challenge protective orders and confidentiality orders in an effort to obtain access to information or to judicial proceedings"); *Doe v. Pub. Citizen*, 749 F.3d 246, 262-64 (4th Cir. 2014) (finding that appellants had standing to challenge sealing of court records); *In re Associated Press*, 162 F.3d 503, 507 (7th Cir. 1998) (recognizing press's standing to challenge sealing of

[13] As is more fully discussed at Section E., below, United States case law has conclusively established that the press and public's "interest" in access to government records is a given.

documents filed in connection with criminal trial); *In re Wash. Post Co.*, 807 F.2d 383, 388 n.4 (4th Cir. 1986) (finding that newspaper seeking access to plea and sentencing hearings and related documents "meets the standing requirement because it has suffered an injury that is likely to be redressed by a favorable decision") (cleaned up); *Newman v. Graddick*, 696 F.2d 796, 800 (11th Cir. 1983) (recognizing newspaper's standing to challenge denial of access to records and proceedings, explaining that it had "suffered a 'distinct and palpable' injury since its reporters have requested and been denied access").

In *Pansy*, 23 F.3d 772, the Third Circuit upheld the press's standing to "challenge protective orders and confidentiality orders in an effort to obtain access to information or to judicial proceedings." The court specifically noted that "the procedural device of permissive intervention is appropriately used to enable a litigant who was not an original part to an action to challenge protective or confidentiality orders entered in that action." *Id.*

In the recent decision in *Rapid City Journal v. Callahan*, 2022 S.D. 38, 977 N.W.2nd 742, this Court held that citizens and press lack standing under Article III of the United States Constitution to challenge a criminal sentence because "a non-party lacks a judicially cognizable interest in a criminal defendant's sentence." Importantly, the Court did, however, allow the newspaper entrée to assert an access issue.

In addition to standing, courts have widely held that the public also has a *procedural* due process right ensuring the press and public have "adequate notice of any limitation of public access to judicial proceedings or documents," as well as "a right to be heard in a manner that gives full protection of the asserted right." *In re Associated Press*, 162 F.3d at 507; *see also In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 182 (5th Cir.

2011), *as revised* (June 9, 2011) ("The courts of appeals that have addressed the question of whether notice and an opportunity to be heard must be given before closure of a proceeding or sealing of documents to which there is a First Amendment right of access, have uniformly required adherence to such procedural safeguards.") (collecting cases); *Wash. Post v. Robinson*, 935 F.2d 282, 288–290 (D.C. Cir. 1991) ("[N]otice and an opportunity to be heard are prerequisites to sealing a plea agreement.") (collecting cases); *In re Wash. Post*, 807 F.2d at 392 (finding that district court erred in failing to provide notice and an opportunity to be heard before closing a plea hearing and sealing affidavits in a criminal case).

Accordingly, the Press is properly in this case and has standing to vindicate the public's right of access to these affidavits.

D <u>The circuit court is fully capable and qualified to make reasonable redactions, and it did not abuse its discretion in deciding to do so without Sanford's input.</u>

Sanford's purported concern that the court or court staff should not be burdened with the "legal responsibility of redaction" is suspicious. His argument that he is "best suited to advocate that his own rights are protected" is specious, presupposing, as it does, that he *has* some redaction privilege that takes priority. And in any event, Sanford has not established any basis for contending that he has a redaction right that can cancel SDCL 23A-35-4.1's automatic disclosure provision.

This Court has already recognized a circuit court's discretion to remove "personal identifying information" that serves no public purpose. 2021 S.D. 61, ¶24. Plainly, that is vastly different information from what this Court noted to be the "contents" of the

affidavits.[14] Sanford himself concedes "the capabilities of the court and court staff" to make limited ministerial redactions of the affidavits prior to their release. Appellate Br. 19. Sanford has also failed to show—and indeed *cannot* show—that the trial court abused its discretion in deciding to make these routine redactions itself, without his input. Relying on this Court's previous ruling, the trial court's June 6 order properly dismissed Sanford's last-minute attempt, via email, to be included in this process:

> [T]he only redactions the Court intends to make are the standard redactions of personally sensitive or identifying information, which in this case consists of personal email addresses, home addresses, phone numbers, and birth dates. This type of limited redaction was acknowledged with approval by the SD Supreme Court. *In re Implicated Individual*, 2021 S.D. 61, 11 24 ("In addition, we have exercised our authority to determine that certain types of information within court records should be redacted in all instances. These include personal identifying information, such as social security numbers, as well as certain financial documents and the names of minor children in particular cases. *See* SDCL 15-l5A-8. We perceive no tension between our rules allowing for the limited redaction of this information to protect individual privacy interests and SDCL 23A-35-4.1's requirement to allow access to the broader 'contents' of a search warrant."). I do not believe that any party needs or should be involved in the process of making those limited redactions, as they are standard redactions that court staff routinely perform.

App. 1 (trial court's June 6, 2022, order via email).

The trial court reiterated its decision in its June 16 Order, noting that "[n]o interested party, including [Sanford] has argued that the Court should *not* make these

[14] Ironically, it was Sanford who, on the first appeal, maintained that SDCL 15-15A-13 gave the *court* "discretion" to redact. It is unclear why this would suddenly expand to include Sanford.

[limited] redactions." Order at 22 (emphasis added). "Nor has any interested party contended that the scope of the redactions should extend beyond personally identifying information."

The trial court properly recognized that it is best positioned to ensure the proper redactions are made and that Sanford "cites no authority" for the proposition that he is entitled to "participate in redacting personally identifying information when documents related to a search warrant are unsealed." *Id.* The court engaged in a lengthy analysis, listing numerous reasons why it should not permit Sanford to engage in this process—noting, for example, that such *ex parte* contact would be improper. The court then concluded that "allowing the parties and their counsel to participate in what should be a routine task that takes mere minutes would become a lengthy and adversarial process that would take weeks, possibly even months, and waste judicial resources." *Id.* at 23. Sanford has utterly failed to show that this decision constitutes an abuse of discretion.

Sanford's reference to SDCL § 15-15A-7, which permits redaction of information as required by federal law, state law, or court rules, and § 15-15A-8, which permits redaction of certain sensitive information like social security numbers, financial documents, and the names of child victims, are irrelevant. The circuit court already reviewed the affidavits and concluded that only certain limited personally identifiable information should be redacted, consistent with these rules. There is no reason to doubt the court's assessment. And, as the trial court recognized, this Court previously rejected the argument that § 15-15A-8 could render ineffective SDCL § 23A-35-4.1's automatic release requirement, finding "no tension" between these rules. 2021 S.D. 61, ¶ 24.

E. The public's right of access to filed search warrant documents is supported by both First Amendment and common law and have not been overcome.

While not necessary to consider here, the First Amendment and common law also require the immediate disclosure of the search warrant affidavits. *See, e.g.*, *In re Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (recognizing First Amendment right of access to search warrant materials); *United States v. Bus. of Custer Battlefield Museum & Store*, 658 F.3d 1188, 1192-93 (9th Cir. 2011) ("*Custer Battlefield*") (recognizing that post-investigation search warrant materials are judicial records and that common law presumption of access applies to them) (collecting cases); *In re N.Y. Times Co.*, 585 F. Supp. 2d 83, 88 (D.D.C. 2008) (recognizing First Amendment and common law rights of access to search warrant materials and supporting affidavits after investigation had concluded); *United States v. Loughner*, 769 F. Supp. 2d 1188 (D. Ariz. 2011) (recognizing First Amendment right to inspect search warrant materials, after investigation had concluded and indictment issued).

Because post-investigation search warrant materials have traditionally been open to the public, and because such access plays a "significant positive role in the functioning" of the courts, the First Amendment presumption of access applies to them under *Press–Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–9 (1986) ("*Press-Enterprise II*"). Search "warrant applications and receipts are routinely filed with the clerk of court without seal" and that access "serves as a check on the judiciary because the public can ensure that judges are not merely serving as a rubber stamp for the police." *In re N.Y. Times*, 585 F. Supp. 2d at 87; *see also Gunn*, 855 F.2d at 573; *Times Mirror Co. v. United States*, 873 F.2d 1210, 1214 (9th Cir. 1989) ("[M]ost search warrant materials routinely become public after the warrant is served."). The history of access to post-investigation search warrant materials under SDCL § 23A-35-4.1 supports this analysis.

Sanford can only overcome the constitutional presumption by showing that "closure is essential to preserve higher values," and any closure must be "narrowly tailored to that interest." *Gunn*, 855 F.2d at 573 (citing, *inter alia*, *Press-Enterprise II*, 478 U.S. at 13-14). He can only overcome the common law presumption of access by showing that the interests in secrecy outweigh it. *Rapid City J. v. Delaney*, 2011 S.D. 55, ¶ 9, 804 N.W.2d 388, 392. He has failed to do either. General reputational and privacy interests are common to all and do not justify the extreme remedy of closure. *Loughner*, 769 F. Supp. 2d at 1196 (recognizing that "privacy and reputational concerns typically don't provide sufficient reason to overcome a qualified First Amendment right of access"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("Records cannot be sealed on the basis of general reputation and privacy interests."). This is particularly true where—like here—the public has long known that Sanford is the target of this child pornography investigation.

Any continued reliance by Sanford on the out-of-circuit decision *Times Mirror* is misplaced. That court expressly declined to address whether a presumption of access exists *after* an investigation has concluded. 873 F.2d at 1211. The Ninth Circuit later addressed that question in *Custer Battlefield*, where it joined a growing consensus in the courts, finding that once an investigation has ended, the common law right of access applies to search warrant materials. 658 F.3d at 1192 (collecting cases).

CONCLUSION

It would not be cynical to suggest that this second appeal appears to be more about delay than law. Sanford has managed to drag this case out for well over two years, and at no point has any court even intimated he is standing on firm legal ground. Sanford

even seems to recognize that on this second appeal, abandoning any objections to SDCL 23A-35-4.1 constitutionality and consequent applicability.

All Sanford is doing with this appeal is trying to insinuate his way into the search warrant file in advance in order to remove anything that is upsetting or embarrassing. South Dakota law does not allow that, however. As this Court already held, "[t]he plain language of [SDCL 23A-35-4.1 provides an unmistakable expression of legislative intent." *In re Appeal of an Implicated Individual*, 2021 S.D. 61, ¶18. The Court has a duty to disclose these affidavits immediately.

The time has come to bring Sanford's delay tactics to an end and enforce that legislative intent. The Court should summarily affirm the circuit court's decision.

Dated this 17th day of October, 2022

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CERTIFICATE OF COMPLIANCE

We certify that this Brief complies with the type volume limitation in SDCL §15-26A-66(b)(2). Relying on the word count of Microsoft Office, the Brief contains 9,940 words.

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CERTIFICATE OF SERVICE

We certify that on the 17th day of October, 2022, we electronically filed the foregoing Appellee Brief on behalf of in Appellees, Pro Publica and Argus Leader Media, and served a true and correct copy, by email, upon Appellant's attorney, Stacy R. Hegge, shegge@GPNA.com and State of South Dakota's attorney, Paul Swedlund, paul.swedlund@state.sd.us.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30063

IN THE MATTER OF AN APPEAL

BY AN IMPLICATED INDIVIDUAL.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable James A. Power
Circuit Court Judge

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Notice of Appeal filed July 18, 2022

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ARGUMENT[1]

ISSUE: WHETHER THE CIRCUIT COURT ERRED IN DENYING THE INDIVIDUAL'S REQUEST TO INSPECT THE AFFIDAVITS PRIOR TO THEIR UNSEALING SO THAT HE MAY INVOKE HIS RIGHTS GUARANTEED BY SDCL 15-15A-13, IF NECESSARY.

Pursuant to SDCL 15-15A-13, parties and interested individuals have a right to request redaction of information in court records. Information to be redacted includes not only personal identifying information, but also information that is confidential pursuant to federal law, state law, court rule, or case law. *See* SDCL 15-15A-7(1) & (2); SDCL 15-15A-8. As related to this case, the Implicated Individual is a party to, and the subject of, the search warrant proceeding and has made numerous requests for the search warrant affidavits to no avail. Because the investigation has now ended with no criminal charges, the Individual must be afforded an opportunity to inspect the affidavits prior to their unsealing so that he may invoke his rights under SDCL 15-15A-13, if necessary.

Contrary to the Press's insistence, this issue was not ruled upon by the Court in the earlier decision of *In re Appeal by an Implicated Individual*, 2021 S.D. 61, 966 N.W.2d 578. The contrasting facts underlying that earlier decision confirm that this

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[1] The Implicated Individual's Opening Brief filed with this Court on September 1, 2022 is cited as "Individual's Opening Brief"; Appellee State of South Dakota's Brief filed with this Court on October 14, 2022, is cited as "State's Brief". Appellees ProPublica and Argus Leader's Brief filed with this Court on October 17, 2022, is cited as "Press's Brief".

In addition, and consistent with the Individual's Opening Brief, documents from the record of the Minnehaha County Clerk of Court, case no. 49SWA20-405 are cited as "R.___". The individual that is the subject of these proceedings is referred to as the "Implicated Individual" or the "Individual"; the State of South Dakota is referred to as "State"; and ProPublica and the Argus Leader are collectively referred to as the "Press". The June 16, 2022, Order re Motions to Unseal Affidavits in Support of Search Warrants, found at R. 1000-1027, is referred to as "Order".

Court has not addressed the circumstances presented here. Regarding the initial search warrant court records subject to unsealing, the Individual had the opportunity to inspect those particular search warrant court records and to participate in the redaction process prior to their unsealing. R. 426-27, 433, 833-34. The Individual must now have that same opportunity as to the search warrant affidavits prior to their unsealing.

I. Standard of Review

At the outset, the Press challenges the application of a de novo standard of review and instead advocates for an "abuse of discretion" standard. *See* Press's Brief at 9-10. The Press indicates that "[t]his Court has already interpreted [SDCL 15-15A-13] to the extent necessary to address any issue [the Individual] has raised" and the only decision for this Court to review is "the circuit court's discretionary application of the rule in the context of this case." Press's Brief at 9 (citing *In re Appeal by an Implicated Individual*, 2021 S.D. 61, ¶¶ 21-24). However, this Court in its prior decision acknowledged "there [was] no redaction question before [it]." *See In re Appeal by an Implicated Individual*, 2021 S.D. 61, ¶ 24. This Court's statement that "[w]e perceive no tension between [the Court's] rules allowing for the limited redaction of [information referenced in SDCL 15-15A-8] and SDCL 23A-35-4.1's requirement to allow access to the broader 'contents' of a search warrant" does not address the legal parameters of the Individual's redaction rights pursuant to SDCL 15-15A-13 or SDCL 15-15A-7(1) and (2). *See id.* Thus, there remains a question of law as to those parameters and a de novo standard of review is appropriate. *See Trask v. Meade Cnty. Comm'n*, 2020 S.D. 25, ¶ 8, 943 N.W.2d 493, 496 ("The interpretation . . . and . . . application of statutes to given facts is a question of law (or a mixed question of law and fact) that we review de novo.").

Regardless, reversal is warranted even assuming *arguendo* that an abuse of discretion standard applies. "An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *See Dowling Family Partnership v. Midland Farms*, 2015 S.D. 50, ¶ 10, 865 N.W.2d 854, 860. Under an abuse of discretion standard, factual determinations are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo. *Id.*

Along with the reasons fully set forth below and in the Individual's Opening Brief, the court abused its discretion as its decision was premised in part on "an erroneous view of the law." *See Black Hills Cent. R. Co. v. City of Hill City*, 2003 S.D. 152, ¶ 14, 674 N.W.2d 31, 35 ("an erroneous view of the law is sufficient to constitute an abuse of discretion."). Specifically, in rejecting the Individual's request to inspect the affidavits and participate in the redaction process, the court determined that including only the Individual and not the Press in the redaction process "would involve improper ex parte contact." *See* Order at 23; *cf.* South Dakota Rules of Professional Conduct Rule 3.5 ("A lawyer shall not: . . . (b) Communicate ex parte on the merits with [here, a judge] during the proceeding unless authorized to do so by law or court order"). Yet as indicated in the Individual's Opening Brief, issuing a publicly accessible court order that authorizes the Individual's inspection of the affidavits prior to their unsealing is not improper ex parte contact, especially considering that the Press has no standing until and unless redactions were made or potentially, when they were sought. *See* Individual's Opening Brief at 15-17 and *infra* at 13; *see also* R. 1031 (July 13, 2022 email from Individual's counsel to the court addressing whether an Order permitting the Individual's inspection would be ex

parte communication). The court's decision to deny the Individual's inspection of the affidavits prior to unsealing based in part on this erroneous conclusion was an abuse of discretion.

Next, any conclusion that a court's authority to redact information in a search warrant affidavit is limited to personal identifying information is contrary to SDCL 15-15A-7(1) and (2). *Cf.* Order at 22 (quoting *In re Appeal by an Implicated Individual*, 2021 S.D. 61, ¶ 24). While the information listed in SDCL 15-15A-8 must be redacted "in all instances[,]" SDCL 15-15A-7 authorizes courts to redact other information that is confidential pursuant to federal law, state law, case law, or court rules. *See also* SDCL 15-15A-13. To be read harmoniously, SDCL 23A-35-4.1's requirement to allow public access to search warrant affidavits must accommodate a court's authority to redact information pursuant to SDCL 15-15A-7, -8, and -13. *See State v. Bettelyoun*, 2022 S.D. 14, ¶ 29, 972 N.W.2d 124, 133 ("Even "[w]here statutes appear to conflict, it is our responsibility to give reasonable construction to both, and if possible, to give effect to all provisions under consideration, construing them together to make them harmonious and workable.") (internal quotation marks omitted).

The Press maintains that "[t]he circuit court already reviewed the affidavits and concluded that only certain limited personally identifiable information should be redacted, consistent with [SDCL 15-15A-7 and SDCL 15-15A-8]." Press's Brief at 28. However, the circuit court failed to recognize its redaction authority beyond SDCL 15-15A-8 and other personal identifying information such as phone numbers and birthdates. *See* Order at 22. Thus, reversal is warranted because the court's redaction authority goes beyond SDCL 15-15A-8, as clearly provided by SDCL 15-15A-7.

The court also signals that no review beyond personal identifying information was conducted because "no interested party contended that the scope of the redactions should extend beyond personally identifying information[,]" but that is troubling for two important reasons. *See* Order at 22. First, consistent with SDCL 15-15A-7, the Individual has repeatedly objected to the release of sensitive information that would violate his constitutional and federal privacy rights and interests. *See, e.g.,* R. 905- 08. Second, the Individual's continuous requests for the affidavits were denied, effectively foreclosing him from determining whether the affidavits contain information confidential pursuant to federal or state law, case law, or court rules. *See, e.g.,* R. 977, 979, 994-95. There can be no burden imposed upon the Individual to specify the appropriate scope of redactions when his requests to review the contents of the affidavits are denied. Accordingly, reversal is required to for the affidavits to be comprehensively reviewed for necessary redactions that may fall within subsections (1) and (2) of SDCL 15-15A-7, yet outside the scope of SDCL 15-15A-8 and other personally identifiable information – a review for which the Individual is best situated to shoulder the responsibility and liability for the protection of his interests.[2] *Cf.* Individual's Opening Brief at 20-22.

Finally, the possibility that the information would be leaked to the media or that the Press would have "an unfair advantage in preparing its article or press release" does not justify denying the Individual's inspection of the document in order to invoke his rights under SDCL 15-15A-13, if necessary. Order at 24. Unlike the Individual, the

[2] The Individual's request to inspect the affidavits is limited to the versions of the affidavit with personal identifying information already redacted. *See* R. 1031 (email from Individual's counsel to Court clarifying that request for inspection is limited to redacted versions).

Press has no standing to inspect the affidavits prior to their unsealing to the general public. By correctly limiting the right to inspect the affidavits to the Individual, there is no unfair advantage to the Press to get a jumpstart on any articles and there is no opportunity for the Press or others to inappropriately leak the contents. Nevertheless, the Individual should not be deprived of his rights under SDCL 15-15A-13 due to others' leaking of information in violation of court sealing, nondisclosure, and protective orders. *Compare* R. 28 (Order to Seal Search Warrant and Affidavit) *and* R. 30 (Order of Non-Disclosure of Search Warrant) *with* R. 41 (email from ProPublica evidencing its knowledge of the search warrant court records through its request for the records). The foregoing reasons highlight that even under an abuse of discretion standard, reversal is necessary.

II. Prior Appeal

The Press's overarching theme in its Brief is that the circuit court's decision should be upheld because this Court has already addressed this issue in the prior appeal. However, that is simply not accurate. The issue in the prior appeal was whether SDCL 23A-35-4.1 was unconstitutional in light of the Supreme Court rule codified at SDCL chapter 15-15A and if constitutional, whether court court's interpretation of SDCL 23A-35-4.1 should be retroactively applied. *See generally In re Appeal by an Implicated Individual*, 2021 S.D. 61. As indicated above, the Court specifically acknowledged in its earlier decision that "there [was] no redaction question before us." *See id.* ¶ 11.[3] Thus,

[3] In the initial circuit court proceeding, the State had requested redaction of the caption because the Individual was incorrectly identified as a "defendant". *See In re Appeal by an Implicated Individual*, 2022 S.D. 61, ¶ 24 n.9. The circuit court rejected the State's argument and the State did not appeal that ruling in the prior appeal. *Id.*

while the Court touched upon the required redactions pursuant to SDCL 15-15A-8, it did not address the more expansive SDCL 15-15A-7 and the interplay between SDCL 23A-35-4.1 and redaction of affidavits under SDCL 15-15A-13. In addition, the issue posed here was not ripe at the time of the earlier proceeding as it was unknown if or when the affidavits would be unsealed. It was not until the State terminated its investigation that redaction of the search warrant affidavits prior to their unsealing became ripe for review.

The Press contends that "[t]he only factual change over the past year has been the termination of the State's investigation that automatically triggers the unsealing of the affidavits under SDCL 23A-35-4.1." Press's Brief at 11. The Press overlooks a key distinction. To allow the parties a meaningful opportunity to decide whether to appeal the court's earlier decision, the court had released the search warrant court records (other than the search warrant affidavits) to the parties' legal counsel.[4] *See* R. 426-27, 433. The Individual was also provided an opportunity to participate in the redaction process prior to their unsealing. R. 833-34. Indeed, the court provided the following direction to counsel in its November 11, 2021 email:

> The search warrants and inventories that will be unsealed . . . are the same documents that I forwarded to counsel in October 2020 to redact. Counsel previously agreed on a method for redacting, but has yet provided me with a redacted copy[.] . . . I would appreciate if counsel can agree on the redactions that should be made and email a PDF of the redacted documents[.]

R. 833-34. While the court had previously referenced the parties agreeing upon "items that constitute personal identification information that should be redacted[,]" the fact remains that the Individual appropriately had an opportunity to inspect the search warrant

[4] While the Individual did not object to the Press's standing at that juncture, it does object to the Press's standing for purposes of inspection of the affidavits prior to their unsealing.

court records to be unsealed after this Court's prior decision and invoke SDCL 15-15A-13, although he ultimately determined that to be unnecessary. *Cf.* R. 432. That same opportunity should be afforded to the Individual as to the affidavits.

III. Redaction Process

Honing in on the general redaction process, certain redactions such as social security information and financial information are required pursuant to SDCL 15-15A-8. The preceding statute, SDCL 15-15A-7, allows for the redaction of additional information, including for information confidential pursuant to federal law, state law, case law, and court rules. Finally, SDCL 15-15A-13 provides parties and interested individuals with the right to make requests for redactions.

In the context of redacting search warrant court records, SDCL 23A-35-4.1 must not be read as prohibiting all redactions. The Press posits that "the unmistakable implication" of this Court's prior decision was that the contents of the affidavits be disclosed. *See* Press's Brief at 11 n.5. The Press also seemingly contends that the "logical inference" from this Court's prior decision is that courts lack all discretion to redact any contents of the search warrant affidavits. *See* Press's Brief at 14 n.10. However, the Press surely cannot be arguing that there can be no redactions other than those mentioned in SDCL 15-15A-8, given such a reading would render SDCL 23A-35-4.1 unconstitutional and in conflict with other state law more recent and more specific than SDCL 23A-35-4.1. *See, e.g.,* S.D. Const. art. 6, § 29; SDCL 23A-6-22.1 (permitting courts to redact names of minors and details of the alleged acts under certain circumstances). Thus, courts must retain the authority to redact the court records and there must be appropriate standards in place to ensure both constitutional and statutory

rights are afforded.

As acknowledged by the State, the development and adoption of appropriate redaction standards is necessary to address "if, when and how a court may order redactions beyond the basic redactions enumerated in court rules and statutes." State's Brief at 4. In advocating for the adoption of a test to consider potential redactions to search warrant affidavits, the State proposes the test in *In the Matter of Search of Premises Known as L.S. Starrett Co.*, No. 1:02M137, 2002 WL 31314622, (M.D.N. Car. Oct. 15, 2022) an unreported decision of the United States District Court for the Middle District of North Carolina.[5]

Under that case, when analyzing whether privacy interests should trump public access to search warrant documents, courts should first consider "the legitimacy of the information in connection with the government's application and then the potential for the information to be misused."[6] *Id.* at *7. A recent case from the United States District Court – District of Columbia is more persuasive, however. In *In re Application of Los Angeles Times Communications, LLC to Unseal Court Records*, No. 21-16 (BAH), 2022

[5] The State also relies on *In re Search of 1993 Jeep Grand Cherokee*, 958 F. Supp. 205 (Del. 1996) in support of denying the Individual's requests to inspect the affidavits prior to their unsealing. *See* State's Brief at 14. However, in that case, the court seemingly glossed over, and did not squarely address, the individual's request to review the court record prior to its unsealing, instead focusing on the main issue of whether the individual's privacy interests precluded the unsealing of the affidavits.

[6] In proposing factors for determining whether privacy interests may overcome the right to public access, the State articulates that factual information in the affidavit, as opposed to "unverifiable hearsay" or "scandalous, unfounded or speculative material" supports public access to the search warrant affidavit. *See* State's Brief at 13 (quoting *United States v. Amodeo*, 71 F.3d 1044, 1050 (2nd Cir. 1995)). Yet here, without reviewing the affidavits, the Individual is prevented from having a meaningful opportunity to refute any position by the State as to whether the contents of the affidavits are unverifiable hearsay or unfounded material.

WL 3714289 (Aug. 29, 2022), the media requested search warrant records related to the investigation of a public official that had ended with no criminal charges. The court employed the *Hubbard* balancing test, which sets forth the following factors for consideration:

> (1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings.

Id. at *5. In analyzing the *Hubbard* factors, the court ultimately approved certain redactions from the search warrant documents prior to their unsealing but denied other proposed redactions because the subject of the warrants had publicly disclosed the investigation and "the investigation involved actions taken by a public official in his public capacity." *Id.* at *6. Yet particularly relevant to this case, the district court highlighted the constitutional shortcomings when an uncharged individual was a target of a search warrant:

> Full disclosure of the search warrant materials prepared at an earlier stage of the government's now-closed investigation into [the public official] and other targets, "without providing a proper forum for vindication," straddle a fine line with the limits of the Due Process Clause of the Fifth Amendment. *Application of WP*, 201 F. Supp. 3d at 123; *id.* at 122 (when "a criminal investigation does not result in an indictment or other prosecution, a due process interest arises from an individual being accused of a crime without being provided a forum in which to refute the government's accusations"); . . . . As this Court has previously explained, once an investigation closes without charges, the subject of the criminal investigation retains significant privacy interests tied to the public disclosure of investigation materials, such as avoiding "the unfairness of being stigmatized from sensationalized and potentially out-of-context insinuations of wrongdoing,' particularly where individuals lack the opportunity 'to clear their names at

> trial," *Application of WP*, 201 F. Supp. 3d at 124 (internal quotations and citation omitted); . . . .
>
> . . . Unsealing all information regarding targets of DOJ investigations, regardless of the targets' statuses as public figures, upsets the due process protections provided by the procedural guardrails that apply to criminal matters. *See, e.g.*, U.S. Const. amend. V. The *Hubbard* balancing test is the "lodestar" in this Circuit to fully account for public and private interests, *Metlife*, 865 F.3d at 666, but those interests must yield to concerns that individuals suspected of criminal wrongdoing, but uncharged for such actions, lack due process to challenge uncorroborated or premature allegations levied by a force so powerful and influential as the U.S. Department of Justice. This concern that the government in its prosecutorial posture may serve as the last word—and potentially, the worst word—on a person's conduct is one of the underlying policy reasons for Federal Rule of Criminal Procedure 6(e), which codifies the strict secrecy applicable to proceedings of a grand jury tasked with making probable cause determinations for felony criminal charges. . . . That protection was valued by the Framers, . . . and remains of paramount importance today.

In re Los Angeles Times Commc'ns LLC, No. MC 21-16 (BAH), 2022 WL 3714289, at *8-9 (D.D.C. Aug. 29, 2022) (several internal citations omitted).

In the case *sub judice*. there was no analysis of the *Hubbard* factors as in *In re Los Angeles Times Commc'ns LLC*, or any other variation of factors. *See generally* Order at 21-25. There was no consideration of the Individual's constitutional rights as touched upon in *In re Los Angeles Times Commc'ns LLC*, despite the court's own prior acknowledgement that "public dissemination of information in [the] sealed documents would work a clearly defined and serious injury to the [Individual's] reputation that would likely include significant financial consequences." *See* R. 123. Because SDCL chapter 15-15A allows for such considerations and redactions, if necessary, the Order should be reversed so that analysis may be performed.

IV. Fourth Amendment

Next, both the State and the Press misconstrue the Individual's reliance upon the

Fourth Amendment line of cases in support of his right to inspect the affidavits. *See, e.g.*, State's Brief at 6; Press's Brief at 20-23. The Individual is not invoking the Fourth Amendment to challenge the constitutionality of SDCL 23A-35-4.1. *Cf*. Press's Brief at 20-23. Further, the Individual agrees that he is not seeking through this proceeding "to vindicate[e] the core 4th Amendment protection from search and seizure[.]" *See* State's Brief at 5. Instead, as is relevant here, the case law cited by the Individual supports his entitlement to the affidavits independent from SDCL 23A-35-4.1 and the general public access, including pursuant to the Fourth Amendment. *See* Individual's Opening Brief at 12-14; *see In re Four Search Warrants*, 945 F. Supp. 1563, 1564-65 (N.D. Ga. 1996) (while it is unclear the authority relied upon, the court granted in part a motion seeking access to sealed search warrant affidavits filed by the subject of the investigation although certain information was redacted from the affidavits and the subject agreed to limit disclosure of the information provided to him).

The contention that the Individual has waived any right to discuss the Fourth Amendment implications must be rejected. The issue presented to this Court – whether the Individual's requests to inspect the affidavits so it may exercise its rights under SDCL 15-15A-13, if necessary, should have been granted – was undisputedly raised in the circuit court proceeding. In any event, it is appropriate for the Court to analyze the Fourth Amendment implications as to the Individual's requests for the affidavits given that those constitutional implications are based on "substantive law which is not affected by any factual dispute." *See Paweltzki v. Paweltzki*, 2021 S.D. 52, ¶ 40, 964 N.W.2d 756, 768-69 (also noting that "although we generally do not address issues for the first time on appeal, this is merely a rule of procedure and not a matter of jurisdiction")

(internal quotation marks omitted).

V. The Press's Standing

Next in an attempt to "fix" its lack of standing at this stage of the proceeding, the Press yet again seeks to expand the scope of this appeal. The issue is limited to the Individual's request to inspect the affidavits so that he may invoke his rights under SDCL 15-15A-13, if necessary. Unlike the authority relied upon by the Press in support of its standing, there are no pending motions to redact information, to seal court records, or to exclude the press from the courtroom. *See* Press's Brief at 24-26. Even under the Press's cited authority, at a minimum there would need to be a motion for redaction pursuant to SDCL 15-15A-13 in order the Press to attain (albeit limited) standing. *Cf.* Individual's Opening Brief at 17 (noting that if an inspection supports a request for further redactions, "then such request under SDCL 15-15A-13 could be made and it may then be the prerogative of the Press to challenge or oppose such request if they are deemed to have standing."). Given the foregoing, the Press lacks standing at this juncture and unlike the Individual, the Press is not entitled to inspect the affidavits prior to their release to the public. *Cf.* Individual's Opening Brief at 15-17.

VI. First Amendment and Common Law

In its final extension far beyond the issue in this appeal, the Press indicates that "[w]hile not necessary to consider here, the First Amendment and common law also require the immediate disclosure of the search warrant affidavits." *See* Press's Brief at 29. However, the Press fails to recognize that its "presumption of access" or any "automatic" unsealing of the affidavits under SDCL 23A-35-4.1 must accommodate a period of time to allow for redactions required by federal law, state law, case law, and

common law. The cases cited by the Press do not support its demand for instantaneous access to the documents without affording any time for necessary redactions. *See* Press's Brief at 29-30. The unsealing of the search warrant affidavits, like the unsealing of other court records, must accommodate the opportunity to address the *Hubbard* factors and perform redactions that may be necessary. *Cf. United States v. Index Newspapers, LLC*, 766 F.3d 1072, 1092, 1095, 1097 (9th Cir. 2014) (requiring the district court to consider any redactions proposed by the government[7] in the process to unseal certain court records and stating that "[t]he appellate record will not be unsealed until all issues regarding redaction are resolved"). The right to public access of the record is not instantaneous and redaction must first be addressed.

CONCLUSION

The Individual agrees with the State that "development and adoption of appropriate standards for determining if, when and how a court may order [certain] redactions" is necessary. Yet, the clear path for the redaction procedure in this case must first involve the granting of the Individual's request to inspect the affidavits and then, if necessary, the opportunity to invoke his rights in SDCL 15-15A-13. The Individual respectfully requests this Court to reverse the circuit court's decision denying his request to inspect the affidavits prior to their release to the general public, and to further adopt the *Hubbard* factors as a fair procedure to carry out SDCL 15-15A-13.

[7] There is no indication that the subjects of the investigation in *Index Newspapers, LLC* requested to be part of the redaction process. *See generally United States v. Index Newspapers, LLC*, 766 F.3d 1072 (9th Cir. 2014). To the contrary, the subjects in that case appeared to support the unsealing of at least some of the court records. *Id.* at 1080, 1096 n.19.

Respectfully submitted this 16th day of November, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with SDCL § 15-26A-66(b). The font is Times New Roman size 12, which includes serifs. The brief is 15 pages long and the word count is 4,506, exclusive of the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated this 16th day of November, 2022.

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CERTIFICATE OF SERVICE

I certify that on November 16, 2022, a true and correct copy of the **REPLY BRIEF OF APPELLANT IMPLICATED INDIVIDUAL** was served via Odyssey and email upon the following individuals:

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