

**IN THE  
INDIANA SUPREME COURT  
NO. \_\_\_\_\_**

STATE OF INDIANA ON THE	)	
RELATION OF RICHARD ALLEN,	)	
	)	
Relator,	)	
v.	)	CAUSE NO. 08C01-2210-MR-000001
	)	
THE CARROLL CIRCUIT COURT and	)	
THE HONORABLE FRANCES C.	)	
GULL, SPECIAL JUDGE,	)	
	)	
Respondents.	)	

**VERIFIED PETITION FOR WRIT OF MANDAMUS AND  
PROHIBITION**

This Court has expressly declared that “there are strong societal reasons for allowing Public Access to Court Records and denial of [that public] access could compromise the judiciary’s role in society, inhibit accountability, and endanger public safety.” IND. ACCESS TO COURT RECORDS, Rule 1, *Commentary*. If there was ever a time where this Court’s unequivocal mandate for public access to court records was critical, it is the present instance.

This is one of the most high-profile cases this state has ever seen and for many Hoosiers this case marks the first time they have followed the workings of an Indiana court. Yet at virtually every turn, the Access to Court Records Rules—and most recently the Indiana Trial Rules—have been violated and Hoosiers and the media (both local and national) have been left on the outside looking in. Instead of the “sunshine” that public access is supposed to provide, the public and the media have been left in the dark.

A writ of mandamus and prohibition is needed here because the trial court has a clear and absolute duty to follow this Court’s mandates ensuring public access to court records, but it has failed to perform that duty repeatedly.

### FACTS SUPPORTING PETITION

1. Last Spring, Defendant-Relator Richard Allen (“Allen”) filed a series of court records<sup>1</sup> in this case and marked everything as “public” documents. (Original Action Record of Proceedings (“Record”), p.35.)

2. But someone within the court system *sua sponte* changed all of Allen’s filings to “confidential” and excluded all of them from public access without informing Allen, and then for the next three months more than 125 separate documents were excluded from public access. (Record, pp.15-23)

3. On June 28, 2023, the trial court explained that all of those documents had been excluded from public access “to comply with the Court Order dated December 2, 2022, which prohibits public comment, commonly referred to as the ‘Gag Order,’” even though that “Gag Order” only governs “extrajudicial” comments, not court filings. (Record, p.42.)

4. The trial court then allowed the parties to “agree” to exclude the **entirety** of certain records from public access—both of which are prohibited by the Access to Court Records Rules. (See ¶¶25-26, *infra*.)

5. As to the other improperly excluded court records, rather than making

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<sup>1</sup> “‘Court Record’ means both Case Records and Court Administrative Records. ‘Case Record’ means any document, information, data, or other item created, collected, received, or maintained by a Court, Court agency or Clerk of Court in connection with a particular case.” A.C.R. 3(A, B).

them public on the CCS—something that clerks do all the time—the trial court created a link at <https://allensuperiorcourt.us/Delphi/> and uploaded a Zip Drive containing 118 documents. (*Id.*)

6. But the file names of those 118 documents have no clear identifying information to enable someone to recognize what the document actually is; none of the exhibits to a particular filing are anywhere near the actual filings they should go with; and the file date for every document is 6-27-2023. (Record, p.47-50.)

7. Because the CCS in this case **still** has every one of the 118 court records excluded from public access, the only way a member of the public can access anything in this case is if they somehow know to read the June 28, 2023 order, see the link embedded therein, and then proceed to open each of the 118 documents until they find the filing they are looking for.

8. More recently, the trial court has begun *sua sponte* **removing** and excluding filed documents from the CCS altogether.

9. For example, On September 18, 2023, Allen made what is known as a “*Franks*” filing, wherein a defendant seeks to present evidence that the officer who prepared the probable cause affidavit misled the court to believe probable cause ever existed. *See Franks v. Delaware*, 438 U.S. 154 (1978).

10. Allen filed three documents with this *Franks* filing—a Motion, a Memorandum in Support, and an Exhibits List—and made all of them publicly accessible.

11. But someone within the court has since removed/excluded the *Franks* Memorandum from the CCS altogether.

12. Likewise, after the trial court attempted to force Allen’s counsel (Attorneys Andrew Baldwin and Brad Rozzi) to withdraw under duress—and in direct conflict with Allen’s express declaration that he wanted **only** Attorneys Baldwin and Rozzi to represent him—Allen instructed his counsel to make certain filings on his behalf.

13. On October 27, 2023, however, the trial court ordered the Clerk to “remove” all of Allen’s filings from both the CCS and the electronic case file. (Record, p.238.)

### **JURISDICTIONAL STATEMENTS AND ORIGINAL ACTION STANDARDS**

14. This Court has jurisdiction over this Petition as an original action.  
IND.ORIGINAL ACTION RULE 1(A).

15. This application has been made expeditiously after the jurisdiction of the respondent court became an issue.

16. As developed below and in the accompanying brief, the respondent court has failed to act and refrain from acting when it was under an absolute duty to do. *See State ex rel. Commons v. Pera*, 987 N.E.2d 1074, 1076 (Ind. 2013) (“Writs of mandamus and prohibition will be issued only where the trial court has an absolute duty to act or refrain from acting.”); *State ex rel. Seal v. Madison Superior Court No. 3*, 909 N.E.2d 994, 995 (Ind. 2009) (writ of mandamus will issue where the trial court has “failed to perform a clear, absolute, and imperative duty imposed by law.”).

17. As explained below and in the accompanying brief, the denial of this application will result in extreme hardship and the remedy available by appeal will be inadequate. *Id.*

18. Rule 2(A) of the Rules of Procedure for Original Actions contains a condition precedent requiring that the subject matter of the Original Action must be raised and ruled on by the trial court prior to filing an Original Action.

19. Doing so in this case, however, is an impossibility because the trial court refuses to accept any filings made by the only attorneys Allen has authorized to represent him in the trial court below (Attorneys Rozzi and Baldwin) and has ordered the Clerk to “remove” anything they file.

20. Accordingly, there is an impossibility of performance of the condition precedent and the facts and posture of this case create extraordinary circumstances<sup>2</sup> that warrant this Court excusing that condition precedent.

### **GROUND FOR WRITS OF MANDAMUS AND PROHIBITION**

21. A writ of mandamus and prohibition is appropriate and warranted in this case because the trial court has failed to perform the “clear, absolute, and imperative duty imposed by” the Access to Court Records Rules and the Trial Rules. *State ex rel. Seal*, 909 N.E.2d at 995.

22. Writs are issued by this Court in a wide variety of circumstances, such as to enforce court rules; effectuate the disqualification of a trial court; order a criminal defendant be released from jail on his own recognizance; and address a trial court’s

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<sup>2</sup> Allen believes this is analogous to the condition precedent in the appellate rules that a motion for a stay pending appeal may not be filed with the appellate court “unless a motion for stay was filed and denied by the trial court.” IND.APP.PROC.R. 39(B). This condition precedent may be excused, however, upon a showing of “extraordinary circumstances.” 11 IND.PRAC. §112.76, *Motion to Stay* (3d ed.).

failure to adhere to statutory mandates.<sup>3</sup>

23. Writs of mandamus and prohibition have also been issued to address matters affecting the “public trust in the integrity of the judicial process.” *State ex rel. Kirtz v. Delaware Circuit Court No. 5*, 916 N.E.2d 658, 662 (Ind. 2009).

24. The Trial Rules mandate that the trial court clerk “shall maintain a sequential record of the judicial events in such proceeding” and the CCS must reflect all trial court events, which include any and all filings. IND.TRIAL PROC., Rule 77(B).

25. In addition, Indiana court records are to be open to and accessible by the public. A.C.R. Rules 1, 4(A, B).

26. Unless an entire case is excluded from public access—which is not at issue here—there are only two ways a court record may be excluded: (1) It falls within A.C.R. 5(B) or (C)—in which case it is excluded as a matter of right; or (2) “Extraordinary circumstances” exist and all of the requirements of A.C.R. 6 are met. *See* A.C.R. Rules 4, 5, 6.

27. To be clear, “a court cannot exclude records otherwise accessible to the public because the parties agree to do so or because the parties have entered into a Trial Rule 26(C) protective order.” A.C.R. Rule 5, *Commentary*.

28. And unless everything in the document can be properly excluded from public access, there must be a public access version and a non-public access version of

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<sup>3</sup> *State ex rel. Crain Heating Air Conditioning & Refrigeration, Inc. v. Clark Circuit Court*, 921 N.E.2d 1281 (Ind. 2010); *State ex rel. Koppe v. Cass Cir. Ct.*, 723 N.E.2d 866, 869 (Ind. 2000); *Williams v. State*, 716 N.E.2d 897, 900 (Ind. 1999); *State ex rel. Pemberton v. Porter Superior Court No. 4*, 912 N.E.2d 377 (Ind. 2009); *State ex rel. Bramley v. Tipton Circuit Court*, 835 N.E.2d 479 (Ind. 2005); *State ex rel. W.A. v. Marion Cnty. Superior Court, Juvenile Div.*, 704 N.E.2d 477 (Ind. 1998).

the document—the public access version has the confidential information redacted but all of the non-confidential information in the document must still be publicly available.

A.C.R. 5(E), *Commentary*.

29. Moreover, every confidential record must be accompanied by “an ACR Form identifying the specific Rule 5 ground(s) upon which exclusion is based.” A.C.R. 5(B). “Simply filing the document and locking it does not satisfy the notice requirement. A person looking at the case will see that a document is excluded in its entirety from the Court Record, and the person must also see ACR Form stating what document was excluded and why.” A.C.R. 5, *Commentary*.

30. The trial court here has repeatedly failed to perform the “clear, absolute, and imperative duty imposed by” these Rules when it *sua sponte* removed/excluded the *Franks* Memorandum and ordered the Clerk to “remove” all of Allen’s most recent filings from both the CCS and the electronic case file.

31. Even if a trial court believes that these filings are improper or unauthorized, that does not justify the removal or exclusion of the court records from the CCS altogether.<sup>4</sup>

32. Instead, the trial court may enter an order declaring that a court record

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<sup>4</sup> For example, after the IURC filed a Brief of Appellee in *City of Carmel, Indiana v. Duke Energy Indiana, LLC*, 22A-EX-00088, the City of Carmel moved to strike the Brief, contending it was an impermissible and unauthorized filing because the IURC was not a party to the appeal. The Court of Appeals agreed and struck the brief and dismissed the IURC as a party to this appeal.” *City of Carmel v. Duke Energy Indiana, LLC*, 198 N.E.3d 1182, 1186 n.1 (Ind.Ct.App.2022), *transfer granted* 209 N.E.3d 1182 (Ind. 2023). But the court did not instruct the Appellate Clerk to **remove** the IURC’s filings from the CCS; those filings are still there and accessible to the public.

is improper or unauthorized and may inform the parties and public that it will not review or consider such filings.

33. But a trial court cannot order those court records removed or excluded from public access altogether.

34. In addition, after the trial court recognized that 118 court records had been improperly excluded from public access—including court records that had been marked public when filed and then *sua sponte* changed by the court to confidential—the trial court created a link to <https://allensuperiorcourt.us/Delphi/> which contained a Zip Drive with those 118 documents uploaded.

35. But this does not satisfy the trial court’s duties under the Access to Court Records Rules.

36. Not only did the trial court allow the parties to “agree” to exclude the entirety of certain records from public access (*see* ¶¶25-26, *supra*), but the Zip Drive does not provide meaningful public access.

37. The file names titles of the 118 documents have no clear identifying information to let someone know what that document actually is, every document has the date of 6-27-2023, and none of the exhibits to a particular filing are connected to the actual filings. (Record, pp.47-50.)

38. Because the actual CCS in this case still has every one of the 118 documents excluded from public access—without any ACR Form accompanying a single one of the excluded documents—the only way a member of the public or media can access anything in this case is if they know they need to read the June 28, 2023 order, see the link embedded therein, and then proceed to open each of the 118



documents until they find the filing they are looking for.

39. In addition, there are still two documents that remain excluded, are not on the Zip Drive, do not have an ACR Form, and for which an ACR Rule 6 hearing has never been held: (1) a June 20, 2023 filing by the Carroll County Sheriff; and (2) a July 5, 2023 letter from a D.O.C. inmate. (Record, pp.22-23.)

40. Writs of Mandamus and Prohibition are needed to ensure court records that were either removed or improperly excluded are placed back on the CCS, made and remain publicly accessible, and going forward court records may only be excluded upon compliance with the Access to Court Records Rules.

### **STATEMENT OF PRECISE RELIEF SOUGHT**

Relator requests that Permanent Writs of Mandamus and Prohibition be issued:

1. Mandating that the trial court reinstate the following court records as publicly accessible documents on the CCS and the electronic case file:
  - a. Allen's September 18, 2023 *Franks* Memorandum;
  - b. Allen's October 25, 2023 Verified Notice of Continuing Representation;
  - c. Allen's October 25, 2023 Motion to Disqualify;
  - d. Allen's October 25, 2023 Praecipe for Transcript; and
  - e. Allen's October 26, 2023 Motion for Continuance.
2. Prohibiting the trial court from ordering the removal of any court records filed in this case from the CCS and the electronic case file.
3. Prohibiting the trial court from excluding from public access any court records without the requirements of the Access to Court Records Rules being satisfied, including but not limited to:
  - a. Every court record excluded from public access must be accompanied by "an ACR Form identifying the specific Rule 5 ground(s) upon which exclusion is based." A.C.R. 5(B).

- b. Unless everything in a court record can be properly excluded from public access, a public access version and a non-public access version of the document must be filed.
4. Mandating that the 118 documents on the Zip Drive must be made publicly accessible on the CCS itself.
5. Mandating that the court records referenced in the June 28, 2023 Order that remain excluded from public access by agreement “be made available for Public Access seventy-two hours after” the Writ is issued “unless the requirements of Rule 6 are thereafter satisfied.” A.C.R. 8(C)(2).
6. Mandating that the June 20, 2023 filing by the Carroll County Sheriff and the July 5, 2023 letter from a D.O.C. inmate “be made available for Public Access seventy-two hours after” the Writ is issued “unless the requirements of Rule 6 are thereafter satisfied.” *Id.*

#### **VERIFICATION**

I hereby affirm under the penalties for perjury that the foregoing statements are true and correct to the best of my knowledge.

By: /s/ Maggie L. Smith

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### **VERIFIED STATEMENT OF WORD COUNT**

Pursuant to Rule 3(B) of the Indiana Rules of Procedure for Original Actions, undersigned counsel certifies that the foregoing contains fewer than 4,200 words, exclusive of the items listed in Appellate Rule 44(C), as counted by the word processing system used to prepare the Brief (MS Word).

By: /s/ Maggie L. Smith

## CERTIFICATE OF FILING AND SERVICE

Pursuant to Rule 2(D) of the Indiana Rules of Procedure for Original Actions, the foregoing was electronically filed using the Court's IEFS system and on October 30, 2023 was served upon the following through the Indiana Electronic Filing System and via electronic mail at the noted e-mail address:

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