

**IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY,
PENNSYLVANIA**

IN RE: SEALED ARREST WARRANT :
PURSUANT TO PA. R. CRIM. 513.1 :
 : No. 801 MD 2022
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**BRIEF IN SUPPORT OF MEDIA INTERVENORS’
EMERGENCY MOTION TO INTERVENE AND UNSEAL**

Proposed intervenors Herald-Standard - Uniontown Newspapers, Inc. (“Herald-Standard”), the Mon Valley Independent (“MVI”), and the Observer-Reporter (collectively, “Media Intervenors”) respectfully submit this brief in support of their contemporaneously filed motion to intervene and unseal the docket and judicial records filed in the case *Commonwealth v. Keven Van Lam* and to unseal judicial records filed in the above-captioned case.

STATEMENT OF THE CASE

Media Intervenors provide news coverage of Westmoreland County and nearby western Pennsylvania communities, including coverage of public safety and criminal activity in the area. Reporters for Media Intervenors routinely cover criminal and civil cases proceeding before the Westmoreland County Court of Common Pleas and local Magisterial District Judges. To provide their readers with

timely and important information about news impacting their communities, Media Intervenors frequently rely on court dockets and filings.

On November 6, 2022, this Honorable Court issued an order (hereinafter, the “Sealing Order”) granting the Westmoreland County District Attorney’s petition to seal arrest warrant information in *Commonwealth v. Keven Van Lam*. See Mot. at Ex. A. The Sealing Order seals the arrest warrant information and the County’s petition for 60 days. The Court thus sealed records in two cases: the County’s petition filed in the above-captioned case and the arrest warrant information filed in the *Lam* case. Further, the Sealing Order delays the disclosure of arrest warrant information to the defendant by 30 days and prohibits the Westmoreland County Prison from disclosing or releasing the arrest warrant information. The Sealing Order states that “good cause has been shown” for the sealing, but does not detail what the Court found constitutes good cause. Although the Sealing Order contained the case name of “*Commonwealth v. Keven Van Lam*,” it did not provide a docket number for the *Lam* case. Further, the Sealing Order did not purport to seal the *Lam* docket or any judicial records beyond the arrest warrant information and the County’s petition.

On November 7, 2022, a further order of this Court assigned the *Lam* case to Magisterial District Judge Wayne Vlastic, Magisterial District 10-1-03, due to the location of the shooting. See Mot. at Ex. B. That order did not provide a docket

number for the *Lam* case, nor seal the docket. On information and belief, no court has entered an order that purports to seal the *Lam* docket.

Despite the lack of any judicial order sealing it, the *Lam* docket has, in fact, been sealed. The *Lam* docket sheet does not appear in the online Unified Judicial System (“UJS”) case search portal and is not accessible at the courthouse. Media Intervenors have been told by the Westmoreland County Court Administrator, the Westmoreland County Clerk of Courts office, Magisterial District Judge Vlasic, the Administrative Office of Pennsylvania Courts (“AOPC”), and the Westmoreland County District Attorney’s office that the *Lam* docket and all filings in that case are sealed. *See* Declaration of Mike Jones (“Jones Decl.”), Mot. at Ex. C, ¶¶ 5–19; Declaration of Kristie Linden (“Linden Decl.”), Mot. at Ex. D, ¶¶ 10–13. Only one official has offered a legal basis for the *Lam* docket’s sealing: in a conversation with MVI assistant editor Kristie Linden, AOPC spokesperson Stacey Witalec claimed the docket was sealed “arrest warrant information” under Pennsylvania Rule of Criminal Procedure 513.1, Sealing of Arrest Warrant. Linden Decl. ¶¶ 10–13. That rule does not, however, provide for the sealing of entire dockets. To date, Media Intervenors and the public remain unable to access the *Lam* docket or any filings in the case.

Media Intervenors have learned through court and County officials that Mr. Lam’s preliminary hearing is currently scheduled for December 19, 2022 at 10

a.m. *See* Jones Decl. ¶ 18; Linden Decl. ¶ 15. Because the docket is sealed, however, Media Intervenors and the public will not know if the date changes unless officials decide to share this information.

Through their newsgathering, Media Intervenors have been able to uncover certain basic information about the case. According to their reporting, defendant Keven Lam, age 55, was arrested on unknown charges on November 6 or 7, 2022, following the shooting death of a man in Rostraver Square.¹ Mr. Lam was committed to the Westmoreland County Prison on November 8, 2022. Media Intervenors have also determined that the victim was Boyke Budiarachman, age 49. *Id.* Given the wholesale sealing of the *Lam* docket and filings, however, Media Intervenors remain in the dark as to other key facts, such as the charges against Mr. Lam.

¹ *See* Mike Jones, *Sources: Rostraver Shooting Victim, Suspect Had Business Ties*, Observer-Reporter (Nov. 19, 2022), https://observer-reporter.com/news/localnews/sources-rostraver-shooting-victim-suspect-had-business-ties/article_6c46bed4-6777-11ed-b073-d7108d9c6d37.html; Mike Jones, *Suspect Revealed in Case Involving Fatal Rostraver Township Shooting*, Observer-Reporter (Nov. 16, 2022), https://observer-reporter.com/news/localnews/suspect-revealed-in-case-involving-fatal-rostraver-township-shooting/article_5e180f26-6523-11ed-b119-d7c343fcadc3.html; Mike Jones, *Indonesian Man Killed in Rostraver Shooting Laid to Rest in Homeland*, Observer-Reporter (Nov. 15, 2022), https://observer-reporter.com/news/localnews/indonesian-man-killed-in-rostraver-shooting-laid-to-rest-in-homeland/article_bcb5f3b4-645a-11ed-b426-931279f1ef8e.html; Kristie Linden, *Officials Remain Secretive in Murder Case*, Mon Valley Independent, Nov. 18, 2022, at A1 (abbreviated version available online at <https://monvalleyindependent.com/2022/11/officials-remain-secretive-in-murder-case>).

STATEMENT OF THE ISSUES INVOLVED

The issues presented for the Court's consideration in this matter include: (1) whether Media Intervenors may intervene for the limited purpose of moving to unseal the docket in *Commonwealth v. Keven Van Lam* and judicial records filed in *Lam* and the above-captioned proceeding; (2) whether the County can satisfy the heavy burden of demonstrating a compelling interest sufficient to overcome the strong presumption of public access to the docket and all other sealed judicial records in *Lam* and the above-captioned proceeding, in their entirety, under the common law, the First Amendment, and the Pennsylvania Constitution; and (3) whether, if a compelling interest justifies continued sealing of certain judicial records or portions thereof in *Lam* and the above-captioned proceeding, the continued sealing must be narrowly tailored and supported by specific, on-the-record findings?

Suggested Answers: Yes.

ARGUMENT

I. The Court should grant Media Intervenors' motion to intervene.

Intervention in this matter is proper. "In Pennsylvania, a Motion to Intervene is the proper vehicle for the press to raise a right of access question." *Commonwealth v. Long*, 922 A.2d 892, 895 n.1 (Pa. 2007) (citing *Commonwealth v. Fenstermaker*, 530 A.2d 414, 416 n.1 (Pa. 1987)). Pennsylvania courts

consistently recognize that intervention by members of the news media is an appropriate means of vindicating the public's right of access to judicial proceedings and records. *See id.*; *Commonwealth v. Upshur*, 924 A.2d 642, 645 (Pa. 2007); *Fenstermaker*, 530 A.2d at 416 n.1; *Cap. Cities Media, Inc. v. Toole*, 483 A.2d 1339, 1344 (Pa. 1984). Here, Media Intervenors seek to intervene for the limited purpose of asserting their right of access to dockets, judicial records, and proceedings under the First Amendment, the Pennsylvania Constitution, and the common law. *See Fenstermaker*, 530 A.2d at 416 n.1.

II. The Court should unseal the docket, judicial records, and proceedings in this proceeding and in *Lam*.

A. The strong presumption of access attaches to the docket, judicial records, and proceedings in this case and in *Lam*.

Media Intervenors have a presumptive right of access to the docket, judicial records, and proceedings in this proceeding and in *Lam* under the First Amendment; article 1, section 11 of the Pennsylvania Constitution; and the common law. *See, e.g., United States v. Smith*, 123 F.3d 140, 147 (3d Cir. 1997); *Fenstermaker*, 530 A.2d at 417; *Upshur*, 924 A.2d at 647. Specifically, “[d]ocket entries and other filings in a criminal proceeding are public records” to which the constitutional and common law right of access attaches. *Commonwealth v. Curley*, 189 A.3d 467, 473 (Pa. Super. Ct. 2018); *see also* 204 Pa. Code § 213.81(1)(B) (including “dockets” in definition of “case records”); *id.* § 213.81(3) (“All case

records shall be open to the public in accordance with this policy.”). Access rights “would be merely theoretical if the information provided by docket sheets were inaccessible.” *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004). Docket sheets provide information on scheduled hearings, give notice of motions for closure so that the public may object, facilitate the inspection of public judicial records, educate the public on the courts’ workings, and increase fairness and the perception thereof. *Id.* at 93, 95; *Doe v. Public Citizen*, 749 F.3d 246, 268 (4th Cir. 2014); *United States v. Criden*, 675 F.2d 550, 557–59 (3d Cir. 1982). If members of the press and public do not have access to a docket sheet setting forth a hearing schedule, they will be unable to learn about and attend those hearings, which will effectively occur in secret even absent a closure order.

Arrest warrants and their supporting applications and affidavits are likewise presumptively public judicial records. *Fenstermaker*, 530 A.2d at 418–19. Public access to arrest warrant information discourages perjury in affidavits, encourages law enforcement to ensure affidavits are supported by sufficient cause, promotes fairness and accuracy in judicial decision making, and increases the perception of fairness in the arrest warrant process. *Id.* Sealing petitions, as records filed with and relied on by the court, are also presumptively public. *In re Cendant Corp.*, 260 F.3d 183, 192–93 (3d Cir. 2001) (“[T]here is a presumptive right of public access

to pretrial motions of a nondiscovery nature.” (citation and internal quotation marks omitted)); *Upshur*, 924 A.2d at 648; *Curley*, 189 A.3d at 473.

Here, the Sealing Order bars access to presumptively public judicial records. The *Lam* docket sheet is presumptively public. *Curley*, 189 A.3d at 473. Inexplicably, however, it has been sealed despite the fact that ***no court order*** purports to seal it. The Sealing Order states that it seals ***only*** the arrest warrant information and the County’s petition. Yet relevant officials and judicial records custodians have all construed the Sealing Order to bar access to the *Lam* docket entirely. As a result, basic and presumptively public information about the *Lam* proceedings, including the charges against Mr. Lam and the dates of scheduled hearings, is unavailable. The arrest warrant information in *Lam* is also a judicial record to which the strong presumption of access attaches, as is the County’s petition to seal that arrest warrant information. *Fenstermaker*, 530 A.2d at 418–19.

B. The strong presumption of access to judicial records and proceedings in this case is not overcome.

Where, as here, the constitutional presumption of access to judicial proceedings and records attaches, “[o]nly a *compelling* government interest justifies closure and then only by a means narrowly tailored to serve that interest.” *In re M.B.*, 819 A.2d 59, 63 (Pa. Super. Ct. 2003) (emphasis in original) (citations and internal quotation marks omitted). Specifically, the party seeking to restrict public access must demonstrate “that opening the proceedings will work a clearly

defined and serious injury to the party seeking closure” and “that the material [it seeks to keep secret] is the kind of information that the courts will protect.” *Id.* (citations and internal quotation marks omitted). Where the common law presumption of access attaches, the party seeking closure must establish that the presumption of access is outweighed by the interests in secrecy. *Upshur*, 924 A.2d at 651 (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 602 (1978)). The burden on the proponent of closure is heaviest when that party seeks to seal a case in its entirety. *Ayala v. Speckard*, 131 F.3d 62, 70 (2d Cir. 1997) (en banc) (“[T]he more extensive . . . the closure requested, the greater must be the gravity of the required interest and the likelihood of risk to that interest.”); *United States v. Doe*, 63 F.3d 121, 129 (2d Cir. 1995); *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994) (“A party who seeks to seal an *entire* record faces an even heavier burden.”).

Procedurally, courts must publicly docket notice of a hearing on closure, permit individuals opposing closure to be heard, make specific on-the-record findings justifying closure, and explain their consideration and rejection of less-restrictive alternatives to closure. See *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984); *United States v. Raffoul*, 826 F.2d 218, 226 (3d Cir. 1987); *Criden*, 675 F.2d at 557–60; *Upshur*, 924 A.2d at 651–52; *Commonwealth v. Hayes*, 414 A.2d 318, 322 (Pa. 1980); *Commonwealth v. Buehl*, 462 A.2d 1316, 1321–22 (Pa. Super. Ct. 1983).

Here, the strong presumption of public access is not overcome. As to the *Lam* docket, again, *no* court order states that the docket sheet and all its entries are sealed. Court and County officials' legal argument for sealing the *Lam* docket is apparently rooted in Pennsylvania Rule of Criminal Procedure 513.1, Sealing of Arrest Warrant. *See* Linden Decl. ¶¶ 10–13. Specifically, the Sealing Order seals the “arrest warrant information” in *Lam* for 60 days pursuant to Rule 513.1. Under Rule 513.1, “arrest warrant information” is defined as “the criminal complaint in cases in which an arrest warrant is issued, the arrest warrant, any affidavit(s) of probable cause, and documents or information related to the case.” Pa. R. Crim. P. 513.1(A). The docket sheet has, apparently, been sealed on the grounds that it is “information related to the case.” Linden Decl. ¶ 13. This astonishingly broad misinterpretation of Rule 513.1 plainly violates the constitutional and common law presumption of access, and has no basis in the Rule itself. Docket sheets rarely—if ever—contain sufficiently sensitive information to warrant sealing. *In re State-Record Co.*, 917 F.2d 124, 129 (4th Cir. 1990). Moreover, before sealing any portion of a docket, courts must make “individualized, specific, particularized findings” with respect to each docket entry. *Curley*, 189 A.3d at 473. Here, the Court has not even stated that the *Lam* docket *is* sealed, much less issued any individualized findings to support sealing. Because no court has sealed the *Lam*

docket, and no compelling interest justifies sealing, the docket should be unsealed. *See id.*; *In re M.B.*, 819 A.2d at 63.

As to the arrest warrant information and the County’s petition, the Sealing Order, which states only that “good cause has been shown” to support sealing, suggests that the Court applied an incorrect standard to seal the relevant records. Mot. at Ex. A. Notably, the Sealing Order does not identify any compelling interest in favor of nondisclosure or explain why more narrowly tailored measures would be insufficient to serve that (hypothetical) compelling interest. *Id.* Absent such a compelling interest supported by individualized findings, the petition and arrest warrant information must be unsealed. *See In re M.B.*, 819 A.2d at 63; *Curley*, 189 A.3d at 474.

Any other motions, briefs, exhibits, memoranda of law, orders, or opinions filed in *Lam* and the above-captioned case are likewise judicial records to which the public has a presumptive right of access.² *Upshur*, 924 A.2d at 648 (“[A]ny item that is filed with the court as part of the permanent record of a case and relied on in the course of judicial decision-making will be a public judicial record or document.”). This presumption—which is always weighty—has particular force here, where a member of the community has been shot and killed in a public

² Because the *Lam* docket is entirely sealed, Media Intervenors are unable to identify the remaining sealed records with specificity.

shopping plaza and the entire case against the suspect has been sealed. It is undeniable that the public has a significant, legitimate interest in timely access to the facts and legal proceedings surrounding this incident, which occurred entirely in the public. Accordingly, any additional judicial records filed in *Lam* and the above-captioned case should be unsealed.

III. To the extent any continued sealing is necessary, such sealing must be narrowly tailored and supported by specific, on-the-record findings.

Even assuming, *arguendo*, that the parties could demonstrate a countervailing interest necessitating some form of closure, any such access restrictions must be no broader than necessary to serve that interest. *Press-Enter. Co.*, 464 U.S. at 510; *Buehl*, 462 A.2d at 1322. Further, any such continued sealing must be supported by specific, on-the-record factual findings. *Upshur*, 924 A.2d at 651 (citing *Fenstermaker*, 530 A.2d at 420–21).

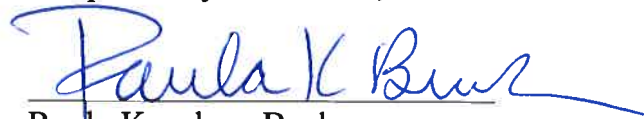
Accordingly, if the Court finds any continued sealing is necessary in *Lam* or the above-captioned case, Media Intervenors respectfully ask the Court to unseal the *Lam* docket sheet and utilize targeted redaction of specific records instead of wholesale sealing. Media Intervenors also ask the Court to place its findings on the record, explaining why the presumptive right of access is overcome, as well as why less restrictive alternatives do not adequately protect the interests at stake.

CONCLUSION

For the reasons set forth above, Media Intervenors respectfully request that the Court grant their motion to intervene, vacate the November 6, 2022 Sealing Order, and enter an order (1) unsealing the docket in *Commonwealth v. Keven Van Lam* and identifying that case by its docket number, (2) unsealing all sealed judicial records filed in *Commonwealth v. Keven Van Lam*, and (3) unsealing all sealed judicial records filed in the above-captioned case. Media Intervenors respectfully request that they be heard on this Motion as soon as possible, and if the Court deems it appropriate, to schedule such hearing as a virtual proceeding.

Dated: November 22, 2022

Respectfully submitted,



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