

**IN THE
INDIANA SUPREME COURT
CASE 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.)

**RELATOR'S BRIEF IN SUPPORT OF PETITION FOR
WRITS OF MANDAMUS AND PROHIBITION**

Maggie L. Smith, #19572-53
FROST BROWN TODD LLP
111 Monument Circle, Suite 4500
Indianapolis, IN 46244-0961
317-237-3800
mlsmith@fbtlaw.com

Cara S. Wieneke, #2437449
WIENEKE LAW OFFICE LLC
PO Box 368
Brooklyn, IN 46111
317-331-8293
cara.wieneke@gmail.com

Jessie A. Cook, 3715-84
Attorney at Law
3650 N. Washington Blvd.
Indianapolis, Indiana 46205
812-232-4634
jessieacook@icloud.com

Attorneys for Relator Richard Allen

TABLE OF CONTENTS

BACKGROUND	3
I.A. Hundreds of documents are improperly excluded from public access.....	3
I.B. Allen files a <i>Franks</i> Memorandum of Law and the trial court <i>sua sponte</i> removes it from the public CCS without notice or hearing.	7
I.C. The trial court attempts to effectuate the removal of Allen’s chosen counsel over his objection and without his consent or approval.....	8
I.D. Allen instructs his chosen counsel to make filings on his behalf and the trial court orders the Clerk to “remove” those filings from both the CCS and the electronic case file.	11
GROUND FOR WRITS OF MANDAMUS AND PROHIBITION	13
II. Original action standards	13
II.A. The trial court must act contrary to an “absolute duty” “imposed by the law.”.....	13
II.B. Condition precedent for Original Actions	14
III. 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.....	15
III.A. The Access to Court Records and Trial Rules require court records to be publicly accessible.....	15
III.B. The trial court continues to violate these absolute duties by improperly removing documents from the CCS and excluding public access to documents filed in this case.	17
III.B.1. Removal of court records from the CCS is never allowed.	17
III.B.2. There remains a lack of meaningful public access in this case.....	19
CONCLUSION	20

BACKGROUND

I.A. Hundreds of documents are improperly excluded from public access.

This case involves one of the most high-profile matters in Indiana history. On April 5, 2023, Defendant-Relator Richard Allen (“Allen”) filed an Emergency Motion to Modify Safekeeping Order, Exhibits, and a Proposed Order, marking everything as “public” documents:

24546878 State of Indiana v. Richard M. Allen OBC01-2210- NR-000001		Bradley Rozzi	Sarah Luzenberg	04/05/2023 10:39 AM	\$0
Delivery by Doxpop Info					
Filing Description:	Emergency Motion to Modify Safekeeping Order				
Filing Type:	M - Motion Filed				
Filing Status:	accepted				
Document Name	Document Type				
1.pdf	Lead (Public document)				
1 - A.pdf	Attachment (Public document)				
1 - B.pdf	Attachment (Public document)				
		E-Service Info	Cancel Filing		
Filing Description:	Proposed Supplemental Order on Safekeeping ADMPROP - Proposed Order Filed				
Filing Type:	ADMPROP - Proposed Order Filed				
Filing Status:	accepted				
Document Name	Document Type				
1 ORDER.pdf	Lead (Public document)				
		E-Service Info	Cancel Filing		

(Original Action Record of Proceedings (“Record”), p.35.)

Thereafter, someone within the court system *sua sponte* changed all of Allen’s filings to “confidential” and excluded all of them from public access without any notice to or from Allen. (Record, p.15.) From that point through the end of June 2023, more than 125 separate court records were excluded from public access. (Record, pp.15-23)

But not a single one of these excluded documents includes the mandatory Access to Court Records “ACR Form identifying the specific Rule 5 ground(s) upon which exclusion is based.” IND. ACCESS TO COURT RECORDS, Rule 5(B). As of today, there is no way for the public to know the grounds on which any document was

excluded.

On June 8, 2023, a member of the media requested access to these excluded court records. (Record, pp.38-40.) On June 28, 2023, the trial court ruled on that motion and explained that all of the 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’.” (Record, p.42.) This “Gag Order,” however, only governs “extrajudicial” comments, not court filings. (*Id.*)

The trial court then allowed the parties to “agree” to exclude the **entirety** of certain records from public access, even though both actions are prohibited by the Access to Court Records Rules. (*Id.*)

First, “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*.

Second, unless everything in the document can be properly excluded from public access, the document cannot be excluded in its entirety. Rather, there must be a public access version and a non-public access version, and the public access version has the **confidential** information redacted but all of the non-confidential information in the document is still publicly available. *Id.*

With regard to the other documents that have been improperly excluded from public access, the trial court did not order the Clerk to make the documents on the CCS public—something that clerks do all the time—which would have allowed the public to identify the filings they wanted and then access those particular filings.

Instead, the trial court created a link at <https://allensuperiorcourt.us/Delphi/>

and uploaded a Zip Drive containing the 118 documents. (*Id.*) Although the 118 documents were all filed sometime between April and June, every document in the Zip Drive has the date of 6-27-2023. (Record, pp.47-50.) More problematic, the file names have no clear identifying information to let someone know what that document actually is, and none of the exhibits to a particular filing are anywhere near the actual filings:

-  1 - B.pdf 6-27-2023 13.34.25 241650327 F65620EE-DFF2-43C7-B081-DF715418EDB5.pdf
-  1 -A.pdf 6-27-2023 13.34.25 241650317 8569FBB3-07A5-429A-961E-CD6BA5B2A208.pdf
-  1 a.pdf 6-27-2023 13.34.25 245978951 EC8CCA60-64CA-440E-872F-E70E0ADD3FF4.pdf
-  1 a.pdf 6-27-2023 13.34.25 247821820 314390B1-8E64-4B51-98F4-83C62818D5FE.pdf
-  1 a.pdf 6-27-2023 13.34.25 248072110 215498F2-BADC-4B45-8787-4704A0924C10.pdf
-  1 b.pdf 6-27-2023 13.34.25 248072159 77B1DABC-4D53-4D2A-B456-E9557B3D3F56.pdf
-  1 Notice.pdf 6-27-2023 13.34.25 245979007 3A739330-7121-4A22-95A9-2265275744CD.pdf
-  1 ORDER MENTAL HEALTH RECORDS.pdf 6-27-2023 13.34.25 248493662 96A63822-9120-4941-9B55-6CAD513AACFD.pdf
-  1 ORDER.pdf 6-27-2023 13.34.25 241650337 CC3A2999-1D03-4750-93FA-25A0B0A37AA6.pdf
-  1 Order.pdf 6-27-2023 13.34.25 245579304 D943AAE2-26A8-4500-9A72-4863C6931BA5.pdf
-  1 Order.pdf 6-27-2023 13.34.25 247537005 A6E5D162-5240-413A-B6D2-3B630F240BFF.pdf
-  1.pdf 6-27-2023 13.34.25 241650344 BFEBA837-E5F7-4E83-AFB1-22866EEAE6B4.pdf
-  1.pdf 6-27-2023 13.34.25 245579329 910EC0B5-85A0-423C-8459-B970279471EA.pdf
-  1.pdf 6-27-2023 13.34.25 247536986 D63595C9-77F2-4BF7-80A1-69CE22A7C9D2.pdf
-  1.pdf 6-27-2023 13.34.25 248072134 E627ED3A-6D3C-457A-A7BD-600D95A14694.pdf
-  Allen 1.pdf 6-27-2023 13.34.25 244331991 A39C16E3-A251-42FC-AA36-0694DF43C391.pdf
-  Allen 2.pdf 6-27-2023 13.34.25 244332007 F6BD31C6-C838-488B-BBC0-945B7CD71347.pdf
-  Allen 3.pdf 6-27-2023 13.34.25 244332028 1E3054DF-D34B-491D-8D58-7FF3189AC549.pdf
-  Allen 4.pdf 6-27-2023 13.34.25 244332059 7AF40FCF-2A00-46F5-90AB-69751D5CCB6B.pdf
-  Allen Motion PO Discovery.pdf 6-27-2023 13.34.25 236617205 7DB56F92-EA58-4E2B-AE3C-819529C301F6.pdf
-  Allen Motion.pdf 6-27-2023 13.34.25 244332121 AF8A612D-FBCC-40E0-8A63-A644EE41CA48.pdf
-  Allen Order.pdf 6-27-2023 13.34.25 236090832 84C247E4-E872-4B9B-BD94-91D29AC1FCF9.pdf
-  Allen Order.pdf 6-27-2023 13.34.25 244332125 AE4D4E2D-FAB6-4705-B1F5-A561EFF57616.pdf
-  Allen prohibit 1.pdf 6-27-2023 13.34.25 244331943 3529A14E-A04B-4B8E-A3C3-B2E4276725C0.pdf
-  Allen Prohibit 2.pdf 6-27-2023 13.34.25 244332093 8575925E-559F-4B57-B79B-7A7C26B4344B.pdf
-  Allen Proposed Order.pdf 6-27-2023 13.34.25 236617230 67033E6D-28DC-4FDB-98A8-3549C59BA30A.pdf
-  Allen- State's Response to Petition.pdf 6-27-2023 13.34.25 235410921 D45F367C-002A-441A-9434-76620EEED428.pdf
-  Allen State's Response.pdf 6-27-2023 13.34.25 236616913 FB2623AB-2BFD-4232-A8A6-4817626E6CA8.pdf
-  Allen.pdf 6-27-2023 13.34.25 232581568 67147572-68C3-4B44-8466-2B6225F08B3C.pdf
-  Allen.pdf 6-27-2023 13.34.25 236090816 112BCF30-3B20-4770-BB62-AD9847138FC7.pdf
-  Appearance by Attorneys - Aaron M. Ridlen; Hannah M. Deters.pdf 6-27-2023 13.34.25 248611341 BC3D323D-1DFD-4DF3-B0
-  Appearance Filed 6-27-2023 13.34.25 229656013 1460A7C0-EB8A-4E77-9CD8-D75D4F2FD160.pdf
-  APPEARANCE.pdf 6-27-2023 13.34.25 228795634 7F0ECD2E-54AF-49B6-9C0C-EAE3C6102502.pdf
-  Change of Venue 2022.11.28.pdf 6-27-2023 13.34.25 229908602 B58D3BC4-4CAA-44F0-BCD9-0BA039F42707.pdf
-  Co-Counsel Appearance 2022.11.14.pdf 6-27-2023 13.34.25 228754043 E0458715-E6F4-4075-ACCF-D7CCDEB701FC.pdf
-  Convert. order.pdf 6-27-2023 13.34.25 245979488 94D7DBC1-C20D-4D47-B533-321CC8951474.pdf
-  Convert.pdf 6-27-2023 13.34.25 245979483 4CE4BB2A-CD30-4995-85AD-98D185740E74.pdf
-  Correspondence tofrom Court Filed 6-27-2023 13.34.25 228419830 3AE8937B-2D5F-4B71-B6AF-2733FB3F8D9A.pdf

(Record, p.47.) Moreover, many of the file names are so long that they cannot be extracted, which makes the document inaccessible. (*Id.*)

The actual CCS in this case still has every one of the 118 documents excluded from public access. (Record, pp.15-23.) This means 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.

In addition to the items the trial court allowed the parties to exclude by agreement, there are two more 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.22-23.¹)

More recently, on September 25, 2023, the State filed a motion to exclude **all** future filings from public access until the court conducts an *in camera* review of each filing—and the State then excluded even **that** motion from public access. (Record, p.25.²) The trial court has neither ruled on this Motion nor set the matter for an ACR Rule 6 hearing. (Record, pp.25-33.)

¹ These filings have been excluded from public access below and, therefore, Allen is not including them as exhibits in this Original Action. This Court can, however, access the content of these confidential filings via Odyssey if desired.

² See fn1, *supra*.

I.B. Allen files a *Franks* Memorandum of Law and the trial court *sua sponte* removes it from the public CCS without notice or hearing.

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).

Allen filed three documents with this *Franks* filing: (1) Motion; (2) Memorandum in Support; and (3) Exhibits List:

Lead Document			
File Name	Description	Security	Download
Franks Motion.pdf 106.19 KB	Franks Motion.pdf	Public document	Original File Court Copy

Attachments			
File Name	Description	Security	Download
Memorandum in Support of Motion.pdf 1.21 MB	Memorandum in Support of Motion.pdf	Public document	Original File Court Copy
Exhibits list.pdf 92.43 KB	Exhibits list.pdf	Public document	Original File Court Copy

(Record, p.52.)

The summary above shows that the Memorandum was filed as a public document, but someone within the court has removed/excluded the 136 page *Franks* Memorandum from the CCS altogether—again with no notice to Allen:

09/18/2023  **Motion for Hearing Filed**

 Franks Motion.pdf

 Exhibits list.pdf

Motion for Franks Hearing

Filed By: Allen, Richard M.

File Stamp: 09/18/2023

(Record, pp.24, 54-136.)

I.C. The trial court attempts to effectuate the removal of Allen’s chosen counsel over his objection and without his consent or approval.

In early October 2023, counsel for Allen learned that Mitchell Westerman had surreptitiously and without authorization photographed crime scene evidence in this case that was being stored in Allen’s attorney Andrew Baldwin’s office and then disseminated those photographs without Attorney Baldwin or Allen’s other attorney Brad Rozzi’s consent. (Record, p.191.)

Attorneys Rozzi and Baldwin immediately informed Allen of this theft and Allen unequivocally informed the trial court that he still wanted these attorneys to represent him and that their representation to-date had been in his “best interest”:

October 11, 2023

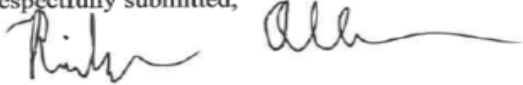
The Honorable Frances C. Gull
Allen County Superior Court – Criminal Division
715 Calhoun St #208
Fort Wayne, IN 46802

RE: State of Indiana vs. Richard Allen
Cause No. 08C01-2210-MR-00001

Dear Judge Gull:

Please accept this letter as confirmation that I have communicated with my Attorney, Bradley A. Rozzi, regarding the circumstances regarding the leaking of sensitive information in this case. I am aware that images of crime scene photos and other related documents were taken by a friend and former employee of Attorney Baldwin, at Attorney Baldwin’s office. I have discussed with Attorney Rozzi the potential impact that the distribution of these documents could have on my defense. Attorney Rozzi has also communicated to me that the Prosecutor has requested that my Attorneys be disqualified from representing me in this case. I do not want this to happen. I want Mr. Baldwin and Mr. Rozzi to continue to represent me until this case is resolved, one way or the other. I believe they are acting in a manner that is in my best interest. I appreciate your time and consideration in this matter.

Respectfully submitted,



Richard M. Allen
Westville Correctional Facility

(Record, p.195.)

Attorneys Rozzi and Baldwin also immediately informed the Prosecutor and trial court of this theft. (Record, pp.191-193.) The trial court set a hearing for 2:00 pm on October 19, 2023 to discuss “these recent developments.” (Record, p.191.)

Despite Allen’s express instructions to the contrary, on October 12, 2023, the trial court *sua sponte* ordered Attorneys Rozzi and Baldwin to “cease work on Mr. Allen’s case” and scheduled an in-chambers meeting for 12:30 pm October 19th, 2023 (before the hearing scheduled for 2:00). (Record, p.191.) This 12:30 meeting is not noticed anywhere on the CCS. (Record, pp.26-29.)

Prior to this meeting, Attorney Baldwin filed a Memorandum explaining the circumstances regarding the photographs and the fact that not only was Attorney Baldwin “snookered and abused” and “betrayed” by the theft, but—more important—nothing “has been disclosed that won’t be disclosed at trial or hearings.” (Record, pp.197-201.) Attorney Rozzi similarly provided the trial court with a letter outlining what had happened and enclosed the above letter from Allen stating he still wanted Attorneys Rozzi and Baldwin as his attorneys. (Record, pp.26, 230-31 n.1³.)

During the October 19th, 2023 in-chambers meeting—at which Allen was not present even though he was in the courthouse and his presence had been requested—the trial court read a prepared statement to Attorneys Rozzi and Baldwin accusing them of “gross negligence” in their capacity as Allen’s counsel. (Record, pp.223-24.) These purported acts of “gross negligence” included:

³ See fn1, *supra*.

- efforts by the defense to level the playing field with a press release after the prosecution filed multiple releases;
- filing motions⁴ to protect Allen’s basic human rights— motions that the trial court either granted or that remain pending;
- filing the *Franks* memorandum that the trial court believed contained “improper statements”;
- filing a tort claim notice to preserve Allen’s rights to seek redress from conditions and treatment related to his incarceration; and
- a third-party’s unauthorized photographing of crime scene evidence, which neither attorney had knowledge of nor participated in.

(Record, pp.223-24.)

After reading from this prepared statement, the trial court then informed Attorneys Rozzi and Baldwin that they had two options:

- 1) they “voluntarily” withdraw their appearances immediately; or
- 2) the trial court would read the prepared statement into the record and then disqualify both attorneys in open court.

(Record, p.230.)

Attorneys Rozzi and Baldwin were shocked and asked to meet with Allen before making any decisions. (*Id.*) Allen re-affirmed that he did not believe Attorneys Rozzi and Baldwin had engaged in **any** negligence, much less **gross** negligence. (*Id.*) Allen also re-affirmed his desire to move forward with Attorneys Rozzi and Baldwin as his sole counsel and objected to the trial court’s attempts to strip him of that counsel. (*Id.*)

After speaking with Allen, Attorneys Baldwin and Rozzi returned to chambers

⁴ (Record, p.202-218.)

and articulated that they believed the trial court had engaged in an unconstitutional ambush of defense counsel without due process. (Record, p.231.) They informed the trial court that any withdrawal would be involuntary and under duress because the trial court had made clear that if they did not agree to withdraw, the Court would disqualify them in open court. (*Id.*)

Attorneys Baldwin and Rozzi believed this placed them in an “impossible ethical bind.” (Record, p.232.) If they did not withdraw in chambers, “the trial court would publicly disparage their representation of the accused, framing their advocacy on his behalf as ‘gross negligence,’ casting both counsel and the merits of their client’s defense in a negative light.” (*Id.*)

They believed such a public statement from the trial court “risked tainting the jury pool, harming their client’s defense, undermining their professional relationship with the client, and possibly creating an actual conflict for their continued representation.” (*Id.*) Faced with this dilemma, Attorney Rozzi informed the trial court that he would file papers regarding his withdrawal at a later date and Attorney Baldwin orally made a motion to withdraw. (*Id.*)

I.D. Allen instructs his chosen counsel to make filings on his behalf and the trial court orders the Clerk to “remove” those filings from both the CCS and the electronic case file.

After the events of October 19, 2023, Allen instructed Attorney Rozzi to file a Notice on October 25, 2023, indicating that Allen did **not** want him to withdraw as counsel. (Record, p.229-232.) This Notice informed the trial court that there were “no circumstances under Rule 1.6 of the Indiana Rules of Professional Conduct which warrant the withdrawal of Attorney Rozzi’s representation of Defendant Allen” and

that everything cited by the trial court as constituting the alleged “gross negligence” was either not attributable to Attorney Rozzi or was the product of “ethical lawyering in the best interests of the clients defense and mental and physical well-being.” (Record, pp.225, 232.)

This Notice also stated that Allen was asserting his constitutional right to counsel of his choice and wanted Attorney Rozzi “to move forward with the representation of Defendant Allen until a final disposition of this matter.” (Record, p.232.) The Notice further pointed out that unless Attorney Rozzi was allowed to continue as counsel of record, the jury trial set to commence on January 8th, 2024—which was already a full fifteen months after Allen’s arrest—would have to be continued, which would unreasonably prejudice Allen. (*Id.*)

Allen also instructed Attorney Rozzi to file a motion seeking the trial court’s recusal and a motion asking for a continuance of the October 31, 2023 hearing because of the many unresolved pending motions in the case. (Record, pp.220-27, 235-36.)

Notwithstanding these filings, on October 27, 2023, the trial court issued the following Order declaring that Attorney Rozzi is “no longer counsel of record” and “ordering” the Clerk to “remove” all of Allen’s filings from both the CCS and the electronic case file:

Court notes filings by former Attorney Rozzi on October 25 and 26, 2023, and takes no action. Attorney Rozzi withdrew from this matter on October 19, 2023, and is no longer counsel of record. These filings, therefore, are ordered stricken from the record. Clerk of the Court ordered to remove the pleadings from the electronic case file and the Chronological Case Summary as being filed in error.

(Record, p.238.)

GROUNDS FOR WRITS OF MANDAMUS AND PROHIBITION

II. Original action standards

II.A. The trial court must act contrary to an “absolute duty” “imposed by the law.”

Original actions provide extraordinary remedies and, accordingly, “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. Commons v. Pera*, 987 N.E.2d 1074, 1076 (Ind. 2013); *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.”).

Writs are issued by this Court in a wide variety of circumstances, such as to enforce court rules;⁵ effectuate the disqualification of a trial court;⁶ order a criminal defendant be released from jail on his own recognizance;⁷ and address a trial court’s failures to adhere to statutory mandates.⁸

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).

⁵ *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).

⁶ *State ex rel. Pemberton v. Porter Superior Court No. 4*, 912 N.E.2d 377 (Ind. 2009).

⁷ *State ex rel. Bramley v. Tipton Circuit Court*, 835 N.E.2d 479 (Ind. 2005).

⁸ *State ex rel. W.A. v. Marion Cnty. Superior Court, Juvenile Div.*, 704 N.E.2d 477 (Ind. 1998).

II.B. Condition precedent for Original Actions

Counsel recognizes that Original Action Rule 2(A) 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. This, however, is a practical impossibility in this case.

Asserting his Sixth Amendment rights, Allen has only consented and authorized Attorneys Rozzi and Baldwin to represent him in the trial court below and only they are authorized to make filings on his behalf in that court.⁹ As noted above, however, the trial court refuses to accept any filings made by these attorneys and orders the Clerk to “remove” anything they file.

Accordingly, there is an impossibility of performance of the condition precedent. 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., Rule 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.)

The facts and current posture of this case rise to this level of extraordinary circumstance and Allen therefore requests that this Court similarly excuse the condition precedent otherwise required for original actions.

⁹ After ordering Allen’s filings removed—and over Allen’s objections—the trial court appointed him new counsel. (Record, p.31.) Allen does not accept this appointment and he has not authorized these new attorneys to act on his behalf in any manner.

III. 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.

III.A. The Access to Court Records and Trial Rules require court records to be publicly accessible.

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).

In addition, this Court has unequivocally mandated that Indiana court records¹⁰ are to be open to and accessible by the public, noting “there are strong societal reasons for allowing Public Access to Court Records and denial of access could compromise the judiciary’s role in society, inhibit accountability, and endanger public safety.” A.C.R. 1, *Commentary* (these rules are designed “to provide maximum public accessibility to Court Records”)¹¹; Rule 4(A, B) (“A Court Record is accessible to the public except as provided in Rule 5... This rule applies to all Court Records, regardless of the manner of creation, method of collection, form of storage, or the form in which the record is maintained.”).

To further this mandate, the Access to Court Records Rules start “from the **presumption** of open Public Access to Court Records.” *Id.* 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:

¹⁰ “‘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).

¹¹ The Access to Court Records Rules recodify the Rules previously found in Administrative Rule 9.

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.¹²

A.C.R. Rules 4, 5, 6.

As noted above, parties may not ever agree to exclude a court record that otherwise does not satisfy Rule 5 or 6: “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*. See also *Travelers Cas. & Surety Co. v. U.S. Filter Corp.*, 895 N.E.2d 114 (Ind.2008); *Angelopoulos v. Angelopoulos*, 2 N.E.3d 688 (Ind.Ct.App.2013); *Allianz Ins. Co. v. Guidant Corp.*, 884 N.E.2d 405 (Ind.Ct.App. 2008).

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

¹² These requirements include a verified request, public notice, public hearing, and a written order that “[f]inds the requestor has demonstrated by clear and convincing evidence that any one or more of the requirements of Rule 6(A) have been satisfied”; “[b]alances the Public Access interests served by this rule and the grounds demonstrated by the requestor”; and “[u]ses the least restrictive means and duration when prohibiting access.” A.C.R. 6(D). Rule 6(A) requires the requestor must demonstrate that: “(1) The public interest will be substantially served by prohibiting access; (2) Access or dissemination of the Court Record will create a significant risk of substantial harm to the requestor, other persons or the general public; or (3) A substantial prejudicial effect to ongoing proceedings cannot be avoided without prohibiting Public Access.” A.C.R. 6(A).

excluded and why.” A.C.R. 5, *Commentary*.

Similarly, 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 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*.

Finally, “If a court determines that Court Records are excluded from Public Access without first satisfying 5(A), (B), (C), (D), or (E), the Court Records shall be made available for Public Access seventy-two hours after notice to the parties and any person affected by the release, unless the requirements of Rule 6 are thereafter satisfied.” A.C.R. 8(C)(2).

III.B. The trial court continues to violate these absolute duties by improperly removing documents from the CCS and excluding public access to documents filed in this case.

III.B.1. Removal of court records from the CCS is never allowed.

The trial court “failed to perform a clear, absolute, and imperative duty imposed by” the Trial Rules and Access to Court Records Rules when it *sua sponte* removed/excluded the *Franks* Memorandum and also ordered the Clerk to “remove” all of Allen’s most recent filings from both the CCS and the electronic case file. *State ex rel. Seal v. Madison Superior Court No. 3*, 909 N.E.2d 994, 995 (Ind. 2009).

This is simply not allowed under either set of Rules. The trial court’s beliefs that these filings are either improper or unauthorized does not justify the removal or exclusion of the court records from the CCS altogether.

This Court need look no further than how Indiana’s appellate courts handle these situations. If an appellate court concludes a filing is improper or unauthorized, it issues an Order or Opinion stating the same and does not consider the filing, but it does not **remove** or **exclude** that filing from the CCS.

For example, most recently in *City of Carmel, Indiana v. Duke Energy Indiana, LLC*, 22A-EX-00088, the IURC filed a Brief of Appellee. 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: “By separate order issued today, we grant Carmel’s motion to strike the brief of the IURC and its motion for leave to file a reply brief in support of its motion to strike. In addition, we dismiss the IURC as a party to this appeal ... [because] it is not a proper party on appeal from its own decision.” *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 Appellate Court did not thereafter instruct the Appellate Clerk to remove the IURC’s filings from the CCS; those filings are still there and accessible to the public because that is what the Access to Court Records Rules require.

The bottom line is that the trial court may enter whatever order it deems appropriate to address any court records the court believes to be improper or unauthorized and it may inform the parties and public that it will not review or consider such filings. What the Trial Rules and the Access to Court Records Rules do **not** allow is for those filings to be *sua sponte* removed or excluded from public access.

Writs of Mandamus and Prohibition are therefore warranted to ensure the court

records are placed back on the CCS, remain publicly accessible, and that these actions do not happen again.

III.B.2. There remains a lack of meaningful public access in this case.

As noted above, although Allen’s April 5, 2023 filings were marked as public documents, someone within the court system *sua sponte* changed all of the filings to “confidential” and excluded all of them from public access. The next three months of court records were all improperly excluded from public access as well (also without the mandatory ACR Form).

On June 28, 2023, the trial court explained that all of the above pleadings 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,’” which the trial court appears to recognize was improper because the trial court created a link to <https://allensuperiorcourt.us/Delphi/> containing a Zip Drive with 118 documents uploaded.

This did not satisfy the trial court’s duties under the Access to Court Records Rules. First, the trial court allowed the parties to “agree” to exclude the entirety of certain records from public access. Section II.A., *supra*, sets out how that violates Rule 5 of the Access to Court Records Rules in two different ways.

Second, the Zip Drive does not provide meaningful public access. The file names for the 118 documents have no clear identifying information to enable someone to recognize what the document actually is; every document has the same date of 6-27-2023; and none of the exhibits to a particular filing are connected to the actual filings.

(Record, pp.47-50.)

The actual CCS in this case still has every one of the 118 documents excluded from public access. (Record, pp.15-23.) As noted above, this means 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.

This does not provide the public access mandated by the Access to Court Records Rules. 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.)

A Writ of Mandamus is needed ordering that the 118 documents must be made publicly accessible on the CCS itself and that the two documents listed above may only remain excluded upon compliance with the Access to Court Records Rules.

CONCLUSION

If there was ever a time when the openness mandated by the Trial Rules and Access to Court Records Rules was critical, it is the present case—one of the most high-profile cases this state has ever seen. For many Hoosiers this is the first time they have followed the workings of a court in this state.

Yet the Trial Rules and Access to Court Records Rules have been repeatedly violated, leaving the public and the media in the dark. A writ of mandamus or prohibition is appropriate to ensure that, going forward, this Court's mandates regarding public access are followed without exception.

Respectfully submitted,

By: /s/ Maggie L. Smith

Maggie L. Smith, #19572-53
FROST BROWN TODD LLP
111 Monument Circle, Suite 4500
Indianapolis, IN 46244-0961
317-237-3800
mlsmith@fbtlaw.com

/s/ Cara S. Wieneke

Cara S. Wieneke, #2437449
WIENEKE LAW OFFICE LLC
PO Box 368
Brooklyn, IN 46111
317-331-8293
cara.wieneke@gmail.com

/s/ Jessie A. Cook

Jessie A. Cook, 3715-84
Attorney at Law
3650 N. Washington Blvd.
Indianapolis, Indiana 46205
812-232-4634
jessieacook@icloud.com

Attorneys for Relator Richard Allen

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:

The Honorable Frances C. Gull, Special Judge
Carroll Circuit Court
101 W Main St #206
Delphi, IN 4692
Frances.Gull@allensuperiorcourt.us

Robert Cliff Scremin
116 E Berry St, Suite 1200
Fort Wayne, IN 46802
robert@robertscreminlaw.com

William Santino Lebrato
116 E Berry St, Suite 500
Fort Wayne, IN 46802
william.lebrato@co.allen.in.us

Nicholas Charles McLeland
101 W. Main St., Suite 204
Delphi, IN 46923
nmcleland@carrollcountyprosecutor.com

Theodore Rokita
Indiana Attorney General
200 West Washington Street, Room 219
Indianapolis, IN 46204
efile@atg.in.gov

/s/ Maggie L. Smith

Maggie L. Smith

FROST BROWN TODD LLP
111 Monument Circle, Suite 4500
Indianapolis, IN 46244-0961
317-237-3800