

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, NORTH, SS.

HILLSBOROUGH COUNTY SUPERIOR COURT

STATE OF NEW HAMPSHIRE

V.

ADAM MONTGOMERY

216-2022-CR-577

**MOTION TO KEEP THE PROBABLE CAUSE AFFIDAVIT IN DOCKET 216-2022-CR-  
2372 UNDER SEAL**

NOW COMES the defendant, Adam Montgomery, by and through counsel, Caroline L. Smith, Esq., and Paige Pihl Buckley, Esq., and respectfully requests this Honorable Court keep under seal the probable cause affidavit supporting the arrest warrant in Docket 216-2022-CR-2372 charging second degree murder for the death of Harmony Montgomery, and other related offenses, due to the insurmountable prejudice unsealing the affidavit would cause to the trial in the above-captioned docket. In support of this request, the following is stated:

1. The defendant has been indicted in this docket with Armed Career Criminal (ACC) and related offenses relating to guns discovered to be missing from the Frain residence on October 2, 2019. Trial in this matter was originally scheduled for November of 2022 but was continued to May 31, 2023.
2. Prior to and during the pendency of this matter, Mr. Montgomery was a person of interest in the investigation of the disappearance of Harmony Montgomery. Throughout 2022, there was continuous media coverage into the disappearance, including news media, social media, and billboard announcements in Manchester and along I-93. On August 11, 2022, the Attorney General held a press conference to announce that the investigation into the disappearance of Harmony had changed to a murder investigation.
3. On October 24, 2022, just two weeks before Jury Selection in the above-captioned matter, Adam Montgomery was arrested and charged with Second Degree Murder in the death of Harmony -- docket #216-2022-CR-2372. He also faces charges of Falsifying Evidence, Abuse of a Corpse, and Witness Tampering. He has pled not guilty.

4. On March 31, 2023, David Sakowich, Managing Editor at WMUR-TV filed a Motion to Unseal the Probable Cause Statement in docket #216-2022-CSR-2372 which was filed the same day as the complaints in that docket. Defense objected to his motion for three reasons:

- a) The application for the arrest warrant is an ex parte proceeding brought by the police prior to the case commencing – it is not a document the NH Rules of Criminal Procedure, Rule 50(a) requires be available for public inspection;
- b) Distinguishable from an affidavit to be filed when there is no arrest warrant, or no arrest warrant signed by a Judge, there is no ruling providing for the filing of an arrest warrant probable cause affidavit upon the docketing of a complaint after arrest; and
- c) The prejudice to the defendant, especially in his upcoming Armed Career Criminal trial, scheduled for Jury Selection May 31, 2023, cannot be overstated.

5. For these reasons, but most importantly due to the prejudice to Mr. Montgomery in his upcoming May trial, the need to keep the affidavit under seal in Docket #216-2022-CR-2372, is equal in the ACC and the homicide case.

6. Generally, an arrest warrant is sought by police after a matter has been investigated and probable cause is believed to exist that a crime has been committed and that the defendant is the person who committed the crime. Complaints are not filed and a criminal case not opened until after the arrest is made. There may or may not be a substantial period of time between the approval of the arrest warrant and the actual arrest and docketing of the complaints.

7. This matter was opened on the above docket with the Court on October 25, 2022. Mr. Montgomery was arrested on murder and related charges on October 24, 2022. Thus, it is clear that the arrest warrant and accompanying affidavit were approved and executed prior to this docket commencing in Superior Court.

8. Pursuant to New Hampshire Rules of Criminal Procedure, Rule 50(a)(1) the general rule is that “all pleadings, attachment to pleadings, exhibits submitted at hearings or trials, and other docket entries (hereinafter referred to collectively as “documents”) shall be available for public inspection” with an exception for confidential or privileged documents submitted for in camera review. In other words, filings as a part of the adversarial process leading up to and including trial are public. The arrest warrant and accompanying affidavit are not pleadings, attachments to pleadings, or exhibits for a hearing or trial to which the defendant can challenge or present his side. They are not documents required to be available to the public. Rather, they are part of an *ex*

*parte* communication with a judge and police and/or the State, in which the defendant cannot participate. A one-sided summary of the police investigation presented *ex parte* to a judge in support of an arrest warrant is not a document that implicates the adversarial process but, rather, is tantamount to a Court sanctioned press release.

9. Nor is the public entitled as a matter of right to a summary of the investigation to support probable cause. When a case is brought through direct indictment before a Grand Jury, no Probable Cause Warrant supporting the arrest is filed with the Court. Grand Jury proceedings are secret. Thus, the information available to the public from the Court is through pleadings, attachments to pleadings and exhibits, hearings and orders, and trial.

10. In this case, Mr. Montgomery could have been arrested through direct indictment without any filing with the Court. Mr. Montgomery was incarcerated and being held on preventative detention on two separate dockets. Trial on one docket, Armed Career Criminal (ACC) and related charges, was scheduled for November, but was continued days after the complaints on the homicide charge were filed in another docket that had not yet been scheduled for trial. The Grand Jury issued the indictments in this docket on January 20, 2023. Nothing prevented the State from proceeding by direct indictment.

11. Affidavits supporting arrest warrants are summaries of the investigation in a manner to support probable cause to arrest a defendant generally prepared and submitted by police. Such an affidavit generally does not contain inconsistencies in the investigation, nor does it address potential defenses. A one-sided recitation of the investigation by the investigators should not be public any more than the State should be able to file its discovery, such as a transcript of a witness or defendant's statements, test results or photographs, unless as an attachment to a pleading or an exhibit relevant to a pleading that the Court will be addressing. Here, the affidavit is not only essentially a narrative of the State's case but has the added heightened credibility of a Court document signed by a Judge.

12. In addition, the Rules of Criminal Procedure set forth when and what should be filed regarding arrest and arrest warrants. When a person is arrested pursuant to a warrant, the filings are different than when arrested without a warrant.

13. NH Rules of Criminal Procedure, Rule 3(c) provides that "When a person is arrested with a warrant, the complaint, and the **return form** documenting the arrest shall be filed in a court of competent jurisdiction without unreasonable delay." (Emphasis added.) Nothing in this rule

suggests that when a person is arrested on a warrant, the **warrant affidavit** becomes a part of the criminal court docket. Instead, Rule 3(c) provides for the **return form** to be filed. Compare NH Rules of Crim Pro, Rule 10 (b) (providing that where a person is “ arrested without a warrant and is held in custody, or if the defendant was arrested pursuant to a warrant **that was not issued by a judge** and is held in custody, the court shall require the state to demonstrate, by **affidavit or by statement filed under oath** if filed electronically, probable cause for arrest.”) (Emphasis added.)

14. For the commencement of a case to include not only the charge but an unsolicited narrative of the police investigation is improper and prejudicial because it is given heightened credibility as a court filing, and especially in the case of the death of a child, the prejudicial effect of tainting the jury pool in the case would deny a defendant his right to due process and a fair trial. When, however, as here, the defendant is facing trial on unrelated matters prior to the trial on the death of a child, the prejudice cannot be understated or overcome.

15. Some prejudice has already occurred to Mr. Montgomery in this ACC case based on the public nature of the investigation into the whereabouts of Harmony Montgomery and by the homicide and related charges brought October 25, 2022. Because of this, the Court has agreed additional measure were needed during jury selection.

16. There is additional and unsurmountable prejudice, however, to public release of the affidavit less than two months before Mr. Montgomery’s trial in this matter, which is scheduled for Jury Selection at the end of May. The publicity surrounding the investigation into the whereabouts of Harmony Montgomery already had the great potential of tainting the jury pool and prejudicing the ACC trial. Publication of a narrative of the State’s case , detailing why investigators believe there is probable cause to believe Adam was responsible for the death of Harmony Montgomery, a 5-year-old, will create insurmountable prejudice and pollute the jury pool to such an extent that a fair trial is impossible. Where, as here, the subject matter of the case from the affidavit will not be addressed in the instant case, Mr. Montgomery is not able to challenge, explain or overcome, the allegations in that affidavit. Even if jurors state they can put aside the information obtained by the media, the allegations will hang out there in the minds of those jurors, unaddressed, unanswered.

17. Publication of the probable cause affidavit in Docket #216-2022-CR-2372 would violate Mr. Montgomery’s rights to due process and a fair trial as guaranteed by the fifth, sixth and fourteenth amendments to the U. S. Constitution and Part 1, Article 15 of the N.H. Constitution.

Accordingly, undersigned counsel requests that this Honorable Court:

- A. Keep the Probable Cause Affidavit in 216-2022-CR-2732 under seal; or
- B. Hold a hearing on this matter if the Court is not inclined to do so; and
- C. Any further relief in favor of Mr. Montgomery that the Court deems equitable and just.

Respectfully submitted,

/s/ Caroline L. Smith  
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**CERTIFICATE OF SERVICE:**

I hereby certify that a copy of this MOTION has been forwarded to the Office of the Attorney General on this 4<sup>th</sup> day of April 2023.

/s/ Caroline L. Smith  
Caroline L. Smith, Esq.