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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO
UNLIMITED JURISDICTION

IN RE SEALED SEARCH WARRANT RECORDS	CASE NO. 2010-0034[1] **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION OF THE MEDIA TO UNSEAL SEARCH WARRANT RECORDS** Date: May 6, 2010 Time: 2:00 pm Dept.: 24 Courtroom: 2C Judge: Hon. Stephen M. Hall

Jason Chen is an online journalist who reported on a prototype Apple iPhone he obtained from someone who found it in a bar. On April 23, a computer crimes task force executed a search warrant on Chen's home, broke down his front door, and seized computers and other equipment. The execution of this search warrant on a journalist has created a public debate over, among other things, whether a basis existed to obtain such a warrant notwithstanding the provisions of the federal Privacy Protection Act, 42 U.S.C. § 2000aa, and a similar state law, Penal Code § 1524(g), that protect First Amendment rights by limiting the ability to issue search warrants against journalists.

[1] Court personnel informed the press that even the search warrant number is sealed. The press therefore reference the case number listed on the publicly available search warrant inventory.

The records that would help answer these questions include the affidavit submitted in support of the warrant and the return, which "shall be open to the public as a judicial record" once the warrant has been executed or 10 days after issuance. Penal Code § 1534. But despite this clear right of access, ***all*** records relating to the warrant have been sealed – and the clerk's office will not even release the order sealing the records or the warrant number. As far as the press can determine, these "judicial records" were sealed without satisfying either the procedural or substantive requirements for sealing judicial records mandated by the Supreme Court in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178 (1999), and codified in Rules of Court 2.500-2.501.

The Associated Press, Bloomberg News, CNET News (part of CBS Interactive), *Los Angeles Times*, Wired.com, the California Newspaper Publishers Association and First Amendment Coalition (collectively, the "press") therefore respectfully apply to unseal the sealed search warrant records so they may be restored to their proper place in the public court file. Otherwise, there is no way for the public to serve as a check on the conduct of law enforcement officers, the prosecutors and the courts and monitor to ensure compliance with the Fourth Amendment as well as the Privacy Protection Act and Penal Code § 1542(g). "[D]ocuments upon which the [court] bases a decision to issue a search warrant are judicial in character, for the decision to issue a search warrant is a judicial decision," and thus public access to those records is important because it "fosters important policy considerations, such as discouraging perjury, enhancing police and prosecutorial performance, and promoting a public perception of fairness." *PG Pub. Co. v. Commonwealth*, 614 A.2d 1106, 1108 (Pa. 1992); *see McClatchy Newspapers, Inc. v. Superior Court*, 189 Cal. App. 3d 961, 975 (1987) (the public's "interest in overseeing the conduct of the prosecutor, the policy, and the judiciary is strong indeed").

Where, as here, a right of access exists, "'access should be immediate and contemporaneous.'" *Mercury Interactive Corp. v. Klein*, 158 Cal. App. 4th 60, 92 (2007) (quoting *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994)). "The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Grove Fresh*, 24 F.3d at 897. The press therefore bring this application on an ex parte basis, having provided the notice required by Local Rules 9.8(B) and 3.19 and Rule of Court 3.1203. Keating Decl., ¶ 2-5.

I.

THE PUBLIC AND ITS SURROGATES IN THE PRESS HAVE A RIGHT OF ACCESS TO SEARCH WARRANT RECORDS

In this state, there is a constitutional right of access to court records, including search warrant records. "Both the federal (First Amendment to the United States Constitution) and the state (article I, section 2(a), California Constitution) constitutions provide broad access rights to judicial hearings and records." *Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106, 111 (1992). This right of access applies to all "the various documents filed in or received by the court" in criminal and civil cases, *id.* at 113, including search warrants and supporting affidavits. *Alarcon v. Murphy*, 201 Cal. App. 3d 1, 6 (1988) ("an affidavit supporting the issuance of arrest and search warrants – part of a court file – is a public record"); Penal Code § 1534 (after execution of the warrant or expiration of a 10-day waiting period, "[t]he documents and records of the court relating to the search warrant ... shall be open to the public as a judicial record"); California Criminal Law: Proc. & Prac. § 12.9 at 272 ("The arrest warrant is available to the public in the court where it is filed because it is a judicial record."). The Supreme Court confirmed the right of access to court records in civil and criminal cases, *NBC Subsidiary*, 20 Cal. 4th at 1209 n.25, and it is now mandated by Rule of Court 2.550.

Access to records in criminal proceedings is particularly important to maintain the public's sense of security in the workings of the criminal justice system. *See, e.g., Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("Openness ... enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."). Indeed, courts have recognized a constitutional right of access to search warrant affidavits precisely because "[s]ociety has an understandable interest not only in the administration of criminal trials, but also in law enforcement systems and how well they work." *In re Application & Affidavit for a Search Warrant*, 923 F.2d 324, 331 (4th Cir. 1991). While most members of the public cannot travel to the court to review the records for themselves, their constitutional right to monitor the proceedings in this case is protected by the press, which functions as "surrogates for the public" through their news reports about the case and the records at issue. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980).

II.

THE SEALING ORDER MUST BE VACATED BECAUSE NEITHER THE SUBSTANTIVE NOR THE PROCEDURAL REQUIREMENTS FOR SEALING HAVE BEEN MET

As judicial records, the search warrant records could not be sealed absent compliance with strict procedural and substantive safeguards. Because these requirements were not met, the sealing order is invalid and unconstitutional. The records should therefore be released without delay.

A. The Sealing Order Was Issued Without Notice Or Hearing And Has Itself Been Sealed, Preventing Public Review Of The Findings Required By *NBC Subsidiary* and Rule 2.550

The search warrant records were sealed – without notice or a hearing – apparently pursuant to an informal request from law enforcement officials or the prosecutor's office. California's Rules of Court, however, prohibit sealing of court records "based solely upon the agreement or stipulation of the parties," Cal. R. Ct. 2.551(a), and require that any "party requesting that a record be filed under seal must file a motion or an application for an order sealing the record. The motion or application must be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing." Cal. R. Ct. 2.551(b)(1). The First Amendment imposes the same requirements. *NBC Subsidiary*, 20 Cal. 4th at 1217-18.

Moreover, the First Amendment and Rules of Court provide that the court may order that a record be filed under seal only if it "expressly find[s]" that:

1. There exists an overriding interest that overcomes the right of public access to the record;
2. The overriding interest supports sealing the record;
3. A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
4. The proposed sealing is narrowly tailored; and
5. No less restrictive means exist to achieve the overriding interest.

NBC Subsidiary, 20 Cal. 4th at 1217-18; *Press-Enterprise v. Superior Court*, 464 U.S. 501, 510 (1984); Cal. R. Ct. 2.550(d). In the absence of such express written findings, the sealing order must be vacated. *See, e.g., South Coast Newspapers, Inc. v. Superior Court*, 85 Cal. App. 4th 866, 873 n.7 (2000) ("[T]he absence of ... findings [supporting a restraint on disseminating images of a criminal

defendant] would require that the order be vacated.") (citing *NBC Subsidiary*, 20 Cal. 4th 1178). In addition to "specifically stat[ing] the facts that support the findings," a sealing order must "[d]irect the sealing of only those documents and pages, or if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file." Cal. R. Ct. 2.550(e)(1).

In this case, the requirement that the Court support a sealing order with express factual findings has been entirely frustrated because the sealing order itself has also been sealed. Thus, even if the sealing order contained the required factual findings, they are meaningless because they cannot be reviewed and effectively challenged. The sealing of a sealing order undermines completely the core principles of openness and fairness that form the basis of the constitutional guarantees of access to judicial records. *See, e.g., Press-Enterprise*, 464 U.S. at 508; *Richmond Newspapers*, 448 U.S. at 572. Since none of the factual findings necessary to support the sealing of court records have been made on the public record, the sealing order is invalid and should be vacated immediately, and the records returned to the public court file.

B. Sealing Is Not Essential To Prevent A Probability Of Prejudice To An Overriding Interest And Thus Is Barred By The First Amendment, *NBC Subsidiary* And Rule 2.550

In any event, it would not have been possible for the Court to make the necessary factual findings to support sealing under the facts of this case. The threshold requirement for lawful sealing is the presence of an overriding interest supporting sealing. *NBC Subsidiary*, 20 Cal. 4th at 1217-18. No overriding interest requiring sealing has been identified in this case, and none exists. The search warrant, including an inventory of items seized, has already been executed and publicized. Disclosing the related search warrant records, including the affidavit and return, would pose no risk of destruction of evidence, and the right to a fair trial of any potential defendant who might be charged in this case can hardly be said to be implicated where it is the prosecution that appears to have requested sealing and where Mr. Chen has himself disseminated records related to this case.

Even if the sealed records contained information that might be potentially prejudicial to a criminal defendant in this case – though there is no indication of that – the release of such information months or years before any trial cannot meet the extremely high threshold necessary to

justify sealing that information. To justify continued sealing, "'it is not enough that publicity might prejudice one directly exposed to it.'" *Press-Enterprise v. Superior Court*, 22 Cal. App. 4th 498, 504 (1994) (citation omitted). Rather, "'the publicity must threaten to prejudice the entire community so that twelve unbiased jurors can not be found.'" *Id.* (reversing order sealing grand jury transcript even though it contained information a juror might remember and be prejudiced). Even "pervasive publicity, without more, does not automatically result in an unfair trial." *Seattle Times v. U.S. Dist. Court*, 845 F.2d 1513, 1517 (9th Cir. 1988). That is because many potential jurors do not see and thus "are untainted by press coverage despite widespread publicity," *id.*, *Press-Enterprise*, 22 Cal. App. 4th at 504-05, and because, as the California Supreme Court has instructed, there are many less restrictive alternatives – "a panoply of measures" – "available to protect the defendant and ensure the constitutionality and fairness of proceedings against him" other than sealing the records. *Brian W. v. Superior Court*, 20 Cal. 3d 618, 625 (1978). These measures include, but are not limited to, the "court's ability through voir dire to identify and screen out 'those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict,'" *Press-Enterprise*, 22 Cal. App. 4th at 505, and, if necessary, "postponing trial until the effect of pretrial publicity subsides," and, in an extreme case, even "a change of venue." *Brian W.*, 20 Cal. 3d at 625.

Moreover, the public interest in examining the records related to the warrant is particularly strong here, where the propriety of the issuance and execution of the search warrant itself has been called into question in public debate. As the Supreme Court has recognized, the effective functioning of the judiciary in such circumstances requires transparency rather than secrecy. *Richmond Newspapers*, 448 U.S. at 572 ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.").

Finally, the sealing order, which evidently sealed the entire file – including the sealing order itself – is not narrowly tailored, as required by *Press-Enterprise*, 464 U.S. at 510, *NBC Subsidiary*, 20 Cal. 4th at 1217-18, and Rule 2.550(d). Even if there were an overriding interest in keeping a particular piece of information in the warrant records secret – and it is difficult to imagine what information that could be in this case – that information should have been redacted and the records otherwise released in their entirety. The sealing order is therefore unconstitutionally overbroad.

III.

EVEN A MINIMAL DELAY IN ACCESS CONSTITUTES AN IRREPARABLE INJURY TO FIRST AMENDMENT RIGHTS, AND THUS THIS MATTER SHOULD BE HEARD AND THE RECORDS SHOULD BE RELEASED PROMPTLY

In the context of access to court records, late relief is often no relief at all. Where a right of access exists, "'access should be immediate and contemporaneous.'" *Mercury Interactive Corp.*, 158 Cal. App. 4th at 92 (quoting *Grove Fresh*, 24 F.3d at 897) ("In light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous.") (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976)); *Application & Affidavit for a Search Warrant*, 923 F.2d at 331 (even "a minimal delay of access unduly minimizes, if it does not entirely overlook, the value of openness itself, a value which is threatened whenever immediate access to ongoing proceedings is denied, whatever provision is made for later public disclosure") (quotation omitted). Where, as here, there is a constitutional as well as statutory right of access, "'[e]ach passing day [the records remain sealed] may constitute a separate and cognizable infringement of the First Amendment.'" *Grove Fresh*, 24 F.3d at 897 (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 1327, 1329 (1975) (Blackmun, J)); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

CONCLUSION

The search warrant records at issue are judicial records to which the press and public have a right of access, and the order sealing these records did not meet the procedural or substantive tests for sealing. The sealing order is thus unconstitutional and should be vacated. For all these reasons, the Associated Press, Bloomberg News, CNET News, *Los Angeles Times*, Wired.com, the California Newspapers Association and First Amendment Coalition respectfully request that the order sealing these records be vacated and the records put in the public court file without further delay.

Dated: May 5, 2010

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