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Media Access to Search Warrants

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Posted in Access to Search Warrants

High-profile criminal investigations and trials frequently set the stage for conflict between the news media, law enforcement agencies, and criminal defendants. While law enforcement reasonably wishes to preserve its ability to successfully investigate and prosecute the case, the media reasonably desires to engage in constitutionally protected newsgathering activities and inform the community about those activities. Of course, the criminally accused want to protect their constitutional right to a fair trial by an impartial jury. One of the issues over which the media, law enforcement, and criminal defendants may disagree is access to search warrants materials—when access should be granted, how much access should be granted, and the procedures that must be followed if access is denied. Indeed, there have been a number of conflicts involving search warrants over the past few months—the Eve Carson investigation is just one recent highly publicized example.

Access to search warrant applications, returns, and supporting materials (such as affidavits) implicates the First Amendment as well as state law. The United States Supreme Court held in *Globe Newspaper Co. v. Superior Court* and *Richmond Newspapers, Inc. v. Virginia* that the First Amendment grants the public and the press a qualified First Amendment right to attend criminal trials. And, in *Press-Enterprise Co. v. Superior Court*, the Court held that this First Amendment right also applies to pretrial proceedings in criminal cases. However, there is some disagreement among jurisdictions about whether there is a First Amendment-based right of access to search warrant materials.

The Eighth Circuit recognized a First Amendment right of access to search warrants in *In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn* (*Gunn I*). In Gunn I, the Eighth Circuit framed the test for overcoming the First Amendment right and the procedures to be followed in this way:

The party seeking closure or sealing must show that such a restriction of the first amendment right of public access is necessitated by a compelling government interest. If the district court decides to close a proceeding or seal certain documents, it must explain why closure or sealing was necessary and why less restrictive alternatives were not appropriate. The district court's findings must be specific enough to enable the appellate court to determine whether its decision was proper; if the

district court decides that a restriction of the first amendment right of public access is warranted, the district court can even file its statement of reasons and specific findings under seal. (Citations omitted.)

Other jurisdictions, including the Fourth Circuit, have not recognized a constitutional right. But even in these jurisdictions, some right of access generally does exist. For example, the Fourth Circuit in Baltimore Sun Co. v. Goetz, 886 F.2d 60 (4th Cir. 1989), recognized a qualified common law right of access, holding that a judicial officer may only deny access to search warrant materials "when sealing is 'essential to preserve higher values and is narrowly tailored to serve that interest. '" The standard for sealing search warrants under the common law in the Fourth Circuit is very nearly the same as the First Amendment standard articulated in Gunn I.

As the Eighth Circuit did in Gunn I, the Fourth Circuit in Baltimore Sun imposed procedural requirements on judges issuing orders to seal search warrant materials. The public has a right to notice of a sealing order and an opportunity to voice objections. Moreover, the court must make findings of fact and conclusions of law regarding the public interest in openness versus closure and the tailoring of the sealing order sufficient to allow for appellate review of the sealing order—"conclusory assertions are insufficient; specificity is required."

The struggle between the public right to know, law enforcement's interest in preserving its investigation, and the criminally accused's right to a fair trial played out recently in the Eve Carson case, which gained national attention when the UNC student body president was killed in March 2008. Law enforcement requested orders sealing search warrant applications, returns, and other supporting documents in order to protect their ongoing investigation and to protect the safety of confidential informants. When law enforcement would not release the search warrant materials two weeks after two people had been indicted for Carson's murder, the Durham Herald-Sun newspaper initiated proceedings to obtain access. In evaluating the Herald-Sun's motion to intervene and unseal the search warrants, the judge in the case applied the Baltimore Sun test and initially denied access in order to allow law enforcement additional time to complete the investigation.

When the matter came up for hearing a second time, nearly two months later, the court granted the Herald-Sun's motion to unseal the search warrant materials over the objections of one of the defendants who raised concerns about alleged dangerous pre-trial publicity.