STATE OF NORTH CAROLINA COUNTY OF WAKE IN RE: SEARCH WARRANTS ISSUED IN CONNECTION WITH THE INVESTIGATION INTO THE DEATH OF NANCY COOPER	)	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION MEMORANDUM OF LAW IN SUPPORT OF MOTION TO UNSEAL SEARCH WARRANTS

Introduction

The North Carolina Public Records Law provides that search warrants returned by law enforcement agencies are public records that are presumptively open to inspection. N.C. Gen. Stat. § 132-1.4(k). Moreover, courts in North Carolina and other jurisdictions repeatedly have held that the First Amendment, the common law, or both create a qualified privilege for the press and public to view and inspect search warrants. This presumption favoring public access to search warrants can be overcome, and the records may be sealed by court order, only when the sealing is justified by a compelling government interest.

Both case law and this court's own Administrative Order dated May 20, 2008 require that the compelling interest that purportedly justifies the sealing be made via a written motion capable of appellate and public review. By sealing the search warrants issued in connection with the investigation into the death of Nancy Cooper in the absence of a written motion this court failed to follow its own rules and has deprived the public of any meaningful opportunity to understand or assess the propriety of the sealing. Moreover, by sealing access to the search warrants, the applications for same and the results of same for thirty days before the search warrants were executed, the court failed to tailor the sealing order narrowly, as the law requires. Therefore, the motion to unseal the search warrants should be granted unless and until the District Attorney demonstrates to the court in writing that the sealing is justified by a specific and compelling governmental interest. If the court finds and determines on the basis of the District

Attorney's submission that the search warrants should remain sealed, the existing sealing order should be modified to include specific findings and conclusions and to narrowly limit its scope and duration.

The Sealing Order

The Cary Police Department has announced that the search warrants issued in connection with the investigation into the death of Nancy Cooper were obtained at 2 a.m. on July 16, 2008. The order sealing them (Exhibit A to the Motion to Unseal Search Warrants) does not state specifically who applied for it; rather, the order recited that it was issued in response to a motion by "the State." The movants have assumed that the motion was made by representatives of the Cary Police Department and/or the District Attorney, but as of the date of this memorandum the movants have not confirmed precisely who sought and obtained the sealing order; accordingly, this motion refers to the requester(s) as "law enforcement agencies." In a telephone conversation with the movants' undersigned counsel, however, the District Attorney for the Tenth Prosecutorial District acknowledged that he should be served with this motion and would assume responsibility for responding to it.

The movants have confirmed that no written motion was filed, even under seal; therefore the only available explanation for the sealing is contained in the order itself, which simply concludes that public release of the search warrants "will jeopardize the right of the State to prosecute a defendant or the right of a defendant to a fair trial or will undermine ongoing or future investigation within the meaning of NCGS 132.1.4.(e)." Based on this scant record, the public is left to assume that specific reasons or factors for this decision either were provided to the court orally and *ex parte,* or were not presented to the court at all. Because the order includes no factual findings, the order rests entirely on the unsupported conclusion that disclosure of the search warrants *will* "jeopardize the right of the State to prosecute a defendant or the right of a defendant to a fair trial" or *will* "undermine an ongoing or future investigation."

The absence of any written motion, coupled with the scant and unsupported conclusions set forth in the sealing order, effectively negates any opportunity for meaningful review of the sealing order. Unless these deficiencies are cured, neither the public nor an appellate court reviewing the order will be able to assess the propriety of the sealing order, because the basis for it will not be disclosed even if and when the search warrants are unsealed.

As the court is well aware, the death of Nancy Cooper, a Cary resident and mother of two, has become a high profile case locally, nationally and in Canada, where Ms. Cooper was a citizen. As such, it poses special challenges for the police, the District Attorney, the lawyers representing Ms. Cooper's husband and other family members, the court and the news media. But although the special challenges of a high-profile case always warrant special care, they do not inherently or automatically justify the sealing of documents which, by law and tradition, routinely are made available to the public in homicide cases. To the contrary, the search warrants in this case, and in any case, should not be sealed unless the party who moves to seal them presents the court with clear, convincing and compelling reasons to do so in the form of a written motion, and the court embodies the reasons for granting the motion in specific written findings.

A. The search warrants subject to the court's order are public record and thus may be sealed only for compelling reasons.

In furtherance of North Carolina's well-established public policy of providing the people with liberal access to information generated or received by government agencies and officials, the General Assembly has declared that the search warrants and return results thereof issued in the investigation of Nancy Cooper's death are public record. The North Carolina Public Records Law ("the Public Records Law") is codified at N.C. Gen. Stat. §§ 132-1 through 132-10. The public policy underlying the Public Records Law is set out in G.S. § 132-1(b), which provides:

The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As used herein, 'minimal cost' shall mean the actual cost of reproducing the public record or public information.

The Public Records Law also provides, in G.S. § 132-1.4(k), that

The following court records are public records and may be withheld only when sealed by court order: arrest and search warrants that have been returned by law enforcement agencies . . . .

The search warrants at issue are manifestly and unequivocally public records as a matter of law, which can only be sealed by court order after the requesting law enforcement agency satisfies the burden of "showing by a preponderance of the evidence that disclosure of the information in question will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation." N.C. Gen. Stat. § 132-1.4(e).

Moreover, the fact that the search warrants may have relevance to an on-going criminal investigation does not affect its status as a public record, because the Public Records Law expressly provides, "The use of a public record in connection with a criminal investigation or the gathering of criminal intelligence shall not affect its status as a public record." G.S. §132-1.4(f).

Because the sealing order at issue was not supported by a written motion and was issued *ex parte,* the record apparently is devoid of ***any*** evidence -- even under seal – supporting this court's conclusion that release of the information contained in the search warrant, application and return "*will* jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or *will* undermine an ongoing or future investigation." Thus the sealing order manifestly was not issued in compliance with the procedure specified by the Public Records Law.

B. The search warrants subject to the Court's order are judicial records and are presumptively open to public inspection pursuant to the First Amendment and common law.

In addition to being defined as "public records" by the North Carolina Public Records Law, search warrants also have been determined by many courts to be "judicial records" and thus subject to the constitutional standards outlined above. Although the Supreme Court of the United States has not spoken directly to the status of search warrants and related documents, numerous federal courts have held that the First Amendment and/or common law principles make such materials presumptively open to inspection. See, e.g., *In re Search Warrant for Secretarial Area Outside the Office of Thomas Gunn,* 855 F.2d 569 (8th Cir. 1988) (recognizing qualified First Amendment right to inspect search warrant supporting affidavits); *In re Sealed Documents,* 15 Media L. Rep. 1983 (D.C.D.C. 1988) (recognizing First Amendment right of access to search warrants that can be overcome by showing of a "compelling government interest" embodied in "narrowly tailored" order); *In the Matter of Search Warrants Issued on June 11, 1988 for the Premises of Three Buildings at Unisys, Inc.,* 15 Media L. Rep. 1980 (D. Minn. 1988) (same).

The Fourth Circuit has recognized a common law right of access to search warrant documents rather than a First Amendment right. In *Baltimore Sun Co. v. Goetz,* 886 F.2d 60 (4th Cir. 1989), the court vacated a magistrate judge's order sealing the affidavits supporting a search warrant, holding that such affidavits are judicial records to which public access can be denied only "when sealing is 'essential to preserve higher values and is narrowly tailored to serve that interest.'" *Id.* at 65-66 (citing *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed.2d 629 (1984); *In re Washington Post Co.,* 807 F.2d 383, 390 (4th Cir. 1986)). To effectuate its holding the Fourth Circuit imposed procedural requirements that courts must follow in sealing search warrants and related materials. The court ruled that 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 concerning the public interest in

openness versus closure, and the sealing order must be tailored sufficiently to allow for appellate review. *Baltimore Sun,* 886 F.2d at 65-66. In such orders, the court said, "conclusory assertions are insufficient; specificity is required." *Id.* at 66.

In *U.S. v. Blowers,* 2005 WL 3830634 (W.D.N.C., 2005), Judge J. Carlton Tilley acknowledged the Fourth Circuit's common law right of access and applied the standards outlined above in allowing a motion by *The Charlotte Observer* and a Charlotte television station to unseal search warrants issued in connection with the prosecution of an FBI agent charged with making fraudulent statements. See also, *In re Search Warrants,* 26 Media L. Rep. 2564 (M.D.N.C. 1998) (Order sealing search warrant affidavit vacated because general fear of reprisal or retaliation against informant was not sufficient to overcome common law right of public access, and government made no specific showing of how ongoing investigation would be jeopardized by unsealing the affidavit.)

C. An order sealing judicial records is subject to strict scrutiny.

In addition to the presumption of openness that attaches to the search warrants under the Public Records Law, the constitutions of both the United States and North Carolina create strong presumptions of openness with respect to judicial records and proceedings that can be overcome only in the rarest of circumstances, and then only on the basis of *factual* findings supported by sound *evidence*; accordingly, this court must carefully scrutinize the sealing order and whether it was based on a strong showing of necessity required to overcome the presumption.

The constitutional presumption of openness at issue is grounded in the recognition by state and federal courts that public confidence in the administration of justice depends upon public understanding; people cannot be expected to accept and approve the outcome of judicial proceedings unless they can see and hear what goes on in their courtrooms. As the Supreme Court of North Carolina has observed:

> The trial and disposition of criminal cases is the public's business and ought to be conducted in public in open court. See, N.C. Const., Art. I, §18. `The public . . . are entitled to see and hear what goes on in the court. [That courts are open is one of the sources of their greatest strength.] *Raper v. Berrier*, 246 N.C. 193, 195, 97 S.E.2d 782, 784 (1957).

In re Edens, 290 N.C. 299, 306, 226 S.E.2d 5, 9-10 (1976).

Similarly, the Supreme Court has admonished that "[a] trial is a public event." *Craig v. Harney*, 331 U.S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947), and has noted that openness is desirable because "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." *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed.2d 973 (1980). The Court also has explained that

> the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process-an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience.

Globe Newspaper Co. v. Superior Court , 457 U.S. 596, 606, 102 S. Ct. 2613, 73 L. Ed.2d 248 (1982).

In a quartet of cases the Supreme Court has laid out and applied the principle that absent extraordinary circumstances, the judicial process must be open because a qualified right of the public to observe and scrutinize criminal proceedings is implicit in the First Amendment. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed.2d 1 (1986) (Press-Enterprise II); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed.2d 629 (1984) (Press-Enterprise I); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-07, 104 S. Ct. 819, 78 L. Ed.2d 629 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81, 100 S. Ct. 2814, 65 L. Ed.2d 973 (1980).

Both the First Amendment to the United States Constitution and common law afford the public a presumptive right of access to judicial records and judicial proceedings. "[T]here is an ingoing presumption in favor of openness." *In re Charlotte Observer*, 882 F.2d 850, 853 (4th Cir. 1989). "Only the most compelling reasons justify non-disclosure," and any party seeking closure bears the "heavy burden of overcoming the presumption of open judicial records." *Pratt & Whitney Canada v. U.S.*, 14 Cl. Ct. 268, 275, 15 Media L. Rep. (BNA) 1033, 1037 (1988). The public has a "general right to inspect and copy public records and documents, including judicial records and documents . . . [based on] the citizen's desire to keep a watchful eye on the workings of public agencies." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98, 98 S. Ct. 1306, 55 L. Ed.2d 570 (1978).

At least 11 decisions from the U.S. Court of Appeals for the Fourth Circuit have recognized a strong presumptive right of access to judicial records and proceedings.[1] The Fourth Circuit is in line with numerous other federal circuits that have recognized a common law and constitutional right of access to judicial records and proceedings.[2]

---

[1] *U.S. v. Moussaoui*, 65 Fed. Appx. 881, 2003 WL 21076836, 31 Media L. Rep. 1705 (4th Cir. 2003); *Ashcraft v. Conoco, Inc.*, 218 F.3d 288 (4th Cir. 2000); *Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000); *Stone v. Univ. of Maryland Medical Sys. Corp.*, 948 F.2d 128 (4th Cir. 1991); *In re Search Warrant*, 923 F.2d 324, 326 (4th Cir.), *cert. denied*, *Hughes v. Washington Post Co.*, 500 U.S. 944, 111 S. Ct. 2243, 114 L. Ed. 2d 484 (1991); *In re Charlotte Observer*, 882 F.2d 850 (4th Cir. 1989); *Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988); *In re Washington Post*, 807 F.2d 383 (4th Cir. 1986); *In re Knight Pub. Co.*, 743 F.2d 231 (4th Cir. 1984); *Under Seal v. Under Seal*, 27 F.3d 564, 22 Media L. Rep. (BNA) 1922, 1923 (unreported 4th Cir. 1994); *In re Landmark Communications*, 12 Media L. Rep. (BNA) 1340 (unpublished 4th Cir. 1985).

[2] *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994) ("[T]he right of the press to obtain timely access to judicial decisions and the documents which comprise the bases of those decisions is essential."); *EEOC v. Westinghouse Elec. Corp.*, 917 F.2d 124 (3rd Cir. 1990); *Davis v. Reynolds*, 890 F.2d 1105 (10th Cir. 1989); *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100, 104 S. Ct. 1595, 80 L. Ed.2d 127 (1984); *Joy v. North*, 692 F.2d 880 (2nd Cir. 1982), *cert. denied sub nom. Baldwin v. Joy*, 460 U.S. 1051, 103 S. Ct. 1498, 75 L.Ed.2d 930 and *cert. denied sub nom. Citytrust v. Joy*, 460 U.S. 1051, 103 S. Ct. 1498, 75 L.Ed.2d 930 (1983) (bank's litigation committee report "is no longer a private document. It is part of a court record."); *U.S. v. Criden*, 648 F.2d 814 (3rd Cir. 1981); *Bigelow v. District of Columbia*, 122 F.R.D. 111, 112, 15 Media L. Rep. (BNA) 2143 (D.D.C. 1988) ("It is

The Constitution of North Carolina also creates a presumptive right of public access to court proceedings; it declares, flatly and unequivocally, that "[a]ll courts shall be open . . ." N.C. CONST. Art. I, §18. Moreover, under North Carolina's Public Records Law, judicial records are public records subject to inspection and copying absent a statutory exemption excluding them from disclosure. The public has a right of access in all cases except those in which a party has demonstrated an overriding interest that cannot be accommodated by any means less drastic than closure In *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 466, 515 S.E.2d 675, 687 (1999), *cert. denied*, 529 U.S. 1033, 120 S. Ct. 1452, 146 L. Ed.2d 337 (2000), the North Carolina Supreme Court held that documents "entered the public domain and became 'public records' once ... filed with the clerk of court." Certainly the rule can be no different when the documents are presented directly to a judge.

D. Merely conclusory allegations are insufficient to overcome the presumption of openness and satisfy the strict scrutiny standard.

A party who moves a court to close proceedings or seal records and to exclude the public bears "the heavy burden of exhibiting the existence of special circumstances adequate to overcome the presumption of public accessibility." *FTC v. Standard Financial*, 830 F.2d 404, 413 (1st Cir. 1987). Unsubstantiated claims or speculations are insufficient grounds for entry of a protective order. "A finding of good cause must be based on a particular factual demonstration of potential harm, not on conclusory statements." *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988); *Brown & Williamson*, 710 F.2d 1165, 1176 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100, 104 S. Ct. 1595, 80 L. ED.2d 127 (1984). ("Under the First Amendment and the common law, we conclude that the District Court erred by failing to state findings or conclusions which justify nondisclosure to the public. The order of the District Court sealing the documents in the case is,

---

generally recognized that the public has a common law right to inspect and copy judicial records.").

therefore, vacated."); *Nelson v. Internal Revenue*, 12 Media L. Rep. (BNA) 1657, 1660 (T.C. 1985) (" . . . a party may not rely on mere conclusory statements or his attorney's unsupported self-serving hearsay statements to establish good cause. . . . A party must come forth with appropriate testimony and factual data to support claims of harm that would occur as a consequence of disclosure."); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 663 (8th Cir. 1983) (court accepted petitioners' argument that "the District Court erred in simply accepting the representation of counsel for P&G that trade secrets were involved. Ordinarily such a representation should not be accepted without question.")

In North Carolina's most noteworthy civil case dealing with the subject, the Fourth Circuit Court of Appeals revisited the question of sealing court records in *Ashcraft v. Conoco, Inc.*, 218 F.3d 288 (4th Cir. 2000).

> In *Knight*, we explained that, while a district court "has supervisory power over its own records and may, in its discretion, seal documents if the public's right of access is outweighed by competing interests," the "presumption" in such cases favors public access. *Knight*, 743 F.2d at 235; see also *Stone*, 855 F.2d at 182 ("The public's right of access to judicial records and documents may be abrogated only in unusual circumstances"). Accordingly, before a district court may seal any court documents, we held that it must (1) provide public notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives. See *Knight*, 743 F.2d at 235- 36; see also Stone, 855 F.2d at 181. These procedures "must be followed when a district court seals judicial records or documents." *Stone*, 855 F.2d at 179-80, 182.

Id. at 302. In *Ashcraft*, the Fourth Circuit found that the trial court failed miserably under the applicable standard. The court noted that "despite the Morning Star's demonstrated interest in the case, no public notice of the parties' joint motion to seal the settlement agreement was given; no opportunity for interested parties to object was provided; there is no indication that the district court considered less drastic alternatives to sealing the agreement; and the court's sealing order did not identify any specific reasons or recite any factual findings justifying the court's decision to override the public's right of access to the settlement documents." *Id.* at

302-03. Accordingly, the Fourth Circuit found the sealing order void. *Id.* at 302.

In this case it is unclear who specifically asked for the search warrants to be issued and sealed, let alone the specific reasons for requesting they be sealed. The sealing order further provides no indication of the court's "specific reasons and factual findings supporting its decision to seal the documents" *Id.* Rather, the sealing order merely states conclusory assertions that the release would "jeopardize the right of the State to prosecute a defendant or the right of a defendant to a fair trial or will undermine an ongoing or future investigation within the meaning of NCGS 132.1.4 (e)." These assertions and the utter lack of support for them from the requesting law enforcement agency fall far short of the constitutional threshold required.

E. If the law enforcement agencies believe that release of the search warrants and the results of their execution would jeopardize the investigation into Ms. Cooper's death, they should be required to provide the existence of the threat clearly and specifically.

The court order gives no indication of the basis for the request that the search warrants be sealed. No written motion or brief was filed in support of the request, even under seal. Therefore, it is especially imperative that the court require the requesting party to provide clear and specific evidence in support of the request. If the law enforcement authorities who obtained the search warrants genuinely believe that release of the search warrants would preclude or materially hinder law enforcement's ability to solve Ms. Cooper's death or to bring to justice the person(s) responsible, they should be prepared to explain their concerns with specificity, and the court should be able to reflect them in its sealing order. On the other hand, if the law enforcement agencies can show nothing more than that sealing the search warrants would be convenient or preferable for them, this court should vacate its order.

The movants are advertent to the fact that in rare cases where a search warrant and the return results thereof include items that are helpful in interrogating suspects and other relevant witnesses, the contents *might* adversely affect the investigation into an apparent homicide. However, nothing in the order suggests that this is such a case. If the District Attorney has this

concern he should have identified specific portions of the documents that allegedly pose a threat to the investigation and explain why they should be withheld. Absent any indication that this sort of analysis was conducted, the public is left to make assumptions and trust that the court order was issued in compliance with constitutional standards. Courts are required to make specific findings that must be included in any sealing order, regardless of its scope. Given the broad, unspecific and unsupported conclusions set out in the sealing order, there is no basis for the public or a reviewing court to conclude that this requirement was met in this case.

Conclusion

For the reasons set forth above, the court should vacate the order sealing the search warrants, supporting affidavits and return results thereof issued in the investigation into the death of Nancy Cooper.

Respectfully submitted this the 28th day of July, 2008.

EVERETT GASKINS HANCOCK & STEVENS, LLP

By: _____

Hugh Stevens
N.C. State Bar No. 4158
C. Amanda Martin
N.C. State Bar No. 21186
Michael J. Tadych
N.C. State Bar. No. 24556
Attorneys for the News and Observer Publishing Company, Inc.
127 West Hargett Street, Suite 600
P.O. Box 911
Raleigh, NC 27602-0911
919 755 0025
919 755 0009 (facsimile)
www.eghs.com