IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

IN THE MATTER OF THE SEARCH OF 1993 JEEP GRAND CHEROKEE, LICENSE NO. PC69059 (DELAWARE), VIN 1J4GZ78Y3PC563912, REGISTERED TO 1ST PA CONSUMER SERVICES, INC. C/O THOMAS J. CAPANO.	:	Case No. 96-91M
IN THE MATTER OF THE SEARCH OF 1993 CHEVROLET SUBURBAN VEHICLE, LICENSE NO. PC80895 (DELAWARE), VIN 1GNFK16K1PJ323323, REGISTERED TO THOMAS J. CAPANO AND KATHLEEN M. CAPANO.	:	Case No. 96-92M
IN THE MATTER OF THE SEARCH OF 2302 GRANT AVENUE, WILMINGTON, DELAWARE 19806.	:	Case No. 96-93M

MAGISTRATE'S REPORT AND RECOMMENDATION

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October 11, 1996
Wilmington, Delaware

TROSTLE, U.S. Magistrate-Judge

The News Journal[1] has filed a motion in this Court seeking to unseal certain search warrants and any supporting affidavits made in connection with an ongoing federal investigation into the disappearance of Anne Marie Fahey. Specifically, the News Journal has claimed a right of public access to pre-indictment warrants and any supporting documentation related to the warrants based upon the First Amendment qualified right of access. In addition, the News Journal has also claimed a common law right of access to these documents. Both of the News Journal's contentions will be discussed below.

Background

Anne Marie Fahey, the scheduling secretary of the Governor of the State of Delaware, was reported missing on June 29, 1996. Docket Item ("D.I.") 7, p. 2. The City of Wilmington Police Department, the Delaware State Police, the Federal Bureau of Investigation and the United States Attorney's Office for the District of Delaware are currently participating in a joint kidnaping investigation as a result of Ms. Fahey's disappearance. D.I. 11, para. 1. In conjunction with the Government investigation, this Court authorized three search warrants on July 30, 1996. D.I. 11, para. 3. Concurrent with the authorization for the search warrants, the Government brought a motion in this Court to have the warrants, the accompanying documents, and the motion to seal the

[1] After the filing of the Motion to Unseal by the News Journal, Philadelphia Newspapers, Inc., as publisher of the Philadelphia Inquirer and the Philadelphia Daily News joined in, relying on the submission previously filed by the News Journal. (Docket Item 10) Therefore, any reference to the News Journal shall equally apply to Philadelphia Newspapers, Inc.

warrants sealed. D.I. 1. The Government's motion was granted on July 30, 1996. According to the News Journal, the warrants were executed at the home of Thomas Capano and upon two of his vehicles on July 31, 1996.[2] D.I. 7, p. 2. On August 8, 1996, the Government presented a motion to this Court to unseal the Motion and Order to Seal. D.I. 4. The Court also granted this motion. D.I. 4. However, the Court did not unseal, nor was it requested to do so in the Government's motion, the remaining documentation concerning the search warrants. It is this information that the News Journal now seeks to obtain through the motion currently before the Court.

In support of its motion to unseal the warrants and supporting documents, the News Journal advances two theories upon which it claims an entitlement to the sealed information. First, the News Journal purports that it has a First Amendment qualified right of access to the materials because many circuit courts, including the Third Circuit Court of Appeals, have recognized a general right of access to judicial records, and this access should therefore be extended to sealed, pre-indictment search warrants and supporting memoranda. D.I. 7, p. 4-5. Moreover, the News Journal argues that it is a beneficiary of a common law right of access to judicial records, and that if the information were to remain sealed, the Government should articulate specific reasons which militate against opening the sealed documents. D.I. 7, p. 10. The issues to be resolved by this Court, therefore, are whether either the First Amendment or the common law confers a qualified right of access to the public to review search warrants

[2] The United States Attorney's Office, in it's response to the News Journal's Motion to Unseal, neither confirmed nor denied that the warrants were executed on July 31, 1996. D.I. 11, para. 3.

and the supporting documentation after the warrants are issued and returned but while an investigation is ongoing and before an indictment has been returned.

Discussion

The public, through its surrogate, the press, has long enjoyed a presumptive right of access to judicial documents and records. Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978). This historical practice has played a "crucial role" in the development of First Amendment jurisprudence, and this common law presumption "has been the *foundation* on which the courts have based the first amendment right of access to judicial proceedings." United States v. Antar, 38 F.3d 1348, 1361 (3rd Cir. 1994), quoting Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986) (emphasis in original).

The first issue addressed is whether executed and returned search warrants and supporting affidavits are considered "judicial records," and may, therefore, be subject to a First Amendment or common law right of access claim.[3] Judicial records are defined as "[d]ockets or records of judicial proceedings." BLACK'S LAW DICTIONARY, 6th Ed., p. 849 (1990). While this definition of a judicial record has not been specifically adopted by the Third Circuit, several opinions suggest that any document physically filed with and acted upon by the court is, while under the court's control, a judicial

[3] The Court is not making a determination as to whether non-returned or unexecuted but authorized search warrants and supporting documentation are judicial records. As discussed *supra* on page 11, Rule 41(g) only requires the warrant and supporting documentation be filed with the clerk of the court after a return has been made to the magistrate judge who authorized the warrant. This Court concludes, in the context of this decision, that only documents filed with the court clerk are judicial records.

record.[4] See Antar, 38 F.3d at 1360 (A transcript of a voir dire proceeding "is a public document, covered by a presumptive right of access," and therefore a judicial record); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 781-782 (3rd Cir. 1994) (Settlement Agreement which was never filed with the court but "briefly perused and returned to the parties" in a closed case was not a judicial record; the fact that a court has entered a confidentiality order over an unfiled document did not convert the document into a judicial record); Enprotech Corp. V. Renda, 983 F.2d 17, 20 (3rd Cir. 1993) (Settlement Agreement that had not been filed, sealed, interpreted or enforced by the trial court was not a judicial record); Littlejohn v. Bic Corp., 851 F.2d 673, 683 (3rd Cir. 1988) (Trial exhibits returned to a party in a terminated civil proceeding which were subject to destruction by the clerk of the court are no longer judicial records within the supervisory power of the district court).

Based upon the aforementioned cases and their analyses, executed and returned search warrants and supporting affidavits are "judicial records." In conformity with Federal Rule of Criminal Procedure 41(g) ("Rule 41(g)"), after return search warrants and supporting documents are filed with the clerk of court.[5] Furthermore, the subject of

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[4] The Fourth Circuit addressed this very issue in Baltimore Sun Co. v. Goetz, 886 F.2d 60 (4th Cir. 1989), and concluded that affidavits for search warrants are judicial records. Id. at 64. In support of its conclusion, the Fourth Circuit stated that Federal Rule of Criminal Procedure 41(g) directs the court to file the papers with the court clerk; the magistrate's decision to issue the warrant is subject to appellate review to insure the Fourth Amendment standard of probable cause is met; and the accused may subsequently use the affidavits in his criminal trial to challenge the sufficiency of the warrant itself. Id. At 64-65.

[5] It is a common practice in the District of Delaware that when warrants and supporting affidavits are sealed by the magistrate judge, the information is forwarded, under seal, to the Clerk's Office. The search warrant is then assigned a case number

the search warrant, if indicted, has the right to challenge the sufficiency of the warrant and the veracity of the affidavits in support thereof. In addition, an appellate court can review the magistrate's decision to authorize the warrant if challenged. Therefore, executed and returned search warrants and supporting affidavits are judicial records.

As stated previously, the News Journal has alleged a First Amendment and common law right of access to the pre-indictment search warrants and supporting affidavits. These bases for access will be discussed more completely below.

A. First Amendment Right of Access

The Supreme Court first established a First Amendment right of access to criminal jury trials in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). Subsequent Supreme Court cases extended the right of public access beyond the criminal trial itself, so that the press enjoys a First Amendment right of access to transcripts of pre-trial suppression hearings, Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) ("Press-Enterprise II"); and the voir dire of potential jurors, Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501 (1984) ("Press-Enterprise I"). The Third Circuit has further extended the public's First Amendment right of access to pre- and post-trial proceedings. See United States v. Criden, 675 F.2d 550, 557 (3rd Cir. 1982) ("Criden II") (First Amendment right of

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and the court clerk continues to hold the confidential information in an unmarked file. The documents then remain under seal until this Court rescinds the sealing order. This requisite practice, however, does not necessarily constitute a historical or traditional basis to permit the public a First Amendment right of access to the search warrant materials. This district's tradition of handling pre-indictment sealed and unsealed search warrants has long been the same. The tradition of openness created by filing unsealed warrants is paralleled by a companion tradition of secrecy for sealed documents.

access exists as to pre-trial suppression, due process, and entrapment hearings); United States v. Smith, 776 F.2d 1104, 1112 (3rd Cir. 1985) ("Smith I") (First Amendment right of access extends to bills of particulars which support an indictment); United States v. Simone, 14 F.3d 833 (3rd Cir. 1994) (First Amendment right of access extends to post-trial hearings to examine an allegation of juror misconduct); Antar, 38 F.3d 1348 (First Amendment right of access extends to voir dire proceedings and transcripts). In addition, the District of Delaware has recently extended the First Amendment right of access to post-trial documents filed in support of a motion for a new criminal trial. United States v. Gonzalez, Cr. A. No. 95-52-MMS, Schwartz, J., mem. op. (D.Del. May 30, 1996).

The Supreme Court has created a two part analysis which a court should apply when determining if the press is entitled to a First Amendment right of access. First, the trial court is to consider "whether the place and process have historically been open to the press and general public." Press-Enterprise II, 478 U.S. at 8. If so, the court is then to consider "whether public access plays a significant positive role in the functioning of the particular process in question." Id.[6] Simply stated, the court's concern in the first consideration is discerning whether there exists a "tradition of accessibility" to the

[6]Although the focus of the Press-Enterprise II analysis is upon the "place and process" of the particular proceeding in question, the Third Circuit has established a First Amendment right of access to records submitted in connection with criminal proceedings. See United States v. Martin, 746 F.2d 964, 968 (3rd Cir. 1984) (A strong presumption in favor of access applies to judicial records and documents.); Smith I, 776 F.2d at 1111 ("[T]he First Amendment right of access recognized in Richmond Newspapers and the common law right of access recognized in Criden, Martin, and Publicker extend to bills of particulars . . ..") Therefore, the Press-Enterprise II analysis will be applied to the News Journal's request for documents filed once a warrant return has been made to this Court.

documents in question, Gonzalez, Cr. A. No. 95-52, mem.op. at 27.; the second component addresses the fairness of access to all parties involved in the criminal proceeding: the accused, the government, and the public. Press Enterprise II, 478 U.S. at 9. If a claimant were to satisfy the first two considerations, characterized by the Supreme Court as ones of "experience and logic," a qualified First Amendment right of access attaches. Id.

Once the movant establishes a qualified First Amendment right, the court is to determine "whether the situation is such that the rights of the accused override the qualified First Amendment right of access." Id. The burden is then placed upon the government to persuade the court that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." Id., quoting Press-Enterprise I, 464 U.S. at 510. To do so, the government must specifically articulate its reasons for closure of the documentation. Id.

1. Experience

To satisfy the experience prong of Press-Enterprise II, the News Journal alleges that the filing requirement of Federal Rule of Criminal Procedure 41(g),[7] which compels the filing of all search warrants and accompanying documentation with the clerk of the court, creates a traditional basis upon which a First Amendment right can be asserted. Following this logic, the mandatory filing requirement constitutes an open, common and established practice. Thus, the News Journal alleges that the routine filing of all warrants and accompanying documents with the court clerk satisfies the first consideration of the Press-Enterprise II analysis. [8]

The Government, in response, contends that a First Amendment right of access does not attach to pre-indictment search warrants and the supporting documentation. Search warrant proceedings have historically been held *ex parte* and are therefore outside the scope of public review. The secretive nature of the proceedings, as argued by the Government, allows it to conduct an ongoing criminal investigation. D.I. 11, para. 4. The Government directly rejects the News Journal's claim that Rule 41(g) provides a historical basis for satisfying the first prong of the Press-Enterprise II analysis because

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[7] Federal Rule of Criminal Procedure 41(g) states:

Return of Papers to Clerk. The federal magistrate judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

[8] The News Journal does not claim a right to attend or seek access to the *ex parte* search warrant proceeding. (Transcript at p. 6, lines 1-5) The newspaper is only seeking access to the returned warrant and any documentation made in support thereof.

the rule is silent regarding sealed documents and provides no authority for the proposition that the search warrant documentation be open to the public. Transcript. at p. 19.

It is undisputed that search warrant proceedings have historically been secret. A pre-indictment search warrant is obtained after an *ex parte* application by the government for a warrant and an *in camera* consideration by the magistrate judge. Times Mirror Co. v. U.S., 873 F.2d 1210, 1214 (9th Cir. 1989), citing In Re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 573 (8th Cir. 1988). The process of obtaining a search warrant is unlike any post-indictment proceeding; it has been characterized as an "extension of the criminal investigation itself." Times Mirror, 873 F.2d at 1214. The purpose of the search warrant hearing is to prevent the potential abuse of the government's investigatory powers; to wit, the government is required to provide a magistrate judge probable cause for the issuance of a search warrant.

While not directly addressing the issue currently before this Court, the Supreme Court has commented on the element of secrecy of the search warrant proceedings. In United States v. U. S. Dist. Court for Eastern Dist. of Mich., Southern Division, 407 U.S. 297 (1972), the Supreme Court, in determining if the warrant provision complies with the Fourth Amendment, recognized the importance of secrecy for warrant proceedings. The Court opined that "[t]he investigation of criminal activity has long involved imparting sensitive communication to judicial officers who have respected the confidentialities involved . . . . [a] warrant application involves no public or adversary proceedings: it is an *ex parte* request before a magistrate or judge." Id. at 321. The element of secrecy

was also commented upon in Franks v. Delaware, 438 U.S. 154 (1978), where the Court considered whether a criminal defendant could challenge the truthfulness of an affiant who presented information in support of a search warrant. The Court concluded that search warrant proceedings are "necessarily *ex parte*, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence," and therefore an accused should be afforded the right to challenge an affiant's veracity. Id. at 169. Based upon these decisions, proceedings to obtain search warrants are historically recognized as secretive.

The historically secretive nature of the proceeding, however, does not necessarily establish a traditional basis to deny access to the documents supporting the Government's proffer of probable cause. Unlike grand jury proceedings, search warrant requests are not mandated to be sealed. A similar historical basis for disclosure exists as there is for sealing documents. The government may always request the court to seal search warrant documents, and the magistrate judge may exercise discretion whether or not to do so. This Court is not convinced that a historically secretive, *ex parte* proceeding automatically leads to the conclusion that all documentation furthering that proceeding should be considered historically secretive as well. Regardless, the burden rests with the News Journal to persuade the court of a historical basis for access, and in its attempt to do so the newspaper has relied upon Rule 41(g).

To satisfy the experience prong of Press-Enterprise II, the News Journal alleges that Rule 41(g) creates a traditional basis of providing accessible information to the clerk and the court, heavily relying upon the lack of specificity in the rule. The Court is not persuaded by this argument. Rule 41(g) is simply a rule of procedure which directs the

magistrate judge to attach to the warrant a copy of the return, inventory and "all other papers in connection therewith" and to file this information with the clerk of the court -- a ministerial provision which furnishes direction to the court and law enforcement officers after a warrant is executed. The Rule does not differentiate between open and sealed documents. As stated above, an equally strong argument can be made that both open and sealed records are the product of a traditionally secretive proceeding. In addition, the rule fails to direct the magistrate judge when the documentation must be returned to the clerk of the district court.[9]

The Court cannot conclude that there is a basis which leads to the result that warrant documentation has historically been open to the public. However, the analysis does not end at this juncture. Regarding a First Amendment right of access claim, the Third Circuit has held "[w]e do not think that historical analysis is relevant in determining whether there is a First Amendment right of access to pretrial criminal proceedings." Criden II, 675 F.2d at 555; also see Simone, 14 F.3d at 838 (the court examined the logic prong of Press-Enterprise II in the absence of an historical basis to support a post-trial inquiry into juror misconduct); Gonzalez, Cr. A. No. 95-52 at 28-29 (historical basis was insufficient when considering if the First Amendment right of access applies to post-trial submissions, consequently the court relied primarily upon the "logic" prong of Press-Enterprise II). Therefore, this principle will be extended to pre-indictment documentation requiring an analysis of the logic prong of Press-Enterprise II.

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[9] Rule 41 does, however, require the law enforcement officer authorized to search a given premises 10 days in which to execute the warrant, (Fed.R.Cr.P. 41(c)(1)), and directs the law enforcement officer to "promptly" make a return to the issuing magistrate. (Fed.R.Cr.P. 41(d)).

b. Logic

The second inquiry under Press-Enterprise II is whether public access to search warrants and supporting affidavits would play a significant positive role in the functioning of the process. In Richmond Newspapers, the Supreme Court identified six societal interests advanced by allowing the public access to criminal proceedings, and these factors constitute the "logic" prong of the inquiry. They are:

> promotion of informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system; promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; serving as a check on corrupt practices by exposing the judicial process to public scrutiny; enhancement of the performance of all involved; and discouragement of perjury.

Simone, 14 F.3d at 839, quoting Smith II, 787 F.2d at 11 (citations omitted). An examination of these interests will determine whether the logic prong supports a First Amendment right of access to search warrants and supporting records.

In an attempt to satisfy the logic prong of the Press-Enterprise II analysis, the News Journal states “[p]erhaps the most cogent argument in favor of a First Amendment right of access is that ‘public access to documents filed in support of search warrants is important to the public’s understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct.’” D.I. 7, p. 6, quoting In re Search Warrant, 855 F.2d at 573.

In response, the Government contends that the disclosure of the information will jeopardize its ongoing investigation. D.I. 11, para. 4. Further, public dissemination may compel a person suspected of criminal activity to “destroy or hide evidence, harass

witnesses identified either directly or indirectly in the affidavit, or flee the jurisdiction." D.I. 11, para. 4. The Government is also concerned that disclosure will adversely affect future investigations -- witnesses will become reluctant to assist law enforcement out of fear of retribution by the suspect prior to an indictment. Id. Finally, according to the Government, disclosure will violate the privacy interests of any target of the investigation and/or others identified in the warrant materials. If the press were to disclose the warrant information at this stage of the investigation, the persons identified therein would become the focus of public scrutiny and, if suspected of criminal activity, "will have no forum in which to exonerate themselves if the warrant materials are made public before indictments are returned." D.I. 11, para. 4, quoting Times Mirror, 873 F.2d at 1216.

The News Journal has generally focused the Court upon the need to educate the public regarding the criminal process and to curb potential prosecutorial or judicial misconduct. However, these concerns are ultimately outweighed by the government's need to preserve and conduct its investigation and to protect the privacy interests of those identified in the warrants. In light of the considerations discussed below, the Court concludes that the second prong of the Press-Enterprise II analysis is not satisfied and, therefore, the News Journal is not entitled access to the affidavits based upon a First Amendment right.

With regard to the first consideration, whether the public will enjoy an "informed discussion of governmental affairs" by obtaining access to the search warrant documents, the danger of exposure of the Government's investigation clearly outweighs the public's interest in reviewing the sealed documents. The sealed affidavits contain

information which, if released, would hamper the government by exposing the scope, focus and direction of its ongoing investigation. It would also cause unnecessary public exposure to witnesses who have cooperated, and result in encouraging an individual upon whom the investigation is focused or another, known or unknown, who committed a suspected crime to destroy or hide evidence, flee the jurisdiction, or identify and improperly influence these witnesses. In addition, publication of the affidavits would focus public scrutiny upon evidence which may be compelling against a particular individual or, in the alternative, focus upon evidence which the government has since ruled out as irrelevant, unreliable or inconsequential.[10] As a result of the alleged execution of the warrants, the Government may have changed the focus and direction of its investigation.[11] In sum, the danger in providing the public relevant, correct information could hamper the government's investigation; the danger in providing

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[10] There is also a danger that the newspapers could disseminate incorrect information. In Franks, the Supreme Court noted:

> '[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing.' quoting United States v. Halsey, 257 F.Supp 1002, 105 (SDNY 1966), aff'd, Docket No. 31369 (2nd Cir., June 12, 1967) (unreported). This does not mean '*truthful*' in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that must be garnered hastily. But surely it is to be '*truthful*' in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

Franks, 438 U.S. at 153-54.

[11] Obviously, information obtained during an ongoing investigation, particularly before indictment, is not a static process. Evidence obtained as a result of an executed search warrant often leads to the development of additional information unknown at the time of execution which could change the focus of the investigation entirely.

irrelevant or unreliable information is that the public would not be objectively educated regarding the search warrant process.

The second factor, opening the proceedings to promote the public perception of fairness, is designed to address fairness to all interested parties. Criden II, 675 F.2d at 556. While the News Journal may claim an interest in the search warrant documentation, the only party involved in an investigation is the Government. Fairness dictates that the government be permitted to continue its investigation without disclosure to the public.

The remainder of the considerations do not persuade the Court that the News Journal should be entitled access to the search warrant documents. The third factor, providing a significant community therapeutic value as an outlet for community concern, hostility and emotion, communicates to the public that the government, through an open criminal trial, has exercised its authority fairly to enforce the law on the public's behalf. In Richmond Newspapers, Chief Justice Burger explained the therapeutic value of open criminal trials as follows:

> Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done-- or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," and the appearance of justice can best be provided by allowing people to observe it.

Richmond Newspapers, 448 U.S. at 571-72 (internal citations omitted).

Simply put, the open criminal trial is a means by which the public, through observation and comment, can vent its frustrations and concerns. The government assumes the burden of ensuring justice is done, while the court assures a fair trial. The public, although not entirely inactive, is more of a passive participant in the process.

Although the Court is sympathetic to the Fahey family and others who are concerned and distressed at the disappearance of Ms. Fahey, this Court believes that the dangers of exposing the Government's investigation at this nascent stage could seriously hamper its efforts to find and properly charge the responsible person(s). At this time, any disclosure would heighten instead of lessen the concern, hostility and emotion which clearly surrounds Ms. Fahey's disappearance, dictating that disclosure not be made.

The fourth factor, allowing the public access to serve as a check upon corrupt practices by exposing the judicial process to public scrutiny, is problematic. The purpose of having a "neutral and detached magistrate" determine probable cause is to safeguard against a prosecutor's overzealousness or bias from effecting his judgment, and insure that a disinterested party objectively reviews the government's proffer of probable cause. This mechanism protects an individual's property from unreasonable searches and seizures. The judiciary's role is to serve as a check upon corrupt law enforcement practices. Thus, a further check upon this procedure, in light of the limited nature of a search warrant application, is redundant and counterproductive.

The fifth and sixth factors -- enhancing of the performance of all involved and discouraging perjury -- are more appropriately directed to adversarial proceedings.

During this ongoing investigation, the Government is the only proactive participant, and, as mentioned earlier, the truthfulness of the affiant is presumed when an application for a warrant is presented to a magistrate judge, even though the magistrate is free to further question the affiant regarding the reliability of the witnesses or information contained therein. Franks, 438 U.S. at 164-65.

In support of its arguments under the First Amendment right of access, the News Journal relies upon the Court's recent pronouncement in Gonzalez, Cr. A. No.95-52. Unlike the interests addressed under the logic analysis in Gonzalez, none would be served in a similar fashion by disclosure of the warrant information. Gonzalez dealt with post-trial submissions, after the government's expert witness had *testified at trial*. The information contained in the warrants before any accusation has been made in the form of an indictment independently supported by probable cause will not assist in determining whether testimony was properly admitted at trial or whether any allegations are accurate. Further, unlike the Whitehurst documents in Gonzalez which contained widely publicized statements against the FBI and related to an internal investigation that had been ongoing for over a year, disclosure of the warrants or supporting materials regarding an investigation in its initial stages before any formal charges have been made will not facilitate informed discussion. Rather, under the present circumstances access would encourage further speculation and supposition beyond what has already transpired.

Similarly, present access to the warrant information will not assist the public in determining whether justice is or is not being done, nor will it increase public confidence in judicial resolution of criminal cases. Since no criminal complaint has been filed nor

any indictment issued, decisions have not been rendered that affect the rights of a *defendant.* Placing these documents in the public domain at this time will not assist in providing a meaningful evaluation of the testimony of witnesses or the judicial process..

Thus, the circumstances in Gonzalez which lead to unsealing certain documents are considerably different from the present matters. Moreover, the societal interests under the logic prong of the First Amendment inquiry would not be furthered by the present disclosure of warrant materials.

In conclusion, this Court holds that there is no constitutional right of access to pre-indictment warrants and supporting documentation based upon the First Amendment. The News Journal did not satisfy either the experience or logic prong of the analysis, and therefore, this Court need not further address the second part of the analysis, namely whether there exists a compelling governmental interest which overcomes the public's First Amendment right of access.

B. Common Law Right of Access

The Court must now decide whether the common law right of access extends to pre-indictment search warrants and supporting documentation. This right of access was described in Warner Communications, where the Supreme Court stated

> [i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. In contrast to the English practice, American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government.

Warner Communications, 435 U.S at 597-98 (citations omitted).

The common law right of access is, however, limited in certain circumstances. The right to inspect and copy judicial records can be restricted if those documents "become a vehicle for improper purposes." Id. at 598 (citations omitted). In making this determination, the trial court should exercise its discretion in light of the relevant facts and circumstances before it. Id. at 599 (citations omitted). Although the Third Circuit has yet to address the issue before this Court, several other circuit and district courts have examined whether to extend a common law right of access to sealed, pre-indictment search warrant documentation. A summary of these decisions and a discussion of the applicable Third Circuit opinions is provided below.

The Ninth Circuit Court of Appeals analyzed this issue in Times Mirror, 873 F.2d 1210. The court recognized a common law right of access to most pre-trial documents, but such access did not extend to "documents which have traditionally been kept secret for important policy reasons." Id. At 1218-1219.[12] The court was unable to find either a historical basis in the warrant application process or an important public need justifying public access. Id. The court concluded that "the ends of justice would be frustrated, not served, if the public were allowed access to warrant materials in the midst of a preindictment investigation into suspected criminal activity." Id.

Baltimore Sun, 886 F.2d 60, held that the common law right of access attaches once a warrant is returned and filed with the court clerk. Id. at 65. In order to defeat this common law presumption, the government is required to demonstrate that "sealing [the

[12] The Ninth Circuit had previously held that the common law right of access did not extend to transcripts of grand jury proceedings, because access would "compromise the long-standing rule of secrecy of the grand jury." Id., citing Re Special Grand Jury (For Anchorage, Alaska), 674 F.2d 778 (9th Cir. 1982).

warrant documentation] is 'essential to preserve higher values and is narrowly tailored to serve that interest.'" Id. At 65-66, quoting Press-Enterprise I, 464 U.S. at 510. If the government meets this burden, the judge is to then consider alternatives to sealing the entire document, including redaction or deletion of passages. Id. at 66.

Several United States District Courts have followed the Baltimore Sun analysis.[13] The Matter of Office Suites for World & Islam Studies, 925 F.Supp. 738 (M.D.Fla. 1996), found that "the Government's reasons for sealing remain compelling in this case and outweigh the press' [sic] right of access."[14] Id. at 743. Specifically, the affidavits outlined the scope and direction of the government's investigation, identified the targets of that investigation, and repeatedly alluded to cooperating witnesses. Id. Therefore, if such information were revealed, the government's ongoing investigation would be severely handicapped. Id.

Office Suites for World & Islam Studies also considered alternative means to denying access to the entire document, such as redacting or extracting portions of the

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[13] See also Matter of Searches of Semtex Industrial Corporation, 876 F.Supp 426, 429 (E.D.N.Y. 1995) (In absence of Second Circuit precedent, the district court maintained closure of the affidavits due to the complex, multi-state nature of the investigation and the need to preserve the identities of undercover agents and others cooperating with the investigation); Matter of Search of Eyecare Physicians of America, 910 F.Supp 414, 416 (N.D.Ill. 1996) (In absence of Seventh Circuit precedent, the district court affirmed a magistrate judge's determination that closure was essential to maintain the secrecy of the grand jury, to preserve privacy interests of witnesses and persons implicated but not charged, to avoid jeopardizing the government investigation and reveal the scope of the investigation, and to prevent the mistaken impression that "certain persons and entities are either subjects of the investigation or are cooperating with the government.")

[14] The Eleventh Circuit had previously recognized that prejudice to an ongoing criminal investigation is a compelling reason for closure of judicial records. United States v. Valenti, 987 F.2d 708, 714 (11th Cir.) cert. denied, 510 U.S. 907 (1993).

affidavit material. Id. However, both methods were deemed inappropriate. Id. Although the individuals identified in the warrant affidavits would be protected if their names were stricken, redaction could not shield against revealing other important aspects of the government's investigation. Id. at 743-44. In addition, extraction was insufficient because

> [t]he affidavits at issue are designed to support the Government's case of probable cause and each section builds on the next. The court has serious concerns that unsealing even a portion of the affidavit would reveal, either explicitly or by inference, the scope and direction of the Government's investigation. Even information already publicized cannot be unsealed because it is inextricably intertwined with the Government's argument for probable cause. The revelation of these matters would likely frustrate the ongoing investigation.

Id. at 744.

A similar result was reached in the Matter of Flower Aviation of Kansas, Inc., 789 F.Supp. 366 (D.Kan. 1992).[15] In denying access, the court held that "the sensitive nature of the information contained in the affidavits, the procedural posture of the criminal investigation, and events which have preceded this motion all weigh in favor of maintaining the affidavits under seal," particularly since an indictment had not yet been returned. Id. at 368. Access was refused due to the ongoing criminal investigation and to maintain the confidentiality of the identities of persons named in the affidavits. Id.

When considering alternatives to a complete denial of access, redaction was found to be inappropriate because it would not "protect the identities of various individuals due to the context in which they are mentioned and because the documents contain multiple references to various individuals." Id. At 368-69. Moreover, the court

[15] At the time of this decision the Tenth Circuit had not addressed this issue.

believed that disclosure of portions of the documents would still expose the scope and nature of the government investigation. Id.

Finally, in the absence of Eleventh Circuit precedent, the United States District Court for the Middle District of Georgia concluded that although a common law access right generally exists as to all judicial records, it is outweighed by multiple public interests in need of protection. In Re Macon Telegraph Publishing Company, 900 F.Supp. 489 (M.D.Ga. 1995). In Macon Telegraph, the court began its analysis by discussing the function of a search warrant in our criminal process. Id. at 492. Specifically, the court opined

> Search warrants are a part of the investigative process whereby law enforcement officials determine whether there is evidence of the *possible* commission of a crime. If so, that evidence is presented to a grand jury of this court, which is then asked to indict one or more persons on the basis of that evidence. A search warrant is not a charge of criminal misconduct. Often times, innocent individuals are necessarily, but unfortunately, the target of search warrants. Any smear upon an innocent individuals good name that would be caused by a release of information surrounding the execution of a search warrant will not be removed in the eyes of the public until such time as the grand jury refuses to return an indictment. Even then, character rehabilitation is much more difficult than denigration caused by revealing information relative to an investigation of that person.

Id. at 492-93 (emphasis in original).

Aside from this general concern of protecting an individual, the court also relied upon the need to preserve the government's uncompromised ability to investigate and prosecute crimes without public interference. Id. at 493, quoting In Re Search Warrant, 855 F.2d at 575 (Bowman, J., concurring).

The common law right of access to judicial records was first applied by the Third Circuit in United States v. Criden, 648 F.2d 814 (3rd Cir. 1981) ("Criden I"). Therein,

review occurred of a district court's decision refusing the press' post-trial request for disclosure of video and audio tapes played to the jury and admitted into evidence during a criminal trial. Id. The district judge, after balancing the respective interests of the litigants, denied the media access to the tapes for a number of reasons: the special impact of videotape evidence; the danger of enhanced punishment to those identified on the tapes as a result of rebroadcast; the impediment to the defendant's right to a fair trial caused by disclosure; evidentiary concerns regarding the admissibility of the tapes; the "devastatingly prejudicial" effect of some material to a defendant awaiting trial; the fear of publication on the "integrity of the trial process;" and the danger of inflicting "unnecessary and intensified pain on third parties" whom the court felt obligated to protect. Criden I, 648 F.2d at 824-829.[16]

Employing an abuse of discretion standard, the Third Circuit's review addressed the factors upon which the lower court relied in denying the press access.[17] The

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[16] The legitimate private concern of third parties was one factor that the Third Circuit deemed important to censure portions of the videotapes. The district court, upon remand, was to excise those segments of the video and audiotapes which produced a risk of serious harm to third parties. Id. At 829.

[17] The Third Circuit identified two levels of discretion. The first level addressed "situations where the [judge's] decision depends on first-hand observation or direct contact with the litigation." Id. at 817. At this level, the judge's decision merits "a high degree of insulation from appellate revision." Id. At 818. This category includes ruling on evidentiary matters, discovery, and procedural issues. Id.

The second level was identified as "commitment to discretion." Id. In this form, the discretion is left to the trial judge "when circumstances are either so variable or so new that it is not yet advisable to frame a binding rule of law . . .." Id. This degree of discretion affords the Third Circuit the opportunity to form a "guiding principle" which identifies the factors and policies pertinent to resolving issues of first impression in the circuit. Id. This Court recognizes that the matters before it fits into the latter category. Although the standard of review is one of abuse of discretion, subsequent appellate

common law right of access to inspect and copy judicial records was a "strong factor" which the trial court did not afford sufficient weight when making its determination. Id. at 819. The common law right to inspect and copy was "justified on the ground of the public's right to know, which encompasses public documents generally, and the public's right to open courts, which has particular applicability to judicial records." Id. (citations omitted). This right is comprised of many interests which a trial court should consider, including "the citizens desire to keep a watchful eye on the workings of public agencies" and access to "information concerning the operations of government." Id., citing Warner Communications, 435 U.S. at 598. The court then analogized the two aforementioned interests to the six identified in Richmond Newspapers, see infra, pgs. 14-17, concluding "that some of the same policy considerations identified as supporting open trials may be considered when the issue involves the common law right of access to trial materials." Id. at 820.

Criden I undertook an expansive analysis of the common law access, stressing the importance of the historically open, public nature of criminal trials and emphasizing their contemporary benefits. Such benefits included the significant community therapeutic value served by the "open process of justice;" the promotion of public confidence in a judicial system that operates fairly; public opportunity to be informed of the functioning of the process, to engage in debate, and to promote conforming civic behavior; the occasion to insure fair application of the law; and generally protecting against the abuse of judicial power. Id. At 821. Upon this foundation, the court resolved

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review, if sought, will consider "both the relevance and the weight of the factors considered." Id.

that the press enjoys a common law right of access to video and audio tapes used in evidence at trial.[18]

In sum, Criden I provided a discretionary framework when analyzing whether public access to a particular court proceeding should be allowed. Three crucial factors were identified: 1) the common law right of access to judicial records; 2) the "significant interest in the public in observation, participation and comment on the trial events;" and 3) privacy interests of third parties, specifically the risk of injury through the dissemination of potentially damaging information.[19] Id. at 823. Moreover, closure is appropriate "only when the party seeking closure demonstrates that the factors opposing access outweigh those favoring it." United States v. Smith, 787 F.2d 111, 115 (3rd Cir. 1986) ("Smith II"); Criden I, 648 F.2d at 823-29, United States v. Martin, 746 F.2d at 967-68 (3rd Cir. 1984).

The public's right of access was expanded in Martin, 746 F.2d 964. The issue addressed was whether the public had the right to copy audiotapes and to obtain transcripts of those tapes played to a jury but not admitted into evidence. Id. The court

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[18] Criden I also identified other factors which the trial court should have considered as favoring access: the value of public supervision and inspection of courtroom proceedings; the public's interest in learning about "important matters" (defendants were "elected public officials accused of receiving money for acts to be performed by them because of their official positions"); and the opportunity to observe a criminal trial. Id. at 822.

[19] Under United States v. Criden, 681 F.2d 919 (3rd Cir. 1982), ("Criden III"), in certain circumstances, the reputation and privacy interests of third parties may outweigh the strong presumption of public access, however all attempts should be made to redact potentially detrimental statements and release the remaining portions of the tape. Those circumstances are limited to situations where, due to the dissemination of the information, third parties are under a risk of serious harm as opposed to the risk of "mere embarrassment." Criden III, 681 F.2d at 922.

considered both the common law right of access to judicial records and public's interest in observing, participating and commenting when it found that both factors create a common law right of access to "all judicial records and documents." Id. at 968, quoting Warner Communications, 435 U.S. at 597. The right of access included "transcripts, evidence, pleadings, and other materials submitted by litigants." Id. (citation omitted). However, the fact that the documents were not admitted into evidence may be a "relevant" consideration if the information were unreliable or prejudicial to a particular individual. Id. at 969.

The common law right of access was augmented in Smith I, 776 F.2d 1104. In Smith I, two defendants were indicted under RICO and conspiracy offenses for, inter alia, attempting to improperly influence state and local officials. Id. at 1105. Pursuant to Fed.R.Cr.P. 7(f), the defendants filed motions for a bill of particulars to obtain the names of the unindicted co-conspirators referred to in an indictment. Id. The lower court ordered that this information be provided to the defendants, and concurrently issued a protective order preventing dissemination of such information to the public. Id. Subsequently, the press intervened and moved to modify the protective order. Id. at 1106.

The district court's denial of the motion was based primarily upon Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984). Specifically, the information was sealed because the government had shown "good cause" for non-disclosure -- the "risk of serious injury to persons named on the list outweighed 'any common law or First Amendment right of

access to the list,'"[20] and thereby satisfied the "good cause" standard as required by Seattle Times, or in the alternative, the "narrowly tailored" standard established in Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596 (1982). Id. at 1107.

The Third Circuit disagreed that Seattle Times and Globe Newspaper Co. provided the appropriate standard, and analyzed Smith I under both the First Amendment and the common law rights of access.[21] With respect to the common law right of access, the court identified Criden I, Criden III, and Martin as "cases [which] recognize a federal common law right of access to certain documents in the possession of a district court." Smith I, 776 F.2d at 1109. According to the Third Circuit, Criden I established a "strong presumption that material introduced at trial should be made

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[20] The district court stated:

> Release of the list of names of unindicted co-conspirators clearly would violate the privacy rights of those individuals. The list constitutes an informal accusation of wrongdoing by the government to which the unindicted co-conspirators would have no meaningful opportunity to respond. Unlike the defendants in this case who have been formally charged and have had or will have the opportunity formally to respond to the charge against them or to have their guilt or innocence with respect to the charges formally determined by a jury, the unindicted co-conspirators have no such opportunity.

United States v. Smith, 602 F.Supp. 388, 397 (M.D.Pa.) aff'd, Smith I, 776 F.2d 1104 (1985).

[21] The court found that "the First Amendment right of access recognized in Richmond Newspapers and the common law right of access recognized in Criden, Martin, and Publicker extend to bills of particulars because we think them more properly regarded as supplements to the indictment than as the equivalent of civil discovery." Smith I, 776 F.2d at 1111. Also see In Re Capital Cities/ABC Inc's. Application For Access To Sealed Transcripts, 913 F.2d 89, 92-94 (3rd Cir. 1990) (Applying Smith I and Smith II in determining if the press should be permitted access to transcripts of sidebar and chambers conferences during an ongoing criminal trial.)

reasonably accessible in a manner suitable for copying and broader dissemination." quoting Criden I, 648 F.2d at 823. Criden III articulated that the strong presumption of access can be overcome by a risk of serious harm to third parties, and redaction should be employed to reduce any such harm. Finally, Martin held that a strong presumption of access exists as to all judicial records and documents regardless of whether the documents are admitted into evidence at trial. Id. at 1109-1110.

The Third Circuit's discussion centered around the close ties that a bill of particulars shares with an indictment and its development within the parameters of the Federal Rules of Criminal Procedure. Id. at 1111. Because a bill of particulars has limited use (by providing minimal information to prepare a defense) and "is designed to define and limit the government's case," it serves a similar function as the indictment, which is available for public review. Id. at 1112-1113. Therefore, the press has a presumptive right of access to this pleading.

Despite this presumption, the court recognized as a paramount concern the privacy of individuals when considering the danger to unindicted persons if their names were released. Smith I, 776 F.2d at 1113-1114. Unnecessary exposure to public scrutiny could occur through unsealing a list which is part of a criminal investigation:

> If published, the sealed list will communicate to the general public that the named individuals, in the opinion of the chief federal law enforcement official of the District, are guilty, or may be guilty, of a felony involving breaches of the public trust. This broad brush assertion will be *unaccompanied by any facts* providing a context for evaluating the basis for the United States Attorney's opinion with respect to any given individual. *When one adds to this that the United States Attorney's opinion was formed on the basis of an investigation that had not yet reached the point where he was willing to make a decision to prosecute, it becomes*

> *apparent that the risk of serious injury to third parties is a grave one.* Finally, as the trial judge noted, the named individuals have not been indicted and, accordingly, will not have an opportunity to prove their innocence in a trial. This means that the clearly predictable injuries to the reputations of the named individuals is [sic] likely to be irreparable.
>
> The individuals on the sealed list are faced with more than mere embarrassment. It is no exaggeration to suggest that publication of the list might be career ending for some. Clearly, it will inflict serious injury on the reputations of all. In some instances, there may be truth to the prosecutor's accusation. On the other hand, given the stage at which his opinion was formed and his "conceivably may have" standard, it is virtually certain that serious injury will be inflicted upon innocent individuals as well. In these circumstances, we have no hesitancy in holding that the trial court had a compelling governmental interest in making sure its own process was not utilized to unnecessarily jeopardize the privacy and reputational interests of the named individuals.

Smith I, 776 F.2d at 1113-1114 (emphasis added).

The common law right of access was next extended to sealed transcripts of sidebar and chambers conferences of an evidentiary ruling. Smith II, 787 F.2d 111. In Smith II, the government sought to impeach a witness' testimony through cross-examination. Id. at 112-113. Subsequent discussions regarding the admissibility based on the Government's proffer were held at sidebar conferences. Id. Thereafter, the press sought access to the transcripts of these discussions. Id.

There, as in the present matters, the press sought documents issued from a procedure to which the public is typically not afforded "contemporaneous presence." Id. at 114. The appellant-witness opposed access, arguing that the factors against publication outweighed those in favor on the following bases: the topic of the government's improper question; the letter from the U.S. Attorney identifying the witness

as a target of the investigation, which resulted from evidence presented to the grand jury, and was thereby cloaked in the protection of secrecy; the prejudicial effect and general unreliability of the information for public dissemination; and the witness' exposure to public humiliation. These arguments were rejected by the court as follows: the letter was not a product of the grand jury proceeding but was an opinion expressed by the United States Attorney, and therefore was not entitled to the safeguards afforded to grand jury matters; the proper basis for the objection was on relevancy, rather than reliability or prejudice;[22] and the witness' position within the Republican Party reduced the potential for public humiliation. Id. at 115-116.[23]

Although the public was not entitled contemporaneous presence to the sidebar and chambers conferences, "the public interest in the ruling [was] not diminished." Id. Therefore, the court opined *"[a]t some stage*, and we need not in this case decide precisely when, the ruling must be available for public review so that *the purposes of open trials* can be satisfied." Id. (emphasis added).[24]

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[22] The Third Circuit had previously held that the admissibility of the information sought is not a "dispositive consideration" to determine if access should be either granted or denied. Id.; also see Martin, 746 F.2d at 969.

[23] The court differentiated Smith II from Smith I by noting that the privacy interest in Smith I was a significant concern because the information "was formed on the basis of an investigation that had not yet reached the point where [the prosecutor] was willing to make a decision on whether to prosecute . . .." Smith II, 787 F.2d at 116, quoting Smith I, 776 F.2d at 1113.

[24] The Third Circuit applied the rationale of the First Amendment right of access to sidebar conferences, but concluded that the press was entitled to a common law right of access. As noted by Judge Schwartz in Gonzalez, it is unclear whether there are still separate and distinct analyses regarding the right of access under the common law right and the First Amendment. Gonzalez, Cr. A. No. 95-52, mem.op. at 14.

Subsequent Third Circuit cases continued to apply the common law right of access to judicial documents, but these decisions have not yet balanced the respective interests when access is sought to pre-indictment search warrant documentation. Although the documents under consideration are not the product of an adversarial proceeding, the warrants were reviewed and authorized by this Court and filed with the Clerk's Office, albeit under seal. In addition, these materials may become the focus of later appellate proceedings, and if indicted, a defendant may challenge the affiant's veracity in seeking the warrants. Because the Third Circuit has recognized a common law right of access to judicial records, this Court extends this qualified right to pre-indictment search warrant documentation.[25] However, as noted earlier, this right is not absolute, and this Court will exercise its discretion and decide if the presumption of access is overcome by mitigating factors which weigh against access.[26]

The News Journal asserts that it is entitled to a common law right of access to the search warrant documentation, and correctly asserts the burden is upon the Government to prove that public access is inappropriate under these circumstances.

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[25] This Court rejects the Government's assertion that a common law right of access automatically does not apply to pre-indictment search warrant documentation. D.I. 11, para. 5. In its response, the Government exclusively relies upon the Ninth Circuit's holding in Times Mirror. However, the Times Mirror decision is based, in part, on the denial of a common law right of access to historically secretive proceedings. See infra, fn. 12. The Third Circuit has not recognized an absolute bar on this basis and, in fact, has applied a balancing test analysis when deciding access to substantive grand jury matters. In Re Grand Jury Matter, 906 F.2d 78, 86-87 (3rd Cir. 1990).

[26] Despite the Government's contention that the traditionally secretive nature of the documents should bar access in this circumstance, this Court declines to follow the specific holding of Times Mirror. A balancing of interests is appropriate under Third Circuit precedent to determine if the News Journal is entitled to access based upon the common law right.

D.I. 7, p. 10. While the Government denies that common law right of access exists, D.I. 11, para. 4, it emphasized factors which compel the conclusion that this right does not apply.[27] These are preserving the secrecy necessary to effectively investigate criminal activity, denying the subject of the affidavits an opportunity to destroy or hide evidence, harass witnesses or flee the jurisdiction, promoting public confidence in law enforcement, and protecting the privacy interests of individuals identified in the documents. D.I. 11, para. 4.

The common law right of access has been premised upon the public's right to be informed of the operations of government and to an open court system. Criden I, 648 F.2d at 819 (citations omitted). Specifically, the Third Circuit has closely analogized this right to the six factors identified in Richmond Newspapers. Criden I, 648 F.2d at 820. As previously discussed, these factors do not support a right access under the First Amendment. See infra, pgs. 14-17. While this conclusion may weaken the presumption that a common law right of access is available under these circumstances, the Government is still required to provide the Court with alternative considerations which outweigh the presumption of access.

1. Investigation Interest

[27] In its brief, the Government requests that if a common law right of access is recognized, it be afforded the opportunity to provide *ex parte* reasons why the warrant affidavits should remain sealed. D.I. 11, para. 5. However, in reviewing the Government's response to the News Journal's Motion to Unseal, and independently evaluating the sealed affidavits, the Court has concluded the sealing order should remain in effect. The court has been unable to locate, and News Journal has not provided, any direct authority to support its position that a subsequent hearing, *ex parte* or otherwise, is necessary to determine if the Government has proffered sufficient reasons to deny public access to these documents. See supra, p. 39 et seq..

The Government has identified its investigative interest as transcending the common law right of access, arguing that public interference at this stage would seriously hamper its ability to conduct criminal investigations. By unsealing the warrant information, the scope and direction of its investigation would be disclosed, creating an opportunity for the subject of the warrants and others to destroy or hide evidence, influence witnesses, or flee the jurisdiction and thereby make this and future investigations difficult to conduct because of witness' reluctance to cooperate out of fear of public disclosure or retaliation.

Search warrants facilitate the government's ability to examine criminal activity. In order to accomplish this efficiently, non-disclosure is frequently essential to protect the breadth and objectives of the investigation. The public does not enjoy an absolute right to review and comment upon police activity before a suspect is charged with an offense, and the execution and return of a search warrant should not indirectly become a vehicle by which intimate access to the government's probe is gained. Ample support exists among the federal courts for the government's unfettered ability to investigate criminal activity as a factor weighing against access during the pre-indictment stage. See Office Suites for World & Islam Studies, 925 F.Supp. at 743; Searches of Semtex Industrial Corporation, 876 F.Supp. at 429; Search of Eyecare Physicians of America, 910 F.Supp. at 416; Flower Aviation, 789 F.Supp. at 368-69; Macon Telegraph, 900 F.Supp. at 493.

In Gonzalez, Judge Schwartz recently rejected a similar "investigation interest" argument. Gonzalez, Cr. A. No. 95-52, mem.op. at 20-21. Specifically, the press sought access to documents alleging that the government's expert witness engaged in

evidence tampering, violated scientific protocols, and issued opinions without proper empirical bases. Id. at 3. However, the matters under consideration are clearly distinguishable from Gonzalez.

First, persuasive authority as mentioned herein requires that the common law right of access should yield to the government's interest in unencumbered investigations. See infra. Second, unlike Gonzalez, where the defendant had already been charged, tried and convicted, this is merely a three month old criminal investigation. The investigation herein is clearly at its "nascent stage, where the risk of disclosing information might affect is viability." Gonzalez, Cr. A. No. 95-52, mem.op. at 21. No indictment, let alone a trial, has occurred. The Government continues to investigate Ms. Fahey's disappearance. Granting access would expose the nature and scope of the Government's ongoing investigation and compromise law enforcement's ability to prosecute the person(s) responsible. Further, in Gonzalez, the expert to which the sealed documents referred had testified at trial in open court and was subject to cross-examination. Here, no testimony has occurred under safeguards of an adversary process. The circumstances herein weigh heavily against granting access at this time.[28]

[28] This opinion is limited to the News Journal's current request for access, and is not directed as to when the search warrants should be unsealed. At oral argument, the Government suggested that the public may be entitled access once an indictment has been obtained. Tr., p. 34. In addition, other district courts have prescribed arbitrary deadlines when the information should be disclosed or required the government to proffer reasons why access should continue to be denied. See Flower Aviation, 789 F.Supp. at 369 (Sealing order remained in effect either ninety days past the date of the Memorandum and Order denying access or upon the issuance of an indictment, whichever occurred sooner); Semtex Industries, 876 F.Supp. at 429 (Unless an indictment were issued, the district court ordered documents remain sealed for approximately three months after the date of the Memorandum Decision. At that time the documents would be disclosed unless, during an *in camera* hearing, the government

The Government has also argued that its investigatory efforts will be handicapped because disclosure would encourage reluctance to assist in this and future investigations. While the danger to future investigations may exist, this Court is troubled with the effect disclosure will have upon witnesses identified in the sealed affidavits.[29] There is first the danger that witnesses and others' privacy will be jeopardized. Assisting law enforcement should not subject anyone to uncontrolled public scrutiny, particularly when the information garnered has not been presented under oath. Second, there is a genuine fear that witnesses may be coerced or improperly influenced to amend or recant previous statements, thereby endangering the legitimate government (and public) interest in developing evidence for review by a grand jury and for the fair and effective administration of justice.

2. Privacy Interests

The Government has also argued that the privacy interests of individuals mentioned in the search warrants need to be protected. Specifically, these persons have "no forum in which to exonerate themselves if the warrant materials are made public before indictments are returned." D.I. 11, para. 4, quoting Times Mirror, 873 F.2d at 1216. The Third Circuit has long maintained a sensitivity to protect reputational

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proffered reasons why the documents should remain sealed); Matter of Office for World & Islam Studies, 925 F.Supp. at 744 (Order to seal was effective until the government moved to have it unsealed or ninety days after the date of the order, whichever was earlier, but allowed the government to present a motion to for extension of the ninety day deadline).

[29] It is speculative to suggest that future investigations will be disrupted by dissemination of the search warrant information herein. The Government has not provided any empirical data which endorses any such adverse effect would result from the opening of the warrant documentation.

interests of witnesses or persons who may be the target of a governmental investigation. Smith I, 776 F.2d at 1113. These reputational interests can outweigh the public's interest in disclosure. Id. To meet this burden, the government is required to show that disclosure would inflict "unnecessary and intensified pain on third parties who the court reasonably finds are entitled to such protection." Criden I, 648 F.2d at 829; Criden III, 681 F.2d at 921. Mere embarrassment is not enough. Id.

Although the News Journal has published information regarding the disappearance of Ms. Fahey and concerning Mr. Capano, the affidavits contain details, none of which have been subjected to an adversarial proceeding or review. The potential for irreparable injury to Mr. Capano's, as well as others' reputations is obvious. A search warrant is not a charge of criminal misconduct. Release of the information surrounding its execution can only result in irreversible character damage to innocent individuals, especially should no indictment or formal charges ensue. No forum exists where Mr. Capano or others could respond to the conclusions or allegations contained within the affidavits, or the resultant inferences drawn therefrom. No opportunity for character rehabilitation is available. As stated previously, the probable cause sufficient to sustain a search warrant does not equate to the evidence sufficient to indict. The mechanism of our criminal justice system to insure persons are convicted and punished for the suspected commission of a crime is not through publication, but rather, through an unbiased criminal trial in a court of law. This Court, through disclosure of warrant information, should not be used to unnecessarily jeopardize privacy and reputational interests.

Thus, the common law right of access is preempted by the factors mentioned

above. However, a further consideration is whether the Court can, through a prophylactic process, "eliminate [] the threat of harm to legitimate third parties" and unseal portions of the documents. Criden III, 681 F.2d at 921 (citations omitted). Redaction and extraction are methods by which the Court may excise sensitive portions of the warrant materials.

Probable cause for search warrants is not based on any single fact or statement and frequently not on any one witness. Nor do the affidavits in the present matters rely on an isolated comment or finding. The establishment of probable cause is like building a masonry wall -- the process of laying one brick after another. Although information may have been previously disseminated to the media, since it is inextricably intertwined with the details supporting probable cause, disclosure of any part thereof would, either explicitly or by reference, reveal the focus, direction and scope of the Government's inquiry and potentially compromise continued investigative efforts. For these reasons, neither redaction or extraction are appropriate methods to provide access to the documentation. The Order sealing the affidavits will therefore remain undisturbed.

C. Necessity for A Hearing

The News Journal contends in its written submission that an obligation exists upon the *trial court* to hold a hearing before sealing the warrants and any supporting documentation. Specifically, the Newspaper claims that "[b]efore a court can issue an order depriving the public of its First Amendment rights, that court must give notice of the proposed order and allow interested parties to be heard so that they may

challenge the order."[30] In support of this proposition, it relies upon various Supreme Court and Circuit Court decisions[31] involving post-indictment pre-trial or trial proceedings. In its written submission, the News Journal argues that no judicial record in a criminal proceeding may be sealed without notice, a hearing, and particularized findings, asserting that these requirements must be met for the sealing of unexecuted search warrants, an *ex parte* process. That position is contrary to its presentation at oral argument, where the Newspaper then asserted access was only being sought to executed, returned warrants and their documentation. As noted by the News Journal, the sealing of the warrants and supporting information occurred at the time of their authorization before execution or return.

The cases cited by the News Journal are distinguishable from the present matter. In addition to involving post-indictment proceedings, they address the reasonable opportunity that a court is to provide *in reaction to a request* by the press for access. None of the cases controlling this jurisdiction dealt with the sealing of documents before the pre-trial stage.[32] Unlike closures of suppression or evidentiary hearings and trials,

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[30]Interestingly, this is the same claim in the same language asserted by the News Journal in Gonzalez, wherein The Honorable Murray M. Schwartz found that the Newspaper's position was not supported by United States v. Antar, 38 F.3d 1348, a decision rendered after any of the controlling opinions now cited by the News Journal in its present motion.

[31]The cases cited are Press-Enterprise I, 464 U.S. 501, Globe Newspaper Co v. Superior Court, 457 U.S. 596, 609 n.25 (1982), Gannett Co v. DePasquale, 443 U.S. 368, 401 (1979), Criden II, 675 F.2d at 558; and In Re Knight Publishing Co., 743 F.2d 231, 234 (4th Cir. 1984).

[32]Although a search warrant often becomes part of the pretrial matters and is frequently the subject of a suppression hearing, until an indictment is returned, unless waived by a defendant under Fed.R.Cr.P. 7(b), no criminal trial on a felony offense will

the issuance of a warrant and its sealing does not involve a hearing where evidence is presented in open court and the opportunity is provided to the accused to challenge and contradict the requested authorization of the warrant. The issuance of a warrant is entirely unilateral with only the government providing support for its authorization to the court and a judge determining whether "grounds for the application exist or that there is probable cause *to believe* that they exist." Fed.R.Cr.P. 41(c)(1) (emphasis added). The finding of probable cause may be based wholly upon hearsay. The subject of the warrant is usually unaware of its issuance. In fact, an inherent purpose of having warrant authorizations as *ex parte* is to preserve evidence and to maintain objective information. The public's interest in evaluating law enforcement and other officials working in the criminal justice system is neither limited nor denied by the sealing of such documents without the type of hearing as claimed by the News Journal. The opportunity for the public to later scrutinize the conduct of law enforcement officials, prosecutors or the court, as well as balancing the right of access against the right of a defendant to a fair trial is not compromised.

In its written argument, the News Journal has directed attention to Criden II's discussion of the opportunity to object to closure.[33] However, Criden II was limited by

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occur. Rule 7(a).

[33]As noted in that discussion at page 558, the Third Circuit commented that neither Gannet nor Richmond Newspapers supported the procedures as suggested by the media in Criden II. Rather, Criden II recognized that the plurality opinion in Richmond Newspapers failed to outline the procedure by which the existence or absence of an overriding interest in a closed proceeding was to be determined. However, Criden II acknowledged the need for notice involving closure of an evidentiary hearing.

the appellate court to a review of the "current role of the first amendment and the societal interests in *open pretrial* criminal proceedings." Criden II, 675 F.2d at 555 (emphasis added). Further, the Third Circuit specifically confined its findings to the issue on appeal (access to transcripts of an evidentiary hearing held *in camera*):

> We are not called upon to decide the application of the first amendment right to other pretrial criminal proceedings or to situations involving interests *other than those of the defendants' fair-trial rights.*

Criden II, 675 F.2d at 557 (emphasis added).

Similarly, Gannett Co., which involved closure of a suppression hearing, held that the Sixth Amendment guarantee of a public trial is for the benefit of the defendant alone and does not provide a right of access to the public to a criminal trial. Even Justice Powell's concurring opinion referenced by the News Journal is limited to the circumstances addressed. As noted therein,

> In view of the special significance of a suppression hearing, the public's interest in this proceeding often is comparable to its interest in the trial itself. It is to be emphasized, however, that not all of the incidents of pretrial and trial are *comparable in terms of public interest and importance to a formal hearing in which the question is whether critical, if not conclusive, evidence is to be admitted or excluded.* In the criminal process, there may be numerous arguments, consultations, and decisions, as well as depositions and interrogatories, that are not central to the process and that implicate no First Amendment rights.

Gannett Co., 443 U.S. at 397 n.1 (emphasis added).

Similarly, Globe Newspaper Co. found that a state statute requiring mandatory closure for criminal trials involving sex offenses against minors violated the First Amendment. In so holding that the mandatory nature of the statute was not a narrowly tailored means of accommodating the state's asserted interest, the Court ascertained

that a case-by-case review by the trial court was appropriate to determine whether the state's legitimate interest for the well-being of a minor victim necessitated closure because:

> Such an approach ensures that the constitutional right of the press and public to gain access to *criminal trials* will not be restricted except where necessary to protect the State's interest.

Globe Newspaper Co., 457 U.S. at 609 (emphasis added).

Under Press-Enterprise I, the Court emphasized the historical openness of trials and jury selection as a presumptively public process except for good cause shown in determining that *voir dire* of potential jurors may not be subject to closure except " by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." 464 U.S. at 510.

Therefore, no impartial reading of the aforementioned cases relied upon by the News Journal supports its expansive claim that representatives of the press and general public must be given the opportunity to be heard and specific findings made before sealing of search warrant materials.

Conclusion

For the reasons contained herein, I recommend that the Motions to Unseal (D.I. 7, 10) be DENIED. An Order consistent with this Report and Recommendation shall follow.