Unsealing Search Warrant Materials For Uncharged Clients

They come late at night, hushed at first. Then, with the splintering of the front door, screaming: "Police officers. We have a search warrant!" A small army of them, looking like dark robots with their high-tech SWAT team gear and weaponry. Fanning out. Tossing the place. And, finally, vanishing.

Months pass. But the prosecution files no charges against your client. Meanwhile, your client has been deprived of significant personal and business items. Your client is uncertain about the future. The television and newspaper carry stories about the raid. Neighbors and family look at your client oddly. There is widespread speculation about the reason for the raid.

In an effort to learn why your client was targeted, in the cool of the afternoon you go to the courthouse. Of the kind, familiar clerk, you request access to the affidavit and other supporting documents underlying the search warrant. Even before you finish, the clerk begins to shake his head gently: "Sorry. Search warrant documents are sealed 'til charges are filed or judge orders 'em unsealed."

Now what?

Many jurisdictions do not define affidavits in support of search warrants as presumptively-public documents. Even in those jurisdictions with statutes directing or implying that search warrant materials will be accessible to the public, prosecutors may, and often do, obtain orders sealing warrant materials.[1] And once the warrant materials are sealed, in most if not all jurisdictions, the targets of the warrants have no automatic right of access unless they are criminally charged. But in many uncharged cases, access at the earliest opportunity is essential for:

- Advising a presumptively-innocent client about what he or she is up against.
- Negotiating a potential criminal case precharge.
- Advising a client in related civil matters.
- Protecting a white-collar client's business interests.
- Presenting a defense to the media that will be consistent with evidence that the prosecution later reveals.
- Preparing a motion for return of property.
- Preparing a civil rights action under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

Most judges balk at precharge motions to unseal search warrant materials. They need to be reassured that there are many legal bases for finding a right of access. The remainder of this article will set forth these bases, as well as some practical tips for gaining precharge access to warrant materials.

By Daniel E. Monnat and Paige A. Nichols

I. Rights Personal To The Client

A. Local Rule Or Statute

The local search and seizure rules or statutes may support a request by an uncharged target for access to warrant materials. For instance, the New Jersey Supreme Court Rules direct that search warrant materials will presumptively be sealed, but that the materials "shall be available for inspection and copying" by the charged defendant or by "any person claiming to be aggrieved by an unlawful search and seizure upon notice to the county prosecutor for good cause shown."[2] And the Federal District Court for the Eastern District of Arkansas boasts a rule directing that warrant materials sealed upon motion of the government may be accessible to *any* party (charged or not) who submits a motion "stating specific grounds supporting the release of the sealed documents."[3]

B. Fourth Amendment

Several federal and state courts have recognized that targets of search warrants have a precharge right of access to search warrant materials grounded in the Fourth Amendment, reasoning that "a person whose property has been seized pursuant to a search warrant has a right under the warrant clause of the Fourth Amendment to inspect and copy the affidavit upon which the warrant was issued."[4] As the Federal District Court of Minnesota has explained, "[t]he power to seal court records is necessarily limited by the Constitution," and "the Fourth Amendment requirement of probable cause is meaningless without some way for targets of the search to challenge the lawfulness of that search."[5]

Because challenges to the lawfulness of a search may take the form of not only a postcharge motion to suppress, but also a motion to return property or a civil rights action, the rights of victims of unlawful searches to seek redress justifies disclosure regardless of whether charges have yet been filed (or indeed are *ever* filed):

> A person whose property is seized pursuant to a search warrant cannot decide whether he/she should make a motion under Rule 41 unless they know the basis upon which the search warrant was issued. To permit an affidavit or any documents in support of a search warrant to remain sealed against examination by the person whose property was searched deprives him of the right secured by Rule 41 to challenge that search.[6]

In an excellent opinion on this subject, the Federal District Court of Maryland spoke at length about the need for precharge disclosure to protect Fourth Amendment rights, emphasizing in particular the fact that even precharge, the "search itself prompts suspicion and damages the reputation of the subject":

> Finally, the government suggests that no Fourth Amendment right attaches to the subject of the search until that subject is indicted. The government dismisses the Property Owner's argument that Rule 41(g) of the Federal Rules of Criminal Procedure expressly provides him with a pre-indictment mechanism to challenge the reasonableness of the search . . . . the government contends that the rule pertains only to the reasonableness of the government's decision to retain property, and therefore provides no pre-indictment right of inspection. Based on this, the government argues, subjects of governmental searches are only entitled to challenge the reasonableness of searches after indictment, at which time they can move to suppress evidence. Until that time, any right to inspect the search warrant affidavit would essentially be a right without a remedy.
>
> The remedy proposed by the government would be essentially meaningless. The Fourth Amendment right to inspect is derived from the government's decision to intrude on the property and privacy rights of the individual. In this case, as in many like it, the search itself prompts suspicion and damages the reputation of the subject. While the government is free to lawfully exercise its power to execute search warrants, the persons against whom that awesome power is unleashed at least have the right to discover the basis for the exercise. This is particularly true in cases such as this one, where the government has yet to name the Property Owner as the target of a criminal investigation, and where the government acknowledges that, due to the complexity of the issues, an indictment in the case may not be issued for a considerable period of time. A delay of several years is not uncommon in such investigations.[7]

Courts that have recognized a Fourth Amendment right of access have also concluded that this right may be limited by the prosecution's interests. These courts employ a balancing test, putting the burden on the prosecution to show that its interests outweigh those of the person seeking access, and that no means short of keeping the warrant materials sealed would be adequate to protect the prosecution's interests. In other words, access to search warrant materials may be denied "only upon a showing of a compelling governmental interest that cannot be accommodated by some means less restrictive than sealing the court's records."[8] The Federal District Court of Minnesota has wisely cautioned that "[m]ore than a conclusory allegation of an ongoing investigation is required" for the government to meet its burden of proving that the documents should remain sealed.[9]

II. Rights The Client Shares With The Public

A. First Amendment

While the First Amendment seems a natural source of the right to unseal search warrant materials, there turns out to be little support in the caselaw for this proposition.[10] The United States Supreme Court has held that the public has a First Amendment right of access to information contained in official court records, but that right is normally only extended to historically-open records.[11] In light of the fact that search warrant proceedings have traditionally been both *ex parte* and closed to the public, most courts to have considered this issue have held that no First Amendment interests are implicated by the sealing of search warrant materials.[12]

The Eighth Circuit appears to stand alone in recognizing "a qualified First Amendment right of access to judicial documents that include[s] search warrant materials."[13] In the leading Eighth Circuit case on this issue, a divided panel reasoned that even if search warrant *proceedings* have historically been closed, the documents related to those proceedings have historically been publicly filed, and public access to these documents would

further public understanding of the judicial system and "may operate as a curb on prosecutorial or judicial misconduct."[14] Adopting an approach much like the one taken by courts that ground the right of access in the Fourth Amendment, the panel concluded that the First Amendment right of access may be overridden only upon a showing by the proponent of closure that sealing "is necessitated by a compelling government interest," and that "less restrictive means [are] not appropriate."[15]

B. Common Law

The U.S. Supreme Court has recognized a common law right of public access to judicial materials,[16] and other courts have applied this right to grant targets of search warrants precharge access to the search warrant materials.[17]

As explained by one district court, "[t]o say that affidavits in support of search warrants are exempt from public access solely because they are affidavits for search warrants creates for them a curious and irrational exemption from the public access afforded every other document filed with the Court."[18] Thus, the common law has been held to give courts authority to balance the target's interest in access against the prosecution's interest in continued secrecy, and to order disclosure in appropriate cases.[19] Even though this balancing test is not constitutionally-mandated, the Fourth Circuit has described it in terms similar to those adopted by the courts that have relied on constitutional bases of access, concluding that sealing is only proper when the government shows that "sealing is essential to preserve higher values and is narrowly tailored to serve that interest."[20]

III. Practice Pointers

A. Choosing a Caption and Case Number

One practical problem that arises in some jurisdictions when counsel moves to unseal search warrant materials before any criminal charges are filed is that there is no public case in which to file the motion. One solution may be to follow the federal cases and caption the motion simply "In re Search Warrant issued on [date]," and ask the clerk to file it with the same case designation used to file the search warrant and supporting materials. The request for access may then be served on the prosecution as a motion in an existing case rather than as a complaint in a new case. In the alternative, counsel may invoke the court's *in rem* jurisdiction over property held *in custodia legis*, caption the case "In re property seized pursuant to Search Warrant issued on [date]," and file the request as a new civil action.[21]

B. Choosing a Legal Basis

Local rules or statutes are the most obvious choice of law for counsel seeking precharge access to search warrant materials. But if these are not available or applicable, what difference does it make which legal basis for access is offered to the court in a jurisdiction that has not previously addressed the issue? The balancing test applied by the court is likely to be the same whether the right to access is grounded in the Fourth Amendment, the First Amendment or the common law. But gaining access via the First Amendment or the common law may open the door for the media to gain like access, thus putting the client's rights to privacy and a fair trial at risk. On the other hand, if the media's oversight is welcome (and counsel is confident of that *before* seeing the warrant materials), then counsel may wish to argue from a basis that supports public access (or perhaps even to goad the media into asserting that basis and seeking access itself).

C. Choosing Your Battles

If consistent with the client's interests, counsel might offer to agree to a gag order to minimize any harm that the prosecution claims public access would do to its ongoing investigation. Such an order should include language granting access to the client, counsel and counsel's staff and agents, and the court and its staff in any legal action involving the search warrant materials.[22]

And if the prosecution's claimed concern is protecting its informant from the client as well as the public, counsel might agree that the informant's name may be redacted from the search warrant materials, reserving the right to move for disclosure of the informant's identity at a later date or after any potential civil suit is filed.[23]

D. Winning the Balance Game

The interests that the prosecution is likely to claim in keeping search warrant materials sealed are fairly easy to predict. It will claim first and foremost that access by anyone—including the target of the warrant—will harm its ongoing investigation.

Several interests might be proffered to counterbalance that claimed interest. These include:

- The client's interest in vindicating Fourth Amendment rights.

- The client's interest in preparing a defense to imminent criminal charges.
- The public's interest (if public access is sought) in monitoring government and judicial conduct.
- The prosecution's interest (if public access is sought) in openness and reassuring the public of its progress in the investigation.[24]

The court may need to be reminded that some interests that ordinarily might weigh in favor of sealing search warrant materials—i.e., the target's interests in privacy and a fair trial if charged—are not at issue when the target is the party seeking access.

Conclusion

Many courts have never been faced with a precharge request for access to search warrant materials. They will be surprised to learn just how much authority exists for granting precharge access to the target of the search. Knowing this authority and using it wisely is the first step towards enforcing the uncharged client's right to know why the government has invaded his or her privacy, and to remedying the harm that invasion has caused.

Notes

1. *See* David Horan, *Breaking the Seal on White Collar Criminal Search Warrant Materials*, 28 PEPP. L. REV. 317, 323-25 (2001) (describing rise in motions to seal search warrant materials in federal cases).

2. N.J. Sup. Ct. R. 3:5-6(c).

3. E.D. Ark. General Order No. 22.

4. *In re Search of Up North Plastics, Inc.*, 940 F. Supp. 229, 232 (D. Minn. 1996) (denying government's precharge motion to continue order sealing affidavit in support of search warrant); *see also In re Search Warrants Issued on April 26, 2004*, 353 F. Supp. 2d 584, 591 (D. Md. 2004) (affirming magistrate's order recognizing "a search subject's pre-indictment Fourth Amendment right to inspect the probable cause affidavit"); *In re Search Warrants Issued August 29, 1994*, 889 F. Supp. 296 (S.D. Ohio 1995) (holding that "the Fourth Amendment right to be free of unreasonable searches and seizures includes the right to examine the affidavit that supports a warrant after the search has been conducted and a return has been filed"; granting uncharged home and business owners' motion to unseal materials in support of search warrant); *Sloan v. Sprouse*, 968 P.2d 1254 (Okla. Crim. App. 1998) (granting mandamus relief and ordering lower court to grant searched party precharge access to documents supporting search warrant; finding Fourth Amendment right to examine affidavit). *But see In the Matter of Eyecare Physicians of America*, 100 F.3d 514, 517 (7th Cir. 1996) ("no provision within the Fourth Amendment grants a fundamental right of access to sealed search warrant affidavits before an indictment"); *In re Search of S&S Custom Cycle Shop*, 372 F.Supp. 2d 1048 (S.D. Ohio 2003) (concluding that "[t]he better reasoned cases have held that no right to inspect sealed affidavits for search warrants exists *under the Constitution or the Criminal Rules*, prior to the initiation of a criminal proceeding against the movant") (emphasis in original).

5. *Up North Plastics*, 940 F. Supp. at 231-33.

6. *Id.* at 233.

7. *Search Warrants Issued on April 26, 2004*, 353 F. Supp. 2d at 591.

8. *Up North*, 940 F. Supp. at 230; *see also Search Warrants Issued on April 26, 2004*, 353 F. Supp. 2d at 591 (cautioning that "the government must demonstrate to the court that: 1) there is a compelling governmental interest requiring materials to be kept under seal, and 2) there is no less restrictive means, such as redaction, available"); *Search Warrants Issued August 29, 1994*, 889 F. Supp. at 299 (adopting compelling interest plus no less-restrictive means test and insisting that documents be redacted if necessary to avoid sealing).

9. *Up North*, 940 F. Supp. at 233.

10. Most courts to have considered this issue have either avoided or rejected the argument that there is a First Amendment right of access to search warrant materials. *See, e.g., In re Application of Newsday, Inc.*, 895 F.2d 74 (2d. Cir.1990) (sidestepping question by finding common law right of access, albeit post-indictment and post-plea); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir. 1989) (rejecting First Amendment argument but finding common law right of access); *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989) (finding no First Amendment or common law right of access).

11. *See generally Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

12. *See, e.g., Times Mirror Co. v. United States*, 873 F.2d 1210, 1213-14 (9th Cir. 1989) (discussing secrecy of warrant proceedings and concluding that "the experience of history implies a judgment that warrant proceedings and materials should not be accessible to the public, at least while a pre-indictment investigation is still ongoing as in these cases"); *Newsday, Inc. v. Morganthau*, 4 A.D.3d 162, 163 (N.Y. App. 1st Dist. 2004) (noting in media action for access to search warrant affidavits that "the warrant application process has historically not been open to the public").

13. *Certain Interested Individuals, John Does I-V, Who Are Employees of McDonnell*

Douglas, Corp. v. Pulitzer Pub. Co., 895 F.2d 460 (8th Cir. 1990), *cert. den.* 498 U.S. 880 (1990) (commonly referred to as *Gunn II*); *see also In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569 (8th Cir. 1988) (commonly referred to as *Gunn I*).

14. *Gunn*, 855 F.2d at 573-74. In support of the proposition that search warrant materials have traditionally been publicly filed, see David Horan, *Breaking the Seal on White Collar Criminal Search Warrant Materials*, 28 PEPP. L. REV. 317, 324 (2001) (noting that until recently, "[s]ealing a search warrant affidavit was . . . understood to be 'an extraordinary action'" (quoting 3 Charles Alan Wright, Federal Practice and Procedure Crim. § 672 at 752 (2d ed. 1982 & Supp. 2000))).

15. *Gunn*, 855 F.2d at 574.

16. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

17. *See, e.g., In re Search Warrant*, 2000 W.L. 1196327 (D.D.C. 2000) (unpublished); *In re Four Search Warrants*, 945 F. Supp. 1563 (N.D. Ga. 1996) (granting media access to sealed affidavits in support of search warrants regarding former Olympic bombing suspect Richard Jewell, and noting that Jewell was granted access to affidavits despite having never been charged, "on the premise that he had a right to know whether there was probable cause to file a . . . motion for return of property or a *Bivens* civil action for damages"); *In the Matter of the Search of Flower Aviation of Kansas, Inc.*, 789 F. Supp. 366 (D. Kan. 1992) (recognizing right but denying disclosure of affidavits where redaction of sensitive materials not feasible and destruction of evidence was reasonably feared); Ark. Op. Atty. Gen. No. 2005-262 (March 10, 2006) (Attorney General opinion reviewing cases and predicting that Arkansas Courts would extend common law right of access to judicial records to warrant materials); *cf. Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir. 1989) (recognizing common law right of access to warrant materials in media action).

18. *In re Search Warrant*, 2000 W.L. 1196327 at *1.

19. *Id.*, 2000 W.L. 1196327 at *2 (ordering government to give redacted affidavit to searched party precharge and to justify continued secrecy of redacted portions).

20. *Baltimore Sun*, 886 F.2d at 65-66 (4th Cir. 1989).

21. *See In re Two Bose Speakers*, 17 Kan. App. 2d 179, 181, *rev. den.* 251 Kan. 938 (1992) ("[w]here no criminal action has been filed, the district court retains *in rem* jurisdiction over property held *in custodia legis*," i.e., property seized during a police investigation).

22. For examples of protective orders, see *Taylor v. Solvay Pharmaceuticals, Inc.*, 223 F.R.D. 544, 546 (D. Colo. 2004) (denying motion to modify protective order after settlement of lawsuit); *Hobley v. Chicago Police Commander Burge*, 225 F.R.D. 221, 226 (N.D. Ill. 2004) (granting protective order in civil rights action on non-party police officer's motion); *In re Bank One Securities Litigation*, 222 F.R.D. 582, 584 - 585 (N.D. Ill. 2004) (granting plaintiff's motion to lift previously-agreed-upon protective order in order to notify class members of action).

23. For cases supporting the proposition that the prosecution may be required to disclose an informant's identity in a civil rights case, see *Hampton v. Hanrahan*, 600 F.2d 600, 637-38 (7th Cir. 1979) (warning that "[t]he assertion of informer's privilege by a law enforcement official defending against a civil suit for damages based on his own alleged official misconduct should be scrutinized closely," and ordering disclosure of informant's identity, subject to suggested protective order, in civil rights case arising from shoot-out between police and Black Panther members during execution of search warrant; reasoning that "disclosure of [the informant's] identity would be important to a resolution of the case since that informant might be a critical figure in the conspiracy alleged by plaintiffs"), *rev. on other grounds*, 446 U.S. 754 (1980); *Bergman v. United States*, 565 F.Supp. 1353 (W.D. Mich. 1983) (ordering disclosure to counsel alone, under strict protective order, in civil rights case brought by Freedom Riders); *Moody v. Hicks*, 956 S.W.2d 398, 400-01 (Mo. App. E.D. 1997) (explaining that weighing against the informer's privilege is the fact that "some discovery must be permitted unless law enforcement officers are to be, as a practical matter, entirely insulated from any civil action against them arising from searches conducted as a result of information purportedly received from a confidential informant"; denying disclosure where request was too speculative).

24. *See* Michael D. Johnson & Anne E. Gardner, *Access to Search Warrant Materials: Balancing Competing Interests Pre-Indictment*, 25 U. ARK. LITTLE ROCK L. REV. 771 (2003).

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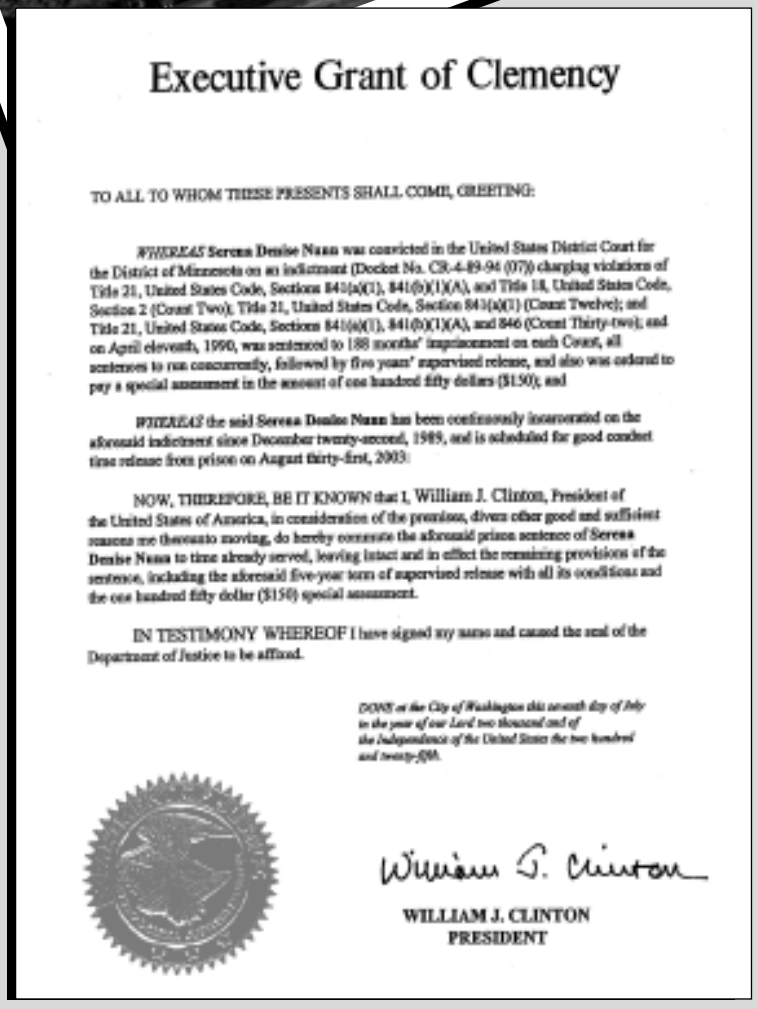

Executive Grant of Clemency

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS Serena Denise Nunn was convicted in the United States District Court for the District of Minnesota on an indictment (Docket No. CR-4-89-94 (07)) charging violations of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A), and Title 18, United States Code, Section 2 (Count Two); Title 21, United States Code, Section 841(a)(1) (Count Twelve); and Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A), and 846 (Count Thirty-two); and on April eleventh, 1990, was sentenced to 188 months' imprisonment on each Count, all sentences to run concurrently, followed by five years' supervised release, and also was ordered to pay a special assessment in the amount of one hundred fifty dollars ($150); and

WHEREAS the said Serena Denise Nunn has been continuously incarcerated on the aforesaid indictment since December twenty-second, 1989, and is scheduled for good conduct time release from prison on August thirty-first, 2003:

NOW, THEREFORE, BE IT KNOWN that I, William J. Clinton, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby commute the aforesaid prison sentence of Serena Denise Nunn to time already served, leaving intact and in effect the remaining provisions of the sentence, including the aforesaid five-year term of supervised release with all its conditions and the one hundred fifty dollar ($150) special assessment.

IN TESTIMONY WHEREOF I have signed my name and caused the seal of the Department of Justice to be affixed.

DONE at the City of Washington this seventh day of July in the year of our Lord two thousand and of the Independence of the United States the two hundred and twenty-fifth.

William J. Clinton

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