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"Show Me the Affidavit"—Ambiguity Persists in the Application of the Common Law Right of Access to Pre-Indictment Records

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In *United States v. Sealed Search Warrants* (*Warrants*), the Fifth Circuit issued a ruling within an existing circuit split holding that district courts must conduct a case-by-case analysis to determine whether the common law right of access extends to a motion to unseal pre-indictment warrant materials.[1] While the court's holding was correct, the scant guidance it provided leaves questions for how this rule should be implemented. The right of access evolved from English law, which provided the right to inspect and copy government records if a citizen had an individual interest in the information and the citizen's interest in disclosure outweighed the government's interest in nondisclosure.[2] In the United States, the right has developed into two distinct doctrines.[3] The first, which is not at issue in *Warrants*, is the First Amendment right to access the proceedings and records of certain criminal and civil cases.[4] The second is a common law right, which according to state and federal courts, provides the right to inspect public records from all branches of government.[5] However, the application and limits of this right have been difficult to delineate.[6]

The Supreme Court first provided some guidance on the common law right of access in *Nixon v. Warner Communications, Inc.*, where it affirmatively recognized that the public has a right to "inspect and copy public records and documents," but also held that the right is not absolute.[7] The *Nixon* Court declined to define the right further and, instead, left it to the

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1. United States v. Sealed Search Warrants, 868 F.3d 385, 395–96 (5th Cir. 2017).
2. Joe Regalia, *The Common Law Right to Information*, 18 Rich. J.L. & Pub. Int. 89, 94–95 (2015).
3. *Id.* at 95.
4. *Id.* at 95–96.
5. *Id.*
6. *See id.* at 96–97.
7. *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597–98 (1978).

discretion of trial courts to decide when the right should apply.[8] This ruling led to a long-standing split in authority among the circuit courts as to whether the right of access should extend to specific categories of judicial records, such as the search warrant affidavits at issue in *Warrants*.[9] The public's growing distrust of the judicial system and some government agencies means that, now more than ever, the common law right of access should be available as an additional safeguard to protect civil liberties when other mechanisms fail.[10] The Fifth Circuit correctly held that district courts must conduct a case-specific balancing test when they consider a motion to unseal pre-indictment judicial records.[11] However, the court should have also held that there is a presumption in favor of the public's common law right of access to pre-indictment materials that carries a strong weight in the balancing test.[12]

Between March and April of 2016, IRS agents executed several search warrants at properties of appellant Justin Smith (Smith) as part of a criminal tax investigation.[13] Agents conducted the first search at the commercial airplane hangar of Smith's business, the second at his residence, and the third at his storage unit.[14] Smith filed three separate motions seeking to unseal the probable cause affidavits supporting each warrant.[15]

The magistrate judge consolidated these motions and granted in part, allowing the government to make redactions of sensitive or confidential information before unsealing the affidavits.[16] The government sought to stay the order and asked for a reconsideration, both of which were denied by the magistrate judge, who provided the government with a deadline to submit their proposed redactions.[17] The government complied and submitted proposed redactions, but the magistrate judge ruled that these redactions were too extensive.[18] She issued her own redacted versions of the affidavits under seal and allowed the government fourteen days to review them.[19] The government objected to the magistrate judge's decisions, and the district court reversed, ruling that the affidavits must re-

8. *Id.* at 598–99.

9. United States v. Sealed Search Warrants, 868 F.3d 385, 391–93 (5th Cir. 2017); *see* Baltimore Sun Co. v. Goetz, 886 F.2d 60, 65–66 (4th Cir. 1989); Times Mirror Co. v. United States, 873 F.2d 1210, 1219 (9th Cir. 1989).

10. *See, e.g.*, Emily Jashinsky, *Young People Trust Amazon and Google More than FBI, DOJ, Federal Government, According to Poll*, WASH. EXAMINER (Apr. 10, 2018, 4:37 PM), https://www.washingtonexaminer.com/opinion/young-people-trust-amazon-and-google-more-than-fbi-doj-federal-government-according-to-poll [https://perma.cc/9BJ4-WATA]; Laura Santhanam, *FBI Support is Eroding, but Most Americans Still Back Bureau, Poll Says*, PBS (Apr. 17, 2018, 5:00 AM), https://www.pbs.org/newshour/politics/fbi-support-is-eroding-but-most-americans-still-back-bureau-poll-says [https://perma.cc/3RQR-945P].

11. *See Sealed Search Warrants*, 868 F.3d at 396.

12. *Id.* at 393–94.

13. *Id.* at 387.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 387–88.

main under seal to prevent the possibility of impeding the ongoing investigation.[20] Smith filed an appeal in response to the district court's ruling.[21]

Following precedent outlined in *SEC v. Van Waeyenberghe*, the Fifth Circuit vacated the district court's ruling and remanded the case for further consideration of Smith's motion.[22] The Fifth Circuit recognized that, in this jurisdiction, "the common law right of access to judicial records has consistently been addressed on a case-by-case basis, indicating that this Court should adopt such an approach in the context of pre-indictment warrant materials."[23] The case-by-case analysis is composed of a balancing test that weighs the public's interest in their common law right of access to judicial records against the government's interest in nondisclosure.[24] Importantly, by adopting this case-specific framework, district courts must explain their decisions on whether to seal or unseal with enough reasoning and specificity to allow for appellate review for abuse of discretion.[25] Here, the Fifth Circuit found the district court's analysis of the motion to be "bare" and lacking in the case-specific balancing test.[26] The court declined to unseal the affidavits outright, finding that district courts are "in the best position to conduct the required balancing test," but also noted that the records in this case may still ultimately be unsealed after the lower court conducts a proper balancing test.[27]

Since the Fifth Circuit had not previously addressed whether the common law right of access extends to pre-indictment warrant materials, the *Warrants* court was guided by similar cases that examined the right as it applies to other categories of judicial records.[28] In *Van Waeyenberghe*, which concerned the sealing of a final order and settlement hearing transcript, the Fifth Circuit ruled that "[i]n exercising its discretion to seal judicial records, the court must balance the public's common law right of access against the interests favoring nondisclosure."[29] The *Van Waeyenberghe* court based its decision on Supreme Court precedent from *Nixon*, recognizing that the common law right, while not absolute, does allow the public access to judicial records that must be offset by the opposing interest in nondisclosure to prevent any improper results.[30] Additionally, the *Warrants* court noted that the *Van Waeyenberghe* balancing test created a presumption in favor of the public's right of access, al-

20. *Id.* at 388.
21. *Id.*
22. *Id.* at 397–98; *see* SEC v. Van Waeyenberghe 990 F.2d 845, 848–49 (5th Cir. 1993).
23. *Sealed Search Warrants*, 868 F.3d at 395.
24. *Id.* at 396.
25. *Id.* at 397.
26. *Id.*
27. *Id.* at 398.
28. *Id.* at 393–395.
29. SEC v. Van Waeyenberghe, 990 F.2d 845, 848 (5th Cir. 1993).
30. *Id.*

though it was left ambiguous what weight the presumption holds in the analysis.[31]

On the precise category of records at issue here, the Fourth and Ninth Circuits are split as to whether the common law right of access extends to motions to unseal pre-indictment warrant materials.[32] The Fourth Circuit ruled in *Baltimore Sun Co. v. Goetz* that district courts must make "a case-by-case determination of how the common law qualified right of access applies to pre-indictment warrant materials."[33] By extending the right to pre-indictment materials, courts can further protect the same affirmative policy justifications that underscored the Fifth Circuit's reasoning in *Van Waeyenberghe*.[34] These policies, such as increasing "trustworthiness of the judicial process," preventing "judicial abuses," and providing "a better understanding of the judicial process," are bolstered under a framework that takes the specific facts of each case into account.[35]

Conversely, the Ninth Circuit in *Times Mirror Co. v. United States* created a bright-line rule that prohibited the use of the common law right of access to unseal pre-indictment materials.[36] The *Times Mirror* court found no precedent allowing access in the context of pre-indictment records and no overriding public need to justify allowing access.[37] Furthermore, it based this decision on the possibility that extending access to records at the pre-indictment phase could lead to the destruction of evidence, danger to witnesses, and injury to the reputations of those named in search warrants.[38] The *Warrants* court rejected creating such a per se ban, finding that "the policy justifications that concerned the Ninth Circuit in *Times Mirror* are not at all diluted by a case-specific approach."[39] Rather, the case-by-case analysis called for by *Van Waeyenberghe* and *Baltimore Sun* better protects those interests by allowing district courts to exercise their discretion in balancing the competing interests between disclosure and nondisclosure.[40]

Considering the potential harm that could result by making it more difficult for the public to access certain categories of records, the Fifth Circuit correctly held that motions to unseal pre-indictment material under the common law right of access must be decided on a case-by-case basis by the district court.[41] As the Supreme Court first indicated in *Nixon*, the United States has a long-standing precedent of allowing citi-

31. *Sealed Search Warrants*, 868 F.3d at 393–94.
32. *Id.* at 391–93; *see* Baltimore Sun Co. v. Goetz, 886 F.2d 60, 65–66 (4th Cir. 1989); Times Mirror Co. v. United States, 873 F.2d 1210, 1219 (9th Cir. 1989).
33. *Sealed Search Warrants*, 868 F.3d at 392.
34. *See id.* at 395.
35. *Id.*
36. *Times Mirror Co.*, 873 F.2d at 1219.
37. *Id.*
38. *See id.* at 1215–16.
39. *Sealed Search Warrants*, 868 F.3d at 395.
40. *Id.*
41. *See id.* at 395–96.

zens the right to access public records.[42] In addition to not being supported by precedent, a per se ban on the application of the qualified right to discrete categories of records hinders the judicial system and prevents courts from making a determination that can best protect the interests and policies at risk in each case.[43] Placing a veil in front of certain types of records needlessly gives off an impression that the court is acting in secret to hide impropriety and misdeeds.[44] Allowing such a notion to fester in the public, even if entirely unfounded, does nothing to protect the integrity of the judiciary. The concerns about destruction of evidence, danger to witnesses, and injured reputations of those named in documents are legitimate; however, taking an uncompromising approach that is blind to the particulars of each case can never fully protect these interests.[45] Each of these policy concerns is not necessarily going to be a factor in every pre-indictment record request, and in the cases where they are, the district court is charged with considering them in the context of the entire fact pattern and denying access "where court files might . . . become a vehicle for improper purposes."[46]

Although the Fifth Circuit's holding reaches the proper result, it perpetuates a lack of guidance on this issue that began when the Supreme Court declined "to delineate precisely the contours of the common-law right."[47] In the present case, the lack of guidance centers around the balancing test, which the court requires for motions to unseal pre-indictment materials. District courts are left in the dark as to whether they must weigh factors on both sides equally or begin the analysis with a presumption in favor of a certain result.[48] This refusal to specify the weight assigned to each side of the balancing test may be the reason why district courts, such as the one in the present case, support their decisions with a mere conclusory assertion.[49] More importantly, those who plan to rely on the common law right of access in their motions to unseal pre-indictment materials are left guessing as to whether they have any chance at success.

In its study of prior case law, the *Warrants* court noted that the Fifth Circuit in *Van Waeyenberghe* required district courts to consider a presumption in favor of the public's common law right of access to judicial records.[50] Despite the apparent importance of creating such a presumption, "the Fifth Circuit has not assigned a particular weight to the presumption in favor of access."[51] In its discussion, the *Warrants* court extends the *Van Waeyenberghe* balancing test to the pre-indictment category of judicial records at issue here, but not only is the weight of any

42. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978).
43. *See Sealed Search Warrants*, 868 F.3d at 395.
44. *See id.*
45. *See id.*
46. *Nixon*, 435 U.S. at 598.
47. *Id.* at 599.
48. *See Sealed Search Warrants*, 868 F.3d at 396.
49. *See id.* at 397.
50. *Id.* at 393–94.
51. *See id.* at 393.

presumption again left undefined, the court also fails to mention whether the presumption extends to pre-indictment records at all.[52] Thus, the court's analysis creates two separate issues. First, the court creates ambiguity over whether the presumption in favor of access applies to pre-indictment materials, and second, it fails to define the weight given to the presumption in the balancing test if it does apply.

Providing clarification that there is a presumption in favor of the public's common law right of access to judicial records, including pre-indictment materials, is more important than ever in today's political climate. Recent events have brought trust in government and the judicial system into question, as some fear certain agencies and courts have been commandeered for political purposes.[53] Improperly obtained and executed search warrants ought to be a troubling concern for advocates of civil liberty, and a presumption in favor of access will help promote fairness and trust in the process. Some in the legal community have proposed giving greater weight to the opposite side of the balancing test, creating a "presumption of non-disclosure from the time the warrant is issued through the time official charges are filed."[54] While district courts should consider the current status of the case as a factor in the balancing test, a presumption in favor of non-disclosure would create an uphill battle for the movant seeking to unseal pre-indictment materials. Therefore, the Fifth Circuit should have firmly extended the presumption from *Van Waeyenberghe* to pre-indictment materials to prevent district courts from applying a presumption on the wrong side of the balancing test.

In addition to applying a presumption in favor of access, the Fifth Circuit should have provided further guidance to the lower courts by holding that the presumption is strong. The current balancing test in *Warrants* creates too much risk that district courts will apply the presumption inconsistently across cases with similar fact patterns.[55] Although lower courts must support their conclusions with reasons sufficiently specific for appellate court review, this does not alleviate the problems that stem from a misapplication of the balancing test, as the burden of appealing an unfavorable ruling would be costly and time-consuming for the citizen requesting access.[56] A strong presumption in favor of access will further protect the policy concerns addressed by both sides of the circuit split since district courts will be less concerned with the methodology of the

52. *See id.* at 395–96.

53. *See, e.g.*, Alan M. Dershowitz, *Dershowitz: Targeting Trump's Lawyer Should Worry Us All*, THE HILL (Apr. 10, 2018, 11:45 AM), https://thehill.com/opinion/judiciary/382459-dershowitz-targeting-trumps-lawyer-should-worry-us-all [https://perma.cc/C5N8-4UEC]; Hugh Hewitt, *The Nunes Memo Revealed a Damning Omission*, WASH. POST (Feb. 5, 2018), https://www.washingtonpost.com/opinions/the-nunes-memo-revealed-a-damning-omission/2018/02/05/189f05e0-0a91-11e8-8b0d-891602206fb7_story.html?utm_term=.2a7f97c6c0d6 [https://perma.cc/X8Q8-WDZ6].

54. Michael D. Johnson & Anne E. Gardner, *Access to Search Warrant Materials: Balancing Competing Interests Pre-Indictment*, 25 U. ARK. LITTLE ROCK L. REV. 771, 810 (2003).

55. *See Sealed Search Warrants*, 868 F.3d at 397.

56. *See id.*

balancing test and more focused on addressing the competing interests fairly.

The Fifth Circuit's holding that the common law right of access extends to pre-indictment search warrant materials helps protect the integrity of the judicial system. However, the court does not provide enough guidance to the lower courts tasked with conducting the balancing test. A strong presumption in favor of the public's right of access will guard against judicial abuses and ensure that courts are able to more often provide access to public records, thus protecting the civil liberties of citizens to the greatest extent possible.