IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In The Matter of the Search of 10792 East Fanfol Lane Scottsdale, Arizona	06-7142MB **ORDER**

At the conclusion of oral argument on the Application of the Associated Press to Intervene for the Limited Purpose of Unsealing Search Warrant Affidavit, the matter was taken under advisement. The court advised that a brief written decision would follow. This is the decision.

The Associated Press (the "AP") seeks an order disclosing the redacted portions of the May 31, 2006 search warrant affidavit signed by IRS Special Agent Jeff Novitsky (the "Novitsky affidavit"). The Novitsky affidavit was submitted in support of a warrant to search the Scottsdale residence of former Arizona Diamondbacks pitcher Jason Grimsley. The AP asserts a First Amendment and federal common law right of access to the redacted names. The AP also asserts that there is a public "right to know" and further, that as the government has disclosed the material to others, it has waived the right to argue that the material should continue to be sealed.

///

FIRST AMENDMENT

To establish a First Amendment right-of-access one must show (a) that the "place and process" in question "have historically been open to the press and general public," and (b) that "public access plays a significant positive role in the functioning of the particular process in question." Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986). This two-prong "experience and logic" test was applied to two consolidated cases in Times Mirror Co. v. U.S., 873 F.2d 1210 (9th Cir. 1989).

In Times Mirror, like here, the media was seeking access to affidavits supporting the issuance of search warrants in ongoing investigations. In finding that "considerations of experience" did not mandate a First Amendment protection, the court stated:

> In sum, we find no historical tradition of open search warrant proceedings and materials. Historical experience, which counsels in favor of finding a First amendment right of access to the criminal trial, *Richmond Newspapers, Inc. V. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), to voir dire, *Press-Enterprise Co. I*, 464 U.S. 501, 104 S.Ct. 819, and to preliminary hearings, *Press-Enterprise II*, 478 U.S. 1, 106 S.Ct. 2735, furnishes no support for the claimed right of access to warrant proceedings in the instant cases. On the contrary, 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.

Times Mirror, 873 F.2d 1210, 1214 (9th Cir. 1989).

In finding that "considerations of logic" do not require First Amendment protection the court stated:

> While [the interests urged by appellants] are clearly legitimate, we believe they are more than outweighed by the damage to the criminal investigatory process that could result from open warrant proceedings. In our view, public access would hinder, rather than facilitate, the warrant process and the government's ability to conduct criminal investigations. In this regard, warrant proceedings are indistinguishable from grand jury proceedings, which the Supreme Court has identified as the "classic example" of the type of "government operation [ ] that would be totally frustrated if conducted openly ... [since] 'the proper functioning of our grand jury system depends upon the

///

> secrecy of grand jury proceedings.'" *Press-Enterprise II*, 478 U.S. at 9, 106 S.Ct. At 2741 (quoting *Douglas Oil Co.*, 441 U.S. at 218, 99 S.Ct. at 1672).

Id. at 1215. The court therefore held "that the First Amendment does not establish a qualified right of access[1] to search warrant proceedings and materials while a pre-indictment investigation is still ongoing." Id. at 1216.

This court believes the most important factor driving the Times Mirror decision was the conclusion that the investigation was ongoing. The court observed that openness would potentially "frustrate the criminal investigation" and "jeopardize the integrity of the search for truth." Times Mirror at 1213. Citing the "historical deference" of the court to government requests to seal, and the need to have a process to "protect sensitive information," the court listed several potential negative results from disclosure: prospective witnesses would be hesitant to come forward knowing that their testimony would be disclosed, possible witness tampering or threatening, destruction of evidence, and those investigated might flee. Id. at 1214.

This court believes the fact that some indictments have issued in this investigation does not act to obviate the need to preserve the redacted material. The indictments thus far relate to the "supply" side of the problem. What remains for possible prosecution is the alleged illegal possession and use of these substances. In this area, no indictments have issued and the investigation continues. Accordingly, the court finds that there is no First Amendment right of access to the redacted portion of the Novitsky affidavit.

COMMON LAW

After describing the cases discussing the common law right to public records and documents, the Times Mirror court stated that none "can be interpreted as recognizing a

---

[1]The court acknowledges that the 8th Circuit, in McDonnell Douglas Corp., 855 F.2d 569, 573 (8th Cir. 1988) recognized a qualified First Amendment right of access to warrant materials. The Times Mirror court discussed and rejected the logic of McDonnell. Times Mirror at 1217. The court in McDonnell, as the right of access was only a qualified right, ultimately declined to disclose the materials sought.

common law right of access to all judicial and quasi-judicial documents. Times Mirror at 1219. After applying the "public need" or "ends of justice" standard established by those cases, the Times Mirror court concluded:

> Under this important public need or "ends of justice" standard, appellants' claim must be rejected. We believe this threshold requirement cannot be satisfied while a preindictment investigation is ongoing. As we explained in our discussion of appellants' First Amendment claim, 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. at 1219.

PUBLIC INTEREST

The AP argues that the public has a "right to know" if public figures are involved in illegal activity. The court in Times Mirror considered the public interest issue by discussing the flip-side of the issue - the right to privacy - and concluded:

> Our position is reinforced by still another factor, namely the privacy interests of the individuals identified in the warrants and supporting affidavits. The Supreme Court has acknowledged that one of the reasons for maintaining the secrecy of grand jury proceedings is to "assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Douglas Oil*, 441 U.S. at 219, 99 S.Ct. At 1673; *see also United Stats v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 n. 6, 78 S.Ct. 983, 986 n. 6, 2 L.Ed.2d 1077 (1958) (need to protect innocent accused from disclosure of the fact that he has been under investigation). This concern applies with equal force here.

Id. at 1216.

An additional consideration described by the Times Mirror court was that the "persons named in the [affidavits] will have no forum in which to exonerate themselves if the . . . materials are made public. . . . Thus possible injury to privacy interests [weighs] against public access to warrant materials. . . ." Id.

WAIVER

The AP argues that the material sought has been disclosed elsewhere and therefore there is nothing left to protect. The AP posits: "If prosecutors have shared the unredacted affidavit with . . . Senator Mitchell or other members of the public, then they should not be

allowed to invoke the privacy interests of third parties . . .." (AP Application p.3). Nothing cited by AP indicates the redacted material has been provided to anyone. At most, there is a New York Times article indicating that the Mitchell investigators and federal investigators are "sharing information." (Ex 5 to AP Application, p.3). Additionally, in a Washington Post article, AUSA Parrella is said only to have indicated the government would provide evidence they are "legally able to provide." (Ex 6 to AP Application, p.1). In opposition, the government's response, supported by the sworn Declaration of Jeffrey D. Nedrow, Assistant United States Attorney for the Northern District of California, ("Nedrow affidavit"), refutes the AP assertion and denies that the redacted information has been provided to the Mitchell Commission. Indeed, the government denies that it has disclosed an unredacted version to anyone.

The AP also cites to a Los Angeles Times article in support of its argument that the unredacted material has been disclosed. The article states: "A source with authorized access to an unredacted affidavit allowed the Times to see it briefly and read aloud some of what had been blacked out . . . ." (Ex 3 to AP Application, p.1). The court, having signed the subject warrant, is aware of the contents of the Novitsky affidavit. The Times article, as the government has stated previously, is inaccurate. Unfortunately, the court is unaware of any authority that requires the disclosure of sealed material to vindicate those aggrieved by inaccurate reporting. The Times article provides no support for the AP position that the names in the affidavit have been disclosed by an "informed" source.

As it would be improper, if not illegal, for government representatives to provide sealed material to the public, and there is no competent evidence it has, the court concludes that the redacted material has not been provided to others.

CONCLUSION

The AP concedes that the investigation into the illegal use and distribution of steroids is ongoing. The Nedrow affidavit provides the particulars of how the investigation is proceeding. The fact that several indictments have issued and some convictions obtained

does not foreclose the issuance of additional indictments.[2] Disclosure at this time may compromise the government's ongoing investigative efforts in several ways. For example, cooperation could be affected, investigation of the named individuals could be compromised, leads developed from the undisclosed information could be cut-off, and evidence could be destroyed. The ongoing nature of the investigation is what drove the decision in Times Mirror and what drives this court's decision.

As discussed in Times Mirror, privacy interests are important, especially when considered in conjunction with an ongoing investigation. This investigation however will conclude. As the government acknowledges in Mr. Nedrow's affidavit, the continuation of the investigation makes the governement's interest paramount "at this point." When the investigation concludes, the weight of the government's argument against disclosure will change dramatically.[3]

As discussed, there has been no waiver through disclosure to "others." Ironically, the most compelling argument for disclosure has no legal precedent. Speculation concerning who is, or is not named in the Novitsky affidavit is unfair. The source for the Times article, if indeed there was one, did not have the Novitsky affidavit. Disclosure would stop unsupported speculation. That decision, however, is not available to the court as long as the investigation is ongoing and there have been no indictments of those named in the Novitsky affidavit.

///

///

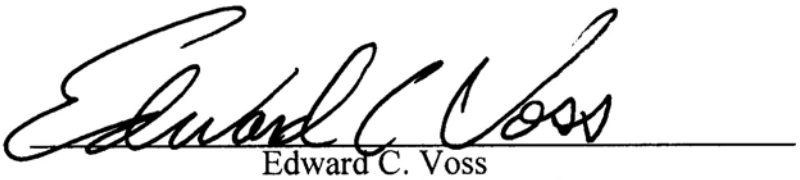
---

[2]A case is still in the investigative stage if only some targets have been indicted. See, e.g., Certain Interested Individuals v. Pulitzer Publishing Co., 895 F.2d 460, 467 (8th Cir. 1990) (case still in investigative stage where some targets have pleaded guilty or gone to trial). Neither Mr. Grimsley nor anyone else mentioned in the affidavit has been indicted.

[3]Were the AP to seek disclosure under such changed circumstances, the privacy interests argued by the Major League Baseball Players Association would have to be weighed against the strong public interest urged by the AP.

IT IS THEREFORE ORDERED denying the application of the Associated Press to unseal the redacted portions of the Novitsky affidavit.

DATED this 27th day of July, 2007.



Edward C. Voss
United States Magistrate Judge