

STATE OF NORTH CAROLINA  
COUNTY OF ORANGE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA

v.

DEMARIO JAMES ATWATER,

Defendant.

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08 CRS 51241

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ORANGE COUNTY, C.S.C.

2008 APR 29 PM 12: 49

FILED

**MEMORANDUM AND ORDER**

This matter comes before this Court upon the April 14, 2008 Motion of The Durham Herald Company to intervene and vacate the order of the Superior Court sealing the search warrant application and return. Present in court were Jim Woodall, District Attorney for Orange and Chatham Counties; James Williams, Public Defender for Orange and Chatham Counties, and Jonathan Broun, representing Defendant, and John Bussian and Elizabeth Spainhour, on behalf of the Intervenor. With the consent of the Defendant and his attorneys, the Defendant was not present in Court. The Court has fully reviewed and considered the record proper in this case, including an *in camera* review of all sealed search warrants, supporting affidavits, and inventories of items seized pursuant to search, as well as arguments and submissions of counsel on behalf of the State, Defendant, and Intervenor.

Based on this consideration as noted above, the Court notes the following Procedural Background, Findings of Fact, Applicable Law, and Conclusions of Law:

**PROCEDURAL BACKGROUND**

1. Magistrate John Thompkins issued a search warrant (hereinafter, "Thompkins search warrant") on March 6, 2008, prior to the institution of any criminal warrants against defendant.
2. The Thompkins search warrant is and has always been filed in the Orange County Clerk of Superior Court, and subject to public viewing.
3. District Court Judge Joseph M. Buckner issued a search warrant on March 12, 2008.

4. Judge Buckner found that release of the information in the search warrant would be detrimental to an ongoing homicide investigation and ordered it sealed until the Court determined its release would not be detrimental to the investigation.
5. Superior Court Judge Carl R. Fox issued two search warrants on March 12, 2008.
6. Judge Fox also found that release of the information in the search warrants would be detrimental to the ongoing homicide investigation and ordered them sealed until the Court determined their release would not be detrimental to the investigation.
7. On March 12, 2008, a warrant for arrest was issued for the arrest of the defendant on a charge of first degree murder.
8. The undersigned issued three search warrants on March 17, 2008.
9. The undersigned also found that release of the information in the search warrants would be detrimental to the ongoing homicide investigation and ordered them sealed until the Court determined their release would not be detrimental to the investigation.
10. On March 31, 2008, defendant was indicted by the grand jury for first degree murder.
11. On April 14, 2008, The Durham Herald Company filed a Motion to Intervene and Vacate Order Sealing Search Warrant.
12. At the hearing, the District Attorney submitted an additional letter under seal, which was received by the Court subject to the same legal analysis regarding a continuing order to seal it, and over the objection of the Intervenor.

#### FINDINGS OF FACT

1. The Thompkins search warrant was issued before any criminal charges were filed, and is a matter of public record.
2. Simultaneously with the issuance of each subsequent search warrant, the Judge issuing the search warrant found that there were facts contained within the affidavit attached to the application for a search warrant that, if divulged, would be detrimental to the ongoing investigations and in each such case ordered the

affidavit sealed "until such time as the Court determined their release would not be detrimental to the investigation."

3. The affidavits supporting the search warrants contain descriptions and details about the case which could reasonably lead to the identification of confidential informants.
4. The affidavits also include information about the case, including the manner in which information was received by law enforcement from these informants, who provided information not previously disclosed to the public.
5. Both confidential informants have been threatened (by persons other than the defendant or co-defendant) and both feel that their safety is at risk and that risk would be increased if their identities were widely known.
6. Two law enforcement agencies, the State Bureau of Investigation and the Chapel Hill Police Department, are still conducting initial interviews with people who have information regarding this case.
7. Investigations are not complete at this time.
8. The letter submitted under seal, over Intervenor's objection, by the District Attorney, and in support of his opposition to Intervenor's motion, pertains to ongoing criminal investigations.

#### APPLICABLE LAW

1. Search warrants that have been returned by law enforcement agencies are public records and may be withheld only when sealed by court order.<sup>1</sup>
2. Except as prohibited by law, the clerk's office shall maintain records of criminal actions and they shall be open to public inspection during regular office hours.<sup>2</sup>
3. Courts, and indeed American society, have long recognized the presumption of open and public trial proceedings.<sup>3</sup>

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<sup>1</sup> N.C.G.S. Sect. 132-1.4(k).

<sup>2</sup> N.C.G.S. Sect. 7A-109.

<sup>3</sup> See, e.g., Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) and Globe Newspaper v. Superior Court, 457 U.S. 596 (1982).

4. "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government."<sup>4</sup>
5. The right of access to criminal trials is not absolute.<sup>5</sup>
6. The public and the press may be barred from a trial in order to inhibit the disclosure of sensitive information only upon a showing that the bar is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest.<sup>6</sup>
7. Affidavits for search warrants are judicial records.<sup>7</sup>
8. The proceeding by which the Court issues a search warrant is by its very nature *ex parte*, and is not an adversary proceeding.<sup>8</sup>
9. Often, time is of the essence when the Court makes an initial determination regarding a search warrant in order to prevent the destruction or removal of evidence; the motion to seal and the Court's consideration of it are therefore under similar time constraints.<sup>9</sup>
10. Notice of the application, issuance, and sealing of a search warrant can be given by docketing the order sealing the documents, with the Order sealing the documents placed in the defendant's file, if a known defendant exists and has been charged, or by being filed alphabetically by the Clerk of Court in its public records in the manner set forth by the Administrative Office of the Courts.<sup>10</sup>
11. The common law qualified right of access to search warrants and supporting affidavits is within the sound discretion of the Court, and the decision of the Court is reviewable under the abuse of discretion standard.<sup>11</sup>

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<sup>4</sup> Globe at 606.

<sup>5</sup> Id.

<sup>6</sup> Id at 606-7.

<sup>7</sup> In re The Baltimore Sun Company v. Goetz, 886 F.2d. 60, 64 (1989).

<sup>8</sup> Id.

<sup>9</sup> Id at 65.

<sup>10</sup> Id.

<sup>11</sup> Id.

12. The Court may, in the proper circumstances, shield portions of court proceedings and records from the public, but this power should only be exercised when its use is required in the interest of proper and fair administration of justice.<sup>12</sup>
13. The opportunity to object to the Order sealing the documents must be afforded upon request.<sup>13</sup>
14. The Court may then determine whether having the documents remain under seal is essential to preserve higher values and is narrowly tailored, but only after considering alternatives to sealing the documents, including, for example, disclosure of some of the documents, or allowing access to redacted versions of the documents.<sup>14</sup>
15. If a Court seals any portion of the documents, it must make findings and conclusions specific enough for appellate review.<sup>15</sup>

#### CONCLUSIONS OF LAW

1. The Court has the requisite jurisdiction to address the matters presented in the Motion filed by the Intervenor.
2. The Intervenor has standing and is a proper party to intervene in this matter.
3. The Thompkins search warrant is a matter of public record, and thus is not the subject of this Order.
4. The remaining six search warrants, attached affidavits, and inventory of items seized pursuant to search are the subject of this Order.
5. All six search warrants and their supporting affidavits were considered separately, and in each case, the judge issuing the search warrant issued a simultaneous order sealing the documents because the public release would be detrimental to an ongoing investigation.
6. In each Order sealing the documents, the issuing judge ordered their sealing until such time as the Court deems their release to not be detrimental to the investigation.

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<sup>12</sup> Virmani v. Presbyterian Health Services Corp., 350 N.C. 449, 463 (1999).

<sup>13</sup> Baltimore Sun at 65.

<sup>14</sup> *See, e.g., Press-Enterprise I*, 464 U.S. at 510 and Baltimore Sun, 886 F.2d 60 at 65.

<sup>15</sup> Baltimore Sun at 66.

7. In each case, the Order sealing the search warrant and related documents was appropriate, and provided notice that such an order had been filed.
8. The opportunity to object to the Orders sealing the search warrants and related documents has been afforded to the public in general by the notice described above, and specifically to Intervenor through the hearing of the Motion to Intervene and Vacate.
9. Disclosure of sensitive details in an ongoing, and not yet complete, investigation, including information not generally known to the public, would interfere with the ongoing investigation, and could interfere with fair and impartial trial proceedings.
10. It is proper for the Court to consider documents submitted under seal in support of the District Attorney's position that the search warrant documents remain under seal.
11. The letter submitted under seal by the District Attorney relates specifically to ongoing investigations by law enforcement, and it is therefore appropriate to remain under seal, marked as "State's Motion to Vacate Exhibit 1, filed under seal" on the outer envelope for purposes of identification.
12. The Court has considered alternatives to sealing the search warrant documents, including leaving sealed only the affidavits, but rejects that approach, because the search warrants and the inventories of items seized pursuant to the search warrant contain information that would interfere with the ongoing investigation.
13. In addition, the affidavits and inventories contain information that could reasonably lead to undue speculation and conjecture, and could interfere with the proper and fair administration of justice.
14. The Court has also considered redacting portions of the search warrant documents, but rejects that approach as well, because in order to prevent interference with the ongoing investigation and to oversee the proper and fair administration of justice, it would be necessary to redact such a significant portion of the documents so as to render the exercise meaningless.
15. The public has a right to information in criminal proceedings, but not in this specific case at this specific time when it interferes with the public's interest in the investigation of crime, or the defendant's right (and public's right, for that matter) to a fair process, free from undue prejudice.

16. The ongoing investigation by law enforcement would be compromised by the unsealing of the warrants and attached documents.

Based on the foregoing and in an exercise of the Court's informed discretion, IT IS ORDERED, ADJUDGED, and DECREED that The Durham Herald Company's Motion to Intervene is ALLOWED.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that State's Motion to Vacate Exhibit 1, filed under seal is hereby Ordered to remain under seal.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Intervenor's Motion to Vacate the Orders Sealing Search Warrants is DENIED, subject to continued review by this Court. IT IS ORDERED that the six search warrants, affidavits, and inventory of items seized pursuant to search are to remain under seal, secured in the custody of the Orange County Clerk of Court, and that this order be placed in the above-captioned file.

IT IS ORDERED that this matter shall be calendared for further hearing on June 27, 2008 in Orange County Superior Court.

This, the 29<sup>th</sup> day of April, 2008.



R. Allen Baddour, Jr.  
Superior Court Judge