NO. E072470

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

M.G., Appellant, v. MICHAEL HESTRIN, AS DISTRICT ATTORNEY, Respondent.	Riverside County Superior Court Case No. MCW1800102

APPEAL FROM THE JUDGMENT OF THE
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

HONORABLE JOHN MOLLOY, JUDGE

RESPONDENT'S BRIEF

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STATEMENT OF FACTS AND THE CASE

On June 19, 2015, The Honorable Helios J. Hernandez signed wiretap 15-409, authorizing the interception of certain individuals to and from target telephone number 951-314-0550. Monitoring commenced on June 19, 2015, and was terminated on July 19, 2015. At the expiration of the court order, all documents and media were sealed for all purposes

within the meaning of Penal Code[1] section 629.66. Pursuant to the requirements of section 629.68, the People provided notice to the individuals affected by the monitoring. (Sup. CT 22.)

Appellant M.G. is the authorized possessor of telephone number 951-314-0550. M.G. did not receive the People's letter informing him of wiretap 15-409. However, numerous friends and family of M.G. received the People's letter and he became aware of it in 2016. (Sup. CT 60.)

On October 31, 2018, M.G. filed an application for inspection of wiretap 15-409 in Riverside County Superior Court. (Sup. CT 4.) The People filed an opposition to the application. (Sup. CT 27.) Thereafter, M.G. filed a declaration in support of his application (Sup. CT 49) and made a request for judicial notice of the number of wiretaps acquired in Riverside County (CT 4). The trial court granted M.G.'s request to take judicial notice of the number of Riverside County wiretaps acquired. On February 13, 2019, the court heard argument on the application and denied M.G.'s request to access the materials related to wiretap 15-409. In particular, the court found M.G. had failed to demonstrate good cause to unseal the wiretap application and orders and the court found no First Amendment right of access to the materials. On April 4, 2019, M.G. filed a notice of appeal. (CT 92.)

[1] All further statutory references are to the Penal Code unless otherwise indicated.

ARGUMENT

I
THE TRIAL COURT PROPERLY FOUND NO FIRST AMENDMENT RIGHT OF ACCESS TO SEALED WIRETAP INFORMATION

The trial court properly concluded there is no First Amendment right to access wiretap materials. Pursuant to well-established First Amendment jurisprudence, there is no historical right of access to wiretap materials and openness of the materials serves no significant public interest.

A. The Law Requires Mandatory Sealing of Wiretap Applications

M.G. argues that as public records, wiretap applications should be open to the public under the first amendment. (AOB 16.) But the law does not treat all public records identically. In fact, the law mandates that wiretap applications be sealed.

California common law recognizes a general presumption of accessibility to judicial records in criminal cases. (*KNSD Channels 7/39 v. Superior Court* (1998) 63 Cal.App.4th 1200, 1203.) "[T]here can be no doubt that court records are public records, [footnote] available to the public in general, including news reporters, unless a specific exception makes specific records nonpublic." (*Estate of Hearst* (1977) 67 Cal.App.3d 777, 782; *Craemer v. Superior Court* (1968) 265 Cal.App.2d 216.) "[A]n affidavit supporting the issuance of arrest and search warrants – part of a court file – is a public record." (*Alarcon v. Murphy* (1988) 210 Cal.App.3d 1, 10-11.) The distinguishing factor in the case before this Court is that a wiretap is a different class of warrant which has been afforded a set of statutes that deal only with the interception of wire communications. (§

629.50 *et seq*.) These statutes make the specific records at issue here, wiretaps, nonpublic.

Section 629.66 provides that "Applications made and orders granted pursuant to this chapter **shall be sealed** by the judge." The statutes specifically provide when and where the information can be shared. Statutorily, there is a presumption in favor of keeping all documents sealed. The code dictates when and where discovery is to be provided to defendants, and law enforcement personnel is severely restricted in sharing information obtained from a wiretap. Unlike traditional search warrants authored and approved pursuant to section 1534, wiretap warrants are done ex parte, are not attached to any case, are not imaged into the court system, and they are generally kept with the law enforcement agency conducting the wiretap. Simply labeling wiretap applications public records because they are generated in the courts does not mean that there is a constitutional right to access the records.

B. The First Amendment Does Not Require Public Access to Wiretap Materials

Under *Press-Enterprise Co. v. Superior Court* (1986) 478 U.S. 1 ("*Press-Enterprise II")*, when deciding whether there is a qualified right of access to court procedures under the First Amendment, the Supreme Court examines (1) the historical openness of the proceeding in question, and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." (*Id*. at p. 8.) Then, "[i]f the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches. But even when

a right of access attaches, it is not absolute." (*Id.* at p. 9.)[2] When considering these two prongs, it is clear there is no qualified First Amendment right of public access to wiretap information.

There is no California case law holding that warrant materials, much less wiretap materials, have been historically open, or that pre-trial public access to these documents plays a significant positive role in the warrant or wiretap process. In fact, courts have held to the contrary. (See *Oziel v. Superior Court* (1990) 223 Cal.App.3d 1284, 1297 (*Oziel*) [no historical tradition of pretrial public access to materials seized under search warrant]; *In re N. Y. Times* (2d Cir. 2009) 577 F.3d 401, 410 [wiretap applications not historically open to public and no compelling interest in doing so].)

For example, in *Oziel, supra*, 223 Cal.App.3d 1284, the media sought pretrial disclosure of videotapes taken of the execution of a search warrant in the Menendez brothers murder case. Unlike the instant issue, the media sought access to seized property instead of documents supporting the warrant. But the Court of Appeal examined the issue under the *Press-Enterprise II* framework. (*Id.* at pp. 1294-1297.) The *Oziel* court held that the media failed to meet either prong of *Press-Enterprise II*. First, the Court of Appeal held that the media failed to show any historical tradition in California of pretrial public access to items seized under a search warrant. (*Id.* at p. 1297.) Furthermore, the court determined there was no showing that disclosure of the videotapes would play a significant positive role in the warrant process or pretrial hearing process. The court held that the interests of the public were sufficiently vindicated by the defendant's challenges to the search and seizure, such that no public disclosure of the warrant materials was necessary. (*Id.* at pp. 1296-1297.)

[2] *Press-Enterprise II* involved access to transcripts of a preliminary hearing.

And within the federal court system,[3] the vast majority of federal courts, have determined that warrant materials have not been historically open or accessible. In *In re N. Y. Times*, *supra*, 577 F.3d 401, the Second Circuit Court of Appeal considered the New York Times' request to unseal wiretaps that were related to the investigation of Elliot Spitzer. The public scrutiny of Elliot Spitzer's embattled career was of significant national interest and the New York Times wanted the information obtained by the wiretaps. The court noted the statutory requirement of confidentiality in the federal wiretap statute." (*In re N.Y. Times Co*., *supra*, 577 F.3d at p. 408.) Applying the two-prong test, the court found no history of openness and no compelling interest in openness:

> In our view, both approaches to a consideration of the First Amendment question presented here favor the government. Wiretap applications were created in 1968 in response to a Supreme Court decision that prohibited the use of electronic surveillance at the sole discretion of law enforcement. [Citation]. Although wiretaps themselves pre-date wiretap applications, the introduction of wiretap applications is a more modern invention and, since the time of their creation in Title III, have been subject to a statutory presumption against disclosure. Accordingly, we conclude that these wiretap applications have not historically been open to the press and general public. In addition, the Times does not present a good reason why its preferred public policy ("logic")--monitoring the government's use of wiretaps and potential prosecutions of public officials--is more compelling than Congress's preferred policy of favoring confidentiality and privacy, as outlined in Title III.

(*In re N.Y. Times Co.*, *supra*, at p. 410.)

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[3] Given that California's wiretap statutes were based on the federal statutes, the guidance of federal authorities is particularly relevant and persuasive.

Similarly, in *Times-Mirror Co. v. United States* (1989) 873 F.2d 1210 (*Times-Mirror*), the Ninth Circuit Court of Appeals concluded "We know of no historical tradition of public access to warrant proceedings. Indeed, our review of the history of the warrant process in this country indicates that the issuance of search warrants has traditionally been carried out in secret." (*Id*. at pp. 1213-1214.)

> 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 [citation], to voir dire [citation], and to preliminary hearings [citation], 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.

(*Id.* at p. 1214.) The court in *Times-Mirror* also concluded that access to warrant materials would not play a significant positive role in warrant proceedings because "public access would hinder, rather than facilitate, the warrant process and the government's ability to conduct criminal investigations." (*Id.* at p. 1215.) The Ninth Circuit found that whatever benefit could be gleaned from open warrant proceedings was "more than outweighed by the damage to the criminal investigatory process that could result." (*Ibid.*) In the court's view, search warrant proceedings are "indistinguishable from grand jury proceedings," which would be "totally frustrated if conducted openly." (*Ibid.*) The court added that the privacy interests of those named in the search warrants and affidavits bolstered the holding, given the grave risk of invasion of privacy and irreparable harm to reputations that could result. (*Id.* at p. 1216.)

In rejecting the argument that openness of warrant materials would serve the public interest, the court noted that something more was required than a mere claim that openness would aid in ensuring government integrity.

> Appellants essentially argue that any time self-governance or the integrity of the criminal fact-finding process may be served by opening a judicial proceeding and its documents, the First Amendment mandates opening them to the public. Were we to accept this argument, few, if any, judicial proceedings would remain closed. Every judicial proceeding, indeed every governmental process, arguably benefits from public scrutiny to some degree, in that openness leads to a better-informed citizenry and tends to deter government officials from abusing the powers of government. However, complete openness would undermine important values that are served by keeping some proceedings closed to the public. Openness may, for example, frustrate criminal investigations and thereby jeopardize the integrity of the search for truth that is so critical to the fair administration of justice. Traditionally, for example, grand jury proceedings have been kept secret even though they are judicial proceedings which are closely related to the criminal fact-finding process. [Citation.] Certainly, the public's interest in self-governance and prevention of abuse of official power would be served to some degree if grand jury proceedings were opened. The same might be said of jury deliberations and the internal communications of this court. But because the integrity and independence of these proceedings are threatened by public disclosures, claims of "improved self-governance" and "the promotion of fairness" cannot be used as an incantation to open these proceedings to the public. Nor will the mere recitation of these interests open a particular proceeding merely because it is in some way integral to our criminal justice system.

(*Id.* at p. 1213.)

M.G.'s argument regarding the First Amendment is no different than the arguments raised and rejected in *In re N.Y. Times Co.* and *Times-*

Mirror. He fails to point to a single case holding that there is a tradition of openness in wiretap proceedings, instead ignoring that prong by claiming that wiretaps are too new. (AOB at p. 21.) But this argument ignores the case law discussed above regarding a historic lack of access to warrant materials. Likewise, M.G.'s argument regarding the utility of opening access to wiretap materials constitutes nothing more than a recitation that government proceedings will benefit by being open to the public. As the court in *Times-Mirror* held, no proceeding would remain closed under that rationale.

The trial court carefully analyzed M.G.'s first amendment challenge under the controlling case law discussed above. (RT 44-50.) M.G. has failed to show legal error and the trial court's order should be affirmed.

II
THE TRIAL COURT PROPERLY DENIED M.G.'S MOTION TO UNSEAL WIRETAP INFORMATION

Contrary to M.G.'s claims, the trial court properly denied his motion to inspect wiretap materials pursuant to section 629.68. The trial court properly held that before considering such a motion, the applicant must establish good cause to unseal the wiretap materials. M.G. failed to meet this burden and his motion was properly denied.

A. A Finding of Good Cause Is Required To Unseal Wiretap Information

M.G. argues that the trial court erred by requiring a finding of good cause to unseal information pertaining to wiretap 15-409 pursuant to section 629.66. (AOB 26-28.) He contends a lesser standard applies under section 629.68. But M.G.'s argument is based on a misunderstanding of the wiretap statutes. Before a request to inspect records under section 629.68

can be granted, the records must first be unsealed pursuant to section 629.66. And unsealing pursuant to section 629.66 requires a finding of good cause.

The statutes discussing the authorization and use of wiretaps are contained in the Penal Code from section 629.50 through 629.98. They are modeled after the federal wiretap statutes. (18 U.S.C. §§ 2510-2520.) Section 629.66 requires sealing of wiretap applications and orders:

> Applications made and orders granted pursuant to this chapter shall be sealed by the judge. Custody of the applications and orders shall be where the judge orders. ***The applications and orders shall be disclosed only upon a showing of good cause before a judge*** or for compliance with the provisions of subdivisions (b) and (c) of Section 629.70 and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for 10 years.

(§ 629.66, emphasis added.)[4] Section 629.66 uses the mandatory "shall" language when referring to sealing of the records. Section 629.68, the next provision within the wiretap statutes, includes provisions for requiring notice:

> Within a reasonable period of time, but no later than 90 days, after the termination of the period of an order or extensions thereof, or after the filing of an application for an order of approval under Section 629.56 which has been denied, the

[4] Likewise, the federal wiretap statutes upon which the California statutes are based, requires good cause to unseal the records. "Applications made and orders granted under this chapter [18 USCS §§ 2510 *et seq*.] shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. *Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction* and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years." (18 U.S.C. § 2518.)

> issuing judge shall issue an order that shall require the requesting agency to serve upon persons named in the order or the application, and other known parties to intercepted communications, an inventory which shall include notice of all the following:
> (a) The fact of the entry of the order
> (b) The date of the entry and the period of authorized interception.
> (c) The fact that during the period wire or electronic communications were or were not intercepted.
> The judge, upon filing of a motion, may in his or her discretion, make available to the person or his or her counsel for inspection the portions of the intercepted communications, applications, and orders that ***the judge determines to be in the interest of justice***. On an ex parte showing of good cause to a judge, the serving of the inventory required by this section may be postponed. The period of postponement shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted.

(§ 629.68, emphasis added.) Reading these two provisions together, it is clear that a superior court judge must first find good cause to unseal the wiretap application and order before the court can consider a motion to inspect under section 629.68.

Both sections 629.66 and 629.68 were enacted in 1995. As originally drafted, section 629.66 read, "The applications and orders shall be disclosed only upon a showing of good cause before a judge and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for 10 years." (Stats.1995, c. 971 (S.B. 1016), § 10.) However, section 629.66 was amended in 2010 to read, "The applications and orders shall be disclosed only upon a showing of good cause before a judge **or for compliance with the provisions of subdivisions (b) and (c) of Section 629.70** and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for 10 years." (Stats. 2010, c. 707 (S.B. 1428), § 11, emphasis added.) Thus, the legislature

specifically amended section 629.66 in 2010 to provide that good cause is required except for compliance with section 629.70. Section 629.70 provides that the prosecution shall provide a copy of wiretap applications, orders, and intercepted communications in criminal discovery. This is the only exception to section 629.66's good cause requirement.

When section 629.66 was amended in 2010 to carve out an exception to the good cause requirement for section 629.70, section 629.68 was in existence, yet the legislature chose not to include it within the carve out. As the trial court expressly found, this legislative history demonstrates section 629.68 is not exempt from 629.66's mandatory good cause requirement:

> To the extent that the legislature understand a need to [except] a specific statute, to the extent that they did [except] that specific statute, and that specific statute was 629.70, it clearly demonstrates for me they know how to [except] a statute. And because it does demonstrate that for me, and the fact that they did not accept 629.68, I must read this in terms of appropriate statutory interpretation that they did not intend to [except] 629.68.

(RT 32.) The trial court properly determined that M.G. was required to show good cause to unseal the wiretap application and orders. M.G. failed to meet that requirement.

B. There is No Good Cause to Unseal the Wiretap

The trial court properly found that M.G. failed to meet his burden to demonstrate good cause to unseal the wiretap. M.G.'s claim to good cause was based primarily on the fact that Riverside County had more wiretap applications in 2015 than other larger counties. Without a single piece of evidence that there was something amiss about those wiretaps, much less

wiretap 15-409, M.G. asks this Court to assume impropriety based on the sheer number of wiretaps alone. This is improper.

M.G. did not present any evidence that wiretap 15-409 was improperly acquired. Like all wiretaps, wiretap 15-409 was reviewed and approved by a superior court judge. Federal authorities, upon which California's electronic intercept statutes are based, have repeatedly found that "a wiretap authorization order is presumed valid, and the defendant bears the burden of proof to show otherwise." (*United States v. Radcliff* (10th Cir. 2003) 331 F.3d 1153, 1160, citing *United States v. Mitchell* (10th Cir. 2001) 274 F.3d 1307, 1309.) M.G. has done nothing to overcome this presumption. Instead, he cites to newspaper articles and political critiques about Riverside County in general. But if M.G.'s criticism of the number of wiretap's acquired in Riverside County constitutes good cause, it would constitute good cause to unseal every wiretap acquired during that time period in Riverside County. M.G.'s argument would effectively eviscerate section 629.66's mandatory sealing within the County of Riverside. This is unreasonable.

M.G. also claims good cause is established because, according to his declaration, he did not receive written notice from the government regarding the wiretap. Instead, he claims "I learned of Wiretap Order No. 15-409 and the wiretap on my phone number, 951-314-0550, in 2016 through numerous friends and family members who received notices about the Wiretap from the Riverside County District Attorney's Office." (Supp. CT 60.) In his briefing, M.G. provided a copy of the notification sent pursuant to section 629.68. (Sup. CT 22.) As the trial court indicated in its ruling, M.G.'s evidence did not establish an attempt to keep the wiretap secret. Why would all of the target's contacts receive notice if there were an orchestrated attempt to secrete the information about the existence of the

wiretap? (RT 27.) Instead, it appears at most that there was some error in the delivery of the notice. Obviously, the People complied with the statutory requirement to provide letters notifying the affected individuals of the intercepted communications—M.G. has admitted to numerous individuals receiving those letters and provided one to the court as evidence. (Sup. CT 22.) The People can only provide notice to the name and address provided by the phone company or discovered through the investigation. There is no requirement that the People follow up to ensure the individuals have received the letter. Whatever occurred that prevented M.G. from receiving the People's notification, the evidence is clear it was not an attempt to suppress the existence of the wiretap. Nothing about what constitutes at most a clerical error after the execution of the wiretap, calls into question the propriety of the application or monitoring process. The trial court was well within its discretion to conclude that M.G.'s claim not to have received proper notice did not amount to good cause to unseal the wiretap information.

CONCLUSION

Accordingly, respondent respectfully requests that this Court affirm the judgment.

Dated: October 31, 2019

Respectfully submitted,

MICHAEL A. HESTRIN
District Attorney
County of Riverside

/s/

EMILY R. HANKS
Deputy District Attorney

CERTIFICATE OF WORD COUNT
Case No. E072470

The text of the **RESPONDENT'S BRIEF** consists of 3,719 words as counted by the Microsoft Word program used to generate the said **RESPONDENT'S BRIEF**.

Executed on October 31, 2019, in Riverside, California.

Respectfully submitted,

MICHAEL A. HESTRIN
District Attorney
County of Riverside

/s/

EMILY R. HANKS
Deputy District Attorney

DECLARATION OF ELECTRONIC SERVICE

Case Name: *M.G. v. Michael Hestrin, as District Attorney*
Case No.: E072470 (Superior Court No. MCW1800102)

I, the undersigned, declare:

I am employed in the County of Riverside, over the age of 18 years and not a party to the within action.

My business address is 3960 Orange Street, Riverside, California.

My electronic service address is Appellate-Unit@RivCoDa.org.

That on October 31, 2019, I served a copy of the within, **RESPONDENT'S BRIEF**, by electronically filing a copy of this document in the Court of Appeal via the True Filing website (www.truefiling.com) and electronically serving the following parties:

David Allen Greene **Electronic Frontier Foundation** davidg@eff.org	**Riverside County Superior Court** appealsteam@riverside.courts.ca.gov

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Dated: October 31, 2019

/ s /

ESPERANZA GARCIA