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COURT OF APPEAL - STATE OF CALIFORNIA
FOURTH DISTRICT
APPELLATE DIVISION

Appeal from
Superior Court of the State of California
for the County of San Bernardino

ELECTRONIC FRONTIER FOUNDATION,)
)
Plaintiff-Appellant,)
)
vs.)
)
SUPERIOR COURT OF THE STATE OF)
CALIFORNIA COUNTY OF SAN)
BERNARDINO, ET AL.,)
)
Defendants-Respondents.)

FILED
JUN 30 2021
WR

COURT OF APPEAL FOURTH DISTRICT

Case No. CIVDS1930054
E#076778

REPORTER'S TRANSCRIPT OF ORAL PROCEEDINGS ON APPEAL

BEFORE HON. DWIGHT W. MOORE, JUDGE
DEPARTMENT S-19
SAN BERNARDINO, CALIFORNIA

1/15/21

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REPORTED BY: CARRIE LANE, CSR 8882
 Official Reporter

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ORIGINAL

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1 SAN BERNARDINO, CALIFORNIA; FRIDAY, JANUARY 15, 2021

2 P.M. SESSION

3 DEPARTMENT S19

HON. DWIGHT W. MOORE, JUDGE

4 MICHAEL RISHER, Attorney at Law, on behalf of
5 Plaintiff; MARK RUMOLD, Attorney at Law, on
6 behalf of E.F.F.; MARK VOS, Deputy District
7 Attorney of San Bernardino County representing
8 the People of the State of California; JAMES
9 SECORD, Deputy District Attorney of San
10 Bernardino County representing the People of
11 the State of California; CHRISTINE MASONEK,
12 Deputy District Attorney of San Bernardino
13 County representing the People of the State
14 of California; MILES KOWALSKI, County Counsel
15 representing the San Bernardino County;
16 J. STEPHEN PASCOVER, Attorney at Law,
17 representing San Bernardino Superior Court,
18 all appearing telephonically.)

19 (Carrie Lane, Official Reporter, CSR 8882)

20 --oOo--

21 THE COURT: First of all, everybody, I am in
22 chambers. I have with me Gail Fry, a newsperson.

23 MS. FRY: The Black Voice News.

24 THE COURT: I also have my court reporter
25 present. They are the only people present in chambers
26 with me. We are masked and distanced.

1 So who is on the phone? Let's take roll. Who is
2 on the phone?

3 MR. RISHER: Michael Risher for the Plaintiff.

4 MR. RUMOLD: Mark Rumold for E.F.F.

5 THE COURT: Last name for Mr. Rumold? Spelling?

6 MR. RUMOLD: Yes. Rumold, r-u-m-o-l-d.

7 MS. FRY: And first name Mark?

8 THE COURT: First name Mark.

9 Okay. Mr. Vos, you are on the phone?

10 MR. VOS: I am on Blue Jeans.

11 THE COURT: Yep. That is --

12 MR. VOS: From the District Attorney's office.

13 THE COURT: Who else from the District Attorney's
14 office?

15 MR. SECORD: James Secord.

16 THE COURT: S-e-c-o-r-d.

17 Unless you've changed your name.

18 MR. SECORD: Not this week.

19 THE COURT: And anyone else from the D.A.'s
20 office?

21 MS. MASONEK: Christine Masonek.

22 THE COURT: Ms. Masonek, good afternoon.

23 MS. MASONEK: Good afternoon.

24 THE COURT: You too, Jim.

25 County Counsel -- do we have somebody from County
26 Counsel on?

1 MR. KOWALSKI: Yes, your Honor. Deputy County
2 Counsel Miles Kowalski.

3 THE COURT: Miles Kowalski. The typical
4 spelling; right?

5 MR. KOWALSKI: Yes.

6 THE COURT: And is Steve Pascover on the phone?

7 MR. PASCOVER: I am, your Honor.

8 THE COURT: All right. That is court attorney
9 Stephen Pascover, p-a-s-c-o-v-e-r.

10 MR. PASCOVER: That's right. Thank you.

11 THE COURT: Is there anybody that I have missed?
12 Well, I guess not.

13 THE COURT REPORTER: Your Honor, can you ask
14 them, when they speak, to please identify themselves?

15 THE COURT: Request from my court reporter, if
16 you speak, before you say anything tell us who it is that
17 is speaking. Every time speak loudly, clearly,
18 distinctly, and slowly enough that her fingers don't catch
19 fire. We've had a problem with that already today with a
20 previous hearing with a lawyer who talks way too fast.

21 So let's kick this off. I'm kind of shouting
22 because my court reporter is some distance behind me. I
23 wish I could move this around somewhere. Okay. So
24 anyhow, we are here on an underlying -- I'm sorry. I've
25 got paper all over my desk -- the underlying request from
26 the Electronic Frontier Foundation --

1 Well, for the record, this is Electronic Frontier
2 Foundation, Petitioner, versus Superior Court of the State
3 of California, County of San Bernardino, Respondent;
4 County of San Bernardino and San Bernardino County
5 District Attorney's Office, real parties in interest; Case
6 Number CIVDS1930054. And this started off with a verified
7 petition to unseal court records filed October 8, 2019.

8 Mr. Risher, am I correct so far?

9 MR. RISHER: Yes.

10 THE COURT: All right. Now, we have had -- and I
11 am not going to recite them because I don't know the dates
12 off the top of my head. But we have had at least two or
13 three joint telephone conferences through the pendency of
14 this matter. And as a result of those conferences and
15 agreements that were reached, the People stipulated to
16 unseal portions. There are, I believe, eight warrants
17 that are being contested here. There are eight warrants
18 that E.F.F. seems to have fully unsealed released to
19 E.F.F. and released to the public.

20 Am I correct, Mr. Risher?

21 MR. RISHER: Almost. Warrants have been
22 released. What we are asking for now are additional
23 materials related to those warrants.

24 THE COURT: I was getting to that. Along the
25 way, we had reached stipulations where some portions by
26 stipulation of the parties have been released to

1 Petitioner; correct?

2 MR. VOS: Mr. Vos here. May I say that I never
3 stipulated -- the District Attorney never stipulated to
4 their release. We made it clear that we were simply not
5 objecting to the release of the warrants and the sealing
6 orders.

7 THE COURT: I could have sworn I saw a
8 stipulation. Ultimately, I think that distinction --
9 although a real distinction is probably not germane to
10 where we are now -- parts of each warrant were, in fact,
11 released to E.F.F. That is a correct statement, is it
12 not?

13 MR. VOS: Mark Vos. Yes, your Honor.

14 THE COURT: All right. Was that Mr. Risher that
15 wanted to say something?

16 MR. RISHER: No.

17 THE COURT: I don't hear lawyers say that often
18 enough. Thank you, counsel.

19 So the premise was portions not including Hobbs'
20 affidavits of those contested warrants were, in fact,
21 released. There was some thought that that might satisfy
22 E.F.F. and they might not ask for anything further.

23 However, it turned out that did not suffice for
24 E.F.F. E.F.F. wishes to obtain each of the warrants now
25 in its entirety, i.e., the previously undisclosed portions
26 of each to which the People in the most strenuous terms

1 possibly object. Fair statement?

2 MR. VOS: Mark Vos. Yes.

3 MR. RISHER: Michael Risher. Yes.

4 THE COURT: All right. And Mr. Kowalski, you're
5 back there being pretty quiet. But if you've got
6 something to say, feel free to chime in.

7 MR. KOWALSKI: Thank you, your Honor. The County
8 does join in the objections of the D.A.'s office.

9 THE COURT: All right. So that brings us to
10 where we are today. The District Attorney's office has
11 most recently filed on November 10 a reply regarding
12 motion for judgment on the pleadings. Before that, there
13 was a pleading -- I'm trying to get these in some kind of
14 sequence.

15 Before that on October 20 of 2020, the D.A. filed
16 a motion for judgment on the pleadings and a brief and
17 opposition on the unsealing, request of judicial notice of
18 four pending criminal cases, and a declaration from Ms.
19 Masonek under seal. Mr. Risher filed on October 8 an, I
20 think, updated verified petition to unseal the records.
21 That is 2019. Sorry.

22 Mr. Risher, did you file any additional paperwork
23 seeking the Hobbs portions? Or has that simply been -- or
24 is that request still based on your original petition?

25 MR. RISHER: This is Michael Risher. The request
26 is based on our initial petition. The only pleading we

1 filed that I think is in addition to that that is relevant
2 here is we did file, I believe, November 6 -- that's the
3 date on the paper -- a memorandum in support of the motion
4 to unseal and an opposition for the motion for judgment on
5 the pleading. That is a single document. We've only
6 filed our initial petition in that single brief.

7 THE COURT: Hang on. Well, I have a -- no. I
8 have the order unsealing that which was released. That is
9 dated August. That was approved as to form only by real
10 parties in interest.

11 Mr. Risher, I am not finding a pleading from you
12 from November 6. I am not suggesting for a moment you
13 didn't file it.

14 MR. RISHER: I think I filed it -- it has been a
15 awhile. But I think I filed it and also emailed it. And
16 then the government filed a reply to it in addition to
17 their October 27 letter.

18 THE COURT: That is a sequence of events that
19 makes perfect sense. It might have gotten stuck in a
20 confidential envelope. Hang on a sec. I just thought of
21 something. I've been coming into the office working on
22 this. And since I obtained all of the sealed warrants, I
23 have had a bunch of documents locked in my desk that I
24 forgot about until this minute. Perhaps it's there. Hang
25 on.

26 MR. KOWALSKI: This is Miles Kowalski. I can

1 confirm I received the documents on November 6.

2 MR. VOS: Mark Vos. I also have it.

3 Do you, your Honor, have our letter of October
4 27?

5 THE COURT: That doesn't ring any bells. The
6 only letters I am aware of were from E.F.F. to the Court I
7 think before this pleading was even initially filed.
8 Wait. Wait. I found the November 9. Declaration of
9 Michael Risher in support of Plaintiff's motion to unseal;
10 correct?

11 MR. RISHER: Well, there should also be an
12 attachment --

13 THE COURT: This is Mr. Risher speaking; correct?

14 MR. RISHER: Yes. Michael Risher speaking.

15 THE COURT: What I have found is two documents
16 filed November 9 -- a declaration of Risher in support to
17 unseal and memorandum in support of motion to unseal and
18 opposition for motion of judgment on pleadings.

19 MR. RISHER: Yes. Michael Risher. And that is
20 what we filed.

21 THE COURT: I have everything. I have reviewed
22 everything that is in the file. The file is -- and this
23 is my fault -- not a masterpiece of organization. Let's
24 just be charitable and say that.

25 MR. VOS: Your Honor, by saying you have
26 everything -- this is Mark Vos by the way for the D.A. --

1 does that include our October 27 letter?

2 THE COURT: A letter from October 27. Yes.

3 MR. VOS: Okay.

4 THE COURT: Yes. You asked for my indulgence. I
5 am a pretty indulgent guy. All right. Despite my obvious
6 lack of total organization as evidenced by this
7 conversation, I have in fact read everything.

8 This is your motion, Mr. Risher. Is there
9 anything else that you haven't put into writing already,
10 anything new, anything additional that you wish to bring
11 to the Court's attention?

12 MR. RISHER: This is Michael Risher. Just one
13 thing. In the government's reply, it brings up for the
14 first time the presumption under Evidence Code 664. And I
15 will just say that I think that is irrelevant. The
16 government has the burden to show that sealing is
17 justified. The government has the burden to show that
18 sealing continues to be justified. Sealing was initially
19 justified for the first 10 days under Penal Code 1534.
20 There is no presumption of any sort that sealing continues
21 to be justified.

22 Everything else I've put in the papers. It's the
23 government's burden. We are not aware of all of the
24 evidence that it has. So I would like to reply to the
25 government's argument if it has any.

26 THE COURT: Thank you, Mr. Risher.

1 Mr. Vos, anything to add to what you've already
2 said?

3 MR. VOS: No. Just a micro brief response to
4 Mr. Risher that we do not believe that we, the government,
5 have the burden to keep -- to have to persistently justify
6 sealing when the warrant materials are sealed under Hobbs
7 and also like statutes such as Evidence Code 1040 through
8 Evidence Code 1042.

9 THE COURT: All right. Thank you, Mr. Vos.
10 Mr. Kowalski, do you have anything to add?

11 MR. KOWALSKI: No, your Honor.

12 THE COURT: All right. Well, my understanding is
13 the basic premise here is a set of rules existed prior to
14 2016 that essentially permitted the Court to seal a
15 warrant and affidavit, and they would remain sealed in
16 perpetuity unless and until some judge made an order to
17 the contrary.

18 However, in 2016, Penal Code Section -- oh, God.
19 I don't have the number in front of me. It's the one with
20 the (g) subsection. Somebody want to refresh my
21 recollection?

22 MR. KOWALSKI: Miles Kowalski. It's 638.52(g).

23 THE COURT: That's it. Thank you, Mr. Kowalski.

24 That code section was amended creating a new --
25 essentially vitiating the prior sealed in perpetuity
26 arrangements and instead instituting --

1 That number again, Mr. Kowalski?

2 MR. KOWALSKI: 638.52.

3 THE COURT: -- instituting a requirement that the
4 order that the Court must order the order under the
5 StingRay provisions, the cell phone simulator -- if it is
6 a cell phone simulator warrant, it must be sealed for the
7 duration of the period of the warrant. There has been an
8 order that it be disclosed to -- by the phone company to
9 the ultimate customer and that that order for good cause
10 could be extended.

11 Now, I did something that I don't see in the
12 pleadings that anybody else has done. I went back to the
13 source and went back to Assembly Bill 1924, Chapter 511,
14 statutes of 2016 and read the Legislative Counsel's Digest
15 about this statute.

16 From my reading of the earlier version of the
17 statute, it didn't say anything about making that warrant
18 public at any point. The Legislative Counsel's Digest
19 talks about this specific -- this is a specific law that
20 enacted the amended -- the amended 638.52(g) and said
21 "This bill would instead require an order or extension
22 order authorizing or approving the installation and use of
23 a pen register or a trap and trace device, directed the
24 order be sealed until the order including any extension
25 expires, and would require that the order or extension
26 direct that the person owning or leasing the line to which

1 the pen register or trap and trace device is attached not
2 disclose the existence of the pen register or trap, etc.,
3 etc., to any other person. This bill would require a
4 government entity that obtained information pursuant to an
5 order for pen register or trap and trace device to notify
6 the intended targets of the order within 30 days after the
7 termination of the order or a delay is allowed for good
8 cause."

9 That focus is entirely, in my view, on how the
10 legislature orders law enforcement to ultimately disclose
11 to the person whose phone was trapped and traced or
12 otherwise detected. And I don't see that this law, that
13 this change in the law, in fact, changes anything in
14 pre-existing law inasmuch as it relates to disclosing
15 information to the public.

16 Mr. Risher, your thoughts.

17 MR. RISHER: Yes. This is Michael Risher. A few
18 thoughts. First of all, what we are dealing with here is
19 not pen register, trap and trace orders. That is why we
20 focused in our November 11 memorandum on the requirements
21 for search warrants because those are two different breeds
22 of animals. Search warrants are governed not by the .522
23 statute but by 1534 and Hobbs which has always required
24 that these materials be open 10 days after issuance
25 assuming that they have been served.

26 So I don't actually know that the change in the

1 law is relevant to these particular records. If it were,
2 if these were trap and trace, then we would be in a
3 slightly different place. But it still wouldn't matter
4 because the orders here consistent with the statute, or
5 maybe consistent with the older statute, say that these
6 materials shall be sealed until further order of the
7 Court.

8 The current version of the pen register and trap
9 and trace statute doesn't require and, in my mind, doesn't
10 permit perpetual sealing --

11 THE COURT: Counsel, give me a specific cite to
12 that code section.

13 MR. RISHER: I'm sorry. Which code section?

14 THE COURT: The one that you are referring to
15 right now about specifically trap or trace. Excuse me.
16 Specifically the cell phone simulator.

17 MR. RISHER: The cell phone stimulators are
18 governed -- I'm sorry. It's going to take me a moment --
19 but are specifically governed by the rules relating to
20 search warrants. I don't have that statute right in front
21 of me.

22 THE COURT: Well, search warrants would be 1534
23 et seq. Agreed?

24 MR. RISHER: Yes.

25 THE COURT: All right.

26 MR. RISHER: And so that's what we are relying on

1 here. And the statute that covers these types of warrants
2 specifically says that all of the rules relating to search
3 warrants apply to these equally. I think that is 1546.2.
4 But I don't have it right in front of me.

5 So I mean, these are warrants. They say so.
6 They are issued under 1534 et seq. They are covered by
7 Section 1534. And even if -- and I think the plain
8 language now of the trap and trace statute also requires
9 that those orders be either unsealed or, if any sealing
10 continues after they are executed, that sealing has to be
11 justified by the Rules of Court. But in any case, we are
12 dealing with the Statute 1534 which unambiguously requires
13 unsealing 10 days after issuance of executed warrants.

14 THE COURT: 1534 makes no reference whatever to
15 Hobbs. Are you suggesting that the Hobbs rules fall
16 before 1534?

17 MR. RISHER: 1534 has been around for a very long
18 time. I tried to figure out how long. I couldn't. And
19 Hobbs, in fact, is an interpretation of 1534. The reason
20 that we have the Hobbs is because 1534 requires that these
21 be made public after they are executed. And Hobbs says,
22 well, even though that is what the statute says, we are
23 going to harmonize that with the Evidence Code protections
24 for confidential informants. And the way we will do that
25 is that all material -- presumptively the search warrants
26 must be made public. We say that repeatedly. We quoted

1 that a half a dozen times, and our brief is saying that --
2 except to the extent that would reveal material that is
3 covered by the confidential informant privilege. And so
4 Hobbs is putting aside its second step which is a due
5 process step. Hobbs is an interpretation of 1534 and
6 stands for the proposition that search warrants are public
7 documents unless there is some other provision of the
8 Evidence Code or some other statute that makes them
9 sealable.

10 And that is our argument here. They are --
11 anything that cannot be sealed under some specific
12 provision of either Hobbs or the factors in the Jackson
13 case has to be released.

14 THE COURT: All right. I certainly agree that
15 Hobbs remains good law. And up until this petition, I
16 have never seen an argument raised based on the
17 longstanding language of 1534 that, once something has
18 been sealed, it needs to be rereviewed and resealed and
19 the sealing extended. You haven't cited any case
20 authority for that. I think your interpretation of the
21 language here really flies in the face of the underlying
22 intentions of Hobbs.

23 Now, I am in a very constrained position in
24 talking about the sealed affidavits. There was a request
25 to accept the sealed affidavit of Ms. Masonek. Inasmuch
26 as that has not been disclosed to the petition --

1 Is that correct, Mr. Vos?

2 MR. VOS: That is correct.

3 THE COURT: Inasmuch as they have had no chance
4 to review or cross-examine it, I am not going to accept
5 that petition -- I mean that declaration. However, I have
6 independently -- and just for the record if it is not
7 clear already, I was a D.A. for 26 years, 18 of which I
8 was a supervisor. I have been a judge for a bit over 13
9 years. For a period of 7 long grueling painful
10 uninterrupted months in the year 2020 working from home, I
11 did nothing but search warrants all day, five days a week,
12 8:00 to 5:00. My personal record was 63 warrants in one
13 day. I believe I probably reviewed more warrants than any
14 other judge in this county. I'm sure that's why they gave
15 this case to me. That was not a plea for sympathy
16 although it probably sure sounded like one. Maybe a
17 little.

18 But so I did not review -- excuse me. I'm not
19 accepting into the record Ms. Masonek's declaration.
20 However, I have personally read all of these warrants and
21 all of the appended affidavits. It appears to me that
22 there has been historically a clear presumption that some
23 information simply should never get out. In the Rules of
24 Intelligence -- I'll fess up. I'm a John le Carre fan.
25 But in the Rule of Intelligence, they talk about sources
26 and methods. And anybody who in any way reveals sources

1 or methods is creating a danger for somebody.

2 And in the world of the types of cases involved
3 in these warrants that -- I believe it is a five defendant
4 homicide case that Ms. Masonek has prosecuted and
5 continues to prosecute as well as the two other cases
6 unrelated to that combined case -- I'm not at liberty to
7 disclose what's in those affidavits. I'm not at liberty
8 to disclose what's in Ms. Masonek's affidavit. But I'm
9 satisfied that there is nothing in any of those
10 affidavits -- in the Hobbs' declarations and those
11 affidavits -- that should be released now or ever.

12 I suppose somewhere a far turn down the road when
13 everybody in the case has passed away, the need for
14 secrecy and the march of technological process might
15 obviate that comment but at least not for a very long
16 time.

17 I am not finding in any of the authorities that
18 have been cited to me -- and certainly no case law has
19 been cited to me -- any authority for the proposition that
20 I can now create a new precedent and order that these
21 warrants which have been reviewed by a judge or sealed by
22 a judge are subject to publication or a continuing review
23 process to justify nonpublication. You just haven't shown
24 that to me, counsel.

25 Mr. Vos, anything you would like to add?

26 MR. VOS: Only a question. Does this mean that

1 the Court is finding that the warrants the Court has
2 reviewed have been sealed according to a compelling state
3 interest and that there is no less restrictive means to
4 further that interest?

5 THE COURT: I haven't said that yet. Stay tuned.
6 But in fact, yes, that is my conclusion. There is nothing
7 about these that can be partially released. The warrants
8 are -- not the warrants. The affidavits, the Hobbs'
9 declarations, are a case unto themselves that releasing
10 any portion of it begins to give somebody an opportunity
11 to begin to unwind the confidential information that is
12 contained therein. And there is a compelling state
13 interest both with regard to protecting confidential
14 informant identity, if that is an issue in any of the
15 cases, and in projecting sources of methods which is
16 unquestionably an issue in all of these.

17 Mr. Risher.

18 MR. RISHER: A couple thoughts. This is Michael
19 Risher. I mean, first, I don't think we can call these
20 Hobbs' affidavits because the affidavit at issue in Hobbs
21 or the material issue in Hobbs was simply an attachment to
22 the affidavit that contained the sensitive information.
23 And that is all that the Court is allowed to remain
24 sealed.

25 I mean, what we should be seeing in these cases
26 and what we are seeing certainly in Alameda County -- it's

1 been a while since I've looked at a bunch of warrants from
2 there. But this is what I used to see -- is that if the
3 investigating officer requesting the warrants offers
4 certain information needed to be sealed under Hobbs, they
5 would submit that as a separate attachment or at least as
6 a part of the warrant that could easily be separated from
7 the remainder of the materials which, under the
8 unambiguous language of Section 1534, is to be made public
9 and --

10 THE COURT: Counsel.

11 MR. RISHER: I appreciate there is going to be
12 confidential material and sensitive material in these
13 affidavits. But I really find it difficult to believe
14 that information -- for example, that they are
15 investigating a 187 versus a 211 -- that the name of the
16 investigating agency, that the general description of the
17 qualifications of the affiance, that the request for or
18 the description of what they are asking the phone
19 companies to do, that all of that can be so sensitive as
20 to marriage, keeping it from the public under the
21 constitutional requirements that court records be public,
22 the specific statutory requirements that search warrant
23 materials be made public after the warrant is executed.
24 And the Rules of Court cover that. I haven't seen them.
25 Maybe I'm -- I don't know what is in them and that is what
26 is causing my inability to comprehend that. But it just

1 seems difficult to believe.

2 THE COURT: Well, you are operating blindfolded
3 with one hand tied behind your back. I recognize that.
4 And quite frankly, the vast majority of warrants that I
5 have reviewed in my day have been structured in the matter
6 that you've described. This is the affidavit. Probable
7 cause sometimes will be two paragraphs and then "See
8 attached Hobbs' declaration." And what is sealed is a
9 Hobbs' declaration. That is the typical format that I
10 have seen employed in this county.

11 But what I've also seen is that every agency in
12 this county -- that is, the largest county in the
13 contiguous 48 -- so we've got a lot of agencies. And even
14 with agencies, detectives on different desks have
15 different warrant formats. So we have lots of formats,
16 and not all of them comply with what I've just said.

17 However, in a situation where the police are
18 doing phone investigations, they are doing trap and trace
19 information, the mere fact of a phone number that they are
20 looking at, even that if it becomes public, provides
21 information to the counter-intelligence agencies working
22 for the defendant. I'm getting carried away with myself.
23 But I think you know what I mean.

24 The mere fact that the police wanted to do a trap
25 on this particular phone number is going to start the
26 wheels turning to figure out "Why are they doing this

1 number? How did they find it out? Is there a leak? Who
2 is the leak? What is the leak? Is there some new
3 technic?" There is a lot of stuff law enforcement is
4 doing pursuant to search warrants that I think are far
5 from common knowledge among the public. And I think there
6 is a compelling state interest in keeping that as a state
7 of affairs.

8 Don't you agree with Mr. Vos?

9 MR. VOS: Yes, your Honor.

10 Well, I have something on a different subject
11 when you are done on this issue.

12 THE COURT: Well, I am kind of done on this
13 issue. So what have you got?

14 MR. VOS: I would just invite the Court to
15 address our argument about standing.

16 First, I wanted to clarify that, when I argued in
17 the District Attorney's briefs that we believe E.F.F. and
18 other members of the public don't have standing under
19 Rules of Court 2.550 and 2.551, we didn't mean to imply
20 they can't approach the Court and petition for unsealing
21 and disclosure.

22 What we meant was, once the Court after having
23 received such a request from the public and not a
24 criminal -- not affected criminal party, once the Court
25 received that request and deemed that those warrants have
26 been sealed under Hobbs and 1040 and 1041 and 1042 of the

1 Evidence Code, the matter should there end, that regular
2 lay members of the public even under the most recent
3 statutes do not have standing to pursue it any further.

4 THE COURT: Well, you understand that, as a
5 single Judge in a Superior Court, nothing that I say in
6 this case has any precedential value other than in this
7 case. I don't think I am in a position to make a ruling
8 along the lines of what you suggest although I do agree
9 with you that what you are suggesting is correct.

10 I don't feel that I have the jurisdiction to make
11 that kind of a finding in this issue. I think I am
12 limited to this case where they have requested certain
13 records be unsealed, and I don't think I'm in a position
14 to make an order as to standing that exceeds the scope of
15 this case. So I'm reluctant to do what you are
16 suggesting. Although as a matter of law, I do agree with
17 your analysis.

18 Mr. Kowalski, you have been remarkably silent for
19 a man of your profession which the Court very much
20 appreciates. Do you have anything to add to this?

21 MR. KOWALSKI: Not me, your Honor. I know when
22 not to chime in.

23 THE COURT: Parenthetically, years ago we had a
24 Judge Campbell in the courthouse. The Victorville
25 courthouse was named after him. He had what he called the
26 rule of Hudson case because Tommy Hudson was a lawyer

1 years ago in the West End who really never knew when to
2 stop talking. And he snatched defeat from the jaws of
3 victory more than once. And so the rule in a Hudson's
4 case is "Hey. You're ahead. Stop." And I think you have
5 just recognized the continuing existence of the rule of
6 Hudson case.

7 Mr. Risher, I am at this point intending to
8 simply deny your petition and make an additional finding
9 that, if I'm wrong and you -- because in my interpretation
10 of these statutes -- well, my interpretation of the
11 statutes is different from your interpretation of the
12 statutes. And at this level, I'm wearing a dress and
13 you're not, and I'm right and you're wrong at least until
14 an appellate court says otherwise.

15 But at this point, I do intend to rule against
16 you as the law does not permit the remedy that you seek.
17 I will go beyond that and say I have reviewed each and
18 every warrant. Were I to be found wrong in my evaluation
19 of the law and were an appellate court to say "No, Judge
20 Moore. You were wrong. These things should be made
21 public unless you have reviewed them and found a
22 compelling reason not to release them," as to that matter,
23 I say I have reviewed the warrants and, as to each
24 warrant, I have found a compelling public interest that
25 there is no lesser remedy available other than to keep
26 these documents sealed, those documents being those

1 portions in each warrant that you have not already
2 received.

3 That is what I am intending to rule. But before
4 I do, Mr. Risher, last chance at the Judge.

5 MR. RISHER: Well, it doesn't sound like I fall
6 into the rule of Hudson in this case.

7 THE COURT: No. Probably you don't.

8 MR. RISHER: There is a case that we've discussed
9 in our petition, the Marriage of Nichols or Nicholas, 186
10 Cal App.4th, 1566. At Page 1574 the Court says "We reject
11 Nichols' efforts to treat sealing orders as if they were
12 sealed caskets rather than presumptively open court
13 records." And the rest of the case is kind of a
14 discussion of why, in fact, there is a continuing duty for
15 courts to evaluate the necessity of the Court unsealing
16 orders and, when they are not necessary because of the
17 passage of time for change of circumstances, it release
18 those records to the extent it is possible to do so
19 without impinging on serious interests.

20 And so I am not in the position to say what is in
21 these. As I've said, it seems difficult to believe that
22 at least part of those records can be released. But what
23 I am in a position to say is that, yes, in fact, the Court
24 does have a duty to, upon request of the public, look at
25 these records and see whether they still need to be
26 sealed. With that, I will pipe down.

1 THE COURT: I profess no expertise in family law.
2 This, in fact, is the only civil case that I have dealt
3 with -- say with a few adoptions -- since 1981. My entire
4 career as a D.A. and as a judge has been exclusively
5 criminal law.

6 I find a decision about sealing records in a
7 civil case, a family law case where people are either
8 talking about support issues or community property issues,
9 I find the consequences and mistakes of a disclosure in
10 that kind of a situation would be far, far afield from a
11 disclosure in a murder investigation, in a multi-defendant
12 murder investigation, in a gang case where in fact -- I'm
13 not referring to these cases in specific because I don't
14 want to talk in specifics. But people die in criminal
15 cases if the wrong information falls into the wrong hands.
16 We've seen it. I have seen people prosecuted for
17 retaliation murders.

18 So I do not find language in a civil case where
19 the consequences of a bad decision to release evidence
20 are, in my view, significantly less than the consequences
21 of a bad decision would be in this case.

22 So Mr. Vos or Mr. Kowalski, anything else you
23 want to add?

24 MR. VOS: Mark Vos. That is it for the District
25 Attorney.

26 MR. KOWALSKI: Miles Kowalski. Nothing from the

1 County. Thank you.

2 THE COURT: Then, gentlemen, at this point I am
3 going to rule as I indicated I intended to. The petition
4 is denied. I am denying the request to unseal the
5 specified court records. I'm not going to list them all.
6 They are listed in the moving papers. So I am denying the
7 petition as to all.

8 I am finding that the law does not provide for
9 the kind of release that Petitioner seeks. Beyond that, I
10 am finding that, even if such a release would under some
11 circumstances be authorized, I am finding that under the
12 circumstances of these specific warrants, having reviewed
13 them all, all should remain sealed because without
14 specifying details, they are compelling State reasons
15 involving either the safety of individuals or the
16 protection of law enforcement technics and methods all
17 which justify sealing these documents. And there is no
18 legislature remedy available other than to keep them
19 sealed.

20 With that done my experience in civil cases, as I
21 said, is limited. But I think we need somebody to give
22 notice of this ruling to all parties, do we not? Or will
23 everybody waive notice?

24 MR. SECORD: Your Honor, James Secord. I would
25 suggest that Mr. Vos give notice to all parties.

26 THE COURT: Mr. Secord, I don't remember calling

1 on you. You are intermeddling.

2 MR. SECORD: I am actually citing the rule of
3 Hudson case keeping my mouth shut until I absolutely need
4 to say something.

5 MR. VOS: This is Mark Vos for the D.A. I will
6 go ahead at my colleague's suggestion and give notice.

7 THE COURT: He's your colleague, not your
8 supervisor?

9 MR. VOS: No. He is retired.

10 THE COURT: For some reason I thought you were
11 simply saying "me too" to what your boss said.

12 MR. VOS: He never rose above lunch buddy even
13 when he was on the payroll.

14 THE COURT: Even when he did work for a living,
15 huh?

16 MR. VOS: Right?

17 THE COURT: A status which I intend to join
18 shortly.

19 All right. Then I will order the District
20 Attorney to give notice to all parties, do that within 10
21 days. Is that acceptable to everybody?

22 MR. VOS: Yes. Mark Vos.

23 MR. KOWALSKI: Miles Kowalski. Yes.

24 THE COURT: And Mr. Risher?

25 MR. RISHER: Michael Risher. Yes.

26 Can I ask one other thing or make another

1 request?

2 THE COURT: Sure.

3 MR. RISHER: I'll make one request. I think it
4 is for everybody. So it's not clear to whether the -- I
5 know that the stipulation and order partially unsealing
6 the parts of the warrants where nobody had an objection
7 has been filed -- it's not clear to me whether those
8 partially -- where those partially unsealed warrants exist
9 in the Court files, whether they exist only in the
10 individual criminal cases -- or warrant files rather -- or
11 whether they have also been made a part of this record.
12 And without --

13 THE COURT: Go ahead.

14 MR. RISHER: I guess the punchline is I think
15 that they should be a part of the record in this case in
16 the event there is an appeal. I think that just makes it
17 much more convenient for the Appellate Court.

18 THE COURT: Presently all warrants are maintained
19 in the Court's warrants file under their numbers. What I
20 have in front of me is a series of envelopes in which some
21 of the information from the warrant, that which was
22 released, is attached to the front of a sealed envelope.
23 And the remaining sealed portions are contained within the
24 sealed envelope. And so we have both the sealed and the
25 unsealed portion of each warrant together.

26 I think it would make sense to maintain that

1 status as to the warrants. And are you suggesting that we
2 make a second copy of each of the disclosed portions of
3 the warrants to attach as a part of the record in this
4 matter?

5 MR. RISHER: Yes, I am. And the easiest way to
6 do that may be simply to attach a copy of the documents
7 that I received from Mr. Vos which has a caption and
8 everything and is a copy of either the stipulation or the
9 order and all of that redacted material, all of those
10 partially unredacted warrants. So we already have that
11 document. There wouldn't be a need to go through and make
12 separate copies of them.

13 THE COURT: Are you sure because I just love
14 making more work for my court staff.

15 All right. I do have in this file a copy of the
16 order unsealing court records reciting what has been
17 unsealed. The copy I have is signed by me and approved as
18 to form by Mr. Vos, missing Mr. Kowalski's signature but
19 -- well, that ship has sailed.

20 I don't have in my file a further -- a specific
21 copy of what was released. I appear to have only a copy
22 of the order unsealing the records without all of the
23 attachments of what, in fact, was unsealed. I don't seem
24 to have that.

25 MR. VOS: Mark Vos, D.A. I have a copy in front
26 of me. It was received, was stamped "Received" August 7

1 by the Court. And if I recollect correctly, I believe in
2 email correspondence your Honor actually acknowledged
3 receipt of it and had had comment concerning it. If you
4 want, I can send a pdf to all the involved parties.

5 THE COURT: Mr. Vos, that was dated when?

6 MR. VOS: The "Received" stamp on the back of my
7 copy is August 7.

8 MR. PASCOVER: Your Honor, Steve Pascover. Your
9 Honor, I have a copy of a 63-page document in what we call
10 or used to call laserfiche. I can make it -- it is
11 already a pdf. If you would like that, you know --

12 MR. RISHER: This is Michael Risher.
13 Mr. Pascover, is that a caption, "Disclosure of unsealed
14 pages from nine sealed search warrant packets," so we are
15 all starting with the same document?

16 MR. PASCOVER: I think so. The date is right.
17 Let me --

18 MR. RISHER: I think that is the document that
19 Mr. Vos is referring to although correct me if I am wrong.

20 MR. VOS: Yes. That is the correct document. I
21 should have read the caption.

22 MR. PASCOVER: Just make sure at this point,
23 disclosure of unsealed pages from nine sealed search
24 warrant packets. We are all talking about the same thing
25 still?

26 MR. RISHER: Yes.

1 MR. VOS: Yes.

2 MR. RISHER: This is Michael Risher. I would
3 request or ask for a stipulation, if this is not already
4 part of the record in this case, this entire packet be
5 made part of the record.

6 MR. VOS: The D.A. agrees. This is Mark Vos.

7 THE COURT: Mr. Kowalski?

8 MR. KOWALSKI: No objection.

9 THE COURT: What I propose then is that I order
10 Mr. Pascover -- teach him to volunteer information -- to
11 print out a copy of that entire pdf and make it a part of
12 the record in our file.

13 Is that agreeable with all parties?

14 Mr. Risher?

15 MR. RISHER: Yes.

16 THE COURT: Mr. Vos?

17 MR. VOS: Yes.

18 THE COURT: Mr. Kowalski?

19 MR. KOWALSKI: Yes.

20 THE COURT: Mr. Pascover, you are so ordered.

21 MR. PASCOVER: Yes.

22 THE COURT: Now, I think that is everything. Is
23 there anything else that we need discuss at this point,
24 gentlemen?

25 MR. VOS: Mark Vos. No.

26 THE COURT: Thank you.

1 MR. KOWALSKI: Miles Kowalski, no.

2 MR. RISHER: This is Michael Risher. Nothing for
3 the plaintiff. Thank you.

4 THE COURT: All right. Then at this point for
5 those of you who I used to see on a regular basis --
6 Mr. Vos, Mr. Secord, Ms. Masonek -- I don't know if I will
7 ever be back in this courthouse. This is my last case.
8 And so I am done with being a sitting Superior Court
9 judge. I won't retire until March 1. But this -- I have
10 been on vacation since October. I came back today to
11 handle this and another matter. I am having tentative
12 discussions with the court about perhaps volunteering to
13 come back as a retired judge to help cover settlement
14 conferences. I understand there is a bit of a backlog
15 around here. I'm sure you've heard that.

16 But I do not know how that is going to play out.
17 So I may or may not ever actually see any of you ever
18 again. If I don't, I have known all of you for many
19 years, Mr. Secord probably the longest. And of course,
20 Ms. Masonek and I shared a courtroom for a number of years
21 in Fontana where she was a calendar deputy in Fontana when
22 I was a baby judge. I just want to say it has been a
23 pleasure working with all of you.

24 MS. MASONEK: And a pleasure working with you as
25 well.

26 THE COURT: I am going to guess that was

1 Christine Masonek.

2 MR. VOS: Bon voyage.

3 MR. SECORD: I hope you have a wonderful
4 retirement.

5 THE COURT: Thanks, Jim. I may be back. At this
6 point I just don't know. I may do settlement conferences.
7 I may sign up as a retired judge and ride circuit doing,
8 you know, substitute teacher kind of stuff on a very
9 limited basis. Or I may just simply go be retired. I
10 haven't quite decided yet. So maybe this is goodbye.
11 Maybe it is not. I don't know. But if it is, it has been
12 a pleasure. Thank you, everybody. I think we are done.

13 MS. MASONEK: Thank you.

14 MS. VOS: Thank you, your Honor. Enjoy your
15 retirement.

16 (Whereupon, the proceedings were adjourned.)
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

DEPARTMENT S19

HON. DWIGHT W. MOORE, JUDGE

ELECTRONIC FRONTIER FOUNDATION,)
)
Appellant,)
)
vs.)
)
SUPERIOR COURT OF THE STATE OF)
CALIFORNIA COUNTY OF SAN)
BERNARDINO, ET AL.,)
)
Respondents.)
_____)

Case No. CIVDS1930054
E#076778

STATE OF CALIFORNIA)
) SS.
COUNTY OF SAN BERNARDINO)

I, CARRIE LANE, Official Reporter of the Superior Court of California, County of San Bernardino, do hereby certify that the foregoing pages 1 - 39, to the best of my knowledge and belief, comprise a full, true, and correct computer-aided transcript of the proceedings taken in the matter of the above-entitled cause held on FRIDAY, JANUARY 15, 2021.

Dated this 18th day of June, 2021.

Carrie Lane C.S.R.

Official Court Reporter, C.S.R. No. 8882

1 STATE OF CALIFORNIA)
 2) Case No. CIVDS1930054
 3 COUNTY OF SAN BERNARDINO)
 4) E# 076778

5 **CLERK'S CERTIFICATION SERVICE RE: CIVIL**

6
 7 I, a sworn Deputy Clerk of the Superior Courts, County of San Bernardino, State of California,
 8 do hereby certify that:

- 9 1. Copies of the **REPORTER'S TRANSCRIPTS/AFFIDAVITS** were served on the
 10 following parties **Appellant Attorney** Aaron David Mackey, Electronic Frontier Foundation
 11 **Respondent's Attorney** Mark Allen Vos, Office of The District Attorney
 12 Appellate Services Unit on the date indicated: JUN 28 2021
 13
- 14 2. The original **REPORTER'S TRANSCRIPTS/AFFIDAVITS** on Appeal were certified to
 15 the Court of Appeal, Fourth Appellate District, Division Two on JUN 28 2021.
 16
- 17 3. A copy of the **REPORTER'S IN-CAMERA TRANSCRIPT** for the following date(s)
 18 was served to **Appellant** **Respondent's Attorney** on:
 19 _____
 20
- 21 4. The original and _____ copy(ies) of the **SEALED REPORTER'S IN-CAMERA**
 22 **TRANSCRIPT** for the following date(s) _____, were certified to the Court of Appeal,
 23 Fourth Appellate District, Division Two on:
 24 _____
 25

Nancy CS Eberhardt, Court Executive Officer

Dated: JUN 28 2021



Patricia Ortloff
 Patricia Ortloff, Deputy Clerk