Appellate Case No. E072470

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

M.G.,

Plaintiff and Appellant,
v.

MICHAEL HESTRIN, as District Attorney, etc.,

Defendant and Respondent.

Appeal from the Superior Court for the County of Riverside
The Honorable John D. Molloy, Presiding Judge
Case No. MCW1800102

BRIEF OF PLAINTIFF AND APPELLANT

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CERTIFICATE OF INTERESTED ENTITIES

Pursuant to California Rules of Court 8.208, Electronic Frontier Foundation states that it is a donor-funded, non-profit civil liberties organization. Electronic Frontier Foundation has no parent corporation and no publicly held corporation owns 10% more of its stock.

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I. INTRODUCTION

The appropriateness of a public right of access to court records is never more apparent than where the cloaking of those court records in secrecy results in an apparent abuse of the legal system. Such is the case here, where such secrecy enabled the Riverside District Attorney to seek, and the Riverside Superior Court to authorize, a disproportionate percentage of all wiretaps in the entire country, raising significant doubts about their constitutionality.

This Court should find that the public has a First Amendment right of access to the court records at issue in this case – wiretap applications, orders, and other associated records filed with the court after the wiretap has been executed and the investigation closed.[1] In the alternative, this Court should find that Miguel Guerrero, the Appellant, and a target of one such wiretap, should have access to the records regarding the specific wiretap executed against him, pursuant to statute.

[1] Guerrero by this motion does NOT seek to establish a public right of access to wiretap orders and records pertaining to wiretaps that are part of ongoing investigations. It is common to distinguish pre- and post-investigation status in considering the First Amendment right of access to court records pertaining to investigatory proceedings. *Compare*, *e.g.*, *People v. Jackson*, 128 Cal. App. 4th 1009, 1022 (2005) (finding a First Amendment right of access to post-investigation search warrant records) *with Oziel v. Superior Court*, 223 Cal. App. 3d 1288, 1297 (1990) (considering the right of access to materials obtained via a search warrant, pre-indictment, while the investigation is ongoing, and not yet entered into evidence). Courts have thus recognized that the public right of access to a particular document may change over time. *See*, *e.g.*, *United States v. Loughner*, 769 F. Supp. 2d 1188, 1190, 1195 (D. Ariz. 2011) (granting public access to warrant records post-indictment, after it had declined to find a right of access to the same records pre-indictment). *See also In the Matter of Grand Jury Proceedings: Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992) (explaining that "Doctrines that initially seem to support secrecy thus turn out to be about the timing of the disclosure").

II. STATEMENT OF APPEALABILITY

The order below denying Guerrero and the public access to the order, affidavits, and related materials pertaining to Riverside Wiretap Order No. 15-409 is appealable as an order after judgment under Cal. Code of Civil Procedure § 904.1(a)(2). *See In re Marriage of Burkle*, 135 Cal. App. 4th 1045, 1051 n.6 (2006)

III. STATEMENT OF THE CASE

This appeal arises from the denial of appellant Guerrero's motion to unseal certain court records, namely the order, affidavits, and related materials pertaining to Riverside Wiretap Order No. 15-409, of which he was a target. Guerrero sought an order unsealing the records pursuant to the First Amendment, which grants the public a qualified right of access to court records. *See NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178 (1999). In the alternative, he sought an order permitting him to inspect the records pursuant to Cal. Penal Code section 629.68. By minute order, the trial court denied the motion. Clerk's Transcript on Appeal 91.[2]

IV. STATEMENT OF FACTS

A. Riverside County's Excessive Issuance of Wiretap Orders

For several years, including 2015, the year at issue in this case, Riverside County courts authorized a disproportionate number of wiretap orders – three times as many as any other state or federal court – triggering scrutiny by the public and the press, [3] and

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[2] Hereinafter, the Clerk's Transcript on Appeal and the Supplemental Clerk's Transcript on Appeal will be abbreviated "CT" and "Supp. CT" respectively.

[3] *See* S.E. Williams, *There Was So Much Wiretapping in Riverside County . . . Even the Bugs Had Bugs*, THE VOICE (Feb. 25, 2016), http://theievoice.com/there-was-so-much-wiretapping-in-riverside-county-even-the-bugs-had-bugs/; Brad Heath & Brett Kelman, *Justice officials fear nation's biggest wiretap operation may not be legal*, USA TODAY (Nov. 11, 2015), https://www.usatoday.com/story/news/2015/11/11/dea-wiretap-operation-riverside-california/75484076/.

rebukes from a federal judge[4] and some federal prosecutors.[5] According to the Attorney General's *California Electronic Interceptions Reports*, Riverside County authorized 624 wiretap orders in 2014 and a record 640 wiretap orders in 2015, far more than any other county in the state (Los Angeles County Superior Court was the next highest among the state courts at 129 authorized wiretap orders for 2014 and 133 for 2015).[6] According to the Administrative Office of the U.S. Courts Wiretap Report, in 2015, wiretap orders issued by Riverside Superior totaled 21,500 days of operation,[7] thus averaging more than 68 wiretaps each day of the year. These were an almost two-fold increase from 2013, in which 329 wiretap orders were authorized and presented a near nine-fold increase from the 74 authorized in 2010.[8] During that same period, the number of wiretaps authorized in Los Angeles and neighboring counties stayed relatively constant.[9]

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[4] "While the sheer volume of wiretaps applied for and approved in Riverside County suggests that constitutional requirements cannot have been met, the legality of that system is the issue before the Court." *United States v. Mattingly*, 2016 WL 3670828, *9 (W.D. Ky. 2016).

[5] Heath & Kelman, *supra* note 2.

[6] Office of the Attorney General, *California Electronic Interceptions Report*, Annual Report to the Legislature 2015 (hereinafter cited as the "Attorney General's 2015 Report") at 5, https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/annual-rpt-legislature-2015.pdf; Office of the Attorney General, *California Electronic Interceptions Report*, Annual Report to the Legislature 2014 (hereinafter cited as the "Attorney General's 2014 Report") at 2, https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/annual-rpt-legislature-2014.pdf

[7] CT 4-6 (requesting judicial notice of the Administrative Office of the U.S. Courts Wiretap Report 2015), also available at http://www.uscourts.gov/sites/default/files/data_tables/wiretap_2_1231.2015.pdf; CT 19 (Report, Table 2: Intercept Orders Issued by Judges During Calendar Year 2015); CT 106:23-24 (granting judicial notice).

[8] Office of the Attorney General, *California Electronic Interceptions Report*, Annual Report to the Legislature 2013 (hereinafter cited as the "Attorney General's 2013 Report") at 2, https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/annual-rpt-legislature-2013.pdf; Heath & Kelman, *supra* note 2.

[9] *See* CT 19; Attorney General's 2013 Report, *supra* note 7; Attorney General's 2014

This number far exceeded the nationwide average: at the height of this record period Riverside Superior Court approved three times as many wiretap orders as any other state or federal court, accounting for almost 20% of the wiretap orders authorized in the United States.[10] Reports submitted by the California Attorney General revealed that the large majority of the more than 2 million communications intercepted through the 2014 and 2015 Riverside wiretap orders were unrelated to crime.[11] Joint reporting by *USA Today* and *The Desert Sun* found that information obtained via the wiretaps was rarely used in federal criminal prosecutions.[12]

B. The Wiretap of the Petitioner

On June 19, 2015, Riverside County Superior Court Judge Helios J. Hernandez signed Riverside Wiretap Order No. 15-409, authorizing the interception of electronic wire communications of certain individuals to and from target phone number 951-314-0550 (the "Target Phone Number") for the period from June 19, 2015 to July 19, 2015.[13] *See* Supp. CT 22. Pursuant to the order, the wiretap was put into place and

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Report, *supra* note 5; Attorney General's 2015 Report, *supra* note 6.

[10] Many of the wiretaps were apparently obtained by the federal Drug Enforcement Administration, CT 25-42, and lacked a "'close investigative nexus' to the county." About 96% of the wiretaps issued were related to drug investigations in other parts of the country. *See* Heath & Kelman, *supra* note 2; Brett Kelman, *Judge: So many Riverside wiretaps, they can't be legal*, DESERT SUN (July 6, 2016), https://www.desertsun.com/story/news/crime_courts/2016/07/06/riverside-county-wiretaps-judge/86779116/; Tim Cushing, *DEA Loses Big Drug Case, Thanks to Illegal Wiretap Warrants Prosecutor Calls 'Procedural Errors'*, TECHDIRT (Dec. 15, 2015), https://www.techdirt.com/articles/20151214/08492533071/dea-loses-big-drug-case-thanks-to-illegal-wiretap-warrants-prosecutor-calls-procedural-errors.shtml.

[11] *See* Attorney General's 2014 Report, *supra* note 5, at 19-49; Attorney General's 2015 Report, *supra* note 5, at 30-67; Heath & Kelman, *supra* note 2.

[12] Heath & Kelman, *supra* note 2; Kelman, *supra* note 8.

[13] Judge Hernandez, during this period, authorized almost five times as many wiretaps as any other judge in the United States. "No judge in the United States has been so prolific in authorizing eavesdropping." Heath & Kelman, *supra* note 2.

communications were intercepted during this period. [*Id.*]

The registered owner of the phone number that was the subject of Wiretap Order No. 15-409 is appellant Miguel Guerrero. Guerrero is a retired California Highway Patrol Officer with no criminal record. Supp. CT 60:11-16.

In addition to the general concern about the disproportionate volume of Riverside wiretaps, the legitimacy of the specific wiretap order at issue in this appeal is particularly in question. California law was not followed in at least one important aspect: Guerrero never received an inventory of Wiretap No. 15-409. Supp. CT 60:17-20. Penal Code section 629.68 requires that no later than 90 days after the termination of the order and extensions, the issuing judge must order the requesting agency to produce to the target an inventory that indicates the fact of entry of the order, the date of the entry and the period of authorized interception, and indicate whether during the period wire or electronic communications were or were not intercepted. It is unclear whether the judge ever ordered that Guerrero be so notified, as California law requires. Rather, Guerrero only learned of the wiretap through family and friends who received notice from the Riverside District Attorney's Office that that Guerrero's phone had been wiretapped and that their communications with him were intercepted.[14] Supp. CT at 19 ¶¶ 4, 6, Exhibit A.

More three years has passed since the conclusion of the wiretap and Guerrero has not been charged with any crime. Supp. CT at 42 fn.10; 60:25-27.

V. STANDARD OF REVIEW

The question of whether the wiretap application, order, and associated records are subject to the public's First Amendment right of access is reviewed independently. *Mercury Interactive Corp. v. Klein*, 158 Cal. App. 4th 60 (2007); *People v. Jackson*, 128

[14] The inventory Guerrero's correspondents received was signed by Deputy District Attorney Deena Bennett, but not dated. Supp. CT at 22. The notice Guerrero's correspondents received did not indicate that the wiretap had been subject to any extensions. Supp. CT at 22.

Cal. App. 4th 1009, 1021 (2005).[15]

The question whether Guerrero has a statutory right of access to the records pursuant to Penal Code § 629.68 is reviewed for abuse of discretion, in which any factual determinations made will be upheld if supported by substantial evidence. *See Oiye v. Fox*, 211 Cal. App. 4th 1036, 1067 (2012). An error in law will be an abuse of discretion. *See Jackson*. 128 Cal. App. 4th at 1018-19.

VI. THE PUBLIC HAS A FIRST AMENDMENT RIGHT TO ACCESS THE WIRETAP ORDER, SUPPORTING DOCUMENTS, AND ANY OTHER INFORMATION SUBMITTED TO THE COURT

Wiretap orders and the affidavits and applications supporting their issuance, where the wiretap expired and the investigation terminated, are court records to which the public has a qualified First Amendment right of access. This right can only be overcome when "(i) there exists an overriding interest supporting closure; (ii) there is a substantial probability that the interest will be prejudiced absent closure; (iii) the proposed closure is narrowly tailored to serve that overriding interest; and (iv) there is no less restrictive means of achieving that overriding interest." *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1181 (1999).

Here, the state cannot meet this test and this Court should reverse the lower court's decision and uphold the right of access to this wiretap and related materials.

[15] The Courts of Appeal have split on the issue of the appropriate standard of review of the question of whether the qualified First Amendment right of access, if found to apply, requires the unsealing of the records. *Compare Jackson*, 128 Cal. App. 4th at 1019-21 (applying independent review), *with Oiye v. Fox*, 211 Cal. App. 4th 1036 (2012) (applying abuse of discretion standard). But that dispute need not be resolved here because the trial court, finding no First Amendment right of access, did not apply the qualified test at all. This Court may thus apply the test using its independent judgment. *See Oiye*, 211 Cal. App. 4th at 1067 (conceding that the independent review standard of *Jackson* applies in the absence of supporting factual findings of the trial court).

A. There Is a Presumptive Right of Access to Court Records Under the First Amendment.

The California Supreme Court has interpreted the First Amendment right of access expansively. *NBC Subsidiary*, 20 Cal. 4th at 1209.[16] The Court acknowledged that the public's access to court proceedings are meant to "enhance the performance and accuracy of trial proceedings, educate the public, and serve a 'therapeutic' value to the community." *Id*. at 1200 (citing *Richmond Newspapers*, 448 U.S. at 569-73). Access "has a structural role to play in securing and fostering our republican system of self-government. Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide open,' but also the antecedent assumption that valuable public debate – as well as other civic behavior – must be informed." *Id*. at 1201 (citing *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J. concurring)).

As the Court noted, this right of access applies not only to hearings, but also to the documents filed with courts. *Id*. at 1208 n. 25 (citing *Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106, 111 (1992)). Indeed, "[n]o meaningful distinction may be drawn between the right of access to courtroom proceedings and the right of access to court records that are the foundation of and form the adjudicatory basis for those

[16] The Court reached this conclusion after reviewing the copious body of U.S. Supreme Court and Courts of Appeals cases on the issue. *See Id.* at 1199-1209 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604-05 (1982); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*) (recognizing a First Amendment presumption of access applies to voir dire transcripts); *Waller v. Georgia*, 467 U.S. 39 (1984) (recognizing a First Amendment presumption of access applied to suppression hearings); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*) (recognizing a First Amendment presumption of access applies to transcripts of preliminary hearings in criminal cases); *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983) (bail hearing); *In re Charlotte Observer*, 882 F.2d 850 (4th Cir. 1989) (change of venue hearing); *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986) (plea hearing); *Application of Storer Communications, Inc.*, 828 F.2d 330 (6th Cir. 1987) (pretrial ex parte recusal hearing); *U.S. v. Edwards*, 823 F.2d 111 (5th Cir. 1987) (midtrial chambers hearing concerning juror misconduct)).

proceedings." *In re Marriage of Burkle*, 135 Cal. App. 4th 1045, 1052 (2006).

B. Wiretap Applications, Orders and Their Supporting Documents Are Court Records.

As a threshold matter, wiretap applications, orders, and their supporting documents submitted to the court are clearly "court records," that is, the "documentation which accurately and officially reflects the work of the court, such as its orders and judgments, . . . all its written orders and dispositions, the official reports of oral proceedings, . . . the various documents filed in or received by the court . . . and the evidence admitted in court proceedings." *Copley Press*, 6 Cal. App. 4th at 113. "All of these documents, which the Court of Appeal termed "Category I documents," "represent and reflect the official work of the court, in which the public and the press have a justifiable interest." *Id.*

That wiretap applications and orders are Category I records is even more clear when they are considered against the other categories of court records. Wiretap applications and orders are certainly not "Category II" records, such as the court's drafts, informal and personal notes, memoranda, critical analyses of others' work, and "all kinds of preliminary writings." *See Id.* at 114. Nor are they the category of records falling between I and II, records that do not "constitute court action, or can be relied upon as reflecting court proceedings with complete accuracy"; nor do they "partake of the discretionary and incomplete content that characterizes the judge's bench notes or first drafts of various court documents." *Id.* at 115.

C. The First Amendment Right of Access Attaches to Wiretap Applications, Orders, and Supporting Documents for Which the Order Has Expired and the Target Not Charged.

The Court in *NBC Subsidiary* found a presumptive First Amendment right of access to "ordinary" civil and criminal proceedings. *NBC Subsidiary*, 20 Cal. 4th at 1212. Thus, in the analogous situation of search warrant applications, orders, and supporting records pertaining to completed searches that have resulted in indictments, courts have found a presumptive First Amendment right of access because these are "ordinary

proceedings." *See Jackson*, 128 Cal. App. 4th at 1022.[17]

For those specific types of proceedings that are not "ordinary," the Court adopted the U.S. Supreme Court's two-part "history and utility" test for determining whether the right of access attaches. *Id.* at 1218-21. According to that test, the court considers (1) "whether there is a 'tradition of accessibility' concerning the" proceeding; and (2) "whether 'public access plays a significant positive role in the functioning of the'" particular process in question. *NBC Subsidiary*, 20 Cal. 4th at 1206 (quoting *Press-Enterprise II*, 478 U.S. at 8). *See also Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring).

Applying the history and utility test, this Court must find a First Amendment right of access to the requested documents.

a. Utility

Although listed second, the utility prong is the more important one: courts will find a First Amendment right of access where utility provides a strong justification for access even in the absence of a long history of openness. *See NBC Subsidiary*, 20 Cal. 4th at 1213-14 ("[A]lthough evidence of such a historical tradition is a factor that strengthens the finding of a First Amendment right of access, the absence of explicit historical support would not, contrary to respondent's implicit premise, negate such a right of access.") (citation omitted). *See also In re Copley*, 518 F.3d 1022 (9th Cir. 2008) (collecting authorities to support the proposition that "logic alone, even without

[17] *Cf. Oziel*, 223 Cal. App. 3d at 1297 (a pre-*NBC Subsidiary* case, applying the history and utility test to find no right of access to search warrant records not yet entered into evidence, while the investigation is ongoing). *See also In re Search Warrant for Secretarial Area Outside Office of Gunn*, *McDonnell Douglas Corp.*, 855 F.2d 569, 573 (8th Cir. 1988) (finding a First Amendment right of access to search warrant records employing a history and utility analysis), and, *Certain Interested Individuals, John Does I-V, Who are Employees of McDonnell Douglas Corp. v. Pulitzer Publ'g. Co.*, 895 F.2d 460, 466-67 (8th Cir. 1990) (applying the qualified First Amendment test from *Office of Gunn* to Title III wiretap materials obtained during the same investigation), *cert. denied*, 498 U.S. 880, 112 S. Ct. 214 (Mem) (1990).

experience, may be enough to establish the right"); *U.S. v. Index Newspapers LLC*, 766 F.3d 1072, 1094 (9th Cir. 2014).[18] Indeed, "utilitarian interests supporting access" may "trump earlier history that supports a tradition of closure." *NBC Subsidiary*, 20 Cal. 4th at 1214 n.32 (citing *Press-Enterprise II*, 478 U.S. 1).

Prioritizing utility over experience especially makes sense in this case since wiretap applications and orders are a relatively new type of record, without any common law history. Indeed, as explained below, California did not enact a procedure for law enforcement to obtain wiretaps orders until 1988. *See* Cal. Penal Code § 629 (repealed by Stats.1997, c. 355 (S.B. 688). § 1). When "[t]here is no historical experience of public access to these hearings or their transcripts because the hearings didn't exist until quite recently," a court may rely more heavily on the utility analysis. *In re Copley*, 518 F.3d at 1027.

The U.S. Supreme Court has explained that the utility test looks at the benefits that public access to the proceeding or materials would confer, such as "enhanc[ing] both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise II*, 478 U.S. at 9 (citing *Press-Enterprise I*, 464 U.S. at 508). ("'[T]he public has a legitimate interest in access to . . . court documents. . . . If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism. For this reason, traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals.'" *NBC Subsidiary*, 20 Cal. 4th at 1211 n.28 (quoting *Estate of Hearst*, 67 Cal. App. 3d 777, 784 (1977))). *See also Hicklin Engineering, LC v. Bartell*, 439 F.3d 346,

[18] The Ninth Circuit has found history and utility, which it and other courts call "experience and logic," to be essentially the same inquiry. "Though our cases refer to this as the 'experience and logic' test, it's clear that they are not separate inquiries. Where access has traditionally been granted to the public without serious consequences, logic necessarily follows. It is only when access has traditionally not been granted that we look to logic. If logic favors disclosure in such circumstances, it is necessarily dispositive." *In re Copley*, 518 F.3d at 1026 n.2.

348 (7th Cir. 2006) ("The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification."); *Brown & Williamson Tobacco Co. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983) (opinions and records are presumptively public because "court records often provide important, sometimes the only, bases or explanations for a court's decision") and at 1177 n.6 ("Long ago Locke emphasized the need for '*promulgated* standing laws' — 'established, settled, *known* laws received and allowed by common consent'. . . They would not 'put a force into the magistrate's hands to execute his unlimited will arbitrarily upon them.'") (quoting Locke, *Treatise of Civil Government* § 124, 136-37 (1690)).

The Ninth Circuit has explained that these general benefits of public court records have special resonance with respect to investigative orders. Public access to such orders "serves as a check on the judiciary because the public can ensure that judges are not merely serving as a rubber stamp for the police." *United States v. The Business of the Custer Battlefield Museum & Store Located at Interstate 90, Exit 514, South of Billings, Mont.*, 658 F.3d 1188, 1193 (9th Cir. 2011) (hereinafter "*Custer Battlefield Museum*").

The U.S. Supreme Court, the State of California, and Congress have also long recognized that wiretaps pose a serious threat to privacy. Wiretaps are more intrusive than a physical search warrant because they capture not only the target's words, but also any and all communications between the target and third-parties—whether or not those communications are criminal. Justice Brandeis expressed this very concern over 90-years ago in his familiar dissent in *Olmstead v. United States*:

> Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping.

277 U.S. 438, 475-76 (1928) (Brandeis, J., dissenting).

It is thus clear that access to wiretap orders and their supporting materials serves a "significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8-9. Without openness, the wiretap process is subject to abuse. Wiretaps orders may be issued without sufficient oversight as to their legality, or law enforcement from outside a jurisdiction might take advantage of judges and district attorneys known for authorizing wiretaps to obtain orders not available elsewhere.

Indeed, as explained above, this is precisely what happened in Riverside County. A disproportionate number of wiretaps were authorized by the court, and the fruits used in prosecutions remote from Riverside County, such as Kentucky.[19] According to press reports, the U.S. Drug Enforcement Administration took advantage of the favorable conditions for wiretap authorization in Riverside County to support prosecutions around the country.[20]

Access to the wiretap records would indeed expose such abuses. The wiretap application discloses the identity of the law enforcement agency seeking to execute the wiretap, the name of the chief executive officer or its designee who reviewed the application,[21] and a full and complete statement of the facts and circumstances relied upon by the applicant to justify its belief that the wiretap should be executed. Cal. Penal Code § 629.50(a). The wiretap order may contain legal analysis, or the absence of such analysis where it would have been expected. As public debate over the Riverside wiretaps continues, the release of the court's opinions and the basis for these opinions becomes

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[19] *See* Brad Heath & Brett Kelman, *Police used apparently illegal wiretaps to make hundreds of arrests*, USA TODAY (Nov. 19, 2015), https://www.usatoday.com/story/news/2015/11/19/riverside-county-wiretaps-violated-federal-law/76064908/. This reporting is corroborated by The Administrative Office of the U.S. Courts Wiretap Report 2015 which indicates that the vast majority of the Riverside wiretaps in 2015 were related to narcotics offenses. CT 25-42.

[20] Heath & Kelman, *supra* note 2; Kelman, *supra* note 8

[21] This has proven to be critical information for the Riverside wiretaps orders because one of the issues is whether the district attorney properly delegated his authority to others in his office. *See* Heath & Kelman, *supra* note 19.

ever more significant in enhancing both the basic fairness of the criminal justice system and the appearance of fairness so essential to public confidence in that system.

b. History

There is no significant history to consider. As noted, wiretap authorization proceedings are a relatively new occurrence. The procedure was first adopted in California in 1988, becoming effective in 1989. Cal. Penal Code §629 *et seq*. (1989, repealed by statute in 1997); *People v. Chavez*, 44 Cal. App. 4th 1144, 1158 & n.7 (1996). And the current procedures were not adopted until 1995. *See* Cal. Penal Code § 629.50 *et seq.* (1995, amended 2011). Indeed, no legal regime governing the issuance of wiretap orders was necessary at all until 1967, when the U.S. Supreme Court reversed earlier precedent and found a reasonable expectation of privacy in the contents of telephone communications. *See Katz v. United States*, 389 U.S. 347, 353 (1967) (overruling *Olmstead v. United States*, 277 U.S. 438 (1928)); *People v. Conklin*, 12 Cal. 3d 259, 268 (1974). And even though Congress enacted Title III, 18 U.S.C. § 2510 *et seq.*, the federal wiretap regime, in 1968, the California Legislature did not enact its first state enabling statute, as required by Title III, for twenty years. *Chavez*, 44 Cal. App. 4th at 1158 n.7 (noting the enactment of Cal. Penal Code § 629 *et seq*.). *See also Conklin*, 12 Cal. 3d at 271-72 (explaining the need for a state enabling statute per 18 U.S.C. § 2516(2)).

Nevertheless, a general history of access to courts orders and the papers filed with the court seeking such orders is certainly present. *See Brown & Williamson*, 710 F.2d at 1177 (opinions and records are presumptively public because "court records often provide important, sometimes the only, bases or explanations for a court's decision"). As explained above, wiretap orders are court orders, and the applications and documents submitted in support of them are records filed with the court. *See In re Marriage of Burkle*, 134 Cal. App. 4th at 1056 (relying on a history of openness of civil trials generally to assess the history of openness of divorce trials). Although the specific order is a relatively recent invention, it is not significantly unlike previous investigative orders, like search warrants, to which, a First Amendment right of access exists post-execution

and post-indictment. *See Jackson*, 128 Cal. App. 4th at 1022.

The court below wrongly relied on *The Times Mirror Co. v. United States*, 873 F.2d 1210, 1211 (9th Cir. 1989), in which the Ninth Circuit found a history of closure of certain search warrant records. But that case addressed only "whether the public has a qualified right of access to search warrants and supporting affidavits relating to an investigation which is ongoing and before any indictments have been returned," which is not an issue in this appeal. The Ninth Circuit explained that it *did not* decide the issue analogous to the one presented here, "the question whether the public has a First Amendment right of access to warrant materials after an investigation is concluded or after indictments have been returned." *Id.* at 1218.

Indeed, when the Ninth Circuit did encounter that issue, it acknowledged that the history of access, and the right of access itself, was much different for records after the investigation has concluded. *See Custer Battlefield Museum*, 658 F.3d at 1193-94. Distinguishing the ongoing-investigation posture of *Times-Mirror*, the court found that warrant materials have historically been public records after the investigation has concluded. *Id.*[22]

c. Penal Code Section 629.66 Does Not Foreclose a First Amendment Right of Access.

The First Amendment right of access attaches to this category of records despite the presumptive seal dictated by Penal Code § 629.66. That section provides that "[a]pplications 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

[22] With respect to the logic prong, the Ninth Circuit explained that the concerns that supported its' decision in *Times-Mirror* "are not as relevant once an investigation has been terminated." *Id.* at 1194. The Ninth Circuit thus found a common law right of access to post-investigation search warrants records, and remanded the matter back to the district court to determine whether the records should be unsealed. *Id.* at 1194-96. The Ninth Circuit declined to decide the question of a First Amendment right of access since it had not yet been addressed by the district court. *Id.* at 1196.

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." Cal. Penal Code § 629.66 (2011).

First, with respect to the "history" prong, a statutory closure requirement will not negate an experience of openness of court orders generally. *See In re Marriage of Burkle*, 134 Cal. App. 4th at 1056. Thus, in *Burkle*, the court's finding of a history of open civil proceedings overrode the statutory command that documents submitted in divorce proceedings be sealed upon request. *Id.* (discussing Cal. Family Code § 2024.6).

Second, Penal Code § 629.66 must be interpreted to be consistent with *NBC Subsidiary*. *See Burkle*, 135 Cal. App. 4th at 1052-53 ("When a statute mandates sealing presumptively open court records in divorce cases, as section 2024.6 does, the state's justification for the mandatory sealing must be scrutinized to determine whether the statute conforms to the requirements enunciated in *NBC Subsidiary*.").

Here, it bears noting that Section 629.66 may be validly applied to search warrant materials while the investigation is pending and before the warrant has been executed or until its expiration. There is no contention in this case that the public has a First Amendment right of access to such records. Thus, Section 629.66's command that applications and orders be sealed initially is unchallenged.

Moreover, with respect to the type of records at issue in this appeal, Section 629.66 allows, as it must, for the case-by-case adjudication of maintaining the seal after the wiretap has been executed or has expired and the investigation closed. *See Globe Newspaper*, 457 U.S. at 609 (striking down statute mandating closure of courtroom during testimony because case-by-case adjudication, rather than blanket closure was a less restrictive mean of advancing the state's interests); *Universal City Studios, Inc. v. Superior Court*, 110 Cal. App. 4th 1273, 1285 (2003) (describing the application of the *NBC Subsidiary* test as an exercise of the court's discretion). As a result, granting access to one particular document does not foreclose the government from articulating an interest in secrecy over other wiretap materials in other cases.

But Section 629.66 cannot be constitutionally applied to post-investigation wiretap

materials if the law requires the party seeking to unseal the records to bear the burden of demonstrating some extraordinary "good cause." *See People v. Connor*, 115 Cal. App. 4th 669, 695-96 (2004) (interpreting a statute that presumed sealing of records so as to avoid a conflict with the First Amendment right of access). As discussed above, the public's interest in overseeing the operation of its court system, to make sure that decisions are rendered fairly, and that the court plays its proper oversight role, is always good cause. *See Estate of Hearst*, 67 Cal. App. 3d at 784; *Brian W. v. Superior Court*, 20 Cal. 3d 618, 625-26 (1978).

Thus, *NBC Subsidiary* requires that the state justify maintaining the seal of the specific records at issue, pursuant to the analysis enunciated by the California Supreme Court.

D. Access to the Records Must be Granted Because the Qualified First Amendment Right of Access is Not Overcome by Countervailing Interests.

Once the First Amendment right of access has been established, the Court must determine whether the presumption of access is overcome with respect to the particular documents requested here. In this case, the four criteria set forth in *NBC Subsidiary* do not justify closure.

To justify the continued sealing of the records sought by Guerrero here, the court must find that "(i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest." *NBC Subsidiary*, 20 Cal. 4th at 1217-18.

First, there is no overriding interest supporting government secrecy in a wiretap order that is over three years old, did not yield charges against the target, and has not been the basis for any prosecution. There is no assertion in the record that the investigation in which Guerrero's phone was targeted remains ongoing. To the contrary, as discussed above, the overriding interests strongly support disclosure in light of the

need for maximum public scrutiny of the Riverside wiretap orders during this period, and the fact, as discussed above, that the legitimacy of this specific wiretap order is in question.

Second, there is no substantial probability that any purported interest would be prejudiced absent closure and/or sealing of the instant wiretap. The key here is "substantial probability." *NBC Subsidiary*, 20 Cal. 4th at 1218 n.39, 1222. Mere speculation about or even some possibility of adverse consequences will not suffice to defeat the public right of access. *See id.* at 1221. Courts require the party seeking closure to produce evidence of harm to the asserted interest. *See Huffy Corp. v Superior Court*, 112 Cal. App. 4th 97, 106-07, 108, 109 (2003); *Universal City Studios,* 110 Cal. App. 4th at 1284.

Third, any proposed closure and sealing must be narrowly tailored to serve a purported overriding interest. In *NBC Subsidiary*, for example, an order closing all nonjury proceedings was deemed insufficiently tailored because the court failed to identify the specific proceedings in which secrecy was necessary. 20 Cal. 4th. at 1223. This factor requires, at a minimum, that the court make a particularized case-by-case determination. *Burkle*, 135 Cal. App. 4th at 1066-67.

Fourth and finally, although the party seeking unsealing bears the burden of demonstrating the existence of less restrictive alternatives, *NBC Subsidiary*, 20 Cal. 4th. at 1218 n.40, the blanket sealing of the entirety of all records is rarely the least restrictive means of furthering an overriding interest. Partial redaction is almost always an option. *See Burkle*, 135 Cal. App. 4th at 1067.

Thus, this Court should order the inspection and release of the wiretap order, supporting documents, and any other information submitted to the Court based on the public's First Amendment right of access to public trial proceedings and in the absence of the findings required by *NBC Subsidiary*.

VII. THE COURT SHOULD MAKE THE INTERCEPTED COMMUNICATIONS, WIRETAP APPLICATIONS, AND ORDERS AVAILABLE TO GUERRERO FOR INSPECTION UNDER SECTION 629.68

Alternatively, if the public is denied access to these specific wiretap order materials, Guerrero himself should be granted access pursuant to California Penal Code section 629.68. Section 629.68 provides that "no later than 90 days after the termination of the wiretap and any extensions, [t]he 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." Cal. Penal Code § 629.68 (2011).

Here, the court below abused its discretion in denying Guerrero the ability to inspect the records because it improperly placed on Guerrero the burden of demonstrating good cause.

A. The Interests of Justice Require That Guerrero be Granted Access to the Wiretap Materials

Access to this wiretap order and related materials will further the interests of justice because of the well-founded doubts about the proper functioning of wiretap procedures in Riverside during this period and the legitimacy of the instant wiretap specifically. As discussed above, the questionable circumstances surrounding the issuance of this particular wiretap presents an especially compelling case for oversight of the government's powers. The failure to provide the required inventory is particularly disturbing since that requirement works hand-in-hand with the inspection provision as critical checks against the state's abuse of its spying powers, so that the target and his attorneys can inspect the record for additional deficiencies.

Moreover, there are no apparent countervailing law enforcement concerns that weigh against disclosure, given the lack of any charges brought against Guerrero in the intervening three years since the wiretap. Because the wiretap occurred so long ago, and there is no indication it was ever extended, it is unlikely that the disclosure of these

records would interfere with any ongoing investigations. And even if such a concern were present, the Court can address it by reviewing and redacting, if necessary, any sensitive records pertaining to ongoing investigations.

B. The Trial Court Wrongly Imported the Good Cause Requirement from Section 629.66 as a Precondition to Exercising Its Discretion To Inspect the Wiretap Records Under Section 629.68.

Misreading the plain language of sections 629.68, the trial court wrongly required Guerrero to prove "good cause" – importing that requirement from section 629.66 – in order to inspect the wiretap records. The court's minute order issued on February 13, 2019 found that "Pursuant to 629.66 the Court does not find good cause and denies the petition." CT 91. At the hearing, the court stated that Section "629.66 does apply on all aspects of the wiretap, meaning that it requires good cause." Reporters' Transcript of Oral Proceedings, CT 127:12-13. In so doing, the trial court improperly converted a statute promoting openness into one defaulting to closure.

Section 629.68 by its very language contains no requirement that the wiretap target bear the burden of proving good cause to inspect the records. Indeed, the statute does the opposite, placing the burden on the party seeking to delay the notice and inventory required by Section 629.68 to demonstrate good cause for such a delay. Cal Penal Code § 629.68 ("On an ex parte showing of good cause to a judge, the serving of the inventory required by this section may be postponed."). It would be an odd legislative choice to expressly include a good cause requirement in one clause, while merely implying it in another.

Moreover, placing the burden of proving good cause on the target is thus counter to the general purposes of Section 629.68. to advance transparency, not hinder it. The section (1) provides public transparency via robust notice requirements to the individuals surveilled under the wiretap, even if they are not subject to criminal prosecution, and (2) ensures government accountability by allowing individuals who are targeted but not criminally charged to inspect the records. Such transparency may be delayed only if the government carries the burden of showing good cause for temporary secrecy. In contrast,

section 629.66, from which the good cause burden is borrowed, is a default secrecy provision.

Lastly, placing the burden of proving good cause on the target is improper given the constitutional dimension to the target's right to inspect the records. Several courts have recognized that those individuals who are surveilled by the police pursuant to court order have a right of access, grounded in the Fourth Amendment, to the associated records. *In re Searches and Seizures*, 2008 WL 5411772, *3 (E.D. Cal. 2008) (collecting cases). These Fourth Amendment interests generally require that the government bear the burden of justifying the continued sealing of such records. *Id.* at *4.

C. Nevertheless, There is Good Cause to Unseal Wiretap 14-509

Even were Guerrero required to prove good cause to inspect the records, he has done so here. There exists a strong possibility of error in the wiretap's application and approval as the authorization provided for the surveillance of an uncharged, law-abiding citizen with no previous record, thus strengthening the need for inspection and oversight. Guerrero reasonably suspects he was unlawfully surveilled during Riverside County's unprecedented 2015 wiretapping campaign and is considering filing a civil action or filing a claim for redress under Cal. Penal Code § 629.86. He needs to inspect the requested records in order to determine whether such an action or claim would be advisable. His need is especially acute because he never received the required inventory.

Moreover, as discussed above, there is a heightened public interest in learning about the wiretaps conducted during 2014-15 in which, as here, the target was not charged with any offense.

VIII. CONCLUSION

For the above stated reasons, this Court should find that the public has a First Amendment right of access to wiretap applications, and related records related to a closed investigation, and that that right of access is not overcome with respect to Wiretap 15-409, the specific wiretap at issue in this appeal. In the alternative this Court should grant

Appellant Guerrero the right to inspect the records pursuant to California Penal Code section 629.68.

Dated: August 5, 2019

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I, counsel for appellant, certify pursuant to California Rules of Court 8.204(c) that this Brief is proportionally spaced, has a typeface of 13 points or more, contains 7,085 words, excluding the cover, the tables, the signature block, verification, and this certificate, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word word-processing program used to prepare this brief.

Dated: August 5, 2019 */s/ David Greene*

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PROOF OF SERVICE

I, Victoria Python, declare:

I am a resident of the state of California and over the age of eighteen years and not a party to the within action. My business address is 815 Eddy Street, San Francisco, California 94109.

On August 5, 2019, I served the foregoing documents:

BRIEF OF PLAINTIFF AND APPELLANT

on the interested parties in this action as stated in the service list below:

X BY TRUEFILING: I caused to be electronically filed the foregoing document with the court using the court's e-filing system. The following parties and/or counsel of record are designated for electronic service in this matter on the TrueFiling website:

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X BY FIRST CLASS MAIL: I caused to be placed the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid:

Riverside Superior Court
Clerk of the Court
4100 Main Street
Riverside, CA 92501

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

Executed on August 5, 2019 at San Francisco, California.

/s/ Victoria Python
Victoria Python