STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
EX PARTE WACCAMAW PUBLISHERS, INC., APPELLANT	)	
VS.	)	
AARON C. BUTLER, ASSOCIATE CHIEF MAGISTRATE FOR HORRY COUNTY RESPONDENT	)	APPELLANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ACCESS TO JUDICIAL RECORDS
IN RE. DENIAL OF ACCESS TO COPIES OF EXECUTED SEARCH WARRANTS	)	

BACKGROUND

Appellant through the undersigned made a request of respondent for access to executed search warrants for searches at 8786 Highway 814 and 8796 Highway 814, Myrtle Beach. The request was made pursuant to Article I, section 9 of the South Carolina Constitution. Respondent denied appellant's request pursuant to the South Carolina Freedom of Information Act, and this appeal was initiated.

APPELLATE JURISDICTION

The Supreme Court of South Carolina has recognized that a circuit court has appellate jurisdiction to review an order of a magistrate without the necessity of initiating an action against the magistrate when the order of the magistrate is inconsistent with the constitutional guarantee of public access to South Carolina courts. *Ex parte South Carolina Press Assn.*, 281 S.C. 52, 314 S.E.2d 321 (1984). Respondent asserts in his motion to dismiss that only "final judgments" are appealable, citing S.C. Code Ann. §14-3-330 (1976), but this code section only addresses the appellate jurisdiction of the Supreme Court of South Carolina. While asserting that appellant

may not appeal the denial of access to judicial records without initiating an action by filing a summons and complaint, respondent asserts that he "is immune from suit under the doctrine of common law judicial immunity" and the South Carolina Tort Claims Act. In other words, under respondent's theory, an order denying access to judicial records in the possession of a magistrate may never be reviewed by an appellate court. The circuit court's jurisdiction to hear appeals from magistrates' courts is established by "notice as required by law being given for the hearing of such appeals" rather than the filing of a summons and complaint. S.C. Code Ann. §14-5-340 (1976). Notice was properly given, and this court has jurisdiction of this appeal.

SEARCH WARRANTS AND RETURNS ARE JUDICIAL RECORDS

Search warrants may be issued only upon a finding of probable cause. U.S. Const. Amen. IV; S.C. Const. Art. 1, §10. And, search warrants in South Carolina may only be issued by judicial officers, limited in the South Carolina Code to magistrates or recorders or city judges having the powers of magistrates or any judge of any court of record. S.C. Code Ann. §17-13-140 (Rev. 2014). Clearly the issuance of a search warrant is a judicial act.

Returns to executed warrants, supporting affidavits and inventories of property seized are to be filed with the "judiciary official authorized to issue search warrants," and records relating to the warrants are to be maintained for three years. S.C. Code Ann. §17-13-141 (Rev. 2014). Search warrants and specified related records retained by judiciary officials, as required by law, are beyond doubt judicial records.

PUBLIC ACCESS TO JUDICIAL RECORDS

The Supreme Court of South Carolina has stated frequently and forcefully that the public and press have a right of access to court records and court proceedings:

> Judicial proceedings and court records are presumptively open to the public under the common law, the First Amendment of the federal

> constitution and the state constitution. S.C. Const. art. I §9 ('[a]ll courts shall be public"); *Davis [v. Jennings],* 304 S.C. [502] at 505, 405 S.E.2d [601] at 603; *Nixon [v. Warner Communications, Inc.],* 435 U.S. [589] at 597-98, 98 S.Ct. [1306] at 1312, 55 L.Ed.2d [570] at 579-80 [(1978)]; *Virginia Dept. of State Police v. Washington Post,* 386 F.3d 567, 575 (4th Cir. 2004); *Anderson v. Cryovac, Inc.,* 805 F.2d 1, 13 (1st Cir. 1986).

Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464, 469 (2006).

Public and press access to judicial proceedings and records serves vital and fundamental interests "crucial to the proper functioning of judicial and governments systems" as the Supreme Court of South Carolina explained in *Ex parte Capital U-Drive-It, supra:*

> Public access to courts and their records serves several fundamental interests which are crucial to the proper functioning of judicial and government systems. Public access discourages perjury and encourages bringing the truth to light because participants are less likely to testify falsely in a sunlit courtroom before their neighbors than in a private room before court officials. Public access promotes free discussion of governmental affairs by imparting a more complete understanding to the public of the judicial system and issues resolved by that system. Public access serves as a check on inappropriate or corrupt practices by exposing the judicial process to public scrutiny. Lawyers, witnesses, and judges may perform their duties in a more conscientious manner, knowing their conduct will be subject to public scrutiny at the time of the proceeding or later through disclosure of court records. [Citations omitted].

Ex parte Capital U-Drive-It, 630 S.E.2d 464, 469.

APPELLANT'S REQUEST WAS NOT MADE PURSUANT TO THE FREEDOM OF INFORMATION ACT

Appellant's request for access to search warrant records in the possession of the magistrate's court was made exclusively pursuant to the South Carolina Constitution and the authorities protecting the public and press right of access to judicial records. The fact that respondent chose to deny access by citing a provision of the South Carolina Freedom of Information Act that has no application to access to judicial records does not overcome appellant's constitutional and common law right of access.

NO MOTION HAS BEEN MADE AND NO ORDER HAS ISSUED PROPERLY CLOSING JUDICIAL RECORDS AT ISSUE HERE

The Supreme Court of South Carolina, noting that "Because South Carolina has a long history of maintaining open court proceedings and records" adopted Rule 41.1, SCRCP "to ensure that the Constitution provision [Art. 1, §9] is fulfilled. The rule identifies seven factors to be weighted to determine "why less drastic alternatives to sealing will not afford adequate protection," and places the "burden on the party seeking to seal documents to satisfy the court that the balance of public and private interests favors sealing the documents." Rule 41.1, SCRCP. There has been no motion to seal the court records requested by appellant and no order addressing any of the relevant factors has been entered.

VOIR DIRE IS A LESS DRASTIC MEASURE TO GUARD AGAINST PREJUDICIAL PRETRIAL PUBLICITY

It is anticipated that respondent will argue that he denied access to the judicial records in his possession to either guard against interfering with a prospective law enforcement action or to protect against prejudicial pretrial publicity in the event there is a criminal prosecution related to the records in respondent's possession. Neither argument is consistent with the constitutionally protected right of access or even the South Carolina Freedom of Information Act. The "interference with a prospective law enforcement action" exemption from the mandatory disclosure requirements for public records may be invoked only by the law enforcement agency claiming the exemption, and must be supported by proof of a particular harm to that law enforcement agency. *Evening Post Publishing Co. v. City of North Charleston,* 363 S.C. 452, 611 S.E.2d 496, 33 Media L. Rep. 1532 (2005). Since a court is not a law enforcement agency, it cannot assert that it will be harmed by the release of records requested by appellant.

If respondent asserts that the request for access was denied to preserve any potential defendant's fair trial rights, that *post hoc* justification is insufficient as the Supreme Court of South Carolina, relying on its decision in *Ex parte First Charleston Corp.,* 329 S.C. 31, 495 S.E.2d 423 (1998), held in *Evening Post Publishing Co., supra,* that denial of access to public records is not a mechanism for insuring a fair trial, explaining "that even in highly publicized cases, *voir dire* is usually sufficient to ensure a fair trial. *Evening Post Publishing Co., supra,* 611 S.E.2d 496, 499.

CONCLUSION

The South Carolina Constitution and decisions of the Supreme Court of South Carolina and the Supreme Court of the United States establish a presumption of openness for court records. That presumption may be overcome in South Carolina only upon a showing that no less drastic measure is available to provide protection of the interests asserted as the basis for denying public and press access to the records. No such show has been made, and cannot be made in this case. Respondent's denial of access to judicial records in his possession should be vacated.

Columbia, South Carolina

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