[J-34-2019]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

IN RE: 2014 ALLEGHENY COUNTY INVESTIGATING GRAND JURY	:	No. 30 WAP 2018
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	:	Appeal from the Order of the Superior Court entered March 14, 2018 at No. 950 WDA 2015, affirming the Order of the Court of Common Pleas of Allegheny County entered May 22, 2015 at No. CP-02-MD-0003179-2015.
APPEAL OF: WPXI, INC.	:	
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	:	ARGUED: April 11, 2019

OPINION

JUSTICE DOUGHERTY **DECIDED: OCTOBER 31, 2019**

In this case of first impression, we consider whether either the common law or the First Amendment confers a qualified right of access to the press and the public to inspect certain search warrant materials issued in connection with a grand jury investigation. We conclude no such right exists where, as here, the request is made while the grand jury's investigation is ongoing. Accordingly, we affirm.

We previously recounted the relevant background of this matter in a prior decision. *In re 2014 Allegheny Cty. Investigating Grand Jury*, 173 A.3d 653, 654-55 (Pa. 2017) ("*Allegheny County II")*. Briefly, appellant, WPXI, Inc., is the owner and operator of a news television station in Pittsburgh. In 2015, WPXI began investigating allegations of improper sexual relationships between faculty and students at Plum High School in Allegheny County. As part of its inquiry, WPXI filed a motion to intervene in the proceedings of the 2014 Allegheny County Investigating Grand Jury for the purpose of

obtaining access to certain documents. Specifically, WPXI sought access to: (1) an application for search warrant and authorization ("search warrant") to conduct a search of the Plum High School Administrative Building, which was issued on May 18, 2015, by the Honorable Jill E. Rangos, supervising judge of the investigating grand jury; and (2) an order sealing the affidavit of probable cause supporting the search warrant ("sealing order").[1] In its motion, WPXI explained that despite the Commonwealth's refusal to supply it with copies of the requested documents, another media outlet had obtained them by other means.[2] Nevertheless, relying upon decisions concerning the common law right of access to public judicial records, *see, e.g.*, *Commonwealth v. Upshur*, 924 A.2d 642, 647-48 (Pa. 2007) (plurality), WPXI asserted it had a right to independently inspect and copy the original documents.

On May 22, 2015, the parties appeared for a hearing before the supervising judge, at which time WPXI reiterated it was "not seeking access to the supporting affidavit or any attachment identifying suspected juvenile victims." N.T. 5/22/2015, at 3. WPXI further stated it was not seeking evidence presented to the investigating grand jury or any grand jury testimony. In WPXI's view, the only two documents to which it sought access — the search warrant and the sealing order — constitute public judicial records. As such, WPXI argued a presumption of openness attached to the documents. Alternatively, WPXI claimed it had a right to the documents under the First Amendment.

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[1] WPXI expressly disavowed in its motion that it was seeking either the affidavit of probable cause supporting the search warrant or the attachment to the affidavit identifying the names of the suspected juvenile victims.

[2] The trial court commented in its Pa.R.A.P. 1925(a) opinion that "an individual who accepted a grand jury subpoena may have provided one media outlet with a copy of [the search warrant.]" Trial Ct. Op., 7/23/2015, at 4. Additionally, we observed in our prior decision that the search warrant and the sealing order have been disclosed publicly via the internet. *See Allegheny County II*, 173 A.3d at 655 n.2.

The Commonwealth did not deny that the materials sought were judicial records, but it disputed WPXI's characterization of those records as public. According to the Commonwealth, a search warrant issued in relation to a grand jury investigation "is very different" from a search warrant issued in an ordinary case, as grand jury matters "have always been secret[.]" *Id*. at 9-10. The need to protect the integrity of a grand jury's investigation, the Commonwealth argued, supports a conclusion there is no presumption of openness to search warrant materials issued in connection with an ongoing grand jury investigation.

Following the hearing, the trial court denied WPXI's motion. The court reasoned the documents were not **public** judicial records because they related to an ongoing grand jury investigation; and since the materials were not public, there was no common law right of access to them. By the same token, the trial court concluded WPXI had no First Amendment right to the documents because grand jury proceedings have not historically been open to the press and public, and public access would not play a significant positive role in the functioning of the grand jury process. The court further stated that, even if a common law or constitutional right of access did exist, there were particularized concerns for secrecy attending the grand jury's investigation that outweighed WPXI's interest in gaining access to the documents. The trial court, however, declined to state its specific findings on the record for fear that doing so would violate the secrecy of the underlying grand jury proceedings and compromise the ongoing investigation. Instead, the court indicated it would supplement its opinion with specific factual findings regarding the compelling governmental interests relevant to the grand jury's investigation "[t]o the extent deemed necessary, and in the manner deemed appropriate by the Superior Court[.]" Trial Ct. Op., 7/23/2015, at 5.

WPXI filed an appeal, which the Superior Court *sua sponte* dismissed on mootness grounds. As the Superior Court saw it, the fact that WPXI conceded it had obtained the requested materials from another source rendered the matter moot, as "a determination in WPXI's favor would have no practical effect[.]" *In re 2014 Allegheny Cty. Investigating Grand Jury*, 147 A.3d 922, 924 (Pa. Super. 2016) ("*Allegheny County I*"). We granted discretionary review and reversed. *Allegheny County II*, 173 A.3d at 656. Crediting the need for responsible media organizations to verify information to protect against liability and to further their professional calling to provide the public with accurate reporting, we agreed with WPXI that the right of access "is not obviated by any and all forms of dissemination by third-party sources" — particularly dissemination in the form of internet postings, which have varying degrees of reliability. *Id*. at 655. In that respect, we noted the Superior Court offered no assessment concerning the reliability, verifiability, or completeness of the documents posted on the internet and obtained by WPXI, and we thus concluded there was insufficient information to support a *sua sponte* mootness determination. Consequently, we reversed and remanded for consideration of the merits of WPXI's claims.

On remand, the Superior Court affirmed the trial court's order denying access in a published opinion. *In re 2014 Allegheny Cty. Investigating Grand Jury*, 181 A.3d 349 (Pa. Super. 2018) ("*Allegheny County III*"). Preliminarily, the Superior Court addressed the propriety of WPXI's motion to intervene and the trial court's denial thereof. The Superior Court highlighted this Court's longstanding recognition that the filing of a motion to intervene by the news media is the proper means of asserting the public's right of access to information pertaining to criminal cases. Quoting our decision in *Commonwealth v. Fenstermaker*, 530 A.2d 414 (Pa. 1987), the Superior Court explained: "Intervention of this type may properly be termed *de bene esse*, to wit, action that is provisional in nature

and for the limited purpose of permitting the intervenor to file a motion, to be considered separately, requesting that access to proceedings or other matters be granted." *Id*. at 351, *quoting Fenstermaker*, 530 A.2d at 416 n.1. From this the Superior Court determined WPXI should have first filed a motion to intervene, which the trial court should have granted; WPXI should have thereafter filed a separate motion to access the documents in question; and the trial court then should have conducted a hearing before ruling on WPXI's request. Because WPXI and the trial court did not abide by this procedure — instead, WPXI filed a single combined motion to intervene and seek access, and the trial court denied the motion in its entirety — the Superior Court concluded the trial court erred. However, the Superior Court deemed the error technical in nature, and therefore not a basis for relief, because WPXI was *de facto* permitted to intervene when it was granted the opportunity to argue the substance of its access request at the hearing.

Turning to the trial court's denial of WPXI's claims of access under the common law and First Amendment, the Superior Court began by observing no Pennsylvania case has addressed the public's right to access or copy grand jury materials or search warrant documents issued in connection with a grand jury investigation. As a result, the court took guidance from this Court's precedents establishing the legal principles applicable to other types of documents, and then considered how the special nature of grand jury investigations impacts the analysis of those principles.

The Superior Court first analyzed this Court's decision in *Fenstermaker*, where we considered a newspaper's right to access affidavits of probable cause supporting arrest warrants that had already been executed. In forging a standard for establishing the common law right of access to judicial documents, we explained the threshold inquiry is "whether the documents sought to be disclosed constitute public judicial documents, for not all writings connected with judicial proceedings constitute public judicial documents."

Fenstermaker, 530 A.2d at 418. We resolved that if a document is considered a public judicial record, there is a presumption of openness; however, "the right to inspect judicial documents is not absolute, and courts do have supervisory power over their records and files." *Id*. at 420. Thus, "[w]here the presumption of openness attached to a public judicial document is outweighed by circumstances warranting closure of the document to public inspection, access to the document may be denied." *Id*.

Applying these standards to the arrest warrant affidavits at issue in *Fenstermaker*, we held the documents were public judicial records to which a presumption of openness attached. Initially, we identified the salutary benefits, from a policy standpoint, that public access to the affidavits would serve. *See id*. at 418 ("public inspection of arrest warrant affidavits would serve to discourage perjury in such affidavits, would enhance the performance of police and prosecutors by encouraging them to establish sufficient cause before an affidavit is filed, would act as a public check on discretion of issuing authorities thus discouraging erroneous decisions and decisions based on partiality, and would promote a public perception of fairness in the arrest warrant process"). We also viewed the affidavits as clearly judicial in character because they informed the magistrate's judicial decision to issue the warrants. *See id*. ("[T]he decision to issue a warrant is itself a judicial one reflecting a determination that the affidavits and the information contained therein provide a sufficient basis upon which to justify an arrest."). And we found it significant that procedural rules require that arrest warrant affidavits be filed in order to become part of the permanent record of a case. *See id*. ("[A]s filed documents, their 'public' character is enhanced."). For these reasons, we concluded the newspaper had a right to access the arrest warrant affidavits.

The Superior Court next examined *PG Publishing Co. v. Commonwealth*, 614 A.2d 1106 (Pa. 1992). In that case, we extended our reasoning in *Fenstermaker* to search

warrants and supporting affidavits. Although we acknowledged a document is not a public judicial document simply because it is generated in connection with judicial proceedings, and the purposes of arrest warrants and search warrants differ, we nonetheless held a search warrant, once executed, is a public judicial document. In reaching this conclusion we noted that while "[t]here is no historical tradition of public access to search warrant proceedings[,]" search warrant applications, like arrest warrants, are filed with magistrate district judges and "the decision to issue a search warrant is a judicial decision." *Id*. at 1108. Moreover, we related that although the search warrant application process is, by design, *ex parte* and not subject to public scrutiny, this "need for secrecy will ordinarily expire once the search warrant has been executed." *Id*.

The Superior Court finally considered the Opinion Announcing the Judgment of the Court ("OAJC") in *Upshur*, another case involving WPXI. There, we reviewed whether an audiotape that was played at a preliminary hearing, but not admitted into evidence, constituted a public judicial record such that WPXI had a common law right of access to it. The OAJC, authored by then-Justice, now-Chief Justice Saylor, revisited the relevant law and observed "the public right to review and copy judicial records and documents provides an important check on the criminal justice system, ensuring not only the fair execution of justice, but also increasing public confidence and understanding." *Upshur*, 924 A.2d at 647.

Relying on *Fenstermaker* and *PG Publishing*, the *Upshur* OAJC determined the tape was, as a matter of law, a public judicial document. Although the tape was not filed or entered into evidence at the preliminary hearing, the OAJC recognized that fact was relevant but not dispositive of the right to access. *See id*. at 650 ("The common law right of access is based upon the public's interest in knowing about events as they actually transpire and not simply on what is filed with a court or formally admitted into evidence.").

The OAJC stressed that the tape, which had been played at a preliminary hearing, formed "the basis of the magistrate district judge's legal decision as to whether the charges [were] held for trial, and thus . . . was clearly the type of material upon which a judicial decision is based." *Id*. at 650-51. Accordingly, the OAJC held the tape was a public judicial record, and the trial court did not abuse its discretion in granting WPXI access to it.

Next, the Superior Court explored how federal courts generally approach access requests under the First Amendment by reviewing the following decisions. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality), the United States Supreme Court held the right of access was embodied in the First Amendment of the United States Constitution,[3] as it was necessary to the enjoyment of other First Amendment rights, including the informed discussion of governmental affairs. After considering whether the criminal trial was historically open to the press and public and whether the right of access played a significant role in the functioning of the judicial process as a whole, the Court concluded "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Id*. at 573. Thereafter, in *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"), the Court formally adopted the "experience and logic" test, which established that the existence of a First Amendment right of access initially is based upon consideration of "whether the place and process have historically been open to the press and general public[,]" and "whether public access plays a significant positive role in the functioning of the particular process in question." *Id*. at 8. If the proceeding in question satisfies these tests, "a qualified First Amendment right of public access attaches." *Id*. at 9. However, "even when a right of access attaches,

[3] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. 1.

it is not absolute[,]" as it may be overcome by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. *Id*.

After carefully surveying our jurisprudence concerning the common law right of access, as well as federal jurisprudence relating to the First Amendment right, the Superior Court summarized the relevant principles of law as follows:

> [T]o prevail on its common-law claim, WPXI initially had to show that the documents it sought were public judicial documents; then, if the Commonwealth wished to have them sealed, the trial court was required to balance the public's right to access with the Commonwealth's interests in preventing disclosure. To prevail on its First Amendment claim, WPXI had to establish that experience and logic favor the public's having access to the documents, after which the Commonwealth could nonetheless prevent access upon showing an overriding government interest narrowly tailored to serve that interest. Both claims require the trial court, in deciding the issue, to make specific factual findings that support its rationale.

Allegheny County III, 181 A.3d at 355. Reiterating once more that no Pennsylvania case had yet applied these principles to a request to access search warrant documents issued in connection with a grand jury investigation, the Superior Court proceeded to examine the overall nature of grand jury proceedings before considering how other jurisdictions have ruled with respect to media requests to access grand jury-related materials.

Regarding the nature of grand jury proceedings, the Superior Court emphasized that the secrecy within which grand jury proceedings are traditionally conducted in Pennsylvania is "indispensable to the effective functioning of a grand jury." *Id*., *citing In re Dauphin Cty*. *Fourth Investigating Grand Jury*, 19 A.3d 491, 502 (Pa. 2011). Not only is the importance of maintaining secrecy in grand jury proceedings entrenched in case law, but it is also mandated by rule and statute. For example, Rule of Criminal Procedure 229 instructs that a supervising judge of an investigating grand jury "shall control the original and all copies of the transcript and shall maintain their secrecy[,]" and "shall establish procedures for supervising custody" of physical evidence presented to the grand

jury. Pa.R.Crim.P. 229. In addition, pursuant to the Investigating Grand Jury Act, 42 Pa.C.S. §§4541-4553, with the exception of witnesses, those who typically appear before the investigating grand jury "may disclose matters occurring before the grand jury only when so directed by the court. All such persons shall be sworn to secrecy, and shall be in contempt of court if they reveal any information which they are sworn to keep secret." 42 Pa.C.S. §4549(b).

The Superior Court determined the critical need for secrecy attendant to grand jury proceedings differentiated those proceedings from ordinary criminal trials at their various stages. As the Superior Court explained, "while the cases discussed above were based upon a presumption of access flowing from the historical tradition and constitutional requirements of open courts and public trials, the opposite is true of grand jury proceedings." *Allegheny County III*, 181 A.3d at 355-56. In support, the Superior Court pointed to this Court's citation in *Upshur* to *Press-Enterprise II*, where the High Court stated that

> [a]lthough many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly. **A classic example is that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.**

Id. at 356, *quoting Press-Enterprise II*, 478 U.S. at 8-9 (emphasis added; internal quotation and citations omitted). As well, the Superior Court identified cases from other jurisdictions that similarly highlighted the importance of grand jury secrecy in holding the denial of public access to grand jury-related documents was proper. *See United States v. David Smith*, 123 F.3d 140, 143 (3d Cir. 1997) (newspaper had no right to access briefs containing grand jury material because "there is no presumptive First Amendment or common law right of access to them if secret grand jury material would be disclosed by that access"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 509 (1st Cir. 1989) (the

"First Amendment attaches only to those records connected with proceedings about which the public has a right to know" and neither the experience nor logic prong was met where Boston Globe challenged statute that automatically sealed records when grand jury opted not to indict); *In re Gwinnett Cty. Grand Jury*, 668 S.E.2d 682, 685 (Ga. 2008) (rule that court records are generally open to public and press does not apply to evidence presented to grand jury because they are not court records to which the public and press usually enjoy access).

Against this backdrop, the Superior Court returned to the search warrant and sealing order at issue here and determined WPXI did not have a right to access the documents under either the common law or First Amendment. First addressing the common law, the Superior Court found the search warrant and sealing order "clearly are judicial documents under [this] Court's pronouncements[,]" as they "were either used by a judge as bases for a decision or embodiments of the judicial decisions made." *Allegheny County III*, 181 A.3d at 358. However, the Superior Court agreed with the trial court that the materials were not **public** judicial documents because they were issued in connection with a grand jury investigation, which distinguished them from the public materials sought by the media in *Fenstermaker*, *PG Publishing*, and *Upshur*. The court explained,

> [g]ranting WPXI access to the information and items sought via the subpoena would defeat the purpose of secrecy: it would make public the subjects of the ongoing grand jury investigation, disclose which provisions of the crimes code the grand jury was investigating, and reveal to potential witnesses, targets, and persons who might have access to similar materials stored at a different location the precise nature of the items relevant to the investigation.

Id. The Superior Court also considered it noteworthy that grand jury documents are controlled by the supervising judge for the purpose of maintaining their secrecy. *Id*., *citing* Pa.R.Crim.P. 229. All things considered, the Superior Court concluded "there is not, nor

has there ever been, any public access to or oversight of grand jury proceedings such that a presumption of openness attaches to the documents to which WPXI sought access" and, accordingly, WPXI's common law claim failed as a matter of law. *Id*.

The Superior Court also rejected WPXI's First Amendment claim, concluding the "experience-and-logic test yields the same result." *Id*. at 359, *citing David Smith*, 123 F.3d at 148 ("[Precedent] implicitly makes clear that grand jury proceedings are not subject to a First Amendment right of access under the test of 'experience and logic.'"). More precisely, the Superior Court held WPXI had no First Amendment right to access the documents because grand jury proceedings have historically been closed to the public and allowing public access to such proceedings would hinder, rather than further, the efficient functioning of the grand jury.

Having concluded WPXI's claims failed as a matter of law under the common law and First Amendment, the Superior Court maintained it did not need to consider WPXI's additional claim concerning whether the trial court erred in not detailing its findings of fact to support its alternative holding that the Commonwealth's interest in secrecy outweighed WPXI's right of access. Yet, the Superior Court also remarked that if it had reached the opposite conclusion with regard to the threshold legal questions, it would have been necessary to remand for the trial court to disclose its reasoning. Mindful of that possibility, the Superior Court opined that "[f]or the sake of judicial economy, a trial court faced with such concerns should detail its findings and rationale for this Court and then seal the opinion." *Id*. at 359 n.5.

WPXI sought allowance of appeal, principally challenging the Superior Court's holdings that neither the common law nor the First Amendment confers a qualified right

of access to the documents at issue. We granted discretionary review to consider these issues of first impression.[4]

[4] We granted allowance of appeal with respect to the following issues as stated by WPXI, although we slightly rephrased WPXI's third issue:

> (1) Did the Superior Court err in holding that a search warrant, and the related order by the Court of Common Pleas that issued the warrant, constituted judicial records, but not public judicial records, and therefore were not subject to the common law right of access established by the Supreme Court in *PG Publishing Co. v. Com*., 614 A.2d 1106 ([Pa.] 1992), which held that executed search warrants are public judicial records presumptively accessible by the news media as representatives of the public — although the warrant was already executed upon a public school district official, in a matter of public importance and neither the executed warrant nor the order of court had been placed under seal — simply because the warrant was related to a matter subject to an investigating grand jury?
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> (2) Is it error for the Superior Court to hold that an executed search warrant and a related Order of the Court of Common Pleas, which have not been placed under seal, are not publicly accessible simply because the warrant was related to a matter subject to an investigating grand jury, when that holding conflicts with the search warrant rules of the Pennsylvania Rules of Criminal Procedure?
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> (3) Does the First Amendment to the United States Constitution provide a presumptive right of public access to an executed search warrant and related order by the Court of Common Pleas in a matter of public importance, when neither the executed warrant nor the order of court had been placed under seal, and the warrant was related to a matter subject to an investigating grand jury?
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> (4) Was it error, under the First Amendment to the United States Constitution, the Pennsylvania Constitution, and common law principles governing the right of access to public judicial records, for the Court of Common Pleas to expressly refuse to make case-specific findings openly on the record as to any compelling governmental interests or public and private interests that would outweigh the right of access, when the Court of Common Pleas denied the news media access to an executed search warrant and related order by the issuing court, neither of which were under seal, in a matter of public importance?

In re 2014 Allegheny Cty. Investigating Grand Jury, 192 A.3d 1110 (Pa. 2018) (*per curiam*).

WPXI initially stresses, once again, that it has never sought access to any grand jury proceedings, sealed material, or documents identifying the potential juvenile victims. Instead, WPXI seeks only "an executed search warrant, not under seal, and an order of court, also not sealed." WPXI's Brief at 9. It is WPXI's position that our decision in *PG Publishing* squarely governs access to these select documents. *See id*. at 11-12, *quoting PG Publishing*, 614 A.2d at 1108 ("A search warrant is a public judicial document."). While WPXI understands the need to protect the integrity of an ongoing grand jury investigation might be a reason ultimately to deny access, it argues that possibility does not alter the nature of the documents sought as public judicial documents. *See id*. at 12, *quoting PG Publishing*, 614 A.2d at 1108 ("The need for secrecy will ordinarily expire once the search warrant has been executed.").

More globally, WPXI takes issue with what it sees as the Superior Court's "*per se* rule that **anything** related to a grand jury is secret, and not available to the public." *Id*. at 13 (emphasis in original). WPXI asserts the Superior Court's view of the scope of grand jury secrecy is "clearly wrong" because it endorses abdication by trial courts of all responsibility to comply with public access requests in the grand jury context, even where there may be no harm from disclosure. *Id*. In that vein, WPXI faults the Superior Court for ignoring the import of the relevant procedural rules, which it claims support the notion that unsealed, executed search warrants do not implicate secret grand jury matters. *See id*. at 13-14, *citing* Pa.R.Crim.P. 208(a) (requiring that a law enforcement officer "shall leave with the person from whom or from whose premises the property was taken a copy of the warrant and affidavit(s) in support thereof") and Pa.R.Crim.P. 211 (permitting the sealing of a search warrant affidavit only "upon good cause shown").[5] WPXI also

[5] In a separate but related section in its brief, WPXI expands upon the fact that Rule 208(a) requires dissemination of a copy of the search warrant to the individual whose property is searched. In short, WPXI argues the Superior Court's ruling forces the public

questions the Superior Court's reliance on Pa.R.Crim. 229. From WPXI's perspective, the Superior Court's use of the rule "to defeat public access to a search warrant, which is not a transcript of a proceeding nor a piece of physical evidence presented to the grand jury, wholly misconstrues Rule 229." *Id*. at 15.

WPXI contends the Superior Court's errors stem from its "inaccurate conflation of **internal** grand jury documents with extrinsic documents, possibly related to a matter before the grand jury, but entirely **external** to it." *Id*. at 14 (emphasis in original). WPXI notes the Superior Court cited as support for its position the Third Circuit's decision in *David Smith*, which concerned the "release to the public of information gleaned from the **internal** deliberations of a grand jury, describing testimony about criminal conduct by a number of unindicted individuals." *Id*. at 15 (emphasis in original). This example, WPXI concludes, highlights how the Superior Court improperly expanded the secrecy of material directly involved in grand jury proceedings — such as testimony and evidence presented to the grand jury — "to additional materials related, but extrinsic, to those proceedings." *Id*. at 16.

For similar reasons, WPXI believes the Superior Court wrongly held its claim of access failed under the First Amendment. *See id*. at 18 ("The Superior Court . . . again confuses grand jury **proceedings** with materials that simply have some connection to a grand jury.") (emphasis in original). According to WPXI, by focusing on the First Amendment right of access as it pertains to grand jury proceedings generally, rather than documents only tangentially related to the work of a grand jury, the Superior Court misapplied the experience and logic test. Viewed properly, WPXI avers "[i]t is the

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to rely on search warrants provided by the party whose property was searched. This, in turn, creates a "bizarre situation" where the public cannot verify the accuracy of the materials because the party in control of the warrant — who on occasion will be the criminal target of the grand jury's investigation — "may alter the warrant, destroy a portion of it, add extra material, or pass it along to others to do so." WPXI's Brief at 17.

experience of the Pennsylvania courts, at least since *PG Publishing*, that executed search warrants are public judicial documents[,]" and it "is the logic of the Pennsylvania justice system that grand jury-related search warrants are no different than any others[.]" *Id*. at 19. To that end, WPXI cites the Third Circuit's decision in *United States v. William Smith*, 776 F.2d 1104 (3d Cir. 1985), and alleges it is more analogous to the present situation than its later decision in *David Smith*. As WPXI explains, the Third Circuit's conclusion in *William Smith* that there was a presumptive First Amendment right to access a bill of particulars relating to a grand jury indictment should also apply here, because the bill of particulars in that case was "produced in the context of a grand jury" but was "not part of the proceedings — like the documents sought by WPXI here." *Id*. at 20.

Finally, WPXI claims the trial court erred by not making findings on the record as to the case-specific reasons for denying access. While WPXI accepts that the right to access under both the common law and the First Amendment is not absolute, and that the presumption of openness may be outweighed by circumstances warranting closure to public inspection, it submits that a trial court making a decision on access is required "to articulate factual findings on the record." *Id*. at 22 (emphasis omitted), *citing, e.g.*, *Fenstermaker*, 530 A.2d at 421 ("the record shall contain an articulation of the factors taken into consideration in reaching a determination as to sealing"). WPXI argues that, by deferring its duty to make the necessary findings until ordered to do so by a reviewing court, the trial court engaged in a practice that "will almost inevitably delay appellate review and access to a public judicial record." *Id*. at 24. WPXI likewise criticizes the Superior Court's suggested mechanism for handling like matters — *i.e.*, that a trial court faced with such a conflict should detail its findings in a sealed opinion — because this implies the opinion would not be available to the requesting party. In fact, WPXI assails

any sealing whatsoever, on the basis that the "letter and spirit of the law revolt against [factual findings] being made in secret." *Id*. at 25.

The Commonwealth defends the lower courts' rulings in all respects. As for the common law right of access, the Commonwealth challenges WPXI's central argument that *PG Publishing* controls the analysis of whether the search warrant and sealing order are public judicial documents. Notwithstanding our pronouncement in *PG Publishing* that search warrants are public judicial documents, the Commonwealth argues the primary bases underlying that conclusion — including the fact that search warrants are filed to become part of the record, and the need for secrecy typically expires after a warrant has been executed — do not apply with equal force to grand jury-related search warrants. Commonwealth's Brief at 20-21. Indeed, the Commonwealth describes how the search warrant in this case was never filed with a magistrate district judge or filed publicly with the clerk of courts, *see id*. at 21, and it proclaims the ongoing nature of the grand jury's investigation when the request for access was made "means the need for secrecy did not expire once the warrant was issued." *Id*. at 30.

The Commonwealth also addresses the fact that the trial court did not seal the search warrant or the order sealing the affidavit of probable cause. Referencing the various precedents, rules, and statutes governing grand jury secrecy, the Commonwealth suggests that, "as a practical matter, there is no need to have routine investigatory documents 'sealed' in order to keep them from being accessed by the public during the course of the investigative proceedings." *Id*. at 21. On the contrary, the Commonwealth claims the broad powers afforded to a supervising judge to safeguard the secrecy of active grand jury investigations "encompass an authority to keep secret search warrants and other documents required to be prepared, executed, and filed, so that a grand jury can complete its task." *Id*. at 21-22, *citing, e.g.*, *In re Dauphin Cty. Fourth Investigating*

Grand Jury, 19 A.3d at 504 ("the supervising judge has the singular role in maintaining the confidentiality of grand jury proceedings") (citation omitted).

In sum, the Commonwealth emphasizes the following factors to support its belief that denial of access was proper: the search warrant and sealing order were products of the grand jury investigation, which was ongoing at the time the request for access was made; grand jury matters have always been presumptively secret; and the documents were not publicly filed. *See id*. at 31. All of this, the Commonwealth avers, proves the search warrant and sealing order are not **public** judicial documents. And even if they are, the Commonwealth falls back on the trial court's alternative holding that any presumption of openness "was outweighed by circumstances warranting closure of the document[s] to public inspection[.]" *Id*.

The strong need for secrecy in ongoing grand jury investigations also undergirds the Commonwealth's argument against finding a First Amendment right of access. The Commonwealth argues that even the existence of a pending grand jury investigation is a fact that normally should be confidential and secret, and the judiciary should not be forced to provide to the public any document that reveals an investigation is ongoing. *See id*. at 40. As such, the Commonwealth sharply disagrees with WPXI's position Pennsylvania courts view executed search warrants as public judicial documents, because this "ignores the context in which this search warrant was issued — *i.e.*, to aid in an ongoing grand jury investigation." *Id*. The Commonwealth also rejects WPXI's assertion that it is the logic of the Pennsylvania justice system that grand jury-related search warrants are no different than any others. While the mechanics of securing a search warrant may be similar in grand jury and non-grand jury contexts, the Commonwealth posits that "the need to keep the focus of inquiry a secret, [and] the need to continue an investigation without alerting

anyone to the scope of inquiry and evidence being sought, varies drastically in the two scenarios." *Id*. at 40-41.

As a final point, the Commonwealth requests that if this Court finds the record inadequate to support denial of access, the case should be remanded to permit the trial court to enumerate the factual findings it alternatively relied upon in denying access. *See id*. at 48. This procedure, the Commonwealth notes, would be in accord with what this Court ordered in *PG Publishing*. Furthermore, to the extent this Court determines a remand is necessary, the Commonwealth agrees with WPXI that fairness dictates WPXI should be sworn to secrecy and given access to the trial court's factual findings so that it may appropriately respond on appeal. *See id*. at 50-51.

In reply, WPXI contests the Commonwealth's attempt to distinguish *PG Publishing,* restating the *Upshur* OAJC's declaration that "the status of materials as 'part of the record' or 'filed with the court,' though relevant, is not necessarily dispositive when deciding whether an item is a public judicial record or document." WPXI's Reply Brief at 3, *quoting Upshur*, 924 A.2d at 650. WPXI also denounces the Commonwealth's reliance on Pa.R.Crim.P. 229 and the Investigating Grand Jury Act, contending neither the Rule nor the Act is relevant here because the items at issue were not presented to the grand jury and do not emanate from any grand jury proceeding. *See id*. at 4-5. Lastly, WPXI opposes any request for a remand, as the only result will be further delay. *See id*. at 11.

We begin by setting forth the standards that guide our review, as the parties apparently disagree about the applicable principles.[6] With respect to the common law right of access, we have previously held "the determination of whether an item will be

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[6] *Compare* Commonwealth's Brief at 17 (question of common law right of access "resolves around whether [the trial court] abused [its] discretion in not granting access") and *id*. at 37 (same with respect to First Amendment right of access) *with* WPXI's Reply Brief at 9 ("the determination of whether First Amendment rights exist is a matter of law and therefore not reviewed by an abuse of discretion standard").

considered a public judicial record or document subject to the common law right of access is a question of law, for which the scope of review is plenary." *Upshur*, 924 A.2d at 647. If, as a matter of law, a presumption of openness attaches to a particular document, a trial court's decision to deny access to the document "will be reviewed for abuse of discretion." *Id*., *citing Fenstermaker*, 530 A.2d at 420. Whether the press and public have a First Amendment right of access also presents a question of law, and a trial court's decision to deny access will be reviewed *de novo*. *See Commonwealth v. Long*, 922 A.2d 892, 897 (Pa. 2007) (consideration of whether the press had a constitutional right of access to the names and addresses of a jury panel in a criminal trial presented a question of law); *see also Times Mirror Co. v. United States*, 873 F.2d 1210, 1212 (9th Cir. 1989) ("whether the public has a qualified First Amendment right of access to search warrants and supporting affidavits during the pre-indictment stage of a criminal investigation is a question of law, which we review *de novo*").

With these standards in mind, we start with an analysis of the common law right of access, "since it is the policy of this Court to resolve claims on non-constitutional grounds in the first instance." *Long*, 922 A.2d at 897. In *Nixon v. Warner Commc'ns Inc.*, 435 U.S. 589 (1978), the United States Supreme Court first referred to the common law right of access, stating "[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Id*. at 597 (footnotes omitted). Thereafter, in *Fenstermaker*, we expressly acknowledged the common law right of access is recognized in this Commonwealth, "but the extent of that right has not been delineated with specificity." 530 A.2d at 419.

Subsequent decisional law has, however, further clarified the contours of the right. Our precedent now makes clear that "not all documents and materials utilized during court proceedings are subject to the right of access. The threshold question in any case

involving the common law right of access is 'whether the documents sought to be disclosed constitute public judicial documents.'" *Upshur*, 924 A.2d at 647-48, *quoting Fenstermaker*, 530 A.2d at 418. Some items fit squarely within the category of public judicial records, particularly those that are filed with the court as part of the permanent record of a case and relied on in the course of judicial decision-making. *See, e.g.*, *Fenstermaker*, 530 A.2d at 419 (arrest warrant affidavits filed with a magistrate); *PG Publishing*, 614 A.2d at 1108 (executed search warrants and supporting affidavits in non-grand jury case); *Upshur*, 924 A.2d at 653 (audiotapes played during a preliminary hearing). "Conversely, documents that are not public judicial documents include transcripts of bench conferences held *in camera* and working notes maintained by the prosecutor and defense counsel at trial." *Long*, 922 A.2d at 898. We have also expressed that "documents placed under seal are similar to transcripts of bench conferences held *in camera*[,]" because "[i]n either instance, the trial court's intentions to remove such proceedings from the public are clear." *Id*. at 898 n.8.

The narrow question we must answer here is whether an executed search warrant and an order sealing an affidavit of probable cause, requested by the press while the grand jury investigation in which they arose remains ongoing, fit within the category of public judicial documents subject to disclosure, or whether they more closely resemble non-public judicial documents that are intended to be shielded from public review. After careful consideration, we hold there is no common law right of access to search warrants and related materials issued in connection with a grand jury investigation, at least insofar as the investigation is ongoing.

In reaching this conclusion, we candidly recognize that grand jury-related search warrants share many of the hallmarks of non-grand jury search warrants, which we have held are public judicial documents. Among other things, there can be no doubt that search

warrants, even those related to a grand jury investigation, are "documents upon which the [supervising judge] bases a decision[,]" *PG Publishing*, 614 A.2d at 1108, which is an important consideration weighing in favor of characterizing the documents as public. *See Upshur*, 924 A.2d at 650 ("[T]his Court has consistently given weight to the character of the materials sought in terms of whether they are of the sort upon which a judge can base a decision."). Notwithstanding this similarity, however, the Commonwealth aptly observes that, unlike ordinary search warrants, grand jury-related search warrants and related materials routinely are maintained by the supervising judge and are not publicly filed with the clerk of courts. *See* Commonwealth's Brief at 21. Although WPXI is correct that "the status of materials as 'part of the record' or 'filed with the court,' though relevant, is not necessarily dispositive when deciding whether an item is a public judicial record or document[,]" *Upshur*, 924 A.2d at 650, we ascribe greater significance to this factor where, as here, "the trial court's intentions to remove such proceedings from the public are clear." *Long*, 922 A.2d at 898 n.8.[7]

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[7] WPXI credibly indicates that neither the Rules of Criminal Procedure nor the Investigating Grand Jury Act expressly authorizes a grand jury supervising judge to seal or withhold from public filing the search warrant itself, let alone other related materials such as a sealing order. *See* WPXI's Brief at 13-15; WPXI's Reply Brief at 4-5. *Cf.* Pa.R.Crim.P. 211(A), (D) (permitting the sealing of search warrant affidavit for good cause shown, and requiring the filing of sealed affidavit with clerk of courts "unless otherwise ordered by the justice or judge"). We are not convinced, however, by WPXI's argument that this absence of express authority means a supervising judge is prohibited from temporarily withholding certain grand jury-related materials from the public during an ongoing investigation, or that it evinces a presumption of openness. *See, e.g.*, *Nixon*, 435 U.S. at 598 ("[e]very court has supervisory power over its own records and files"); *In re Dauphin Cty. Fourth Investigating Grand Jury*, 19 A.3d at 503 ("The very power of the grand jury, and the secrecy in which it must operate, call for a strong judicial hand in supervising the proceedings."). All the same, it seems this is yet another area in which further consideration by the Criminal Procedural Rules Committee would be beneficial, as it has become increasingly clear to us that the Rules do not comprehensively address the unique concerns relative to the search warrant process in grand jury cases. *Accord In re Return of Seized Property of Lackawanna Cty.*, 212 A.3d 1, 17 n.18 (Pa. 2019).

Our conclusion, like that of the Superior Court, is also informed by the special nature of grand jury proceedings. *See Allegheny County III*, 181 A.3d at 352. In *Press-Enterprise II*, the United States Supreme Court commented that "it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly. A classic example is that 'the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.'" 478 U.S. at 8-9, *quoting Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979). We have repeatedly expressed the same viewpoint. *See, e.g.*, *In re Dauphin Cty. Fourth Investigating Grand Jury*, 19 A.3d at 502 ("In Pennsylvania, grand jury proceedings have traditionally been conducted in secrecy, and for a salutary reason."); *In re Investigating Grand Jury of Philadelphia Cty. (Appeal of Philadelphia Rust Company)*, 437 A.2d 1128, 1130 (Pa. 1981) (the secrecy of grand jury proceedings "is indispensable to the effective functioning of a grand jury's investigation"). Thus, it is apparent that there is no historical common law right of access to grand jury proceedings; and it necessarily follows that the same is true of documents and other materials generated from or related to grand jury proceedings. *See, e.g.*, *Douglas Oil Co.*, 441 U.S. at 218 n.9 ("Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye."); *David Smith*, 123 F.3d at 156 ("Unlike judicial records to which a presumption of access attaches when filed with a court, grand jury

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Regarding the dissent's critique of our suggestions above as a "misguided effort[,]" Dissenting Opinion at 2, we strongly disagree. As the dissent itself concedes, our precedent now makes clear that law enforcement officers are entitled to seek search warrants in conjunction with a grand jury's investigation. *In re Return of Seized Property of Lackawanna Cty.*, 212 A.3d at 15 n.14. There is nothing new about this practice. More fundamentally, we reject the dissent's position that the search warrant in this case is a public judicial document because it "should have been filed with the local clerk of courts[.]" Dissenting Opinion at 5. Notably, the parties have never suggested the search warrant was not filed with the clerk of courts, only that it was not **publicly** filed. As discussed, records will not be considered public judicial documents where "the trial court's intentions to remove such proceedings from the public are clear." *Long*, 922 A.2d at 898 n.8.

materials have historically been inaccessible to the press and the general public, and are therefore not judicial records in the same sense.").

Of course, the thrust of WPXI's argument is that the search warrant and sealing order at issue do not involve grand jury proceedings or otherwise constitute grand jury material, but rather are documents wholly external to the grand jury and its investigation. We cannot agree. As we recently observed, albeit in the context of addressing a motion for return of property relative to a search warrant issued by a supervising judge of an investigating grand jury,

> any challenge to a search warrant issued in connection with an investigating grand jury affects the work of the grand jury and may require delving into secret grand jury matters. *See generally In re Fortieth Statewide Investigating Grand Jury*, 191 A.3d [750,] 762 n.21 [Pa. 2018] ("[T]o be effective, secrecy must extend to some range of matters beyond what happens before the grand jury in a grand jury room."); SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW & PRACTICE, §5.6 ("If the disclosure of the documents in context reveals something about the grand jury's investigation, the policy of grand jury secrecy has been breached regardless of whether the documents on their face related directly to the grand jury's activities.").

In re Return of Seized Property of Lackawanna Cty., 212 A.3d at 16 n.17. Plainly, grand jury secrecy reaches beyond what actually transpires in a grand jury room, and is broad enough to encompass search warrant materials issued in connection with the grand jury's investigation. *See, e.g.*, *Times Mirror*, 873 F.2d at 1215-16 ("We believe that secrecy is no less important to the process of investigating crime for the purpose of obtaining evidence to present to a grand jury."; "If proceedings before and related to evidence presented to a grand jury . . . can be kept secret, *a fortiori*, matters relating to a criminal investigation leading to the development of evidence to be presented to a grand jury may also be kept secret.") (internal quotation and citation omitted).

On this score, and with respect to the particular documents in question, we note the Rules of Criminal Procedure require that search warrants contain certain information,

much of which undoubtedly would be considered protected grand jury material. For example, Pa.R.Crim.P. 205(A) requires that a search warrant shall identify the property to be seized and name or describe with particularity the person or place to be searched. Pa.R.Crim.P. 205(A)(2)-(3). Such information, along with other material commonly contained within search warrant applications, would make public "the subjects of the ongoing grand jury investigation, disclose which provisions of the crimes code the grand jury was investigating, and reveal to potential witnesses, targets, and persons who might have access to similar materials stored at a different location the precise nature of the items relevant to the investigation." *Allegheny County III*, 181 A.3d at 358. *See also In re Search of Fair Fin.*, 692 F.3d 424, 432 (6th Cir. 2012) (publication of search warrant documents may reveal government's theory of crime being investigated; enable suspects to figure out which other places are likely to be searched; alert others that they, too, are suspects and cause them to destroy evidence or flee; force government to be more selective with information it discloses in order to preserve integrity of its investigation, which could impede magistrate's ability to accurately determine probable cause; and reveal names of innocent persons who never become involved in ensuing criminal prosecution).

Relatedly, an order sealing an affidavit of probable cause, although largely stripped of the substance contained in a search warrant or affidavit, may nevertheless also contain grand jury material. *See generally In re Search of Fair Fin.*, 692 F.3d at 433 (although most grand jury material is contained in affidavits submitted in support of search warrant applications, "sensitive information frequently makes its way into other documents"). In fact, the sealing order in this very case reveals the grand jury was investigating crimes involving minor victims of sexual or physical abuse. Even if that were not the case, the dissemination of a sealing order in and of itself reveals the existence of a grand jury; that

there was sufficient probable cause to obtain a search warrant; and that there was good cause for sealing the affidavit. Courts should not be required to lift unnecessarily the veil of secrecy from this information — at least not during the initial stages of a grand jury investigation. *See generally In re Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505, 516 (Pa. 2006) (implicitly recognizing grand jury secrecy extends to a confidential notice of submission to the court). Moreover, it would be imprudent to force upon the Commonwealth the considerable burden of responding on a case-by-case basis to requests for access to grand jury-related materials made in the middle of a continuing investigation.

Generally speaking, openness "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*"). Indeed, the "importance of the public having an opportunity to observe the functioning of the criminal justice system has long been recognized in our courts." *Fenstermaker*, 530 A.2d at 417. However, we may not ignore the reality that complete openness would undermine important values that are served by keeping some proceedings closed to the public. For that reason, and consistent with our historical experience in this Commonwealth, we hold there is no common law right of access to search warrants and related materials issued in connection with an ongoing grand jury investigation.

We now turn to the First Amendment right of access. While there have been few occasions that have required us to address the First Amendment in this context because we were able to resolve the specific claim of access under the common law, *see, e.g.*, *Fenstermaker*, 530 A.2d at 419, we are not entirely without precedential guidance. In *Long*, after holding there was no common law right of access to jurors' names and

addresses, we proceeded to consider the First Amendment right at considerable length. 922 A.2d at 899-905. In doing so, we discerned that although there is overlap between the common law and constitutional inquiries — notably, both rights seek to foster the fairness of the criminal justice system by ensuring that the public has access to proceedings — there is also "a distinction between the two inquiries, as the First Amendment provides a greater right of public access than the common law." *Id*. at 897. This distinction hinges "on what is being accessed and the nature of the legal tests applied to evaluate the right of access." *Id*. at 897 n.6; *see id*. (the First Amendment right speaks of access to judicial proceedings and the information contained therein, and the right can be denied only by proof of a compelling governmental interest and proof that the denial is narrowly tailored to serve that interest).

Most relevant to our present inquiry is the "experience and logic" test adopted in *Press-Enterprise II*. We summarized this test in *Long* as follows:

> The "experience" inquiry considers whether there has been "a tradition of accessibility." *Press-Enterprise II*, 478 U.S. at 8. In other words, a court looks to "whether the place and process have historically been open to the press and general public." *Id*. A "tradition of accessibility implies the favorable judgment of experiences." *Id*. The "logic" inquiry focuses on "whether public access plays a significant positive role in the functioning of the particular process in question." *Id*. In conducting this inquiry, a court should consider whether the process enhances the fairness of the criminal trial as well as "the appearance of fairness so essential to public confidence in the system." *Id*. at 9. These considerations are related as they "shape the functioning of governmental processes." *Id*. If the right asserted is grounded in both experience and logic, then a right of access to the proceedings in question exists under the First Amendment.

Long, 922 A.2d at 900. Pursuant to this test, we must determine whether allowing access to search warrants and related materials issued in connection with an ongoing grand jury investigation is supported by both experience and logic.

Starting with an historical inquiry, it is indisputable that that proceedings for the issuance of search warrants are not, and have not, been public. *See PG Publishing*, 614

A.2d at 1108 ("There is no historical tradition of public access to search warrant proceedings."); *see also Franks v. Delaware*, 438 U.S. 154, 169 (1978) (the proceeding for issuing a search warrant "is necessarily *ex parte*, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence"). While it is true that search warrant materials in non-grand jury cases are often accessible to the extent that they are publicly filed with the clerk of courts after they have been executed, *see* Pa.R.Crim.P. 210 ("[t]he judicial officer to whom the warrant was returned shall file the search warrant, all supporting affidavits, and the inventory with the clerk of the court of common pleas"), this does not equate to a longstanding tradition of accessibility to **grand jury-related** search warrant materials.[8] As we have explained, there is no history of access to grand jury proceedings or materials, and this includes search warrants and related materials issued in connection with an ongoing grand jury investigation. *See generally* SARA SUN BEALE & WILLIAM C. BYSON, GRAND JURY LAW & PRACTICE, §5.10 ("The tradition of secrecy extends to proceedings ancillary to a grand jury investigation, and thereby precludes any First Amendment right of access to those proceedings."). Accordingly, we find no historical tradition of accessibility to grand jury-related search warrant materials.

[8] In fact, even in non-grand jury cases, the government may seek to seal search warrant materials where there are legitimate interests in preventing disclosure. *See* Pa.R.Crim.P. 211(A). This need for secrecy is especially important when disclosure would "defeat an ongoing investigation[.]" *Id*., Cmt. In a similar way, even though law enforcement must provide a copy of the search warrant and affidavit(s) with the person whose property is searched, *see* Pa.R.Crim.P. 208(A), the same is not true of sealed affidavits, *see* Rule 208(C), and the government may always seek a protective order "to prevent or restrict the defendant from disclosing the contents of the affidavit." Pa.R.Crim.P. 211, Cmt. All of this convinces us that search warrants and related materials issued in connection with an ongoing grand jury investigation are more akin to unexecuted search warrants, which are not available for public inspection unless and until executed. *See* Pa.R.Crim.P. 212 & Cmt. (explaining that temporarily delaying the dissemination of search warrant information to the general public until after execution protects public safety and the integrity of investigations).

Logic also dictates there should be no First Amendment right to access grand jury-related search warrant materials during an ongoing investigation. As we have relayed time and time again, the secrecy in which the grand jury operates serves multiple critical purposes:

> (1) [t]o prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation[.]

In re Dauphin Cty. Fourth Investigating Grand Jury, 19 A.3d at 503 (internal quotation and citation omitted). There are a number of ways in which these indispensable attributes of the grand jury process would be compromised by the public release of search warrant materials during the pendency of an investigation. *See, e.g.*, *Allegheny County III*, 181 A.3d at 358 (listing potential harms of disclosure); *In re Search of Fair Fin.*, 692 F.3d at 432 (same).

Of course, we do not mean to suggest public access in this context would never confer a societal benefit. *Cf. Fenstermaker*, 530 A.2d at 418 (identifying salutary benefits associated with access to arrest warrant affidavits). In a generalized sense, public access to grand jury-related search warrant materials may very well promote the integrity of the criminal justice system. *See generally Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 604-05 (1982) (access ensures the public's interest in self-governance, enhances the quality and safeguards the integrity of the fact-finding process, and fosters an appearance of fairness). Nevertheless, while these general interests are clearly legitimate, they are outweighed by the inevitable negative ramifications of disclosure on grand jury secrecy and the jeopardy it would pose to the criminal

investigatory process. *See, e.g.*, *Times Mirror Co.*, 873 F.2d at 1213 (rejecting as overbroad an argument that the First Amendment mandates access to search warrant materials simply because access implicates interests of "self-governance or the integrity of the criminal fact-finding process"). We thus conclude public access to grand jury-related search warrant materials would not play a significant positive role in the functioning of either the search warrant or grand jury processes, both of which are implicated by the materials in question.

In sum, we find that neither experience nor logic points to a First Amendment right to access search warrants and related materials issued in connection with an ongoing grand jury investigation. We stress, however, that our holding is limited to the narrow circumstances presented — namely, a request for access to search warrant materials made while a grand jury's investigation is **ongoing**. On this discrete question, we note our determination that no First Amendment right of access attaches in this context has significant support from numerous federal appellate decisions. *See, e.g.*, *id*. at 1218 ("we find no First Amendment right of access to search warrant proceedings and materials when an investigation is ongoing but before indictments have been returned"); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 62 (4th Cir. 1989) (the press and public do not have a qualified First Amendment right of access to search warrant affidavits "in the interval between execution of the warrants and indictment"); *In re Search of Fair Fin.*, 692 F.3d at 433 (concluding that no First Amendment right of access applies to search warrant documents "based in part on the lack of any evidence that there is a historical tradition of such access and in part because that access would be detrimental to the search warrant application and criminal investigatory processes").[9]

[9] We express no opinion as to whether a First Amendment right might attach to grand jury-related search warrant materials requested **after** an indictment has issued or an investigation has concluded. *Cf. In re Application of New York Times Co. for Access to*

For the foregoing reasons, we affirm the order of the Superior Court.[10]

Chief Justice Saylor and Justices Baer, Todd, Wecht, and Mundy join the opinion.

Justice Donohue files a dissenting opinion.

Certain Sealed Court Records, 585 F.Supp.2d 83, 90 (D. D.C. 2008) (applying the "experience and logic" test to search warrant materials where the request was made after investigation had concluded and holding there was a qualified First Amendment right of access to the documents).

[10] Based on our conclusions that, as a threshold matter of law, WPXI had no common law or First Amendment right to access the documents at issue, we do not reach the question of whether the Commonwealth's interest in secrecy outweighed WPXI's right of access, or whether the trial court erred by not detailing on the record its findings that allegedly supported that alternate conclusion. At the same time, we see no problem with the Superior Court's suggestion that a trial court faced with a similar conflict in future cases should detail its findings in a sealed opinion.