

APPENDIX

896 F.3d 1007

United States Court of Appeals, Ninth Circuit.

UNITED STATES of
America, Plaintiff-Appellee,
Shawndale Boyd, Intervenor,
v.

Damion SLEUGH, Defendant-Appellant.

No. 17-10424

Argued and Submitted March 15,
2018 San Francisco, California

Filed July 23, 2018

Synopsis

Background: Defendant, who was convicted of conspiring to distribute or to possess with intent to distribute marijuana, using firearm during drug trafficking crime and causing murder, and related charges, filed motion to unseal co-defendant's applications to issue subpoenas. The United States District Court for the Northern District of California, No. 4:14-cr-00168-YGR-2, [Donna M. Ryu](#), United States Magistrate Judge, [318 F.R.D. 370](#), denied defendant's motion. Defendant appealed.

Holdings: The Court of Appeals, [Berg](#), District Judge, sitting by designation, held that:

as matter of first impression, there was no presumption of public access under First Amendment or common law that attached to subpoena applications and their supporting materials, and

defendant failed to demonstrate special need for sealed subpoena materials.

Affirmed.

Attorneys and Law Firms

***1009** [Ethan A. Balogh](#) (argued) and Dejan M. Gantar, Coleman & Balogh LLP, San Francisco, California, for Defendant-Appellant.

[Ellen V. Leonida](#) (argued) and Todd M. Borden, Assistant Federal Public Defenders; [Steven G. Kalar](#), Federal Public Defender; Office of the Federal Public Defender, San Francisco, California; for Intervenor.

Merry Jean Chan (argued), Assistant United States Attorney; [J. Douglas Wilson](#), Chief, Appellate Division; United States Attorney's Office, San Francisco, California; for Plaintiff-Appellee.

Appeal from the United States District Court for the Northern District of California, [Yvonne Gonzalez Rogers](#), District Judge, Presiding, D.C. No. 4:14-cr-00168-YGR-2

Before: [J. Clifford Wallace](#) and [Marsha S. Berzon](#), Circuit Judges, and Terrence Berg, * District Judge.

* The Honorable Terrence Berg, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

BERG, District Judge:

***1010** Criminal defendants sometimes seek to obtain evidence by filing applications asking the court to issue subpoenas for the production of documents or witnesses pursuant to [Federal Rule of Criminal Procedure 17\(c\)](#). These applications, supported by an attorney's affidavit explaining the reasons the evidence is necessary, are often filed ex parte and under seal. The issue on appeal in this case—a question of first impression for this Circuit—is whether one defendant in a criminal case can get access to the [Rule 17\(c\)](#) subpoena applications and supporting documents that were filed under seal by another defendant's attorney in the same criminal case, either because of the presumptive right of public access to court records or upon a showing of special need. In view of the circumstances presented

here, the district court properly denied the request for disclosure, and we affirm.

I. THE PARTIES, TRIAL, AND SLEUGH'S APPEAL

In March 2014, Damion Sleugh and Shawndale Boyd were indicted together on charges of (1) conspiring to distribute or to possess with intent to distribute marijuana, and (2) attempted possession with intent to distribute marijuana, each in violation of 21 U.S.C. §§ 846, 841(a)(1) & (b)(1)(D); (3) robbery affecting interstate commerce, in violation of 18 U.S.C. § 1951(a); (4) using or carrying a firearm during or in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c); and (5) using a firearm during a drug trafficking crime and causing a murder, in violation of 18 U.S.C. § 924(j). Sleugh was also charged as being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The charges arose from a five-pound marijuana drug deal that Sleugh and Boyd arranged, which ended in the death of the man who was delivering the marijuana, Vincent Muzac.

While awaiting trial, Boyd filed ex parte applications with the court seeking several Rule 17(c) subpoenas. Boyd requested that these applications be filed under seal. The subpoenas sought records relating to multiple cell phone numbers from various service providers for the time period surrounding the date of the alleged crimes, along with some surveillance video from other sources. To support the Rule 17(c) subpoena applications, and as required by local rule, Boyd's defense attorney submitted affidavits describing the need for the records.¹ Those affidavits were also filed ex parte and under seal.

¹ Sleugh has moved to include the Rule 17(c) subpoenas themselves, describing the kinds of records sought, as part of the public record of this appeal. Boyd and the Government did not object to this unsealing request. (Sleugh did not seek to disclose the applications and supporting affidavits setting out the reasons why these cell phone records were being sought by Boyd's attorney.) We granted Sleugh's motion and refer to the contents of the Rule 17(c) subpoenas herein. However,

the applications for the subpoenas, including Boyd's counsel's affidavits, remain under seal and, thus, at the center of the instant dispute.

On May 5, 2015, Boyd pleaded guilty to all counts except the murder charge. He agreed to cooperate with the government, and he testified against Sleugh at trial. Sleugh also testified.

Evidence was presented at trial that Sleugh and Boyd arranged to purchase five pounds of marijuana from Vincent Muzac—Boyd's friend and co-worker—for \$11,000. On the day of the deal, Boyd and Sleugh met at Sleugh's house. They decided to drive separately, Boyd getting a ride from a neighborhood acquaintance known by the nick-name "Q," and Sleugh, carrying the purchase money, driving a white *1011 Ford Escape that had been rented by Boyd's mother. They met at a Walmart parking lot, where there was also a Starbucks. Boyd met Muzac at the Starbucks. Video evidence showed Boyd and Muzac leaving the Starbucks together. Once in the parking lot, Boyd walked by himself up to the white Ford Escape where Sleugh was waiting. Boyd spoke to Sleugh for a few seconds. Boyd then walked away and entered "Q's" vehicle. Boyd and Q drove off, leaving the area. Muzac then walked to the Ford Escape where Sleugh was waiting and got inside. Four minutes later, the Ford Escape drove off without Muzac. Muzac's body was later found lying in the parking lot next to only one pound of marijuana, and without the \$11,000.

Boyd testified that, after he and Q left the Starbucks parking lot, he tried repeatedly to contact Muzac on his cell phone, with no success. Later that day, Boyd met Sleugh at Sleugh's apartment, and asked Sleugh if everything was okay. Sleugh told Boyd that he and Muzac argued about the quality of the marijuana, that Muzac punched Sleugh in the mouth, and that Sleugh then shot Muzac in the arm. Boyd testified that Sleugh told him that after he shot Muzac, he pushed him out of the car and left.

Muzac ultimately died from his wounds. Boyd testified that he did not become aware that Muzac had died until he and Sleugh were arrested on February 22, 2014 and charged in California state court with Muzac's murder.² Sleugh testified to a

different version of events. He claimed that Q—the man who drove off with Boyd in another vehicle—shot Muzac.

2 When the instant federal charges were brought against Sleugh and Boyd, the state prosecutor dismissed the murder charges.

On July 17, 2015, the jury convicted Sleugh of all charges. Sleugh was sentenced on November 4, 2015 to life in prison. Boyd received a three-year prison sentence. Sleugh appealed his conviction. See *United States v. Damion Sleugh*, No. 15-10547 (9th Cir.). At Sleugh's request, we stayed the briefing schedule of Sleugh's direct appeal while he sought permission from the district court to unseal Boyd's Rule 17(c) subpoena applications.

Sleugh argued to the district court that he needed access to Boyd's Rule 17(c) subpoena applications for his appeal because of the "possibility" that Boyd testified inconsistently with Boyd's counsel's assertions in those applications. Sleugh did not specify any particular portion of Boyd's testimony as problematic, and did not articulate how he thought counsel's assertions in support of obtaining the cell phone and other records were likely to contain any inconsistent or otherwise impeaching statements. Sleugh reasoned that Boyd's shift from defending the case to pleading guilty and testifying for the Government suggested that Boyd either misrepresented facts in the Rule 17(c) subpoena applications, or lied during his testimony. Put differently, Sleugh asserts that Boyd's testimony on behalf of the Government must have been inconsistent with any defense theory Boyd used to support the Rule 17(c) subpoena applications. Standing on that assumption, Sleugh concluded that he could have used the statements of Boyd's counsel in the Rule 17(c) subpoena applications to cross-examine Boyd at trial. Sleugh also contended that he had a right to access the Rule 17(c) subpoena applications as judicial records. The magistrate judge who originally granted Boyd's Rule 17(c) subpoena applications denied Sleugh's motion to unseal them. The district court affirmed.

When Sleugh appealed the district court's decision denying disclosure, Boyd *1012 intervened, arguing that his Rule 17(c) subpoena applications

should remain under seal. Sleugh's direct appeal of his conviction remains stayed, pending the instant appeal.

II. STANDARD OF REVIEW

A district court's denial of a motion to unseal is reviewed for abuse of discretion. *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016). As part of that review, this court must first determine under de novo review whether the district court applied the correct legal rule. *United States v. Hinkson*, 585 F.3d 1247, 1261–62 (9th Cir. 2009) (en banc). If the district court applied the wrong rule, the district court abused its discretion. *Id.* The application of the correct legal standard may nonetheless constitute an abuse of discretion if the application "was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* at 1262 (quotations, citation, and footnote omitted).

III. ANALYSIS

a. No Presumptive Right of Public Access

Attaches to Rule 17(c) Subpoena Applications

A criminal defendant has a constitutional right to compulsory process in building a defense. *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) (holding that "criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt").

While Rule 16 of the Federal Rules of Criminal Procedure generally governs discovery procedures in criminal cases, Rule 17(c) allows parties to a criminal trial to use the district court's subpoena power to request materials or testimony from witnesses. Fed. R. Crim. P. 17(c)(1). The Supreme Court has made it clear that a party seeking production of materials under a Rule 17(c) subpoena must demonstrate to the court "(1) relevancy; (2) admissibility; [and] (3) specificity." *United States v. Nixon*, 418 U.S. 683, 700, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). If the grounds

articulated in support of the subpoena request were made part of the public record, such a showing could reveal counsel's trial strategies or defense theories to the opposing party, here, the government. This concern about revealing defense strategies to the government could also apply to revelations of such confidential theories to co-defendants, who may have adverse interests—the issue implicated in this appeal. Recognizing this potential conundrum, some courts, like the district court here, have local rules that permit defendants to file their [Rule 17\(c\)](#) applications under seal for “good cause.” N.D. Cal. Crim. Local Rule 17-2(a) (1).

At the same time, filings under seal can interfere with open, public access to judicial records and documents. See *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) (“It 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.” (footnotes omitted)). Shrouding the mechanics of a criminal case in secrecy places the public's interest in a transparent judicial system at risk. See *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (“*Press-Enterprise I*”) (observing that open criminal proceedings “enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system”); see also *1013 *Phoenix Newspapers, Inc. v. U.S. Dist. Court*, 156 F.3d 940, 946 (9th Cir. 1998) (observing that “[o]ne of the most enduring and exceptional aspects of Anglo-American justice is an open public trial”).

Sleugh argues that the district court should have granted him access to Boyd's sealed [Rule 17\(c\)](#) subpoena requests because he has a presumptive right to access them under either the First Amendment or common law. However, “there is no right of access which attaches to all judicial proceedings, even all criminal proceedings.” *Phoenix Newspapers, Inc.*, 156 F.3d at 946.

As to the First Amendment, the test to determine “whether a right of access attaches to a particular kind of hearing” is a two-part test “known as the

‘experience and logic’ test.” *Phoenix Newspapers, Inc.*, 156 F.3d at 946. The test also applies to documents generated as part of a judicial proceeding, such as those here. *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213 n.4 (9th Cir. 1989). “The ‘experience’ prong of the test questions ‘whether the place and process have historically been open to the press and general public[.]’ ” *Phoenix Newspapers, Inc.*, 156 F.3d at 946. (quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)) (“*Press Enterprise II*”). The “logic” element “inquires ‘whether public access plays a significant positive role in the functioning of the particular process in question.’ ” *Id.* “If a proceeding fulfills both parts of the test, a qualified First Amendment right of access arises, to be overcome ‘only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.’ ” *Id.*

As to the common law, there is “a strong presumption in favor of access to court records.” *Ctr. for Auto Safety*, 809 F.3d at 1096. A party seeking to seal a judicial record can overcome this presumption only by showing a “compelling reason.” *Id.*

The issue here, then, is whether there is a presumptive right of public access to [Rule 17\(c\)](#) subpoena requests under either the First Amendment or common law. We have not addressed this issue before. The district court and the magistrate judge found guidance in the First Circuit's decision, *United States v. Kravetz*, 706 F.3d 47 (1st Cir. 2013), the only circuit court opinion squarely addressing this issue. Applying the reasoning of *Kravetz*, they held that Sleugh has no presumptive right to access Boyd's sealed [Rule 17\(c\)](#) subpoena requests.

In *Kravetz*, a journalist appealed from an order denying his request to unseal documents in a criminal case. 706 F.3d at 50. The documents included a sentencing memorandum as well as [Rule 17\(c\)](#) subpoena materials. *Id.* at 51, 53. The journalist argued that “the sealed documents were ‘judicial documents’ to which he had a right of

access under the First Amendment and common law.” *Id.* at 52.

Applying the “experience and logic” test, the First Circuit rejected the journalist’s First Amendment argument. *Id.* at 53. Under the “experience” prong, the court noted, “there is no tradition of access to criminal discovery.” *Id.* at 54. “To the contrary, ‘[d]iscovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation.’ ” *Id.* (quoting *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986)) (other citation omitted).

Applying the logic prong did not support a presumptive right of access either. The court reasoned that recognizing such a right would dangerously require criminal defense counsel “to prematurely expose trial strategy to public scrutiny.” *Kravetz*, 706 F.3d at 54. More broadly, public access ***1014** would have a “deleterious effect ... on the parties’ search for and exchange of information in the discovery process.” *Id.* (citation omitted). Accordingly, the court found “no First Amendment right of public access to the subpoenas or related materials.” *Id.* at 54.

Nor did the common law right of access apply. *Id.* at 54. The court reasoned that the common law right of access ordinarily attaches to “judicial records,” which “are those ‘materials on which a court relies in determining the litigants’ substantive rights.’ ” *Id.* (quoting *In re Providence Journal Co., Inc.*, 293 F.3d 1, 9–10 (1st Cir. 2002)). Rule 17(c) materials, in contrast, “relate merely to the judge’s trial management role,” not the adjudication process. *Id.* at 54–55 (citations omitted).

The *Kravetz* court held, then, that “no presumptive right of public access, based either in the common law or the First Amendment, attaches to the Rule 17(c) subpoenas or the related documents filed in connection with the underlying criminal prosecution[.]” *Id.* at 56. Instead, access is permitted “only upon a showing of special need.” *Id.*

We agree with *Kravetz*’s application of the First Amendment test. We also agree with *Kravetz*’s

application of the common law test, which is consistent with our position on the somewhat related question of what showing must be made to seal discovery documents filed to support motions in civil cases. For example, in *Center for Auto Safety*, the district court sealed documents attached to the plaintiffs’ motion for preliminary injunction and to the defendant’s opposition brief. 809 F.3d at 1095. A third party intervened, seeking to unseal the documents. *Id.* The district court held that the motion for preliminary injunction was a non-dispositive motion, and, therefore, the documents could be sealed merely upon a showing of “good cause.” *Id.* at 1095–96.

Observing that “a motion for preliminary injunction frequently requires the court to address the merits of a case” and “often includes the presentation of substantial evidence,” *Id.* at 1099 (citing *Stormans v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009)), we reversed and held that such documents should only be sealed for “compelling reasons,” *Id.* We observed how “[t]he focus in all of our cases is on whether the motion at issue is more than tangentially related to the underlying cause of action.” *Id.* at 1099. We explained that while motions for preliminary injunctions frequently are “more than tangentially related to the merits of a case,” so that documents supporting such motions should not be sealed except upon a showing of compelling reasons, “materials attached to a discovery motion unrelated to the merits of a case” need satisfy only the less exacting “good cause” standard.” *Id.* at 1097–99. In adopting the “more than tangentially related to the merits” approach, we cited favorably *Kravetz*’s test for determining if materials affect substantive rights, thereby triggering the common law right of access. *Id.* at 1100.

We agree with *Kravetz* that Rule 17(c) subpoenas, subpoena applications, and supporting affidavits, like civil discovery motions and supporting materials, are ordinarily only “tangentially related to the underlying cause of action.” *Ctr. for Auto Safety*, 809 F.3d at 1099. To be sure, the actual evidence gathered from the issuance of Rule 17(c) subpoenas could go to the merits of a case. The materials or witnesses sought could impact the

verdict at trial, the ultimate issue in any criminal case. Also, to make an assessment of the relevance of the subpoenaed materials, the court will need to take into account the merits of any potential defense theories articulated in [Rule 17\(c\)](#) subpoena applications. See *Nixon*, 418 U.S. at 700, 94 S.Ct. 3090.

***1015** But the applications and supporting affidavits for [Rule 17\(c\)](#) subpoenas merely invoke the district court's authority to compel the production of evidence. They are not evidence themselves. Such affidavits might sketch out possible defense theories that may or may not find support in actual evidence. As *Kravetz* observed, "[m]aterials submitted to a court for its consideration of a discovery motion are actually one step further removed in public concern from the trial process than the discovery materials themselves." *Kravetz*, 706 F.3d at 54 (quoting *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986)).

Because our law does not dictate when a party may unseal the applications and affidavits filed in support of [Rule 17\(c\)](#) subpoena requests, and *Kravetz* sets forth a reasonable approach that is consistent with our precedent, we adopt that approach here. See *Padilla-Ramirez v. Bible*, 882 F.3d 826, 836 (9th Cir. 2017) ("As a general rule, we decline to create a circuit split unless there is a compelling reason to do so."). As such, we hold that there is no presumption of public access under the First Amendment or common law that attaches to [Rule 17\(c\)](#) subpoena applications and their supporting materials. Accordingly, parties can only justify accessing sealed or in camera [Rule 17\(c\)](#) subpoenas, subpoena applications, and supporting documents by demonstrating a "special need." *Kravetz*, 706 F.3d at 56.

The next issue, then, is whether Sleugh showed a "special need" for Boyd's [Rule 17\(c\)](#) subpoena materials. We hold that he did not.

b. Sleugh failed to demonstrate a "special need" for Boyd's Rule 17(c) subpoena materials.

Sleugh contends that his appellate counsel requires access to Boyd's [Rule 17\(c\)](#) subpoena materials

to explore possible issues for his direct appeal. While appellate counsel certainly has an obligation to scour the record for appealable issues, see *Jones v. Barnes*, 463 U.S. 745, 753, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), this duty does not automatically create a right of access to sealed materials containing a co-defendant's defense theories.³

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As the magistrate judge here noted, the only case law Sleugh relies on does not support Sleugh's argument. In *Ellis v. United States*, 356 U.S. 674, 78 S.Ct. 974, 2 L.Ed.2d 1060 (1958), the Court addressed only when leave to appeal may be denied to indigent defendants. The Court held that if defense counsel for an indigent defendant "is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account." *Id.* at 675, 78 S.Ct. 974. Then, "[i]f the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied." *Id.* Thus, *Ellis* simply reminds us of the noncontroversial expectation that counsel diligently and conscientiously investigate grounds for appeal. Nothing in *Ellis* requires the production of a co-defendant's trial strategies or defense theories. Similarly, *Hardy v. United States*, 375 U.S. 277, 282, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964), only held that appellate counsel for indigent defendants are entitled to a free copy of the entire trial transcript. This entitlement does not include a co-defendant's sealed filings.

Sleugh argues that he needs Boyd's [Rule 17\(c\)](#) applications because they could prove that Boyd lied during trial. Again, Sleugh does not identify any portion of Boyd's testimony which he believes is false (other than his statements regarding the government's promises, discussed below), and Sleugh does not explain how the attorney's affidavit detailing the relevance of the cell phone and other records sought in Boyd's [Rule 17\(c\)](#) subpoenas could be used to show that Boyd's trial testimony was false. Sleugh simply speculates that the assertions of counsel in Boyd's [Rule 17\(c\)](#) subpoena applications must be different from Boyd's trial

testimony. Underlying ***1016** Sleugh's conclusion is, again, the assumption that Boyd's testimony during trial was inconsistent with any defense theory that Boyd's counsel proffered in the pre-trial [Rule 17\(c\)](#) subpoena applications.

Sleugh assumes too much. Boyd's testimony against Sleugh—that Sleugh admitted to shooting Muzac and that Boyd was not present at the time of the shooting—were compelling defense theories for Boyd. Sleugh offers no reason for believing that Boyd's counsel would have advanced a theory inconsistent with Boyd's trial testimony in the [Rule 17\(c\)](#) subpoena applications. Nothing about the face of Boyd's [Rule 17\(c\)](#) subpoena applications suggests that the affidavits in support of those applications would be likely to undercut Boyd's testimony.⁴

⁴ In response to Sleugh's counsel's request at oral argument, we reviewed in camera the sealed affidavits that Boyd's counsel submitted in support of the [Rule 17\(c\)](#) subpoena applications. Sleugh's position, that they contain factual assertions contradicting Boyd's trial testimony, is without merit. In situations where a reasonable and plausible basis is articulated suggesting that factual assertions attributable to a witness in a [Rule 17\(c\)](#) application contradict that witness's in-court testimony, a district court could also conduct such an in camera review to protect the integrity of the process.

Sleugh also argues that Boyd “lied” when he testified on redirect that the government made no promises to him in connection with his cooperation. Sleugh's contention takes Boyd's testimony out of its surrounding context. During cross-examination, Sleugh's trial counsel asked Boyd if the government “promised [Boyd] that they would bring a motion for a downward departure ... if the government feels that you have provided substantial assistance to the government through your cooperation.” Boyd answered that such a motion was “only a possibility. It's not guaranteed. It's subject to the government's discretion” and that the judge is “the only person that will be sentencing me on this case[.]” Therefore, when Boyd later testified on redirect that the government did not promise him

anything, Boyd clearly was referencing the fact that any government “promises” were not guaranteed.

Regardless, Sleugh does not explain how any potentially inconsistent testimony by Boyd creates a “special need” for Boyd's [Rule 17\(c\)](#) subpoena applications. Even assuming the applications contain “impeachment material,” as Sleugh alleges, they cannot affect this appeal because they were never in front of the jury, and we do not engage in *de novo* fact-finding on appeal. Nor could Sleugh use the statements to bring a sufficiency of the evidence challenge to his conviction, because for such a challenge, “we [only] look at the evidence actually presented at trial.” *United States v. Sayakhom*, 186 F.3d 928, 942 n.7 (9th Cir. 1999).

Further, the [Rule 17\(c\)](#) subpoena applications predated the plea agreement and Boyd's cooperation, and the subpoenas themselves mainly sought cell phone records and some surveillance video. Even if Boyd were caught in a lie about whether his plea agreement involved certain promises by the government, such a misstatement would not necessarily create an entitlement for Sleugh to examine the sealed affidavits proffered by Boyd's attorney to support the [Rule 17\(c\)](#) subpoenas for records.

We hold that Sleugh failed to present a “special need” to access Boyd's sealed [Rule 17\(c\)](#) subpoena applications.⁵

⁵ Because we hold that Sleugh has failed to demonstrate a “special need” for Boyd's [Rule 17\(c\)](#) subpoena application materials, we need not address whether Boyd's counsel waived any attorney-work product protection to those materials by filing them with the court under seal, or whether attorneys' representations as to defense theories in affidavits supporting subpoena applications could be attributable to the client for impeachment or other purposes.

***1017 c.** *There is a continued need to seal Boyd's [Rule 17\(c\)](#) subpoena materials.*

Alternatively, Sleugh argues that there is no reason to continue sealing Boyd's [Rule 17\(c\)](#) subpoena materials. He reasons that Boyd pleaded

guilty, testified, and was sentenced and released. Therefore, according to Sleugh, revealing the [Rule 17\(c\)](#) subpoena applications poses no risk to Boyd.

Sleugh has a point, to an extent. There is some support for the position that these subpoena applications should not be sealed forever. Regarding transcripts of sealed trial proceedings, we require that such transcripts “must be released when the danger of prejudice has passed.” *Phoenix Newspapers, Inc.*, 156 F.3d at 948 (internal quotation marks omitted). If there is no longer any need to seal the [Rule 17\(c\)](#) subpoena materials at issue here, then perhaps they should be unsealed.

There are two problems with applying this rule here, though. First, unlike the trial transcripts at issue in *Phoenix Newspapers*, which we held were entitled to a presumption of public access under the First Amendment “experience and logic” test, [Rule 17\(c\)](#) subpoena applications do not have a history of being available to the public; such applications do not constitute evidence, and they do not determine the merits of a criminal case. Accordingly, it makes sense that it is harder to unseal [Rule 17\(c\)](#) subpoena applications than trial transcripts.

Second, in this case there is a continuing need to seal these [Rule 17\(c\)](#) subpoena applications. Boyd’s plea deal and sentence resolved only his federal charges, but Boyd was initially charged with murder in California state court.⁶ That charge was dismissed, but the state is not precluded from refiling that charge against Boyd. See *Berardi v. Superior Court*, 160 Cal. App. 4th 210, 218, 72 Cal.Rptr.3d 664 (2008) (observing that [Cal. Penal Code § 1387](#) “generally provides a ‘two dismissal’ rule” precluding prosecutors from refiling certain charges only after the same charges have been dismissed twice already “according to the provisions of that statute”). Because there is no statute of limitations for murder in California, the specter of that charge

continues to loom over Boyd. See [Cal. Penal Code § 799\(a\)](#). Also, there is a possibility that the federal government could pursue the murder charge against Boyd should he breach his plea agreement.

⁶ We grant Boyd’s request for judicial notice of his state court charges. [Fed. R. Evid. 201\(d\)](#); *Rosales-Martinez v. Palmer*, 753 F.3d 890, 894 (9th Cir. 2014) (“It is well established that we may take judicial notice of judicial proceedings in other courts.”).

Unsealing Boyd’s [Rule 17\(c\)](#) subpoena applications could reveal Boyd’s defense theories to the state and federal governments for any future trial. The prospect of undermining the confidentiality of Boyd’s defense strategies justified sealing these materials in the first place, which Sleugh does not contest. It is no different now.⁷

⁷ This is not to say that all [Rule 17\(c\)](#) subpoena applications may or should remain under seal forever. There may be instances when there is no longer any need to protect a defendant’s theories of defense (e.g., upon the defendant’s death, or when the statute of limitations has run on all charges). Boyd’s situation is unique because, as long as he lives, he will always face the risk of another state murder charge. Accordingly, we need not resolve whether all [Rule 17\(c\)](#) subpoena applications should remain under seal in perpetuity.

*1018 IV. CONCLUSION

For these reasons, we **AFFIRM** the district court’s affirmance of the magistrate judge’s order denying Sleugh’s motion to unseal Boyd’s [Rule 17\(c\)](#) subpoena applications.

All Citations

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAMION SLEUGH,

Defendant.

CASE NO. 14-cr-00168-YGR-1

**ORDER RE: OBJECTIONS TO MAGISTRATE
JUDGE'S ORDER ON ADMINISTRATIVE
MOTION FOR DISCLOSURE OF SEALED
MATERIALS TO APPELLATE COUNSEL**

Re: Dkt. No. 223, 225

Defendant-Appellant Damion Sleugh filed an administrative motion for an order authorizing the disclosure to his appellate counsel of all materials filed under seal in this case. (Dkt. No. 210.) The government did not oppose the disclosure of materials it filed under seal, but Shawndale Boyd, Sleugh's co-defendant, opposed the motion with respect to his ex parte applications for Federal Rule of Civil Procedure 17(c) subpoenas. Boyd did not oppose unsealing the court orders on his applications and the corresponding subpoenas. Thus, on December 29, 2016, the magistrate judge issued an order granting in part and denying in part Sleugh's administrative motion. Specifically, the magistrate judge denied Sleugh's motion for disclosure only with respect to the disclosure of Boyd's ex parte subpoena applications. (Dkt. No. 223.)

Now before the Court are Sleugh's objections to the magistrate judge's order. (Dkt. No. 225.) Specifically, Sleugh asks this Court to set aside the portion of the magistrate judge's order denying his motion for disclosure of Boyd's ex parte subpoena applications. Having carefully reviewed the magistrate judge's order and the objections thereto, the Court **OVERRULES** Sleugh's objections and **AFFIRMS** the magistrate judge's order at Docket Number 223.

I. BACKGROUND

In 2014, Boyd and Sleugh were indicted on several counts in this district. (Dkt. No. 1.) Boyd pleaded guilty to four counts and the government dismissed the murder charge. (Dkt. No. 183.) Subsequently, Boyd testified at trial against Sleugh, and in July 2015, a jury found Sleugh

1 guilty of all counts, including use of a firearm during a drug trafficking crime causing murder.
2 (Dkt. No. 146, 175.) Sleugh was sentenced to a total term of life plus 120 months. (Dkt. No. 175
3 at 2.)

4 Relevant to the instant objections, Boyd filed several subpoena applications pursuant to
5 Rule 17(c). Under such rule, a party may subpoena a witness to produce “any books, papers,
6 documents, data, or other objects the subpoena designates.” Fed. R. Crim. P. 17(c)(1). The
7 proponent of a Rule 17(c) subpoena must demonstrate relevancy, admissibility, and specificity.
8 *See United States v. Nixon*, 418 U.S. 683, 700 (1974). As such, courts have recognized that
9 criminal defendants may face a dilemma between revealing their defense to the government by
10 supporting their Rule 17(c) applications or not acquiring necessary evidence for their case. *See*
11 *United States v. Tomison*, 969 F. Supp. 587, 593–94 (E.D. Cal. 1997). Accordingly, courts have
12 allowed defendants to file Rule 17(c) applications under seal. *Id.* (recognizing that the “need to
13 preserve a defendant’s constitutional right to obtain and use relevant evidence suggests that Rule
14 17(c) affords the defendant the right to pre-trial production in secrecy”). Here, the Court allowed
15 Boyd to file such subpoena applications under seal.

16 On May 13, 2016, Sleugh filed a motion for disclosure of sealed materials to his appellate
17 counsel, including, among others, Boyd’s Rule 17(c) subpoena applications. (Dkt. No. 210.) On
18 August 8, 2016, the Court referred such motion to Magistrate Judge Ryu. (Dkt. No. 218.)
19 Magistrate Judge Ryu issued her order on December 29, 2016 (Dkt. No. 223), to which Sleugh
20 filed objections on January 10, 2017 (Dkt. No. 225).

21 **II. LEGAL STANDARD**

22 “A party has fourteen days from the date of service to object to a Magistrate Judge’s
23 nondispositive order.” *United States v. Pacific Gas & Elec. Co.*, No. 14-CR-175-TEH, 2016 WL
24 3185008, at *2 (N.D. Cal. June 8, 2016). Federal Rule of Criminal Procedure 59(a) provides that
25 when a party files objections to a magistrate judge’s order on a nondispositive matter, the district
26 judge “must consider timely objections and modify or set aside any part of the order that is
27 contrary to law or clearly erroneous.” A party’s failure to object waives the party’s right to
28 review. *Id.*; *see also Pacific Gas & Elec. Co.*, 2016 WL 3185008, at *2.

III. DISCUSSION

Sleugh raises two objections to the magistrate judge's order denying him access to Boyd's Rule 17(c) subpoena applications, namely that he: (i) has a presumptive right to access such sealed materials; and (ii) has, nevertheless, demonstrated a special need to review such materials. The Court addresses each contention below.

A. Presumptive Right to Access Sealed Materials

In ruling against Sleugh with regard to the Rule 17(c) subpoena applications, the magistrate judge found that no presumptive right of access to Rule 17(c) subpoena materials exists, under either the First Amendment or the common law, and, thus, Sleugh would need to demonstrate a special need to access such materials. Sleugh, on the other hand, contends that he has a presumptive right of access to such materials, and should thus be entitled to the materials unless a compelling need for closure of the same exists.

Sleugh does not persuade in this regard. The magistrate judge discussed the extant case law related to disclosure of sealed Rule 17(c) subpoena materials, and found that such authority does not support a presumptive right of access to the same. The Ninth Circuit has not yet addressed the issue specifically, and thus, the magistrate judge relied on the First Circuit's opinion in *United States v. Kravetz*, 706 F.3d 47 (1st Cir. 2013). There, the First Circuit explained that the "scope of the public's presumptive right of access to this category of documents appears to be a matter of first impression among the circuits." *Id.* at 53. The First Circuit then proceeded to hold that no such right of public access to such documents existed either under the First Amendment or the common law. *Id.* at 53–56. Thus, the First Circuit held that the disclosure of such documents "may be obtained only upon a showing of special need." *Id.* at 56 (citing *United States v. Corbitt*, 879 F.2d 224, 237–39 (7th Cir. 1989) and *United States v. Charmer Indus., Inc.*, 711 F.2d 1164, 1175–76 (2d Cir. 1983)); *see also Tomison*, 969 F. Supp. at 595 (explaining that the "pre-trial production process" is not a "historically open proceeding" and thus there is no presumptive public right of access to the same).

1 The Court finds persuasive the reasoning in *Kravetz* and *Tomison*, and the magistrate
2 judge's discussion of the same, and adopts it here. Thus, to obtain disclosure of the Rule 17(c)
3 sealed materials, Sleugh must demonstrate a special need for the same.

4 **B. Special Need for Disclosure of Rule 17(c) Materials**

5 Sleugh contends that a special need exists for his counsel to review the Rule 17(c)
6 materials because Boyd may have made factual representations to the Court in his Rule 17
7 affidavits that he may have contradicted during trial testimony. Thus, Sleugh argues, such
8 affidavits may be beneficial in undermining his conviction. The magistrate judge rejected such
9 argument explaining that no such possibility exists here where the Rule 17 applications "were
10 supported by Boyd's counsel, and not Boyd himself." (Dkt. No. 223 at 9.)

11 Sleugh contends that such a finding was erroneous because, although the applications were
12 supported by affidavits from Boyd's counsel, such could still provide impeachment material.
13 Specifically, Sleugh could have used counsel's statements as admissions or as extrinsic evidence
14 with which to impeach Boyd's testimony. Thus, Sleugh argues, the magistrate judge could not
15 have categorically found that there was no possibility that such affidavits could contain
16 impeachment evidence. Sleugh further contends that the situation at hand is a far cry from that
17 found in *Kravetz*, where the First Circuit held that the journalist's assertion of a generalized
18 interest failed to satisfy the "special need" standard for obtaining disclosure of sealed documents.
19 *Kravetz*, 706 F.3d at 56. Here, by contrast, the disclosure would be limited to review by Sleugh's
20 counsel rather than the general public and for the specific purpose of preparing Sleugh's appeal.

21 Sleugh, however, does not persuade. Pursuant to Federal Rule of Criminal Procedure
22 59(a), the district judge "modify or set aside any part of the order that is *contrary to law* or *clearly*
23 *erroneous*." Fed. R. Crim. P. 59(a) (emphases supplied). Courts have a broad range of discretion
24 in determining whether a person has sufficiently demonstrated a "special need" for the disclosure
25 of sealed materials. *Kravetz*, 706 F.3d at 56; *see also Charmer Indus., Inc.*, 711 F.2d at 1177
26 (holding that the court has a "fair measure of discretion in weighing the competing interests in
27 order to determine whether or not the person seeking disclosure has shown that the ends of justice
28 require disclosure"). The Court does not find that the magistrate judge's finding was clearly

erroneous or that she abused such discretion here. The magistrate judge was well within her discretion to find that Boyd's counsels' theories contained in the subpoena applications regarding what evidence may exist or could be discovered through the subpoenas have little to no bearing on Boyd's testimony at trial.

Accordingly, the Court finds no grounds upon which to disturb the magistrate judge's order and hereby **OVERRULES** Sleugh's objections to the same.

IV. CONCLUSION

For the foregoing reasons, the Court **OVERRULES** Sleugh's objections and **AFFIRMS** Magistrate Judge Ryu's order at Docket Number 223.

IT IS SO ORDERED.

Dated: July 7, 2017



YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

USA,

Plaintiff,

v.

Damion Sleugh,

Defendant.

Case No. [14-cr-00168-YGR-2](#) (DMR)

**ORDER ON ADMINISTRATIVE
MOTION FOR DISCLOSURE OF
SEALED MATERIALS TO APPELLATE
COUNSEL**

Re: Dkt. No. 210

Defendant and Appellant Damion Sleugh filed an administrative motion for an order authorizing the disclosure to his appellate counsel of all materials filed under seal in this case. [Docket No. 210 (Mot.).] The government does not oppose the disclosure of any materials it filed under seal. Balogh Decl., May 13, 2016, ¶ 2. However, Shawndale Boyd, who was Sleugh's co-defendant, opposes the motion. Boyd argues that the ex parte applications for Federal Rule of Criminal Procedure 17(c) subpoenas that he filed under seal should remain under seal and should not be disclosed to Sleugh's counsel. [Docket No. 214 (Opp'n).] Boyd does not oppose the unsealing of the court orders on his applications and the corresponding subpoenas. [Docket No. 221.] For the following reasons, Sleugh's motion for disclosure of materials that the government filed under seal is granted as unopposed. Similarly, Sleugh's motion is granted as unopposed to the extent it seeks disclosure of the subpoenas requested by Boyd, and the court orders regarding those subpoenas. However, Sleugh's motion for disclosure of Boyd's ex parte subpoena applications is denied.

I. BACKGROUND

In 2014, Sleugh was charged in this district with six counts, including use of a firearm during a drug trafficking crime causing murder. [Docket No. 1 (Indictment).] Boyd was also charged with use of a firearm during a drug trafficking crime causing murder, plus four additional

counts. *Id.* Boyd pleaded guilty to four counts and the government dismissed the murder charge. Boyd subsequently testified at trial against Sleugh. [Docket No. 183 (Boyd Judgment).] In July 2015, a jury found Sleugh guilty of all counts. [Docket No. 146.] Sleugh was sentenced in November 2015. [Docket No. 175 (Sleugh Judgment).]

During the course of Boyd's investigation of the charges, Boyd's counsel submitted numerous applications for the issuance of subpoenas pursuant to Federal Rules of Criminal Procedure 17(b)¹ and 17(c) and Criminal Local Rule 17-2(a)(1). Criminal Local Rule 17-2(a) states that a court order is required to issue a Rule 17(c) subpoena. It provides that a party may obtain the issuance of a subpoena by filing either a noticed motion or, "for good cause, an *ex parte* motion without advance notice to the opposing party." Crim. L.R. 17-2(a)(1). Any party seeking a subpoena must support its request with a declaration "specifying the facts supporting the issuance of the subpoena." *Id.* Under Local Rule 17-2(a)(1), "[a]n *ex parte* motion and order thereon may be filed under seal for good cause."

Through the subpoenas, Boyd sought the production of specific documents and information that he claimed were relevant and material to his defense. Boyd filed the Rule 17(c) applications *ex parte* and requested that they be filed under seal pursuant to Criminal Local Rule 17-2(a)(1). The court granted the applications and sealing requests, and Boyd's applications and the corresponding orders were sealed by the court.² Sleugh now moves for an order authorizing the disclosure of the sealed materials to Sleugh's appellate counsel on an attorneys' eyes only ("AEO") basis for the purpose of prosecuting his appeal. He does not challenge the initial sealing of these materials nor does he seek public disclosure. Boyd opposes the motion.

¹ Rule 17(b) provides that "[u]pon a defendant's *ex parte* application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas." This procedure "was added to Rule 17(b) so that indigent defendants would be on the same footing as other defendants and the government when deciding whether to apply for a subpoena for production at trial." *United States v. Tomison*, 969 F. Supp. 587, 590 n.5 (E.D. Cal. 1997).

² The applications and corresponding orders were docketed at the following entries: Docket Nos. 17-30, 32-34, 36-37, 42-45, 57-60, and 79-82.

Sleugh argues that his appellate counsel has a duty to investigate the entire district court record, and that court proceedings and records are presumptively open to the public. He contends that Boyd bears a heavy burden to justify the continued sealing of the documents at this juncture, arguing that any privilege or protection over the documents has been waived, and there is no longer any need to protect Boyd's trial strategy because Boyd has already waived his right to trial, pleaded guilty, and testified against Sleugh.

Boyd disputes Sleugh's right to gain access to certain materials that Boyd filed under seal. He contends that in order to obtain the subpoenas, his counsel was required to submit applications setting forth the materials sought and their relevance to Boyd's defense. This required disclosure of Boyd's "defense theories, investigation, work product, and potentially privileged information." Opp'n at 4. Boyd argues that while Sleugh is entitled to challenge any ex parte evidence which forms the basis for Sleugh's conviction, Sleugh has no due process, common law, or statutory right to his co-defendant's theories, confidential communications, work product, or investigation.

On December 7, 2016, in response to a court order, Boyd submitted a statement confirming that he does not object to unsealing the court orders on the Rule 17(c) applications and the corresponding subpoenas. [Docket Nos. 220, 221.] Sleugh submitted a response to Boyd's statement on the same day in which he repeats his argument that the applications and court orders should be provided to his appellate counsel. [Docket No. 222.]

II. DISCUSSION

"A criminal defendant has both a constitutional right to obtain evidence which bears upon the determination of either guilt or punishment, and a Sixth Amendment right to process." *United States v. Tomison*, 969 F. Supp. 587, 593 (E.D. Cal. 1997) (citations omitted). "Rule 17(c) implements both the right to obtain the evidence and to require its production." *Id.* (citations omitted). Under Rule 17(c), a party may subpoena a witness to produce "any books, papers, documents, data, or other objects the subpoena designates." Fed. R. Crim. P. 17(c)(1).

The proponent of a Rule 17(c) pretrial subpoena must demonstrate "(1) relevancy; (2) admissibility; [and] (3) specificity." *United States v. Nixon*, 418 U.S. 683, 700 (1974); *see also United States v. Eden*, 659 F.2d 1376, 1381 (9th Cir. 1981). The proponent must also show that

the materials sought “are not otherwise procurable reasonably in advance of trial by exercise of due diligence,” that “the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial,” and that “the application is made in good faith and is not intended as a general ‘fishing expedition.’” *Nixon*, 418 U.S. at 699-700 (citing *United States v. Iozia*, 13 F.R.D. 335, 338) (S.D.N.Y. 1952)).

Rule 17 can present unique challenges for criminal defendants. In order to exercise the right to pre-trial production of third-party evidence, a criminal defendant must demonstrate relevance, specificity and admissibility, but in so doing, may well be forced to reveal defense strategy. The *Tomison* court grappled with this tension in determining whether Rule 17(c) authorizes a district court to consider an ex parte application for a pre-trial subpoena. After analyzing the text of Rule 17 and finding that it did not resolve the question, the court examined the rule’s purpose. The court addressed the inherent conflict faced by criminal defendants in applying for Rule 17(c) subpoenas, and concluded that the rule allows for submission of supporting information to the court in secrecy:

Since a defendant seeking pre-trial production must make a demonstration of relevancy, admissibility and specificity, *see Nixon*, 418 U.S. at 700, 94 S.Ct. at 3103–04, requiring that defendant share the showing with the government would effectively force the defendant to reveal his or her theory of the case. *See Reyes*, 162 F.R.D. at 470. As Judge Payne observed, “[f]orcing any defendant to confront the choice between issuing a pre-trial subpoena duces tecum and disclosing his defense to the government places an unconstitutional limitation on the defendant’s right to compulsory process.” *Beckford, supra* at 1027. Thus, the need to preserve a defendant’s constitutional right to obtain and use relevant evidence suggests that Rule 17(c) affords the defendant the right to pre-trial production in secrecy. *See, e.g., Jenkins*, 895 F.Supp. at 1397 (holding that secrecy is necessary until court reaches its decision on whether to produce documents).

Tomison, 969 F. Supp. 587, 593–94. *See also United States v. Jenkins*, 895 F. Supp. 1389, 1397 (D. Haw. 1995) (holding that Rule 17(c) permits ex parte applications, noting that “[j]ust because the decision to allow pretrial production is left to the court does not mean that it should be heard in an adversary proceeding.”).

Sleugh avoids addressing the standards applicable to Rule 17(c) subpoenas or Criminal

Local Rule 17-2(a)(1), and fails to grapple with the unique justification for allowing criminal defendants to file ex parte sealed affidavits in support of requests for issuance of pretrial subpoenas as discussed in *Tomison*. Sleugh instead urges the court not to “adopt Boyd’s myopic focus on Rule 17 subpoenas,” (Reply at 2), and argues that his appellate counsel has a duty to investigate “the entire district court record.” Mot. at 2. However, neither of the cases cited by Sleugh come close to addressing a criminal defendant’s right to access documents filed under seal by a co-defendant. See *Ellis v. United States*, 356 U.S. 674, 675 (1958) (counsel’s leave to withdraw may be granted and in forma pauperis defendant’s leave to appeal may be denied “[i]f the court is satisfied that counsel has diligently investigated the possible grounds of appeal”); *Hardy v. United States*, 375 U.S. 277, 280 (1964) (court-appointed appellate counsel cannot “faithfully discharge the obligation which the court has placed on him unless he can read the entire [written] transcript”).

Sleugh next argues that “[i]n camera proceedings excluding the defense ‘are anathema in our system of criminal justice, and in the context of a criminal proceeding, may amount to a denial of due process.’” Mot. at 2 (citations omitted). Again, the cases cited by Sleugh do not discuss whether a criminal defendant has a due process right to a co-defendant’s sealed ex parte Rule 17(c) applications. Rather, they address whether the government is permitted to present evidence or argument against a criminal defendant in camera. See *United States v. Thompson*, 827 F.2d 1254, 1258-59 (9th Cir. 1987) (holding that district court violated defendant’s due process right by conducting an in camera, ex parte proceeding in connection with defendant’s *Batson* challenge); *Chambers v. Florida*, 309 U.S. 227, 237 (1940) (noting that “[t]he determination to preserve an accused’s right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes.”); *United States v. Abuhamra*, 389 F.3d 309, 330-31 (2d Cir. 2004) (addressing “whether a district court may rely on evidence submitted by the government *ex parte* and *in camera* to deny bail.”). Here, Sleugh is not seeking access to evidence or information that the government used against him. Instead, he seeks Rule 17(c) applications in which his co-defendant’s counsel was required to disclose the theory of his co-defendant’s case and

1 investigation. *See Tomison*, 969 F. Supp. at 591 n.8 (since documents filed by a defendant seeking
2 a subpoena “must demonstrate relevancy, specificity, and admissibility, [they] inevitably lay out
3 the defendant’s entire case as it stands at the time the subpoenas are sought.” (citation omitted)).

4 Sleugh next asserts that under the First Amendment and the common law, court
5 proceedings and records are presumptively open to the public. He argues that he is thus “entitled
6 to a presumption of entitlement to disclosure,” and that Boyd bears the burden to “present facts
7 supporting closure and to demonstrate that available alternatives will not protect his rights.” *Mot.*
8 *at 2-3, 6* (quoting *Oregonian Publ’g Co. v. United States Dist. Court*, 920 F.2d 1462, 1467 (9th
9 Cir. 1990)). Sleugh is only partially correct, as there is “no right of access which attaches to all
10 judicial proceedings, even all criminal proceedings.” *Phoenix Newspapers, Inc. v. United States*
11 *Dist. Court*, 156 F.3d 940, 946 (9th Cir. 1998). “Thus, although we begin with the ‘presumed
12 right of access to court proceedings and documents,’ . . . the United States Supreme Court has
13 articulated a two-part test, known as the ‘experience and logic’ test, for determining whether a
14 right of access attaches to a particular kind of hearing.” *Id.* (quoting *Oregonian*, 920 F.2d at
15 1465); *see also In re McClatchy Newspapers, Inc.*, 288 F.3d 369, 373 (9th Cir. 2001) (“[t]he right
16 ‘to inspect and copy judicial records is not absolute.’” (quoting *Nixon v. Warner Commc’ns*, 435
17 U.S. at 589, 598 (1978))).

18 In other words, to qualify for a presumption of disclosure, Sleugh must first establish
19 through application of the “experience and logic” test that a right of access attaches to sealed ex
20 parte Rule 17(c) affidavits. If such a right attaches, then the burden shifts to Boyd to present facts
21 to overcome the presumption of disclosure.³ The “‘experience’ prong of the test questions
22 ‘whether the place and process have historically been open to the press and general public, while
23 the second element inquires ‘whether public access plays a significant positive role in the
24 functioning of the particular process in question.’” *Phoenix*, 156 F.3d at 946 (quoting *Press-*
25 *Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986)). “If a proceeding fulfills both parts of the
26 test, a qualified First Amendment right of access arises, to be overcome ‘only by an overriding

27
28 ³ Sleugh completely ignores the “experience and logic” test, even though it is discussed at length
in at least one of the cases that he cites in support of his position.

1 interest based on findings that closure is essential to preserve higher values and is narrowly
2 tailored to serve that interest.” *Id.* (quoting *Press-Enterprise*, 478 U.S. at 9-10); *Oregonian*
3 *Publ’g Co.*, 920 F.2d at 1466.

4 The Ninth Circuit regularly has applied the “experience and logic” test to determine
5 whether a presumed right of access extends to documents related to criminal proceedings. *See*,
6 *e.g.*, *Oregonian*, 920 F.2d at 1465-66 (public has qualified right of access to plea agreements and
7 related documents); *Phoenix*, 156 F.3d at 947-49 (public has qualified right of access to transcripts
8 of closed hearings held during jury deliberations in criminal trial); *In re Copley*, 518 F.3d at 1026-
9 28 (while public has qualified right of access to plea colloquy transcript, public has no First
10 Amendment right to access transcripts of closed portions of hearings on motions to seal plea
11 proceedings and declarations and documentation appended to government’s motion to seal).

12 It does not appear that the Ninth Circuit has addressed whether the public has a First
13 Amendment or common law right of access to ex parte Rule 17(c) applications. In *Tomison*, the
14 court discussed its disagreement with an earlier decision holding that “the public’s right to access
15 to the courts militates against ex parte applications under Rule 17(c).” 969 F. Supp. at 595 (citing
16 *United States v. Urlacher*, 136 F.R.D. 550, 556-58 (W.D.N.Y. 1991)). The court noted that the
17 “pre-trial production process . . . hardly fits as an historically open proceeding,” and that “there is
18 no public right of access to a criminal defendant’s trial strategy.” *Id.* It continued, stating that the
19 “right of access is only presumptive and not absolute; it may be outweighed when the court finds
20 that disclosure is necessary to preserve overriding rights of criminal defendants,” and found that
21 the public right of access is “insufficient to deny the defendant the opportunity to proceed ex parte
22 under Rule 17(c) where the court finds that an ex parte application is necessary to preserve the
23 defendant’s overriding constitutional rights to the court’s process without revealing his trial
24 strategy.” *Id.* Accordingly, it held that “there is no reason to believe that ‘public access plays a
25 significant positive role in the function of the particular process in question.’” *Id.* (quoting
26 *Urlacher*, 136 F.R.D. at 556); *see also Jenkins*, 895 F. Supp. at 1397 (“[t]he secrecy of the pre-
27 issuance process [of Rule 17(c)] is not a burden on free access to the courts”).

28 More recently, in *United States v. Kravetz*, 706 F.3d 47, 53 (1st Cir. 2013), the First Circuit

considered “[t]he scope of the public’s presumptive right of access” to Rule 17(c) pretrial subpoenas and related documents, observing that the issue appeared to be a matter of first impression among the circuits. In analyzing the existence of a First Amendment right to access, the court applied the “experience” prong and found that “there is no tradition of access to criminal discovery”; instead, “[d]iscovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation.” *Id.* at 54 (quotation omitted). As to the “logic” prong, the court held that “there is scant value and considerable danger in a rule that could result in requiring counsel for a criminal defendant to prematurely expose trial strategy to public scrutiny.” *Id.*

The *Kravetz* court also examined whether a common law right of access applies to Rule 17(c) subpoenas. It noted that the issue was whether the documents sought “constitute ‘judicial records,’” which are “those materials on which a court relies in determining the litigants’ substantive rights.” *Id.* (quotations omitted). The court found that “the district court’s review and disposition of [the defendant’s] Rule 17(c) requests were not undertaken ‘in order to dispose of any issue as to the elements of the criminal charges against him’”; rather, the materials “relate[d] merely to the judge’s trial management role.” *Id.* at 54-55 (quotation and citation omitted). Accordingly, it concluded that “Rule 17(c) subpoenas and related materials thus are not those relied on to determine the litigants’ substantive rights.” *Id.* at 55. The court held that “no presumptive right of public access, based either in the common law or the First Amendment, attaches to the Rule 17(c) subpoenas or the related documents filed in connection with [an] underlying criminal prosecution.” *Id.* at 56. Therefore, it held, “access may be obtained only upon a showing of special need.” *Id.*

This court finds the reasoning in *Tomison* and *Kravetz* persuasive and adopts it here. Sleugh is not entitled to a presumption of access to Boyd’s Rule 17(c) applications under either the First Amendment or common law. Nor has Sleugh established any special need that would justify access to Boyd’s ex parte applications. Sleugh argues that “there exists the possibility that Mr. Boyd made factual representations to the Court [in the Rule 17 affidavits] that he then contradicted during trial testimony.” Sleugh contends that if this is the case, then he should have

had the opportunity to use the affidavits at trial to test the accuracy of Boyd's testimony. Mot. at 6. No such possibility exists here, as all of the Rule 17 applications were supported by affidavits by Boyd's counsel, and not Boyd himself.⁴

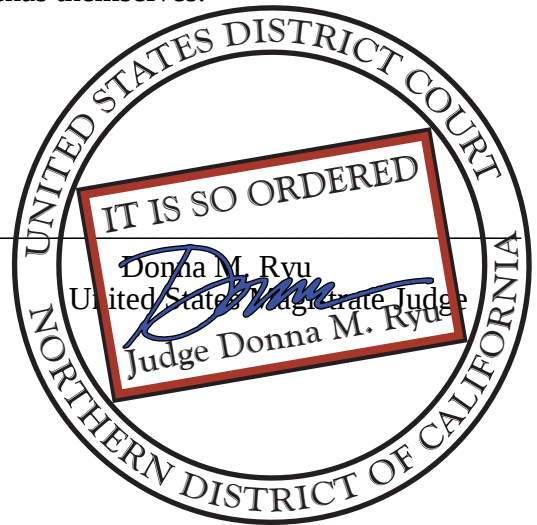
Sleugh's motion with respect to Boyd's Rule 17(c) applications is therefore denied.

III. CONCLUSION

For the foregoing reasons, Sleugh's administrative motion to disclose sealed materials to his appellate counsel is granted in part and denied in part. The motion is granted as to the documents the government filed under seal. Within seven days of the date of this order, Sleugh and the government shall file a joint statement identifying the specific docket entries corresponding to the government's under seal filings along with a proposed order unsealing those entries. Sleugh's motion is denied as to the following docket entries, but only as to Boyd's Rule 17(c) applications: Docket Nos. 17-30, 32-34, 36-37, 42-45, 57-60, and 79-82. The clerk is directed to unseal the corresponding orders and subpoenas themselves.

IT IS SO ORDERED.

Dated: December 29, 2016



⁴ As Sleugh has not established his right to gain access to the sealed ex parte Rule 17 applications, the court need not reach Sleugh's arguments regarding the absence of attorney-client and work product protection for the information contained in the applications.

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OCT 04 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

SHAWNDALE BOYD,

Intervenor,

v.

DAMION SLEUGH,

Defendant-Appellant.

No. 17-10424

D.C. No.

4:14-cr-00168-YGR-2

Northern District of California,
Oakland

ORDER

Before: WALLACE and BERZON, Circuit Judges, and BERG,* District Judge.

The panel has voted to deny the Appellant's petition for panel rehearing.

Judge Berzon has voted to deny Appellant's petition for rehearing en banc, and

Judges Wallace and Berg have so recommended. *See* Dkt. 49.

The full court has been advised of the petition for rehearing en banc and no
judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P.

35.

* The Honorable Terrence Berg, United States District Judge for the Eastern District of Michigan, sitting by designation.

The petition for panel rehearing and the petition for rehearing en banc are
DENIED.