Nos. 10-3079, 10-3080

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JARON BRICE,

Defendant-Appellant.

Appeal from the United States District Court for the District of Columbia, Case Nos. 1:05-mc-00405 and 1:05-mc-00406

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING OR REHEARING *EN BANC*

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PANEL OPINION, CERTIFICATE OF PARTIES AND DISCLOSURE STATEMENT

Pursuant to D.C. Cir. R. 26.1 and 35(c), *amicus* states as follows:

A copy of the opinion of the panel from which rehearing is being sought appears in Defendant-Appellant's petition for rehearing or rehearing *en banc* dated September 21, 2011. Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in Defendant-Appellant's petition for rehearing or rehearing *en banc* dated September 21, 2011:

(A) *Amicus curiae* The Reporters Committee for Freedom of the Press;

(B) Counsel for *amicus curiae*

- Lucy A. Dalglish;
- Gregg P. Leslie;
- Derek D. Green.

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

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Per D.C. Cir. R. 28(a)(2), authorities upon which we chiefly rely are marked with asterisks.

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press ("The Reporters Committee" or "*amicus*") is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

As advocates for the rights of the news media and others who seek to provide information to the public on important issues that affect them, the Reporters Committee has a strong interest in upholding the public's right to access, monitor and report on the proceedings of this nation's court system. The panel's opinion at issue here raises a significant concern about the proper application of the well-established procedure courts must undertake before sealing court proceedings and records to which the First Amendment right of access attaches. *Amicus* submits this brief in order to urge this Court to ensure that district courts properly protect the public's right of access in any proceeding to which the right applies.

In addition, as the panel's opinion itself recognizes, the public's right to monitor material witness proceedings is an issue of first impression in the federal appellate courts. *Amicus* submits this brief in support of Appellant's rehearing or

rehearing *en banc* petition in order to highlight the importance of ensuring that courts follow the proper procedures in determining whether to limit the public's right to monitor courtroom proceedings in which a person's physical liberty is at stake.

SOURCE OF AUTHORITY TO FILE

In accordance with D.C. Cir. R. 35(f), *amicus* files this brief pursuant to this Court's order dated August 31, 2011, allowing *amicus* to file a brief in support of Appellant's petition for rehearing *en banc*, not to exceed 15 pages, and its order dated September 8, 2011, stating *amicus*' submission is due September 21, 2011.

FED. R. APP. P. 29(c)(5) STATEMENT

Amicus states that:

(A) no party's counsel authored this brief in whole or in part;

(B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) no person — other than the *amicus curiae*, its members or its counsel — contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Pursuant to the U.S. Supreme Court's two-part test governing the closure of court proceedings and records, the district court in this case properly concluded that because of the history and important function of material witness proceedings, a First Amendment right of access applies to such proceedings. The lower court — and the appellate panel, in deferring to the trial court's finding — failed, however, to apply the high Court's well-established jurisprudence about the procedural steps necessary to protect that right when it summarily sealed documents related to its material witness determinations without the proper analysis. Indeed, material witness hearings are akin to historically open pretrial-detention or bail hearings, or even trials, where a person's physical liberty is at stake and thus public oversight is of vital importance. As such, a presumption of disclosure required the trial court to make specific, on-the-record findings demonstrating that closure was necessitated by a compelling government interest and narrowly tailored to serve that interest.

In failing to undertake that analysis or requiring the district court to do so, however, the panel's opinion effectively suggests that a presumption of closure attaches to court proceedings and documents once a privacy interest in them has been identified, a standard that directly contravenes Supreme Court jurisprudence. The high Court has made clear that sealing should occur only to the extent necessary to preserve the privacy interests of the individuals sought to be

protected. As such, a court's balancing of the government's interest in privacy and the public's interest in access to its courts, and its consideration of adequate alternatives to closure are the only means to satisfy both interests. A court cannot simply default to a presumption of closure every time a compelling privacy interest is implicated and still ensure that the public's First Amendment right of access is protected to the greatest extent possible.

The interest in openness in this case is not mere curiosity but rather a concern about the very integrity of the courts — the judiciary's ability to detain people who have not been charged with any criminal offense. Indeed, of particular concern to *amicus* is the distinction between the sealing of private facts disclosed in the proceedings and the sealing of other relevant information related to both the court's imposition of an increased sentence and the legal reasoning behind its determination of whether material witnesses would be detained. This suppression of public inquiry into — and understanding of — the government's justification for detaining crime victims against their will threatens to undercut the public's confidence in its judicial system.

ARGUMENT

Appellant's petition for rehearing or rehearing *en banc* presents an issue of fundamental importance to the public's right of access: ensuring that the procedural safeguards that give this right its substance remain intact — and

enforced.[1] Rehearing or *en banc* review of this case will enable this Court to reaffirm the proper procedural steps district courts must undertake before sealing records subject to a First Amendment right of access.

I. Public oversight is of vital importance to historically open court proceedings in which a person's liberty interest is at stake.

This Court has long recognized the public's constitutional right of access to certain court proceedings, *see, e.g.*, *The Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991), and is undoubtedly familiar with the basis of this First Amendment right. The constitutional right of access enables the public's "discussion of governmental affairs" to be an informed debate, and serves the dual purposes of ensuring fairness in the judicial system and promoting confidence in that branch of government. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605–06 (1982); *see also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*") (stating that public access to criminal proceedings "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system"). The right of access also allows the public "to participate in and serve as a check upon the

[1] Because the panel here properly assumed that the First Amendment right of access applies to material witness proceedings, *amicus* focuses on the procedural steps necessary to protect that right, rather than addressing whether the First Amendment right of access applies to material witness proceedings.

judicial process — an essential component in our structure of self-government." *Globe Newspaper*, 457 U.S. at 606. As former Chief Justice Warren Burger explained, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (plurality opinion).

In accordance with this jurisprudence, this Court has held that the First Amendment protects public access to a particular proceeding if "such access has historically been available, and serves an important function of monitoring prosecutorial or judicial misconduct." *Robinson*, 935 F.2d at 288 (citations omitted). Under the historical prong, courts must examine the nature of the proceeding at issue, not simply when a precise type of procedure was codified. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 701 (6th Cir. 2002) ("[A]lthough historical context is important, a brief historical tradition might be sufficient to establish a First Amendment right of access where the beneficial effects of access to that process are overwhelming and uncontradicted." (citing *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring))). Just because the present material witness statute was created in 1984, that does not mean there is not a long history of access to this *type* of proceeding, where a person is before the court with the threat of detention. The statute allows for the detention of even a person known

to be innocent in aid of ensuring the fundamental proposition that "the public has a right to every man's evidence." *See In re Application of the United States for a Material Witness Warrant*, 213 F. Supp. 2d 287, 298 (S.D.N.Y. 2002) (citation and internal quotation marks omitted). Where hearings pursuant to the statute are held, they are closed only to the extent necessary to prevent disclosure of matters occurring before the grand jury, a historically secret proceeding. *See In re Application of the United States for Material Witness Warrant*, 214 F. Supp. 2d 356, 364 (S.D.N.Y. 2002).

Indeed, material witness hearings are akin to pretrial-detention or bail hearings or even trials, which implicate the public's right to know and assess why someone is being jailed and thus are presumptively public. This is particularly so in cases such as this one, where the investigative stage of a prosecution is long over, and the legitimate justification for secrecy in a grand jury investigation is no longer a concern.

These concerns take on additional importance in circumstances in which a person's physical liberty is at stake. Such is the case in material witness proceedings, in which courts are tasked with deter mining whether to allow the government to physically detain individuals — including victims and others not charged with any crime — against their will, as witnesses. *See* 18 U.S.C. § 3144 (2006). The physical liberty implications are even higher in this case, where the

trial court used information obtained through these secret proceedings as a basis for increasing Appellant's sentence. *See* Panel Op. at 3.

Indeed, excessive secrecy in such proceedings can engender the very type of suspicion of government that open proceedings are intended to dispel. In the context of a pre-indictment material witness proceeding, the district court in Oregon warned that withholding excessive information about the proceeding "could create public perception that an unindicted member of the community has been arrested and secretly imprisoned by the government." *In re Grand Jury Material Witness Detention*, 271 F. Supp. 2d 1266, 1268 (D. Or. 2003). A court in the Southern District of New York similarly commented that "the determination to jail a person pending his appearance before a grand jury is presumptively public, for no free society can long tolerate secret arrests." *In re Application of the United States*, 214 F. Supp. 2d at 364.

Notably, both of the above cases address secrecy of material witness proceedings in relation to grand jury proceedings, which raised separate secrecy concerns. Those concerns should not be present with the post-indictment material witness proceedings at issue here.[2] Regardless, it is noteworthy that in both the

[2] Although the government's briefing to the panel suggested grand jury privacy could be at issue, the parties agree the material witness proceedings here occurred post-indictment. *See* Appellee's Br. at 24; Appellant's Opp'n Br. at 4 n.2. The

District of Oregon and Southern District of New York opinions discussed above, the court agreed that *some* information about the material witness proceedings should be publicly released. *See In re Grand Jury Material Witness Detention*, 271 F. Supp. 2d at 1268–69; *In re Application of the United States*, 214 F. Supp. 2d at 364–65.

II. This Court should accept rehearing or *en banc* review to ensure that court proceedings subject to a First Amendment right of access are not closed without exploring less-drastic alternatives.

Once application of this "history and important function" test has established that a First Amendment right of access to a particular proceeding or record exists, such proceedings or records may be sealed only in limited circumstances. The panel's decision properly recited the "three prongs of the *Washington Post* test" that must be satisfied before a proceeding or record subject to the First Amendment right of access can be sealed. *See* Panel Op. at 6.[3] At issue here is only the third "prong": whether there were "alternatives to closure that would adequately protect the compelling interest" identified, namely preventing the invasion of privacy of

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panel's opinion does not discuss or rely on grand jury secrecy as a basis for affirming the district court's denial of the motion to unseal.

[3] "Where there is a First Amendment right of access to a judicial proceeding, the 'presumption [of access] can be overridden only if (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.' *Washington Post*, 935 F.2d at 290 (internal quotation marks omitted)."

the witness-victims. *See id.* at 7. In deferring to the district court's unsupported assertion that no alternatives to closure would protect this compelling interest, the panel's opinion, in effect, misapplies presumptions regarding proceedings and records subject to the First Amendment right of access, thereby changing the entire nature of the balancing of interests. That is, the district court's lack of — and panel's acceptance of — a meaningful attempt to weigh the government's compelling interest in protecting privacy with the public's right of access and an adequate consideration of alternatives to sealing in effect create a presumption of closure that attaches once a privacy interest is identified. Such a finding, however, contravenes the constitutional mandate that a presumption of disclosure attaches once the court concludes that a First Amendment right of access applies.

Accordingly, the panel's opinion stands in stark contrast to the Supreme Court's analysis in *Press-Enterprise I*, 464 U.S. 501. Like the panel here, the Supreme Court in *Press-Enterprise I* reviewed a trial court decision to seal the record of an entire proceeding (here, the records of a material witness proceeding; in *Press-Enterprise I*, the proceedings and subsequent transcript of a lengthy *voir dire*). The trial courts in both cases declined to unseal even a portion of the record, citing compelling privacy concerns. *See id.* at 512–13; Panel Op. at 6–7. The Supreme Court rejected the trial court's closure order in *Press-Enterprise I* as both lacking "requisite specificity" and failing to adequately consider alternatives:

> Assuming that some jurors had protectible privacy interests in some of their [*voir dire*] answers, the trial judge provided no explanation as to why his broad order denying access to information at the *voir dire* was not limited to information that was actually sensitive and deserving of privacy protection. Nor did he consider whether he could disclose the substance of the sensitive answers while preserving the anonymity of the jurors involved.
>
> Thus not only was there a failure to articulate findings with the requisite specificity but there was also a failure to consider alternatives to closure and to total suppression of the transcript. The trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected.

Press-Enterprise I, 464 U.S. at 513.

The panel's opinion here required far less of the district court. Rather than requiring the district court to explain why its "broad order denying access" to an entire case could not be more narrowly tailored, *see id.*, the panel appears to have concluded on its own that "redaction was not a viable option here." *See* Panel Op. at 7. Certainly, the panel did emphasize the district court's "description of the nature of the documents at issue in this case." *Id.* But that emphasis conflates the requirement that closure serve a "compelling interest" (which is not in dispute) with the requirement that the district court consider "alternatives to closure and to total suppression of the [record]." *See Press-Enterprise I*, 464 U.S. at 513.

Such an analysis is necessary because it is the only means to satisfy both the government's interest in privacy and the public's interest in access. It is hard to fathom that *all* the documents in the sealed cases — and *all portions* of those

documents — consist of information of such a private nature that no part of them can be publicly disclosed. Yet, without specific, on-the-record findings about those documents that are "actually sensitive and deserving of privacy protection," *see id.*, and the ability, or lack thereof, to protect those interests by disclosing only part of the information contained therein, the privacy interest is protected at the expense of the public interest. As such, this analysis is a procedural requirement that safeguards the public's First Amendment right of access.

It is important to note that the interest in openness in this case is not mere curiosity but rather a concern about the very integrity of the courts — the judiciary's ability to detain people who have not been charged with any criminal offense. Indeed, of particular concern to *amicus* is the distinction between the sealing of private facts disclosed in the proceedings and the sealing of other relevant information related to both the court's imposition of an increased sentence and the legal reasoning behind its determination of whether material witnesses would be detained. Concerns over the disclosure of "intensely private and painful information about" the victims, *see* Panel Op. at 4, does not explain the absolute suppression of, *e.g.*, the official arguments and rationale for detaining these victims against their will. Nor does it explain the suppression of the procedural facts about these cases, or answer the questions that arise in this context. Did the prosecution (and district court) follow the proper procedural steps for detaining the material

witnesses? How long were the witnesses detained? It is the answer to these types of questions that the press and public must be able to obtain if they are to have "confidence in the system." *See Press-Enterprise I*, 464 U.S. at 508.

Perhaps the answer to some of these questions could not be provided if the court had undertaken the proper analysis, but the panel's opinion provides no indication that it did so. As Judge Easterbrook stated for the U.S. Court of Appeals for the Seventh Circuit, "[j]udges deliberate in private but issue public decisions after public arguments based on public records." *Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000). "The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification." *Id.*

The panel's opinion in this case enabled the district court to not only seal private facts, but to suppress public inquiry into — and understanding of — the government's justification for detaining crime victims against their will. A published appellate opinion condoning such secrecy presents a serious concern to the public's right of access.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to accept rehearing or rehearing *en banc* of this case.

Dated: September 21, 2011
Arlington, VA

Respectfully Submitted,
By: */s/ Lucy A. Dalglish*

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2011, I electronically filed in searchable Portable Document Format the foregoing brief *amicus curiae* with the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, thereby affecting service on the following counsel of record, all of whom are registered for electronic filing.

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