No. 10-SP-1612

IN THE
DISTRICT OF COLUMBIA
COURT OF APPEALS

IN RE: ACCESS TO JURY QUESTIONNAIRE

THE WASHINGTON POST,

Appellant.

ON APPEAL FROM AN ORDER OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT THE WASHINGTON POST

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 28(a)(2)(b), Appellant The Washington Post states that it is a wholly-owned subsidiary of The Washington Post Company, a publicly-held corporation. Berkshire Hathaway, Inc., a publicly-held company, has a 10 percent or greater ownership interest in The Washington Post Company.

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ISSUES PRESENTED FOR REVIEW

1. Whether the trial court's blanket sealing of written questionnaires completed by empanelled jurors and used by the court and counsel during voir dire violates the public's First Amendment and common law rights of access to criminal judicial proceedings and records.

STATEMENT OF THE CASE

This is an appeal from an oral order of the Superior Court of the District of Columbia denying Appellant The Washington Post ("The Post") access to completed jury questionnaires in the trial of Ingmar Guandique, who has been convicted of the felony murder of Chandra Levy. U.S. v. Guandique, No. 2009 CF1 009230 (D.C. Sup. Ct.). Voir dire began on October 18, 2010. On November 3, 2010, after unsuccessful efforts to obtain the questionnaires without filing a motion by requesting them from the court's media liaison, The Post, along with The Associated Press, Gannett Company, Inc., and The Reporters Committee for Freedom of the Press, moved to intervene for access to the completed 11-page, 55-question forms used in jury selection. On November 15, 2010, when the trial itself was almost over, the Superior Court decided to disclose answers to only four questions – age, gender, education level, and nature of employment. On November 22, 2010, the jurors returned with their guilty verdict against Mr. Guandique. On November 24, 2010, the Superior Court held a hearing on the intervenors' motion and ruled from the bench that it would not release the completed juror questionnaires. No written order was entered. The Post filed a timely appeal.

STATEMENT OF FACTS

In October 2010, nearly a decade after Chandra Levy vanished in a popular Washington, DC park while out for a jog, Ingmar Guandique appeared in Superior Court to stand trial for her murder. The trial, like the investigation before it, attracted an outpouring of public interest. The

Post and other local and national media had been closely covering the case since Ms. Levy's disappearance in May 2001. See, e.g., Arthur Santana, Lack of Answers Frustrates Family of Missing Woman, WASH. POST, May 16, 2001. In July 2008, at a time when leads in the case had long grown cold, The Post published over the course of two weeks a 12-part special report on the search for the killer of Ms. Levy, whose body was found in Rock Creek Park approximately one year after she was reported missing. See Sari Horwitz, Scott Higham and Sylvia Moreno, Who Killed Chandra Levy?, WASH. POST, July 13-27, 2008. The substantial journalistic resources invested by The Post in the 2008 series focused public attention on Mr. Guandique, who was first identified as a suspect in the fall of 2002 when he was already serving time in prison for other assaults on women on the jogging trails of the park. See Sari Horwitz and Allan Lengel, Levy Probe Concentrates On Rock Creek Attacker, WASH. POST, Sept. 29, 2002. In April 2009, Mr. Guandique was charged with the felony murder of Ms. Levy.

Jury selection began on October 18, 2010 before the Honorable Gerald I. Fisher in Superior Court. As part of the voir dire process, prospective jurors were asked to complete an 11-page, 55-question questionnaire. The Post obtained from the court a blank copy of the questionnaire. See Appendix ("App.") at 23-33. The questionnaire identified individuals by juror number only. No names, addresses, social security numbers, or other personally-identifiable details were requested. Rather, the form sought standard demographic information as well as input from the jury pool on issues specifically relevant to the trial of Mr. Guandique, who had entered the United States illegally from El Salvador as a young adult and was a member of the MS-13 gang. Particular areas of inquiry included familiarity with Rock Creek Park and the crime scene; knowledge of local gang activity and the Hispanic community in Washington; attitudes toward illegal immigration; and exposure to pre-trial publicity about Ms. Levy's

disappearance and Mr. Guandique's eventual arrest for her murder years later.

During voir dire, reporters and members of the public were placed in a nearby room where an audio connection enabled them to hear – but not see – the questioning of potential jurors. Counsel for the prosecution and the defense used the completed questionnaires to examine the jury pool during voir dire. Prospective jurors only very rarely asked to answer certain questions confidentially, and during these brief intervals the court accordingly suspended the audio feed to the room where the public and press were sequestered. A jury of 16 was empanelled (four were alternates), and the government opened its case on October 25, 2010.

Shortly after the trial began, The Post, which was providing its readers with daily (sometimes hourly) news coverage of the proceedings, requested from the Superior Court access to the questionnaires of the 16 jurors. Through a public affairs officer for the court, Judge Fisher informed the newspaper that he would not release the questionnaires during the trial. The Post was not told when – or if – the completed forms would be made available. According to the docket below, at no time did the prosecution or the defense ever petition the court to maintain any secrecy over the completed juror questionnaires.

On November 3, 2010, while the government was still presenting its case-in-chief, The Post and three other intervenors sought access to the completed questionnaires.[1] See Motion for Leave to Intervene and Motion of The Washington Post, The Associated Press, Gannett Company, Inc., and Reporters Committee for Freedom of the Press for Contemporaneous Access to Trial Exhibits and Completed Juror Questionnaires, U.S. v. Guandique, No. 2009 CF1 009230 (D.C. Sup. Ct. Nov. 3, 2010). They argued that under the First Amendment and the common law, the public and the press are presumptively entitled to contemporaneous access to criminal

[1] At the same time, the media intervenors asked for trial exhibits to be made contemporaneously available with their use in court. That request was resolved and is not at issue in this appeal.

proceedings, including all aspects of voir dire, and that no compelling reason existed for the blanket refusal to disclose the questionnaires when the court could undertake limited redactions to address any privacy concerns brought to its attention by individual jurors. Over the course of the next week, counsel for the intervenors made several inquiries about the status of their motion, but the court did not rule, schedule a hearing on the motion, or order the parties to set forth their positions.

On November 10, 2010, the prosecution rested and the defense began to call its witnesses. On November 12, 2010, a Superior Court public affairs officer advised the media intervenors early in the day that Judge Fisher had decided to release only the following information collected on the questionnaires: age, gender, education level, and occupation. Further, even that limited information would not be disclosed until Judge Fisher consulted the jury, which could not happen until the trial resumed the following Monday, the day the defense was to conclude its case. In the afternoon of November 12, the court gave counsel for the media intervenors a brief, impromptu opportunity to be heard on the record.

At the hearing, the court confirmed that it would "consider disclosing age, sex, education, and occupation" but that it was "reluctant to do [that] until at least Monday ... [B]ecause I promised the jury ... that none of the information would be disclosed ... I would want to ask them about that." App. 37. Judge Fisher alluded to language in the questionnaire that made the following representation to the jury pool:

> The information that you give in your answers will be used only by the Court and the parties to select a qualified jury. After a jury has been selected, all copies of your responses to the questionnaire will be returned to the Clerk of the Court and kept in confidence, under seal, not accessible to the public or the media.

App. 23. Judge Fisher defended the blanket secrecy over the completed questionnaires on the

grounds that the court would not otherwise "get full candor from the jury, and that was the overriding concern." App. 43. However, he acknowledged that during voir dire "only one or two jurors out of maybe 70-some were unwilling to have any of their issues discussed." App. 43.

Counsel for the intervenors raised several points in favor of both more access and immediate access: "This is the time, while the trial is happening, and the public's attention is focused on this matter, that is when the public is most interested in learning about the full aspects of the process, and the jury selection is a critical piece of it." App. 39. The media counsel also told the Superior Court that the limited information it intended to make available to the public was insufficient to satisfy the constitutional requirement of openness and that a simple procedure was available to cure any legitimate privacy concerns:

> [W]hat I would ask is that the Court inform the jury that because of the First Amendment interest ... there is ... a presumption that their questionnaires are going to be disclosed ... and they can circle a particular answer if they think there's something particularly sensitive about it, and then [the Court] would have to be the final arbiter. And the test you would be applying is ... [whether there is] a highly sensitive piece of information that would cause ... an actual perceptible injury to someone's privacy just if it were disclosed.

App. 40-41.

Judge Fisher rejected these arguments, stating that a "juror-by-juror inquiry about their questionnaires – is – I think that would be incredibly disruptive of the trial itself." App. 42. He also said, "I've done a little bit of research, but really haven't had a chance to do more than that just because we've been involved in this trial. ... And I think I probably need to talk to somebody at least more versed in this – the legalities of this than I am to figure out ... what I'm compelled to do or not compelled to do." App. 44.

On the morning of November 15, 2010, after meeting with the jurors off the record in the

jury room and hearing no objection from the prosecution or the defense, the court released a short written statement listing each juror's age, gender, education level, and profession. See Henri Cauvin, A first look at the Levy jury, The Crime Scene, WASH. POST, Nov. 15, 2010. The next day, the media organizations, including The Post, filed a request for formal, on-the-record findings from the Superior Court explaining the reasoning and basis for its ongoing denial of any access to the 11-page questionnaires themselves with the significant additional information they contained. See Media Intervenors' Request for Findings Regarding Continuing Sealing of Juror Questionnaires, U.S. v. Guandique, No. 2009 CF1 009230 (D.C. Sup. Ct. Nov. 16, 2010). The media intervenors wrote that the injury to the public's First Amendment and common law rights of access to judicial proceedings and records was especially significant because the high-profile trial was almost over and the right to contemporaneous access to this information had been effectively denied by the court's inaction. Indeed, that very day, counsel for the government and the defendant gave their closing arguments, and Judge Fisher instructed the jury. On November 22, 2010, the jurors returned with their guilty verdict against Mr. Guandique.

In the post-verdict news coverage that followed on November 22 and 23, 2010, at least four members of the jury of nine women and three men who decided the case, Linda Norton, Sharae Bacon, Emily Grinstead, and Sue Kelly, spoke to the press and were quoted by name in The Post and in other local and national media, including USA Today, NPR, and CNN, discussing the evidence and the reasons for the jury's verdict; at least six of the 12 jurors also appeared on television, having chosen to participate in a press conference outside the courthouse after the verdict was announced.[2] Mr. Guandique has since moved for a new trial. On February

[2] See Keith L. Alexander, Jurors focused on Guandique cellmate, previous attack victims, WASH. POST, Nov. 22, 2010; Oren Dorell, Immigrant guilty in 2001 Levy murder, USA TODAY, Nov. 22, 2010; Jennifer Ludden, Man Convicted In Chandra Levy Slaying, All Things

11, 2011, Judge Fisher denied his motion and sentenced him to 60 years in prison.

Neither the prosecution nor the defense opposed the media request to release the juror questionnaires in full. Susan Levy, the victim's mother, filed an opposition requesting that certain photographs that were admitted as trial exhibits be placed under seal (a request that the media intervenors did not oppose), but she did not address the jury questionnaires. See Victim's Opposition in Part to Motion of The Washington Post, the Associated Press, Gannett Company, Inc., and Reporters Committee for Freedom of the Press for Contemporaneous Access to Trial Exhibits and Completed Juror Questionnaires, U.S. v. Guandique, No. 2009 CF1 009230 (D.C. Sup. Ct. Nov. 22, 2010).

A full hearing on the intervenors' motion was not held until November 24, 2010, two days after the verdicts were rendered and members of the jury made themselves available (by name and on television) to the public and press to speak about the case. At the hearing, Judge Fisher ruled from the bench that he would not publicly disclose the completed jury questionnaires. App. 70. There was no written order. In oral findings, Judge Fisher's principal justification was that, in the off-the-record discussions with jurors 10 days earlier, they were – "to a person" – concerned about their privacy and that "people were going to try to talk to them and intrude upon their private or their working lives." App. 57. The court was also "somewhat equally concerned about that afterwards because I don't know – if jurors believe that they're going to be pursued after trial because of information they provide privately, then I think they're going to have a lot of difficulties giving up that information." App. 57-58.

Regarding its privacy concerns, the court did not make findings beyond these general

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Considered, NPR, Nov. 22, 2010; Kelly Marshall Smoot, Jury convicts man in killing of Chandra Levy in 2001, CNN, Nov. 22, 2010; see also Jury on Convicting Guandique, WRC-TV television broadcast Nov. 22, 2010, available at http://www.nbcwashington.com/ news/local-beat/Jury_on_Convicting_Guandique_Washington_DC-109984769.html.

conclusions. It did not cite any specific information that any juror wished to keep confidential, or articulate even in generic terms the privacy interests that would be implicated by disclosure of such information as familiarity with Rock Creek Park, exposure to pre-trial publicity, and the like. Nor did the court indicate that it had reviewed the completed questionnaires with the jurors at any time to determine whether blanket sealing was warranted. While noting that District law regulates the use of certain information collected during jury service, App. 55, 63, the court stated, "I don't think we have something one way or the other that tells us what to do with questionnaires. I quite frankly did not think about it in advance." App. 64.[3]

Judge Fisher also maintained that public access to questionnaires would create a risk of "unfairness during the trial itself. That all of a sudden there will be information out there about individual jurors and it will become known to them and will enter into their deliberative process." App. 57. According to the court, "bloggers" on the Internet could not be prevented from publicizing this information: "I have no idea what you do to stop the sort of blogosphere out there ... . How do we stop people in the age of technology – they get whatever information they want and they put it out over the internet or some other means." App. 58, 67. The result, Judge Fisher said, would be that Superior Court judges would be "disinclined" to use expanded questionnaires in the future if they were presumptively public. App. 63.

Counsel for the intervenors described how both the privacy and the fairness concerns raised by the court could be resolved while at the same time preserving the constitutional presumption of openness in criminal trials:

> The fairness of the trial, your Honor, I think Courts have time and again found is more than adequately addressed through sequestration of the jurors, if need be, in a case like this.

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[3] The local statute protects juror names, addresses, and other identifying information. See D.C. Code § 16-5102(a)-(c) (2011).

> The privacy issues can be addressed by withholding the particular information that was so sensitive that there was a privacy interest that trumps the 1st Amendment interest in access. That can be done by having selective questioning at a juror's request be done privately. That can be done by using a written questionnaire but telling jurors that the questionnaire is going to be public and telling the juror that if there's something they don't want to put down on paper, then they can take that up ... privately with the Court.

App. 68-69.

In defense of its decision to deny public access to the questionnaires, the Superior Court also referred to the fact that it had indicated to prospective jurors that their answers would be used only for voir dire and remain confidential. "And so having told the jury that," Judge Fisher stated, "I intend to live up to that promise unless the Court tells me I have to do otherwise." App. 59. The media counsel objected that such an unqualified promise should not have been made at the outset, and that it "put things ... off the tracks constitutionally right there." App. 62. The court rejected that argument and denied counsel's request for a finding that such promises should not be extended in future cases. App. 69. The Post now takes this appeal.

ARGUMENT

Written juror questionnaires are an essential part of voir dire proceedings, and the public has a presumptive right of access to them under the First Amendment and the common law. The Superior Court turned this presumption upside down by promising prospective jurors absolute confidentiality even before they had filled out their forms. The trial judge should have made no such promise because Supreme Court authority permits closure of presumptively open criminal judicial proceedings only after an objection has been raised and considered by the trial court under the daunting test of strict scrutiny. In light of this constitutionally-mandated presumption, the Superior Court clearly should not have promised secrecy over the content of the completed juror questionnaires before it knew what they contained.

Maintaining a total seal on the basis of purported jury privacy interests was equally a constitutional error because no subsequent on-the-record findings reveal any individual juror concerns over specific portions of the questionnaires. Nor can fair trial rights conceivably overcome the presumptive public access to these materials when the defendant himself did not object to their release in the first place. Under the de novo review required by the First Amendment, the trial court has failed to show that the wholesale sealing of these questionnaires was a narrowly-tailored means of achieving a compelling governmental interest.

Moreover, the existence of private, sensitive information on the questionnaires that is personally identifiable is not likely. The questionnaires did not inherently solicit such sensitive information (unless a prospective juror was a victim of or witness to a violent crime), and if any person did reveal personal facts that were highly sensitive, the forms did not, in any event, record actual juror names or addresses. The vast majority of the more newsworthy questions focus on the attitudes toward the daily realities of life in urban America – feelings about gang activity, illegal immigration, non-English speakers, even about tattoos on MS-13 members – found in a panel of citizens facing their solemn duty in a trial over a sad and long-unsolved crime. The experiences they brought to the jury room are a matter of great community interest. Jurors ultimately dispense justice in private but trust in this system prevails because the First Amendment and the common law make the manner in which they are selected public.

I. The Constitution requires de novo review of the trial court's ruling.

Under the First Amendment, a trial court's denial of access to jury questionnaires used as part of the voir dire process must be reviewed de novo to ensure that the decision was "necessitated by a compelling government interest, and ... narrowly tailored to serve that

interest." Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) ("Press-Enterprise I"); see also Virginia Dep't of State Police v. Washington Post, 386 F.3d 567, 575 (4th Cir. 2004) ("We review a district court's decision concerning access under the First Amendment de novo."). De novo review under the Constitution also requires this Court to examine the record to see if the least restrictive means were employed by the trial court to protect the interests it found more important than the First Amendment. "Absent consideration of alternatives to closure, the trial court could not constitutionally close" public access to the completed questionnaires used at voir dire in this case. Press-Enterprise I, 464 U.S. at 511.

II. The First Amendment and the common law create a presumption of access to all aspects of criminal trials, including to juror questionnaires used in voir dire.

A. The constitutional and common law right of access to judicial proceedings and records arises out of historical experience and plays a key structural role in promoting public confidence in the administration of justice.

In Richmond Newspapers v. Virginia, 448 U.S. 555, 580 (1980) (Burger, C.J.), the Supreme Court found that "the right to attend criminal trials is implicit in the guarantees of the First Amendment[.]" In recognizing a constitutional requirement in the presumption of openness, the Court based its decision on two fundamental features of the criminal justice system. The first was "a long history of trials being presumptively open" in England. Id. at 575; see also id. at 590-91. This tradition of public justice carried over to colonial America, where "throughout [the country's] evolution, the trial has been open to all who cared to observe." Id. at 564. The presumption of public criminal trials was thus "common practice in America when the Constitution was adopted." Press-Enterprise I, 464 U.S. at 508. A second, equally important ground for the Supreme Court was – as this Court has put it – "its perception that not only do open trials enjoy an ancient history, but also public access serves the values embodied in the first amendment." Mokhiber v. Davis, 537 A.2d 1100, 1107 (D.C. 1988); see Richmond

Newspapers, 448 U.S. at 577, 580 ("[W]ithout the freedom to attend such trials ... important aspects of freedom of speech and of the press" would be "eviscerated.").

Thus, both historical tradition and deeply-held constitutional values compelled the recognition of a First Amendment right of public access to criminal trials. Criminal proceedings, the Supreme Court declared in Richmond Newspapers, must be open to the public in the absence of "an overriding interest articulated in findings." Id. at 581. Justice Brennan, in a concurring opinion, recognized a third, "structural" interest served by open criminal proceedings – they further the institutional interest of "maintaining public confidence" in the fairness and integrity of the judicial system itself. Id. at 595.

Two years later, in Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982), the Court reaffirmed the right of access to criminal trials and reiterated that this "uniform rule of openness" was the product of "both logic and experience." Before public access to criminal proceedings is denied, "it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." Id. at 606-07. Moreover, the interest must be articulated "along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." Press-Enterprise I, 464 U.S. at 510. See also Nellson v. Bayly, 856 A.2d 566, 567 (D.C. 2004) (noting the "explicit and authoritative guidance" from the Supreme Court under the First Amendment "on the standards and procedures governing the limited authority of courts to restrict public access" to criminal proceedings). The same First Amendment rule that protects access to judicial proceedings also protects access to judicial records. See Washington Post v. Robinson, 935 F.2d 282, 288 (D.C. Cir. 1991) (joining sister circuits in applying constitutional standards to the unsealing of plea agreements and related proceedings).

In addition to the First Amendment right of access, the common law also confers a presumptive right both to attend criminal trials, see Richmond Newspapers, 448 U.S. at 589 (Brennan, J., concurring), as well as to examine judicial records. In Nixon v. Warner Communications, 435 U.S. 589, 597-98 (1978), the Supreme Court found that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." See also Publicker Indus. v. Cohen, 733 F.2d 1059, 1066-67 (3d Cir. 1984) ("[A] common law right of access to ... inspect judicial records is beyond dispute."); In re Application of National Broadcasting Co., 653 F.2d 609, 612 (D.C. Cir. 1981) ("As all parties agree, the existence of the common law right to inspect and copy judicial records is indisputable."). This Court recognized a common law right of access to judicial records in Mokhiber, 537 A.2d at 1108, where it held that both the constitutional and common law rules "ensure a presumption of access and permit a court to bar disclosure only when the specific interests favoring secrecy outweigh the general and specific interests favoring disclosure."

B. The constitutional and common law presumption of openness applies fully to the voir dire process, including completed jury questionnaires.

The broad presumptive right of access to criminal proceedings and records guaranteed under the First Amendment and the common law does not begin once the jury is seated but rather in the pre-trial process that includes the voir dire examination of potential jurors. In Press-Enterprise I, 464 U.S. at 503, a California trial court judge closed all but three days of extensive voir dire proceedings conducted prior to an emotionally-charged trial involving the rape and murder of a teenage girl. The closure was supported both by the defendant, who cited his Sixth Amendment rights to a fair trial, and the government, which cited concerns for juror privacy. Id. at 510-11. But the Supreme Court, extending the constitutional guarantees it created in Richmond Newspapers to jury selection, unanimously held that the closure violated the public's

First Amendment rights. Id. at 513. Justice Brennan wrote for the Court that "[c]losed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." Id. at 509; see also id. at 510 ("The presumption of openness may 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.").

The First Amendment right of access to jury selection has been repeatedly reinforced by the federal appellate courts as well. In ABC v. Stewart, 360 F.3d 90 (2d Cir. 2004), the Second Circuit moved quickly to overturn a trial court order barring the media from attending the in camera voir dire of jurors in the prosecution of television personality Martha Stewart for insider trading. Following Press-Enterprise I, the appellate court held that the closure, which had been requested by the prosecution, was a violation of the public's First Amendment rights. Despite the "intense media coverage" of the proceedings, the Second Circuit found "nothing in either the district court's findings or in the record to suggest that the presence of reporters at voir dire proceedings would have especially chilled juror candor" or otherwise abridged Ms. Stewart's Sixth Amendment rights. Id. at 101-02. Indeed, the court instructed that if media attention alone were "sufficient to warrant closure, then courts could routinely deny the media access to those cases of most interest to the public, and the exception would swallow the rule." Id. at 101.

The right of the public to observe voir dire extends not only to the live questioning of potential jurors, but also to completed jury questionnaires. While both the Constitution and the common law require this result, the courts that have decided the issue have situated the right in the First Amendment and the Press-Enterprise I body of cases because written jury questionnaires "serve as an alternative to oral disclosure of the same information in open court" and are "synonymous with, and a part of, voir dire" proceedings. Bellas v. Superior Court, 85

Cal. App. 4th 636, 640 n.2 (2000); Lesher Communications v. Superior Court, 224 Cal. App. 3d 774, 778 (1990) ("The questionnaire is a part of the voir dire itself."); Beacon Journal Publishing Co. v. Bond, 781 N.E.2d 180, 188, 196 (Ohio 2002) (applying "experience and logic" test from Press-Enterprise I to request for completed juror questionnaires). The purpose of jury questionnaires is to "streamline the jury selection process," United States v. George, Misc. No. 92-301, 1992 WL 233354, *1 (D.D.C. July 23, 1992) (Lamberth, J.), and to "expedite the examination of prospective jurors." Beacon, 781 N.E.2d at 188. That the examination is done through written questionnaires rather than in open court "is of no constitutional import." Id. at 189. Courts have thus consistently held that "the First Amendment qualified right to open proceedings in criminal trials extends to prospective juror questionnaires." Id. at 188.

To hold otherwise, of course, would open up a massive loophole in the public's First Amendment rights. As the Beacon court and others have recognized, the public's right to attend voir dire cannot hinge on whether it is conducted in writing or by live testimony – by that logic, all constitutional rights of access could be circumvented by replacing a courtroom proceeding with a written one. The holding of Press-Enterprise I is eviscerated unless written questionnaires are subjected to the same presumptive right of access as live voir dire.

The unassailability of that principle was recognized by the federal trial court in the District of Columbia in George, a high-profile criminal case similar to this one. There, U.S. District Judge Royce Lamberth, now Chief Judge, had prepared a 36-page questionnaire for prospective jurors in advance of individual questioning. Id. at **1-2. As it did here, The Post filed an unopposed application seeking the release of the completed questionnaires. The court, applying the authority on the constitutional right of access to voir dire, determined in a written decision – issued only two days after the jury was empanelled and before trial had begun – that

the release of the completed questionnaires was required "in keeping with the legal standards as set forth by ... the United States Supreme Court and this Circuit." Id. at *2; see also Cable News Network v. United States, 824 F.2d 1046 (D.C. Cir. 1987) (setting out test under Press-Enterprise I that must be met before voir dire can be closed to the public).[4]

Many state appellate courts have similarly held that the public has a constitutional right to view jury questionnaires completed as part of voir dire. For example, in Forum Communications v. Paulson, 752 N.W.2d 177 (N.D. 2008), the North Dakota Supreme Court ordered the release of a 34-page jury questionnaire used in a sensational murder trial. The appellate court concluded that the trial court's stated interests in maintaining the questionnaires under seal were "insufficient to rebut the presumption of openness and to warrant a blanket closure." Id. at 185; see also Beacon, 781 N.E.2d at 184-85, 195 (granting media request to make public questionnaires of jury in murder trial)); Lesher, 224 Cal. App. 3d at 778 (same); In re Matter of Newsday, 159 A.D.2d 667, 668-70 (N.Y. App. Div. 1990) (same); Copley Press v. Superior Court, 228 Cal. App. 3d 77, 89 (1991) (granting media request to provide access to jury questionnaires in future criminal proceedings). Public access is not only presumed to be full and complete but also immediate and contemporaneous with trial. See Capital City Press v. Erwin, 619 So. 2d 533 (La. 1993) (granting intervenor access to completed juror questionnaires and commanding trial court to make them available "within 24 hours from the time of this Order").

In a tale of two trials, taking place at the same time as the Guandique prosecution in Washington was another long-awaited and high-profile proceeding in New York where Ahmed Ghailani was facing charges for his role in the 1998 bombings of the U.S. embassies in Kenya

[4] In George, 1992 WL 233354, at *2, the court ordered the release of the completed questionnaires of all prospective jurors, rather than just those selected to serve on the jury. Here, by contrast, The Post voluntarily limited its request to the questionnaires of the 16 empanelled jurors.

and Tanzania. But in U.S. v. Ghailani, Crim. No. 98-1023 (S.D.N.Y. filed Sept. 21, 1998), U.S. District Judge Lewis Kaplan granted a request from the media to release the completed juror questionnaires. See Order, U.S. v. Ghailani, Dkt. No. 1024 (S.D.N.Y. Sept. 22, 2010). In Ghailani, neither the government nor the defendant objected to the release of the materials. Indeed, the U.S. Attorney conceded that "[c]ompleting questionnaires is ... an integral part of the voir dire process." Letter from Preet Bharara, U.S. v. Ghailani, Dkt. No. 1025 (S.D.N.Y. Sept. 22, 2010) (government not objecting to media request as long as jurors provided opportunity to request that court determine that certain portions of their completed questionnaires remain confidential); see also Letter from Michael Bachrach, U.S. v. Ghailani, Dkt. No. 1030 (S.D.N.Y. Sept. 27, 2010) ("Defendant Ahmed Khalfan Ghailani, by and through his attorneys, respectfully submits that he has no objections to any of the requests made the press[.]"). Two trials, two cities, two questionnaires, but only the New York court complied with its constitutional duty to maintain the fullest possible public access to the materials used in voir dire proceedings.

III. In shifting the burden to the public to justify disclosure of court proceedings, the trial court failed to follow well-established First Amendment authority to implement and preserve the presumption of openness in criminal trials.

A. Concerns about juror privacy were unsubstantiated and refuted by the record, and sealing the questionnaires to protect fair trial rights was unwarranted where the defendant did not object to their release.

The trial court's solicitude for the privacy of the jury, however well-intentioned, is insufficient to justify sealing answers to 51 of the 55 questions for all of the 16 empanelled jurors. Instead of starting with the presumption that everything in the questionnaires must be disclosed and then allowing redaction of any portions that, based on the content of the actual responses, raised genuine privacy concerns, the court decided to release four hardly illuminating categories of information and left everything else under seal. In effect, it reversed the

constitutionally-mandated presumption of openness.

Trial judges have long sought to balance jurors' privacy interests against the public's constitutional right of access to criminal trials. In Press-Enterprise I, 464 U.S. at 511, the Supreme Court held that "[t]he jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain." However, a juror's preference for privacy in such situations must be weighed against the need for openness, which "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Id. at 508. Press-Enterprise I set forth a procedure to achieve that balance by accommodating juror privacy in "deeply personal" situations while simultaneously "minimizing the risk of unnecessary closure" of voir dire proceedings:

> To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge in camera but with counsel present and on the record. ... By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy.

Id. at 512 (emphasis added).

The Press-Enterprise I procedure is constitutionally compelled not only for the examination of jurors in open court, but also for the examination that takes place through written questionnaires that are an inherent part of voir dire proceedings. See George, 1992 WL 233354, at *4; Forum Communications, 752 N.W.2d at 185; Beacon, 781 N.E.2d at 189-190; Lesher, 224 Cal. App. 3d at 779; Copley, 228 Cal. App. 3d at 81, 87;

Bellas, 85 Cal. App. 4th at 645-46; Newsday, 159 A.D.2d at 669; Capital City Press, 619 So. 2d at 534. The Superior Court committed constitutional error by shifting the presumptions in this case – it treated the completed jury questionnaires as if they were presumptively private (even before they were filled out) instead of recognizing them as the presumptively public materials that they indisputably are. It failed to follow Press-Enterprise I with respect to these forms and instead placed disproportionate weight on a potential threat to juror privacy represented by their disclosure.

The substantive claim to privacy is much weaker in this case, in fact, than in cases where questionnaires have been released:

- The record is devoid of any specific threats to or harassment of jurors as was present in Forum Communications, 752 N.W.2d at 179, and Newsday, 159 A.D.2d at 669.

- The Post did not seek completed questionnaires from the entire jury pool or all of those who participated in oral voir dire as was the case in George, 1992 WL 233354, at *4, Forum Communications, 752 N.W.2d at 179, and Lesher, 224 Cal. App. 3d at 779.

- The request for disclosure was unopposed, unlike in Press-Enterprise I, 464 U.S. at 504, and in Lesher, 224 Cal. App. 3d at 777. Judge Fisher acknowledged that during oral voir dire very few prospective jurors refused to answer questions on the record. App. 43.

- The questionnaires did not contain personally-identifiable information such as the names and addresses that were released in Forum Communications, 752 N.W.2d at 179, and Beacon, 781 N.E.2d at 195, or other categories of private information such as social security, telephone, and driver's license numbers. See id. at 190. Nor did the questionnaires probe into "family members' mental health, history of therapy and counseling, sexual abuse ... and details of the person's religious beliefs and practices" as did the requests in the recent prosecution of Brian David Mitchell for the kidnapping of Utah teenager Elizabeth Smart. See U.S. v. Mitchell, No. 2:08CR125, 2010 WL 4386915, *4 (D. Utah Oct. 29, 2010).

- The Ghailani terrorism trial in New York called for security and juror protection measures that far exceeded the procedures in this case. See Order, U.S. v. Ghailani, Dkt. No. 1029 (S.D.N.Y. Sept. 27, 2010). None of the jurors in Ghailani met with the news media after their verdict. That at least six of the Guandique jurors voluntarily identified themselves by speaking to the press after trial or by participating in the post-verdict press conference suggests they did not fear for their personal privacy. The Superior Court's concern for the possibility of prejudice to the trial arising out the proliferation of private

juror information in the "blogosphere" was pure speculation and an improper basis for abridging First Amendment rights.

Although the questionnaire in this case was longer and more detailed than is typical in Superior Court practice, the questions themselves were not particularly invasive. A number of them covered basic educational, employment, and residency information. App. 24-25. Individuals were asked about prior jury service; connections to law enforcement or victims' rights groups; and familiarity with the crime scene, pre-trial publicity, or with any of the participants at trial. App. 23-33. Standard assurances were sought about the ability of the jurors to be fair and to avoid press coverage during trial. App. 30-33. More specific to this case, potential jurors were asked about any bias they may harbor about the Hispanic community, illegal immigration, or the MS-13 gang. App. 27-29. But unless any person empanelled on the 16-member jury was a victim of or witness to a violent crime or sexual assault and objected to making that information public, App. 27, the release of the completed questionnaires could not be expected to lead to disclosure of sensitive personal information. In the absence of any findings by the trial court to the contrary, the assumption must be that it will not.

Nor was withholding the questionnaires justified on fair-trial grounds. Any asserted threat to a fair trial resulting from disclosure was conjecture to begin with and is particularly remote now that the trial is over and the jury has been disbanded. To be sure, the right of the accused to "fundamental fairness in the jury selection process is a compelling interest" to be weighed against the presumption of openness. Press-Enterprise I, 464 U.S. at 510-11. But there must be concrete, fact-specific findings – not speculation – to warrant closing voir dire on this ground. See id. at 510; see also Beacon, 781 N.E.2d at 191 ("[W]e find the record to be void of specific findings of prejudice" to the defendant sufficient to deny access to jury questionnaires.).

There were no such findings here. Indeed, it is telling that Mr. Guandique has not

objected to the release of the questionnaires – as the defendant did in Press-Enterprise I. Judge Fisher had ample tools to deal with potential prejudice to the trial if he believed that release of the questionnaires would risk affecting the outcome of the trial. He can admonish jurors to avoid press reports and conversations about the case outside of deliberations. He can also sequester juries. Resorting to a blanket sealing of the questionnaires in the absence of findings that these other steps would have been inadequate to protect the integrity of the trial violates the First Amendment presumption of openness. In any event, such a rationale for sealing had evaporated by the time of the second hearing, when the court continued to deny access to the completed questionnaires even though the verdict had been rendered and many jurors had spoken freely to the press about their decision.

Finally, the withholding of completed questionnaires cannot be justified on the basis of a speculative fear that their release would have caused the Guandique jurors – or will cause future juries in Superior Court – to be less candid in their responses. Jurors will not be any "less forthcoming" if a trial court properly follows Press-Enterprise I by permitting them to object to disclosure of answers to specific questions when completing jury questionnaires. Id. As the Ohio Supreme Court observed in Beacon, "such jurors will have no more incentive to withhold information from a questionnaire than they would at oral voir dire – where it is undisputed that the mere risk of untruthfulness does not give rise to a substantial probability of prejudice." Id.

B. The trial court failed to find means less restrictive than blanket sealing to accommodate legitimate privacy concerns such as limited redactions to the questionnaires taken in response to affirmative requests from jurors.

The Superior Court also erred in its failure to seriously consider "alternatives to closure and to total suppression" of the questionnaires as required by the First Amendment and the ruling in Press-Enterprise I. See 464 U.S. at 513; see also id. at 520 (Marshall, J., concurring) ("[P]rior

to issuing a closure order, a trial court should be obliged to show that the order in question constitutes the least restrictive means available for protecting compelling state interests."). Indeed, the trial judge seemed caught off guard by the constitutional implications of his decision to use written questionnaires, confessing that he "quite frankly did not think about it in advance." App. 64. While the trial court did release very limited information about the jury, no evidence exists that it fulfilled its obligation to exhaust alternatives to blanket sealing. More surgical means, such as first redacting and then releasing the questionnaires, were readily available.

Courts across the country have implemented Press-Enterprise I by sealing discrete portions of questionnaires only as necessary to protect genuine privacy concerns. For example, in Newsday, 159 A.D.2d at 668, a New York state appellate court affirmed the trial court's release of completed questionnaires with the redaction of "the names of the petit jurors and any answers which would enable the public to learn the identity of those jurors." The trial court made specific findings that withholding the identifying information was necessary to protect the jury in light of "daily increasing tense emotions among members of the victim's family and members of the defendant's family and reported threats on defense counsel." Id. The appellate court agreed, finding that the judge had "merely deleted a very small fraction of the material in the written questionnaires based on a specific finding which clearly showed that the petit jurors' ability to serve, without fear of intimidation or harassment, was in jeopardy." Id. at 670-71 (citations omitted) (emphases added). See also Bellas, 85 Cal. App. 4th at 651 ("As to the questionnaires of trial jurors, the court was limited to ensuring that the personal juror identifying information (names, addresses, and telephone numbers, only) was redacted.").

The trial court in George took a similar approach, releasing the full completed questionnaires after only "redact[ing] those portions of prospective jurors' answers which

contain deeply personal and private information that the prospective jurors would wish to keep out of the public domain." George, 1992 WL 233354, at *2; see also id. at *4 (citing Press-Enterprise I, 464 U.S. at 511). Limited redaction was warranted, the federal court found, because "the prospective jurors have already appeared in open court" and "the court would be running the risk that this deeply personal information could be linked with those individuals who wish to keep it private." Id. at *4.

Even though the information elicited in the questionnaires in this case is not obviously of a deeply personal and sensitive nature, counsel for the intervenors advised Judge Fisher at the November 12, 2010 hearing – while the trial was still ongoing and the public was keenly focused on the proceedings – that if the court would not immediately make the full questionnaires available the appropriate procedure was to "inform the jury that because of the First Amendment interest" and the "presumption that their questionnaires are going to be disclosed," each juror should notify the court within a short specified period of time if there are any answers that are "particularly sensitive" that they would prefer to keep confidential. App. 40. At that point, the trial court would serve as the "final arbiter" to determine whether the responses designated by the jurors, if any, truly reflect a compelling privacy interest that would require some redaction before release. App. 41. The Superior Court, however, took no action with respect to the questionnaires other than preparing a separate document releasing the age, gender, employment, and educational information for each juror.

The Post does not object to the limited redaction of questionnaire responses that touch upon profoundly personal and sensitive information. See Press-Enterprise I, 464 U.S. at 512 ("For example a prospective juror might privately inform the judge that she, or a member of her family, had been raped but had declined to seek prosecution because of the embarrassment and

emotional trauma from the very disclosure of the episode."); George, 1992 WL 233354, at *4 ("As one prospective juror stated in his/her questionnaire in response to the question of whether he/she wishes to keep any information in the questionnaire private, 'I do not wish to reveal my [relative's] past personal information in open court. It is confidential. He has a good job and is doing good. His past is no one's business.'"). Such redactions, however, must be narrowly tailored and comply with required procedures under the First Amendment. See, e.g., id. ("By making the above findings and considering whether alternatives are available, the court has satisfied the requirements ... in Press-Enterprise [I]."). And, if the presumption of openness is to mean anything, each and every redaction must be made only after reviewing the actual content of the juror's answer. Holding that 51 of the 55 answers will be excluded, regardless of what those answers were, flips that presumption on its head.

The Superior Court did not take other basic procedural steps to ensure meaningful protection of the public's First Amendment rights in open criminal proceedings. After The Post moved to intervene, more than a week passed before the court notified the newspaper that it had decided to release only four limited facts about each juror. At the brief afternoon hearing on November 12, 2010, counsel for the intervenors tried to persuade the court that significantly more was required. Not only did the court's presumptions (and its promise) against disclosure deny vital information to the public when focus on the trial was at its peak, its approach also contradicted the instructions in Press-Enterprise I for judges to wait for an "affirmative" request from a juror to be heard, see 464 U.S. at 512, before closing any part of voir dire.

The court's inaction and continued withholding of information forced the intervenors to file a request for findings. Only after the jury returned with its verdict did a full hearing on the motion finally take place. This sequence of events stands in contrast to the chronology in

George, where the trial court ordered the questionnaires released only two days after voir dire ended. In addition, the court in George took other measures to preserve the public's right of access. It held voir dire in the "large ceremonial courtroom" to accommodate the press and the public, George, 1992 WL 233354, at *5; the court here directed the press and the public into a room where voir dire could be heard but not seen. The court in George released the questionnaires after redacting information that was affirmatively identified by jurors as confidential, id. at **4-5; the court here apparently determined on its own initiative, even before consulting jurors, that virtually the entire questionnaire was not suitable for release. By placing the specific objections of jurors on the record, the court in George showed that it had followed the constitutional roadmap of Press-Enterprise I. Here, the court met with jurors regarding the media request for access without a court reporter present, thus leaving behind no record of what transpired.

Under the de novo review required by the First Amendment, this Court's reversal of the Superior Court is warranted.[5]

C. The promise by the trial court to keep the completed juror questionnaires under seal turned First Amendment presumptions on their head and provided no basis to deny the public the constitutionally-mandated presumption of access.

Because the First Amendment and the common law guarantee a presumption of openness to criminal trial proceedings, including voir dire, as well as to judicial records, the trial court made a promise to jurors that it could not keep – namely, that "all copies" of their responses "to the questionnaire will be ... kept in confidence, under seal, not accessible to the public or the media." App. 23. The trial court, having improperly assured jurors that the completed

[5] Though it is not necessary to reach this issue since the denial of a First Amendment right of access must be reviewed de novo, see supra at 10-11, it is also apparent on this record that the lower court abused its discretion under the common law in sealing the questionnaires.

questionnaires would never be disclosed, then denied the public the access that the First Amendment and the common law compel on the basis that it had made a prior pledge of secrecy to the jurors. The Superior Court's promise should not have been made, and it does not support the decision to withhold the questionnaires from public release either during or after the trial.

The lower court ruling falls squarely into a pattern of cases from around the country where trial judges have been reversed – or reversed themselves – for making inappropriate promises extending confidentiality to juror questionnaires. For example, in Forum Communications, 752 N.W.2d at 178, the court told prospective jurors that their completed questionnaires, which included their names and addresses, "shall be sealed in an envelope and marked 'Confidential.'" A media company intervened during the trial seeking access to the questionnaires. After the jury verdict, when the company again requested the information, including the identities of the jurors, the trial court declined, stating in an order that it "gave its word to the jurors" and would not make the materials available. Id. at 179.

The Supreme Court of North Dakota reversed, finding the existence of a promise of confidentiality to a jury plainly insufficient to overcome the "presumption of openness" under the Constitution. Id. at 185. The North Dakota court concluded:

> We recognize that the use of expanded questionnaires is a valuable tool. ... as a way of obtaining extremely personal and sometimes embarrassing information from prospective jurors in criminal cases. ... We suggest that these expanded jury questionnaires be accompanied ... [by] unambiguous language that the questionnaires will become public records, and as an alternative to writing in sensitive personal data to a question, jurors can respond to the question by requesting a closed appearance. ... the court can have the in camera hearing transcribed and then decide if that portion of jury selection should be available or access denied based on the showing required under Press-Enterprise [I].

Id. at 185-86. The court was sweeping in its rejection of preserving jury secrecy in order to make good on a promise that was improper from the moment it was made. Trial judges, the

court definitively stated, "must not offer a guarantee of protection from public disclosure of information contained in juror questionnaires." Id. at 186 (emphasis added).

Similarly, the Ohio Supreme Court in Beacon considered a request for completed questionnaires in a capital rape and murder case. The trial court told prospective jurors that their responses to the 67-part questionnaire, which probed into jurors' "medical history, criminal record, and religious beliefs," would not be made public and that they "would be identified only by number." Beacon, 781 N.E.2d at 185. The state's highest court unequivocally rejected the argument that the questionnaires "should not be disclosed because they were completed pursuant to a promise of confidentiality." Id. at 190. "Constitutional rights," the court stated, "are not superseded by a mere promise of a trial judge to act contrary to those rights." Id. (emphases added).

The California appeals courts have likewise instructed that trial judges cannot fall back on pledges of secrecy over juror questionnaires as a way to withstand appellate review of an otherwise invalid ruling barring disclosure. In Bellas, 85 Cal. App. 4th at 640, a cover page on a juror questionnaire claimed, "Your answers will be used only in the selection of this jury and not for any other purpose .... [They] will be maintained by the Court, under seal and in confidence." The Court of Appeals flatly declared this unconditional assurance "incorrect." Id. at 652. Referencing Press-Enterprise I, the court held that "[n]o comprehensive offer of protection from public disclosure of information communicated on juror questionnaires is legally effectual where public access is mandated by the First Amendment." Id. at 652. See also Lesher, 224 Cal. App. 3d at 778 (rejecting trial court's guarantee that information jurors provide on written questionnaires "will not be seen by anyone except the lawyers, their staffs, the defendant, my staff, and myself"); Copley, 228 Cal. App. 3d at 82, 89 (holding that judge's pledge that

completed questionnaires would "not be distributed to anyone except [the trial court], [the court's] staff, and the attorneys in the case" was a "blanket denial of access to the questionnaires" that "was unconstitutional").[6]

Not only did the trial court make a promise that was inconsistent with constitutional and common law requirements, it also erred in believing that its actions were supported by a local statute. App. 55, 63. Under District law, upon the completion of jury selection, "no person ... shall divulge or use the name, home address, business address (if any), or any other identifying information of any citizen who participated in that jury selection, whether or not the citizen was selected to serve on the jury." D.C. Code § 16-5102(a) (2011). This provision, however, is not applicable to the questionnaires in this case because by their very nature they did not require jurors to provide their names, their addresses, or any other personally "identifiable information" – which is defined as information that "would reasonably lead someone to be able to communicate with or contact a citizen without his or her permission." D.C. Code § 16-5101(2) (2011). Furthermore, the court system itself retains the authority (as it must) to release any juror information to the public at any time. D.C. Code § 16-5102(a) (2011). Indeed, the statute would be unconstitutional if a court were to construe it to deny access to judicial proceedings and records on a lesser showing than required by the First Amendment. The expansive promise the trial court made to jurors in this case thus finds no support in District law.

That the Superior Court expressed the belief that judges will no longer use expanded jury

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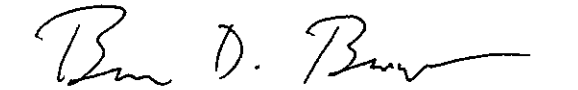
[6] In George, 1992 WL 233354, at *2, the blank questionnaires informed jurors that their answers "shall be used only by the court and counsel and shall be kept confidential and sealed," but the court did not attempt to withhold the materials on this basis. The federal trial court in the Elizabeth Smart kidnapping case released at the end of each day the questionnaires of those potential jurors who had completed oral voir dire, recognizing that its earlier "promise to the jurors regarding the confidential nature of their questionnaire responses was potentially at odds with the process detailed in Press-Enterprise I." Mitchell, 2010 WL 4386915, at *4.

questionnaires if they are presumptively public, see App. 44, 63, is beside the point. If trial courts find such questionnaires helpful in making jury selection run more efficiently or result in more dependably impartial juries, they are of course free to rely on them with even greater frequency and with more detail provided they comply with the constitutional requirements of Press-Enterprise I to maintain the presumption of openness for this additional -- but equally integral – part of voir dire. But courts cannot justify their well-meaning efforts to improve upon jury selection by shifting the focus of voir dire away from the tradition of oral colloquy and toward written interactions between counsel and potential jurors as a way to evade public scrutiny of the criminal justice system at work. The representations made to jurors in this case were unconstitutional and should be corrected by this Court so that in future cases trial judges will not make the same mistake and deprive the public of important First Amendment rights.

CONCLUSION

For the foregoing reasons, the order of the Superior Court should be reversed and vacated and this case remanded with instructions to release the completed questionnaires in full or to undertake the appropriate constitutional procedures to examine whether any limited and narrow redactions are required by a compelling governmental interest.

Respectfully submitted,



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I hereby certify that on this 22nd day of February, 2011, I caused a copy of the foregoing Brief of Appellant The Washington Post and the Appendix thereto to be served via first-class mail, postage prepaid, on:

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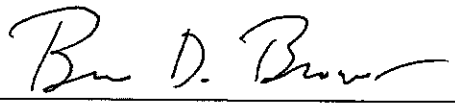

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