NO. 13-35243

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

INDEX NEWSPAPERS LLC,
DBA *The Stranger*,

Intervenor - Appellant,

v.

MATTHEW DURAN,

Defendant - Appellee.

OPENING BRIEF OF INTERVENOR-APPELLANT

On Appeal from the United States District Court
for the Western District of Washington
D.C. No. 12-GJ-00149
(Hon. Richard Jones)

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August 5, 2013

CORPORATE DISCLOSURE

Index Newspapers LLC is a Washington limited liability company, duly organized and validly existing in the State of Washington. Index Newspapers LLC has two members: Quarterfold, Inc., an Illinois corporation, and Loaded-For-Bear Publishing Co., a Washington corporation. Neither Quarterfold nor LFB is a public company, and the shareholders of Quarterfold and LFB are all natural persons.

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A. STATEMENT OF JURISDICTION

1. *Introduction*

Appellee Matthew Duran was subpoenaed as a witness to a grand jury in the Western District of Washington. After he refused to testify, the district court found him in contempt. The district court file (No. 12-GJ-00149) was sealed, apparently pursuant to Fed. R. Crim. Proc. Rule 6(e) ("Rule 6") and West. Wash. Local CrR 6(j)(2).[1] Appellant Index Newspapers LLP, dba *The Stranger*, moved to unseal the non-secret portions of Mr. Duran's file, and filed this appeal when the district court denied its motion.

2. *Subject Matter Jurisdiction of District Court*

The district court had jurisdiction over Mr. Duran pursuant to 28 U.S.C. § 1826. *The Stranger* petitioned the district court as a third-party intervenor to unseal the file pursuant to *In re Special Grand Jury (for Anchorage, Alaska)*, 674 F.2d 778, 782-83 (9th Cir. 1982), *citing Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 224-26 (1979). *See also* Western District of Washington Local CR 5(g)(8) ("A non-party seeking

[1] The sealed file is not accessible on PACER, and Mr. Duran's name and the case number cannot be located through a normal public search function.

access to a sealed document may intervene in a case for the purpose of filing a motion to unseal the document").

3. *Basis of Jurisdiction in this Court*

It is not clear whether this Court has jurisdiction to hear this appeal, or whether the only remedy is by means of mandamus review. *See, e.g.,United States v. McVeigh*, 119 F.3d 806, 809-10 (10th Cir. 1997) (describing split of circuits). Because of this uncertainty, *The Stranger* filed both a mandamus petition[2] and this appeal, following the example of other parties in similar circumstances.[3]

The Government's position in the mandamus case is that this Court has jurisdiction over *The Stranger*'s appeal, but mandamus is not

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[2] *Index Newspapers, LLC v. United States District Court for the Western District of Washington*, No. 13-71021.

[3] *See United States v. Connolly (In re Boston Herald, Inc.)*, 321 F.3d 174, 177 (1st Cir. 2003) ("To be sure of receiving prompt review, the Herald prudently made its request for access through two different procedural means, each raising the same substantive issues. On August 19, 2002, the *Herald* filed an interlocutory appeal from the district court's July 29 order; on October 21, it filed a petition for a writ of mandamus."); *In re Providence Journal Company, Inc*., 293 F.3d 1, 9 n. 3 (1st Cir. 2002) ("Along with its mandamus petitions, THE JOURNAL prudently filed a protective appeal."); *In re Special Grand Jury (for Anchorage, Alaska)*, 674 F.2d 778 at 779-80 ("From that denial, the movants appeal to this court or, in the alternative, petition this court for a writ of mandate.").

appropriate. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. at 231-33 (Rehnquist, J., concurring). While *The Stranger* opposes the Government's position in the mandamus case, and has argued that mandamus is the proper remedy, there is some authority that both remedies are appropriate and that, ultimately, it does not make any difference which form of review is used. *See United States v. Connolly (In re Boston Herald, Inc.)*, 321 F.3d at 177-78 (finding jurisdiction for both mandamus and appeal). Under the All Writs Act, 28 U.S.C. § 1651, "[a] federal court of appeals has the power to treat an attempted appeal from an unappealable (or possibly unappealable) order as a petition for a writ of mandamus." *United States v. Horn*, 29 F.3d 754, 769 (1st Cir. 1994). *See also United States v. McVeigh*, 119 F.3d at 809 n. 4 ("Treating an asserted appeal as a petition for a writ of mandamus in this situation is appropriate if Appellants have standing and have complied with the substantive requirements of Fed. R. App. P. 21(a)."), *citing In re Washington Post*, 807 F.2d 383, 388 & n.3 (4th Cir. 1986).

If mandamus is not appropriate, then this Court has jurisdiction under 28 U.S.C. § 1291.

4. *Timeliness of Appeal*

The district court entered its order granting in part and denying in part *The Stranger*'s motion to unseal Mr. Duran's file on February 4, 2013. ER 4-15.[4] On February 15, 2013, *The Stranger* filed a timely motion for reconsideration and motion to alter or amend the judgment under Fed. R. Civil. Proc. 59(e) and Western Wash. Local Civ. Rule 7. ER 148 (Dist. Ct. Dkt. No. 33). The district court denied this motion on February 27, 2013. ER 1-3. *The Stranger* filed its notice of appeal on March 26, 2013. ER 16-19. This appeal is timely under FRAP 4(a)(1) & (a)(4).

5. *Appeal From Final Order*

If mandamus is not the exclusive route to appellate review in this case, the district court's orders granting in part and denying in part the motion to unseal and the order denying reconsideration are final decisions allowing for an appeal under 28 U.S.C. § 1291. *See In re Special Grand Jury (for Anchorage, Alaska)*, 674 F.2d at 783-84.

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[4] Although the district court docket has been forwarded to this Court, ER 145-49, many of the documents below remain sealed. *The Stranger* does not have access to all of them and therefore cannot include them in the Excerpts of Record. Accordingly, where the documents are not available to *The Stranger*, citation will be to the docket itself. It should be noted that some, but not all, of the documents have been filed in the mandamus case, No. 13-71021.

B. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the public have a right to access portions of ancillary grand jury proceedings that do not involve matters enjoined to secrecy by Rule 6(e)?

2. Where the district court recognized that portions of a file in a grand jury recalcitrant witness case contained information that the public had the right to obtain, and in fact ordered that *The Stranger* be allowed access to the transcripts of portions of the contempt hearings, should the district court have unsealed the entire file and ordered the Government to select which portions of the file should then be redacted and sealed?

C. STATEMENT OF THE CASE

Appellee Matthew Duran was subpoenaed to a grand jury in the Western District of Washington. On August 31, 2012, he filed a motion to quash the subpoena. ER 145 (Dist. Ct. Dkt. No. 1). On September 13, 2012, the district court (the Hon. Richard Jones, presiding) denied that motion. ER 146 (Dist. Ct. Dkt. No. 6). Mr. Duran refused to testify, and was then found in contempt. ER 146 (Dist. Ct. Dkt. Nos. 8, 19, 20, 22). On September 21, 2012, Mr. Duran appealed the contempt order to this Court. ER 146 (Dist. Ct. Dkt. No. 12). On October 19, 2012, the Court affirmed the

contempt finding. ER 148 (Dist. Ct. Dkt. Nos. 23 & 30).[5] Mr. Duran remained in custody, and the district court file (and this Court's file on appeal) also remained sealed.

On November 5, 2012, Appellant Index Newspapers LLC, dba *The Stranger*, filed a motion in Mr. Duran's case[6] to unseal the portions of the file that did not contain grand jury secrets. ER 148 (Dist. Ct. Dkt. No. 24).[7] The United States opposed the motion, ER 148 (Dist. Ct. Dkt. No.25), but Mr. Duran did not oppose it. ER 148 (Dist. Ct. Dkt. No. 26, 27 & 28).

On February 4, 2013, the district court entered an order granting *The Stranger*'s motion in part and denying the motion in part. ER 4-15. The

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[5] Although this Court's decision in Mr. Duran's recalcitrant witness appeal remains under seal, both in this Court and in the district court, a copy is available on the Internet. *In re Grand Jury Subpoena (Matthew Duran)*, No. 12-35774 (9th Cir.10/22/13) (http://law.justia.com/ cases/federal /appellate- courts/ca9/12-35774/12-35774-2012-10-19.html). The copy in ER 85-88 comes from the Internet since the copy below remains sealed and is not accessible to Appellant.

[6] There was another recalcitrant witness whose proceedings were linked with Mr. Duran's, Katherine Olejnik. Western District of Washington, No. 12-GJ-00145. Ms. Olejnik's name appears throughout Mr. Duran's docket. *The Stranger* moved to unseal Ms. Olejnik's case as well. Although Ms. Olejnik's case is subject to the mandamus action, *The Stranger* has not filed a notice of appeal in her case.

[7] The docket mistakenly lists the motion as having been filed by Mr. Duran.

district court allowed *The Stranger* to have copies of the transcripts of the purportedly open portions of the contempt hearings,[8] but denied the remainder of the motion to unseal the files, even with redactions. *Id*. On February 15, 2013, *The Stranger* filed a motion for reconsideration and a motion to alter or amend the judgment under Fed. R. Civil. Proc. 59(e) and Western Wash. Local Civ. Rule 7. ER 148 (Dist. Ct. Dkt. No. 33).[9] The district court denied this motion on February 27, 2013. ER 1-3. The same date, the district court entered an order releasing Mr. Duran from custody. ER 20-25.[10]

The Stranger filed a petition for a writ of mandamus related to the district court's sealing orders on March 22, 2013. No. 13-71021. This petition is still pending. On March 26, 2013, *The Stranger* also filed a notice of appeal. ER 16-19.

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[8] While the district court ordered that a portion of one of Mr. Duran's contempt hearings be opened to the public, members of the public were still not allowed into the hearing. ER 41-44, 46, 77.

[9] Again, the docket mistakenly lists the motion as having been filed by the witnesses.

[10] The copy of this order at ER 20-25 was not obtained directly from the district court file as it is still sealed.

D. STATEMENT OF FACTS

Appellant Index Newspapers LLC operates several independent newspapers in the Pacific Northwest, including *The Stranger*, a weekly paper based in Seattle, Washington. Beginning in the summer of 2012, a reporter for *The Stranger*, Brendan Kiley, wrote a series of stories about a grand jury sitting in the Western District of Washington investigating anarchist activities. ER 79-84. The grand jury's focus reportedly has been on damage caused during a demonstration in downtown Seattle on May 1, 2012 (including damage to the William Kenzo Nakamura United States Courthouse). ER 47-84.

Several political activists in Portland, Oregon, and Olympia, Washington, were subpoenaed to testify before the grand jury. In the Fall of 2012, a number of them refused to testify and were incarcerated as recalcitrant witnesses. One witness, Matthew Duran, filed a motion to quash the subpoena, and this motion was litigated prior to his appearance before the grand jury. ER 89-113;[11] ER 145-46 (Dist. Ct. Dkt. Nos. 1, 3, 6,

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[11] The motion to quash and the Government's response are still sealed in the District Court, and were not accessible to *The Stranger*. However, Mr. Duran later filed these documents in the mandamus action, No. 13-71021, and the portions of the briefing related to the motion to

(continued...)

7 & 9). Mr. Duran ultimately refused to answer questions before the grand jury, was found in contempt and imprisoned. ER 146 (Dist. Ct. Dkt. Nos. 8, 19, 20). While in jail, for no apparent reason, Mr. Duran was placed into solitary confinement.[12] He unsuccessfully appealed the contempt finding to this Court. ER 85-88.

The Stranger filed a motion to unseal portions of the grand jury files related to Mr. Duran that did not contain matters that were covered by the secrecy requirements of Rule 6(e). ER 148 (Dist. Ct. Dkt. No. 24). The requested materials included the transcripts from the hearings related to the motions to quash, the transcripts from the contempt hearings, briefing, and the electronic dockets on ECF/PACER. In support of the motion, *The Stranger* submitted copies of various press articles covering the

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[11](...continued)
quash, ER 89-144, are taken from the mandamus case. ER 89-144. The briefing is not submitted for legal argument, but rather to demonstrate the lack of secret information contained therein. *See Circuit Rule* 30-1.5.

[12] The district court's release order recounts in great detail Mr. Duran's conditions of confinement in the isolation section of the Federal Detention Center at Sea-Tac. ER 22-23. In the mandamus case, No. 13-71021, Mr. Duran filed an extensive declaration from the district court about his conditions of confinement. It is not clear where in the docket of the district court this declaration can be found, so a copy of this declaration is not being included in the Excerpts of Record.

proceedings, including those from both domestic and international sources. ER 47-84. Mr. Duran did not oppose the motion, and the attorney for Mr. Duran submitted a declaration recounting how members of the public were actually excluded from what should have been the public portion of the contempt hearing on September 13, 2012. ER 41-45.[13] The Government opposed unsealing the non-secret portions of the grand jury files. ER 148 (Dist. Ct. Dkt. No. 25). Even the briefing on the unsealing motion was placed into the sealed district court file and was unavailable to the public.

At the same time that *The Stranger* was litigating access to the *Duran* (and the *Olejnik*) file, *The Stranger* filed another motion to unseal the search warrant file in *In re Search Warrant Issued on October 3, 2012*, Western District of Washington No. 12-MJ-534. In October 2012, the Government filed, without sealing, a search warrant affidavit related to searches stemming from the investigation of anarchists. After two press outlets

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[13] It is correct, as the district court noted, ER 2, that Mr. Duran's attorney did not file her declaration until after the Government filed its responsive pleading. However, *The Stranger* actually cited to Internet accounts of this closure in its opening pleading, ER 46 & 77, which clearly would have given the Government the chance to respond to the allegation of an improper closure. The Government's failure to deny the allegation should be seen as a concession that one of Mr. Duran's contempt hearing was in fact closed to the public. Mr. Duran's counsel's later declaration simply added additional evidence to a claim that had already been made earlier.

published stories about this affidavit, the Government obtained an order sealing the file. *The Stranger* successfully moved to unseal this search warrant file, with the district court placing the burden on the Government to propose redactions. ER 26-40.

On February 4, 2013, in a single order for both the *Olejnik* and *Duran* cases, the district court granted *The Stranger*'s motion in part and denied it in part. ER 4-15. This order itself was placed into the sealed district court file, and was inaccessible to the public. The district court allowed *The Stranger* to obtain transcripts of the public portion of the contempt portions of the hearings, ER 11, and clarified that the witnesses and their attorneys were free to distribute their pleadings. ER 14.[14] However, the district court denied the request to unseal the file, with the Government redacting documents related to grand jury secrets. The district court acknowledged in its order that unsealing, with redactions, could be accomplished, finding that the files contain:

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[14] ER 14 ("The media reports also rely on statements from Ms. Olejnik, Mr. Duran, their attorneys, and their associates. They are free to make whatever statements they wish; they have no obligation to preserve grand jury secrecy. To the extent they wish to disclose information they have submitted or received in these proceedings, they may do so.").

> a mix of secret grand jury material, grand jury material that may have lost its secrecy, legal argument, banal information, and more. *It is perhaps possible to assess every document in these files to redact secret grand jury material and divulge the remainder.* The result would likely be an incomplete and sometimes indecipherable "court file" that would be as likely to mislead the public as to enlighten it. Nonetheless, neither the court nor the Government has an obligation to sift through these grand jury proceedings to determine what is secret and what is not.

ER 14 (emphasis added).

The Stranger filed a motion for reconsideration and a motion to alter or amend the judgment under local rules and Fed. R. Civ. P. 59(e). ER 148 (Dist. Ct. Dkt. No. 33). *The Stranger* argued that the Government should review the files and segregate or redact secret grand jury material and divulge the remainder. On February 27, 2013, the district court denied *The Stranger*'s motion. ER 1-3. This appeal (and *The Stranger*'s petition for a writ of mandamus) timely followed.

E. SUMMARY OF ARGUMENT

The district court recognized that the public has a right to access portions of grand jury proceedings in a recalcitrant witness case that did not involve matters enjoined to secrecy under Rule 6(e). ER 10-11. The district court further found that some of the files at issue contained material that

was not secret, and that "[i]t is perhaps possible to assess every document in these files to redact secret grand jury material and divulge the remainder." ER 14. Yet, the district court concluded that it would be too much trouble to "sift" through the file and redact secret matters, and seal only the matters that were required to be sheltered from the public. Moreover, the district court concluded that somehow redactions "would be as likely to mislead the public as to enlighten it." *Id*.

This conclusion is wrong and conflicts with what other courts have done in similar situations. In fact, the district court's conclusions conflict with the order it itself issued in the parallel case, involving access to a search warrant affidavit. ER 26-40.

The Stranger does not seek in this appeal any material that would qualify as secret under Rule 6(e). Rather, based upon the First Amendment, the common law and Rule 6(e) itself, *The Stranger* seeks public access to non-secret portions of the proceedings in Mr. Duran's case that are ancillary to the grand jury proceedings, portions that do not contain any secret matters -- the briefing and court orders related to the motion to quash the subpoena, the contempt hearings and the release hearings, the transcripts for any portion of the proceedings that do not involve secret information, the

docket of the case, and the pleadings and court orders related to the motion to unseal itself. The information sought to be unsealed is of great public importance, involving a matter extensively covered in the local, national and international media, and therefore touches on the public's sacrosanct right to know.

Accordingly, the Court should reverse the district court and order that the *Duran* file be unsealed, with appropriate redactions, if any.

F. ARGUMENT

1. *Reviewability and the Standard of Review*

The issues of whether the public has a right under the First Amendment, the common law or Rule 6 to judicial materials involve issues of law, requiring *de novo* review. *See Times Mirror Co. v. United States*, 873 F.2d 1210, 1212 (9th Cir. 1989) (*de novo* review of public right to access search warrant affidavits in pre-indictment posture). The First Amendment interests at stake also require a "heightened" standard of review. *In re Providence Journal Company, Inc*., 293 F.3d at 11. Moreover, even if the standard of review is "abuse of discretion,"a district court abuses its discretion, by definition, when it makes an error of law. *A.D. v. State of Cal. Highway Patrol*, 712 F.3d 446, 460 (9th Cir. 2013).

The Stranger raised the issues in this appeal in the district court. ER 148 (Dist. Ct. Dkt. Nos. 24, 26, 33).

2. *The Right of Public Access to the Ancillary Grand Jury Proceedings*

As this Court recently noted, there is a qualified public right of access to judicial records in criminal cases that arises under both the First Amendment and the common law. *United States v. Business of Custer Battlefield Museum*, 658 F.3d 1188, 1192 (9th Cir. 2011), *citing Nixon v. Warner Commc'ns, Inc*., 435 U.S. 589, 597 (1978); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*"). To be sure, the right is qualified, and does not extend to all judicial documents that have traditionally been kept secret, such as grand jury transcripts and sealed search warrant materials in the midst of a pre-indictment investigation. *Kamakana v. City & Cnty. of Honolulu,* 447 F.3d 1172, 1178 (9th Cir. 2006).[15]

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[15] The historic reason for the generalized secrecy surrounding grand jury investigations was, in part, to protect the grand jurors from the overreaching power of the Crown, and thus, in many ways, was a protection of liberty and freedom, rather than as a tool of government oppression. *See generally United States v. Smyth*, 104 F. Supp. 283, 289 & n.17 (N.D. Cal. 1952) (explaining historic roots of secrecy of grand jury as protection against the Crown during the Stuart years).

On the other hand, the secrecy requirements involving grand jury transcripts and other pre-indictment materials do not extend so far as to cut-off public scrutiny of the "ministerial" aspects of a grand jury. *In re Special Grand Jury (for Anchorage, Alaska)*, *supra*. Similarly, concerns about secrecy cannot be applied to ban those called before grand juries from discussing their own testimony, and such a ban would violate the First Amendment. *Butterworth v. Smith*, 494 U.S. 624 (1990).

Thus, generalized concerns about the secrecy of grand jury proceedings do not require that contempt proceedings associated with so-called "recalcitrant witnesses" be held behind closed doors. In *In re Oliver*, 333 U.S. 257 (1948), the Supreme Court held to be unconstitutional a secret summary contempt procedure in a grand jury-type proceeding in Michigan:

> The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, [footnote omitted] to the excesses of the English Court of Star Chamber, [footnote omitted] and to the French monarchy's abuse of the *lettre de cachet*. [Footnote omitted] All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, [footnote omitted] the guarantee has always been recognized as a safeguard against any attempt to employ

> our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

333 U.S. at 268-70. *See also In re Rosahn*, 671 F.2d 690 (2d Cir. 1982) (vacating contempt citation because of improper closure of contempt proceeding); *In re Fula*, 672 F.2d 279, 283 (2d Cir. 1982) (same); *In re Grand Jury Matter*, 906 F.2d 78, 86-87 (3d Cir. 1990) (same).

Accordingly, Rule 6(e)(5) has an important limitation to its secrecy requirements: "Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury." The 1983 Advisory Committee notes to this rule explain that this language was included because of concerns about the First Amendment right to public access because of the proceedings' similarities to criminal trial, and because of the Fifth and Sixth Amendment rights of the person found in contempt. Rule 6, Notes of Advisory Committee on Rules -- 1983 Amendment, *Note to Subdivision (e)(5)*. *See In Re Grand Jury Matter*, 906 F.2d at 86.

The Supreme Court has used the two-part "experience" and "logic" test to determine the public's First Amendment right to access judicial proceedings. *Press-Enterprise II*, 478 U.S. at 8. Cases such as *In re Oliver*, *supra*, demonstrate the general "experience" that the contempt portions of ancillary grand jury proceedings should be open to the public and confirm a profound and historic distrust for secret proceedings.

As for the "logic" prong, the issue is "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8. This factor may be satisfied where, as this Court recently held in *United States v. Guerrero*, 693 F.3d 990 (9th Cir. 2012), the proceeding at issue is "adversarial." 693 F.3d at 1001.

In *Guerrero*, the Court addressed the issue of whether a competency proceeding should be open to the public. To be sure, the Court distinguished the "classic example" of grand jury proceedings that "would be totally frustrated if conducted openly." *Id*. at 1001, *quoting Press-Enterprise II*, 478 U.S. at 8-9. But, typically, proceedings before the grand jury are not adversarial, and are, instead, inquisitorial and investigative. Thus, the public's role is not significant. However, what the

Court said about competency hearings applies equally to the adversarial portions of ancillary grand jury proceedings:

> An adversarial competency hearing better resembles a criminal trial or a preliminary hearing than it does a grand jury proceeding. In competency proceedings, a defendant has the right to be represented by counsel and the opportunity to testify, present evidence, subpoena witnesses, and to confront and cross-examine witnesses. . . . Moreover, like preliminary hearings, competency hearings may determine the critical question of whether a criminal defendant will proceed to trial. A court's decision on whether a defendant is able to understand the nature of the proceedings against him and whether he is able to assist counsel in his defense is a critical part of the criminal process. Allowing public access to a competency hearing permits the public to view and read about the criminal justice process and ensure that the proceedings are conducted in an open, objective, and fair manner. Indeed, public confidence in the judicial system is especially significant where a defendant accused of a violent felony is not tried because he was found incompetent.

Id. at 1001.

Unlike grand jury proceedings, held in secret without the presence of counsel and without the presence of a judge, the proceedings at issue here were as adversarial as one could imagine. Mr. Duran had his own lawyer, present in court, making legal arguments on his behalf. He had the ability to present evidence on the issue of his privilege. There was a neutral judge sitting as the decision-maker, and Mr. Duran had the right to an adversarial

appeal (again with appointed counsel, briefing, and a decision by a panel of neutral decision-makers). Such a proceeding should not take place behind closed doors, and "logic" supports the recognition of the right of public access to the adversarial portions of these proceedings.

Because the civil contempt proceeding for a recalcitrant witness is protected not by the Sixth Amendment's public trial provision, but by the Due Process Clause of the Fifth Amendment, a witness can waive an objection to the closure of the contempt proceedings by not objecting. *Levine v. United States,* 362 U.S. 610 (1960). However, even here, closure is not appropriate where there is a public interest in keeping the proceedings open:

> This is not a case where it is or could be charged that the judge deliberately enforced secrecy in order to be free of the safeguards of the public's scrutiny; nor is it urged that publicity would in the slightest have affected the conduct of the proceedings or their result. Nor are we dealing with a situation where prejudice, attributable to secrecy, is found to be sufficiently impressive to render irrelevant failure to make a timely objection at proceedings like these.

362 U.S. at 619.

In contrast, this is an instance where public scrutiny was needed to ensure that First Amendment rights are not being abused. In response to

damage at a federal courthouse, federal law enforcement agents allegedly burst into private homes and searched for "anti-government" literature. ER 53, 63-65. There have been public allegations that the grand jury was being used as a tool of harassment, ER 61-62-, 67-68, and that the FBI was surveilling anarchists in the Pacific Northwest before windows were broken in downtown Seattle on May 1, 2012, a fact that was confirmed by the unsealed search warrant affidavit. ER 47-52. Internationally, media accounts have compared the jailing of the recalcitrant witnesses in Seattle to the incarceration in Russia of Pussy Riot members. J. Slattery, "America's Pussy Riot," *Al Jazeera*, Oct. 19, 2012. ER 70-72. Armed guards and locked doors prevented supporters of the witnesses to enter the courtroom during the portions of one contempt hearing that was supposed to be open to the public. ER 41-43, 46, 77. When the press attempted to litigate the issue of public access, the pleadings connected to that litigation itself were sealed and kept from public view.

Given these allegations, the public needs reassurance:

> As for the historical need for secrecy to protect the grand jury from the Crown, the dynamics of modern federal prosecutions are different, with many citizens regarding the grand jury as weapon of the government rather than a shield from it. Shining some sunlight on the instant dispute reassures

> the public that someone is watching the watchers, [footnote omitted] and that this district's federal prosecutors are part of the solution, not part of the problem.

In re Grand Jury Subpoena to Amazon.com, 246 F.R.D. 570, 575-76 (W.D. Wisc. 2007).

This is also not a case where the witnesses themselves wished privacy and secrecy. Here, Mr. Duran had no objection to unsealing the files. ER 45. While the district court concluded that "[g]rand jury secrecy, however, is not theirs to waive," ER 14 n. 4, the extent to which a grand jury witness willingly gives up any pretense of secrecy is a proper factor to determine if the files related to ancillary grand jury proceedings need to continue to be sealed under Rule 6(e)(6). Like the witnesses in the grand jury convened to investigate President Clinton, the witnesses here had "virtually proclaimed from the rooftops" that they had been called before the grand jury, and thus any secret information under Rule 6(e) may lose its secret character. *In re Motions of Dow Jones & Co. Inc.*, 142 F.3d 496, 505 (D.C. Cir. 1998).

Moreover, the fact that the district court recognized that portions of the contempt hearings needed to be open to the public (even if they were not completely opened) refutes any argument that the transcripts of those proceedings and the pleadings should be kept under seal. The district

court's order providing the transcripts only to *The Stranger* does not cure the problem of keeping the public from accessing those same transcripts. People should not have to obtain counsel and file a lawsuit to gain access even to the names of the court reporters and the dates of the relevant hearings.

Accordingly, under the common law right of access to judicial documents, the First Amendment, and Rule 6(e), the public had the right to access the court briefing and orders regarding the contempt citation related to Matthew Duran and his motions to quash the subpoenas, the transcripts of the contempt and status hearings, any briefing by his attorney, the electronic docket on ECF/PACER, Mr. Duran's recalcitrant witness appeal, and the briefing and orders related to the motion to unseal itself.

3. *Selective Redaction is the Remedy That Would Lead to the Release of Much of the File*

The district court seemingly agreed that the public had the right to access to contempt proceedings that did not contain grand jury information. ER 10 ("The Stranger is Entitled to Material Related to the Contempt Proceedings That Does Not Disclose Grand Jury Information."). The court therefore ordered that *The Stranger* could obtain the transcripts of the

proceedings, some of which were open to the public. ER 11. Yet, the district court refused to unseal the files (or even the court docket) and redact the sensitive matters that are secret under Rule 6(e). While recognizing that the files could be selectively redacted, the district court concluded that selective redaction would create an "incomplete" court file that would "as likely mislead the public as to enlighten it." ER 14.

The district court's conclusion, with all due respect, is based upon a suspicion of the public's understanding of the law, and implies that the public is simply unable to understand the secret nature of the proceedings and how to read a redacted file. This distrust of members of the public (which would include attorneys, reporters, and others well familiar with how to read court files, even those that are selectively redacted) is antithetical to the purposes of the First Amendment and the common law right of access to judicial documents.

The district court's order shields from the public much information that is not subject to the secrecy requirements of Rule 6. Notably, Rule 6(e)(6)'s provisions regarding sealing is qualified:

> *Sealed Records*. Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent

> and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

This rule specifically limits sealing to grand jury matters that are "necessary" to prevent unauthorized disclosure of matters before a grand jury. Where blanket sealing of an entire file is not "necessary," redaction is the preferred remedy.

A review of those aspects of the file to which *The Stranger* has access reveals that it is no longer "necessary" to keep much of the file sealed. For instance, Mr. Duran's motion to quash the subpoena and the Government's response, both filed before Mr. Duran's appearance before the grand jury, should be unsealed because none of these documents could possibly contain references to grand jury secrets. ER 89-144.[16] Indeed, a review of the briefing, subsequently filed in the mandamus action, shows not only a lack of any secret information, but that the Government intentionally did not disclose secret information to Mr. Duran's attorney: "Accordingly, the government has given the witness' counsel only a general, vague, an incomplete description of the investigation and how their clients fit in. The

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[16] In the mandamus action, No. 13-71021, Mr. Duran filed a declaration he apparently submitted to the district court on September 4, 2012. It is not clear from the district court docket where that declaration was filed so it is not being included in the Excerpts of Record here.

government has told counsel that it is deliberately giving them vague and incomplete information to avoid revealing the details of the investigation." ER 92. It is no longer necessary to keep this briefing from the public.

Similarly, it is not clear how the orders holding Mr. Duran in contempt or pleadings related to his release motions could contain grand jury secrets, as the district court erroneously held below. ER 10-11. Certainly a review of the order releasing Mr. Duran and Ms. Olejnik from confinement, ER 20-25, contains no secret information, and is of undisputed significant public interest -- particularly, its discussion of the onerous conditions of confinement that Mr. Duran and Ms. Olejnik had to endure. It is not "necessary" to keep the public shielded from such information.

A review of this Court's decision rejecting Mr. Duran's appeal, ER 85-88, also fails to find any secret grand jury information. In contrast, it is not "necessary" to keep this decision, accessible on the Internet, in a sealed file.

Thus, the district court's orders below -- rejecting the motion to quash, finding Mr. Duran in contempt and committing him to the custody of the U.S. Marshal, and finally releasing him from custody, ER 146-49 (Dist. Ct. Dkt. Nos. 6, 16, 20, 22, 37 -- and this Court's own decision, ER 85-88,

all should be unsealed, unless the Government can find anything in those documents that is secret.

More importantly, the pleadings related to the litigation over unsealing themselves, and the district court's orders regarding unsealing, ER 1-15; ER 148-49 (Dist. Ct. Dkt. Nos. 24, 25, 26, 27, 28, 31, 32, 33, 38) should be accessible to the public.[17] Nothing in any of *these* documents remotely contains grand jury secrets, and it is not "necessary" for these documents to be kept under seal. The public should have access to litigation over secrecy -- so the public can see that its Government has attempted to insulate itself from public scrutiny of its own desire for secrecy. *See In re Motions of Dow Jones & Co. Inc.*, 142 F.3d at 501 & n. 8 (ordering unsealing of district court hearings and motions related to public access to grand jury hearings).

Practically, it is not difficult for a court to unseal files and order appropriate redactions. For instance, the district court could easily have

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[17] Notably, in the parallel motion to unseal the search warrant affidavit, Magistrate Judge Mary Alice Theiler's Report and Recommendation (12-MJ-534) noted that the Government had failed to provide any justification to keep its briefing regarding the motion to unseal under seal. ER 39 at n. 4. Judge Jones approved this report, ER 26-27, so it is puzzling why he came to a different conclusion here and allowed the Government to keep secret its attempts to keep these files sealed.

ordered that the district court docket be unsealed, but that any information referring to secret matters be redacted from public viewing. Indeed, when this appeal was docketed in this Court, the docket from the district court was forwarded and distributed to the parties. ER 145-49.[18] A review of the district court docket reveals that it does not contain any grand jury secrets nor does it contain anything that would be misleading.[19]

Opening the docket up to public scrutiny would actually increase respect for the grand jury system, without compromising secrecy. Through an inspection of the docket in ER 145-49, the procedure followed in Mr. Duran's case would be exposed to the public, and it could be demonstrated that the procedures used in here are not as nefarious as some in the community might fear. Given the Government's persistent shrill claims of

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[18] On July 12, 2013, *The Stranger* moved to unseal this docket so it could be filed in the mandamus action. Dkt. No. 8. On August 2, 2013, the Commissioner denied this motion without prejudice to renewing the argument in the opening brief. Dkt. No. 11. *The Stranger* hereby renews that motion, there being no reason for this docket to remain sealed.

[19] The district court noted that "[t]here are documents in the court file that are unrelated to any contempt proceeding. The Stranger has no way of knowing this, however, because the dockets in each of these cases are sealed. Only the court and its staff have access to them." ER 5. It is not clear what this conclusion is based upon since the docket, ER 145-49, clearly is related to the contempt proceedings involving Mr. Duran.

secrecy, people in the community and around the world, who are unfamiliar with the nature of grand jury proceedings, could ease their skepticism by looking at the public record of what happened to Mr. Duran. Any person looking up the case on PACER could see from the docket that there was an adversarial proceedings before a disinterested judge, that Mr. Duran had counsel at public expense, that various orders were entered after briefing and argument, that the witness was given the opportunity to purge himself of contempt, and that he had the opportunity to appeal to this Court. This Court's appellate decision could also then be reviewed.

Exposing this history to the public could only increase community awareness of a procedure with which most people (including many lawyers) do not have much experience. With public access to the file of the adversarial proceedings against. Mr. Duran, even if redacted of any documents the Government believed contained secret grand jury information, those who are suspicious of the grand jury system could see that there were procedures afforded to Mr. Duran that appear to be consistent with the Rule of Law.

On the other hand, public knowledge of the onerous and punitive conditions of Mr. Duran's confinement, confirmed by the district court

judge, ER 22-23, would shed the public spotlight on an inhumane practice, but could not in any way expose grand jury secrets.

Again, if there is in fact any secret grand jury material in the file (which there does not appear to be), selective redaction is the accepted remedy. For instance, in a case involving a witness in the so-called "Whitewater" scandal, Susan McDougal, the 8th Circuit specifically directed:

> OIC [Office of Independent Counsel], working with our Clerk of Court, to substitute for our current sealed file a public file, redacted to exclude portions of the record that disclose substantive grand jury proceedings, supplemented by a filing under seal that contains all redacted portions of the briefs and record on appeal. After an unsealed public file has been created in this fashion, counsel for McDougal may challenge by motion OIC's decision as to the portions of our file which should remain under seal.

In re Grand Jury Subpoena (Susan McDougal), 97 F.3d 1090, 1095 (8th Cir. 1996). Years later, Ms. McDougal complained that the clerk's office in the district court had in fact sealed too much and again asked for the file to be unsealed, the 8th Circuit rejected her arguments, holding that she should have asked the district court to "undertake an in camera review of the sealed record to determine if any materials were sealed in error and should be made

accessible or if all must remain under seal." *United States v. McDougal*, 559 F.3d 837, 841 (8th Cir. 2009).

Even the cases relied upon by the district court here, ER 15, support selective redaction. In *United States v. Smith*, 123 F.3d 140 (3d Cir. 1997), the Government publicly disseminated sentencing materials in a criminal case that arguably contained grand jury information. Upon the complaints of some defendants and some uncharged individuals, the district court sealed the sentencing memorandum and ordered that the parties file under seal their briefs addressing whether the Government violated Rule 6(e). The press intervened, challenging the sealing order. *Id.* at 143. On appeal, the Third Circuit upheld the district court's order, but the order being upheld merely was that the press would be excluded from the very proceedings held to determine if grand jury secrecy was even an issue:

> The district court has informed the parties that it will disclose all nonsecret aspects of the sentencing memorandum, the briefs, and the hearing as soon as it determines which aspects of those papers and proceedings are secret. Under the circumstances we have described, that access is enough to satisfy any right of access that the newspapers may have to the nonsecret aspects of the proceedings.

123 F.3d at 153-54. This holding supports the exact type of selective redaction that *The Stranger* has advocated in this case. *See also Newark*

Morning Ledger Co., 260 F.3d 217, 228 (3d Cir. 2001) ("In sum, the District Court properly sealed the initial filings and motions so that it could determine whether secret grand jury information was implicated. The court held that after it determined what, if any, information was secret grand jury material, it would open the proceedings and disclose all non-grand jury materials. We see no error.").

The Western District of Washington's Local Rules actually require selective redaction, in accord with the predominant practice in most districts around the country. Western District of Washington Local Civil Rule 5(g) provides in part

> There is a strong presumption of public access to the court's files. This rule applies in all instances where a party seeks to overcome the policy and the presumption by filing a document under seal.
>
> (1) A party must explore all alternatives to filing a document under seal. . . .
>
> . . .
>
> (5) Only in rare circumstances should a party file a motion, opposition, or reply under seal. A party who cannot avoid including confidential information in a motion, opposition, or reply must follow this procedure:

> (A) the party shall redact the confidential information from the motion, opposition, or reply and publicly file the redacted motion, opposition, or reply; and
>
> (B) the party shall file the unredacted motion, opposition, or reply under seal, accompanied by a motion or stipulated motion to seal the unredacted motion, opposition, or reply in compliance with part (3) above.

This general policy puts the burden on the party who seeks to shield information from the public to redact the document. This is the norm, not the exception, and does not lead to confusion by the public or an undue burden on the party whose job it is to propose redactions.[20]

The district court cited to *In re Sealed Case*, 199 F.3d. 522 (D.C. 2000). ER 15. However, that case simply upheld a district court's denial of a press request for a generic rule requiring public docketing of *all* ancillary grand jury related matters. Yet, there was, at least, a local rule in the District of Columbia that provided a mechanism of unsealing grand jury matters. D.C. District Local Criminal Rule 6.1 provided:

> papers, orders and transcripts of hearings subject to this rule, or portions thereof, may be made public by the court on its own

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[20] West. Wash. Local CrR 6(j)(2) allows for the initial filings in grand jury cases to be under seal, as recognized by the district court, ER 12, but this does not mean that once a document is under seal, the entire file must always remain under seal if such is no longer "necessary" under Rule 6(e)(6). Selective redaction is still the preferred remedy.

> motion or on motion of any person upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury.

199 F.3d at 524.

The D.C. Circuit believed that this rule allowed the media to request a redacted public docket in any specific case, which would then allow for the exercise of discretion on a case-by-case basis where:

> the District Court must duly consider the request and, if it denies the request, offer some explanation. The District Court's explanation must bear some logical connection to the individual request. In other words, it must rest on something more than the administrative burdens that justified the denial of across-the-board docketing, and it must be more substantial than, say, an arguable possibility of leaks.

199 F.3d at 527.

Thus, the district court's concern here about the possible burdens was misplaced. It is not uncommon, as the cited cases reflect, to allow for the partial unsealing of grand jury contempt files and the redaction of key documents that the Government believes contain grand jury secrets.

Moreover, to the extent the district recognized that Mr. Duran was free to share whatever information he wished to share, including his briefing, ER 14, it does not make any sense, given his consent, to continue to seal *his* briefing from the public. The district court concluded, "As to the

written material submitted to this court in connection with the contempt proceedings, they contain grand jury information." ER 11. This is conclusion is erroneous. None of the written material that has been filed related to the mandamus case which has been so far revealed, ER 89-144, supports this conclusion.

This Court recently noted the 3d Circuit decision relied upon by the district court, *United States v. Smith*, *supra*, and distinguished it on the basis that once "secret" materials are in the hands of third persons, there no longer is an interest in secrecy:

> In *United States v. Smith*, after the government publicly released a sentencing memorandum that contained allegations of criminal conduct against uncharged individuals, the district court sealed the sentencing memorandum and denied a motion by various newspapers for access to the sentencing memorandum and the sealed briefs. 123 F.3d 140, 143, 145 (3d Cir. 1997). Consistent with our disposition of this case, the Third Circuit held that a motion by newspapers to access the released sentencing memorandum was moot because the newspapers "already possess[ed] it," and rejected the newspapers' claim to access the briefs because such access would "disclose additional confidential material." *Id.* at 146, 154. The court added, however, that "[e]ven if the dissemination by members of the public continues," an order barring further disclosure of the material in the sentencing memorandum "will at least narrow that dissemination." *Id.* at 155. This statement is dictum and does not undermine our commonsense conclusion that once a fact is widely available to the public, a court cannot grant any "effective relief" to a

> person seeking to keep that fact a secret. We doubt, because of the information's availability on the internet, that enjoining further disclosure by the parties will "narrow [any further] dissemination."

Doe v. Reed, 697 F.3d 1235, 1239-40 (9th Cir. 2012). Because the district court's order in these cases recognized that any grand jury secrets in the hands of third parties (i.e. the witnesses, their attorneys) can be freely disseminated, the argument for continued secrecy loses force and thus further secrecy is not required.

In short, selective redaction is the norm. It is consistent with principles of grand jury secrecy under Rule 6(e). It is a procedure that is commonly used, and it balances the public's right to know under the common law and the First Amendment with the interests of grand jury secrecy.

G. CONCLUSION

In *U.S. Industries, Inc. v. United States District Court*, 345 F.2d 18 (9th Cir. 1965), this Court warned against applying grand jury secrecy for the sole purpose of keeping matters secret:

> [I]t must be kept in mind that, in making a determination of when to permit a disclosure of grand jury proceedings, we are to examine, not only the need of the party seeking disclosure, but also the policy considerations for grand jury secrecy as they

> apply to the request for disclosure there under consideration. In other words, if the reasons for maintaining secrecy do not apply at all in a given situation, or apply to only an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need. This view of the necessity for a court to perform such a weighing process is amply demonstrated, we believe, by the remarks of Mr. Justice Brennan in his dissenting opinion in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 403, 79 S.Ct. 1237, 1242, 3 L.Ed.2d 1323 (1959):
>
> > Grand jury secrecy is, of course, not an end in itself. Grand jury secrecy is maintained to serve particular ends. But when secrecy will not serve those ends or when the advantages gained by secrecy are outweighed by a countervailing interest in disclosure, secrecy may and should be lifted, for to do so in such a circumstance would further the fair administration of criminal justice.

345 F.2d at 21-22.

Here, the district court appeared to apply grand jury secrecy as an end in itself, and failed to properly weigh the public's interest in the non-secret portions of Mr. Duran's adversarial proceedings. The Court should reverse

the district court and order the file below to be unsealed, with selective redaction.

DATED this 5th day of August, 2013.

Respectfully submitted,

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H. RELATED CASES

This case is related to the mandamus action in *Index Newspapers, LLC v. United States District Court for the Western District of Washington*, No. 13-71021, and two prior recalcitrant witness appeals, *In re Grand Jury Subpoena (Matthew Duran)*, No. 12-35774, and *In re Grand Jury Subpoena (Katherine Olejnik)*, No. 12-35811.

I certify or declare under penalty of perjury that the foregoing is true and correct.

Dated this 5th day of August 2013, at Seattle WA.

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(5) & (a)(7) and Circuit Rule 32-1, the attached Opening Brief of Appellant (excluding the table of contents, table of citations, addendum containing statutes, certificate of related cases, certificate of service, and this certificate) complies with the type-volume limitation and that it is proportionately spaced, has a typeface of 14 points or more and contains 8608 words.

Dated this 5th day of August 2013, at Seattle WA.

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ADDENDUM

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28 U.S.C. § 1291 provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

28 U.S.C. § 1651 provides in part:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1826 provides in part:

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of —
>
> (1) the court proceeding, or
>
> (2) the term of the grand jury, including extensions,

> before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

D.C. Local Rule 6.1 provided in part:

> papers, orders and transcripts of hearings subject to this rule, or portions thereof, may be made public by the court on its own motion or on motion of any person upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury

Fed. R. App. Proc. Rule 4 provides in part:

> (a) Appeal in a Civil Case.
>
> (1) Time for Filing a Notice of Appeal.
>
> (A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the entry of judgment or order appealed from.
>
> (B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:
>
> (i) the United States; . . .
>
> . . .
>
> (4) Effect of a Motion on a Notice of Appeal.
>
> (A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion: . . .

. . .

(iv) to alter or amend the judgment under Rule 59 . . . .

Federal Rules of Appellate, Ninth Circuit Rules provides:

30-1.5. Items Not to Be Included in the Excerpts of Record

The excerpts of record shall not include briefs or other memoranda of law filed in the district court unless necessary to the resolution of an issue on appeal, and shall include only those pages necessary therefor.

Fed. R. Crim. P. Rule 6 provides in part:

(d) *Who May Be Present*.

(1) *While the Grand Jury Is in Session*. The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.

(2) *During Deliberations and Voting*. No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting

(e) *Recording and Disclosing the Proceedings*.

(1) *Recording the Proceedings*. Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the

recording, the reporter's notes, and any transcript prepared from those notes.

(2) *Secrecy*.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) Exceptions.

(A) Disclosure of a grand-jury matter other than the grand jury's deliberations or any grand juror's vote may be made to:

(i) an attorney for the government for use in performing that attorney's duty;

(ii) any government personnel -- including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or

(iii) a person authorized by 18 U.S.C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

> (i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence. . . .
>
> . . .
>
> (5) *Closed Hearing.* Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.
>
> (6) *Sealed Records.* Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.
>
> (7) *Contempt*. A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence under Rule 6, may be punished as a contempt of court.

Fed R. Crim. Proc. Rule 6, *Notes of Advisory Committee on Rules -- 1983 Amendment,* provides in part:

> Subdivision (e)(5) is expressly made "subject to any right to an open hearing in contempt proceedings." This will accommodate any First Amendment right which might be deemed applicable in that context because of the proceedings' similarities to a criminal trial, *cf. United States v. Criden*, *supra*, and also any Fifth or Sixth Amendment right of the contemnor. The latter right clearly exists as to a criminal

contempt proceeding, *In re Oliver*, 333 U.S. 257 (1948), and some authority is to be found recognizing such a right in civil contempt proceedings as well. *In re Rosahn*, 671 F.2d 690 (2d Cir. 1982). This right of the contemnor must be requested by him and, in any event, does not require that the entire contempt proceedings, including recitation of the substance of the questions he has refused to answer, be public. *Levine v. United States*, 362 U.S. 610 (1960).

U.S. Const. amend. 1 provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. 5 provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

U.S. Const. amend. 6 provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to

> be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Western District of Washington Local Civil Rule 5(g) provides in part:

> There is a strong presumption of public access to the court's files. This rule applies in all instances where a party seeks to overcome the policy and the presumption by filing a document under seal.
>
> (1) A party must explore all alternatives to filing a document under seal.
>
> > (A) If the party seeks to file the document under seal because another party has designated it as confidential during discovery, the filing party and the designating party must meet and confer to determine whether the designating party will withdraw the confidential designation or will agree to redact the document so that sealing is unnecessary.
> >
> > (B) Parties must protect sensitive information by redacting sensitive information (including, but not limited to, the mandatory redactions of LCR 5.2) that the court does not need to consider. A party who cannot avoid filing a document under seal must comply with the remainder of this rule.
>
> (2) A party may file a document under seal in only two circumstances:
>
> > (A) if a statute, rule, or prior court order expressly authorizes the party to file the document under seal; or

(B) if the party files a motion or stipulated motion to seal the document before or at the same time the party files the sealed document. Filing a motion or stipulated motion to seal permits the party to file the document under seal without prior court approval pending the court's ruling on the motion to seal. The document will be kept under seal until the court determines whether it should remain sealed.

A party filing a document under seal shall prominently mark its first page with the phrase "FILED UNDER SEAL."

(3) A motion to seal a document, even if it is a stipulated motion, must include the following:

(A) a certification that the party has met and conferred with all other parties in an attempt to reach agreement on the need to file the document under seal, to minimize the amount of material filed under seal, and to explore redaction and other alternatives to filing under seal; this certification must list the date, manner, and participants of the conference;

(B) a specific statement of the applicable legal standard and the reasons for keeping a document under seal, with evidentiary support from declarations where necessary.

Where parties have entered a litigation agreement or stipulated protective order (see LCR 26(c)(2)) governing the exchange in discovery of documents that a party deems confidential, a party wishing to file a confidential document it obtained from another party in discovery may file a motion to seal but need not satisfy subpart (3)(B) above. Instead, the party who designated the document confidential must satisfy

subpart (3)(B) in its response to the motion to seal or in a stipulated motion.

(4) A party must minimize the number of documents it files under seal and the length of each document it files under seal. Where the document to be sealed is an exhibit to a document filed electronically, an otherwise blank page reading "EXHIBIT __ FILED UNDER SEAL" shall replace the exhibit in the document filed without sealing, and the exhibit to be filed under seal shall be filed as a separate sealed docket entry. Where the document to be sealed is a declaration, the declaration shall be filed as a separate sealed docket entry.

(5) Only in rare circumstances should a party file a motion, opposition, or reply under seal. A party who cannot avoid including confidential information in a motion, opposition, or reply must follow this procedure:

> (A) the party shall redact the confidential information from the motion, opposition, or reply and publicly file the redacted motion, opposition, or reply; and
>
> (B) the party shall file the unredacted motion, opposition, or reply under seal, accompanied by a motion or stipulated motion to seal the unredacted motion, opposition, or reply in compliance with part (3) above.

(6) When the court denies a motion to seal, the clerk will unseal the document unless (1) the court orders otherwise, or (2) the party who is relying on the sealed document requests in the motion to seal or response that, if the motion to seal is denied, the court withdraw the document from the record rather than unseal it. If a document is withdrawn on this basis, the parties shall not refer to it in any pleadings, motions or other filings, and the court will not consider it. For this reason,

parties are encouraged to seek a ruling on motions to seal well in advance of filing underlying motions relying on those documents.

(7) When a court grants a motion to seal or otherwise permits a document to remain under seal, the document will remain under seal until further order of the court.

(8) Parties may file a motion or stipulated motion requesting that the court unseal a document. A non-party seeking access to a sealed document may intervene in a case for the purpose of filing a motion to unseal the document.

(9) When a party files a paper copy of a sealed document, the party shall seal the document in an envelope marked with the case caption and the phrase "FILED UNDER SEAL." This requirement applies to pro se parties and others who are exempt from mandatory electronic filing and to parties submitting courtesy copies to comply with LCR 10(e)(9).

Western District of Washington Local Civil Rule 7 provides in part:

(h) Motions for Reconsideration

(1) Standard. Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence.

(2) Procedure and Timing. A motion for reconsideration shall be plainly labeled as such. The motion shall be filed within fourteen days after the order to which it relates is filed. The motion shall be noted for consideration for the day it is filed. The motion shall point out with specificity the matters which the movant believes were overlooked or misapprehended by the court, any new matters being brought to

the court's attention for the first time, and the particular modifications being sought in the court's prior ruling. Failure to comply with this subsection may be grounds for denial of the motion. The pendency of a motion for reconsideration shall not stay discovery or any other procedure.

Western District of Washington Local Criminal Rule 6(j) provides:

(j) Grand Jury Practice

(1) Motions practice in connection with Grand Jury proceedings and process issued in aid of such proceedings shall be accorded the secrecy protections as set forth in Fed. R. Crim. P. 6(e).

(2) The Clerk's office shall accept for filing under seal without the need for further judicial authorization all motions and accompanying papers designated by counsel as related to Grand Jury matters.

(3) Such motions shall be assigned Grand Jury cause numbers if not otherwise related to pending criminal cases and will be decided by the judge of this court assigned by the Chief Judge to hear Grand Jury matters.

(4) In all other respects, motions and related filings shall conform to Local Rule CrR 12(c).

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to attorney of record for the United States, Matthew Duran and all other parties.

I also certify that on the 5th day of August 2013, I deposited a copy of the foregoing into the United States Mail in an envelope, with proper first postage attached, addressed to:

Judge Richard Jones
United States District Court for the
Western District of Washington
700 Stewart St., Suite 13128
Seattle, WA, 98101

I certify or declare under penalty of perjury that the foregoing is true and correct, this 5th day of August 2013 at Seattle WA.

/s/ Alex Fast
Legal Assistant for Neil M. Fox