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.

APPELLEE'S RESPONSE BRIEF

On Appeal from the United States District Court
for the Western District of Washington
D.C. No. 12-GJ-000149
(Hon. Richard Jones)

KIMBERLY N. GORDON
Attorney for Matthew Duran
1111 Third Avenue, Suite 2220
Seattle, WA 98101
Telephone: (206) 682-3053

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2. Where the district court recognized that much of the file in a grand jury recalcitrant witness case contained information that the public had the right to obtain, and in fact ordered that the petitioner 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?

3. Does Mr. Duran have a right to Due Process that will be furthered by release of the portions of the grand jury file that do not involve matters enjoined to secrecy by Fed. R. Crim. P. 6(e)?

4. Does Mr. Duran has a constitutional right to associate that will be furthered by release of the portions of the grand jury file that do not involve matters enjoined to secrecy by Fed. R. Crim. P. 6(e)?

B. STATEMENT OF FACTS

On May 1, 2012, also known as "May Day," a small group of vandals damaged Seattle's William Kenzo Nakamura Courthouse during a protest

march. Mr. Duran was not in Seattle at the time, did not attend the protest, did not plan to cause the damage that occurred, did not know who caused the damage, and did not have anyone confess their involvement to him. ER 28-30. Three months later, on August 8, 2012, Matthew Duran was served with a subpoena to testify before a grand jury.

The Assistant United States Attorney handling the case then orally confirmed to Mr. Duran's counsel that the grand jury was investigating the courthouse damage and related matters, and that Mr. Duran was neither a target nor subject of the investigation. But the government declined to identify the target (or targets) of the investigation. The government declined to provide Mr. Duran any other information about why the grand jury believed he had information relevant to their investigation. During these conversations, Mr. Duran did not receive any other information from the government.

Publicly available information suggested to Mr. Duran that two other individuals had been previously subpoenaed to provide information about this incident to the grand jury. The government declined to verify whether this was true.

Publicly available information discussed search warrants that were executed contemporaneously in Oregon, and suggested that they were executed in an investigation that was related to that of this grand jury. The government declined to affirm or deny whether this impression was accurate.

1. ***Substantive grand jury matters were not revealed during litigation of the Motion to Quash that took place prior to Mr. Duran's grand jury appearance***.

On August 31, 2012, Mr. Duran and Katherine Olejnik (another individual also subpoenaed to testify before the grand jury) filed a Motion to Quash their subpoenas. ER 206-236. The government filed a response to the motion, in which it made it clear that it "deliberately" had not, and would not, provide further information. ER 181-205. It would not provide factual support for its belief that Mr. Duran and Ms. Olejnik possibly had information relevant to their investigation. The government provided this rationale for its refusal to do so:

> In this case, it has been clear from conversations with counsel that the witnesses are strongly opposed to testifying under any circumstances. Under these circumstances, revealing details about the topics of the testimony and the kinds of questions that would give the witnesses – whose goal is to never testify – a window into the ongoing

> investigation. The witnesses would be free to share whatever insights they gleaned with the targets of the investigation.
>
> Accordingly, the government has given the witnesses' counsel only a general, vague and incomplete description of the investigation and how their clients fit in. The government has told counsel that it is deliberately giving them vague and incomplete information to avoid revealing the details of the investigation.
>
> The government has told counsel the general nature of the investigation – namely, that it focuses on the vandalism of the Nakamura Courthouse and related criminal activity.
>
> The government has told counsel that the witnesses are not targets.
>
> The government has told counsel that the witnesses have been subpoenaed because the investigation has shown that they are associations of one or more of the targets, and that there is information that they may have lived with one or more of the targets at the time of the offense.
>
> Beyond that limited information, the government has told counsel almost nothing. The government has not said who the targets are or how they were identified. The government has not named the particular people that the witnesses are expected to give information about. The government has reason to believe that the witnesses may have information about targets other than the target(s) that the witness may have actually lived with. The government has not, however, identified who those targets are or why it thinks the witnesses may have information about them.

ER 184-185.

Although the government also purported to describe, in its Opposition, the topics that the grand jury hoped to discuss with Mr. Duran and Ms. Olejnik, that description also provided no information beyond what was already obvious. The government only indicated that the grand jury wished to inquire whether the subpoenaed parties had associates who

- Had any motive to vandalize the courthouse;
- Travelled, or planned to travel, to Seattle for May Day;
- Had any particular purpose for being in Seattle during May Day;
- Were a part of a group of protesters that marched to the Courthouse;
- Had any contact with other suspects;
- Made any relevant statements;
- Possessed black clothing or anarchist flags; and
- Travelled with any other associates to the May Day demonstrations.

ER 188-190.

The hearings on Mr. Duran and Ms. Olejnik's Motions to Quash were set for different days, with Mr. Duran's hearing scheduled first. Accordingly, on September 13, 2012, when the Court heard Mr. Duran's Motion to Quash, he did not have any information about grand jury matters that could potentially have been gained during Ms. Olejnik's hearing.

At the outset of the Motion to Quash hearing, the Court closed the courtroom to the public.[1] An interested member of the public was denied

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1 The District Court has previously confirmed that Mr. Duran, his counsel, and associates

> 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.

ER 14. This portion of the District Court's Order has not been challenged, and comports with Fed. R. Crim. P. 6(e) (2), which provides only a narrow list of persons who are obligated to maintain grand jury secrecy.

But when the Court authorized the Clerk to release the transcripts from the hearings on Mr. Duran's Motion to Quash and the contempt proceedings, the Court noted:

> The court authorizes the Clerk of Court to release the transcripts of the proceedings of September 13, 2012, to Kimberly Gordon, counsel for Matthew Duran. Ms. Gordon may use those transcripts for the sole purpose of pursuing her appeal of the court's September 13 orders. She remains bound by the secrecy and confidentiality in all other respects.

ER 55.

On one hand, Fed. R. Crim. P. 6(e) places no obligation of secrecy upon counsel or Mr. Duran. It does not appear that the Rule requires counsel to keep the transcripts secret and instead would permit counsel to use them in this civil case. This Rule is consistent with United States Supreme Court precedent holding that concerns about secrecy cannot be applied to ban

entry, not even able to walk through the courtroom doors with Mr. Duran and his counsel. ER 57.

During the hearing, Mr. Duran was represented by counsel, and was able to present arguments and evidence (such as it was). The Court, however, noted that counsel's arguments were not based on actual information about the grand jury's investigation, but speculation, assumptions, and predisposition about its scope and focus. ER 131-180.

Counsel for Mr. Duran agreed that neither she nor Mr. Duran had specific facts about the grand jury's investigation, other than the extremely limited information disclosed by the government. *Id.* Up to that point, neither Mr. Duran, nor counsel, had any grand jury secrets to discuss or disclose.

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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, 626, 110 S. Ct. 1376, 1378, 108 L. Ed. 2d 572 (1990). But the Order attached in ER 55 seems to suggest otherwise. Accordingly, in order ensure that using the transcripts to support Mr. Duran's Response to the Brief of Intervenor-Appellant will not run afoul of the Court's order, counsel will file these transcripts under seal. *See* ER 104-130; ER 131-180. This procedure appears to comply with 9th Cir. Rule 30-1.4(a)(8)(viii) governing use of the transcripts of oral rulings on appeal, and 9th Cir. Rule 30-1.10 governing the use of Presentence Reports on appeal.

They had not been included in any pleadings. They were not included in counsel's argument.

The government also provided argument during this hearing, but again provided no facts about the grand jury's investigation or intended questions. Instead, the government discussed cases and the legal issues raised in Mr. Duran's Motion to Quash. ER 160-169.

The Court then ruled, noting that Counsel for Mr. Duran can "only speculate" as to the nature, scope, and type of examination to be conducted by the grand jury. ER 142, 144. The Court denied Mr. Duran's Motion to Quash. ER 175.

The ruling on the Motion to Quash did not conclude the hearing, but the courtroom remained closed to the public while the government persuaded the Court to directly order him to testify before the grand jury and inform him of the possible civil and criminal contempt penalties. ER 175. The Court did so. ER 175-176. The court, through the government, also informed Mr. Duran that the current grand jury's term was set to expire in March, 2014. ER 176. The hearing then ended, still without referencing anything more than counsel's "speculation" about the grand jury's actual matters.

2. *The civil contempt hearing revealed few, if any, grand jury "secrets."*

The fact that Mr. Duran appeared before the grand jury was not secret, but was covered in the press. ER 63-99. When he appeared, Mr. Duran was placed under oath and stated his name for the record. ER 107. According to the government, the "first remotely substantive question" asked of Mr. Duran was about where he lived. *Id.* Mr. Duran declined to answer that question, as well as all others. ER 112-114. As a result, Mr. Duran did not provide any information. The government's questions did not reveal anything secret, detailed, or previously unknown. ER 112-114.

Immediately after his grand jury appearance, Mr. Duran was directed back to the court for a civil contempt hearing. He went to the courtroom, together with counsel and an interested member of the public. ER 57. As they stepped out of the elevator, they were met by a large group of armed officers. ER 57. They were physically stopped and told that they were not allowed to be on the floor. ER 57. After the officers learned of their reason for going to the courtroom, they let Mr. Duran and his counsel go inside. ER 57. The member of the public was prohibited. ER 57.

At the beginning of the hearing, the courtroom was ordered closed by the court. ER 107. The doors to the courtroom were locked and blocked by the armed officers. ER 58. The government called the Court Reporter to read the questions asked by the grand jury, as well as Mr. Duran's answers (or rather, refusals to answer). ER 112-114. The government noted that Mr. Duran refused to answer any questions that went "directly to the core of the criminal conduct in this case." ER-115. Mr. Duran did not indicate where he was when the courthouse was vandalized, whether he saw it vandalized, or whether anyone told him that they were involved in the vandalism. *Id*. The government also indicated that it specifically declined to ask Mr. Duran questions that would give Mr. Duran "insight into who our suspects are and what kind of evidence we have against them." ER 122. The government deliberately declined to ask questions that would create a risk of "giving [targets] information, a risk that it [would] get back to the targets." ER 121.

Mr. Duran was held in civil contempt and the Court directed that the courtroom be reopened. ER 124. While it appeared to those inside the courtroom that the doors were then unlocked, Mr. Duran's counsel later

learned that the interested member of the public, as well as others, were still denied access. ER 58.

In any event, the Court then explained its ruling and Mr. Duran's procedural options, set a date for a status hearing, and denied Mr. Duran's request for an Appeal Bond. ER 125-126. The hearing concluded without the government or counsel revealing substantive grand jury matters.

3. *Subsequent events do not reference grand jury secrets*.

As Petitioner Index Newspapers notes, the grand jury proceedings and Mr. Duran's incarceration were covered by the domestic and international press. ER 63-99.

Mr. Duran appealed the District Court's Order to the Ninth Circuit. *In re Grand Jury Testimony*, No. 12-35774. Although the appeal is purportedly "under seal", the ruling somehow became publically available at http://law.justia.com/cases/federal/appellate-courts/ca9/12-35774/12-35774-2012-10-19.html. The opinion is included in the excerpts as ER 100-103.

As Index Newspapers explains, the District Court for the Western District of Washington ruled, over the government's objections, that records

from a presumably related case should also be unsealed, with only selected redactions:

> 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 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 40-54.

Mr. Duran's subsequent release from confinement, after more than five months of custody. ER 241. What remains sealed, is the Court's Order granting release, in which the Court made stark findings about what Mr. Duran and Ms. Olejnik were subjected to during their time in the government's custody:

> Both Ms. Olejnik and Mr. Duran have provided extensive declarations explaining that although they wish to end their confinement they will never end their confinement by testifying. The court finds their declarations persuasive. They have submitted to five months confinement. For a substantial portion of that confinement, they have been held in the special housing unit of the Federal Detention Center at SeaTac, during which they have had no contact with other detainees, very little contact even with prison staff, and exceedingly limited ability

> to communicate with the outside world. … The Government does not dispute the witnesses' assertions that confinement in the special housing unit entails 23 hours of solitary confinement in their cells and an hour of solitary time alone in a larger room each day, a single fifteen-minute phone call each month (as opposed to five hours of monthly phone time for detainees outside the special housing unit), and exceeding limited access to reading and writing material Their physical health has deteriorated sharply and their mental health has also suffered from the effects of solitary confinement. Their confinement has cost them; they have suffered the loss of jobs, income, and important personal relationships. They face the possibly of criminal convictions for contempt. Ms. Olejnik plausibly explains, moreover, that she would face ostracism within her community of friends if she were to testify, based on the experience of another grand jury witness within her community who she believes choose to testify rather than face continued confinement. Both she and Mr. Duran have refused to testify.
>
> The Government rebuts none of the assertions in Ms. Olejnik's or Mr. Duran's declarations. The Government suggests no reason to disbelieve those assertions. The Government suggests no particular reason for the court to conclude that there is a substantial likelihood either witness will testify if the court continues their confinement. …. The court has observed both Ms. Olejnik and Mr. Duran during their prior appearances before the court. Whatever the merits of their choices not to testify, their demeanor has never given the court reason to doubt their sincerity or the strength of their convictions.

ER 22-24.

In it's order, the Court made *no* reference to the subject of the grand jury's investigation, but only made non-specific references to additional

arguments contained in the pleadings supporting and opposing the witnesses' release:

> The witnesses and the Government also invite the court to consider arguments specific to the grand jury investigation at issue. The witnesses argue, for example, that any testimony they could offer would be, at best, tangential to the investigation. They contend that other jurisdictions have charged people for what the witnesses believe are similar crimes without the need for tangential testimony. They also contend that the duration of their confinement already exceeds the likely imprisonment of anyone who might be convicted as a result of the grand jury's investigation. Each of these arguments, however, strays from the court's central inquiry: are these witnesses likely to testify if their confinement continues?

ER 24-25. Finally, the Court concludes the proceedings the way they began, noting that Mr. Duran can still only guess about the grand jury's investigation:

> The court observes, moreover, **that the witnesses' speculations about the grand jury investigation and its likely future course** are a much shakier foundation for their request for release than their personal statements about their confinement, their principles, and the reasons that they will never provide testimony.

(Emphasis added.) ER 25.

C. SUMMARY OF ARGUMENT

Index Newspapers seeks access to the portions of Mr. Duran's court file that do not contain grand jury secrets. ER 228 (Dist. Ct. Dkt. No. 24);

Opening Brief of Intervenor-Appellant at 13-14, 37-38. This begs these question: What portions of Mr. Duran's court file contain grand jury secrets?

It does not appear that Index Newspapers has sought the transcript of Mr. Duran's grand jury appearance. Neither have they sought access to the portion of the contempt hearing in which Mr. Duran's grand jury "testimony" was read. Index Newspapers is not asking for this Court to permit it access to the grand jury room, to the names of other witnesses who may have appeared before the grand jury, or to any material submitted to the grand jury for consideration. Thus, viewing Index Newspapers's actual request in light of the facts of this case, demonstrates that Index Newspapers is not seeking an extension of existing rules about grand jury secrecy. They are seeking appropriate application of those rules to this case.[2]

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2 As Index Newspapers explained in its Reply filed in the related Writ of Mandamus Proceedings:

> The Government spends much of its time focused on the historic secrecy of grand jury materials. Yet, *The Stranger* has never sought materials that are secret under Fed. R. Crim. Proc. Rule 6(e). Rather, *The Stranger* has only sought non-secret materials related to the contempt proceedings of Ms. Olejnik and Mr. Duran and the

Index Newspapers's request for access to portions of Mr. Duran's file does not seek access to the substance of testimony before the grand jury. Moreover, significant and lengthy portions of the record had nothing to do with the Court's ultimate finding of contempt. Instead, they related to a hearing that occurred prior to Mr. Duran's grand jury appearance. Other pleadings were filed months after the contempt hearing and concerned the conditions of Mr. Duran's confinement and strength of his resolve.

Most of the records and transcripts in this case fail to reference actual grand jury secrets because, at the most basic level, only the government was privy to those secrets and they did not share them. Thus, throughout all of these proceedings the Court repeatedly reminded Mr. Duran that he could only "speculate" about the nature of the grand jury's investigation. This is important because, as the district court ruled[3] and the government highlighted

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> proceedings related to the motions to quash. The materials could easily be redacted to exclude any secret information.

Index Newspapers, LLC Reply Brief in related case Index Newspapers LLC v. Western District of Washington, case # 13-71021 at 10.

3 See Government's Response Brief in related case Index Newspapers LLC v. Western District of Washington, case # 13-71021

in pleadings related to this case: "speculation [is] not the same as revealing matters occurring before the grand jury." *See* Government's Response Brief in related case *Index Newspapers LLC v. Western District of Washington*, case # 13-71021 at 11.

It is Mr. Duran's perspective that granting Index Newspapers's request will further the public's interest in conducting justice openly and transparently. The release of the portions of the record sought by Index Newspapers will not compromise grand jury secrets. Mr. Duran's due process rights to public proceedings, which were previously violated, could be partially restored through the unsealing of the non-secret portion of the record. Finally, the government's treatment of Mr. Duran necessarily impacts his right to freely associate. This harm can now be partially alleviated by unsealing the non-secret portions of the court file. For all of these reasons, Mr. Duran supports Index Newspapers's request.

D. ARGUMENT

1. *The public has a deeply-rooted and long-standing interest in access to court record that will be furthered by release of the non-secret portions of Mr. Duran's court file.*

The public has a recognized interest open court proceedings. In fact it is now axiomatic that, barring an exceptional and particularized reason for sealing court proceedings or filings, they should be conducted openly and transparently, and available on the public record. "[T]he guarantee [of public proceedings] has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." *In re Oliver*, 333 U.S. 257, 270, 68 S.Ct. 499, ___ L.Ed.___ (1948). It also reflects "the notion, deeply rooted in common law, that 'justice must satisfy the appearance of justice.'" *Levine v. United States*, 362 U.S. 610, 616, 80 S.Ct. 1038 ___ L.Ed. ___ (1960) (*quoting Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, ___ L.Ed. ___ (1954)).

2. *Grand jury secrecy, and the justifications for it, will not be compromised by release of the records sought by Index Newspapers.*

There are well-established potential justifications for the secrecy of matters occurring before the grand jury: preventing those persons who may be indicted from escaping; insuring that the grand jury enjoys unfettered freedom in its deliberations; preventing targets of the investigation from tampering with witnesses; encouraging witnesses to testify frankly and

truthfully without fear of retaliation; and shielding those who are exonerated by the grand jury. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 n. 6, 78 S.Ct. 983, 986 n. 6, 2 L.Ed.2d 1077 (1958) (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3rd Cir.1954)); see also *In re Grand Jury Matter*, 906 F.2d 78, 86 (3rd Cir. 1990).

Undoubtedly, some individuals subject to grand jury subpoenas wish to have this fact remain secret. But Mr. Duran has never insisted on secrecy, and has consistently pursued the opposite. Mr. Duran has never feared the public's scrutiny, but has embraced it as a safeguard against what he perceived was an unjust action that unfairly affected his ability to associate with his chosen communities. He has also embraced it as a means to show that, despite any suspicions raised by his grand jury subpoena, he did not damage the courthouse or otherwise commit a crime. Granted, the district court concluded "[g]rand jury secrecy is not [Mr. Duran's] to waive." But this conclusion overstates Mr. Duran's position.

Many of the articulated justifications for sealing presume that the subpoenaed party would find comfort, strength and encouragement in the secrecy. But as applied to the facts of this case, those potential

justifications fail. Instead of the darkness of secrecy, Mr. Duran finds solace in, and seeks the protection of, the light. And the "contemnor's" desires have mattered, with the United States Supreme Court previously ruling that it is requested by the contemnor, due process demands that even portions of the contempt proceedings be opened to the public. *Levine v. United States*, 362 U.S. 610, 618, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960). Similarly, Federal Rule of Criminal Procedure 6(e)(5) imposes obligations of secrecy on others, but not on the contemnor or his counsel.

a. *Index Newspapers's request does not increase the risk that those who may be indicted will escape.*

Continued sealing will not prevent those who may be indicted from escaping, because the records from Mr. Duran's case do not identify anyone who may be indicted. In fact, the records do not provide any details about the May Day incident that are not already publicly known. *See* ER 22-24.

b. *Index Newspapers's request could not impact Mr. Duran's decision to refuse to testify.*

Unsealing these records will not serve to discourage Mr. Duran from testifying; rather, Mr. Duran has already refused to testify and spent months in solitary confinement without changing his mind about doing so. *See* ER

22-24.

c. *Index Newspapers's request does not impact the safety of any witness.*

Continued sealing is not required in order to protect Mr. Duran or any other witness from tampering. The public already knows that Mr. Duran was subpoenaed as a witness by the grand jury. Mr. Duran has not yet been subjected to tampering and does not seek continued sealing in order to protect him in the future. Instead, his decision not to testify is one of personal choice and conscience, instead of pressure from anyone else.[4]

To the extent that the interest is in protecting *another* witness, other than Mr. Duran, continued sealing will not serve that end either. The record in Mr. Duran's case does not contain any reference to or identification of any other witness.

d. *Index Newspapers's request will only help Mr. Duran, who is in the position of an exoneree.*

For this same reason, continued sealing will not help any exoneree. Instead, *unsealing* will help Mr. Duran demonstrate that, despite the grand

4 *See* ER 26-39.

jury subpoena, he was not a suspect or target of the investigation into the courthouse damage. The District Court concluded that a redacted record "would be as likely to mislead the public as to enlighten it." ER 14. From Mr. Duran's perspective, even a redacted record would meaningfully substantiate his claims that he was not a suspect. It would instead demonstrate that he submitted to a particularly grueling, harmful and trying period of incarceration, and through his conduct, words and tenacity left the Court no reason to question that he was a man of strong conviction. ER 22-24. It would demonstrate that he went to jail rather than testify and that the Court was convinced that further incarceration would only strengthen his resolve. *See* ER 24 **("**The Court does not doubt the truth of [the proposition that lengthier confinement is more coercive than a shorter term] but it finds that Ms. Olejnik and Mr. Duran have shown that it no longer applies to them.")

e. *Index Newspapers's request should not serve as any constraint on this grand jury.*

While sealing may serve to insure that the some grand juries enjoy unfettered freedom in their deliberations, it is again difficult to imagine

how, due to the facts of this case, unsealing the records in Mr. Duran's case will serve as any constraint on this grand jury. The records do not identify the grand jurors, anything more than a vague description of the general nature of the investigation, evidence considered or sought, and previous or future witnesses.

3. *Mr. Duran's due process right to public proceedings was previously violated, but can be partially restored through the unsealing of the non-secret portion of the record.*

Mr. Duran's due process right to public proceedings was implicated by the continued closure of court even after the Court ordered that the closure cease. ER 58. The harm caused by the violation grows as a result of the continued sealing of the records for those hearings. In *United States v. Levine*, the United States Supreme Court held that, if public access is requested by the person facing contempt, then continued exclusion of the public, except for when substantive grand jury matters are being discussed, is deemed "contrary to the requirements of the Due Process Clause." 362

U.S. at 619. The Second Circuit further explained why civil contemnors have public hearing rights:

> Given the burden that imprisonment imposes on an individual, a civil contempt trial that could result in an order of confinement carries with it the same concerns and purposes that lead to the requirement of a public trial in the criminal context, such as the need to assure accountability in the exercise of judicial and governmental power, the preservation of the appearance of fairness, and the enhancement of the public's confidence in the judicial system.

In re Rosahn, 671 F.2d 690, 697 (2d Cir. 1982); *See also In re Grand Jury Matter*, 906 F.2d 78, 86-87 (3rd Cir. 1990) ("We believe that the Second Circuit's approach, which balances the need for secrecy in grand jury matters against important considerations favoring open judicial proceedings, is sound. We hold, therefore, that in a civil contempt proceeding where an alleged contemnor faces possible incarceration, the proceeding may be closed to the public only to the extent that substantive grand jury matters are being considered; the remainder of the hearing must take place in open court.")

Despite the district court ruling that the courtroom should be opened for part of Mr. Duran's contempt hearing, the interested public was denied access. ER 58. Importantly, because the denial occurred from outside the

courtroom, Mr. Duran and his counsel were not in a position to be able to know about the denial until after the hearing had ended – until after damage had been done. *Id*. But this Court can partially remedy the problem by unsealing the non-secret portions of the record in order to provide the public the unfettered access that it that Mr. Duran originally deserved.

While Mr. Duran does not suggest that the Court could satisfy due process by always closing the entire contempt proceedings and then later unsealing of the non-secret portions of the hearings, doing so in this case brings with it an advantage. At this time, it is easy to review the transcript in order to separate out the portions of the hearing that pertain to grand jury secrets. There is no need for guess-work and questions about whether secret information will surface after the hearing is opened. The record is complete and can be redacted in order to preserve anything that should not be revealed.

4. *Continued, uniform sealing of the entire file exacerbates the harm caused to Mr. Duran's right to associate.*

A fourth interest, protected by the First Amendment, is Mr. Duran's freedom of association. Freedom of association is "derivative of First

Amendment free speech rights." *In re Roberts*, 650 F.Supp. 159, 162 (N.D. Georgia, 1987), citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958)). In this respect, even "justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association." *Branzburg v. Hayes*, 408 U.S. 665, 680-81, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972).

Mr. Duran has made no secret of the fact that he has been involved in activist and social justice communities. Regardless of whether this was the government's intent in this case, individuals who are subject to grand jury inquiry often face suspicion and ostracism from such communities. As Mr. Duran's Motion to Quash demonstrates, he is aware of, and quite concerned about, this tendency. ER 215-218. The closure of the courtroom and sealing of the proceedings has only made it more difficult for him to alleviate others' concerns about his continued association with their organizations. Anyone questioning Mr. Duran's representations about his role in the grand jury's investigation is currently unable to review any portion of the court file in order to corroborate his claims. In fact,

currently, anyone attempting to do so will not even be able to *find the case* in which Mr. Duran was subpoenaed.

Rather than "mislead" the public about whether Mr. Duran is loyal and sincere in his convictions and words, or whether he cooperated with the grand jury subpoena, an appropriately redacted record would still make these things quite clear.

5. *Unsealing and Redaction is the Appropriate Remedy*.

Other Circuit courts have made it clear that the appropriate procedure is to unseal these court files, but redact grand jury material that is not subject to disclosure. In *In re Newark Morning Ledger Co.*, 260 F.3d 217, 228 (3d Cir. 2001), the Court approved of the District Court's decision to initially seal filings and motions, but only until the Court could determine what information, if any, involved secret grand jury materials. The Court explained:

> On June 20, 2011, the District Court issued a final order denying the complaining party's motion for contempt proceedings. But the District Court did not unseal all the records pertaining to the motion nor did it lift the seal on future proceedings. Under *Smith*, we believe the District Court should complete its review of the proceedings and after determining what, if any, materials contain secret grand jury information, unseal all non-secret material.

Id, at 228; *see also United States v. Smith*, 123 F.3d 140, 153 (3rd Cir. 1997) ("It is not until the district court determines what constitutes grand jury material in the context of this case, which it can only do at the conclusion of the proceedings before it, that it will know what aspects of the briefs, the hearing, and the sentencing memorandum to make public, if any.")

Similarly, in *In re Grand Jury Subpoena*, 97 F.3d 1090, 1095 (8th Cir. 1996), the Court of Appeals Directed the Office of Independent Counsel to work with the 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 records 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.

See also, *United States v. McDougal*, 559 F.3d 837, 841 (8th Cir. 2009) (Recognizing that the District Court should, in the face of a challenge to blanket sealing of a civil contempt proceeding, undertake and *in camera* review of the sealed record to determine which records "related to a grand

jury proceeding." If the records were "related", then they should remain sealed. Otherwise, they should be unsealed.)

It does not appear that the Ninth Circuit has ruled on this issue. This Court should provide its guidance on this question.

E. CONCLUSION

Throughout the briefing in this case and the related Writ of Mandamus, Index Newspapers, LLC, the government, and Mr. Duran have all looked to federal decisions discussing many different grand jury proceedings. The decisions document the existence of grand jury subpoenas, the identities of some subpoenaed parties, and the nature and substance of proceedings ancillary to grand jury investigations. The decisions hear, discuss and weigh the interests of the government, the public and subpoenaed parties. The decisions provide the public, the bar, and the judiciary information about those specific cases, the functioning of our government and the nature of the rights we possess. Despite this wealth of information that has been released to the public in other cases, the grand jury system continues to fulfill its role in the criminal justice system.

Mr. Duran urges this Court to grant Index Newspapers's request to unseal the portions of these proceedings that do not reveal the matters that occurred before the grand jury. Otherwise, unlike the other cases cited herein, Mr. Duran's case will simply disappear over time. Granted, the district court has made it clear that Mr. Duran and his counsel are free to share information and pleadings from the case. But that is not the same as an unsealed, publicly available record. No one will be able to find the case, or even know of its existence, through traditional methods of legal research. Unless someone knows Mr. Duran's name and is still able to contact him, or knows the name of his attorney and is still able to contact her, the records will not be able to be found. Even an internet search will be relatively useless without these pieces of information. A visit to the court's website or the clerk's office will also be fruitless, because every bit of this case, even its very existence, is currently sealed from public view.

Index Newspaper's request should be granted because doing so will further the public's interest in conducting justice openly and transparently. Release of non-secret records will not compromise grand jury secrets. Mr. Duran's due process right to public proceedings could be partially restored.

Finally, the harm previously caused to Mr. Duran's freedom of association can be partially rectified.

For the foregoing reasons Mr. Duran joins in Petitioner Index Newspapers LLC's request that this Court reverse the district court and order the file below unsealed, with selective redaction.

Respectfully submitted,

s/Kimberly N. Gordon
KIMBERLY N. GORDON #25401
Attorney for Defendant-Appellee, Matthew Duran

STATEMENT OF 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 18th day of September, 2013.

Respectfully submitted,

s/Kimberly N. Gordon
KIMBERLY N. GORDON
Attorney for Defendant-Appellee
Matthew Duran

BRIEF FORMAT CERTIFICATE PURSUANT TO

CIRCUIT RULE 32(e)(4)

Pursuant to Ninth Circuit Rule 32 (e) (4), I certify that the opening brief is

_____ Proportionately spaced, has a typeface of 14 points or more and contains _____ words, or is

_____ Monospaced, has 10.5 or less characters per inch and

___X___ Does not exceed 30 pages (opening and answering briefs) or 15 pages (reply briefs)

or

_____ Contains _____words.

DATED this 18th day of September, 2013.

s/Kimberly N. Gordon
KIMBERLY N. GORDON
Attorney Defendant-Appellee
Matthew Duran

CERTIFICATE OF SERVICE

I certify that on September 18, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing counsel to all counsel of record who are participants in the CM/ECF system.

I also certify that on September 18, 2013, I deposited copies of the foregoing into the United States Mail in envelope, with proper first class 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 of the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of September, 2013.

s/Ian D. Saling
Senior Paralegal
Gordon & Saunders, PLLC