U.S. Department of Justice

United States Attorney
Southern District of New York

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January 22, 2016

By E-Mail – Submitted Under Seal

The Honorable Valerie E. Caproni
United States District Judge
United States Courthouse
40 Foley Square
New York, New York 10007

Re: United States v. Sheldon Silver, S1 15 Cr. 093 (VEC)

Dear Judge Caproni:

The Government respectfully writes pursuant to the Court's Order dated December 1, 2015 directing the parties to address "disclosure of the sealed transcript from the October 16, 2015 oral argument and the related sealed filings." The Government has conferred with defense counsel who informed the Government that the defendant opposes any unsealing on the ground that even redacted release of the documents "would violate Mr. Silver's rights." Counsel for one of the third parties has filed a letter opposing unsealing on the ground that no redaction can protect that third party's identity. Counsel for the other third party opposes unsealing but in the alternative submitted proposed redactions for the Court to consider if the Court is inclined to unseal the relevant documents. The New York Times has filed a letter requesting that the documents be unsealed.

As set forth below, the Court should consider both the privacy interests of third parties and the First Amendment and common law rights of public access to court proceedings. The Government provides herewith for the Court's consideration redacted versions of the motion papers and transcript that the Government respectfully submits adequately protect the privacy rights of third parties while also preserving the public's right to access court proceedings and monitor the judicial process. *See Lugosch* v. *Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006).[1]

A. Background

In advance of trial, on October 12, 2015, the Government submitted a Motion *in Limine* Concerning Certain Character Evidence based on credible and reliable information that the

[1] The Government respectfully submits that to the extent the defendant has privacy rights that are implicated in disclosure of the sealed documents, those rights are substantially outweighed by the public's right of access.

Government had obtained about two extramarital relationships engaged in by the defendant in which he used his public position to benefit the individuals with whom he was having relations. The Government did not seek to admit evidence of those relationships at trial on its direct case, but asserted that such evidence would be relevant and admissible if the defendant introduced character evidence suggesting that he was careful to separate his personal business from official business or that he was a man of integrity or a good family man. (Gov't Mot. at 11). The Government did not name the third party individuals in its motion, but in light of their privacy interests and fair trial considerations, the Government submitted the motion under seal.

On October 15, 2015, the defendant filed under seal a response to the Government's motion, and the Court heard oral argument on the motion on October 16, 2015. The Court ordered that the courtroom be closed for the argument, and that the motion papers remain under seal until after trial. The Court set forth on the record two principal reasons justifying sealing and closure in advance of trial. First, the Court cited the fair trial rights of the defendant:

> [G]iven the proximity between today and the beginning of trial, I am concerned that the disclosure of the defendant's alleged extramarital affairs would increase the difficulty of picking a jury in this case. Because the allegations are not simply that he had two affairs but that he used his official position to gain favors for at least one of the women, the press is likely to make much out of the allegation. While jurors will be asked if they can set aside everything they've heard outside the courtroom, that sort of allegation may be particularly difficult for some to set aside, even if the evidence is never actually admitted in court.

(Oct. 16, 2016 Sealed Tr. at 115). The Court also stated that there was "no way" to redact the motion in advance of trial that would not affect fair trial rights. (*Id.* at 112).

Second, the Court cited the privacy interests of the third party individuals with whom the defendant was alleged to have had extramarital relationships: "[A]lthough we could anonymize [to] limit [it] to some extent, it seems likely that many people would be able to identify them based on at least the current briefs. They have a privacy interest in not being exposed in this matter at this stage of the proceeding." (*Id.* at 115).

The Court further explained that "[t]his is not to say that the motion should stay sealed or that it could not be redacted and disclosed subsequently," and stated that after trial the Court would consider whether the papers and transcript should remain under seal. (*Id.*) With regard to unsealing after trial, the Court stated that its "biggest concern is as to the third parties, to the two women who are identifiable from the brief. I think it could be redacted so they are no longer identifiable." (*Id.* at 112).

With regard to the substance of the Government's motion, the Court found that while there were "lots of character traits" that the information in the Government's motion could be relevant to, the Court's "general inclination" was that the "prejudicial impact outweighs the probative value, but that . . . is subject to how the trial starts to spin out." (*Id.* at 110). The Court warned the defense that "you need to be careful about the defense you're going down

relative to good family man, separates business and pleasure, official acts from personal acts, because that's going to be door-opening type of actions." (*Id.*)

At trial, the Government did not argue that the defendant opened the door to the admission of evidence regarding the extramarital relationships, and the defendant did not testify. Accordingly, the Government did not attempt to introduce any evidence of the relationships or of the defendant's official actions taken on behalf of those individuals. The Government may address certain of this conduct at sentencing, however, as the defendant's repeated use of his official position to benefit those with whom he was having a relationship may be relevant to the sentencing factors under 18 U.S.C. § 3553(a) and may be responsive to arguments that the defendant seeks to present at sentencing.

B. Legal Standard

The Supreme Court has held that "the press and general public have a constitutional right of access to criminal trials." *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 603 (1982) (citing *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980)). The "right of access is embodied in the First Amendment," and stems in part from the fact that "the criminal trial historically has been open to the press and general public." *Id.* at 603-04. The Supreme Court has further explained the principles underlying the constitutional right of access:

> [T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process-an essential component in our structure of self-government.

Id. at 606.

Following *Globe Newspaper*, the Supreme Court and the Second Circuit have held that the First Amendment right of access applies not only to criminal trials themselves, but to numerous other aspects of criminal proceedings, including preliminary hearings, *see In Press–Enterprise Co.* v. *Superior Court of Calif.*, 478 U.S. 1 (1986); pretrial suppression hearings, *see In re Herald Co.*, 734 F.2d 93, 98 (2d Cir. 1984); *voir dire* proceedings, *see ABC, Inc.* v. *Stewart*, 360 F.3d 90, 105-06 (2d Cir. 2004); plea hearings, *see United States* v. *Haller*, 837 F.2d 84, 86 (2d Cir. 1988); and sentencing hearings, *see United States* v. *Alcantara*, 396 F.3d 189, 191-92 (2d Cir. 2005). As particularly relevant here, the Second Circuit also has held that the First Amendment right of access applies to "written documents submitted in connection with judicial proceedings that themselves implicate the right of access," *In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) ("*New York Times I*"), and to "briefs and memoranda" filed in connection with pre-trial and post-trial motions, *see United States* v. *Gerena*, 869 F.2d 82, 85 (2d

Cir. 1989). The public also has a common law right of access to such documents. *See Lugosch*, 435 F.3d at 123.

In light of the First Amendment right of access to motion papers and judicial documents in criminal proceedings, such documents only may be sealed "if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *New York Times I*, 828 F.2d at 116 (internal quotation marks omitted). "'[D]ocuments used by parties [in connection with substantive pre-trial motions] . . . should not remain under seal absent the most compelling reasons.'" *Lugosch*, 435 F.3d at 126 (quoting *Joy* v. *North*, 692 F.2d 880, 893 (2d Cir.1982)).

The Second Circuit has articulated a four-step process "that a district court must follow in deciding a motion for closure:"

> First, the district court must determine, in specific findings made on the record, if there is a substantial probability of prejudice to a compelling interest of the defendant, government, or third party . . . which closure would prevent. Compelling interests may include the defendant's right to a fair trial; privacy interests of the defendant, victims or other persons; the integrity of significant [government] activities entitled to confidentiality, such as ongoing undercover investigations or detection devices; and danger to persons or property. Second, if a substantial probability of prejudice is found, the district court must consider whether reasonable alternatives to closure cannot adequately protect the compelling interest that would be prejudiced by public access. Third, if such alternatives are found wanting, the district court should determine whether, under the circumstances of the case, the prejudice to the compelling interest override[s] the qualified First Amendment right of access. Fourth, if the court finds that closure is warranted, it should devise a closure order that, while not necessarily the least restrictive means available to protect the endangered interest, is narrowly tailored to that purpose.

United States v. *Doe*, 63 F.3d 121, 128 (2d Cir. 1995) (internal citations and quotation marks omitted); *see also United States* v. *Martoma*, No. S1 12 CR 973 PGG, 2014 WL 164181, at *5 (S.D.N.Y. Jan. 9, 2014) (applying *Doe*'s four-factor test and holding that "the embarrassment [the defendant] will suffer if the [evidence at issue] is disclosed does not trump the presumptive right to public access that attaches to substantive pre-trial motions").

The Second Circuit has held that the "privacy interests of innocent third parties" can be the kind of "compelling interest" that may justify sealing or closure. *United States* v. *Amodeo*, 71 F.3d 1044, 1051 (2d Cir. 1995). "In determining the weight to be accorded an assertion of a right of privacy," the Second Circuit has instructed courts to "consider the degree to which the subject matter is traditionally considered private rather than public," such as "[f]inancial records of a wholly owned business, family affairs, illnesses, embarrassing conduct with no public ramifications, and similar matters." *Id.*; *see also United States* v. *Simpson*, No. 09 Cr. 249, 2010 WL 3633611, at *2 (N.D. Tex. Sept. 20, 2010) ("The court can order the redaction of [third-party] names if it finds that substantial privacy interests would be violated by disclosure.").

The privacy interests of a public official in a corruption case, on the other hand, are less compelling where the official's conduct has "public ramifications." *Amodeo*, 71 F.3d at 1051; *see also United States* v. *Huntley*, 943 F. Supp. 2d 383, 387 (E.D.N.Y. 2013); *Pansy* v. *Borough of Stroudsburg*, 23 F.3d 772, 787 (3d Cir. 1994) ("privacy interests are diminished when the party seeking protection is a public person subject to legitimate public scrutiny"); *United States* v. *White*, No. Cr. A. 04-370, 2004 WL 2399731, at *5 (E.D. Pa. Sept. 22, 2004) (holding that disclosure of grand-jury testimony of city employees was proper because "they cannot be expected to have any personal privacy interest in their duties as [c]ity employees").

C. Analysis

The Government respectfully submits that under the standards set forth in *Lugosch*, *Doe*, and related cases, the relevant motion papers and argument transcript can be appropriately redacted in order to protect the rights of third parties, while still vindicating the public's First Amendment right of access.

The motion papers and transcript plainly are judicial documents to which the First Amendment right of access applies such that only the "most compelling reasons" can justify their remaining under seal, and even where such compelling reasons are present, any sealing must be "narrowly tailored" to serve the interest at issue. *Lugosch*, 435 F.3d at 126; *New York Times I*, 828 F.2d at 116.[2] The public's constitutional right of access to the documents at issue is particularly strong here because the motion, and the Court's comments at oral argument, had the potential to affect the course of the trial, including the defendant's decision ultimately not to testify or to offer character evidence on his behalf. Aspects of the defendant's conduct – notably his willingness to abuse his official position to provide financial benefits to those close to him – are also likely to be relevant at sentencing.

Notwithstanding the above, the privacy interests of the third parties who were identified in the motion papers (albeit not by name) can constitute the type of "family affairs" that that can justify limited sealing. *Amodeo*, 71 F.3d at 1051.[3] Moreover, the specific identity of those

[2] Counsel for one of the third parties argues that the Court should find that no First Amendment right of access applies because "none of the content [set forth in the motion] was raised at trial." (Letter from Counsel dated Jan. 21, 2016 at 2). That is not the standard, however. Under both *In re New York Times Co.*, 828 F.2d at 114, and *Gerena*, 869 F.2d at 85, the First Amendment right of access extends to "briefs and memoranda" filed in connection with pre-trial motions in criminal actions regardless of whether the motions resulted in evidence that was introduced at trial. Nor is it relevant that the Court did not issue a final decision on the motion prior to trial. *See Lugosch*, 435 F.3d at 123 (noting that the right of access attaches "[o]nce th[e] submissions come to the attention of the district judge"). Similarly, the argument transcript concerned a judicial proceeding to which the First Amendment right of access applies.

[3] It should be noted that the alleged conduct as set forth in the motion papers was not strictly private even from the perspective of the third parties, as the motion sets forth how these individuals benefited from the defendant's use of his official position on their behalf. As such, the conduct as alleged had "public ramifications." *Amodeo*, 71 F.3d at 1051.

individuals (as opposed to the underlying conduct as alleged in the Government's motion) did not "play[] a particularly significant role in the functioning of the judicial process," *Globe Newspaper Co.*, 457 U.S. at 603, nor is the identity of those individuals necessary "for the public monitoring of federal courts," *Lugosch*, 435 F.3d at123.[4]

Based on the foregoing, the Government's enclosed proposed redactions are carefully tailored to protect the identities of the third parties by removing information in the relevant documents that could be used by the press or the public to readily identify them with specificity.[5] While the Government realizes that even with these careful proposed redactions members of the press or public nonetheless may speculate as to the identities of the third parties, pursuant to well-established law set forth above, the Court needs to consider the impact on the public's right of access that would come from sealing the documents in their entirety.

Respectfully submitted,

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[4] To the extent the defendant argues that his own right to privacy justifies continued sealing, the Government respectfully submits that any such privacy right is substantially outweighed by the public's right of access in light of his role as a public official and a convicted defendant. *See, e.g.*, *Huntley*, 943 F. Supp. 2d at 387.

[5] Counsel for one of the third parties has proposed additional redactions in the event the Court does not keep the entire set of documents under seal. The Government does not believe such additional redactions are necessary to ensure that the individual is not specifically identified in the motion papers. Moreover, the proposed additional redactions would keep under seal one of the ways in which the defendant used his official position to advance his personal interests. Accordingly, the Government does not believe the proposed additional redactions are "narrowly tailored" to protect the privacy interest at issue. *Lugosch*, 435 F.3d at 126.