Case Nos. 09-1511 & 09-1531

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PRISON LEGAL NEWS,
Plaintiff-Appellant,

v.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Colorado
The Honorable Marcia S. Krieger
D.C. Case No. 1:08-cv-1055-MSK-KLM

BRIEF OF *AMICI CURIAE* 60 MINUTES, THE ASSOCIATED PRESS, WESTWORD, THE AMERICAN SOCIETY OF NEWS EDITORS, THE ASSOCIATION OF CAPITOL REPORTERS AND EDITORS, THE SOCIETY OF PROFESSIONAL JOURNALISTS, AND THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO IN SUPPORT OF PLAINTIFF-APPELLANT

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The Society of Professional Journalists is a non-profit organization that has no parent company and does not issue stock.

The American Civil Liberties Union of Colorado is a non-profit organization that has no parent company and does not issue stock.

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INTEREST OF *AMICI CURIAE*

Amici curiae respectfully submit this brief in support of appellant Prison Legal News. *Amici* are news organizations, associations of news professionals, and a civil rights advocacy group with longstanding interests in the public availability of court records. *Amici* understand that tools including, but not limited to, the Freedom of Information Act are critical to public understanding of the affairs of the government. *Amici*'s ability to serve their own functions in disseminating and analyzing newsworthy information depends on the access of interested members of the media and the public to court and other government records. Pursuant to Fed. R. App. P. 29(a), both parties have consented to the filing of this brief.

60 Minutes, a production of CBS News, a division of CBS Broadcasting, Inc., is a weekly national television news magazine.

The Associated Press gathers and distributes news of local, national and international importance to its member newspapers and broadcast stations and to thousands of other customers in all media formats across the United States and throughout the world.

Westword is a weekly newspaper published in Denver, Colorado, the largest media market in the state. Westword has extensively covered conditions and events at USP Florence.

With some 600 members, the American Society of News Editors (formerly the American Society of Newspaper Editors) is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and credibility of newspapers.

The Association of Capitol Reporters and Editors was founded in 1999 and currently has approximately 200 members. It is the only national journalism organization for those who write about state government and politics.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire

and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The American Civil Liberties Union of Colorado is a not-for-profit public interest organization with 10,000 members. Since 1952 it has worked to defend and protect the civil rights and liberties of all persons in Colorado. The ACLU frequently relies on state and federal open records laws, and it works to preserve and strengthen the right of the press and the public to obtain information about the functioning of our courts and our government.

SUMMARY OF THE ARGUMENT

This case concerns media access to audiovisual evidence that was published to two juries in open court during federal capital trials. It arises under the Freedom of Information Act (FOIA) only because appellant Prison Legal News (PLN) sought copies of the trial exhibits in question after they had been transferred from the clerk of court back to the office of the United States Attorney prosecuting the matter. Had copies of those documents[1] remained in the court's own file, the

[1] *Amici* use the term "document" to encompass the full scope of "documents or electronically stored information" defined in Fed. R. Civ. P. 34(a)(1)(A).

Freedom of Information Act (FOIA) simply would not apply, and PLN would have been able to exercise its common-law and First Amendment rights to inspect and copy trial exhibits in the possession of the court.

Those rights of public access to court records, especially trial exhibits, continue to apply, notwithstanding a change in the government custodian of the records. Accordingly, application of any exemptions to FOIA disclosure must take into account not only the public and press's interest in the underlying information, but also the well-established public interest in transparent court proceedings. Any other approach effectively allows the government to obtain a *de facto* seal on the records without a public process, inverting what should be the government's burden to articulate a need for secrecy *ex ante* into a media organization's need to litigate under FOIA *ex post*.

Hence the district court erred in applying only a FOIA analysis suitable to Executive Branch records, rather than a test comprehending the documents' status as judicial records. Applying the common-law and First Amendment rights to court records, it is clear that the trial exhibits at issue in this case would be subject to disclosure as non-

sealed court records if the clerk of court were the physical custodian. They should, accordingly, be produced through PLN's FOIA request.

ARGUMENT

I. THE VIDEOTAPE AND PHOTOGRAPHS AT ISSUE BECAME JUDICIAL DOCUMENTS WHEN THEY WERE PUBLISHED AS TRIAL EVIDENCE WITHOUT BEING SEALED.

The trial exhibits requested by PLN became judicial documents when they were published to the jury and played to the gallery in open court. At no time before, during, or after the trial did the government move to seal the exhibits or close the courtroom. Their return to the prosecutor's office did not somehow remove their status as judicial records. Any public disclosure analysis—whether under the common law, the First Amendment, or FOIA—should, therefore, proceed from the premise that these are unsealed judicial records in the custody of a government office.

A. The Recording And Photographs Were, And Are, Judicial Documents.

At both of the Sablan murder trials, the tape and photographs sought by PLN were offered and admitted as exhibits. Aplt. App. at 10-11, 13, 23, 24. They were, that is, "filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory

proceedings." *Goldstein v. Forbes*, 260 F.3d 183, 192 (3d Cir. 2001); *see also United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("The item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document.") Documents that are "used to determine litigants' substantive legal rights" are the most readily subject to treatment as court records for these purposes. *See Lugosch v. Pyramid Co.*, 435 F.3d 110, 121 (2d Cir. 2006). Hence trial evidence is *the* prototypical example of a judicial document. *United States v. Martin*, 746 F.2d 964, 968 (3d Cir. 1984) (noting that "the common law right of access is *not limited to evidence*, but rather encompasses all 'judicial records and documents'" (emphasis added)); *see also*, *e.g.*, *Valley Broadcasting Co. v. U.S. District Ct.*, 798 F.2d 1289, 1294 (9th Cir. 1986) (analyzing tapes in evidence as judicial records); *United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985).[2] Whether the evidence was entered in a bench or a jury

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[2] The category of judicial records is much broader than trial evidence, and encompasses mere discovery documents attached to discovery motions, *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157 (3d Cir. 1993); potential *Brady* material submitted for *in camera* review, *United States v. Wecht*, 484 F.3d 194, 209 (3d Cir. 2007); settlement agreements filed with the court, *SEC v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993); and indeed "all

trial is of no consequence to its status as a judicial record. *See, e.g.*, *United States v. Sampson*, 297 F. Supp. 2d 342, 344 (D. Mass. 2003) (audiovisual jury exhibits are "documents relied upon in judicial proceedings").

During the trials, the exhibits were apparently held in the custody of the clerk of the district court. *See* D.C.COLO.LCrR. 55.1 ("Pleadings, other papers, *and exhibits in court files* shall not be removed from the clerk's office or the court's custody except by written court order." (emphasis added)). Following the completion of each trial, the Sablans' trial courts returned the copies of the exhibits in question to the U.S. Attorney, without any showing tantamount to a motion to seal. Aplt. App. 90.[3] Had the trial court not taken this step, the tape and photographs in question would have physically remained a part of the court's file, where it would be axiomatic that while the presumption of

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materials that are the subject of an evidentiary ruling by the court, whether or not found admissible," *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 899 (C.D. Pa. 1981); *but cf. United States v. McVeigh (In re Dallas Morning News)*, 119 F.3d 806, 813 (10th Cir. 1997) (denying public access to exhibits deemed inadmissible).

[3] Identically-worded form orders were entered at the close of each Sablan prosecution providing that "counsel for the parties shall retain custody of their respective exhibits" until after the expiration of all appeals. *See* Order Regarding Custody of Exhibits and Depositions, No. 00-cr-531 (D. Colo. March 12, 2007 & May 20, 2008).

public access, discussed *infra*, applies, FOIA does not. 5 U.S.C. § 551(1)(B) (exempting "the courts of the United States" from the FOIA definition of "agency").

It is routine for federal judicial records to be transferred from the custody of a court clerk to an Executive Branch agency better suited to preserve and maintain the records. Federal court records are regularly deposited in the National Archives' regional records centers, while the Supreme Court's own older records are kept at the National Archives Building in Washington, where they are open for public inspection. *See* National Archives, "Frequently Asked Questions," *at* www.archives.gov/faqs. The practice of returning criminal exhibits to the U.S. Attorney also appears relatively widespread. *See, e.g.*, *United States v. Novaton*, 271 F.3d 968, 992 (11th Cir. 2001).

The mere fact that court records are stored in a non-judicial federal facility does not imply that they cease to be court documents. *Amici* are unaware of any case that has advanced that improbable proposition.[4] And, indeed, at least one other Court of Appeals

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[4] Exhibits returned to *private* parties may be a different matter, but that question is not presented here. *See Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 781 (1st Cir. 1988) (noting that court has no

confronted with the precise factual situation at issue in this case readily concluded that an exhibit played in court and then returned to the federal prosecutor remained a judicial record. In *United States v. Graham*, the Second Circuit rejected defendants' argument that tapes played at a pre-trial hearing were not judicial records because they were not entered into evidence and "are not in the custody of the Clerk, but rather in the hands of the prosecutor." 257 F.3d 143, 152 n.5 (2d Cir. 2001). The fact of custody was deemed irrelevant: "However, it is common for the parties to retain custody of their own trial exhibits and . . . the tapes became public by virtue of having been played in open court." *Id.* The *Graham* court treated any court "documents held by the government" to be subject to the rules applicable to judicial records. *Id.*

Other cases, if less precisely on point, are to the same effect. Thus the court in *United States v. Fuentes*, No. Cr. S-07-248, 2008 WL 2557949, at *3 (E.D. Cal. June 24, 2008), ordered prosecutors—and the clerk of court—to produce certain "ministerial" grand jury records that were "a matter of public record." The Supreme Court of Pennsylvania recently held that an audiotape played by prosecutors at a preliminary

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power to prevent destruction of exhibits returned to parties once case is closed and jurisdiction terminates).

hearing—but never admitted to evidence or physically placed in the custody of the court—was nonetheless a judicial record subject to reproduction for the public. *Commonwealth v. Upshur (In re WPXI, Inc.)*, 924 A.2d 642, 648-51 (Penn. 2007).

While FOIA actions against EOUSA are relatively common, *amici* have been unable to locate a single case in which EOUSA has been reported to claim a FOIA exemption against disclosure of a trial exhibit. Indeed, EOUSA itself propounds policies to the U.S. attorneys making clear that documentary evidence introduced at trial becomes a judicial record:

> Normally, United States Attorneys' offices (USAOs) should not have custody of evidence. . . . When evidence is required in court the agencies handling the case, or other representative of the investigating agency, should bring the evidence and retain custody until the material is introduced as evidence, *at which point it becomes the responsibility of the United States Marshal, the Clerk, and the Court*.

United States Attorneys' Manual § 3-13.250 (emphasis added). And, in other cases, EOUSA has recognized that court records in its possession are subject to broader disclosure obligations than other prosecutorial records. *See Thomas v. Office of U.S. Attorney*, 928 F. Supp. 245, 247 (E.D.N.Y. 1996) (EOUSA advised a FOIA requester that "as a third

party requester, he would receive only public court records and news clippings"); *Larson v. Executive Office for U.S. Attys.*, No. 85-2575, 1988 WL 285732, at *1 n.3 (D.D.C. Nov. 22, 1988) (EOUSA willing to provide "copies of public court records"). *See also U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989) (ordering FOIA production of "publicly available" court opinions in possession of Justice Department).

Common sense, and the case law on this question, are therefore in accord: A judicial record does not lose that status when a court transmits it to another arm of the government for archiving or preservation. Any other rule would raise a serious question as to a court's power to restrict public access to records by so archiving them. Consequently, the trial exhibits here retain their status as judicial documents.

B. The Judicial Records In Question Were Played In Open Court Without An Application To Seal.

A motion to make a filing under seal is the only procedure by with evidence published to a jury can be shielded from public view. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) ("If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure

of private information.”). When a filing is made under seal, the submitting party may be required to produce a redacted version for public view; and in any event the sealing court “must retain [an] unredacted copy as part of the record.” Fed. R. Civ. P. 5(d), (f); Fed. R. Crim. P. 49.1(d), (f). In these and other ways, the practice of filing under seal has extensive procedural safeguards to protect against over-use and ensure that court proceedings are open to public inspection to the greatest extent possible, most importantly, notice and the obligation that the court make findings on the record. But no sealing procedure was invoked here.

The local rules of the district court recognize the judge’s “constitutional obligation to determine whether sealing a paper filed in a case or closing all or a portion of a court proceeding is warranted.” D.C.COLO.LCrR. 47.1(A). So weighty is the presumption in favor of public access that

> On the business day after the filing of a motion to seal or motion to close court proceedings, a public notice will be posted in the clerk’s office and on the court’s web site. The public notice will advise of such motion and state that any person or entity may file objections to the motion on or before the date set forth in such public notice. . . .

D.C.COLO.LCrR. 47.E. Any submission not granted a seal "shall be deemed part of the public record." D.C.COLO.LCrR. 47.H.

The government did not utilize this procedure, either in the first Sablan trial or—perhaps more surprisingly—in the second, which took place *after* PLN's FOIA request. Aplt. App. at 13, 24, 34. No privacy interest was asserted by the government or by any party on behalf of the Sablans' victim or his family, and neither the public nor press was put on notice that the exhibits shown in open court would not be available for subsequent inspection.

II. THE PRESS AND PUBLIC ENJOY A STRONG PRESUMPTIVE RIGHT OF ACCESS TO UNSEALED JUDICIAL RECORDS UNDER THE COMMON LAW AND THE CONSTITUTION.

The interest in open judicial process transcends the importance of any particular document. The right of access to court records "is an important aspect of the overriding concern with preserving the integrity of the law enforcement and judicial processes." *United States v. Hickey,* 767 F.2d 705, 708 (10th Cir. 1985); *see also United States v. Hubbard,* 650 F.2d 293 (D.C. Cir. 1980). Both the common law and the First Amendment protect democratic values of transparency and accountability in the judicial process by requiring courts to make

specific findings and follow particular procedures prior to limiting access to judicial documents. Where, as here, none of those procedures were invoked, the traditional rights of access are at their zenith. Setting aside for the moment the complication that the judicial records are in the custody of the prosecutor, it is clear that the press and public's right of access should apply to the exhibits in question.

A. The Common Law Provides A Presumptive Right of Access to Judicial Documents.

"It is clear that the courts of this country recognize a general right to inspect and copy . . . judicial records and documents." *Nixon v. Warner Comm.*, 435 U.S. 589, 597 (1977). This "general" or "common law" right of access to judicial documents parallels the insistence on public trials and similarly manifests the common law's dedication to transparency and accountability. *See Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1068 (3rd Cir. 1984) (citing M. Hale, *History of The Common Law of England* 163 (C. Gray ed. 1971)).

This historic right "allows the citizenry to monitor the functioning of our courts, thereby ensuring quality, honesty and respect for our legal system." *In re Cont'l Ill. Sec. Litig*, 732 F.2d 1302, 1308 (7th Cir. 1984). To ensure "a measure of accountability" and promote "confidence

in the administration of justice," the common law system identifies the trial as a public event, rendering what transpires in the courtroom as public property. *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995); *In re Application of Nat'l. Broadcasting Co.*, 653 F.2d 609, 614 (D.C. Cir. 1981) (citing *Craig v. Harney*, 331 U.S. 67, 374 (1947)). Judicial documents are thus public documents "almost by definition," and the public is entitled to access them by default. *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006); *Fla. Star v. B.J.F.*, 491 U.S. 524, 543 (1989) (White, J., dissenting) ("[J]udicial records have always been considered public information in this country.").

"The appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch." *FTC v. Standard Fin. Mgmt. Corp.,* 830 F.2d 404, 410 (1st Cir. 1987).

This Court has repeatedly and consistently recognized "the axiom that a common law right exists to inspect and copy judicial records."

Hickey, 767 F.2d at 708; *see also, e.g.*, *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007); *United States v. McVeigh (In re Dallas Morning News)*, 119 F.3d 806, 811-12 (10th Cir. 1997) (per curiam); *see also Exum v. United States Olympic Comm.*, 209 F.R.D. 201, 205 n.3 (D. Colo. 2002) ("[T]he filing of a document with the court gives rise to a presumptive right of public access.") (citing *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 460-61 (10th Cir. 1980)).

1. Only Extraordinary, Compelling Circumstances Could Preclude Access To Audiovisual Evidence Played In Open Court.

It has been established for some time that audio and video recordings played in court are subject to the same principles of public access as written matter. In the landmark case *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 599 (1978), the Supreme Court applied the usual presumption of public access to the historic audiotapes President Nixon recorded in his offices, which the government had introduced as exhibits in the trials of some of the Watergate coconspirators. While *Nixon* held that complete transcriptions of the tapes, rather than copies of the recordings themselves, were sufficient for public dissemination, no justice in *Nixon*

questioned that the *content* of the exhibits needed to be available for republication outside the trial courtroom. *See* 435 U.S. at 600 (noting dispute concerned only "aural" recordings, not contents of conversations). *Nixon* was complicated by the existence of a statute arguably providing for the National Archives to take custody of the tapes. For the majority, this "alternative means of public access tip[ped] the scales" towards limiting disclosure to complete transcripts. 435 U.S. at 605. Hence *Nixon* left open the standard for providing media organizations with access to reproduce and, potentially, broadcast audio and video information shown at trials of public interest.

The answer, as elaborated by the lower courts since *Nixon*, is that the common-law presumption of access to court records applies with full force to audiovisual recordings, to be displaced only in exceedingly rare instances, especially when transcription of the material would be inadequate.[5] In 1980, the Second Circuit held that "when physical

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[5] The District Court's rules appear to recognize this explicitly. *See* D.C.COLO.LCrR. 55.2 (providing that "[p]hotographic negatives [and] tape recordings" in the clerk's custody "shall not be available for inspection by any person except while in the presence of and under the control of the clerk. The clerk may limit or preclude access and copying in order to preserve such evidence."). The government has not asserted

evidence is in a form that permits inspection and copying without any significant risk of impairing the integrity of the evidence or interfering with the orderly conduct of the trial, only the *most compelling circumstances* should prevent contemporaneous public access to it." *In re Application of Nat'l Broad. Co.,* 635 F.2d 945, 952 (2d Cir. 1980) (emphasis added). The Second Circuit reasoned:

> Once . . . evidence has become known to the members of the public . . . through their attendance at a public session of court, it would take *the most extraordinary circumstances* to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction.

Id. (emphasis added).

Other Courts of Appeals soon adopted substantially the same rule. *United States v. Criden (In re Nat'l Broad. Co.)*, 648 F.2d 814 (3d Cir. 1981) (television network entitled to copy audio- and videotapes used in political corruption trial, deeming the evidence to be judicial records); *United States v. Jenrette (In re Nat'l Broad. Co.),* 653 F.2d 609 (D.C. Cir. 1981) (district court abused discretion in denying reproduction of audio- and videotapes played in "Abscam" criminal trial).

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here that reproduction of the exhibits for PLN would cause any degradation of the originals.

Other post-*Nixon* decisions acknowledged the force of the presumption but allowed wider scope for the district court's exercise of discretion than does the Second Circuit's most-compelling-circumstances standard. *See United States v. Webbe*, 791 F.2d 103, 106 (8th Cir. 1986) (denying release of tapes where transcripts had already been produced to media); *United States v. Beckham*, 789 F.2d 401, 414 (6th Cir. 1986) (common-law right encompasses taped evidence, but approving withholding of "a duplicate of information already made available to the public and the media"); *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982) (allowing that strong presumption of access may give way in light of "articulable facts known to the court, not . . . unsupported hypothesis or conjecture" that release of tape could affect the fairness of a trial); *but see United States v. Ladd*, 218 F.3d 701 (7th Cir. 2000) (granting press access to sealed hearsay statements used as evidence at trial).[6] *See also In re Associated Press*, 172 Fed. Appx. 1, 3-4 (4th Cir. 2006) (unpublished) (requiring same-day press disclosure of all documents and tapes "fully published to the jury" in

[6] Both *Edwards* and *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 431 (5th Cir. 1981), withheld recordings based concerns that release would impinge on the fairness of subsequent trials of related defendants. That consideration is not present here.

Zacarias Moussaoui prosecution, *including* exhibits "declassified only for the limited purpose of being discussed in court and shown to the jury without unrestricted public access").

While acknowledging the common-law right, the Tenth Circuit has focused its analysis on courts' power to seal records where the public interest in disclosure "is outweighed by competing interests," rather than on the precise contours of public access to *unsealed* records. *See Hickey*, 767 F.2d at 708. In *McVeigh*, 119 F.3d 806, this Court was faced with media organization requests to unseal certain motions and evidence in a trial of substantial public importance. The Court was able to avoid determining the precise contours of the news media's common-law right to electronic evidence played in open court in that case. But its approach emphasized the difference between the withholding of tapes in *Nixon*, "where transcripts of the tapes were [already] available to the media and the public," and a case, like this one, "where access to [court] documents is an important factor in understanding the nature of the proceedings themselves and when access to the documents is supported both by experience and logic." *McVeigh*, 119 F.3d at 812.

2. Media Access To Audiovisual Evidence Is Critical To Public Evaluation Of The Administration Of Justice.

In the decades since *Nixon*, audio and audiovisual evidence has frequently played a critical role in criminal prosecutions. The fact that this evidence can be reproduced and retransmitted has provided the public with important insight into the administration of justice. As courts regularly recognize, the news media play a critical role in advancing the public's access to court proceedings by obtaining, reproducing, and retransmitting audiovisual evidence played in open court. To note only two of the countless examples:

- In the trial of terrorism coconspirator Zacarias Moussauoi, media organizations sought and obtained access to all documents published to the jury "as soon as is practically possible, but in no event later than 10:00 a.m. on the day after the exhibit is published to the jury," including specially declassified materials. *In re Associated Press*, 172 Fed. Appx. at 4.
- In the prosecution of alleged Mafia figure John Gotti, Jr., the news media sought and obtained full access to review audiovisual evidence during the trial, and to duplicate it at

the close of trial. *In re NBC Universal, Inc.*, 426 F. Supp. 2d 49, 58-59 (E.D.N.Y. 2006).

3. The Common-Law Right Of Access Applies To The Exhibits At Issue Here.

As this Court has approached the issue, the public's interest in reviewing court records is at least as strong as the public interest in avoiding unnecessary sealing of those records in the first place. *See, e.g.*, *McVeigh*, 119 F.3d at 811. And, among all judicial records, the lowest possible bar to disclosure must apply to exhibits already disclosed in court, where any interest weighing against public disclosure has already been substantially compromised, if not eliminated entirely. But even if the *ex ante* sealing standard were the appropriate one, these materials fall readily within the scope of the common-law right of access.

In *Mann v. Boatwright*, 477 F.3d 1140 (10th Cir. 2007), this Court held that one litigant's privacy concerns related to an ongoing family feud could not outweigh the presumption of public access to a civil complaint and other documents. The Court was "not convinced . . . that [litigant's] privacy concern with respect to this information is sufficiently critical to outweigh the strong presumption in favor of

public access to judicial records." *Id.* at 1148 (citing *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993)). This was true, at least in part, because the sensitivity of the material in a document does not render the document any less relevant to a legitimate matter of public concern. *See Anderson v. Suiters*, 499 F.3d 1228, 1236-37 (10th Cir. 2007). But it was also true—in an irony that would appear to establish the point—because "much of the information" at issue "appears to have been disclosed previously *in public probate court proceedings* . . . ." *Mann*, 477 F.3d at 1149 (emphasis added).

As well explained in PLN's brief, the records at issue here concern two trials of substantial public interest. Both the underlying crime and the ensuing trials were subject to substantial coverage in the news media, much of which focused on how a high-security prison could have allowed the murder in question to take place. *See, e.g.*, Mike McPhee, "Pair May Face Death In Prison Slaying," *Denver Post*, Jan. 27, 2001, at B-4. The case was the first in several years in which the federal death penalty was sought in Colorado. *Id.* The public's interest in both the circumstances of the trial and the underlying conditions at a federal facility were, therefore, at their zenith. Any cognizable privacy interest

is, conversely, highly attenuated—if not wholly vitiated—by the fact that the materials have indeed already been displayed publicly, twice, in an open courtroom.

Unlike *Nixon*, *Webbe*, or the Gotti case, it is not plausible to think (and the district court here did not suggest) that transcription of the tape could be an adequate substitute for its disclosure. Unlike audio recordings of conversations among presidential aides, where only the presence of a separate disclosure statute "tip[ped] the balance" to only requiring transcripts (*Nixon*, 435 U.S. at 605), autopsy photos and a video "taken at the scene with the perpetrators present *and continuing to act* and comment" are not susceptible to a transcription that would convey their complete contents. Aplt. Appx. at 11 (emphasis added).

To the extent that the district court questioned the relevance of the exhibits to the examination of government activity (*see* Aplt. Appx. at 113), it wholly failed to appreciate that the fact that the government *used* the documents as trial evidence itself established their connection to the government's decision-making in charging the Sablans with capital murder.

The district court therefore erred in failing to take cognizance of the common-law right of access to these documents as court records, to be overcome only by "extraordinary," "most compelling" circumstances. *Application of Nat'l Broad. Co.*, 635 F.2d at 952.

B. The Evidence At Issue Falls Within The Qualified First Amendment Right Of Access To Court Documents.

Several courts have recognized a First Amendment right to view certain court documents that is "even more stringent" than the common-law right. *In re Providence Journal Co.*, 293 F.3d 1, 11 (1st Cir. 2002). This Court has remained agnostic on that question but has twice assumed, without deciding, that there may be "a constitutional right of access to court documents," and that such a right would be governed by the First Amendment standard for public access to criminal trials and proceedings set forth in *Press-Enterprise Co. v. Superior* Court, 478 U.S. 1 (1986) (*Press-Enterprise II*). *See McVeigh*, 119 F.3d at 812; *United States v. Gonzales*, 150 F.3d 1246, 1255-56 (10th Cir. 1998).[7] The Court need not reach the constitutional issue here because both the FOIA and common-law rights of access plainly apply. But were those

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[7] *See also Larson v. Am. Family Mut. Ins. Co.,* No. 06-cv-1355, 2007 WL 1686747 (D. Colo. June 8, 2007) (applying *Gonzales,* 150 F.3d at 1260, to video depositions).

grounds to prove inadequate, the standalone First Amendment right would demand disclosure.

The Supreme Court has long recognized the First Amendment dimension of public attendance at trials and other judicial proceedings. *See Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 604 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality opinion). The familiar, two-pronged test for ascertaining the scope of the right originated in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*), and *Press-Enterprise II*. The "experience" test examines whether the "place and process have historically been open to the press and general public." *Press-Enterprise II,* 478 U.S. at 9. The "complementary" test for "logic" asks "whether public access plays a significant positive role in the functioning of the particular process in question" by, for example, "enhancing . . . the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise I*, 464 U.S. at 508.

Following the *Press-Enterprise* cases, at least six circuits have held that these First Amendment principles extend from attendance at court hearings to related tangible records. *See In re Providence Journal*

Co., 293 F.3d 1 (1st Cir. 2002) (finding constitutional right of access to "materials on which a court is meant to rely in determining the parties' substantive rights" in a criminal case); *Hartford Courant v. Pellegrino*, 380 F.3d 83, 91-96 (2d Cir. 2004) (court dockets); *United States v. Biaggi (In re N.Y. Times Co.)*, 828 F.2d 110, 114 (2d Cir. 1987) ("written documents submitted in connection with judicial proceedings that themselves implicate the right of access" and exhibits at a suppression hearing); *In re Herald Co.,* 734 F.2d 93, 101 (2d Cir. 1984) (exhibits used at a suppression hearing); *United States v. Antar*, 38 F.3d 1348, 1359-60 (3d Cir. 1994) (transcripts of voir dire); *United States v. Soussoudis (In re Washington Post Co.)*, 807 F.2d 383, 390 (4th Cir. 1986) (documents filed as part of plea and sentencing hearings); *In re Search Warrant*, 855 F.2d 569, 573 (8th Cir. 1988) (affidavit filed in support of search warrant); *Phoenix Newspapers, Inc. v. United States District Court*, 156 F.3d 940, 948 (9th Cir. 1998) (transcripts of closed criminal proceedings once need for closure ceases); *see also Peters*, 754 F.2d at 763 (common-law right of access to trial exhibits is "of constitutional magnitude through the first amendment"); *Associated Press v. U.S. District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (pre-

Press-Enterprise constitutional right of access to documents related to pretrial proceedings).

The *Press-Enterprise* test carries over readily to trial exhibits that were *in fact* played to a jury and public gallery. Like the documents in *In re Herald Co.*, the materials at issue here were offered as substantive evidence. Like the documents in *Phoenix Newspapers*, any potential for prejudice to ongoing or future judicial proceedings has dissipated. The public criminal trial is the *sine qua non* of a judicial event that satisfies both the "history" and "logic" prongs of *Press-Enterprise I* and *II*.

Moreover, the careful weighing of interests and traditions required by the *Press-Enterprise* framework would be irrelevant in many cases if the government were to proceed routinely as it did here, failing to file a properly noticed motion to seal when the documents were first submitted to the Court and then asserting FOIA protection once the documents returned to its custody. Vindication of the public's First Amendment interest requires the prior assertion of a government interest in secrecy or privacy, rather than *post hoc* assertions once the documents have been "clawed back" to government control. The "appearance of fairness" so important to the *Press-Enterprise* approach

demands fair *ex ante*, not *ex post*, procedures, of the sort the district court would have imposed under Fed. R. Crim. P. 49.1 and its local rules had a motion to seal actually been filed.

III. JUDICIAL DOCUMENTS TRANSFERRED TO THE CUSTODY OF THE EXECUTIVE SHOULD BE SUBJECT TO COURT RECORD ACCESS PRINCIPLES, NOT THE FOIA EXEMPTION JURISPRUDENCE.

The common-law and constitutional rights of access to court records would be substantially eroded, if not eviscerated, if transfer of physical custody of the court records to another arm of government wholly defeated the right. Any former court document now held by some branch of the government—whether it be the Administrative Office of the U.S. Courts, the National Archives and Records Administration, or the Department of Justice—must therefore remains subject to the principles of public access to judicial records. *See Graham*, 257 F.3d at 152 n.5. FOIA, rather than petition to the court or its clerk, may be the preferred statutory right of action for obtaining records from FOIA-governed agencies, but the underlying interest remains an interest in judicial records. When the item requested under FOIA is a judicial record held by an executive custodian, any application of FOIA's

statutory exemptions to disclosure must be restricted to the more limited grounds for refusing disclosure of court records.

This point substantially overlaps with PLN's forceful argument that by virtue of their publication to the jury in open court, the exhibits at issue here fall within the well-established "public domain" doctrine compelling production through FOIA. *See* Plf.-Aplt.'s Br. at 16-26. That these documents are in the public domain for FOIA purposes is clear; as the D.C. Circuit has explained,

> until destroyed or placed under seal, tapes played in open court and admitted into evidence—no less than the court reporter's transcript, the parties' briefs, and the judge's orders and opinions—remain a part of the public domain.

Cottone v. Reno, 193 F.3d 550, 554 (D.C. Cir. 1999).

To the extent, however, that the public-domain determination is not coextensive with the determination of what constitutes a judicial record, this Court should recognize that it is the status of these materials *as* judicial records that compels their disclosure. The fact that FOIA provides one *procedure* for accessing and compelling production of the documents cannot create in the Executive Branch a new substantive right to withhold judicial materials that a court could not itself withhold if it retained possession. Any other rule would allow the government to

effectuate a *de facto* judicial seal without the process and judicial involvement that a proper motion to seal necessarily involves. And, as argued *supra*, the non-FOIA balancing test for disclosure of the exhibits as unsealed trial exhibits wholly supports their disclosure now.

Had the exhibits been sealed, the Federal Rules would appear to have required the court to maintain a copy of them. *See* Fed. R. Crim. P. 49.1(f). It would invert the logic of sealing and FOIA to make *unsealed* records in the hands of the prosecutor harder to obtain than *sealed* records that remained with the court.

Tax Analysts is entirely compatible with this principle, though it differs from the instant case in a key factual detail. That case concerned an organization's efforts to obtain through FOIA an Executive Branch agency's compendium of *publicly-available* court opinions. 492 U.S. at 140-41; *see also id.* at 156 (Blackmun, J., dissenting) ("There is no question that the material is available elsewhere."). The government had argued that FOIA was not applicable because, *inter alia*, the documents were not "agency records" under FOIA. *Id.* at 146. The Court disagreed, holding that the court opinions fell squarely within FOIA's mandate. *Id.* at 155. Here, there has been no suggestion that the copies

of the exhibits in question are not FOIA "agency records," nor that they could be obtained from any other source. *Tax Analysts* only supports the conclusion that *unique* copies of judicial records held by the executive must be produced under FOIA under the open-access principles that always apply to judicial records.

To the extent—if any—that FOIA exemptions 6 or 7(C) are even cognizable with regard to court records in the hands of a FOIA agency, the public interest in court records *qua* court records must weigh heavily on the scale in favor of disclosure. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). That is, while the exemptions require a balancing of public interests in disclosure and a private interest in privacy, the public interest in disclosure encompasses not only FOIA's own policy favoring transparent agency action, but the even more longstanding common-law and constitutional interest in open judicial administration. The public interest in both agency records and judicial documents plainly outweighs general assertions of third-party privacy that were never articulated before the documents were published in open court.

Any other approach would allow the government to obtain a *de facto* seal without meeting the sealing burden. If it had sought to seal these records before introduction at trial, the government would have been required to establish "compelling reasons" by reference to specific facts, *Kamakana*, 447 F.3d at 1178,[8] and news organizations would have received actual public notice and an opportunity to intervene and raise competing concerns of openness, D.C.COLO.LCrR. 47.E.

The court below required PLN to establish a prevailing public interest, rather than requiring the government to carry the burden it would have in a motion to seal. *See* Aplt. Appx. at 111. That cannot be right. The public's presumptive, *per se* interest in open public records must be taken into account in the first instance, and the onus of defeating the public interest must remain on the government, as it would in any proceeding seeking a judicial seal. The government has made, and can make, no such showing here with respect to documents that have already been shown in open court.

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[8] Even the standard for sealing in a civil matter is "good cause," Fed. R. Civ. P. 26(c), requiring a specific demonstration by the movant "that disclosure will cause a clearly defined and serious injury. Broad allegations of harm, unsubstantiated by specific examples . . . will not suffice." *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995).

CONCLUSION

The judgment of the district court should be reversed insofar as it upheld EOUSA's withholding certain portions of the requested materials. The requested materials should be ordered disclosed to PLN in their entirety.[9]

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Respectfully submitted,

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[9] PLN has acceded to obscuring certain portions of the videotape. *See* Pl.-Appt.'s Br. at 15 n.1. *Amici* take no position on that issue.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,910 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008 in 14-point Century Schoolbook.

Dated: March 8, 2010

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CERTIFICATE OF DIGITAL SUBMISSION

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2010, a true and correct copy of the foregoing ***Amici Curiae* Brief on Behalf of Appellant Prison Legal News** was served via the ECF system to counsel for Plaintiff-Appellant and Defendant-Appellee, as indicated below.

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