UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN RE APPLICATION OF AMERICAN LAWYER NEWSPAPERS GROUP, INC., PUBLISHER OF THE AMERICAN LAWYER, MANHATTAN LAWYER, AND LEGAL TIMES	: Misc. No. M-71
UNITED STATES OF AMERICA v. IVAN F. BOESKY, Defendant.	: 87 Crim. 378 (MEL)

MEMORANDUM OF LAW IN SUPPORT OF THE APPLICATION OF AMERICAN LAWYER NEWSPAPERS GROUP, INC. FOR THE UNSEALING OF PAPERS SUBMITTED IN CONNECTION WITH THE SENTENCING OF IVAN BOESKY

CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Applicant
American Lawyer Newspapers
Group, Inc.

Of Counsel:

Floyd Abrams
Devereux Chatillon
Diane Kiesel

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IN RE APPLICATION OF AMERICAN LAWYER NEWSPAPERS GROUP, INC., PUBLISHER OF THE AMERICAN LAWYER, MANHATTAN LAWYER, AND LEGAL TIMES	:	Misc. No. ___
UNITED STATES OF AMERICA	:	
v.	:	87 Crim. 378 (MEL)
IVAN F. BOESKY,	:	
Defendant.	:	

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The seriousness of the crimes in which Ivan Boesky has admitted participating was remarked upon by this Court in the sentencing hearing of December 3, 1987. So was the enormous public interest in the sentencing proceedings. (See Transcript of December 3, 1987) It is also clear that the sentencing of Mr. Boesky, because of his well-publicized plea bargain with the government, may well be the only public proceeding regarding Mr. Boesky's liability for the crimes in

which he was involved. The Second Circuit has held that the First Amendment right of access to criminal proceedings 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). While it may be that the inclusion of matters covered by the government's privilege against disclosure of ongoing investigations, if properly invoked, could prevent complete disclosure of the reports submitted to the Court in connection with this proceeding, the First Amendment interest in public access to the courts should lead to disclosure of any portions of the reports not covered by any privilege. After first discussing the background of the case, the existence of the First Amendment right of access and its scope is set forth. In the next section the procedure proposed by American Lawyer to separate privileged from non-privileged material is set forth.

FACTUAL BACKGROUND

Ivan Boesky, a prominent arbitrageur accused of being involved in insider trading, pleaded guilty to a single criminal charge on April 24, 1987. On December 3, 1987, a sentencing hearing was held before the Court. In connection with that hearing, reports were filed by the U.S. Attorneys office, the U.S. Probation Department, and Mr. Boesky's attorneys. These reports and other materials were sealed. The only

indication given of why these materials were sealed was the Court's reference to ongoing government investigations, the revelation of which might interfere with law enforcement. (Transcript at 29-30)

ARGUMENT

I.

THE FIRST AMENDMENT PROVIDES A RIGHT TO ACCESS TO SENTENCING PROCEEDINGS AND TO DOCUMENTS FILED IN CONNECTION WITH SENTENCING PROCEEDINGS

Since Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), the Supreme Court consistently has recognized a First Amendment right of access on the part of the public and the press to judicial proceedings in criminal cases. The plurality opinion, relying on the Anglo-American history of open trials and the salutary effects of such openness concluded that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." Id. at 581.

Following Richmond Newspapers, the Supreme Court consistently and repeatedly has affirmed the constitutional right of access to a variety of proceedings at various stages of a criminal case. See Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735 (1986) ("Press-Enterprise II") (right of access to preliminary hearing); Press-Enterprise Co. v. Superior Court,

464 U.S. 501 (1984) ("Press-Enterprise I") (right of access to jury selection); Waller v. Georgia, 467 U.S. 39 (1984) (right of access to suppression hearing); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (right of access to trial testimony of minor in sex crime prosecution).

In Press-Enterprise I, the Court discussed some of the reasons why open criminal proceedings are so central to the administration of justice as well as the constitutional scheme:

> "The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system . . . .
>
> "This openness has what is sometimes described as a . . . 'therapeutic value.' Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done. . . . Whether this is viewed as retribution or otherwise is irrelevant. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected. . . .

> "'People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing' . . . . Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." 464 U.S. at 508-09 (emphasis in original; citations omitted).

Although the Supreme Court has not yet reached the question, courts have held that post trial proceedings, including sentencing hearings, are subject to the First Amendment right of access. In CBS, Inc. v. United States District Court, 765 F.2d 823 (9th Cir. 1985), the Court of Appeals held that the public and the press have a First Amendment right of access to sentencing proceedings and to documents submitted in connection with those proceedings. The Court of Appeals said:

> "We find no principled basis for affording greater confidentiality to post-trial documents and proceedings than is given to pretrial matters. The primary justifications for access to criminal proceedings, first that criminal trials historically have been open to the press and to the public, and, second, that access to criminal trials plays a significant role in the functioning of the judicial process and the governmental system . . . apply with as much force to post-conviction proceedings as to the trial itself." Id. at 825 (citations omitted).

The Court of Appeals adopted the following standard, quoting from Press-Enterprise I:

> "'The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The

> interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.'" CBS, Inc., 765 F.2d at 825.

See also United States v. Carpentier, 526 F. Supp. 292 (E.D.N.Y. 1981) (court finds First Amendment right of access to sentencing hearing and exhibits admitted in that hearing).

The Court of Appeals for the Second Circuit has held that a qualified First Amendment right of access extends "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). In that case involving the criminal prosecution of Congressman Mario Biaggi, The New York Times and other entities sought access to motions to suppress wiretap material that had been filed under seal. Even though the sealed papers contained material expressly covered by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510, et seq. (1982 & Supp. III 1985), as amended, which has stringent requirements for the sealing and nondisclosure of the results of wiretaps, the Court of Appeals held that a First Amendment right of access applied:

> "We thus agree with appellees that the right of privacy protected by Title III is extremely important. Nevertheless, where a qualified First Amendment right of access exists, it is not enough simply to cite Title III. Obviously, a statute cannot override a constitutional right." Id. at 115.

The Court of Appeals concluded:

> "Thus, our recognition of a qualified First Amendment right of access to the motion papers filed here does not mean that the papers must automatically be disclosed. The First Amendment right of access to criminal proceedings is not absolute. Proceedings may be closed and, by analogy, documents 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."' Press-Enterprise II, 106 S. Ct. at 2743, citing Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984). Such findings may be entered under seal, if appropriate. In re Herald Co., 734 F.2d at 101. Broad and general findings by the trial court, however, are not sufficient to justify closure. 'The First Amendment right of access cannot be overcome by the conclusionary assertion that publicity might deprive the defendant of [the right to a fair trial].' Press-Enterprise II, 106 S. Ct. at 2744. Where privacy interests in wiretapped conversations are asserted, the court should consider 'whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes.' Waller, 467 U.S. at 48." 828 F.2d at 116 (footnote omitted).

The Court of Appeals remanded the case to the District Court for further proceedings.[1] See also Applications of National

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1 On remand, the District Court released certain papers and redacted portions of other documents. The District Court expressed concern that while further redactions might be necessary to protect privacy interests, such redactions would render the documents meaningless. A second appeal was taken and the Court of Appeals again remanded for further findings, and stated: "On remand, Judge Weinstein should make specific findings as to the scope and nature of the Title III privacy interests at stake and decide

(Footnote continued on next page)

Broadcasting Co., 828 F.2d 340 (6th Cir. 1987) (First Amendment right of access to documents filed in connection with recusal proceeding and conflict of interest proceeding); Associated Press v. United States District Court, 705 F.2d 1143 (9th Cir. 1983) (First Amendment right of access to documents filed in connection with pretrial criminal proceedings); Sarasota Herald Tribune v. Holtzendorf, 507 So. 2d 667, 668 (Fla. Ct. App. 1987) (court recognized a First Amendment right of access to letters submitted on behalf of the defendant in a sentencing proceeding).

Thus the law is clearly established that there is a First Amendment right of access to the sentencing proceedings in this case and that the right extends as well to documents filed in connection with that proceeding. This right of access is especially important in this case in which, because of Mr. Boesky's plea bargain with the government, the only meaningful public proceeding will be Mr. Boesky's sentencing. Crucial to an understanding of the sentence ultimately imposed on Mr. Boesky by this Court will be the representations made to

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(Footnote continued from preceding page)

> whether, in his balancing equation, those privacy interests are of sufficient weight to justify more extensive redaction than provided for in the September 22 order even if the remaining document becomes 'almost meaningless.'" In re New York Times Co., No. 87-1422, slip op. at 5 (2d Cir. Dec. 10, 1987).

the Court by both the government and the defense. The prosecution has been criticized by some for the perceived leniency of the plea bargain struck with Mr. Boesky. Others in the public may have the perception that wealthier defendants charged with white-collar crimes "get off" easier and receive less punishment than other defendants. This and related cases have attracted an enormous amount of public interest because of the nature of the crimes alleged and their possible impact on the public generally. In short, both the particular sentencing proceeding before the Court as well as the larger context of this case implicate the core reasons for the First Amendment right of access: open proceedings accessible to and understood by the public build confidence that the system is working and justice is being done. In addition, to repeat what the Supreme Court has said, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980). Without access to the materials submitted to this Court as part of the sentencing proceeding, the Court technically may be open, but its actions will be little understood. It is to prevent just such a situation that the First Amendment right of access exists.

II.

APPLICATION OF THE FIRST AMENDMENT RIGHT OF ACCESS TO THIS CASE

Obviously, no fair trial rights exist in this case to weigh against the First Amendment right of access. Two other interests, however, are identifiable on the record as possibly weighing against the First Amendment right of access: the interest embodied in Rule 32 of the Federal Rules of Criminal Procedure in the confidentiality of presentence reports, and the possibility that information relevant to ongoing criminal investigations is contained in the documents submitted in connection with the sentencing proceedings. Each of these will be discussed below.

Rule 32(c)(3) provides for disclosure of the presentence report to the defendant and the prosecution. Certain information that may be included in such reports, such as confidential law enforcement informants are not subject to disclosure. Although the Rule does not explicitly contemplate disclosure to third parties, the Court of Appeals for the Second Circuit ruled in United States v. Charmer Industries, Inc., 711 F.2d 1164 (2d Cir. 1983), that disclosure may be made if a "compelling demonstration" is made that "disclosure of the report is required to meet the ends of justice." Id. at 1175.

At the outset, it is clear that the First Amendment right of access applies to presentence reports. Although presentence reports traditionally have not been open to the public (or even until recently the defendant), the values served by the right of access would be vindicated by their disclosure. Because presentence reports serve an important role in the exercise of this Court's discretion in setting an appropriate sentence, disclosure of the presentence report would materially advance both the public's understanding of the process of criminal sentencing, and public acceptance of whatever sentence the Court imposes in the case.

The second interest that may be posed in this case to be weighed against a First Amendment right of access is the interest of the government in protecting ongoing criminal investigations. This is a qualified privilege that has been recognized by the courts. See, e.g., National Lawyers Guild v. Attorney General, 96 F.R.D. 390, 403 (S.D.N.Y. 1982); Jabara v. Kelley, 75 F.R.D. 475, 493 (E.D. Mich. 1977); Ghandi v. Police Department, 74 F.R.D. 115, 125 (E.D. Mich. 1977); Kinoy v. Mitchell, 67 F.R.D. 1, 10-11 (S.D.N.Y. 1975). In order to invoke this privilege, claims "must be lodged by the head of the agency concerned, after personal consideration of the material and evaluation of the risks of disclosure." Id. at 11 (footnote omitted). See, e.g., National Lawyers Guild, supra,

96 F.R.D. at 403; Ghandi, supra, 74 F.R.D. at 125. In light of the First Amendment interests at stake, it is respectfully submitted that the government be requested to decide if it wishes to invoke the privilege and, if it does, to identify for the Court with specificity those particular portions of the materials submitted under seal the disclosure of which it contends would jeopardize ongoing investigations. This Court would then be in a position to make the "'specific, on the record findings . . . demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest."'" In re New York Times Co., 828 F.2d 110, 116 (2d Cir. 1987). All portions of the documents submitted that the Court finds do not implicate these concerns may then be unsealed.

That at least portions of the materials submitted are not subject to any possible claim of privilege seems clear from the record already public. This Court at the December 3, 1987 hearing commented:

> "The other side of the scale is that there has been enormous cooperation. When the United States Attorney, who is not necessarily prone to do so, states that the cooperation in this case is the most remarkable, or whatever exact adjective used, in the history of the securities laws, and then spells out what it is, a judge can't help but take that into consideration." (Transcript at 3-4) (emphasis added).

The material submitted to the Court by the United States Attorney's Office referred to in the underlined portions of this quotation clearly is of interest to the public and the press as part of understanding the judicial and prosecutorial conduct in this case. It also plainly does not involve any conceivable law enforcement privilege.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Application of American Lawyer Newspapers Group, Inc. for the unsealing of documents submitted to this Court in connection with the sentencing of Ivan Boesky be granted.

Dated: New York, New York
December 11, 1987

Respectfully submitted,

CAHILL GORDON & REINDEL
(a partnership including
professional corporations)

By: _____
Floyd Abrams

Of Counsel:

Devereux Chatillon
Diane Kiesel

80 Pine Street
New York, New York 10005
(212) 701-3000