IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-1441

UNITED STATES OF AMERICA,
Plaintiff-appellee,

v.

MICHAEL D. ANDREAS, et al.,
Defendants-appellees,

APPEAL OF: THE NEW YORK TIMES COMPANY and
DOW JONES & COMPANY, INC.,
Intervenors-appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
(HON. BLANCHE M. MANNING)

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
(HON. BLANCHE M. MANNING)

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

STATEMENT OF JURISDICTION

The district court has jurisdiction, pursuant to 15 U.S.C. § 1 and 18 U.S.C. § 3231, of the pending criminal antitrust case (United States v. Andreas et al., No. 96 CR 762, N.D. Ill.) from which this interlocutory appeal is taken. The district court also had jurisdiction to consider appellant newspapers' motions to intervene in the criminal case and to obtain access to documents filed in the criminal case. Grove Fresh Distributors, Inc. v. Everfresh Juice Co., 24 F.3d 893, 896 (7th Cir. 1994).

We disagree with appellants' statement (NYT Br. 1-3)[1] that this Court has jurisdiction of this appeal under the collateral order doctrine and 28 U.S.C. § 1291, for the reasons we explain below. See infra, Argument, Part I(1).

[1] "NYT Br." refers to appellants' brief in this Court. "A" refers to the appendix bound with appellants' brief. "SA" refers to the supplemental appendix filed by appellants in this Court. "Defendants" refers to defendants Michael Andreas and Terrance Wilson in the district court proceeding.

The order from which appeal was taken was dated January 5, 1998, and entered on the docket on January 30, 1998. SA 213. The notice of appeal was filed February 24, 1998. SA 1, 215.

STATEMENT OF ISSUES

1. Whether the order below is final and therefore appealable.

2. Whether an order that granted appellants in substance all the relief they requested in the district court is appealable.

3. Assuming the issue was raised below, whether a document properly under seal in a criminal case becomes public in its entirety when it is referred to or quoted in part in a district court opinion ruling on pretrial issues.

4. Whether the district court imposed the proper burden of proof on appellants.

STATEMENT OF THE CASE

I. NATURE OF THE CASE AND COURSE OF PROCEEDINGS BELOW

In September 1997, appellant New York Times Company ("New York Times") filed a motion to intervene in this pending criminal antitrust case, United States v. Andreas, No. 96 CR 762, N.D. Ill., for the purpose of securing public disclosure of legal briefs and attachments previously filed under seal in the case, to the extent sealing was "over-inclusive," and to obtain an order requiring future filings to be made under seal only upon a particularized showing to the court of a justifiable need for secrecy. SA 64-66, 207. Appellant Dow Jones & Company, Inc. ("Dow Jones") filed a motion to join that pending motion. SA 91-93. Appellee United States did not oppose the Times' motion. Tr. of Proceedings of Sept. 8, 1997 at 12.

In an order dated January 5, 1998, Judge Blanche M. Manning granted the motions to intervene. With respect to the merits, the court also granted the newspapers' motions to the extent that they sought to preclude the parties from filing pleadings under

seal where those pleadings contain material that is outside the ambit of the protective orders but she denied the motions to the extent they sought to modify existing protective orders. A 1-9.

II. STATEMENT OF FACTS

A. The Criminal Case

In an Indictment filed December 3, 1996, defendants Michael D. Andreas, Mark E. Whitacre, Terrance S. Wilson, and Kazutoshi Yamada were charged with fixing the price of and allocating the sales volume of lysine[2] offered for sale to customers in the United States and other parts of the world, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. See SA 198-99. The trial in this case is currently scheduled to commence on July 9, 1998.[3]

Among the numerous orders entered by the district court during the course of this criminal case are two protective orders dealing with discovery issues -- one signed by the court on February 6, 1997 (SA 2-7), and another signed on April 8, 1997 (SA 8-13).[4] The purpose of these orders is to authorize the limited disclosure of otherwise privileged or confidential materials in the government's investigative files to certain trial defendants, their attorneys, and to potential trial witnesses. These orders were necessary not only to facilitate discovery required for adequate trial preparation by all parties in the criminal case but also (1) to maintain the privileged nature of the material in the government's files, much of which

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[2] Lysine is a protein additive in poultry and swine feed.

[3] Mr. Yamada remains a fugitive. Another defendant, Mr. Whitacre, was not actively involved in any of the district court proceedings relevant to this appeal.

[4] A third protective order, signed July 10, 1997, (SA 14-16) related to the photographing, inspecting, and copying of recordings. The court decided that, since the order did not designate materials as confidential, it was outside the scope of the newspapers' motion and would not be addressed. A 2, n.1.

is also relevant to other ongoing grand jury investigations,[5] and (2) to protect defendants' right to a fair trial by preventing potential jurors from being exposed to potentially prejudicial information prior to trial. See A 4-5. Among the privileged or otherwise confidential materials in the government's files that are subject to these protective orders are grand jury testimony, documents produced to the grand jury pursuant to subpoena, applications and orders entered in connection with the grand jury, and audio and video tape recordings. SA 2-13. The orders strictly limit the use that can be made of all these "Confidential Materials" by persons receiving copies pursuant to the protective orders. SA 2-13. Pursuant to the protective orders, the parties filed a variety of documents under seal. A 2.

B. The Motions To Intervene

In September 1997, appellant New York Times, later joined by appellant Dow Jones (SA 91-93), filed a motion to intervene in the criminal case in order "to secure public disclosure of documents filed under seal and to modify protective orders." SA 64. The motion listed, by docket number, documents filed under seal; argued that wholesale filing under seal of pretrial motions is not permitted; and contended that the district court "must evaluate the specific sealed material to determine that the 'sealing' is not over-inclusive." SA 65.[6] The Times asked the court to order the parties "to file any portions under seal only

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[5] See Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1124 (7th Cir. 1997)(describing grand jury investigations arising out of investigation of Archer Daniels Midland (ADM)).

[6] Although the newspaper asked the court to order that listed docket entries "be made available to the public," it qualified this request by saying that it wanted access "generally" to motions and legal briefs filed in their entirety under seal. SA 65.

upon a particularized showing to the Court that the need for secrecy overcomes the constitutional and common-law privilege of public access." Ibid. The Times suggested that this could be accomplished by amending the protective order. Ibid. In the accompanying memorandum, the Times also argued that "wholesale filing of motions and supporting legal memoranda under seal" is improper. SA 74-77, 78.

Counsel for appellee United States stated at proceedings held in the criminal case on September 8, 1997, that "[w]e have no opposition to the New York Times' motion. We're not going to file any papers." Tr. of Sept. 8, 1997 Proceedings at 12. Defendants Andreas and Wilson did file an opposition in which they argued that portions of the sealed documents were confidential, and that it is proper to file entire documents under seal even if some portions are not confidential. Alternatively, defendants asked for 30 days after filing of an original document to file a redacted version. SA 103-15. The newspapers filed a reply (SA 123-28). In neither their original motion nor their reply memorandum did the newspapers argue that a presumption of access was created with respect to the privileged or otherwise confidential materials subject to the protective orders in this case, when they were cited by the district court in its pretrial orders.[7]

C. The District Court's Order

By order dated January 5, 1998, Judge Manning granted the motions to intervene. A 3-4. Proceeding to the merits, the court treated the newspapers' motion as a request to modify the protective orders. The court noted that the protective orders simply guaranteed the continued confidentiality of materials that are already shielded from disclosure. A 4-6. Specifically, the

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[7] Apparently no oral hearing was held on the newspapers' motion. See NYT Br. 6.

court observed that grand jury materials are protected from disclosure by Rule 6(e) and that surveillance tapes allegedly made pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20, are protected from disclosure by statute. A 4-5. Finally, with respect to materials related to the ongoing citric acid market criminal antitrust investigation "and the FBI's investigation of financial transactions by former officers and employees of ADM," the court concluded that the newspapers had not provided any particularized reason for making those materials public and, accordingly, they remain subject to the protective order. A 5.

But while the court refused to modify the protective orders, it also held that filing entire documents under seal is permitted only where the entire document is confidential, and that the defendants had conceded that their filings under seal were "not 100% confidential." A 6. The court rejected defendants' argument that redaction should be dispensed with because it is time-consuming and expensive, and because most of the documents' contents are confidential. It stated that "we cannot condone the practice of routinely filing entire documents under seal." Ibid. The court further rejected defendants' request to file redacted documents 30 days after the sealed versions, noting that the public is "entitled to timely access to non-confidential court filings." Ibid.

Accordingly, the parties were instructed that if they "wish[ed] to file pleadings under seal in the future, they must simultaneously file either a public document with an accompanying sealed supplement or a sealed document with an accompanying public redacted version of that document." A. 7. With respect to sealed pleadings already filed, the parties were required to file by February 24, 1998, public documents "redacted in conformance with this order." A 7. Further, the court "admonish[ed] all parties filing sealed documents that it will

examine both sets of filings and take appropriate action if non-confidential materials are filed under seal." A 7.

The government and defendants have since refiled documents previously filed under seal -- some on the public docket with or without redactions while others have been refiled entirely under seal. SA 215. For example, the government refiled two documents under seal plus one redacted document, and explained why these filings were consistent with the court's order.[8] Dkt. nos. 181, 182. Appellants did not object in the district court to any of the filings made in compliance with the court's prior order, or ask the court to review the redactions. Thus, the court has not issued any order regarding the documents filed under seal, in whole or in part, pursuant to its prior order.

SUMMARY OF ARGUMENT

As we have already noted, the United States did not oppose appellants' motions in the district court. The United States generally agrees that pleadings in criminal cases should be available to the press to the extent that they do not contain privileged or otherwise confidential information, and that hearings and trials generally should be open to the public. But we cannot reconcile the arguments that we understood appellants were making in the district court with the arguments that they now make in this Court. Specifically, while the focus of appellants' arguments in the district court appeared to be on obtaining access to non-privileged or non-confidential information in pleadings that had been filed under seal, in this Court they now argue that a presumption of access to privileged or otherwise confidential information is created whenever a

[8] Curiously, appellants' brief in this Court lists nine other documents (R. 46, 47, 78, 110-115) that were filed by the government and allegedly are under seal. NYT Br. 6. None of these documents was mentioned in appellants' district court pleadings (see SA 71, 126), and, as the docket sheet plainly indicates, these nine documents are not filed under seal. SA 202, 203, 207-08.

district court “uses” such material as a basis for a decision on a pretrial motion. NYT Br. 22. We cannot agree.

As we understood appellants’ district court pleadings, they argued that documents filed by the parties should not routinely be filed under seal, and that pleadings should generally be filed on the public record, with privileged information either redacted from the publicly filed document (and included only in a version filed under seal), or filed in separate addenda under seal. To be sure, appellants also wanted the district court to modify its protective orders, which the court refused to do. But the order the court entered effectively guarantees that everything that should be in the public record -- specifically, any information that is not privileged or otherwise confidential -- will in fact be available to the public. Accordingly, we believe the district court’s order provides appellants in substance with all the relief that they requested and could have reasonably expected to receive.

But appellants have neither declared victory nor objected in the district court to how that court’s order was carried out by the parties. Rather, they have appealed to this Court claiming that a presumption of access to privileged or otherwise confidential material is created whenever a district judge “uses” such material as a basis for a ruling on a motion. There are several problems with this argument. First, the issue of access to documents remains "open [and] unfinished" (Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949)) in the district court, and the district court’s order is therefore not final for purposes of appeal. Accordingly, we believe that this appeal is premature at best and should be dismissed for lack of appellate jurisdiction. Second, as already noted, appellants received all the relief they asked for; accordingly they have no basis for appeal. Third, appellants did not argue in the district court that there is a presumption of access to privileged material that

is "used" by a district court in making pretrial rulings in a criminal case. They should not be permitted to raise it for the first time on appeal. Fourth, this argument ignores the privileged or confidential nature of the materials that are subject to the protective order. Indeed, if appellants are right, then the government, or any other party with a valid claim of privilege or confidentiality, risks loss of that privilege, through no fault of its own, if a district court for whatever reason "uses" the privileged material as a basis for its decision. Whatever qualified right of public access the First Amendment or the common law may create, it does not require this result. Finally, in the context of this case, where all of the materials subject to the protective orders are privileged or otherwise confidential, appellants' claim that the district court incorrectly put the burden of persuasion on them is without merit.

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED FOR LACK OF APPELLATE JURISDICTION

This appeal should be dismissed for lack of jurisdiction for two reasons: the order from which appellants appeal is not final; and appellants prevailed in the district court and there is accordingly no adverse judgment to appeal.

1. Appellants contend (NYT Br. 1-3) that this Court "has jurisdiction over this appeal pursuant to the collateral order doctrine." We disagree.

In Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), the Supreme Court "carved out a narrow exception to the normal application of the final judgment rule," and authorized an immediate appeal of a "limited class of final collateral orders." Midland Asphalt Corp. v. United States, 489 U.S. 794, 798-99 (1989). A collateral order is not appealable unless "stringent" requirements are satisfied. Id. at 799; Digital Equipment Corp.

v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994). First, the order must conclusively decide the disputed question; second, the order must resolve an issue of substantial importance completely separate from the merits of the action, not one that will merge into the final judgment; and, third, the order must be effectively unreviewable on appeal from a final judgment. Midland, 489 U.S. at 799; Digital Equipment, 511 U.S. at 867; Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). The collateral order doctrine is narrowly construed to avoid piecemeal review. Oswald v. General Motors Corp., 594 F.2d 1106, 1118 (7th Cir. 1979), cert. denied, 444 U.S. 870 (1979).

In this case, the district court's order was part of an on-going process and did not finally resolve the issue of what pleadings, or parts thereof, appellants have a right to obtain. Rather, as we already have noted, the district court has directed the parties not to "routinely fil[e] entire documents under seal," and to resubmit documents previously filed under seal, making redactions if necessary, so that the refiled pleadings conform to the court's order. A. 6-7. Moreover, it promised to review the refilings and future "filings and take appropriate action if non-confidential materials are filed under seal." A. 7. Thus, the decision on access to sealed documents remains "tentative, informal [and] incomplete" and "the matter remains open [and] unfinished" (Cohen, 337 U.S. at 546), because appellants could have objected, but apparently did not, to the pleadings that were refiled in accordance with the court's order or, for that matter, to any subsequent pleading that may have been filed under seal either in whole or in part.

Appellants' apparent failure to object in the district court to any specific refiled pleading, or to any new pleading, that has been filed under seal either in whole or in part precludes meaningful appellate review of the district court's order at this time. The district court's order gives appellants access to all

non-privileged and non-confidential material in any pleading that has been or will be filed in this case. To the extent that appellants now want more relief than this or believe that the parties have not complied with the district court’s order, the district court’s order provides the means by which appellants may seek access to specific documents or portions thereof that they believe they are entitled to see. But until they seek that further relief and obtain a further ruling from the district court, there has been no final decision concerning access to any specific document that this Court can review now. Therefore, the district court’s decision cannot be viewed as final and this appeal should be dismissed for lack of jurisdiction. See In re Grand Jury Proceedings (Johanson), 632 F.2d 1033, 1038-39 (3d Cir. 1980) (refusal to hold hearing to determine who was leaking grand jury materials to the press not appealable as collateral order in light of continuing developments in district court).

2. Moreover, to the extent that the order from which appellants appeal decided anything, it granted appellants in substance all of the relief that they requested in the district court. Therefore, as the prevailing party, appellants have nothing to appeal from, and this Court lacks jurisdiction.

In the district court, the newspapers requested that wholesale filings under seal in the underlying criminal case cease, and that future filings not include matters not properly under seal. Although the newspapers asked for certain listed documents by docket number, they asked only for access "generally" to sealed pleadings, and they made clear that, as to future filings, portions of pleadings could be filed under seal upon a proper showing of the need for secrecy. SA 65. They also argued that "wholesale" filings under seal were not permissible. SA 65, 74-77, 78. Thus, the newspapers apparently recognized that some portions of the listed documents might properly be retained under seal.

As to this portion of their request, all the relief they requested was granted by the district court's order. A 1-8. While the district court did not grant this relief by modifying the protective orders as requested by appellants (SA 64, 65), it accomplished the same result by means of a separate order. This separate order also provided that the district court would review pleadings that are either filed under seal or contain redactions, to make sure that the parties have complied with its order. Specifically, the court stated that it did not "condone the practice of routinely filing entire documents under seal," "admonishe[d]" the parties that it would take "appropriate action if non-confidential materials are filed under seal," and directed the parties to refile pleadings previously filed under seal "in conformance with" its order. A 6-7; see also SA 64-65 (describing relief sought by appellants in district court).

In these circumstances, appellants received in substance all the relief that they requested. To the extent that appellants now want more relief -- specifically, access to the privileged or otherwise confidential material that is subject to the protective order rather than simply access to non-privileged and non-confidential information that previously had been filed under seal -- appellants are raising issues that were neither raised in or addressed by the district court. Similarly, to the extent that appellants may believe that the parties did not faithfully carry out the district court's order when they refiled their pleadings, they first should have sought relief from the district court before proceeding to this Court. But with respect to the arguments appellants did make in the district court, appellants received in substance all of the relief they requested and cannot complain now on appeal that they should have received more relief. See, e.g., Perez v. Ledesma, 401 U.S. 82, 87, n.3 (1971); Gunn v. University Committee to End War in Viet Nam, 399 U.S. 383, 390 n.5 (1970); Pollution Control Industries of

America, Inc. v. Van Gundy, 979 F.2d 1271, 1273 (7th Cir. 1992); First National Bank of Chicago v. Comptroller of the Currency, 956 F.2d 1360, 1363 (7th Cir.), cert. denied, 506 U.S. 830 (1992).

II. APPELLANTS HAVE NO RIGHT OF ACCESS TO PRIVILEGED INFORMATION

Appellant newspapers assert for the first time on appeal that "a presumption of access attaches to documents filed under seal upon which the district court bases its pretrial rulings." NYT Br. 8. They further argue that the district court improperly placed the burden of persuasion on them. NYT Br. 27-30.

Appellants “presumption” argument was never made to or addressed by the district court and, therefore, cannot be made for the first time in this Court. In any event, it is wrong. And in the context of this case, in which all of the materials subject to the protective orders are plainly privileged or confidential, appellants’ burden of persuasion argument is without merit.

A. Appellants’ Presumption of Access Argument Was Never Made in the District Court and Is Not Properly Before This Court

In their brief in this Court, appellants note that the district court disposed of six suppression motions in one pretrial ruling (SA 18-55), and they list nine types of items filed under seal that are referred to in that opinion, including several letters, FBI interview forms, excerpts of taped conversations, and a search warrant affidavit. NYT Br. 11-12. They claim that these materials became "presumptively public" when the district court "review[ed] and relie[d] upon" the documents or "used" them in its opinion, or when they "served as the basis" for a pretrial order. Id. at 8, 10-13, 14, 15, 22, 25. More broadly, they appear to be claiming a right to obtain,

inter alia, access to video and audio tapes that were the subject of the court's rulings.

Appellants never raised this argument in the district court. The closest they came to making this argument is when they summarized (SA 75) In the Matter of Grand Jury Proceedings: Victor Krynicki, 983 F.2d 74, 75 (7th Cir. 1992), as stating, inter alia, that information that is used at trial or otherwise becomes the basis of judicial decision enters the public record. But this summary, which appears in a section entitled "The Seventh Circuit Has Held That Wholesale Sealing of Briefs is Improper" (SA 74), was not made the basis of any argument. Cf. United States v. Tracy, 989 F.2d 1279, 1286 (1st Cir.)("[I]ssues are deemed waived when 'adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation'") (citation omitted), cert. denied, 508 U.S. 929 (1993). Indeed, appellants acknowledged in the district court that "a presumption of access does not apply to documents 'properly submitted to the court under seal'" (SA 76), and argued only that wholesale sealing of pleadings is not permitted. See, e.g., SA 71 (sealing may not be "over-inclusive"), SA 74-75 (Seventh Circuit disapproves of wholesale filing of motions under seal), SA 75 (Seventh Circuit requires filing of confidential material in addendum), SA 76 (pleading that contains confidential information does not warrant sealing entire document). Given the nature of the arguments appellants made in the district court, that court had no occasion to address the "presumption" argument appellants now make at length in this Court.

Accordingly, appellants' assertion (NYT Br. 15) that the district court made a "ruling" that "no presumption of access applies to judicial documents, initially filed properly under seal, but subsequently relied upon by the district court in judicial decision-making" has no basis in the record. Therefore, this Court should decline to consider the argument. McKinney v.

Indiana Michigan Power Co., 113 F.3d 770, 773 (7th Cir. 1996). Nor should this issue be addressed in a factual vacuum that appellants created. By not arguing in the district court that they have a right of access to privileged or otherwise confidential material simply because the district court relies on that material in its decision, appellants gave neither the parties in the criminal case nor the court an opportunity to address the numerous privileges and rules of confidentiality applicable to the materials subject to the protective orders. There is no reason why this Court should undertake that task for the first time on appeal.

B. There Is No Presumption of Access Created When A District Court "Uses" in Pretrial Rulings in a Criminal Case Materials Previously Properly Filed under Seal.

Appellants do not argue that the protective orders in this case are over broad, or that the parties acted improperly when they initially filed under seal those pleadings (or portions of pleadings) covered by the protective order. See, e.g., NYT Br. 10, 11, 13, 22, 25. Rather, they argue that materials properly filed under seal became subject to a presumption of public access when they were "used" or referred to by the district court in pretrial rulings. Ibid.[9] They make no effort to define what constitutes "use," or who is to determine what the district court's mental processes were -- that is, what materials it "used" -- in arriving at the pretrial ruling. They rely primarily on statements made by this Court in the context of evidence introduced in a civil case, In the Matter of Continental Illinois Securities Litigation, 732 F.2d 1302 (7th Cir. 1984), cited in Pepsico, Inc. v. Redmond, 46 F.3d 29, 31 (7th Cir. 1995) and In the Matter of Grand Jury Proceedings: Victor Krynicki, 983 F.2d 74, 75 (7th Cir. 1992). In fact, their argument both

[9] This is a legal argument, and therefore subject to plenary review by this Court. See, e.g., United States v. Cotton, 101 F.3d 52, 54 (7th Cir. 1996).

ignores the privileged or confidential nature of the materials they seek and is not supported by the cases they cite.

1. Appellants' argument ignores the nature of the material subject to the protective orders in this case. As we have already noted, since appellants' arguments in the district court were not clearly directed at access to privileged or confidential material, neither the parties in the criminal case nor the district court had any reason fully to address all of the applicable privileges. Nevertheless, as several examples demonstrate, the privileged or confidential nature of the material subject to the protective orders is obvious.[10]

Specifically, grand jury transcripts and any other material that reveals "matters occurring before the grand jury" are both within the scope of the protective orders and clearly confidential under Fed. R. Crim. P. 6(e). Rule 6(e) reflects the fact that "some kinds of government operations * * * would be totally frustrated if conducted openly." Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1, 8-9 (1986) (Press II). "A classic example is that 'the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.'" 478 U.S. at 9 (quoting Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979)). Thus, there is no First Amendment or common law right of public access to grand jury matters -- and no presumption of public access. See In re Motions of Dow Jones & Co., Nos. 98-3033 and 98-3034, 1998 WL 216042 at *2, *7 (D.C. Cir. May 5, 1998); United States v. Corbitt, 879 F.2d 224, 228, 237 n. 15 (7th Cir. 1989)(principles of common law access; collecting First Amendment cases). Rather, Fed. R. Crim P. 6(e)(2) "draws a veil of secrecy" over matters occurring before the grand jury. Krynicki, 983 F.2d at 75-77.

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[10] This discussion of applicable privileges is not intended to be exhaustive.

See also Fed. R. Crim. P. 6(e)(5) (court must order hearings closed to extent necessary to prevent disclosure of matters occurring before a grand jury); 6(e)(6)(records, orders, and subpoenas relating to grand jury proceeding to be kept under seal as necessary to prevent disclosure of matters occurring before grand jury).

Audio and video tapes, as well as all other materials in the government's investigative files, including transcripts of tapes and interview notes, are protected from disclosure by the law enforcement investigatory privilege. Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1124-26 (7th Cir. 1997). The fact that some of these tapes, as well as other material in the government's files, may also be relevant to other ongoing grand jury investigations is a particularly compelling reason to maintain the confidentiality of this material. Another document sought by appellants in this case (NYT Br. 12) is an affidavit in support of a search warrant that remains under seal in the court (C.D.Ill.) in which it was filed. This Court has previously rejected claims that there is a common law right of access to such an affidavit. In the Matter of Eyecare Physicians of America, 100 F.3d 514, 518-19 (7th Cir. 1996).

2. The cases on which appellants rely either do not address the issue appellants now raise, or do not support appellants' contention. This case does not involve the public's right of access to trials and hearings that historically have been open to the public.[11] See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). Indeed, a public trial is scheduled to be held in this case and much of the material appellants seek will become available at that time. Cf. Dellwood Farms, 128 F.3d at

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[11] Even if there is a First Amendment presumption of public access to a particular proceeding, the presumption can be overcome if closure is essential to preserve higher values and is narrowly tailored to serve that interest. Press II, 478 U.S. at 9.

1125 (antitrust civil plaintiff cannot force government to speed up its investigation so that it can get access to government's investigative files). Moreover, the Supreme Court has never specifically addressed the public's First Amendment right of access to pleadings filed in connection with pretrial proceedings in criminal cases. See United States v. McVeigh, 119 F.3d 806, 812 (10th Cir. 1997), cert. denied, 118 S. Ct. 1110 (1998).[12] But it has indicated that no First Amendment right of public access attaches to materials unless "the place and process have historically been open to the press and general public" and "public access plays a significant positive role in the functioning of the particular process in question." Press II, 478 U.S. at 8. Further, the common law presumption of public access does not apply to materials properly under seal. Corbitt, 879 F.2d at 228, 238.[13] Finally, this Court has never held that a district court's "use" of privileged or confidential

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[12] Appellants assert that the Tenth Circuit in United States v. McVeigh applied "a presumptive right of access * * * to pretrial filings." NYT Br. 17. In fact, that court noted that "[t]here is not yet any definitive Supreme Court ruling on whether there is a constitutional right of access to court documents," and assumed for purposes of its decision, without deciding, that access to judicial documents is governed by the analysis articulated in Press II. 119 F.3d at 812. It then went on to determine that a First Amendment right of access did not apply to evidence considered by a trial court in ruling on a suppression motion and determined by the court to be inadmissible. As to severance motions, the court assumed, but did not decide, that there was a presumption of access, and held that it was overcome in that case. 119 F.3d at 813-14. The nature of materials considered by a trial court in ruling on a suppression motion, and determined to be admissible, was not before the court. 119 F.3d at 813-14.

[13] Two cases on which appellants heavily rely (NYT Br. 19-22) to support their claims, United States v. Amodeo, 44 F.3d 141 (2d Cir. 1995) and United States v. Amodeo, 71 F.3d 1044 (2d Cir. 1995), apply only a common law analysis. See 44 F.3d at 145-47; 71 F.3d at 1048, 1051.

information in ruling on pretrial matters in a criminal case creates a presumption of access to the privileged information.[14]

On the contrary, this Court has held, in a variety of contexts, that there is no presumption of public access to privileged or confidential materials, although these materials may be relied on by district courts in making rulings. Thus, there is no First Amendment or common law right of public access to presentence reports, although the sentencing court obviously relies on them to reach a sentencing decision and prepare a judgment. Corbitt, 879 F.2d at 228-40. And where courts rely on grand jury materials covered by Fed. R. Crim. P. 6(e)(2) in reaching decisions, this Court has noted that courts are careful to omit from their published opinions any details that are within the scope of Rule 6(e)(2). When 6(e) material is relevant to an appeal, the government can place all discussions relating to Rule 6(e) materials in a sealed addendum in the court of appeals. Far from becoming public property when relied on by a district court in reaching a decision, grand jury materials remain under seal in the court of appeals. Krynicki, 983 F.2d at 76-77.

Similarly, this Court has also reviewed the legislative concerns behind Title III of the Federal Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-20, and concluded that pretrial sealing under that Act of taped telephone conversations, which may never be used at trial, does not offend the First Amendment, even when the tapes are reviewed by the district court in making a pretrial ruling. United States

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[14] We do not dispute appellants' right of access to any opinion or order filed on the public docket even if that opinion or order contains privileged or confidential information. If a district court wishes to avoid the disclosure of confidential or privileged information, it can either decline to describe confidential details in its opinion or file relevant portions of its opinion under seal. See, e.g., Krynicki, 983 F.2d at 76.

v. Dorfman, 690 F.2d 1230, 1231, 1233-35 (7th Cir. 1982).[15] This Court held that such information, once sealed, may not be made public without the consent of the relevant parties, except as permitted by the Act -- for example, as evidence at trial. Dorfman, 690 F.2d at 1233-35. The Court, while not expressly referring to the two-part test later elucidated by Press II, clearly rejected a First Amendment right of public access, or a presumption of public access, to Title III sealed materials.[16]

Moreover, even assuming we understood what appellants mean when they argue that a presumption of public access is created whenever a district court "uses" information as a basis for its ruling, the rule appellants urge is unworkable when the underlying information is protected by a valid claim of privilege or confidentiality. For example, district courts frequently have to determine whether material is protected by some privilege such as the attorney-client privilege, and they may rely on privileged material submitted under seal as a basis for decision. See generally United States v. Zolin, 491 U.S. 554 (1989)(in camera inspection of documents allegedly protected by attorney-client privilege). Assuming the court upholds the claim of privilege "using" as a basis for its decision allegedly privileged materials submitted to it in camera, then if, as appellants

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[15] As the Second Circuit noted in In re Matter of New York Times Co. (Biaggi), 828 F.2d 110, 115 (2d Cir. 1987), cert. denied, 485 U.S. 977 (1988), quoted at NYT Br. 27, a statute like Title III cannot override a constitutional right. But this Court has reviewed the policies behind Title III and determined that the First Amendment does not create a presumption of public access to materials properly sealed under Title III.

[16] Appellants claim (NYT Br. 27) that Dorfman takes an overly narrow view of the First Amendment because it was decided prior to 1986, when the Supreme Court extended the First Amendment right of access to preliminary hearings (Press II). But Dorfman refers broadly to a First Amendment right "to make the government give [media] access to nonpublic information," and does not suggest that its decision turns on the pretrial timing of the request for access. 690 F.2d at 1233-35. Dorfman is the law of this Circuit.

suggest, a presumption of access to the material held privileged now exists, the privilege is effectively nullified. The result is no less perverse when the existence of a privilege is not at issue. A party that relies on an in camera submission of privileged or confidential information in a criminal case to support or oppose a motion should not have to run the risk that a presumption of access to the privileged information will be created if the district court "uses" that information as a basis for its decision. See Pepsico, Inc. v. Redmond, 46 F.3d 29, 31 (7th Cir. 1995)(disclosing trade secrets to the world is "not an appropriate price for the privilege" of bringing a legitimate lawsuit). Indeed, such a result would plainly frustrate the important policy objectives that privileges and confidentiality rules are designed to protect.

For example, Rule 6(e) exists in part to protect from unfavorable publicity accused persons who are ultimately exonerated, and also to prevent prospective defendants from either fleeing or frustrating the investigation. See generally Douglas Oil v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979). Similarly, the law enforcement investigatory privilege is intended in part to prevent premature revelations about the government's case that could interfere with subsequent enforcement efforts. These policy concerns are particularly important where, as here, the privileged or confidential materials are also relevant to other ongoing grand jury investigations. Dellwood Farms. To the extent that a district court "uses" privileged or confidential material in ruling on a pre-indictment or pre-trial motion, there should be no loss of the applicable privilege or confidentiality except to the extent that the court decides to disclose such material in an opinion filed on the public docket. Indeed, if appellants' rule were adopted, the result would be predictable, and it would not advance their stated objective of gaining access to dispositive

materials: judges who wished to preserve a privilege would avoid admitting in their opinions that they "used" privileged materials as a basis for their decisions (thus complicating appellate review), or they could place references to privileged information in a separate opinion filed under seal. In either event, the public learns less, not more.

Finally, appellants cannot rely on (NYT Br. 19, 22) In the Matter of Continental Illinois Securities Litigation, 732 F.2d at 1309, and cases citing Continental. In Continental, a party's confidential report, previously subject to a protective order, was entered in evidence by that party during an open hearing in a civil case, in support of its motion to terminate derivative claims. Witnesses also testified in open court about the contents of the report. The report was entered in evidence without reference to the fact that it had previously been subject to a sealing order. Id. at 1304-05, 1310. This Court held that a presumption of access, based on constitutional rights, applies to evidence introduced "in a proceeding which has been characterized as a 'hybrid summary judgment motion.'" 732 F.2d at 1309 (citation omitted). But the Court "express[ed] no view as to whether the presumption of access applies to materials used in other pretrial stages." Id. at 1309, n.10. And it noted that if the recipient of protected material introduced the material (as is the case with many of the materials at issue in the present case), "the protective order might have a wholly different significance." Id. at 1311.

Continental is not relevant to the present criminal case. In Continental, this Court held that the parties could not have expected continued confidential treatment of the document after they made it public in open court. Here, by contrast, the privileged or otherwise confidential information at issue has never been made public. There has been no express or implied waiver of any valid claim of privilege at this stage of the pre-

trial proceedings.[17] Accordingly, Continental offers no precedent applicable to this case.

C. Appellants' Burden Of Proof Argument Can Be Summarily Rejected

Appellants complain that the burden was placed on them to make a "particularized showing of a right to the sealed documents." NYT Br. 27-30. However, to the extent that the newspapers claimed in the district court that the sealings were overinclusive, that court placed no such burden on appellants. The court agreed with appellants that wholesale sealing was not permissible and ordered corrective action.

To the extent that appellants now assert a "presumption of access" to privileged or otherwise confidential material, their burden of proof argument is without merit.[18] Appellants do not argue that the materials at issue are not privileged or otherwise confidential and, as we have already demonstrated, there is no presumption of access to such materials. See, e.g., Corbitt, 879 F.2d at 228. Accordingly, this Court should summarily reject the burden of proof argument that appellants make.

[17] Further, whatever the equivalent of a summary judgment motion (732 F.2d at 1309) may be in a criminal case, that point clearly has not been reached here.

[18] Burden of proof is a legal issue, subject to plenary review in this Court. Cotton, 101 F.3d at 54.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. Alternatively, the district court's decision should be affirmed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

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