RECORD NO. 19-1287 **REDACTED**

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

In re: GRAND JURY SUBPOENA

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHELSEA MANNING,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT ALEXANDRIA

MEMORANDUM OF OPENING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

II. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This appeal seeks the reversal of an order of the Honorable Claude Hilton dated March 8, 2019 holding appellant Chelsea Manning in civil contempt of court pursuant to 28 U.S.C. §1826, for refusing to testify before a grand jury in the Eastern District of Virginia, Alexandria Division. This is an expedited appeal pursuant to 28 U.S.C. §1826.

The procedural history is as follows. A grand jury was convened in the Eastern District of Virginia pursuant to 18 U.S.C. §3231. In late January 2019, Assistant United States Attorney Gordon Kromberg contacted Vincent Ward, Ms. Manning's court martial appellate counsel, to inform Mr. Ward that Ms. Manning was to be subpoenaed to appear and give testimony before a grand jury sitting in that district on February 5, 2019. Mr. Ward requested a month to research and prepare, and Mr. Kromberg obliged. Ms. Manning was served through counsel with a subpoena bearing the return date of February 5, 2019. The appearance was adjourned on consent until March 5, 2019.

On March 5, 2019 Ms. Manning appeared in the District Court having filed an Omnibus Motion to Quash and a Motion to Unseal the Pleadings and open the courtroom. Judge Hilton granted the government's application for use immunity, and noted that she had been given parallel immunity against military prosecution. The Court then denied the various quash motions with respect to the subpoena

generally. At that time it was noted that many of the arguments were likely to be renewed at any contempt hearing. Judge Hilton reserved judgement on the issue of whether or not to unseal the pleadings and permitted the parties additional time to brief and argue the issue.[1] The following day, Ms. Manning appeared before the grand jury. In response to questioning, she asserted the subpoena violated the rights guaranteed her under the First, Fourth, and Sixth Amendments to the Constitution, and other statutory rights.

After approximately twenty minutes, questioning ceased. The government immediately initiated civil contempt proceedings against her, pursuant to 28 U.S.C. §1826. After vigorous argument regarding the

On March 8, 2019, after brief hearings held in a closed courtroom, the Court found that Ms. Manning lacked just cause for her refusals to testify, held her in contempt, and denied bail pending appeal. Ms. Manning was ordered remanded to the custody of the Attorney General. She has remained confined at the Alexandria Detention Center since March 8, 2019.

[1] This issue was mooted after the government concurred with Ms. Manning's contention that the pleadings and transcripts of the hearings of March 5 and 6 ought to be unsealed. However, the issue has not been mooted with respect to the bulk of the contempt hearing. See Argument, VI(D), *infra*.

The decision of the District Court is a final finding of contempt in a proceeding enforcing a final judgment. This Court has appellate jurisdiction over this proceeding under 28 U.S.C. §1291.

Ms. Manning filed timely Notice of Appeal on March 15, 2019. The appeal is now before the Court for expedited review pursuant to 28 U.S.C. §1826.[2]

III. ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred by denying the motion for government affirmations or denials of electronic surveillance, in violation of Ms. Manning's rights under 18 U.S.C. §§2515 and 3504.

2. Whether the District Court erred by failing to consider evidence of grand jury abuse strongly suggesting that the investigation of criminal activity was not the sole and dominant purpose of this subpoena.

3. Whether the District Court erred in holding all but part of the sentencing portion of the contempt hearing in a closed courtroom, in contravention of Ms. Manning's Fifth and Sixth Amendment rights under the U.S. Constitution and F.R.Crim.P. Rule 6(e)(5).

[2] With the consent of the government, and the permission of Ms. Manning and the Court, the briefing schedule has been modified and extended by a matter of days, in order to enable all parties adequate time to consider the issues.

IV. STATEMENT OF THE CASE

Ms. Chelsea Manning ("Ms. Manning") was summoned earlier this year to appear before a grand jury as part of an investigation that appears to have been initiated in 2010, and that seems likely to involve events about which she has already disclosed the sum of her knowledge. Prior to appearing in the District Court, Ms. Manning was immunized against prosecution by both the Department of Justice ("DOJ") and the United States military. Through counsel, she filed and argued an omnibus motion to quash, a motion to unseal the pleadings, and repeatedly requested that the courtroom be opened to the public. These motions were denied by Judge Hilton with the explicit understanding that the pleadings, declarations, and arguments made with respect to the subpoena as a whole would be renewed and reincorporated by reference in objecting to specific questions asked of Ms. Manning before the grand jury. The District Court opened the courtroom for the final portion of the sentencing phase of the contempt proceedings, limiting the parties to five minutes of argument each.

V. STATEMENT OF FACTS

A. Ms. Manning is subpoenaed and given perplexing information.

Chelsea Manning is recognized world-wide as a champion of the Free Press and open government. In 2013, Ms. Manning, then an all-source intelligence

analyst for the U.S. military, was convicted at a United States Army court martial for disclosing classified information to the public. She was sentenced to thirty-five years imprisonment and a dishonorable discharge. She was confined under onerous conditions, including but not limited to prolonged solitary confinement, leading U.N. Special Rapporteur on Torture Juan Mendez to classify isolation exceeding 15 days as "cruel and inhumane treatment." Preface to the 2014 Spanish Edition of Sourcebook on Solitary Confinement by Sharon Shalev *available at* http://solitaryconfinement.org/uploads/JuanMendezPrefaceSourcebookOnSolitaryConfinementTranslation2014.pdf. In 2017 her sentence was commuted by then-President Barack Obama. She was released from prison in May, 2017.

In January, 2019, Vincent Ward, who represents Ms. Manning in the appeal of her court martial, was contacted by AUSA Gordon Kromberg, who informed him that Ms. Manning was to be subpoenaed to give testimony before a grand jury in the Eastern District of Virginia ("EDVA"). Mr. Ward accepted service on her behalf, asked for, and was given a month to prepare.

In preliminary conversations, Mr. Ward was told that Ms. Manning was not a target of the investigation. Mr. Kromberg further stated that the government believed that Ms. Manning had given false, mistaken, or incorrect testimony during her court martial, and that she may have made statements inconsistent with her prior testimony.

The government's allegation that she made statements inconsistent with her court martial testimony lead Ms. Manning and counsel to believe that she has been and is subject to illegal electronic surveillance. Accordingly, she filed a motion to disclose electronic surveillance pursuant to 18 U.S.C. §§2515 and 3504, annexing a declaration setting forth the foregoing and other unusual experiences that gave rise to a good faith belief that she is and has been so targeted. She has sworn that if the government is possessed of something that has led them to believe she made statements inconsistent with her prior testimony, the only possible conclusion is that the government has intercepted, misunderstood, and misattributed electronic communications. Ms. Manning firmly denies that her prior testimony was false.

Ms. Manning further asserted that her motion to quash should be granted because the subpoena itself constitutes an abuse of the grand jury process. This is so because it is apparent that she is unable to offer the government any information that is material or relevant to their investigation, having already disclosed the full extent of her knowledge. All of the information that she disclosed, as well as the forensic investigation in the hands of the government, indicates she is solely responsible for the only federal offense about which she has any personal knowledge. The only conclusion that can be drawn, therefore, is that the government wishes to examine her as a potential defense witness at the trial of another already existing indictment not disclosed; ask her questions she is simply

unable to answer; or inquire into matters unrelated to the investigation of any federal offense.

As none of the above-described are permissible purposes for issuing a subpoena, the existence of any of those conditions suggests an abuse of process, Ms. Manning filed an omnibus motion to quash, refused to respond to questions before the grand jury, and argued at her contempt hearing that she had just cause for her refusal to testify.

B. Ms. Manning raises a colorable claim of electronic surveillance, triggering the government's obligation to affirm or deny surveillance under §3504.

As part of her initial motion to quash, Ms. Manning alleged unlawful electronic surveillance under 18 U.S.C. §§2515 and 3504. Ms. Manning submitted a declaration in factual support of the motion. See Argument, VI(A), *infra*. Counsel argued in pleadings and at the March 5 hearing for the government to make simple affirmations or denials that electronic surveillance had occurred, even at one point prevailing on the judge to simply ask the government whether they were aware of any such surveillance. Joint Appendix (hereinafter "J.A."), pages 305-307. Judge Hilton did not grant the requested relief. In fact, he did not make any statement about the motion, the argument, the facts, or the law, or respond in any manner whatsoever to the request. Contrary to clear precedent, Judge Hilton

denied the motion *sub silentio* without stating any basis for denying Ms. Manning the requested relief, and without setting forth factual findings that would enable meaningful appellate review. This was reversible error.

During contempt proceedings, the motion and request for affirmations or denials was renewed, based on the specific questions asked. J.A. 373. The motion was denied only inasmuch as relief was not granted. Judge Hilton did not respond to the motion or the request in any manner.

C. Ms. Manning raises colorable concerns of grand jury abuse, rebutting the presumption of grand jury regularity.

As part of her motion to quash and arguments following thereon, Ms. Manning raised colorable concerns about the possibility of grand jury abuse, and asked for some assurances from the government as to their purpose in issuing her a subpoena. J.A. 300; 303-305. Rather than taking seriously that the presumption of grand jury regularity is rebuttable, the government simply stated that such a presumption normally exists. J.A. 315. Judge Hilton denied the motion as premature, saying only "You're saying 'if' or 'what.' There's no way of knowing this. This is just entire speculation. I can't base a ruling on that… make your argument quickly." J.A. 301.

At the grand jury, Ms. Manning was asked a number of questions that had no value whatsoever to any ongoing investigation. J.A. 356-364. She again raised

the issue of grand jury abuse at the contempt hearing. J.A. 370-373. At this point, she raised concrete and specific factual arguments. She set forth evidence of inappropriate and prejudicial questions, clearly rebutting the presumption of grand jury regularity. At no point did Judge Hilton even acknowledge or consider the evidence rebutting the presumption of regularity or the possibility that the government had any obligation to confirm that the subpoena or individual questions were motivated by a proper purpose. See Argument, VI(B), *infra*.

D. Judge Hilton holds contempt proceedings in a sealed courtroom, save for the announcement of finding and sentence.

On March 6, Ms. Manning appeared before the grand jury, and was excused after about twenty minutes. J.A. 356. The government immediately attempted to initiate contempt proceedings and the parties appeared before Judge Hilton. After argument on the issue of sealing with respect to proceedings relating to, but not literally occurring before the grand jury, Judge Hilton advised the parties that contempt proceedings would be held in a closed courtroom, and adjourned the proceedings for two days. J.A. 347-348.

Ms. Manning appeared for a hearing on the issue of just cause on the morning of March 8, 2019. She immediately objected to the closure of the courtroom and insisted, based on the law, that it must be opened in order to avoid a due process violation and violation of the Federal Rules. J.A. 368-369. Judge

Hilton heard this argument and did not comment. The government conceded that the sentencing portion might be held open to the public, but resisted the idea of opening any other part of the hearing. J.A. 381-382. Judge Hilton reiterated that the hearing would be closed to the public but agreed to open it only for imposition of sanction. J.A. 385. See Argument, VI(C), *infra.*

Argument on issues relating to just cause were held. Judge Hilton found Ms. Manning lacked just cause for her refusal to testify, opened the courtroom, repeated his finding, and after brief argument on the appropriate sanction, sentenced Ms. Manning to be confined for the term of the grand jury.

E. Notice Filed

On March 15, 2019, counsel for Ms. Manning timely filed a Notice of Appeal to the Fourth Circuit. The Appeal was set for an expedited briefing schedule pursuant to 28 U.S.C. §1826. See Notice of Appeal, J.A. 330.

VI. SUMMARY OF ARGUMENT

The finding of civil contempt must be vacated for three reasons. First, the Court improperly denied the appellant's motion concerning electronic surveillance. Second, Court failed at properly address the issue of grand jury abuse. Third, the Court's order to seal the courtroom during substantial portions of the hearing violated the Fifth And Sixth Amendment.

VII. STANDARD OF REVIEW

The standard of review is abuse of discretion.

VIII. ARGUMENT

A. The finding of contempt must be vacated because the District Court denied the electronic surveillance motion contrary to and without considering the relevant facts presented or the controlling law.

In her Omnibus Motion to Quash, based on a declaration outlining her reasons for believing she had been subjected to electronic surveillance (See Declaration at J.A. 387-389), and at both the March 5 and March 8 hearings, Ms. Manning asked that the government either affirm or deny the existence of any electronic surveillance, pursuant to 18 U.S.C. §§2515 and 3504, which forbids the use of evidence derived from unlawful electronic surveillance. A grand jury witness is entitled to refuse to answer questions derived from the illegal interception of electronic communications. The recalcitrant witness statute plainly affords a "just cause" defense to civil contempt charges. Gelbard v. United States, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972); In re Askin, 47 F.3d 100, 102 (4th Cir. 1995). Thus, in order to determine whether such just cause exists, a witness must raise an allegation of unlawful government surveillance sufficient to trigger the government's obligation to either affirm or deny that such surveillance occurred. In re Grand Jury Subpoena (T-112), 597 F.3d 189, 200 (4th Cir. 2010).

The Fourth Circuit clearly accepts such a motion as a legitimate legal claim, and requires that it be considered and ruled upon. Inasmuch as relief was not granted, Judge Hilton denied the motion. He did so however without explicitly denying the motion, or commenting on it in any manner so as to justify the denial or allow for appellate review.

Because the subject of covert surveillance is not well-positioned to identify it with specificity, the threshold for a prima facie showing is exceedingly low. A prima facie showing may set forth merely the circumstances surrounding the alleged unlawful surveillance and facts showing that the witness themself would have been "aggrieved" (that their "interests were affected") by such surveillance. United States v. Apple, 915 F.2d 899, 905 (4th Cir. 1990).("A cognizable "claim" need be no more than a "mere assertion," provided that it is a positive statement that illegal surveillance has taken place.")

In a declaration filed prior to hearing, Ms. Manning provided her phone numbers, addresses, and email addresses, and the time period during which she believes her communications were being intercepted. She described surveillance vans outside her apartment, and suspicious interactions with strangers. She raised a logical claim regarding the probability that any "inconsistent" statements the government believes to have been made by her were more likely intercepted, misunderstood, and misattributed electronic communications.

It is in no way unreasonable for Ms. Manning, a former intelligence analyst publicly reviled by high-ranking members of the U.S. government, to believe that she is under fairly intense electronic surveillance. That Ms. Manning was released after her commutation does not in any way mean that the National Security Agency, Federal Bureau of Investigation, Central Intelligence Agency, and Defense Intelligence Agency, all of which undeniably engage in wide-ranging, often unlawful intrusions into people's privacy, have not continued to make her the subject of intense surveillance. Though she has lived a law-abiding life since 2010, the government has not hidden their belief that Ms. Manning figures heavily in their deeply suspicious narratives about national security. There is no doubt that she is subject to physical surveillance, and it frankly strains credulity to imagine that she is *not* being surveilled electronically. Ms. Manning raised these issues and more in her declaration, and in so doing, made a prima facie showing. Once Ms. Manning made even a "mere assertion" of unlawful electronic surveillance, it triggered the government's obligation to make specific denials of electronic surveillance, lawful or otherwise. United States v. Apple, 915 F.2d 899, 905 (4th Cir. 1990)

As explained in both hearings and the pleadings, the government's obligation to make a canvass and render affirmations or denials may be triggered by vague, incomplete, or uncertain allegations. There are "a number of compelling

reasons why Congress would think it wise to require the prosecution to affirm or deny electronic surveillance on *no more than a mere assertion* by persons who would be aggrieved by such surveillance if it had occurred." Id., emphasis added. These compelling reasons include the fact that while it is relatively simple for the government to provide information concerning illegal surveillance, requiring a higher burden of proof for a witness from whom evidence may have been concealed would make it practically impossible for any witness to prevail on such a claim. In addition, requiring a higher burden of proof would inadvertently encourage "the development of more secretive means of illegal surveillance, rather than encouraging elimination of such unlawful intrusions," and requiring the disclosure of the content of any potentially-monitored conversations would violate the witness's right to privacy. Vielguth, 502 F.2d at 1259 n. 4. Ms. Manning's statements here meets that minimal standard. See In re Grand Jury Subpoena (T-112), 597 F.3d 189, 210 (4th Cir. 2010), adopting Vielguth, and In re Grand Jury Subpoena (T-112), 597 F.3d 189, 210 (4th Cir. 2010), Traxler, *concurrence*, adopting the reasoning of the Vielguth Court.

Thus, the government should have been required by Judge Hilton to respond to Ms. Manning's allegations. The government must only provide a response that is as concrete and specific as the allegations raised by the witness. U.S. v. Apple, supra, ("The government's general denial of a claimant's general allegations of

illegal electronic surveillance is sufficient, see, e.g., In re Grand Jury 11–84, 799 F.2d at 1324; where the claimant makes a stronger showing, the government's denial must be factual, unambiguous, and unequivocal.") But whatever their degree of specificity, there is simply no doubt that the government *must* make such a denial. In re Grand Jury Subpoena (T-112), 597 F.3d 189, 200 (4th Cir. 2010) Finding that a letter denying any surveillance was sufficient, the Circuit states as follows: "Were the letter something other than the plain denial it plainly appears to be, the government would have proceeded in nothing less than bad faith." This does not mean that the government must turn over anything resembling "discovery" to the aggrieved party; merely, again, that they must be able to represent that surveillance either did or did not take place.

Typically, the District Court does require the government to make affirmations or denials, and so this issue is most often addressed on appeal in terms of a challenge to the *sufficiency* of those denials. A failure of the government to respond sufficiently in the face of a prima facie allegation of electronic surveillance constitutes ground for an appeal of the issue. Justice Traxler's concurrence in In re Grand Jury Subpoena (T-112), *supra*, goes even farther than suggesting that a failure on the part of the government justifies an appeal. Rather, he asserts, such a failure constitutes just cause excusing witness testimony in and of itself. In re Grand Jury Subpoena (T-112), 597 F.3d 189, 203 (4th Cir. 2010).

The case at bar, however, presents an issue that is arguably even more serious, and requires a concomitantly serious remedy. Here, rather than the government making insufficient denials, the District Court did not even consider Ms. Manning's claim that even those denials were required. The court made no comment on the motion whatsoever.

After Ms. Manning thoroughly raised the issue in the pleadings, supported by the declaration, and renewing reference to those arguments during the contempt hearing, the government made conclusory statements to the effect that they did not believe their obligations were triggered by her claims, but notably they made absolutely no effort whatsoever to deny that electronic surveillance occurred. J.A. 316. In their argument, the government simply asserted that Ms. Manning did not make sufficiently confident claims of surveillance, and that she did not actually know whether she had been subjected to surveillance. The almost necessary inability of a witness to know with certainty that they have been surveilled is of course exactly the state of affairs contemplated by §3504, and is precisely why the threshold for a colorable claim is so low.

On March 5, at the close of the hearing on the motion to quash, Judge Hilton denied Ms. Manning's motion to quash, and denied several of the motions included within her omnibus motion. He said nothing whatsoever as to her request for affirmations or denials of electronic surveillance.

Judge Hilton ignored Ms. Manning's requests for government denials of electronic surveillance, despite counsel placing before the District Court clear Fourth Circuit law indicating that the kinds of allegations raised by Ms. Manning are in fact sufficient to trigger the government's obligation. Therefore, whether the government's failure was in itself just cause for her refusal, or whether Judge Hilton's failure to even consider the argument constitutes reversible error, it was not improper for Ms. Manning to decline to testify before the grand jury. The denial of the §3504 at the district level is reversible error. The error is compounded by the failure of the District Court to consider the arguments, or even make a clear

ruling on them. His thoughts on the matter, if any, are unpreserved, and thus evade meaningful appellate review.

B. The finding of contempt must be vacated because the District Court failed to demand from the government even minimal assurances of grand jury regularity despite ample evidence of abuse.

While a presumption of regularity attaches to grand jury proceedings, it may be overcome upon a sufficient showing of abuse. Where, as here the witness comes forward with such information it is incumbent upon the court to order the government to furnish evidence that the purpose of a grand jury, or a particular subpoena, or even a particular question, is not improper. Mullaney v. Wilbur, 421 U.S. 684, 702 ns. 30 and 31 (1975); J.A. 305.

Ms. Manning put before the District Court evidence sufficient to justify her concerns. Ms. Manning pointed out in her pleadings and at the March 5 hearing that both the President and the Secretary of State (formerly the head of the Central Intelligence Agency) had publicly expressed resentment at President Barack Obama's commutation of her sentence. J.A. 304. Furthermore, she continually reiterated that the government was possessed of any and everything she knew about any legitimate subject of investigation. J.A. 304. Therefore, because her testimony before the grand jury would be identical to her previous testimony, it would be impermissibly redundant. Such testimony would not add anything to the grand jury's investigation.

[3] Based on reporting which, per the editorial standards of the Washington Post, verified with two government sources possessed of personal knowledge, there is already a charging instrument that has issued with respect to this grand jury. See e.g.: Prosecutors Think Chelsea Manning made 'false or mistaken' statements during military trial, her lawyers say, *available at:* https://www.washingtonpost.com/local/legal-issues/prosecutors-think-chelsea-manning-did-not-tell-truth-about-wikileaks-her-lawyers-say/2019/03/21/ded935a2-

Taken as a whole, this evidence was sufficient to suggest that regardless of the purpose of the grand jury generally, the sole and dominant purpose of the subpoena specifically issued to her was something other than to gather new information per the grand jury's investigative function. "The principles that the powers of the grand jury may be used only to further its investigation, and that a court may quash a subpoena used for some other purpose, are both well recognized." United States v. Moss, 756 F.2d 329, 332 (4th Cir. 1985). Thus, "practices which do not aid the grand jury in its quest for information bearing on the decision to indict are forbidden. This includes use of the grand jury by the prosecutor to harass witnesses or as a means of civil or criminal discovery." United States v. (Under Seal), 714 F.2d 347 (4th Cir. 1983).

Furthermore, "once a criminal defendant has been indicted, the Government is barred from employing the grand jury for the 'sole or dominant purpose' of developing additional evidence against the defendant." United States v. Bros.

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Constr. Co. of Ohio, 219 F.3d 300 (4th Cir. 2000). Given that Ms. Manning was subpoenaed only *after* a charging document issued, evidence suggests that it was the government's intent to impermissibly "use the grand jury to improve its case in an already pending trial by preserving witness statements, locking in a witness's testimony, pressuring potential trial witnesses to testify favorably, or otherwise employing the grand jury for pretrial discovery." United States v. Alvarado, 840 F.3d 184 (4th Cir. 2016). See also United States v. Moss, *supra*, ("it is the universal rule that prosecutors cannot utilize the grand jury solely or even primarily for the purpose of gathering evidence in pending litigation").

Certainly, the burden of demonstrating an irregularity in such proceedings rests squarely upon the party alleging an impropriety. United States v. (Under Seal), 714 F.2d 347, 350 (4th Cir.), cert. dismissed, 464 U.S. 978, 104 S.Ct. 1019, 78 L.Ed.2d 354 (1983). But where, as here, a witness raises concrete and credible concerns about the potential impropriety of questioning, the presumption of regularity that normally attaches to grand jury proceedings is rebutted. United States v. Alvarado, 840 F.3d 184, 189 (4th Cir. 2016) ("Defendants alleging grand jury abuse bear the burden of rebutting the 'presumption of regularity attache[d] to a grand jury's proceeding.").

This does not mean that the grand jury may be stymied by mere speculation, but that in the face of credible concerns, the District Court must make an inquiry,

and that various remedies may be had. In re Grand Jury Subpoenas Duces Tecum, Aug. 1986, 658 F. Supp. 474, 477–78 (D. Md. 1987) (where the "government has failed to rebut this inference, by means such as the introduction of an affidavit attesting to the proper purpose of the investigation, an evidentiary hearing should be held in order to ascertain the government's true motives" *emphasis added*); see also U.S. v. Loc Tien Ngyuen, 314 F.Supp.2d 612 (E.D.Va. 2004) ("particularized and factually based grounds exist to support the proposition that irregularities in the grand jury proceedings may create a basis for dismissal of the indictment" *emphasis added*).

"Where the Gov't makes a representation that an investigation is ongoing such that additional counts or additional defendants may be added, it cannot be said that the sole or primary motivating factor of the grand jury subpoena is to gather evidence on charges pending from an existing indictment." United States v. Crosland, 821 F.Supp. 1123, 1127 (E.D.Va.1993) (citing Moss, 756 F.3d at 232). But here, the government made no such representation, and the District Court did not inquire further into the matter. Much like the electronic surveillance inquiry, the burden on the witness to trigger the government's obligation is fairly low, but the burden on the government is concomitantly low. The court may be satisfied by an affidavit or even an in camera recitation of the specific reasons for calling this witness and for asking the particular questions. But there *is* a minimal expectation

that the government will satisfy the court that the sole and dominant purpose of the subpoena is not improper, and that the witness in fact is able to add something of value to the grand jury's investigation.

At the conclusion of the March 5 hearing, Judge Hilton denied several of the motions included in Ms. Manning's omnibus motion. As to the issue of grand jury abuse, he stated only "There's no evidence presented of any improper motive. You've raised questions about what might or might not be the motive. I don't have anything in front of me that would require me to rule on it." J.A. 318.

The failure of the District Court to consider the evidence of grand jury abuse, let alone require any assurances of propriety by the government, is reversible error.

C. The finding of contempt must be vacated because the District Court held the significant portions of the contempt hearing in a closed courtroom in violation of the Fifth and Sixth amendments to the United States Constitution and F.R.Crim.P. Rule 6(e)(5).

The District Court ordered that the hearings on March 5 and 6, and the contempt proceedings held March 8, 2019, be closed to the public, presumably acting pursuant to the grand jury secrecy requirement articulated in Fed. R. Crim. P. 6(e). J.A. 298. The Court held the entirety of the three days of proceedings in a closed courtroom over Ms. Manning's objection, (J.A. 298, 347) only perfunctorily opening the courtroom *after* finding Ms. Manning in contempt. J.A. 385. The courtroom was opened, the District Court repeated its finding of contempt, allowed the parties brief argument as to sentencing, and ordered Ms. Manning into confinement. The brief opening of the courtroom for the conclusion of the sanction proceedings was inadequate and violated Ms. Manning's rights to due process and a public trial.

The text of Rule 6(e)(5) recognizes that the fundamental rights implicated by contempt proceedings and sanctions are paramount to grand jury secrecy. A "[c]ourt must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury." Fed. R. Crim. P. 6(e)(5), *emphasis added*. This imperative requiring closure of the courtroom is conditional and "subject to any right to an open proceeding." Id. A court's decision to close contempt hearings to the public affects the rights of the alleged contemnor as well as those of the press and the public because "the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public," Waller v. Georgia, 467 U.S. 39, at 46 (1984)(reversing conviction because exclusion of public from multi-day suppression hearing regarding sensitive wiretap information violated defendants' Sixth Amendment right to public trial).

Although secrecy is the defining feature of the grand jury, courts have long recognized that Fifth Amendment due process rights and Sixth Amendment public trial rights apply to proceedings finding and sanctioning a grand jury witness for civil contempt. In re Oliver, 33 U.S. 257 (1948)(reversing finding of civil contempt made and punished in closed proceeding because "it is 'the law of the land' that no [person]'s life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal" and finding further that

"Summary trials for alleged misconduct called contempt of court have not been regarded as an exception to this universal rule against secret trials…"). In the matter of In re: Rosahn, the Second Circuit joined the majority of federal circuits to hold that the Fifth Amendment requires that alleged civil and criminal contemnors both be afforded the same procedural safeguards, including the right to counsel and the right to a public contempt hearing. 671 F.2d 690 (2nd Cir., 1982).

In addition to the rights of the contemnor, the public and the press enjoy a right of access to judicial proceedings consistent with the "First Amendment and the common-law tradition that court proceedings are presumptively open to public scrutiny." Doe v. Pub. Citizen, 749 F.3d 246, 265 (4th Cir. 2014); see also In re: The Wall St. Journal, No. 15–1179, 601 Fed. Appx. 215, 217–18, 2015 WL 925475, at *1 (4th Cir. Mar. 5, 2015) (the public "enjoys a qualified right of access to criminal trials, pretrial proceedings, and documents submitted in the course of a trial"). The Fourth Circuit has recognized that the First Amendment right of access extends to civil trials and some civil filings. Am. Civil Liberties Union v. Holder, 673 F.3d 245, 252 (4th Cir. 2011)(citing Va. Dep't of State Police v. Washington Post, 386 F.3d 567, 575–78 (4th Cir. 2004)).

Consistent with the similarities between the public/press right of access to judicial proceedings, in the case of Waller v. Georgia (467 U.S. 39) the Supreme Court set forth the test courts should apply when determining whether or not the

fundamental rights implicated by open, public judicial proceedings should give way to other rights or interests. Relying on First Amendment jurisprudence, the Waller court held:

> "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"

Id. at 45.

The Fourth Circuit has held that the First Amendment and common law tradition require court proceedings to be presumptively open to public scrutiny and "may be abrogated only in unusual circumstances" when the denial of access is narrowly tailored to and necessitated by a compelling governmental interest. Va. Dep't of State Police v. Washington Post, 386 F.3d 567 at 574–78 (4th Cir. 2004)(finding that assertions by the Virginia State Police that the possible hindering of current investigations, undermining of future investigations, and risks to witnesses, were merely "general concerns stated in a conclusory fashion [that] are not sufficient to constitute a compelling government interest.").

The subpoena to Ms. Manning, the motions and legal defenses put forth and argued on Ms. Manning's behalf, and the contempt proceedings were beyond the scope of Rule 6(e)'s secrecy requirements because they did not "disclose the essence of what took place in the grand jury room." In re Grand Jury Investigation, 903 F.2d 180, 182 (3rd Cir. 1990)(citing Nixon v. Warner Communications, Inc.,

435 U.S. 589 (1978)). Furthermore, the factual, non-argumentative questions asked of Ms. Manning before the grand jury did not allude to or seek any information which is not already a widely-known matter of public record. J.A. 367. See In re: Charlotte Observer, 921 F.2d 47, 50 (4th Cir. 1990)(vacating injunctions forbidding press from disclosing subject of grand jury investigation when subject's name had been inadvertently announced during public proceedings). See also In re: North, 16 F.3d 1234, 1245 (D.C. Cir. 1994)("There must come a time… when information is sufficiently widely known that it has lost its character as Rule 6(e) material.")

The Government did not assert any compelling governmental interests for closure of the proceedings in the District Court other than to make a conclusory argument that permitting the public to hear the substance of the questions put forth to Ms. Manning would impermissibly disclose matters about an ongoing grand jury investigation, and that the courtroom could be opened only for the announcement of the court's *conclusion* as to whether Ms. Manning was contempt and any imposition of sanctions. J.A. 295; J.A. 354; J.A. 381-2. The Rules of Criminal Procedure and case law are clear: Rule 6(e)(2)(B) does not list "witnesses" as a category of persons who "must not" disclose grand jury matters, and the plain language of Rule 6(e)(2) itself coupled with the Advisory Committee note clearly demonstrates that the rule does not mandatorily impose an obligation of secrecy on a grand jury witness. In re: Grand Jury Proceedings, 417 F.3d 18, at 26 (1st Cir.

2005). The District Court incorrectly presumed that the contempt hearing should and must be closed, (J.A. 298) did not require the government to articulate a compelling interest necessitating closure of the courtroom, and did not narrowly tailor closure of the courtroom to a specific, non-conclusory government interest.

The District Court incarcerated Ms. Manning but denied her the fundamental procedural safeguards required by the Fifth and Sixth Amendments. The court began from the position that all hearings and arguments would remain closed to the public, and in so doing did not analyze the text and history of Fed. R. Crim. P 6(e) or give adequate deference to the "First Amendment and the common-law tradition that court proceedings are presumptively open to public scrutiny." Doe v. Pub. Citizen, 749 F.3d at 265. The court did not scrutinize the Government's assertion that the courtroom must be kept closed as one implicating Ms. Manning's Constitutional rights: the court did not require the government to articulate a specific and compelling reason to abrogate Ms. Manning's rights, nor did the court assess how any closure of the courtroom should be narrowly tailored to in order to "assure accountability in the exercise of judicial and governmental power, the preservation of the appearance of fairness, and the enhancement of the public's confidence in the judicial system." Rosahn, 671 F.2d at 697.

The brief opening of the courtroom for the conclusion of the sanction proceedings was inadequate and violated Ms. Manning's rights to due process and

a public trial. The order finding Ms. Manning in contempt and imposing a sanction should therefore be vacated and remanded for further proceedings in accordance with the law.

IX. CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the finding of contempt be vacated, either permanently, or pending meaningful determination of the motions denied in error below.

Respectfully submitted,

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