No. 16-2431

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NORTH JERSEY MEDIA GROUP INC., *et al.*,
Appellees

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees

JOHN DOE,
Appellant

Appeal from a Final Order in a Civil Case of the United States District Court for the District of New Jersey (Civil No. 16-267). Sat Below: Honorable Susan D. Wigenton, U.S.D.J.

BRIEF FOR RESPONDENT THE UNITED STATES OF AMERICA

PAUL J. FISHMAN
UNITED STATES ATTORNEY
Attorney for Appellee
970 Broad Street
Newark, New Jersey 07102-2535
(973) 645-2700

On the Brief:

Mark E. Coyne
Chief, Appeals Division
David W. Feder
Assistant U.S. Attorney
mark.coyne@usdoj.gov
david.feder@usdoj.gov

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"A" ..... the Appendix accompanying Appellant John Doe's opening brief

"DE" ..... the docket entry in the civil case now on appeal

"JDB" ..... Appellant John Doe's opening brief

STATEMENT OF RELATED CASES AND PROCEEDINGS

This appeal arises in connection with the pending prosecution of Defendants William E. Baroni, Jr. and Bridget Anne Kelly, Crim. No. 15-193 (SDW), whose trial is scheduled to begin on September 12, 2016. A46-59 (Docket). Alleged coconspirator David Wildstein separately pled guilty and awaits sentencing, Crim. No. 15-209 (SDW). There is also pending private civil litigation concerning the same conduct that is charged in the Baroni, Kelly and Wildstein prosecutions. *Galicki v. State of New* Jersey, No. 14-cv-169 (JLL). The United States has not participated in that civil litigation other than to seek to stay it, which was denied. *Galicki v. State of New* Jersey, 2015 WL 6522815 (Oct. 26, 2015). The Government knows of no other related cases or proceedings.

STATEMENT OF THE ISSUES

Whether a Government letter providing unindicted coconspirator information to Defendants should be publicly disclosed under the First Amendment and common law rights of access, even though: (a) the Government provided the letter voluntarily for discovery purposes to aid Defendants' preparation for trial; (b) the Government submitted the letter to the District Court only to request that it be maintained under seal given the legitimate privacy interests at this stage of the criminal case; and (c) the letter was not yet relevant to

any decision that might be made later by the District Court regarding the scope of the case or the evidence to be admitted.

STATEMENT OF FACTS AND CASE

A. The Charges.

A Grand Jury in the District of New Jersey indicted Defendants on charges that, in 2013, they conspired to facilitate and conceal the causing of traffic problems in Fort Lee, New Jersey to punish Fort Lee's mayor for not endorsing New Jersey Governor Christopher J. Christie's reelection. A60-97. The Indictment, which spans 38 pages and some 120 paragraphs and subparagraphs, describes numerous telephone conversations, text messages and emails involving the Defendants, and lays out their roles in great detail. A60-95.

Defendants are charged in nine counts with conspiracy and substantive violations involving: (1) misapplying , converting and fraudulently obtaining the resources of the Port Authority (Counts 1 and 2); (2) wire fraud (Counts 3 through 7); and (3) civil rights deprivations (Counts 8 and 9). The Indictment alleges that Defendants conspired and schemed with "others," but, consistent with Department of Justice policy, *see* U.S. ATTORNEY'S MANUAL ["USAM"] 9-11.130, it does not identify the "others" by name apart from Wildstein. A64, 66 (Count 1), 88, 90 (Counts 3-7), 92 (Count 8).

B. The Discovery Motions.

In November 2015, Defendants filed omnibus discovery motions demanding, among a variety of things, a bill of particulars identifying by name the "others" referenced in the Indictment. A105-08, 115-25. The Government opposed the request for a bill of particulars as "unnecessary given the detailed Indictment and the expansive discovery disclosures." A134. The Government also objected that a bill of particulars "would unfairly define and limit the government's case due to the fact that the evidence at trial must conform to the allegations in a bill of particulars," A138 (quotation omitted), and urged that the "requests for a bill of particulars should be denied," A140. The Government also opposed a number of the Defendants' other discovery demands as either premature or otherwise inappropriate.

Nevertheless, the Government offered to provide Defendants with certain information and documents in addition to the voluminous material already provided to them. In particular, the Government represented that, "in a document to be filed under seal," it would "identify any other individual about whom the Government has sufficient evidence to designate as having joined the conspiracy." A141. By doing so, the Government did not expressly or implicitly concede that Defendants were entitled to that information in a bill of particulars.

C. The Coconspirator Letter.

Keeping its promise, on January 11, 2016, the Government hand-delivered the Coconspirator Letter to the Court, copying defense counsel by emailing them a PDF version. In accordance with the Department of Justice's policy against unnecessarily naming uncharged third-parties, the Government requested that the Coconspirator Letter be maintained under seal. A150 (citing USAM 9-27.760). And consistent with its professional obligations of fairness and candor to the court, the Government's letter hewed to the standard it had articulated in its brief: to be named in the letter, an individual had to be someone "about whom the Government has sufficient evidence to designate as having joined the conspiracy." A192.

Contrary to John Doe's claims, the Government never "stressed that it did ***not*** have sufficient information to label the individuals on the Letter as conspirators[,]" JDB10-11; *see id.* at 50-51. Nor has the Government ever characterized any individual identified in the Coconspirator Letter as "innocent." JDB13; *see id.* at 50-51. The Government did not—and does not as a matter of course—declare anyone "innocent" and has not used that term to describe anyone referred to in the Coconspirator Letter. Rather, the Government emphasized that it "makes [unindicted coconspirator] designations only upon careful consideration of the facts." A195.

On February 5, 2016, the court held a hearing to discuss the status of discovery motions. A55.[1] At the hearing, the District Court acknowledged that the parties had resolved or were working to resolve many of the issues raised by Defendants. The court explained that it did not "need to rule" on the bulk of those requests "unless [Defendants] have an issue going forward." A165. At no time during the hearing did Defendants mention their requests for a bill of particulars. The court never ordered the Government to produce a bill of particulars, and the Government did not provide one. Instead, the court granted only one of the many requests Defendants made in their motions—a request for leave to issue Rule 17(c) subpoenas—and otherwise dismissed the "remainder" as "MOOT." A184.

D. The Media's Motion.

On January 13, 2016, weeks before the hearing, but shortly after the Government provided Defendants and the court with the Coconspirator Letter, a consortium of media entities (the "Media") moved to intervene in the criminal case and sought access to, among other things, the Coconspirator Letter. DE1. The Government did not oppose the Media's intervention, but did oppose disclosure of the Coconspirator Letter. DE26. In doing so, the Government relied on and quoted a Department of Justice policy that "federal prosecutors should strive to avoid

[1] Defendants also have moved to dismiss the Indictment. A55. Those motions were heard later and remain pending. A58.

unnecessary public references to wrongdoing by uncharged third-parties." A192-93 (quoting USAM 9-27.760). Although that policy includes "bills of particulars that identify unindicted co-conspirators[,]" *id.*, it is not so limited. The policy also encompasses other "government pleadings" that might identify unindicted coconspirators, including "plea hearings" and "sentencing memoranda." USAM 9-27.760.

At no point did the Government's opposition brief describe the Coconspirator Letter as a bill of particulars. To the contrary, the Government likened the Coconspirator Letter to discovery, insofar as it was "communicated to Defendants only for purposes of trial preparation." A193. As the Government explained, "because evidence relating to even uncharged coconspirators may take on significance at a conspiracy trial, the Government, prior to trial, routinely identifies them so that defendants can have that information to prepare for trial." A188.[2]

E. The Order Granting Access and John Doe's Appeal.

On May 10, 2016, without having held oral argument, the District Court granted the Media's motion to intervene and ordered the Government to disclose the Coconspirator Letter. The Court construed the Coconspirator Letter as a bill of

[2] Nonetheless, the Government could have made clearer to the District Court that the Coconspirator Letter was a discovery letter, not a bill of particulars.

particulars and consequently as a judicial record to which the First Amendment and common law rights of access presumptively apply. The Court then conducted the balancing analysis called for by *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985), and concluded that the privacy interests of anyone identified in the Coconspirator Letter did not overcome the presumption of access.

Doe subsequently intervened, requested permission to proceed anonymously, and sought a stay to enable him to fully brief the matter. The District Court granted the requests for intervention and to proceed anonymously, but denied a stay and directed the Government to docket the Coconspirator Letter, which it equated to a bill of particulars and "deemed" a "judicial record." A18. Before the Government did so, Doe appealed to this Court, which stayed the District Court's order, ordered merits briefing and scheduled oral argument.

SUMMARY OF ARGUMENT

In appropriate circumstances, the public has a presumptive right of access to judicial proceedings and records, which promotes important societal interests. That presumptive right of access, however, does not—and should not—extend to the Government's disclosure in discovery of the names of individuals whom the Government has identified as unindicted coconspirators, particularly when that disclosure was made solely to aid the defendants in their preparation for trial and

that identification is not yet relevant to any decision that might be made by the District Court.

There is no provision in the Federal Rules of Criminal Procedure for the Government to designate individuals as "unindicted conspirators." Nor is it the province of the Department of Justice to do so as part of its obligations and responsibilities to enforce the criminal laws of the United States. Rather, the purpose of designating an individual in the preliminary phase of a prosecution as an unindicted coconspirator is primarily to identify for defendants those individuals whose statements or actions later may legally be attributable to them at trial. It is not, has never been, and should not be the purpose of such designations to provide the public with information about people for whom the Government has proof of conspiratorial culpability but whom the Government has determined—for whatever reason—not to charge.

There may be circumstances in which an indictment charging conspiracy is so vaguely drafted that a bill of particulars identifying unindicted coconspirators may be required to provide constitutionally adequate notice to defendants. But that is the rare case, and it is not this one. Defendants had more than sufficient information—a detailed charging document coupled with extensive discovery—to understand the charges. Nor does it matter that Defendants styled their request—as defendants often do—as a motion for a bill of particulars. The information that the

Government provided in the Coconspirator Letter was not a formal bill of particulars nor was it an acknowledgement that a bill of particulars was required. Rather, the letter was part of the back and forth in which parties routinely engage as part of the discovery process in a criminal case. It is well-settled that communications of discovery materials are not presumptively accessible to the public because their sole purpose is to permit defendants to prepare for trial.

In light of these circumstances, public disclosure of the contents of the Coconspirator Letter at this preliminary stage of the prosecution would be premature, unnecessary and unfair to John Doe. To be sure, the Media urged the District Court to read this Court's precedent to extend a presumption of public access to such information, even if it has no evidentiary or adjudicatory value at this point in the prosecution. But that reading is too broad, and this appeal presents this Court with an opportunity to clarify that a presumption of access should not apply to voluntary pretrial disclosures of information to defendants about their unindicted coconspirators. Such access should occur if and when the District Court is called upon to adjudicate the evidentiary significance of that information. The time may come where the information contained in that letter must become public, but that time is not now.

ARGUMENT

There Is No Presumptive Right of Public Access to Unindicted Coconspirator Information Contained in an Unfiled Discovery Letter That Is Not Related to Any Request for Judicial Decision Making.

***Standard of Review*:** The Government accepts Doe's formulation of the standard of review. JDB19-20.

A. The Coconspirator Letter is not subject to a presumption of access under the First Amendment or common law.

In ordering disclosure, the District Court equated the Coconspirator Letter to a bill of particulars and held that the Government's decision to send it to the court made it a judicial record. Based on those determinations, the District Court applied the presumption set forth in *Smith* that the First Amendment and common law rights of access applied to the Coconspirator Letter. A7-9. As John Doe correctly argues, however, JDB24-36, the Coconspirator Letter was neither a bill of particulars nor a judicial record and therefore was not subject to the First Amendment and common law presumptive rights of access. Rather, the Coconspirator Letter was a discovery letter, provided to the District Court only so that the Court could seal the letter and protect its contents from disclosure.

1. *Smith* addressed whether the public had a right to access a bill of particulars.

Smith is this Court's only precedential opinion addressing a pretrial request for the public disclosure of unindicted coconspirator information. *Smith* affirmed the district court's refusal to permit public pretrial disclosure of the identities of

unindicted coconspirators, but not before holding that the First Amendment and common law rights of access presumptively apply to bills of particulars. *Id.* at 1112-13. Although that is not the rule in other Circuits, *e.g.*, *United States v. Anderson*, 799 F.2d 1438 (11th Cir. 1986), this Court need not reconsider this aspect of *Smith* to grant Doe the narrow relief he seeks. It is enough for this Court to clarify that the First Amendment and common law presumptive rights of access do ***not*** apply to the Government's confidential and voluntary disclosure of conspirator information to defendants in criminal cases before trial, even if the Government provides that information to moot motion practice over a request for a bill of particulars.

In *Smith*, the defendants moved for a bill of particulars on various issues, including the identities of the unindicted coconspirators to whom the indictment referred. 776 F.2d at 1105. Severing that aspect of the motions from the others, the district court "simultaneously ordered identification of the unindicted co-conspirators and granted a government request for a protective order regarding their names." *Id.* at 1105-06. The Government complied with the order, and the resulting list was placed under seal. *Id.* at 1106. Two newspapers intervened in the criminal case and moved to unseal the list. The district court "found that the document could remain sealed so long as the government showed 'good cause' therefor," *id.* at 1107, the standard applied to civil discovery in *Seattle Times Co. v.*

Rhinehart, 467 U.S. 20 (1984). The district court agreed that the deleterious effect on the "privacy rights" of the individuals on the list constituted good cause. 776 F.2d at 1107.

This Court ultimately affirmed the district court's order denying the media access to the coconspirator information. *Id.* at 1115. *Smith* rejected, however, the district court's application of the "good cause" standard. Instead, this Court held that the more stringent analysis under the First Amendment and common law rights of access presumptively extends to bills of particulars, which it concluded were "more properly regarded as supplements to the indictment than as the equivalent of civil discovery." *Smith*, 776 F.2d at 1111. This Court reasoned that bills of particulars are functionally akin to indictments—they "set the parameters of the government's case"—and thus are subject to the same "historic tradition of public access" that applies to indictments. *Id.* at 1111-12. *But see Anderson*, 799 F.2d at 1442 & nn.4-5. As a result, this Court held that "the trial court ensealment of the list of names can be sustained only if it is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Smith*, 776 F.2d at 1112 (quotation marks omitted).

Nevertheless, *Smith* recognized that "privacy rights may outweigh the public's interest in disclosure," *id.* at 1113. This Court agreed that the bill of particulars in that case threatened those named with career-ending harm, and that

those uncharged individuals would have no opportunity to vindicate themselves. *See id.* at 1113-14. This Court added that "[t]he overriding interests that the trial judge acted carefully to protect were interests of a character that this court has previously recognized as worthy of protection in a similar context—the reputational and privacy interests of third parties." *Id.* at 1115. Agreeing with the district court that "disclosure would almost certainly result in extremely serious, irreparable, and unfair prejudice to those included in" the list of unindicted co-conspirators," this Court affirmed the order denying access to the sealed bill of particulars. *Id.*

2. *Smith* does not apply to the Coconspirator Letter because that letter is not a bill of particulars.

Smith should not control because the Coconspirator Letter is not a filed bill of particulars and should not be construed as one. The Government agrees with John Doe's comprehensive assessment of the defining characteristics of the Coconspirator Letter. JDB30-36. The Government conceptualized and treated the Letter as a vehicle for voluntarily delivering discovery to Defendants rather than as a formal bill of particulars that was ordered by the District Court. Indeed, the Government objected strongly to Defendants' request for a bill of particulars in its opposition to Defendants' discovery motions. Nevertheless, the Government volunteered to provide the requested information, recognizing that it would better facilitate Defendants' preparation for trial.

"The purpose of the bill of particulars is to inform the defendant of the nature of the charges brought against him to adequately prepare his defense, to avoid surprise during the trial and to protect him against a second prosecution for an inadequately described offense." *United States v. Moyer*, 674 F.3d 192, 203 (3d Cir. 2012) (quotation marks omitted). It should be ordered only when "the indictment itself is too vague and indefinite" to "contain all the elements of a crime and adequately appraise the defendant of what he must be prepared to meet." *Id.*(quotation marks omitted). Unlike those rare cases requiring a bill of particulars, the Indictment in this case was plainly sufficient and the Coconspirator Letter did not purport to supplement it formally. Nor does the Conspirator Letter "set the parameters of the government's case" at trial. *Smith*, 776 F.2d at 1111.

Moreover, unlike the bill of particulars in *Smith*, the Coconspirator Letter was not the subject of a judicial determination. In *Smith*, the district court expressly granted the defendants' motions for bills of particulars under Rule 7(f) and "ordered identification of the unindicted co-conspirators." 776 F.2d at 1105. Here, by contrast, the District Court did not "direct the government to file a bill of particulars." Fed. R. Crim. P. 7(f). Because the Government voluntarily provided unindicted coconspirator information in a discovery letter, the Court had no occasion to consider whether the Indictment was so vague or nondescript that it failed to provide "that minimum amount of information necessary to permit

[Defendants] to conduct [their] *own* investigation." *Smith*, 776 F.2d at 1111. And no one "not charged with criminal conduct" should "suffer the stigma of being named co-conspirators in an indictment" or an unsealed bill or particulars "just so that defense attorneys can avoid the inconvenience of discovery." *United States v. Kramer*, 711 F.2d 789, 796 (7th Cir. 1983).

The analysis does not change because the Government elected, out of an abundance of caution, to protect the sensitive information contained in the Coconspirator Letter by asking the District Court to seal it. The court was merely the passive repository of the letter and needed to do nothing with it at this juncture. The mere act of submitting a document to the court as part of a request to seal that same document should not convert the document into a judicial record to which a presumptive right of access attaches. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 782-83 (3d Cir. 1994); *cf. United States v. Smith*, 123 F.3d 140, 151 (3d Cir. 1997) ("examining material in camera is a common method used by courts to make decisions without undermining the secret or privileged nature of certain material").

The Government chose to deliver the Coconspirator Letter this way, rather than transmit it exclusively to Defendants, to enlist the District Court's assistance

in keeping the letter under seal.[3] It would be beyond ironic if an act taken to safeguard certain information from premature public disclosure inadvertently triggered the public's right to access that information. *See United States v. Holy Land Found. For Relief & Dev.*, 624 F.3d 685, 693 (5th Cir. 2010) ["*Holy Land*"] (faulting the Government for naming unindicted coconspirators in an unsealed pretrial brief in anticipation of a judicial determination regarding their status).

Anyone identified in the Coconspirator Letter should not be penalized for the Government's decision to transmit what it considered discovery material to the District Court, copying defense counsel, for the purpose of requesting that it be maintained under seal. After all, "there is no tradition of access to criminal discovery" in this country, and "public access has little positive role in the criminal discovery process." *United States v. Kravetz*, 706 F.3d 47, 54 (1st Cir. 2013) (addressing trial subpoenas). That is the case here, where the "discovery" in question is not even required by the Constitution, much judicially determined to qualify as *Brady* or *Giglio* material. *See United States v. Wecht*, 484 F.3d 194,208-11 (3d Cir. 2007).

[3] The Government made the sealing request in accordance with Department of Justice guidance set forth in the USAM, which directs prosecutors to avoid unnecessarily identifying uncharged third parties in public documents and court proceedings. USAM 9-27.760. Although the USAM "is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law," USAM § 1-1.100, it refers to multiple court decisions that condemn the unwarranted naming of uncharged coconspirators.

Because the District Court never addressed or decided whether a bill of particulars was required, there is no cognizable public interest in the Coconspirator Letter at this point in time. The common law right of access "promotes public confidence in the judicial system by enhancing testimonial trustworthiness and the quality of justice dispensed by the court." *Littlejohn v. Bic Corp.*, 851 F.2d 673, 678 (3d Cir. 1988). Here, however, there was no "justice dispensed by the court."

3. Disclosure should be postponed even under the balancing required by *Smith*.

Even if *Smith* were to apply here, the privacy interests of any individual referred to in the Coconspirator Letter would outweigh any presumptive right of access to such information. The Government's unindicted coconspirator designation will have legal significance only if this prosecution proceeds to trial. For example, should the Government move for the admission of statements made in furtherance of the conspiracy by an unindicted coconspirator under Federal Rule of Evidence 801(d)(2)(E), the District Court would have to " 'find by a preponderance of the evidence that: (1) a conspiracy existed; (2) the *declarant* and the party against whom the statement is offered were members of the conspiracy; (3) the statement was made in the course of the conspiracy; and (4) the statement was made in furtherance of the conspiracy.' " *United States v. Weaver*, 507 F.3d 178, 181 (3d Cir. 2007) (quoting *United States v. Ellis*, 156 F.3d 493, 496 (3d Cir. 1998) (emphasis added)).

In those circumstances, the parties will likely present evidence and argument on each of those points. The District Court, in turn, would assess supporting evidence to determine whether a designated individual was a coconspirator, as opposed to someone who "only knew about the conspiracy, or only kept 'bad company' by associating with members of the conspiracy, or was only present when it was discussed or when a crime was committed." 3d Cir. Model Crim. Jury Instr. § 6.18.371D. In that context, "[t]he identity of a witness whose statement was admitted at trial is a very important factor in assessing the integrity of the proceedings." *United States v. Ladd*, 218 F.3d 701, 705 (7th Cir. 2000). But that assessment would happen at or just before trial, if it happens at all. In other words, depending on how the Government will seek and be permitted to marshal its evidence at trial, the identification of an individual as an unindicted coconspirator may ***never*** have any adjudicatory significance and may never be disclosed.

Thus, at this stage of the prosecution, the coconspirator information the Media seek is "unaccompanied by any facts providing a context for evaluating" the Government's designation. *Smith*, 776 F.2d at 1113; *see Holy Land*, 624 F.3d at 692 ("the context of a party's naming as a possible coconspirator is relevant to whether the naming was wrongful and whether it should be sealed"). While this Office makes such designations only upon careful consideration of the facts, the designation currently rests on only one party's parsing of the evidence. Courts

release such information only after a judge has an opportunity to pass on the support for it and the "status of coconspirator" is "grounded in an evidentiary basis far more solid than the assertion of the United States Attorney." *Ladd*, 218 F.3d at 704-05 (citations and footnote omitted); *id.* at 706 (describing "animating concern" in *Smith* as "to avoid tarnishing the reputations of individuals who had been named coconspirators by the Government without any judicial check on the factual basis for the imposition of such a label"); *Holy Land*, 624 F.3d at 693 (ordering expungement when "there was no judicial determination that evaluated [the uncharged coconspirator's] connection to the case pursuant to a clear, circumscribed legal standard").

Moreover, the absence of important factual context underscores that the Coconspirator Letter is not now part of any request for judicial decision making. Revealing coconspirator information at this preliminary juncture and not as part of any judicial determination would make this case an extreme outlier. As one district court judge in this Circuit observed, "[t]he cases in which the Third Circuit has applied a 'strong' presumption . . . involve[] the accessibility of documents that directly impacted and were crucial to the district court's exercise of its Article III duties." *United States v. Kushner*, 349 F. Supp. 2d 892, 904 (D.N.J. 2005). Other Circuits take a similar approach, limiting the common law presumptive right of access to "those materials on which a court determines the litigants' substantive

rights" and excluding "materials" that "relate merely to the judge's trial management role." *Kravetz*, 706 F.3d at 54-55 (internal quotation marks omitted).

This timing aspect differentiates the circumstances in this case from those in other cases in which courts have ordered disclosure under public rights of access. In *Ladd*, for example, the Seventh Circuit found "an important public interest in revealing" the names of "unindicted coconspirators whose hearsay statements were considered as evidence during trial." 218 F.3d at 704. The court reasoned that "[t]he source of evidence admitted at trial and the circumstances surrounding its admittance are important components of the judicial proceedings and crucial to an assessment of the fairness and the integrity of the judicial proceedings." *Id.* *Ladd* expressly distinguished *Smith* on timing grounds, calling it "a very different situation . . . in which the alleged coconspirator is identified by the Government during a preliminary phase of the case." *Id.* at 704. Indeed, *Smith* itself recognized that "it may become necessary to disclose some of the names *in the course of the trial* in order to permit the parties a fair opportunity to develop their respective cases." 776 F.2d at 1114 n.5 (emphasis added).

But that time is not now, whether or not John Doe is a public employee or elected or appointed official, and despite the public's interest in this prosecution. A27-28. *Smith* acknowledged "that the public has a substantial interest in the integrity or lack of integrity of those who serve them in public office." 776 F.2d at

1114. Still, this Court did "not think that the subject matter of the particular information to which access is sought can control the issue before us." *Id.* Although the District Court has confirmed that "the Government limited the scope of the [Coconspirator] Letter to those for 'whom the Government has sufficient evidence to designate as having joined the conspiracy,'" A28, the bill of particulars in *Smith* remained sealed even though it identified individuals "who, in the opinion of the United States [Attorney], are unindicted coconspirators in this case," 776 F.2d at 1113. And despite recognizing that the First Amendment and common law rights of access extend to bills of particulars, *Smith* concluded that "the reputational and privacy interests of third parties" were "overriding interests . . . of a character . . . worthy of protection." *Id.* at 1115. Thus, even if *Smith* applies here, the reputational and privacy interests of anyone referred to in the Coconspirator Letter should outweigh the public's presumptive right of access at this time.

B. This Court does not need to address the due process concerns raised by Doe.

Doe has raised a due process challenge to the disclosure of the Coconspirator Letter, claiming a Fifth Amendment right not to be named by public release of the Letter. JDB37-49. But Doe cannot credibly contend—and the Government does not concede—that the Government must provide notice to uncharged third parties and an opportunity to challenge that designation before naming them as coconspirators. JDB49. For example, if the Government were to

seek to admit coconspirator statements against defendants under Rule 801(d)(2)(E), even Doe acknowledges that the Government would have a "potentially legitimate interest" in naming unindicted coconspirators when moving for the admission of their statements under Rule 801(d)(2)(E). JDB47.

Furthermore, neither the Supreme Court nor the Third Circuit has discussed the disclosure of uncharged coconspirator information in due process terms. To the contrary, the Supreme Court in *Nixon v. United States*, 418 U.S. 683 (1974), expressly declined to decide whether it was improper for an indictment to identify an unindicted coconspirator. *Id.* at 687 n.2. The Court has never revisited that question. Moreover, harm to reputation, without more, is not protected by the Due Process Clause. *See, e.g.*, *Paul v. Davis*, 424 U. S.693, 711-12 (1976). Rather, an individual must assert that he has suffered "stigma plus." *See, e. g.*, *Graham v. City of Philadelphia*, 402 F.3d 139, 142 & n.2 (3d Cir. 2005). But the only harm that Doe has raised in these proceedings is reputational and hypothetical. Time and again this Court has stated that is not enough. *See, e.g.*, *Kelly v. Borough of Sayreville*, 107 F.3d 1073, 1078 (3d Cir. 1997) ("possible loss of future employment opportunities is patently insufficient to satisfy the requirement . . . that a liberty interest requires more than mere injury to reputation") (quoting *Clark v. Township of Falls*, 890 F.2d 611, 620 (3d Cir. 1989)); *Sturm v. Clark*, 835 F.2d

1009, 1012 (3d Cir.1987) ("financial harm resulting from government defamation alone is insufficient to transform a reputation interest into a liberty interest").

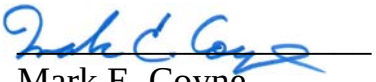
Nor is it clear how such a due process right would be vindicated. By construing the Coconspirator Letter as a discovery transmission rather than a bill of particulars, however, this Court can avoid these knotty due process issues. *Cf. New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 301 (3d Cir. 2007) ("[W]e have an obligation not to decide constitutional questions unless necessary."). No court has "recognized a general right not to be implicated as a possible coconspirator in another's criminal case." *Holy Land*, 624 F.3d at 691. There is no basis for this Court to do so now.

CONCLUSION

For all of these reasons, the Coconspirator Letter should remain under seal unless and until its contents become germane to an evidentiary or other trial-related ruling that the District Court must make. The United States therefore suggests that this Court vacate the District Court's order requiring the public filing of the Coconspirator Letter and remand with instructions to deny without prejudice the Media's motion to unseal.

Respectfully submitted,

PAUL J. FISHMAN
UNITED STATES ATTORNEY

By: 

Mark E. Coyne
Chief, Appeals Division
David W. Feder
Assistant U.S. Attorney
970 Broad Street, Suite 700
Newark, NJ 07102-2535
(973) 645-2700

Date: May 27, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify as an Assistant United States Attorney for the District of New Jersey, that:

(1) this brief complies with the length limitations of Fed. R. App. P. 32(a)(7) by not exceeding 30 pages;

(2) this brief complies with the typeface requirements and type style requirements of Fed. R. App. 32(a)(5) and (6) by using Microsoft WORD 2010's 14-point proportionally-spaced Times New Roman typeface;

(3) the text of the PDF and paper copies of the brief is identical; and

(4) the PDFs of the brief were prepared on a computer that is automatically protected by a virus detection program, namely a continuously-updated version of Trend Micro OfficeScan, and no virus was detected.

By: 

Mark E. Coyne
Assistant U.S. Attorney
Chief, Appeals Division

Dated: May 27, 2016

CERTIFICATION OF FILING AND SERVICE

I hereby certify that on May 27, 2016, I caused this Brief to be filed with the Clerk of this Court by (a) electronic filing in the PDF form using the Circuit's electronic filing system, and (b) paper filing of an original and six paper copies of the Brief using overnight courier.

I also certify that on May 27, 2016, I caused this Brief to be served on all counsel of record by the Notice of Docketing Activity generated by the Third Circuit's electronic filing system.

By: 

Mark E. Coyne
Assistant U.S. Attorney
Chief, Appeals Division

Dated: May 27, 2016