QUESTION PRESENTED

I. Whether the district court correctly sealed an entire category of information from public access, including preventing Mr. Miller from having meaningful access to the documents, when that category of information was related to the misconduct of federal law enforcement officers who investigated Mr. Miller.

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TABLE OF AUTHORITY

PETITION FOR WRIT OF CERTIORARI

Petitioner Marlon Miller respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the Eleventh Circuit affirming the decision of the district court is reproduced in the Appendix at Appendix A. The Eleventh Circuit's opinion was not published, but it can be found at *United States v. Miller*, Case No. 16-11690, manuscript op. (11th Cir. May 30, 2019). The order of the district court is at Appendix B.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on May 30, 2019. Mr. Miller filed a Petition for Panel Rehearing and for En Banc Consideration on June 20, 2019. The Petition was denied on August 28, 2019; that order is included as Appendix C. This Petition is being filed within 90 days of that Order, pursuant to Supreme Court Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.

STATEMENT OF THE CASE

On April 10, 2013, Mr. Miller was indicted for (1) conspiracy to possess with the intent to distribute at least one kilogram of a mixture containing heroin, in violation of 21 U.S.C. §§ 841, 846 (Count 1); (2) attempt to possess with intent to distribute at least one kilogram of a mixture containing heroin, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(i) (Count 2); and (3) possession with intent to distribute at least 100 grams of a mixture containing heroin, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B)(i) (Count 3). (Doc. 32). Mr. Miller was initially represented by W. Sander Callahan. (Doc. 15, 52).

a. Investigation into DEA Agents

Briefly, the charges against Mr. Miller stemmed from the seizure of drugs after Mr. Miller's codefendant, Enedina Del Carmen Moreno, was stopped by a Drug Enforcement Administration ("DEA") agent while transporting the drugs to Atlanta. The Atlanta-based DEA agents worked under Group Supervisor [redacted], who became the subject of an ongoing investigation based on his inappropriate relationships/actions regarding various confidential sources. One of those confidential sources was [redacted] ("M[redacted]"), who orchestrated the drug deal for which Mr. Miller was convicted, as described in detail below.

This information first became relevant to this case when the government filed a Motion to Seal Notices Regarding Ongoing Investigation, requesting that all

Notices Regarding Ongoing Investigation be sealed "for reasons noted before the Court on June 30, 2015, namely, the sensitivity of an ongoing [redacted] investigation." (Doc. 214).[1] The district court granted the motion. (Doc. 215). The government filed a Notice on the same day, in which it revealed that [redacted], DEA Task Force Officer [redacted], and Special Agent [redacted] were the subject of a joint [redacted] investigation for various violations of the DEA Standards of Conduct and criminal violations of 18 U.S.C. § 1001 and 18 U.S.C. § 641. (Doc. 220 at 2-3). Specifically, [redacted], who was the [redacted] Supervisor at the time, was alleged to have had inappropriate relationships with one or more confidential sources, made improper payments to one or more confidential sources, and falsified [redacted] reports of investigations to justify payments to one or more confidential sources. (*Id.* at 3).

The government noted that one confidential source with whom [redacted] allegedly had an inappropriate relationship with was [redacted], who was also an uncharged co-conspirator in Mr. Miller's case. (*Id.* at 3). M[redacted]. [redacted] allegedly provided information against Mr. Miller after Mr. Miller was arrested. (*Id.*). Additionally, [redacted] personally falsified [redacted] reports, and he signed reports

1 It is unclear what information was presented to the Court on June 30, 2015, as there is no relevant transcript or minute entry from that date.

that [redacted] wrote and asked him to sign as though he wrote them. (*Id.* at 4). [redacted] admitted using false information in a DEA 6 to justify payments to a confidential source at [redacted] direction. (*Id.* at 5).

The government requested that the Notice be sealed, that defense counsel be prohibited from disclosing the information to anyone but Mr. Miller and the court, that defense counsel be prohibited from copying the document or leaving a copy with Mr. Miller, and that defense counsel return the protective order to the U.S. Attorney's Office at the conclusion of his representation of Mr. Miller. (*Id.* at 6-7). The court granted the request and specifically ordered that any motion, pleading, or other notice referencing any information in the document be filed under seal. (Doc. 221).

On June 14, 2015, the government filed an Updated Notice Regarding Ongoing Investigation, disclosing that [redacted] had inappropriate relationships with as many as three confidential sources. (Doc. 235 at 3). One confidential informant alleged, *inter alia*, that she and [redacted] had a long-term sexual and personal relationship; that [redacted] behavioral and mental state had deteriorated, in part due to alcohol abuse; that the [redacted] had made payments to her for which she was unaware of the basis, except that [redacted] had promised to pay her rent; and that [redacted] had revealed information regarding active DEA investigations. (*Id.* at 3-4). The updated

notice contained the same restrictions on disclosure. (*Id.* at 7). The court entered essentially the same order. (Doc. 236).

On October 9, 2015, the government filed its Proposed Procedures Relating to Disclosure of [redacted] Investigative Reports. (Doc. 239). In that document, the government indicated that it had recently received disks containing reports, transcripts of interviews, and associated documents. (*Id.* at 1). The government's proposed procedures for the disclosure and review of the documents were as follows:

> The United States will make a redacted electronic version of the reports and transcripts available to defense counsel for viewing on a computer in the United States Attorney's Office in Atlanta, Georgia.
>
> i. Defense counsel will be permitted to take notes, but will not be permitted to have physical copies of any document;
>
> ii. Should defense counsel believe that he or she needs access to redacted information, defense counsel shall file a motion under seal with a copy to counsel for the United States so that the matter can be litigated before the Court; and
>
> iii. Should defense counsel believe that he or she needs a copy of any document contained in the electronic file, defense counsel shall file a motion under seal with a copy to counsel for the United States so that the matter can be litigated before the Court.

(*Id.* at 3-4). The government noted that it was going to file the documents with the court and requested that "these disks be placed under seal and made part of the record in this case." (*Id.* at 4).

The government also requested restrictions on disclosure of the information as follows:

> Given that the above investigation is ongoing, and the information contained in the [redacted] reports contains nonpublic information that could have a negative impact on: the safety of some of the persons mentioned in the reports, transcripts and documents; the privacy of other people under investigation in other cases; and the reputations of law enforcement agents and agency employees mentioned in the reports, transcripts, and documents; the Government respectfully requests (a) that the Court approve the procedures described in paragraph 5, above; (b) that defense counsel be prohibited from disclosing the information made available for inspection at the United States Attorney's Office to anyone other than the Court his or her client; (c) that although defense counsel will not be given copies of any documents during this review and inspection process, that defense counsel be prohibited from copying any of the reports, transcripts or documents, made available for inspection at the United States Attorney's Office, or showing the defendant any of the reports, transcripts or documents; and (d) that should defense counsel need to file any motion, pleading, or other notice referencing any information in the document, defense counsel shall be required to file any such document under seal.

(*Id.* at 4-5). The district court entered an order approving of the procedures described in the government's proposal. (Doc. 240).

b. Pre-Trial Proceedings

i. Review of Sealed Documents

Counsel filed a motion to unseal relevant documents from the [redacted] investigation, requesting that the government provide her with copies of the relevant

documents. (Doc. 254).[2] At a pre-trial conference on December 29, 2015, the government indicated that the only documents that would be relevant were M[redacted] own interviews, and the court agreed to look only at those documents to determine if M[redacted] was operating as a [redacted] confidential source prior to Mr. Miller's arrest. (Doc. 330 at 8, 16-17, 20-21, 24-27). Counsel explained that the broader subset of documents went to the quality and credibility of the investigation, but the court declined to disclose any documents, finding that the limited set of documents it reviewed did not establish that M[redacted] was working as a DEA agent prior to the date of Mr. Miller's arrest. (Doc. 330 at 19-20; Doc. 258).

c. Evidence Presented at Trial

Subsequently, Mr. Miller went to trial, at which time he did not present any evidence related to M[redacted] or the evidence of the investigation. At trial, the evidence showed, in relevant part, the following:

Ms. Moreno was arrested in Laredo, Texas by a Customs and Border Protection agent, Francisco Parra, who determined that she was engaged in narcotics smuggling after discovering cans of fruit in her bag. (Doc. 333 at 146-51). Ms. Moreno stated that she worked for Manuel in Mexico. (*Id.* at 200). Ms. Moreno had transported drugs to the United States at least two or three times before. (*Id.* at 203,

[2] The court noted that the motion had been filed at Docket Entry 254 in its order denying said motion. (*See* Doc. 258). However, it does not appear that the motion is currently part of the record, as it not available or noted on CM/ECF.

239, 255-56). She believed that she was transporting cocaine, but she was actually transporting heroin. (*Id.* at 226). She was very angry about this because she knew that heroin is more expensive than cocaine and that it could cause her to get more prison time. (*Id.* at 242-43). Therefore, she should have received $25,000-30,000 to deliver the drugs, not $8,000. (*Id.* at 243).

The agents and Ms. Moreno then agreed for Ms. Moreno to conduct the drug transaction while wearing a wire. The agents gave her one can of heroin and six cans of fake heroin. (*Id.* at 191-92). Ms. Moreno was waiting at the bus station in Atlanta to deliver the drugs, when Terrence Beebe came into the station and approached her. (*Id.* at 233). Ms. Moreno got in the truck. (*Id.* at 233-34). The Doraville Police Department pulled the truck over as though it were making a traffic stop. (*Id.* at 194). Eventually, the truck sped off and led the officers on a high-speed chase. (*Id.* at 195).

At trial, Mr. Beebe testified that he had a lengthy criminal history, including drug convictions. (Doc. 334 at 309-10).[3] He testified that his involvement in the drug transaction at issue began when he learned, several days prior, that his [redacted], [redacted], "had a package coming through," allegedly with Mr. Miller. (*Id.* at 314). Mr. Beebe testified that he was "supposed to have went there and

[3] Page numbers refer to those on the top-right corner of the transcript, not the CM/ECF numbering.

visualize the package." (*Id.*). He explained that this meant that M[redacted] wanted him "to go see what was supposed to have been going, was supposed to have been bringing, was supposed to have been coming in." (*Id.* at 316). He was instructed "to go and see a package and tell her, confirm to her if it was one bag of whatever it was or whatever it was." (*Id.* at 317). Mr. Beebe testified that he thought he was required to do this because "they had a trust issue between" [redacted] and Mr. Miller. (*Id.*).

After the police stopped the truck, Mr. Beebe called M[redacted] and told her that they had been stopped by the police. (*Id.* at 330). Mr. Beebe believed that M[redacted] was having heroin delivered because s/he had a source in Mexico. (*Id.* at 333). Mr. Beebe testified that Mr. Miller had gone with M[redacted] to Mexico to meet the source of the drugs to try to get a better price. (*Id.* at 335-37, 340). Mr. Beebe agreed that M[redacted] had arranged the drug transaction. (*Id.* at 344-45).

Officer Brandon Baker testified that he stopped the red truck and conducted a brief traffic stop prior to the high-speed chase. (*Id.* at 400-01, 403). During the stop, Officer Baker mostly spoke with Mr. Beebe, despite the fact that Mr. Miller was the one driving the truck. (*Id.* at 404, 406). He testified that Mr. Beebe was very dramatic and that he was panting, which "became heavier and heavier as he continued to look in [the] back seat." (*Id.* at 408). Office Baker asked for consent to search the car, and Mr. Beebe declined unless there was a warrant or a K-9. (*Id.*

at 408, 440). Officer Baker asked them to step out of the vehicle, but "at that time, he looked over. Mr. Miller looked over at Beebe and Beebe nodded his head." (*Id.* at 408). Then the windows began to roll up, and the truck drove away. (*Id.*).

DEA Agent Noe discovered $4,000 in Mr. Miller's backpack. (*Id.* at 493). Agents were never able to find the one can of heroin that was sent out for the drug deal. (*Id.* at 500-01). After trial, Mr. Miller was convicted of all three counts against him. (Doc. 335 at 642).

d. Sentencing

Because the government had filed a 21 U.S.C. § 851 enhancement, Mr. Miller faced a mandatory minimum of 20 years in prison, which the court sentenced him to on April 12, 2016. (Docs. 98, 301). Mr. Miller filed a timely notice of appeal. (Doc. 302).

e. Appellate Proceedings

On appeal, Mr. Miller moved to lift the protective order, requesting that the Court order the government to produce copies of the documents filed under seal to counsel and clarify that he was permitted to file his brief publicly—not under seal—or, alternatively, to remand this case for the district court to conduct an evidentiary hearing to address the concerns raised in the motion. The government opposed the motion. The Eleventh Circuit denied the motion without explanation.

The parties filed all of their briefs under seal. Relevant to this Petition, Mr. Miller argued that the district court erred by denying Mr. Miller his right to a public trial when it sealed various documents filed by the government, and prevented Mr. Miller or any member of the public from having or accessing copies of those documents, without making the necessary findings to support the protective order. Moreover, Mr. Miller maintained his objection to filing his brief under seal and to his appellate proceedings being conducted under seal and requested that the panel reconsider his Motion to Lift the Protective Order in full.

The Eleventh Circuit affirmed Mr. Miller's convictions and sentences. The Court declined to consider Mr. Miller's request for panel reconsideration of his Motion to Lift the Protective Order, erroneously concluding that Mr. Miller had improperly filed two motions for reconsideration. As to the issue relevant to this Petition, the Court concluded that the district court had properly sealed the documents, based on its adoption of the government's procedures. The Eleventh Circuit emphasized that the court had

> adopted the government's position that its interest was grounded in protecting sensitive non-public information contained in an ongoing investigation involving government agents and confidential informants. At base, the district court found that closure was essential to preserve the government's higher interest and its adoption of procedures preventing disclosure of information solely related to the investigation ensured that the order was narrowly tailored to serve that interest. Moreover, because Miller was permitted to access the investigation documents under the adopted disclosure procedures, the district court

did not violate Miller's common-law right to access with regard to those documents.

(Opinion at 4-5). The Court agreed with the government that the district court's adoption of the government's motions as "sufficient support for the need for closure," and that the adoption enabled the Court "to adequately determine whether the sealing order was properly entered." (*Id.* at 5 n.1).

Mr. Miller sought reconsideration from the panel and from the Eleventh Circuit sitting *en banc*, but that motion was also denied.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari pursuant to Supreme Court Rule 10(c) because the Eleventh Circuit has decided Petitioner's case, which involves important federal questions, in a way that conflicts with this Court's precedents regarding the right to a public trial, the press and the public's First Amendment rights, and the common-law right of access.

Due to the district court's improper sealing order, Mr. Miller has been forced to conduct his entire appellate proceedings under seal, including even filing this Petition under seal. This entire process has violated Mr. Miller's right for these criminal proceedings to be conducted in public. There has not been any press or public scrutiny of the significant law enforcement misconduct in this case—all because no one in the public or the press has been able to learn of the misconduct and how it related to this case. The court's sealing order consequently has violated

the press and the public's First Amendment rights and common-law right of access—all to protect the law enforcement officers who engaged in serious misconduct.

This Court has held that the concerns presented by this case are so fundamental to the framework in which we conduct criminal trials that they require reversal even absent any harm to the defendant in question. Yet, here, both the district court and the Eleventh Circuit failed to meaningfully engage with the serious constitutional issues implicated by the district court's sealing order, as they simply agreed that the reasons proffered by the government were sufficient. The questions presented by this sealing order therefore raise serious constitutional issues that should be addressed by this Court.

ARGUMENT AND AUTHORITY

I. The district court erred by sealing an entire category of information from public access, including preventing Mr. Miller from having meaningful access to the documents, when that category of information was related to the misconduct of federal law enforcement officers who investigated Mr. Miller.

The press and public enjoy a qualified First Amendment right of access to criminal trial proceedings. *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596, 603, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). Open criminal proceedings have been an "indispensable attribute of an Anglo–American trial" for centuries. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569, 100 S.Ct.

2814, 65 L.Ed.2d 973 (1980) (plurality opinion); *see also Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597–98, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) (holding that the press and public also enjoy a common-law right of access to judicial records). Public trials and judicial proceedings are "rooted in the 'principle that justice cannot survive behind walls of silence,' and in the 'traditional Anglo–American distrust for secret trials.'" *Gannett Co. v. DePasquale*, 443 U.S. 368, 412, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 349, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), and *In re Oliver*, 333 U.S. 257, 268, 68 S.Ct. 499, 92 L.Ed. 682 (1948)) (Blackmun, J. concurring in part); *Richmond Newspapers*, 448 U.S. at 591, 100 S.Ct. 2814 (Brennan, J., concurring) (recognizing "this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public") (quoting *In re Oliver*, 333 U.S. at 273, 68 S.Ct. 499).

This right extends not only to the criminal trial itself, but also to other integral parts of the trial process such as voir dire proceedings and preliminary hearings. *Press–Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) ("Press–Enterprise I") (voir dire proceedings); *Press–Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) ("Press–Enterprise II") (preliminary hearings). It also attaches to the transcripts of these proceedings. *See Press–Enterprise II*, 478 U.S. at 3, 13–15, 106 S.Ct. 2735

(transcript of preliminary hearing). Circuit courts have also recognized a right of access to plea hearings, plea agreements, and related documents. *Oregonian Publishing Co. v. United States Dist. Court*, 920 F.2d 1462, 1465–66 (9th Cir.1990) (right of access to plea agreements and related documents); *United States v. Danovaro*, 877 F.2d 583, 589 (7th Cir.1989) (right to attend proceedings at which pleas are taken and inspect the transcripts); *United States v. Haller*, 837 F.2d 84, 86–87 (2d Cir.1988) (right of access to plea hearings and plea agreements); *In re Washington Post Co.*, 807 F.2d 383, 388–90 (4th Cir.1986) (right of access to plea hearings, sentencing hearings, and documents filed in connection thereto).

In order to overcome the presumption of openness, the party must make a sufficient showing that it is necessary, and the district court must make sufficient findings. Specifically, a party may overcome that presumption if it can show "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press–Enterprise I*, 464 U.S. at 510, 104 S.Ct. 819. When sealing proceedings or documents, a court must articulate the overriding interest "along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.*

The Eleventh Circuit has said that these findings "should include the reason for the closure, the evidence that supports the need for the closure, the number of persons excluded and the number allowed to remain, and the presence or absence of

the press." *Douglas v. Wainwright*, 714 F.2d 1532, 1546 n. 16 (11th Cir.1983) (applying First Amendment standard to defendant's Sixth Amendment right to a public trial); *see also United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1030 n.16 (11th Cir. 2005).

In *Ochoa-Vasquez*, the Eleventh Circuit explained:

> Of course, disclosure of evidence supporting the need for continued secrecy may in some cases reveal sensitive information that, if publicized, would defeat the purpose of keeping the proceeding or record sealed in the first place. *United States v. Kooistra*, 796 F.2d 1390, 1391 (11th Cir.1986). But the law permits the district court to seal parts of the denial of access order itself so far as the facts sealed are necessary to protect the higher values at issue, and where "the district court makes every effort to explain as much of its decision as possible on the public record to enable an interested person to intelligently challenge the decision." *Washington Post v. Robinson*, 935 F.2d 282, 289 n. 9 (D.C.Cir.1991) (holding that, in sealing a plea agreement, "the trial court may file its findings under seal if it is necessary to protect the secrecy of the plea agreement ... [but] should only seal that part of its findings that is necessary to protect the secrecy of the sealed plea agreement, and it must make every effort to explain as much of its decision as possible on the public record to enable an interested person to intelligently challenge the decision"); *accord United States v. Haller*, 837 F.2d 84, 87 (2d Cir.1988); *In re Washington Post Co.*, 807 F.2d at 391. Thus, the sensitive nature of the facts poses no barrier to compliance with the First Amendment. The district court can enable meaningful appellate review of its order and provide as much information to the public as possible, while still protecting the higher values at stake.

Ochoa-Vasquez, 428 F.3d at 1030 n.16.

This Court has held that the violation of a right to a public trial is structural, such that the defendant does not have to show harm in order to merit reversal. *Waller*

v. Georgia, 467 U.S. 39, 49, 104 S.Ct. 2210, 2217 (1984). Because the same concerns and rights are implicated by the issue presented here, Mr. Miller submits that the error in this case is structural and requires reversal.

a. The district court never made the requisite findings to support sealing every document related to the OIG and OPR investigations.

The district court's orders do not address the requisite balancing test in any way. The district court only issued the order after stating "[f]or good cause shown." (Docs. 215, 221, 236, 240). However, the court was required to "articulate the overriding interest along with findings specific enough that a reviewing court can determine whether the closure order was properly ordered." *Ochoa-Vasquez*, 428 F.3d at 1030. Because the district court failed to engage in the appropriate analysis in any way, the order failed to comply with long-standing precedent governing the sealing of public documents. Notably, the "good cause" standard is a lower standard that governs issues such as whether a deadline should be extended. *See* Fed.R.App.P. 4(b)(4). As described above, the decision to seal entire issues from the public has a much higher threshold, which the district court failed to meet.

b. The reasons identified by the government were insufficient to overcome the presumption of openness, especially where the case involved such significant misconduct by law enforcement agents.

In its written pleadings, the government stated that the information should be sealed in order to protect a pending investigation. However, given the importance of these issues to Mr. Miller's case and his appeal and the public's right of access to

the information, the pending investigation is insufficient to overcome the heavy burden on the government to seal every document related to the [redacted] investigation and every related pleading.

Further, this investigation has now been "pending" since May of 2014, for more than five years. From the documents reviewed by counsel, the [redacted] and [redacted] investigations appear to be completed. It is unclear what investigation is still pending and/or active, or how long it will take to complete the investigation. The government should not be allowed to cite a "pending investigation" indefinitely, with the effect of never being required to disclose information to criminal defendants investigated by [redacted] and his [redacted].

Moreover, at least two of the subjects of the investigation, former TFO [redacted] and TFO [redacted] are no longer targets in light of their resignations from the DEA. The primary target, [redacted], his attorney, and defense counsel in a federal case being prosecuted in the Eastern District of Missouri now have access to at least the documents in question. [redacted] has testified and been cross-examined at length, mostly in public about the investigation and the allegations against him. *See* CM/ECF for E.D. Mo., case no. 4:14-cr-88, doc. 410. The context in which the [redacted] investigation was released in that case is a *Franks* hearing regarding the application for and issuance of a Title III wiretap. The Government in that case, in conjunction with the [redacted] which is in charge

of the investigation and possible prosecution of [redacted], made it clear during a hearing just prior to [redacted] testimony that the parties in Eastern District of Missouri, [redacted], and his attorney all have actual copies of the investigative materials. These are the same documents that both trial and appellate counsel have only been able to review in the office of the Atlanta U.S. Attorney, relying on hand written notes to guide their presentation of the information to this Court.

In *United States v. Ignasiak*, the Eleventh Circuit held that the public had a "great interest" in learning that a government *witness* abused governmental authority and committed acts which could have been charged as felonies, but were not. *United States v. Ignasiak*, 667 F.3d 1217, 1238 (11th Cir. 2012). The Court specifically rejected the contention that the witness' privacy interests outweighs the public's right to know the information. *Id.* at 1239. This case involves DEA Agents who had the power to arrest people and subject them to federal prosecutions and lengthy terms of imprisonment. The public interest in the misconduct at issue here is significantly greater than the interest in the information in *Ignasiak*. Therefore, Mr. Miller submits that the investigation is of such an interest to both him and to the public that the fact that it is still pending cannot overcome this interest, especially when he has testified, had access to the documents sought here, and actual copies have already been provided to other defense counsel litigating issues in which [redacted] and [redacted] are involved.

c. The information that the government sought to conceal has now been made publicly available in the St. Louis case.

As noted above and perhaps most compellingly, the information that the government has sought to protect is now largely in the public domain. Specifically, the information related to the [redacted] investigation has been disclosed in *United States v. Gatling,* CM/ECF for E.D. Mo., case no. 4:14-cr-88, docs. 406, 407, 408, 410. There, testimony from one [redacted], [redacted], and other [redacted] is publicly available. Moreover, there has been significant media attention to that case, and articles expressly name [redacted].[4]

Because the information is already publicly available, there was no justification to continue sealing the documents—or for them to remain sealed in perpetuity. The district court's order prevented Mr. Miller from having meaningful access to the information at the time of the trial, but it has also required Mr. Miller to litigate his entire appellate proceedings under seal, notwithstanding his clear and repeated objections to doing so. Further, the public and the press have been deprived

4 "DEA supervisor denies claim that sexual relationship imperiled St. Louis drug case," Robert Patrick, St. Louis Post-Dispatch, Oct. 23, 2016, available at http://www.stltoday.com/news/local/crime-and-courts/dea-supervisor-denies-claim-that-sexual-relationship-imperiled-st-louis/article_cb5ddd71-e65f-5592-89ad-f2776080c29a.html (last accessed Mar. 2, 2017); "Atlanta DEA sex scandal claim continues playing out in St. Louis drug case," Robert Patrick, St. Louis Post-Dispatch, Feb. 15, 2017, available at http://www.stltoday.com/news/local/crime-and-courts/atlanta-dea-sex-scandal-claim-continues-playing-out-in-st/article_570a0834-269b-5741-b47c-e1c1215440cf.html (last accessed Mar. 2, 2017).

of their right to know about the misconduct and how it interacted with the facts of this case—where Mr. Miller is now serving 20 years in custody.

CONCLUSION

In light of the arguments advanced in this Petition, Mr. Miller respectfully requests this Court grant his petition and vacate his conviction and sentence.

This 26th day of November, 2019.

Respectfully submitted,

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