REDACTED IN ACCORDANCE WITH THE JUNE 25, 2012 ORDER OF THE U.S. SUPREME COURT

No. 11M122

IN THE

Supreme Court of the United States

RICHARD ROE, JANE DOE, JOHN DOE II,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent,

v.

JOHN DOE,

Respondent.

United States Court of Appeals for the Second Circuit
Docket Nos. 10-2905-cr, 11-479-cr, 11-1408-cr,
11-1411-cr, 11-1666-cr, 11-2425-cr

Motion by Petitioner "Richard Roe"

(1) To Order the Docketing and Public Availability of the Petition for Writ of Certiorari in Redacted Form as Provided Herewith

(2) To Caption the Case With the True Name of Richard Roe

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June 1, 2012
(Redacted on July 9, 2012)

To: The Honorable Justices of the Supreme Court of the United States

I, Richard E. Lerner, an attorney admitted to practice before this Court, state under penalty of perjury, pursuant 28 U.S.C. §1746, that the following statements are true, based on my knowledge and my review of the files maintained in my representation of petitioner Richard Roe.[1]

I. Statement of Relief Requested and Introduction

1. Roe herewith submits a proposed redacted version of his petition for writ of certiorari to the Court of Appeals for the Second Circuit, respectfully requesting it be made publicly available by this Court. Additionally, Roe respectfully requests that the case be captioned in his true name.

2. In sections II, III, and IV, Roe lists the redactions and explains why certain information has been redacted and other information has not. In section V, Roe requests the caption of the case be changed to his name. In section VI, in the context of the public right of access, Roe demonstrates that the public interest in this case is insurmountable, as there can be no compelling or countervailing interest mitigating against public availability of the redacted petition in light of the following:

3. It would be extraordinary to seal any petition, especially where, as here, such sealing would be predicated upon nonexistent sealing orders of the district court. Without access to the petition, *amici* could not weigh in, though "[A]n *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court." Rule 37. And this is no ordinary petition. Doe's criminal case has been secret for 14 years. His past victims lost at least $40,000,000 to his first fraud; his current victims have lost some $500,000,000 to his second fraud – *viz.*, his concealment of his

[1] This motion is revised, per the June 25, 2012, order of this Court, requiring redaction from the petition for writ of certiorari and from this motion "any appended item containing a party's true name and any reference to such item...."

RICO conviction. Attorney Roe has been enjoined from telling Doe's victims and from vindicating the rights of his clients. He has been ordered to stand mute while Doe continues these frauds. Without public access to this petition, Doe's victims cannot know that their rights were violated, cannot intervene, and cannot submit *amici* briefs. But with access, *amici*, victims, and the public will learn that there are secret criminal trials conducted in United States courts and that this Court has been asked to outlaw them. This Court cannot decide this issue in secrecy. **When courts of record fail to act on the record, this Court of last resort must.**

II. By Order, Roe's Petition Was Filed as "Sealed"

4. On February 14, 2011, the Second Circuit ordered that any appeals Roe filed in this Court be denominated "Sealed." JA 1285. Roe filed his petition, so denominated, on May 10, 2012. The Court accepted it on May 14, 2012 and directed him to file this motion and redacted petition.

III. The Information Redacted

5. In the appendix, these items, actually or allegedly under seal below, were redacted:[2]

5.1.	Second Circuit order of January 28, 2011	App. 29a
5.2.	Second Circuit order of February 4, 2011	App. 30a
5.3.	Second Circuit order of February 8, 2011	App. 33a
5.4.	Second Circuit order of February 9, 2011	App. 35a
5.5.	Second Circuit order of February 10, 2011	App. 37a
5.6.	[redacted]	App. 118a
5.7.	Scheduling order of March 23, 2011, District Court, EDNY	App. 131a

6. In the petition itself, information that could only be known or inferred from the preceding redacted documents, or from the PSR, criminal complaint, information, cooperation, and proffer agreements which are the subject res of the underlying case, has been redacted.

[2] In accordance with this Court's June 25, 2012 order, we have redacted the reference to item 5.6. However, that item is referenced by date the June 29, 2011 decision of the Second Circuit, which is a matter of public record. Additionally, there are further items in the appendix which are redacted, but not listed here, as listing such items here would appear to contravene the requirement that any items contained in the appendix that identify any party by his true name be redacted.

IV. The Information not Redacted

7. ***The orders appealed from are not sealed, and so were not redacted.*** Immediately after issuing their summary orders of February 14, 2011 and June 29, 2011, the Second Circuit posted them on its website, where they have been publicly available for a year.[3] Both were published, reported within days, and have been publicly available on Westlaw, Lexis, Leagle, and vLex for a year.[4] They are on blogs such as the Second Circuit Public Defender's. And the press has them.

8. Because they are actually public, found even by Google search, and have been for so long, *a fortiori* given this Court's Rule 14(d)[5] requiring their indirect publication by citation in the petition, the orders cannot be considered sealed,[6] so were not redacted from the appendix. Since those orders and the information they contain are public, information in the petition which was derived therefrom was not redacted.

9. ***Information in documents obtained publicly was not redacted.*** That Doe pled guilty to racketeering charges for defrauding investors of $40,000,000 is a matter of public

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[3] See http://www.ca2.uscourts.gov/opinions.htm, then click "Search" in "Opinions and Summary Orders" and enter docket number 10-2905.

[4] For example, the February 14, 2011 order is at 2011 WL 494282 and 2011 U.S. App. LEXIS 2903. The June 29, 2011 order is at 2011 WL 2559016, and 2011 U.S. App. LEXIS 13335. The PACER public docket's links to those orders were recently disabled, but the Second Circuit reissued the June 29 order on December 12, 2011, in duplicate, as a mandate, and the link to that order is active, and has been for six months, so the June 29 order is in fact available on PACER.

[5] "A petition for a writ of certiorari shall contain...'**Citations of the official *and unofficial*** reports of the opinions and orders entered in the case by courts..." [Emph. Add.]

[6] Once a document is released by a court to the public it may be freely disseminated. See *Florida Star v. BJF*, 491 U.S. 524 (1989); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). Indeed, Second Circuit precedent, *Gambale v. Deutsche Bank AG*, 377 F.3d 133 (2d Cir. 2004), prohibits sealing a document once it has been disseminated, especially by publication on Westlaw and Lexis:

> But however confidential it [a settlement amount] may have been beforehand, subsequent to publication it was confidential no longer. *It now resides on the highly accessible databases of Westlaw and Lexis and has apparently been disseminated prominently elsewhere.* We simply do not have the power, even were we of the mind to use it if we had, to make what has thus become public private again. The genie is out of the bottle ... we have not the means to put the genie back. [Footnotes omitted; Emph. Add.]

See also *SmithKline Beecham Corp. v. Pentech Pharms., Inc.*, 261 F.Supp.2d 1002, 1008 (N.D.Ill.2003) (Posner, J., sitting by designation) (refusing to seal portions of an agreement containing confidential information already disclosed in the court's opinion.)

record, as the government issued a press release on [redacted] so stating. App. 86-96. The Second Circuit noted in its June 29 order that the press release is publicly available to Roe to confirm Doe's conviction. That press release, available in [redacted], is in the appendix, and has not been redacted. *Id.*[7]

10. ***Information in documents not subject to sealing orders and obtained without court process was not redacted.*** The petition refers to a conversation Roe's client recorded lawfully on which senior officers of Doe's real estate firm admit that Doe skimmed millions from the firm as part of a money laundering and tax evasion scheme. That recording is not sealed and was obtained without court process. Thus, though the PSR has information that Doe was defrauding the government of taxes, such information is not exclusive to the PSR, so it has not been redacted.

11. ***Information evidencing judicial or prosecutorial misconduct was not redacted.*** Information necessary to understand the petition and the argument that the PSR contains information of public concern – *viz.* evidence of prosecutorial and judicial misconduct – has not been redacted. For example, Doe's Probation Officer: (i) reported that Doe was receiving no salary from his firm while he was skimming millions; (ii) reported that Doe had a negative net worth while he was spending large sums on rent and buying a home; (iii) admitted that he had been told not to ask the whereabouts of the proceeds of Doe's crime, as to which Doe admitted taking millions; (iv) admitted knowledge that Doe was hiding his conviction from his firm, partners and victims; and (v) noted the DOJ's failure to comply with the victim notification requirements of 18 U.S.C. §3664(d)(2)(A), especially as to restitution. While this information was not redacted, the dollar amounts and other details, such as the name of the company from which Doe was skimming millions of dollars, have been redacted.

[7] Per the June 25, 2012 order, the press release will be redacted from the petition.

12. Neither the government nor Doe can have a cognizable interest requiring redaction of references to the February 10, 2011 *sua sponte* Second Circuit order enjoining Roe from telling anyone, expressly including Congress, of what he deems judicial and prosecutorial misconduct, reference to that order has not been redacted. Because the fact that a *United States court has for the first time in our history issued a hyper-injunction*[8] *criminalizing a citizen's reporting of official misconduct is of unprecedented constitutional gravity*, this has not been redacted.

13. Never in American history, before this order, has a United States court threatened an American citizen with criminal prosecution for reporting to Congress – the sole constitutional check and balance over the courts – evidence of judicial misconduct, or anything else. There has apparently been only one other hyper-injunction in modern times,[9] and it was soundly condemned by Parliament when it came to light.[10]

V. Roe Requests that the Caption be Changed to His True Name.

14. By the Second Circuit's disclosure in its public June 29, 2011 decision that [redacted], assigned to [redacted], Roe's identity is now a public fact, [redacted]. [redacted] a [redacted] search of [redacted] finds [redacted]

[8] Orders that purport to gag one from even telling another that the gag order has been imposed have been the subject of a great deal of debate in the Parliament of the United Kingdom. Such orders are called "super-injunctions." Orders which purport to gag one from even reporting to Parliament that such an order has been issued have been called "hyper-injunctions." See "'Hyper-Injunction' Stops You Talking to MP," The Telegraph, March 21, 2011, http://www.telegraph.co.uk/news/uknews/law-and-order/8394566/Hyper-injunction-stops-you-talking-to-MP.html; "Got Secrets You Want to Keep? Get a Hyper-Injunction," The Guardian, http://www.guardian.co.uk/law/2011/mar/21/secrets-to-keep-hyper-injunction.

[9] That hyper-injunction involved a whistleblower's report that the water tanks of a passenger ship regularly traveling in American waters had been painted with toxic chemicals, which report resulted in the shipping company's obtaining a hyper-injunction prohibiting the whistleblower from telling anyone, **even Parliament**, of the case, the injunction, or the health risk. *See* references in fn. 5.

[10] No surprise, given that the last time an English judge enjoined a citizen, or rather a *subject*, from petitioning the legislature for redress, he and the Attorney General were impeached. Chief Judge North had issued an opinion approving Charles II's "Proclamation against Tumultuous Petitioning," assisting the Attorney General in drafting it. As a result, Parliament Resolved: "That the Evidence this day given to this house against sir Francis North, Chief-Justice of the Common-Please, is sufficient ground for this house to proceed upon an Impeachment against him for high Crimes and Misdemeanors." November 24, 1680. From Parliament's subsequent response to this, its enactment of the English Bill of Rights in 1683, we trace our constitutionally codified First Amendment right to petition.

[redacted]. [redacted] figured it out and reported this case on [redacted], identifying Roe by name. App. 139.

15. A man's reputation is his most precious possession, yet Roe has been deprived of his name, by the Second Circuit's treatment of him as anonymous. This is repellent to him, as the Second Circuit's decision rebukes "Roe" for "flouting" the district court's "sealing" orders, even though:

16. The district court acknowledged on the record that **no sealing order was ever issued in the John Doe case**. (JA166-167, 697). Apparently, he just told a clerk to seal the case, without conducting a hearing and making the requisite record findings, capable of appellate review, prior to sealing the docket. *See Press-Enterprise Co. v. Superior Court of Cal*, 478 U.S. 1 (1986), and, generally, the *Richmond*[11] line of cases.

17. No sealing order could have bound Roe, who was not a party or privy to *U.S. v. Doe* when any "oral" or "implicit" sealing order might have been issued. *Chase National Bank v. City of Norwalk*, 291 U.S. 431 (1934), citing *Alemite Mfg Co. v. Staff*, 42 F.2d 832. No order operates *contra mundum*. So even if an order had said, "No one who comes into possession of documents filed in this court may speak of them," it would have been void as to Roe, *pro tanto brutum fulmen. A fortiori*, as a prior restraint, it would be unenforceable as to Roe for failure to comply with First Amendment due process requirements of an adversarial hearing. *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968).

18. Roe asks recaptioning, that he may prove the rightness of his cause in his true name.

VI. Maximum Public Access to the Petition is Compelled to Further The Ends of Justice and the Expressly Mandated Intent of Congress

19. The public enjoys presumptive rights of access to judicial dockets, records, and proceedings. The petition for writ of certiorari is a record as to which there is such a presumptive

[11] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

right of access. As such it should fall within the second of these two classes of documents (and in any event must fall within the first): [12]

20. ***A presumptive common-law right*** of access to all dockets, records, and proceedings (with exceptions such as grand jury proceedings), which may be overcome only upon a sufficient evidentiary showing of a higher **countervailing** interest.

21. ***A presumptive First Amendment right*** of access to that subset of the above which experience and logic show are subject to such a right, which may be overcome only upon a sufficient evidentiary showing of a higher **compelling** interest.

22. Here, it matters not which category the petition is deemed to fall within, as the public import of the issues in this case is **insurmountable**, even before considering the lack of reviewable record findings below, and the lack of evidence of the existence of a countervailing, let alone compelling, interest that would outweigh the right of access. For example, no evidence was proffered, let alone subject to cross-examination, as to a risk to Doe's safety. (And it is hard to see how there could be any danger when his conviction and cooperation have been publicly known for a decade. See App. 87 at fn.2, and App. 102). The district court **said** there was risk, apparently fact-finding by judicial fiat, not evidence, and the Second Circuit found no error in that bald statement. This Court cannot validate such egregious repudiation of its *Richmond* cases by depriving the public of access.

23. But this Court is obligated to another constituency besides the public: Concealment of an entire criminal case, especially pursuant to non-existent sealing orders, violates Congressionally mandated crime victims' rights, which did not even exist until after the Reagan-era *Richmond* cases.

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[12] See *Press-Enterprise v. Superior Court*, 478 U.S. 1 (1986) (experience and logic pre-test to find First Amendment right of access); *Nixon v. Warner*, 435 U.S. 589 (1978) (common-law right of access); and the *Richmond* cases.

24. For example, the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. §3771, effective in 2004, affords victims rights, to notice of, and to attend, public court proceedings involving the crime; to confer with the Government attorney; and importantly, to timely restitution as provided by law, to petition the district court to enforce those rights, and to mandamus the courts of appeals if necessary.

25. In synergy with the Mandatory Victim Restitution Act ("MVRA"), 18 U.S.C. §3663A, effective in 1996 – which requires the court award full restitution and requires victims be notified in advance of sentencing of proposed restitution and allowed to participate in its determination – these laws comprise a regime of rights rendered worthless in cases hidden from the public and the victims.

26. Here, the government and district court took advantage of the concealment of Doe's case, secretly awarding an illegal sentence, failing to order restitution, though Doe's cooperation agreement acknowledged he would be sentenced to a mandatory restitution order. The district court's failure to follow mandatory sentencing law was illegal. *Ex Parte United States*, 242 U.S. 27 (1916). *Dolan v. U.S.*, 130 S.Ct. 2533 (2010), confirms that the mandate of the MVRA – *viz.*, that the court **shall** order restitution notwithstanding any other provision of law – means what it says.

27. Petitioner most respectfully avers that the CVRA applies to this Court, and therefore that this Court has a statutory duty pursuant to 18 U.S.C. §3771 to ensure that Doe's victims are given notice of this proceeding. Hence, by virtue of 18 U.S.C. § 3771, there must be, at the very least, public docketing of the redacted petition. We submit, however, that this Court may find that it has a further statutory duty to ensure that Doe's victims are informed of this petition by the DOJ.[13]

[13] Compare 18 U.S.C. § 3771 (a) subsections (2) and (4). Under subsection (2), Doe's victims have a right to notice of ***any*** public court proceeding. Presumably, the instant petition for a writ of certiorari is a court proceeding. Under subsection (4), in contrast, Doe's victims had the right to be heard at any public proceeding in the "district court"

28. Nor does this end with notifying victims. In response to the press coverage this case is receiving, a member of New York's congressional delegation wrote to Roe expressing concern for what appear to be violations of his and his clients' First Amendment rights, and requesting that Roe provide, by personal visit as well as documentation, all information on the matter as would not violate court orders. And given the recent experience of Professor (and former Federal District Judge) Paul Cassell, there seems little point in seeking "permission" from the Second Circuit to tell Congress the truth.[14] Professor Cassell was a co-author of the appeal brief and reply brief submitted in this matter to the Second Circuit – hence, has knowledge of the facts he wished to tell Congress about this case.[15]

29. Moreover, the sealing and prior restraint orders on Roe and his clients infringe on their rights of assembly and petition, not only through their private lawsuit(s), which have been frozen, but by assembly, by collaboration with organizations and individuals who would be concerned about the issues in this case, and who may well wish to submit to this Court amicus briefs in Roe's support. For example:

30. **Victims' rights organizations.** The word "mandatory" in the *Mandatory* Victims Restitution Act means just that. Yet Doe was given only probation, and a $25,000 fine. Why?

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involving release, plea, sentencing or parole. We submit that under subsection (2), this Court may be statutorily required, pursuant to section (b) (1), to ensure that Doe's victims are notified of this proceeding. It states, "In any court proceeding involving an offense against a crime victim, the court ***shall*** ensure that the crime victim is afforded the rights described in subsection (a)." (Emph. Add.) Subsection (c) makes it the obligation of the DOJ to use its best efforts to notify Doe's victims. We submit that, in order to "ensure" that Doe's victims are informed of this proceeding, this Court may be required to direct the DOJ to notify Doe's victims of this proceeding.

[14] On April 26, 2012, Professor Cassell testified before Congress on a proposed Victims Rights Amendment. In advance of testifying, Professor Cassell submitted prepared remarks about the case at bar to the United States Attorney for the Eastern District of New York for comment. What he received in reply was a warning that there were sealing orders, that Professor Cassell should take care not to violate them, and that he should get pre-clearance of his remarks from Judge Cogan of the Eastern District of New York, to whom the Second Circuit had delegated authority in its February 14th order. Professor Cassell accordingly asked Judge Cogan if his proposed remarks would violate any orders. Judge Cogan replied that he did not believe he had the authority to issue an opinion on the matter. This was detailed by Professor Cassell in a letter to Congress. The letter is most readily available on the website of the University of Utah, School of Law, where Professor Cassell teaches victim rights law. See http://today.law.utah.edu/wp-content/uploads/2012/04/cassell-transmit-supplemental-letter1.pdf

[15] See *id.*

31. **Investment protection organizations.** Organizations committed to protection of investors should be deeply concerned that federal courts would maintain the docket of a RICO stock fraudfeasor for 14 years, emboldening him, to defraud investors, as he has, by the concealment of his conviction, a *per se* material fact. Roe's RICO complaint shows that Doe committed hundreds of millions of dollars of this concealment fraud, with rippling insolvencies and bankruptcies in the wake, leaving possibly a half billion dollars of loss. Yet in none of the courts where these issues are being litigated is it even known that at the center of it all is a convicted RICO stock fraudfeasor.

32. **Bar associations, civil rights, and free speech advocates.** Had the employee who gave Roe the documents showing Doe's secret criminal case given them instead to *The New York Times*, Roe suspects the lower courts would have immediately recognized no prior restrain could issue. This is more than suspicion: the transcript of February 14, 2011 oral argument in the Second Circuit shows Judge Pooler opining that Roe did not have the same rights to disseminate information about a criminal proceeding as did the organized media, and shows Judge Cabranes asking the government for assurance before issuing orders enjoining Roe's speech that he wouldn't also be enjoining the speech of anyone from organized media.

33. Apparently relying on the fact that Roe is an attorney, the district court, then the circuit court, said he had an obligation to not use the documents. Bar associations should be interested in arguing that attorneys' First Amendment rights are equal to that of the media and other citizens.[16] And it would be interesting to hear their views on whether Roe, an officer of the court, was obligated to use this information on behalf of his clients, and whether – consistent

[16] See *Citizens United v. FEC*, 558 U.S. 50 (2010). Roe acknowledges the special case where the **extra-judicial** speech of an attorney to a party in an ongoing **criminal** jury trial might influence the jury pool. *Gentile v. State Bar of Nevada,* 501 U.S. 1030 (1991). However, in this case, Roe was not counsel of record for any party to *U.S. v. Doe* action, nor was there any possibility that his or his clients' speech could have interfered with Doe's case, as he had pled guilty and been sentenced long before Roe learned of his secret case and illegal sentence. In any event, prohibiting Roe from suing on account of the fraud in concealing Doe's conviction is prohibiting **judicial speech**.

with his duties to his clients – he had an obligation to report the judicial and prosecutorial conduct to appropriate ethics panels.

34. Bluntly, the lower courts in this case have held that the First Amendment analysis this Court has applied to leaked "secret" documents that originated in the executive and legislative branches should be different from the analysis applied to leaked "secret" documents that originated in the judicial branch. They have held that, though the Pentagon Papers could not be gagged – notwithstanding that they concerned military secrets, and were arguably stolen – the documents at issue here **could** be gagged, without First Amendment due process, regardless of their content, simply because they originated in the courts and had been sealed, in this case with orders written in invisible ink.[17]

35. **Judicial oversight organizations.** Such organizations may be concerned that there was no one protecting the public's right to know what transpired during Doe's sentencing, that because of his cooperation, Doe was allowed to be sentenced under a pseudonym, ensuring he would have a virtually clean criminal record, and was allowed not to pay restitution. Because all this was done in secret, there was no one in that courtroom looking out for the interests of the public or Doe's victims, though 18 U.S.C. § 3771(a) (2) required the district judge to do so.

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[17] The information concerned will cast members of the judiciary in a poor light, but it is core speech, and Roe trusts this Court will hold that an attorney has the same right to criticize a judge before whom he is not appearing as any public official. In *Grosjean v. American Press*, 297 U.S. 233 (1936), this Court held that "[f]or more than a century prior to the adoption of the [First Amendment] – and, indeed, for many years thereafter – history discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, ***the agencies and operations of the government.***" 297 U.S. at 245 (Emph. Add.). "Judge Cooley has laid down the test to be applied – 'The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.' 2 Cooley's Constitutional Limitations, 8th ed., p. 886." 297 U.S. 249-250.

The gag orders imposed upon Roe prevent the discussion in public of what he believes, and what has been briefly shown in the petition for a writ of certiorari to be, the maladministration of justice. It is also true that Roe has presented his arguments to the District Court and Circuit Court with brutal candor; but an attorney's right to speak freely does not end at the courthouse steps. Nor may an attorney be punished for criticizing a judge, or "undermining" a judge's authority with such harsh criticism, particularly where such criticism is founded in fact and in law.

36. **Advocates of government transparency.** "Everything secret degenerates, even the administration of justice ...." Lord Acton. The petition shows that some three decades ago the Second Circuit embarked on this path of secret criminal cases, a path which has degenerated to the point that an attorney, Roe, would be threatened with charges of criminal contempt if he were to tell his Congressman, or anyone else, that a federal judge failed to impose upon a RICO fraudfeasor the sentence mandated by Congress.[18]

37. **The Media.** Roe has been contacted by members of the media and the public, who have deduced his true identity, based upon the information contained in the Second Circuit's June 29, 2011 decision.[19] However, Roe is unable to speak freely with them, and thus the public remains ignorant of the fact that a convicted RICO fraudfeasor has continued to defraud investors, at least by his concealment. Based upon the information contained in the June 29, 2011 decision, and other publicly available information, *The Miami Herald* and others have moved to unseal John Doe's entire docket. Their motion was given a separate Eastern District docket number, 12-CR-150, the captioned, "In the Matter of the Motion to Unseal Docket No. 98-1101." The Miami Herald then moved before E.D.N.Y. Chief Judge Carol Amon to unseal Doe's case, using Doe's real name, which it had deduced from public information. That motion was scheduled to be heard on April 20, 2012, but has been adjourned *sine die.* Clearly, this is a matter of great public concern. [redacted] also published an article about the case on [redacted], entitled [redacted] The

[18] *Ex Parte United States*, 242 U.S. 27 (1916), held it unlawful, the usurpation of the powers of the executive branch and the legislative branch, for a judge to not impose the sentence mandated by duly enacted legislation.

[19] [redacted]

article identified Richard Roe by his true name and stated that [redacted] had determined Doe's identity from public documents but was withholding it for the time being.

38. In short, everyone knows what went on here, and who Doe is, and that this has been kept in such secrecy for so long is shameful. The secrecy must end, we submit, with the public docketing of the redacted petition.

Conclusion

WHEREFORE, it is respectfully requested that the Court publicly docket the redacted petition, and change the caption of the case to identify "Richard Roe" by his true name.

Dated: New York, New York
June 1, 2012

[Redacted and amended to include footnotes 1, 2, and 7 on this 9th day of June, 2012]

Respectfully submitted,

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12-112

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PETITION FOR A WRIT OF CERTIORARI

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May 10, 2012
(Redacted on July 9, 2012)

QUESTIONS PRESENTED

1. Respondent Doe pled guilty to racketeering for defrauding investors out of $40,000,000, but as his case was blanket sealed, entirely hidden, the District Court didn't sentence him to restitution, though by law such order was mandatory, and didn't notify his victims, also mandatory. This Court has held that a court acts illegally when it fails to follow mandatory sentencing laws. Does a sealing order justify a court's refusal to sentence or otherwise act according to law?

2. The courts know respondent takes advantage of his sealed case, concealing his conviction from investors and partners in spite of a duty to disclose. Victims of this fraud, including petitioner's clients, have lost up to $500,000,000. Does a court violate the law when it emboldens crime by maintaining seals?

3. Doe's case is not unique; the Eleventh Circuit prohibits sealed dockets, but Second Circuit courts, in conflict, indiscriminately blanket seal entire cases, operating a covert dual justice system, accountable to no one, without public notice, hearing, or evidentiary support. Does this violate the constitution?

4. Petitioner learned this from case documents he received from a whistleblower. They reveal official misconduct, yet he was enjoined from telling anyone, *even Congress*, based on an alleged 12-year-old blanket sealing order no one has seen, to which he is a stranger. The Third and Sixth Circuits, in conflict, hold this unconstitutional. Does a court violate the First Amendment by extending a sealing order into a prior restraint *contra mundum*, enjoining without due process one who lawfully and privately receives a copy of a sealed document from disseminating it?

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DECISIONS BELOW

Two opinions of the Second Circuit have been published, a February 14, 2011 "Summary Order" 414 Fed.Appx. 327, 2011 WL 494282. App. 43a-51a; and a June 29, 2011 "summary order," 428 Fed.Appx. 60, 2011 WL 2559016. App 52-72.[1]

All other orders are, or are allegedly, under seal. Those necessary to consideration of this petition are in the appendix.

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[1] "App" references the appendix herein; "JA___" the joint appendix submitted to the Second Circuit; "SA ___" the special appendix filed with the Second Circuit.

JURISDICTION

This appeal is from a permanent prior restraint injunction upheld in a June 29, 2011 Second Circuit order; other orders therein extending and interpreting previous prior restraint orders *pendente lite*,[2] App. 52a-75a; and from the Appellate Court's denial of a petition for mandamus.

Petitioner and *pro se* appellants below timely moved for rehearing and rehearing *en banc*, the last was denied on December 12, 2011. By March 9, 2012 letter this Court granted a 60 day enlargement, to May 10, 2012 to file this petition.

Statutory jurisdiction lies in 28 U.S.C. 1254(1).

[2] *Socialist Party v. Skokie*, 432 U.S. 43 (1977); *New York Times v. United States*, 403 U.S. 713 (1971).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Constitution, Article III

U.S. Constitution, Amendment I

U.S. Constitution, Amendment VI

18 U.S.C. § 1506, "Theft or Alteration of Record or Process; False Bail"

18 U.S.C. § 3553(c), "Imposition of a Sentence"

18 U.S.C. § 3663, "Order of Restitution"

18 U.S.C. § 3663A, "Mandatory Restitution to Victims of Certain Crimes"

18 U.S.C. § 3664, "Procedure for Issuance and Enforcement of Order of Restitution"

18 U.S.C. § 3771, "The Crime Victims' Rights Act"

Federal Rule of Criminal Procedure 32, "Sentencing and Judgment"

Federal Rule of Civil Procedure 65(d), "Injunctions and Restraining Order"

28 CFR § 45.10, "Procedures to Promote Compliance with Crime Victims' Rights Obligations"

28 CFR § 50.9, "Policy with Regard to Open Judicial Proceedings"

STATEMENT OF THE CASE

I. The Back Story: "White Collar Crime Does Pay"

In 1994, Doe, Sal Lauria, and Gene Klotsman acquired a stock brokerage. Backed by organized crime, they acquired large blocks of stock,[3] then, "incentivizing" their brokers by beating or threatening to kill any who got out of line, they got customers to buy, the stocks rose, and they sold and pocketed a fortune, the stocks then falling.[4] Pump and dump.

Doe, with a felony conviction for assault with a deadly weapon, was barred from the securities industry, so his ownership interest and control in the brokerage were concealed. App. 97a-98a.

Competitors, also backed by organized crime, started shorting the stocks. According to Lauria, Doe announced he might murder one, Alain Chalem, but did not. Doe's father, a reputed Mogilevich crime boss who would soon be convicted of extortion with the Genovese family, had dinner with Chalem and was heard arguing. The next day Chalem was found dead, shot in the head several times.[5]

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3 [redacted]

4 [redacted]

5 [redacted]

Victim losses were $40,000,000 to $80,000,000 when in 1998, Doe forgot to pay rent on a locker. App. 73a. The owner broke in, saw weapons and incriminating documents, and called the FBI. App. 73a.

In 1998, Doe, Lauria and Klotsman secretly pled to racketeering and became cooperators. App. 87a, fn. 2, 102a. Their cases were blanket sealed, apparently without sealing orders issued, or anyone requesting one[6].

On March 2, 2000, 19 underlings were arrested. The [redacted] issued a [redacted] with the [redacted] announcing the arrests and noting by their true names that Doe, Lauria and Klotsmsan had already pled guilty to racketeering. App. 86a, 87a.

On February 2, 2001, *in open court with co-defendants and counsel present*, Doe's status as a cooperator was openly discussed, his real name used[7], App. 102a. The public docket for the case, [redacted], shows "3500" letters going to defendants regarding Doe, using his real name and calling him a government witness. So much for any purported secrecy of pleas and cooperation.

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6 As discussed *infra*, District Court Judge Glasser acknowledged on the record several times that he never issued a "formal" sealing order. JA 152-153,164,166-167,167,235,697. [redacted] SA 44.

7 In spite of this, the government implied in its March 17, 2011 motion to unseal Doe's case that [redacted] App 118a-129a.

In 2002, all 19 pled guilty. Most received a few years' incarceration and restitution of a million dollars or so.

In 2002, Klotsman, who had stopped cooperating, was sentenced[8] to 6 years' incarceration, and $40,000,000 of restitution. App. 109a.

In 2003, Lauria published his tell-all account, *The Scorpion and the Frog*, describing his and his partners' cooperation. [redacted]

Lauria was sentenced in 2004 to racketeering predicated on securities fraud and money laundering[9]. Although the guideline was about 17 years, he got probation and a small fine. Fn. 9. Though by his plea he admitted responsibility, as one of the three ringleaders, for *all* losses, and the scheme straddled the effective date of the Mandatory Victim Restitution Act, 18 U.S.C. §3663A ("MVRA"), App. 6a, making restitution mandatory, his order of judgment shows no restitution. Fn 9. The statement of reasons is blank. Fn 9. As he was sentenced in secret there is no knowing why.

Though he started the fraud in 1994, the four-year statute of limitations for civil RICO claims against him did not begin to run until he was sentenced. 18 U.S.C. §1964(d). His victims had until 2008 to sue, and had the court imposed the mandated order of restitution, they would have been entitled to summary judgment on liability. 18 U.S.C. §3664(l). Instead, due to the blanket sealing, his victims were not aware of any of this

[8] Doc. 4 Case 02-CR-1313-ILG EDNY.

[9] Doc. 15 Case 98-CR-1102-ILG EDNY.

Conveniently, Lauria's criminal case remained hidden until April 2009[10], when it was unsealed at the request of the government, too late for his victims to easily sue, or seize the $1,500,000 "fee" he had got in 2007 from a real estate developer largely owned and controlled by Doe, where Lauria worked from time to time between 2002 and 2007. App. 160a. Lauria would have had to give that to his victims if he had been ordered to make restitution. 18 U.S.C. §3664(k).

On receiving that fee, he autographed a copy of his book for a friend, inscribing, "White Collar Crime Does Pay." JA 737.

II. Respondent Doe's Secret Criminal Case: What the PSR and Other Documents Reveal

Doe came up for sentencing in 2004. Though his cooperation agreement [redacted] of mandatory restitution JA 473, his 2004 Presentence Report, or "PSR," noted DOJ hadn't given the victim list JA 514, required by the MVRA so Probation can contact victims about restitution. 18 U.S.C. 3664(d)(2).

As most of the 19 co-defendants and Klotsman had restitution orders, it cannot be that DOJ and Probation couldn't identify Doe's victims; they were the same, as were the losses.

The PSR also shows the Probation Officer, though charged with warning employers and others of recidivism risk, knew Doe had been working since

[10] See generally Case 98-CR-1102-ILG EDNY

2002 as a partner at that real estate development firm, yet agreed not to communicate with the firm, thus allowing Doe's prosecution to remain hidden from the firm and his partners[11]. JA 515.

The Officer also stated in the PSR that Doe self-reported no salary from [redacted], but he (the Officer) wouldn't verify it JA 537-538, as that might alert the firm to Doe's secret case. JA 537.

At that same time, as alleged in petitioner's RICO complaint, Doe was skimming $[redacted] per year from the firm, calling the money loans. JA 342. Jane Doe has a recording in which the top officers in the firm admit those loans, some $4,000,000 by 2007, weren't to be repaid, but were to evade taxes. JA 344.

The Probation Officer concluded Doe had a negative net worth of $[redacted], JA 540, yet with no income still managed to live in an $[redacted]/month house. JA 534. Mere days after the PSR was issued Doe closed on a $[redacted] home with $[redacted] cash wired from his firm to the closing attorney; as petitioner's RICO complaint alleges, Doe took a $[redacted] mortgage. JA 341. Presumably, he told the bank something different from what he told his Officer; it's not likely a bank would lend $[redacted] to someone with a negative net worth, no income, and RICO conviction facing a [redacted]-year sentence.

The Officer expressly noted that he did not ask what happened to the millions of dollars of crime proceeds Doe had admitted receiving. JA 541.

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[11] Doe and Lauria occasionally worked together there. App. 160a. Probation would have to have known, as Lauria was then on probation pursuant to terms which forbid association with felons without permission. fn9.

Doe was not sentenced for another 5 years, until October 23, 2009, App. 128a, so as of its October 2004 effective date the Crime Victim Rights Act ("CVRA"), App. 14a, applied to his case. *U.S. v. Eberhard*, 525 F.3d 175 (2nd Cir. 2008). Apparently none of the rights was provided. For example, DOJ and the court were required to notify Doe's victims of the scheduled sentencing, if open, and give them the opportunity to be heard. App. 14a-15a. And by law, sealing or no sealing sentences must be read aloud in open court, 18 U.S.C. §3553(c).

Yet the government says Doe was sentenced in public, though under the name Doe, and has argued that the transcript of his sentencing should remain sealed. App. 128a. The government has also admitted that Doe's sentence failed to include restitution; thus, Doe's victims were deprived their rights under the CVRA and the sentence illegal.

In all, as alleged in petitioner's RICO complaint, Doe took about $[redacted] from the firm from [redacted] through [redacted], but his victims have received nothing. JA 299.

III. Petitioner learns Doe is a secretly convicted RICO felon

As noted, petitioner is a New York attorney who represents Jane Doe and John Doe II, minority partners in the real estate developer Doe largely owned and controlled. The firm's projects include an internationally prominent $450,000,000 New York hotel condominium. Jane Doe is its former Director of Finance.

Jane Doe and John Doe II engaged petitioner on suspicion they had been defrauded by other partners, including Doe, who was its Chief Operating Officer and Managing Director. Subsequently, petitioner's clients directed him to sue.

When petitioner began drafting a RICO complaint in 2009, publicly available information showed Doe was "connected to" organized crime. For example, a [redacted] article, App. 73a, and a [redacted] article, App. 109a, discussed Doe's involvement in State Street, the aforementioned stock fraud. It was widely believed Doe had been an "unindicted co-conspirator" who avoided prosecution by cooperating. App. 110a.

There was, however, information from which one could infer Doe *had* been prosecuted. For example, Klotsman told the [redacted] Doe had pled guilty. App. 110. The [redacted] quoted Doe's lawyer, who didn't deny it, but just challenged anyone to find it. App. 116a.

On March 1, 2010, these suspicions were confirmed when unexpectedly, and without solicitation, petitioner received documents from a whistleblower, a former employee of Doe's firm, who told petitioner he had got them from the firm's files. JA 187-191, 196-198.

The documents were a criminal complaint, JA 590, information, JA 588, proffer, JA 466, and cooperation agreement JA 472-480, all from 1998, and a PSR from 2004 JA 496-544, all from Doe's secret case, 98-CR-1101 E.D.N.Y., identifying Doe by his true name, confirming Doe had pled guilty to racketeering, and had been scheduled for sentencing in 2004.

Petitioner, concluding $750,000,000 of the firm's capital, $550,000,000 bank debt, and $200,000,000 equity from development partners had been procured with the fraudulent concealment of Doe's conviction, and that the firm's customers were being defrauded daily by sales of condominiums pursuant to false and misleading offerings, acted quickly.

On May 10, 2010, petitioner filed a civil RICO complaint, 10-CV-3959, S.D.N.Y., charging Doe and others with operating the firm through a pattern of crime, including excerpts from the documents. Within a day [redacted] had the story and a copy of the complaint with the excerpts online, available for download. App. 164a. Additionally, upon receipt, the firm's general counsel disseminated the complaint to several named defendants and attorneys on May 12. JA 740.

IV. Procedural History

A. District Court Proceedings

2010 – The TROs and Permanent Injunction

Initial TROs. On May 18, Doe obtained an *ex parte* TRO from the same judge who had secretly prosecuted him, (Glasser, J., E.D.N.Y.), enjoining dissemination of the documents and ordering a hearing to ascertain how petitioner got them.

Bench Statements. On July 14, the first of four days of hearings, petitioner asked the court to reveal any order purporting to seal anything, or bind him. JA 147. Judge Glasser admitted "there is no formal

order" but "from the very first document that was filed, it was filed clearly indicating a sealed case." He admitted he couldn't "find any order signed by me, which directed that this file be sealed," and that there was no indication in the first filing "or in any subsequent document that an application was made or request was made in that document to seal that file." JA 160-167, 697. *Judge Glasser admitted there were no orders ever issued that bound petitioner and there were no sealing orders ever issued.* JA 697.

Hearings. On June 21, the third day, petitioner testified, explaining how he got the documents and why he had a First Amendment right to use them. He testified that none indicated they had been "sealed" and, in any event, it has been the law for 70 years that orders cannot run *in rem*, but must be expressly directed against a party or privy. JA 232-234,255-258. Judge Glasser agreed that a sealing order is directed only to court personnel. JA 697.

The Permanent Injunction. After petitioner testified, Judge Glasser (without notice, other testimony, or argument) permanently enjoined dissemination of the PSR and its contents, essentially ruling a PSR exempt from First Amendment prior restraint considerations. JA 265.

Hearings (cont'd). Doe testified last. Consistent with petitioner's testimony that the whistleblower had said he had got the documents from the firm, Doe admitted keeping copies of the documents at his firm, in his desk and "possibly" on its computers JA 277-282, and, importantly, saying nothing of any specific threat to his or his family's safety.

Bench Statements. On July 20, the fourth day, Judge Glasser stated that the whistleblower had not testified, but one could infer that he "may" have stolen the documents. But "[w]hat order of the Court was violated by that event?" JA 698. He could find no theory by which any court order had been violated, or how anything petitioner did could have violated any court order, though he reserved decision. JA 700.

2011

The Mandamus Petition. In early February, in response to the Second Circuit's demands for a docket from the District Court, petitioner requested Judge Glasser make one and also requested he comply with the CVRA by recognizing his clients as crime victims and dealing with Doe's past victims.

The Government Moves to Unseal. On March 17, acknowledging that [redacted], the government moved to unseal much of the case. App. 86a-87a,118a,120a. [redacted] See *infra*.

The Scheduling Order. Notwithstanding that Judge Glasser acknowledged that he had never issued a "formal" sealing order, and had acknowledged that sealing orders only bind court personnel, Judge Glasser issued a [redacted], petitioner had "flouted" an "implicit" sealing order. App. 134a.

B. Second Circuit Proceedings

2011 – Sealing the Appeal

Orders. In a series of orders, App. 29a-42a, the Second Circuit ordered the government to show cause why the appellate docket should not be unsealed, ordered that oral argument with respect to that motion be conducted in a sealed courtroom, and issued *sua sponte* gag orders barring the petitioner and his clients from revealing any documents or contents thereof filed in related cases in the Eastern or Southern Districts or the Second Circuit. *The court **expressly** barred the petitioner from reporting to Congress documents showing that the District Court unlawfully failed to impose a congressionally mandated sentence of restitution.* App. 41a.

The Mandamus. Meantime, since there was no docket (and there is still none) at the District Court, and Judge Glasser had not taken up petitioner's "demand," petitioner filed a mandamus in the Second Circuit, seeking an order to compel the District Court to publish a docket and begin to comply with the CVRA, for example to direct the District Court to cause the victims of Doe's crimes to be notified of their right to congressionally mandated restitution.

Argument. Argument with respect to the government's motion to seal and the mandamus proceeding was held February 14, in a sealed courtroom. JA 39-42.

The government said Doe's criminal case had been secret since inception, that while"[t]here have been public accounts [of Doe's prosecution] ... they have been lacking in terms of their corroboration and

the government seal of approval, if you will. The government feels that is an important difference." JA 1263-1264.

Referring to [redacted] article, App. 109a, the government acknowledged it reported that Doe had been involved in State Street with Lauria and Klotsman, "[b]ut the [redacted] itself couldn't find any confirmation of that," JA 1266, so "...the government advocates for a sealing that does not release the real name of Mr. Doe and does not reveal facts that would alert other individuals to his cooperation or conviction." JA 1269.

The government, on questioning by the panel, said it believed there was a serious risk of harm to Doe if any of this got public.

Petitioner argued that none of these facts were in the record, so were only argument, and that the First Amendment required the appellate docket be public. JA 1283-1284. The court seemed to concede that *media organizations* could not have been enjoined had they come into possession of the documents at issue, and such appellate proceedings would be open, but petitioners could be gagged because they're not the media:

> **Judge Cabranes** asked for assurance from the government that: "[W]e are not talking about preventing a news organization from publishing a matter of public concern or impinging on editorial discretion." JA 1270.
>
> **Judge Pooler** responded to petitioner's First Amendment arguments with: "We are not dealing here with prior restraint

> of the press or media. That's what the *Pentagon Papers* case was about." JA 1281. "[Newspapers have a special charge in publishing information for citizens. [Petitioner] doesn't have any charge in making this information available to citizens." JA 1284.

The February 14 order. The court then issued its summary order, A 43, (1) denying the petition for mandamus and (2) maintaining the appellate case under blanket seal.

The Mandamus. Although there was no sealing order in Doe's case, and no notice, hearing, or findings to support sealing, the court found no abuse of discretion in keeping a secret district court docket, *without explanation.* The Second Circuit indicated that it might explain its ruling on a later date. App. 47a. It never has. It has never mentioned the CVRA component of the mandamus petition.

Sealing the Appeal. The court ordered the seal on the appellate case maintained, applying a balancing test, "In light of the serious, indeed grave, concerns expressed by the United States regarding the possible consequences of unsealing these documents, and the absence of any sufficiently persuasive countervailing considerations expressed by [petitioner]..." App. 48a.

Prior Restraints Pendente Lite. The order continued the February 10th injunction, "re-emphasizing that petitioner was not to reveal or distribute ***sealed*** documents, nor the contents thereof, to any third-parties, including members of the public or the media." App. 48a [emphasis added].

2011 – The Merits Appeal

Petitioner's brief argued that the District Court gag orders were unconstitutional and otherwise contrary to law because (1) the documents were obtained without court process so were outside the jurisdiction of the court; (2) the documents revealed prosecutorial and judicial misconduct, so the information therein concerned core speech; (3) a sealing order had never been issued; (4) even if it had, it couldn't have bound petitioner, a stranger to the case; (5) even if it could bind petitioner, without decretal language enjoining speech, it could not be interpreted to do so; and (6) even if it were so interpreted, there had been no prior restraint due process, no findings at a clear and convincing level of a compelling interest, near certain imminent grave harm, and no other alternative; and (7) any constitutional limit on attorney speech applied only to extra-judicial speech during an ongoing criminal jury trial, certainly not to revealing official misconduct or suing for injuries to his clients.

The government argued (1) the whistleblower stole the documents from Doe (though there was no such evidence); (2) petitioner had an obligation as an attorney not to use them; (3) dissemination of the information contained in the documents would pose a grave risk to Doe and national security (again without any evidence, and contrary to the position taken by the government mere days later in its March 17, 2011 motion to unseal the District Court Docket, App. 118a).

The decision. As noted, in its June 29th summary order, the Second Circuit continued the

temporary injunctions, upheld the permanent injunction directing the "return" of the PSR and barred dissemination of the information contained therein, remanding for further proceedings with respect to the non-PSR documents.

C. Current Status

The Second Circuit has yet to issue a decision explaining the denial of the writ as to unsealing the docket for Doe's case and has not yet taken up the writ as to ordering the District Court to comply with the CVRA. The District Court has not yet ruled on the remanded issue of the remaining documents. Pending resolution of all these sealing issues petitioner's civil RICO complaint remains under seal in the S.D.N.Y. and the case is frozen.

REASONS FOR GRANTING THE WRIT

I. The integrity of the federal court system depends on this Court's confirming that a covert dual justice system of secret criminal trials is illegal and can have no place in American law.

A. Secret criminal courts are illegal. In particular, they work a fraud on victims.

> Counsel have not cited, and we have been unable to find, a single instance of a criminal trial conducted *in camera* in any federal, state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute. – *In Re Oliver*, 333 U.S. 257, 266 (1948)

They should have looked in New York. In the thirty years since *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), this Court has repeatedly affirmed a First Amendment right of access to criminal proceedings.

In the same thirty years, the courts of the Second Circuit, at least the Eastern and Southern districts, have operated in egregious defiance of it.

In 1982, *The New York Times* described a system of secret justice prevalent in the S.D.N.Y., of hidden guilty pleas, and, often, hidden sentencings for cooperators"[12]. An ensuing GAO audit ordered by Congress found the problem present nationwide, but some *50 times* as frequent in New York[13].

Washington may be, now, a close second[14].

Interestingly, the U.S. Attorney at the time denied this was for cooperators' safety, insisting it

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[12] "Secret Pleas Accepted by U.S. Attorney in City," *New York Times*, April 23, 1982. App 76a.

[13] "Audit Criticizes U.S. Prosecutor on Secret Pleas," *New York Times*, July 4, 1983. App 81a.

[14] In 2006, a study revealed 469 criminal cases conducted in complete secrecy between 2001 and 2005. And while *In re Sealed Case* first appeared as a case name in 1981, it is now the most common case name on the D.C. Court of Appeals docket. *Kudzu in the Courthouse: Judgments Made in the Shade*, Smith, 2009 Fed. Cts. L. Rev. 177.

was for the convenience of the government, so their identity would remain secret. No one asked how he thought that might work out for the victims.

One might say that U.S. Attorney operated before victims' rights were elevated, before the first such statute, the Victim Witness Protection Act, took effect in 1983, but for long before the VWPA, courts could order restitution as a condition of probation, and two things may be safely concluded, (1) few if any who got these secret convictions were incarcerated, as that would make the secret hard to keep; and (2) few if any had restitution imposed as a condition, as that too would expose the secret.

Lord Acton observed, "Everything secret degenerates, even the administration of justice," a value similar to that expressed in colonial charters:

> That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that *justice may not be done in a corner nor in any covert manner*[15].

Now, as this case illustrates, the problem is at scandal level, and the damage done to victims is incalculable. And we are all victims when the integrity of the federal justice system degenerates. And only this Court can stop it.

What would they say, men like John Lilburne, who, tried for treason during the reign of Charles II,

[15] New Jersey Provincial Charter Ch. 23, July 29, 1674.

insisted on his right to a public and open trial – "as an understanding Englishman (who in his actions hates deeds of darkness, holes or corners).... But if I be denied this undoubted privilege, I shall rather die here than proceed any further." – were they to learn that we have a system one of dual justice, where defendants who can *pay* enough will get secret trials, illegal deals, and hidden dockets?

And make no mistake – In the shadow justice system, hidden justice *is* for sale, admission *paid* in the currency of cooperation.

Most of these hidden cases are those of cooperators. Petitioner makes no argument that cooperation and plea bargaining are, or ought to be, unconstitutional or illegal; those are matters of politics, of executive discretion, not relevant here.

But when the government crosses the line into illegality and the courts don't stop it, when sealing orders work injustice to crime victims and embolden the criminal defendant to continue on his path of crime, attention must be paid. Notice must be taken.[16]

For example, in respondent John Doe's case, though his stock swindles ran from 1994 through 1996, pursuant to 18 U.S.C. §1964(d) his victims were precluded from suing him in civil RICO until he was sentenced in October 2009, when a four-year statute of limitations first began to run. In other words, they can still sue him *now*.

[16] As indicated in a recent [redacted] article, victims of Doe's concealment fraud would never have invested millions of dollars in the [redacted] project if they'd known his background. App. 157a.

18 U.S.C. §1506, App. 3a, makes it an obstruction of justice to conceal a federal court judgment in such manner that it does not take proper and full effect. It has been in force since 1790. Yet petitioner is barred from taking steps to reveal this, that would give effect to the secret final judgment of conviction rendered against respondent Doe. And the courts below, respondent Doe, and the government are preventing the judgment from taking effect.

For example, if Doe had been ordered as part of his sentence to pay to victims restitution, as the law required that the district court do, 18 U.S.C §3663A, App. 6a, they would be able to use the order to obtain summary judgment of civil RICO liability, 18 USC §3664(l). App. 12a-13a.

How does a district court justify refusing to comply with provisions of mandatory sentencing law? It doesn't. It can't.

This Court so held, unanimously, in *Ex Parte United States*, 242 U.S. 27 (1916): When a federal court refuses to impose a mandatory sentence it violates the law and operates *illegally*. If there were any doubt that this applies to a mandatory sentence of restitution, this Court put that to rest in *Dolan v. United States*, 103 S.Ct. 2553 (2010), noting that when Congress wrote in the mandatory restitution statute that such an order must be imposed at sentencing *notwithstanding any other* provision of law, 18 U.S.C. §3663A, Congress meant what it said.

What about cooperator safety? Every filing by respondent Doe and the government solemnly intones that warning, arguing that the courts must

hide all this to keep Doe safe. To which the reply must be, where in Article III are the federal courts vested with police powers?

Ex Parte United States answers, "Nowhere." *Humanitarian considerations (the health and safety of the defendant) cannot justify a court's defiance of the law*, concluding with the statement: ***"Rule made absolute,"*** 242 U.S. at 53 [Emphasis added], making it clear: there is *never* any lawful basis for a court to refuse to obey mandatory sentencing law. All courts in the country were thereupon required to comply with mandatory sentencing laws. Some 2000 defendants throughout the country faced sentencing that they thought had been delayed indefinitely after this Court ruled in *Ex Parte United States*.

And what about the current victims, not of the underlying crime, but of its concealment? As the courts below well know from all the submissions, respondent has been a principal at a New York real estate developer, its former Chief Operating Officer and managing director from about 2002 through 2008. JA 298. Even without the submissions the judiciary would have to know, because during that entire time respondent was under a cooperation agreement and the Probation Office knew what he was doing. JA 515.

It is black letter law that when a principal conceals a fraud conviction from his partners and investors, to whom he owes fiduciary duties of self-disclosure, that is constructive fraud. Respondent Doe has been doing that since he pled guilty in 1998. The courts below must know he has been emboldened to continue his frauds, if for no other reason than that his Probation Officer acknowledged

in the 2004 PSR that Doe's racketeering conviction was being hidden from the firm and his partners, including petitioner's clients. JA 515. The firm's investors, lenders, and insurers have been and continue to be defrauded by this concealment, as petitioner alleged in the civil RICO complaint JA 321. That complaint has been languishing under seal for years because the courts wish to "protect Doe's safety," even though, as argued *infra*, no one has ever produced any evidence that there's even any risk.

Back to the original victims. *Dolan* strongly suggests this Court would hold that sentencing respondent today to that long overdue restitution order would not violate due process. With interest or loss of use, that should be about a $200,000,000 restitution order by now. If that is the case, then every day that the District Court refuses to do so, it violates the law. *Ex Parte United States.*

Finally, how many other defendants have hidden felony convictions? How many licensed professionals are unlawfully maintaining their licenses by failing to disclose a conviction they know is hidden? How many schoolteachers are hiding federal convictions? Doctors? Why is petitioner enjoined from revealing that Doe pled guilty to RICO, and was finally sentenced in October 2009?

The reasons for granting this writ are that there myriad victims, and they are us.

B. This Court should put an end to this by holding unconstitutional *per se*, under its existing jurisprudence, any use of sealing orders that violates the separation of powers and the limits of Article III authority.

A criminal trial comes into existence with at least one aspect, even if merely its existence, presumptively open.

By this Court's precedent, any portion of that trial which is presumptively open at inception can only be closed upon the court's finding that one of two tests have been satisfied, a *compelling interest* test or a *countervailing interest* test[17].

By definition, it can never be a compelling or countervailing interest to a presumption of openness (or to anything else) for a court to seek to operate in violation of the law. No court has a constitutionally cognizable interest in operating illegally, without authority, and so no court has a constitutionally cognizable interest in sealing anything such that to do so would bring about an illegal result.

Direct Illegality I. As noted, in *Ex Parte United States*, 242 U.S. 27 (1916), this Court held, unanimously, that a court that fails to follow mandatory sentencing laws violates the separation of

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[17] *Press-Enterprise v. Superior Court,* 478 U.S. 1 (1986). Any proceeding to be sealed is first made subject to an "experience and logic" test; if it passes that test, it enjoys a qualified First Amendment right of access that may only be overridden upon the finding of a compelling interest; if it fails, it enjoys a common law right of access subject to countervailing interests. *Gannett v. DePasquale*, 443 U.S. 368 (1979).

powers and acts illegally, specifically stating that even considerations of humanity (*e.g.*, the health and safety of a defendant) would not justify a failure to sentence according to law. 242 U.S. at 51.

The obligation to impose a sentence of mandatory restitution, 18 U.S.C. §3663A, is a part of mandatory sentencing law, indeed itself states that the order shall be imposed notwithstanding any other law. *See Dolan, supra.*

Therefore, no order, whether imposed upon satisfaction of a compelling interest or countervailing interest test, which results in a frustration, avoidance, evasion, derogation, or other failure to comply with those laws can be legal.

Whether, and if so to what degree, *Ex Parte United States* applies to other mandatory provisions of sentencing law is to be developed. For example, 18 U.S.C §3553(c) facially requires a statement of reasons be read aloud in open court as part of sentencing. Presumably *United States* is not limited to substantive statutes. Petitioner submits that where Congress has spoken, even if procedurally, in areas which this Court has determined are within Congressional authority to control, by separation of powers sealing may not legally override it.

Direct Illegality II. For that matter, nothing in *United States* is married to sentencing law; its logic should apply to anything where Congress has constitutionally restricted what a Court might otherwise have the authority to do.

For example, as noted, n 1790 (one year after the All Writs Act, thus superseding it in the event of any conflict), Congress passed the direct forerunner

to 18 U.S.C. §1506, App. 3a, which makes it illegal to "take away" or "avoid" any federal court record with the result that a judgment not take effect.

With respect to those rights, to whomsoever applying, created by Congress for which a defendant's final conviction is a condition precedent, no order that frustrates fulfillment of those rights can be legal. The issue is not whether §1506 creates a private right of action for a judicial taking in a situation like the underlying case where the right to sue respondent in civil RICO based on his RICO securities fraud came into existence only upon his final conviction and entry of judgment but is being concealed from his victims; the issue is that it cannot be legal to conceal it.

Indirect Illegality. Congress has often restricted the equity jurisdiction of the lower courts. It must follow that any sealing order which, facially or as applied, would sufficiently directly cause something to happen which was outside the equity jurisdiction of a court to order directly is also illegal, facially or as applied, without regard to sentencing.

While the precise contours of this concept are outside the scope of this petition, it simply cannot be that a federal court has the equity authority to impose, *or maintain*, a sealing order in the face of actual or chargeable knowledge that the concealment it creates is being used as an instrument of crime or fraud. To sit and do nothing, maintaining a sealing order as is being done here, on respondent's entire criminal case, knowing that he, and others acting in concert with him, are taking advantage of it to continue to defraud others cannot be a lawful action.

C. This Court should find an absolute First Amendment right of access to criminal docket sheets, resolving the conflict between the Second and Eleventh Circuits.

This Court has never considered whether such a right of access applies to criminal docket sheets. The first Circuit to take up the issue, the Eleventh, not only found a First Amendment right of access, but found it absolute, not qualified, holding that a sealed proceeding or document not noted on a public docket was an unconstitutional infringement on the public's qualified right of access to criminal proceedings. The right to attend the actual proceedings in question might be qualified, but the right to know they're going on is absolute. *U.S. v. Valenti*, 987 F.2d 708 (11th Cir. 1993).

But the only other Circuit to fully consider the issue, the Second Circuit – while finding a First Amendment right of access to civil and criminal docket sheets – found the right to be *qualified*, going out of its way to note that in "appropriate" circumstances a docket sheet could be sealed. *Hartford Courant v. Pellegrino*, 380 F.3d 83 (2004).

Predictably enough, that is the Circuit at the center of most of the secret criminal cases, like this one, as reported by the *New York Times*. App. 76a.

In the Second Circuit, words and practice diverge. In this case, Judge Glasser has never maintained a public docket since 1998. Yet in denying petitioner's petition for a writ of mandamus, which sought an order directing that Judge Glasser be required to make public the docket of Doe's case, the Second Circuit, *without explanation,* found no

abuse of discretion in Judge Glasser's failure to do so, even in the complete absence of any findings in the record purporting to satisfy the strict-scrutiny test (and, *a fortiori*, in the complete absence of any actual sealing order). App. 47a.

This Court should follow the Eleventh and find an *absolute* First Amendment right of access to docket sheets, that a sealed or incomplete ("dual") docket sheet is facially unconstitutional. Because of this split of authority between the two circuits, this petition should be granted.

D. This Court should hold the blanket sealing of criminal cases facially unconstitutional.

"Blanket sealing" means a sealing order issued at some time which purports to prospectively adjudicate questions of sealing not yet ripe, thus at one fell swoop purports to authorize the automatic (default) sealing of every subsequent proceeding and record in the case, including the docket, if the sealing order is issued at inception.

This Court has strongly suggested, if not held, that "individualized determinations are always required before the right of access may be denied," *Globe Newspapers v. Superior Court*, 457 U.S. 596, 608 n.20 (1982) (citing *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581 [1980]). Blanket sealing orders are facially unconstitutional as they would override this requirement, and this Court should hold so explicitly. And the "narrowly tailored" component of the strict scrutiny test must *per se* fail if a court blanket seals, "conveniently" not having to

redact and decide. This petition should therefore be granted, so this issue may be resolved.

E. This Court should clarify the requirements of the "strict scrutiny" closure test.

In practice, strict scrutiny isn't. As Professor Levine notes in *Toward a New Public Access Doctrine*, 27 Cardozo L. Rev. 1739 (2006):

> Many courts pay lip service to the strict scrutiny test, but seem to stop before giving any real analysis when they find that the pro-closure interests asserted are compelling. ***These courts legitimize closures with unsubstantiated speculation about the harms that public access might cause, making general assumptions*** about the effects of pre-trial publicity or the willingness of participants to be candid, for example, ***without recognizing that what is true as a statistical matter may not be true of a particular case or individual.*** They do not sufficiently explore the measures, short of total closure, that could adequately serve the compelling interests at stake. ***The courts seem especially willing to bow to pro-closure interests when closure proponents claim that national security is at stake, and in highly controversial and contentious criminal proceedings.*** The result is that the proceedings in which the public has the most interest are most often the ones that are closed...

This is a problem of unparalleled dimension, at least in the Second Circuit. In just one case, little known outside the criminal bar in that Circuit, in 1995 the appellate court held that a district court judge not only need not give any public notice or hold any hearings before sealing an entire criminal trial, he can do so in an organized-crime case solely upon the defendant's uncorroborated claims that he feels at risk, so long as the government does not object. *Astonishingly, the court noted that the district court was free to consider the absence of any evidence of a threat as proof that the secrecy was working. United States v. Doe*, 63 F.2d 84, 87 (1995). One can only imagine how many closures have been justified in the last twenty years by the Second Circuit's invitation to defendants and the government to collude in such an arrangement. As the *New York Times* articles show, this has been the custom and practice in the Second Circuit for at least thirty years.

II. Federal courts may not exempt themselves from the First Amendment on some claim of "judicial privilege." When a stranger to a case lawfully receives copies of sealed documents, whether labeled "PSR" or "XYZ," full prior restraint due process must be provided before he may be enjoined from disseminating them; *New York Times v. United States* applies equally to the dissemination of documents sourced to the judiciary as to the executive or legislative branch.

A. If Ellsberg had clerked for a judge...

Hypothetical: A clerk to a federal judge opposes the war in Iraq. Working on a sealed criminal case involving a contractor, he has access to a sentencing memorandum and grand jury minutes. Each reveals the government had early knowledge the war would lead to many times more casualties than admitted.

With the help of a Senator's staff, he makes copies and leaks them to *The New York Times*, *The Washington Post*, and other newspapers, and mails a copy to an activist attorney. None had any idea until receipt what was coming, though he made clear in each case by cover letter what he had done.

Question: Is there some "judicial privilege" found in, or in "penumbras" formed by "emanations" from, the Article III power of a court that it may claim an inherent authority to protect its function and enjoin those recipients from disseminating it absent the *recipients'* proving a compelling need, or must traditional prior restraint due process be followed?

Consider first the copies sent to the newspapers. While the individual opinions in *New York Times v. United States*, 403 U.S. 713 (1971), varied, the papers were allowed to publish, immediately. Several comparisons must be made.

First, whatever side of the case, not one Justice cared that they had been stolen:

> In resolving that conflict, the attention of every Member of this Court was focused on the character of the stolen document's contents and the consequences of public disclosure. *Although the undisputed fact that the newspaper intended to publish information obtained from stolen documents was noted ...* ***neither the majority nor the dissenters placed any weight on that fact.*** [Emphasis added][18].

Second, quoting Justice Brennan:

> *The entire thrust of the Government's claim ...has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences* ***may*** result... there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden...such cases may arise only when the Nation "is at

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[18] *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001)

> war"...during which times *"[n]o one would question but that a government might prevent* ***actual*** *obstruction* to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."...*in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue* ***would*** *cause the happening of an event of that nature ... only governmental allegation and proof that publication* ***must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient.*** [Emphasis added]

The Justice states the core tenet of this Court's prior restraint jurisprudence, that at least with core speech, the harm that is said to be threatened must be *imminent* and *catastrophic*, or *clear* and *present*; but whatever words be used to express it, core speech regarding information lawfully obtained may not be enjoined absent some intolerable danger the risk of which is vastly more real than mere conclusion.

This brings the argument full circle. In previous pages, petitioner argued that the misuse of sealing those proceedings and records to which there is a qualified First Amendment right of access can be traced to a "lip service" approach to the "strict scrutiny" component of the *Press-Enterprise II* test.

Concededly, in the jurisprudence of access cases – where a citizen seeks access to governmental

records – it is not entirely clear that "strict scrutiny" is to be applied with such rigor as in prior restraint cases.

But if nothing else, we see the damage to the country that inevitably results where a cherished value, be it access to courts or freedom of speech, is protected by a standard that can be satisfied by a "hunch" or by "the judge's experience" or, worse, by the uncorroborated expression of a subjective fear of a defendant with Alice in Wonderland logic that the *absence* of any evidence of a threat is itself sufficient.

No Justice of this court would consider the possibility that core speech, truthful speech of public concern revealing, as petitioner would reveal, all that has happened here, and particularly the contents of that PSR[19], should be enjoined on Doe's mere assertion that he "feels" at risk, or worse yet, on the District Court's "sense" that there might be such a risk, *a fortiori* in the complete absence of evidence. Yet that's exactly what happened here.

An entire criminal case has been hidden for fourteen years. There is no evidence how that came to be, and whatever evidence there is establishes that no test was ever applied.

And what happens? The inevitable in a dual justice system operating in the dark. Illegality.

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[19] No one can doubt the contents of Doe's PSR are core speech. Any discussion of a convicted felon in the context of his crime and sentencing recommendations is core speech, and this PSR (and the other documents) containing evidence of the violation of federal sentencing law is clearly core speech, critical of government misconduct.

Deprivation of victims' rights. Judicial misconduct. Prosecutorial misconduct[20].

Then a whistleblower comes along who gets hold of documents in the files of his employer and releases them. What happens next?

Well, if this is 1982, and it's not the government's own misconduct that's at issue, the whistleblower is called a hero. The Solicitor General files an amicus brief and writes that, while the question whether the whistleblower stole them is irrelevant to petitioner's First Amendment rights...

> "Evidence of crime is not the private property of anyone. .... Those who discover it and spread the news ... are not guilty of ... theft. [T]o the contrary, any effort to disseminate such information is encouraged by the law, while efforts to preserve its secrecy are strictly forbidden.... [P]ublic policy favors its unfettered dissemination ...."

That's what the Solicitor General wrote in an amicus brief in *Dirks v. SEC*, 463 U.S. 646 (1983), where a former employee of a company running a massive fraud whose officers were involved with organized crime gave documents to a securities analyst to reveal them.

Petitioner expects the same courtesy here.

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[20] The CFR provisions in the appendix show the prosecutor had an obligation to assure victims' rights were protected, and oppose the secrecy of the proceedings. 28 C.F.R. 45.10 & 28 C.F.R 50.9 App. 22a-28a. The failure of the prosecutor to follow the guidelines makes the information in the documents newsworthy.

Until then, look at what did happen here. The District Court issued a permanent injunction on anything in the PSR simply because it was a PSR. No application of the compelling interest test[21], just a holding that since it's nearly impossible to access a PSR that you don't already have, you can be ordered to keep quiet about it if you already have it.

In other words, if you don't have the right to access it, you don't have the right to reveal it, even if it's dropped in your lap and reveals the misconduct of the same court deciding whether to enjoin you.

As to the other documents, yes, the record shows the District Court issued a finding that their dissemination would prove a grave risk to Doe. Based on what? Who knows, because there's no evidence in the record to support that.[22].

The Second Circuit upheld the permanent injunction on the PSR. On what basis? The court said, not surprisingly, that its precedents hold that there was no *right of access* to a PSR absent a showing of compelling need. So petitioner could be enjoined from disseminating one *he already had* unless he could prove a compelling need?

In the same situation, where both grand jury minutes and a sentencing memorandum had leaked to the public, the Third Circuit pointedly noted that it would not even think to try to enjoin those who

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[21] *Carroll v. Princess Anne*, 393 U.S. 175 (1968).

[22] In fact the government moved to unseal the docket on March 17, 2011 (App.118a) because [redacted], but it retracted its motion on January 26, 2012. App. 137a. The change of position is newsworthy in itself.

received it, as the First Amendment protected their right to disseminate it. *U.S. v. Smith*, 123 F.3d (1997). This case at bar presents a split of authority, as well as with the Sixth, see *Procter & Gamble v. Bankers Trust*, 78 F.3d 219 (6th Cir.1996) (where the appellate court recognized a clear distinction between a party's *mis*use of *Rhinehart* material as opposed to a non-party's use).

B. Petitioner has the same rights as media

In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), this Court held that an innocent recipient of an illegally taped cell phone call could not be punished for disseminating its contents, which revealed possible criminal activity in connection with municipal government, *even though the recipient knew the source had made the tape illegally.* As this Court is aware, that statement is true not only of the defendant broadcaster in that case, but also of the defendant "middleman," a citizen who found the tape in his mailbox and then gave it to the broadcaster.

Then how does one explain why the Second Circuit panel seemed so concerned that petitioner is not organized media? One doesn't. This Court has said just recently:

> We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Citizens United v. Federal Election Comm'n*, ___ U.S. ___, 130 S.Ct. 876, 905-06 (2010).

Our hypothetical activist attorney has the same rights as the *New York Times*, with all respect to Judge Pooler, including freedom of the press, as the term refers to freedom of the printing press vs. oral speech, and like any other citizen of this age, petitioner at the press of a button can make his thoughts known to 50,000,000 people within seconds, 10 times the readership of the paper of record. So long as his speech does not interfere with an ongoing criminal jury trial in which he is counsel, whether he expresses it by lawsuit in behalf of his clients victimized personally by the underlying facts, or by speechifying, or by any other way, it is his to express.

CONCLUSION

For all the foregoing reasons, it is most respectfully requested that this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit be GRANTED.

Dated: May 10, 2012

[Redacted this 9th day of July, 2012, in accord with this Court's order of June 25, 2012. Additionally, several typographical errors in the original have been corrected in this redacted version.]

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Constitutional, Statutory and Regulatory Provisions

The United States Constitution

Article III

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

Section 2, Paragraph 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * *

Amendment I

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.

* * *

Amendment VI

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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Theft or Alteration of Record or Process; False Bail (18 USC § 1506)

Whoever feloniously steals, takes away, alters, falsifies, or otherwise avoids any record, writ, process, or other proceeding, in any court of the United States, whereby any judgment is reversed, made void, or does not take effect; or

Whoever acknowledges, or procures to be acknowledged in any such court, any recognizance, bail, or judgment, in the name of any other person not privy or consenting to the same—

Shall be fined under this title or imprisoned not more than five years, or both.

Imposition of a Sentence (18 USC § 3553(c))

(c) **Statement of Reasons for Imposing a Sentence.**—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

> (1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or
> (2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994 (w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Pro-

cedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

Order of Restitution (18 USC § 3663)

(a)

(1)

(A) The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848 (a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A (c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

* * *

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

Mandatory Restitution to Victims of Certain Crimes (18 USC § 3663A)

(a)

(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

* * *

(c)

(1) Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii), [1] when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848 (a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection.

(A) that is—

(i) a crime of violence, as defined in section 16;
(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856 (a)), including any offense committed by fraud or deceit; or
(iii) an offense described in section 1365 (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or
(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

Procedure for Issuance and Enforcement of Order of Restitution (18 USC § 3664)

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

* * *

(d)

(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

* * *

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

* * *

(f)

(1)

(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

* * *

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;
(B) projected earnings and other income of the defendant; and
(C) any financial obligations of the defendant; including obligations to dependents.

* * *

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

* * *

(j)

(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

* * *

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney Gener-

al of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)

(1)

(A)

(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court

shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

The Crime Victims' Rights Act (18 USC § 3771)

(a) Rights of Crime Victims.—A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) Rights Afforded.—

(1) In general.— In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

* * *

(c) Best Efforts To Accord Rights.—

(1) Government.—Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) Advice of attorney.— The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) Notice.— Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) Enforcement and Limitations.—

(1) Rights.— The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) Multiple crime victims.— In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3) Motion for relief and writ of mandamus.— The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings

be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) Error.— In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) Limitation on relief.— In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

* * *

Pleas (Federal Rule of Criminal Procedure 11(b))

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. . . .

Sentencing and Judgment (Federal Rule of Criminal Procedure 32)

I. Rule 32. Sentencing and Judgment

* * *

(c) Presentence Investigation.

(1) ***Required Investigation.***

(A) ***In General***. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) 18 U.S.C. §3593 (c) or another statute requires otherwise; or
(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

(B) ***Restitution.*** If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

* * *

(2) ***Interviewing the Defendant.*** The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(d) Presentence Report.

* * *

(2) ***Additional Information.*** The presentence report must also contain the following:

* * *

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

* * *

(D) when the law provides for restitution, information sufficient for a restitution order;

(e) Disclosing the Report and Recommendation.

(1) ***Time to Disclose.*** Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

Injunctions and Restraining Orders (Federal Rule of Civil Procedure 65(d))

Contents and Scope of Every Injunction and Restraining Order.

(1) Contents. Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;
(B) state its terms specifically; and
(C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

(2) Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;
(B) the parties' officers, agents, servants, employees, and attorneys; and
(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

Procedures to Promote Compliance with Crime Victims' Rights Obligations (28 CFR 45.10)

(a) Definitions. The following definitions shall apply with respect to this section, which implements the provisions of the Justice for All Act that relate to protection of the rights of crime victims. See 18 U.S.C. 3771.

Crime victim means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights, but in no event shall the defendant be named as such guardian or representative.

Crime victims' rights means those rights provided in 18 U.S.C. 3771.

Employee of the Department of Justice means an attorney, investigator, law enforcement officer, or other personnel employed by any division or office of the Department of Justice whose regular course of duties includes direct interaction with crime victims, not including a contractor.

Office of the Department of Justice means a component of the Department of Justice whose employees directly interact with crime victims in the regular course of their duties.

(b) The Attorney General shall designate an official within the Executive Office for United States Attorneys (EOUSA) to receive and investigate complaints alleging the failure of Department of Justice employees to provide rights to crime victims under 18 U.S.C. 3771. The official shall be called the Department of Justice Victims' Rights Ombudsman (VRO). The VRO shall then designate, in consultation with each office of the Department of Justice, an official in each office to serve as the initial point of contact (POC) for complainants.

* * *

(e) Disciplinary procedures.

(1) If, based on the investigation, the VRO determines that a Department of Justice employee has wantonly or willfully failed to provide the complainant with a right listed in 18 U.S.C. 3771, the VRO shall recommend, in conformity with laws and regulations regarding employee discipline, a range of disciplinary sanctions to the head of the office of the Department of Justice in which the employee is located, or to the official who has been designated by Department of Justice regulations and procedures to take action on disciplinary matters for that office. The head of that office of the Department of Justice, or the other official designated by Department of Justice regulations and procedures to take action on disciplinary matters for that office, shall be the final decision-maker regarding the disciplinary

sanction to be imposed, in accordance with applicable laws and regulations.

(2) Disciplinary sanctions available under paragraph (e)(1) of this section include all sanctions provided under the Department of Justice Human Resources Order, 1200.1.

Policy With Regard To Open Judicial Proceedings (28 CFR § 50.9).

Because of the vital public interest in open judicial proceedings, the Government has a general overriding affirmative duty to oppose their closure. There is, moreover, a strong presumption against closing proceedings or portions thereof, and the Department of Justice foresees very few cases in which closure would be warranted. The Government should take a position on any motion to close a judicial proceeding, and should ordinarily oppose closure; it should move for or consent to closed proceedings only when closure is plainly essential to the interests of justice. In furtherance of the Department's concern for the right of the public to attend judicial proceedings and the Department's obligation to the fair administration of justice, the following guidelines shall be adhered to by all attorneys for the United States.

(a) These guidelines apply to all federal trials, pre- and post-trial evidentiary proceedings, arraignments, bond hearings, plea proceedings, sentencing proceedings, or portions thereof, except as indicated in paragraph (e) of this section.

(b) A Government attorney has a compelling duty to protect the societal interest in open proceedings.

(c) A Government attorney shall not move for or consent to closure of a proceeding covered by these guidelines unless:

(1) No reasonable alternative exists for protecting the interests at stake;

(2) Closure is clearly likely to prevent the harm sought to be avoided;

(3) The degree of closure is minimized to the greatest extent possible;

(4) The public is given adequate notice of the proposed closure; and, in addition, the motion for closure is made on the record, except where the disclosure of the details of the motion papers would clearly defeat the reason for closure specified under paragraph (c)(6) of this section;

(5) Transcripts of the closed proceedings will be unsealed as soon as the interests requiring closure no longer obtain; and

(6) Failure to close the proceedings will produce;

(i) A substantial likelihood of denial of the right of any person to a fair trial; or

(ii) A substantial likelihood of imminent danger to the safety of parties, witnesses, or other persons; or

(iii) A substantial likelihood that ongoing investigations will be seriously jeopardized.

(d) A government attorney shall not move for or consent to the closure of any proceeding, civil or criminal, except with the express authorization of:

(1) The Deputy Attorney General, or,

(2) The Associate Attorney General, if the Division seeking authorization is under the supervision of the Associate Attorney General.

(e) These guidelines do not apply to:

(1) The closure of part of a judicial proceeding where necessary to protect national security information or classified documents; or

(2) In camera inspection, consideration or sealing of documents, including documents provided to the Government under a promise of confidentiality, where permitted by statute, rule of evidence or privilege; or

(3) Grand jury proceedings or proceedings ancillary thereto; or

(4) Conferences traditionally held at the bench or in chambers during the course of an open proceeding; or

(5) The closure of judicial proceedings pursuant to 18 U.S.C. 3509 (d) and (e) for the protection of child victims or child witnesses.

(f) Because of the vital public interest in open judicial proceedings, the records of any proceeding closed pursuant to this section, and still sealed 60 days after termination of the proceeding, shall be reviewed to determine if the reasons for closure are still applicable. If they are not, an appropriate motion will be made to have the records unsealed. If the reasons for closure are still applicable after 60 days, this review is to be repeated every 60 days until such time as the records are unsealed. Com-

pliance with this section will be monitored by the Criminal Division.

(g) The principles set forth in this section are intended to provide guidance to attorneys for the Government and are not intended to create or recognize any legally enforceable right in any person.

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/s/ [redacted]

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/s/ [redacted]

10-2905-cr, 11-479-cr
USA v. Doe

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the ___ day of _____, two thousand eleven.

PRESENT:

JOSÉ A. CABRANES,
ROSEMARY S. POOLER,
DENNY CHIN,
Circuit Judges.

Nos. 09-2905-cr, 11-479-cr

[OVAL STAMP]
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
FEB 14 2011, 2:45 pm
Catherine O'Hagan Wolfe, Clerk

RICHARD ROE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee,

JOHN DOE,

Defendant-Appellee.

FOR RICHARD ROE: RICHARD E. LERNER, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York, NY.

FOR APPELLEE: TODD KAMINSKY, Assistant United States Attorney, United States Attorney's Office for the Eastern District of New York, Brooklyn, NY.

FOR DEFENDANT-APPELLEE: KELLY ANNE MOORE, Morgan, Lewis & Bockius LLP, New York, NY.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, following a hearing on the record on February 14, 2011, that an injunction *pendente lite* shall enter to prevent the dissemination by an party, their officers, servants, employees and attorneys, and all who are in active concert or participation with them, of materials placed under seal by orders of this Court or of the United States District Court for the Eastern District of New York (I. Leo Glasser, *Judge*).

Richard Roe ("Roe") is an attorney at law whose identity is known to all participants in this litigation and who has been given the name "Richard Roe" as a legal placeholder because the disclosure of his true identity in this litigation context may, for the time being, lead to the improper disclosure of the materials at issue here.

Roe appeals from orders of the District Court permanently enjoining distribution of a Presentence Investigation Report ("PSR") prepared for sentencing purposes in a criminal proceeding before Judge Glasser and temporarily enjoining Roe and his clients from further disseminating other sealed documents filed in Doe's criminal proceedings before the District Court (Docket No. 10-2905-cr).

We also have before us a separately docketed but consolidated petition for a writ of mandamus

directing the District Court to make public the docket of the criminal case in question (Docket No. 11-479-cr). In turn, the United States (the "government") seeks a temporary injunction, pending the disposition of this appeal, to restrain Roe and his counsel and clients, and all persons acting in concert with them, from the threatened dissemination of the sealed materials at issue here by (1) filing and pursuing civil actions in other federal or state courts in which the sealed materials are annexed to pleadings or otherwise referred to or made public, and (2) by conveying copies of these materials or the contents thereof to third-parties, including the media.

We assume the parties' familiarity with the remaining facts and procedural history of the case.

(i)

We turn first to Roe's petition for a writ of mandamus. The All Writs Act empowers us to "issue all writs necessary or appropriate in aid of [our] respective jurisdiction[ ] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). One such writ is the writ of mandamus, an "extraordinary remedy" that has been used "both at common law and in the federal courts . . . to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction." *Cheney v. U.S. Dist. Crt. for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (brackets and internal quotation marks omitted). We issue a writ of mandamus only in "exceptional circumstances amounting to a judicial

'usurpation of power' or a 'clear abuse of discretion.'" *Id.* (citations and some internal quotation marks omitted); *see also Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) ("A district court has abused its discretion if it [has] based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence or [has] rendered a decision that cannot be located within the range of permissible decisions." (brackets, citations, and internal quotation marks omitted)).

Roe falls well short of his heavy burden to secure a writ of mandamus directed to the District Court Here, the District Court reviewed the sealed documents and the voluminous submissions by the parties, conducted four days of hearings inquiring into how Roe had obtained the documents and how he intended to use them, and explained in detail and on the record its well-reasoned decision to issue a permanent injunction against further distribution of the PSR and a temporary injunction against further distribution of the other sealed documents. Under the circumstances, we see no basis upon which to conclude that the District Court in any way usurped its power or clearly abused its discretion. *See Cheney*, 542 U.S. at 380. Accordingly, the petition for a writ of mandamus (Docket No. 11-479-cr) is DENIED.

Our decision to deny the petition for a writ of mandamus may be further elaborated in due course in a published opinion.

The docket in this proceedings (Docket No. 11-479-cr) and all documents referenced therein shall remain SEALED until further order of this Court.

(ii)

Pending a full review of the merits of Roe's appeal by a panel of this Court, the government, by a sealed motion of January 26, 2010 and accompanying affidavit, requests a *temporary stay* of the unsealing of Docket No. 10-2905-cr and of the materials placed under seal by Judge Glasser pending the appeal of this matter. In light of the serious, indeed grave, concerns expressed by the United States regarding the possible consequences of unsealing these documents, and the absence of any sufficiently persuasive countervailing considerations expressed by Roe, the government's motion is hereby GRANTED.

Accordingly, pursuant to this order and to our orders of January 28, 2011 (granting government's motion for an emergency stay of unsealing the docket in No. 10-2905); February 9, 2011 (granting government's motion for an emergency stay of unsealing the docket in No. 11-479 and ordering Roe not to publicly file any additional documents or cases that referred to matters subject to sealing orders in Nos. 10-2905-cr and 11-479-cr); February 10, 2011 (re-emphasizing, *inter alia*, that Roe was not to reveal or distribute sealed documents, nor contents thereof, to any third-parties, including members of the public or the media); and February 11, 2011 (re-emphasizing, *inter alia*, that all previous orders of this Court and of the United Stares District Court for the Eastern District of New York with respect to the documents at issue remained in full force and effect until further order of this Court), we

hereby ORDER that ALL PARTIES, THEIR OFFICERS, AGENTS, SERVANTS, EMPLOYEES, AND ATTORNEYS, AND ALL OTHER PERSONS WHO ARE IN ACTIVE CONCERT OR PARTICIPATION WITH THEM, *see* Fed. R. Civ. P. 65(d)(2), are TEMPORARILY—and WITHOUT PREJUDICE to any claims or arguments that may be asserted by the parties on the merits of these appeals or on the orders in effect during the consideration of the appeals—ENJOINED from publicly distributing or revealing in any way, to any person, or in any court, proceeding or forum, except to those persons directly involved in the parties' own legal representation, any documents or contents thereof subject to sealing orders in Docket No. 10-2905-cr or in any related proceedings before the District Courts for the Eastern District of New York and Southern District of New York.

For the purpose of enforcing this Court's orders and those of the District Court for the Eastern District of New York during the panel's consideration and adjudication of the pending appeal, we REMAND the cause (Docket No. 10-2905-cr) to the District Court for the Eastern District of New York with instructions to the Chief Judge of that Court to assign a United States District Judge from that Court with the limited mandate of implementing and overseeing compliance with our orders and the orders previously entered by Judge Glasser. Of course, Judge Glasser, an experienced and able jurist who has shown admirable patience and forbearance in the face of extraordinary provocations, shall retain

jurisdiction over the underlying (and long-lived) criminal proceeding involving John Doe.

Furthermore, in all other respects and pursuant to *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), this panel shall retain jurisdiction over (1) the pending appeal, both for the disposition of the appeal on the merits as well as with respect to any further motions practice; (2) any other appeals from the District Court's order granting the permanent and temporary injunctions at issue; and (3) any appeals arising from any further proceedings in the District Court, including any further petitions for extraordinary writs, including the writ of mandamus.

(iii)

Without in any way limiting the effect of this summary order and the Court's previous orders, we further ORDER:

(1) This appeal (Docket No. 10-2905-cr) will be EXPEDITED.

(2) The briefing schedule will be as follows:

a. Roe's opening brief shall be filed no later than Monday, February 28, 2011.

b. The government's opening brief shall be filed no later than Monday, March 14, 2011.

c. Roe's reply brief shall be filed no later than Monday, March 21, 2011.

d. The government's sur-reply brief shal be filed no later than Thursday, March 24 2011.

CONCLUSION

To summarize:

(1) the petition for a writ of mandamus in Docket No. 11-479 is DENIED, and the docket of that case shall remain SEALED pending further order of our Court;

(2) the government's motion for a temporary stay of unsealing of the docket in No. 10-2905-cr pending full review of the merits of Roe's appeal is GRANTED;

(3) the parties and all who are in active concert or participation with them are TEMPORARILY ENJOINED, pursuant to the terms of the order stated above;

(4) we REMAND the cause to the United States District Court for the Eastern District of New York for a limited purpose and under the terms noted above.

The limited mandate described above shall issue forthwith.

FOR THE COURT,
Catherine O'Hagan Wolfe, Clerk of Court

10-2905-cr
Roe v. United States

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 29th day of June, two thousand eleven.

PRESENT:

JOSÉ A. CABRANES,
ROSEMARY S. POOLER,
DENNY CHIN,
Circuit Judges.

Nos. 09-2905-cr, 11-479-cr, 11-1408-cr,
11-1411-cr, 11-1666-cr, 11-1906-cr,
11-2425-cr

RICHARD ROE, an attorney,
Appellant,

JANE DOE AND JOHN DOE II, clients of Richard Roe,
Pro Se Appellants,

v.

UNITED STATES OF AMERICA,
Appellee,

JOHN DOE,
Defendant-Appellee.

FOR APPELLANT RICHARD ROE: Richard E. Lerner, Wilson Elser Moskowitz Edelman & Dicker LLP (David A. Schulz and Jacob P. Goldstein, Levine Sullivan Koch & Schulz LLP; Paul G. Cassell, S.J. Quinney College of Law at the University of Utah, *on the brief*), New York, NY and Salt Lake City, UT.

FOR APPELLEE UNITED STATES OF AMERICA:	Todd Kaminsky, Assistant United States Attorney (Peter A. Norling and Elizabeth J. Kramer, Assistant United States Attorneys; Loretta E. Lynch, United States Attorney, *on the brief*), United States Attorney's Office for the Eastern District of New York, Brooklyn, NY.
FOR DEFENDANT-APPELLEE JOHN DOE:	Nader Mobargha, Beys, Stein & Mobargha LLP, New York, NY.*

Appeal from a May 18, 2010 temporary restraining order, a June 21, 2010 permanent injunction, a July 20, 2010 temporary restraining order, and a March 23, 2011 scheduling order issued by the United States District Court for the Eastern District of New York (I. Leo Glasser, *Judge*); appeal also from orders of April 1, 2011, April 4, 2011, and May 13, 2011 of the United States District Court for the Eastern District of New York (Brian M. Cogan, *Judge*).

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court permanently enjoining the dissemination of John Doe's Pre-Sentence Report is **AFFIRMED**.

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* Pursuant to our order of February 14, 2011, John Doe was not invited to brief this appeal nor has he moved to submit a brief. However, Doe has filed various letters and opposition papers in response to Roe's motions throughout the course of the appeal.

The appeal in Docket No. 10-2905-cr is **DISMISSED** in part, and the appeal in Docket No. 11-1408-cr is **DISMISSED** in full, insofar as they challenge the District Court's temporary restraining orders of May 18, 2010 and July 20, 2010 and insofar as they challenge any related orders that may have been entered or re-affirmed on May 28, June 11, June 14, or June 21, 2010.

The appeal in Docket No. 11-1411-cr is **DISMISSED** because appellant has waived his opportunity to challenge Judge Brian M. Cogan's orders of April 1, 2011 and April 4, 2011.

The appeal in Docket No. 11-1906-cr is **DISMISSED** for want of jurisdiction.

With respect to Docket No. 11-2425-cr, the order of Judge Cogan is **AFFIRMED**.

The appeal in Docket No. 11-1666-cr by *pro se* appellants is **DISMISSED** in all respects except insofar as it challenges the District Court's permanent injunction against the dissemination of Doe's PSR; with respect to that claim, the judgment of the District Court is **AFFIRMED**.

The Clerk of Court is **DIRECTED** to close Docket Nos. 11-1408-cr, 11-1411-cr, 11-1906-cr, and 11-2425-cr upon entry of this order. The Clerk of Court is also **DIRECTED** to close Docket No. 11-479-cr to the extent it was not already closed upon entry of our February 14, 2011 order. *See* Order, *Roe v. United States*, Docket Nos. 10-2905-cr, 11-479-cr (2d Cir. Feb. 14, 2011).

The remainder of this cause (Docket Nos. 10-2905-cr, 11-1666-cr) is **REMANDED** to the District Court (I. Leo Glasser, *Judge*) for proceedings con-

sistent with this order and with instructions (i) to rule upon the government's unsealing motion of March 17, 2011, (ii) to issue a final determination regarding whether the dissemination of the other (non-PSR) sealed documents in John Doe's criminal case, particularly those that refer to Doe's cooperation, should be enjoined, and (iii) in the event that a final determination regarding the dissemination of the other sealed documents does *not* result in an injunction against the dissemination of documents referring to Doe's cooperation, to enter an order temporarily staying the unsealing of any documents referring to Doe's cooperation pending an appeal by the government to our Court. In the event that the government elects not to appeal the unsealing of any documents that may be unsealed by the District Court, the government is **ORDERED** to notify the District Court and our Court of its decision not to pursue the appeal within the otherwise applicable time for taking the appeal.

It is further **ORDERED** that, pursuant to *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), this panel shall retain jurisdiction over any further appeals from proceedings in the District Court, including any further petitions for extraordinary writs.

It is hereby **ORDERED** that Judge Cogan shall retain jurisdiction for the limited purpose of enforcing our February 14, 2011 mandate—that is, to ensure the parties' compliance with the orders of this Court and any that have been, or may hereafter be, entered by Judge Glasser. Our panel retains jurisdiction pursuant to *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), over any appeals from any orders or judgments entered by Judge Cogan.

Finally, it is **ORDERED** that appellant Richard Roe is hereby warned that the Court's patience has been exhausted by his filing of six separate notices of appeal regarding the same principal legal dispute—including the filing of an appeal from a March 23, 2011 scheduling order that obviously was not a final order nor subject to any of the exceptions to the "final judgment rule," *see* Part (iv), *post*—and that any further attempts to re-litigate the issues decided by this order, or other future filings of a frivolous nature, may result in sanctions, including the imposition of leave-to-file restrictions, requirements of notice to other federal courts, and monetary penalties.

The Clerk of Court is **DIRECTED** to transmit a copy of this order to Judge Cogan.

INTRODUCTION

Appellant Richard Roe ("Roe"), an attorney, and two of his clients, *pro se*, appeal from a May 18, 2010 temporary restraining order, a June 21, 2010 permanent injunction, a July 20, 2010 temporary restraining order, and a March 23, 2011 scheduling order entered by Judge Glasser. Because the *pro se* appellants incorporate Roe's arguments as their own and make no other independent legal claims, our legal conclusions apply to all appellants, though our order refers principally to Roe.

BACKGROUND

A. The SDNY Complaint and Judge Glasser's Initial Rulings

On May 10, 2010, Richard Roe publicly filed a civil RICO complaint against John Doe ("Doe") and other defendants in the United States District Court for the Southern District of New York (Naomi Reice Buchwald, *Judge*). Attached to the complaint were exhibits that included sealed materials from Doe's criminal case in the Eastern District of New York. The complaint itself explicitly referenced the confidential information in the exhibits, including the fact that Doe had cooperated with the government.

On May 18, 2010, upon an application by Doe, Judge Glasser issued an order to show cause why a preliminary injunction should not be entered against Roe's dissemination of the sealed materials from Doe's criminal case. He also temporarily restrained Roe and his clients from "disseminating the Sealed and Confidential Materials or [the] information therein." The materials in Roe's possession included a 2004 Pre-Sentence Report ("PSR"), two proffer agreements, Doe's cooperation agreement, a criminal complaint, and a criminal information. The TRO was later extended multiple times without objection (and, on some occasions, at Roe's request) until a hearing could be held on June 21, 2010.

At the June 21, 2010 hearing, Judge Glasser heard testimony from Roe before issuing a permanent injunction against dissemination of the 2004 PSR, pursuant to *United States v. Charmer Industries, Inc.*, 711 F.2d 1164 (2d Cir. 1983). He also directed Roe to return the PSR to the United States Attorney's Office (Roe eventually returned the PSR directly to the court). With respect to the other sealed documents, Judge Glasser extended his temporary restraining order until July 20, 2010, with Roe's consent, and requested that the parties brief whether the court had the authority to permanently enjoin the dissemination of those documents.

On July 9, 2010, Roe filed a notice of appeal concerning Judge Glasser's May 18, 2010 and June 21, 2010 orders.

On July 20, 2010, Judge Glasser held another hearing at which he recited his factual findings, including: (1) that Roe knew the documents at issue were sealed prior to his public filing of those documents; (2) that one of Roe's clients had "wrongfully taken" and had "no legal right to those documents"; and (3) that dissemination of the documents would cause "irreparable harm, which is imminent to Mr. John Doe . . . [and] would put Mr. John Doe's safety at risk." Over Roe's objection, Judge Glasser reaffirmed his ruling of June 21, 2010 regarding the permanent injunction against dissemination of the PSR and extended his TRO with respect to the other sealed documents for another 10 days. He further ordered that the permanent injunction and TRO should cover all copies of the documents at issue, and that all originals and copies of such documents were to be returned or destroyed until Roe met his "burden with respect to whether or not

there is some need to maintain those documents or to keep them." The TRO was subsequently extended to August 13, 2010, by request of the parties, while they negotiated a possible settlement.

On August 10, 2010, Roe filed a notice of appeal concerning the July 20, 2010 order that re-affirmed the permanent injunction and extended the TRO.[1] Judge Glasser has not since issued a final ruling regarding the disclosure of the non-PSR sealed documents.

B. Our February 14, 2011 Order and Judge Cogan's Assignment to Enforce Our Mandate

On February 14, 2011, we heard oral argument on the government's motion for a temporary stay of the unsealing of the appeal. In an order issued that day orally and later in written form, we granted the government's request to keep the appeal under seal and temporarily enjoined Roe and his associates from distributing or revealing in any way any documents or contents thereof subject to sealing orders in Doe's criminal case or on appeal. *See* Order, *Roe v. United States*, Docket Nos. 10-2905-cr, 11-479-cr (2d Cir. Feb. 14, 2011). We also remanded the cause to the District Court for the Eastern

[1] On February 7, 2011, Roe also filed a petition for a writ of mandamus requesting that we order the District Court to withdraw its various injunctive and temporary restraining orders and publicly docket Doe's criminal case. We denied this petition in our order of February 14, 2011. *See* Order, *Roe v. United States*, Docket Nos. 10-2905-cr, 11-479-cr (2d Cir. Feb. 14, 2011).

District of New York for the limited purpose of allowing the Chief Judge to assign a District Judge to "implement[ ] and oversee[ ] compliance with our orders and the orders previously entered by Judge Glasser." *Id.* Pursuant to our order, then-Chief Judge Dearie referred the case to Judge Brian M. Cogan for enforcement of this limited mandate.

On March 1, 2011, Roe submitted a letter requesting "clarification" from Judge Cogan that, notwithstanding our order of February 14, 2011, he was permitted to disseminate certain information within the sealed documents because that information was allegedly public knowledge. On April 1, 2011, Judge Cogan held a hearing regarding Roe's request. At that hearing Judge Cogan learned that Roe had not yet destroyed or returned certain electronic and paper copies of the original PSR and other sealed documents, in violation of Judge Glasser's July 20, 2010 order. Accordingly, by oral order on April 1, 2011, and by a subsequent written order of April 4, 2011, Judge Cogan ordered Roe to destroy or return any remaining electronic or paper copies of the PSR and other sealed documents, without prejudice to his ability to seek the documents if any of the various sealing orders were vacated by our Court. *See* Order, *United States v. Doe* (E.D.N.Y. Apr. 4, 2011).

On April 8, 2011, Roe filed a notice of appeal with respect to Judge Cogan's orders of April 1 and April 4, 2011.

On May 13, 2011, Judge Cogan issued a written order denying Roe's March 1, 2011 request to release certain information contained within the sealed documents. After opining that information

"available to the public" was not covered by our injunction, Judge Cogan nevertheless ordered that Roe could not "extrapolate from sealed documents . . . [which] could easily be combined with and thereby tainted by Roe's knowledge of non-public sealed information." Order, *United States v. Doe* (E.D.N.Y. May 13, 2011). Upon a review of the specific statements and information that Roe intended to release, Judge Cogan further concluded that "[i]t seems obvious that Roe is seeking to fatally undermine the purpose of the injunctions by publicizing information that would render them ineffective." *Id.*

On June 15, 2011, Roe filed a notice of appeal with respect to Judge Cogan's order of May 13, 2011.

C. Recent Events before Judge Glasser

On March 17, 2011, after learning that Doe's criminal conviction had been disclosed in a press release by the U.S. Attorney's Office for the Eastern District of New York, the government moved before Judge Glasser for a limited unsealing of the docket and certain documents in Doe's underlying criminal case. The government explicitly sought to unseal only those docket entries and documents that did *not* refer to Doe's cooperation with the government.

On March 23, 2011, Judge Glasser issued a scheduling order in which he stated that he was "uncertain of [his] continuing jurisdiction to address the controversy presented by [Roe's February 4, 2011 'demand' that the case be docketed and

the government's March 17, 2011 motion for a limited unsealing of the case]." Scheduling Order, *United States v. Doe* (E.D.N.Y. March 23, 2011). Accordingly, he requested that "the government, Richard Roe and John Doe [ ] brief the issue of the Court's jurisdiction and submit their briefs simultaneously on April 8th, 2011." *Id.*

In addition to setting the briefing schedule, the order reflected Judge Glasser's factual finding that Roe had "'knowingly and intentionally flouted a Court order" by "unilaterally deciding" to disclose information in Doe's sealed criminal case. *Id.*

On May 11, 2011, Roe filed a notice of appeal concerning Judge Glasser's March 23, 2011 order.

On April 19, 2011, upon requests from both Roe and the government, we issued an order confirming that Judge Glasser retained jurisdiction "to decide the government's motion to unseal, as well as to decide any other pending or future motions to unseal that would not result in the public disclosure of docket entries or underlying documents *that reference John Doe's cooperation with the government*." Order, *Roe v. United States*, Docket Nos. 10-2905-cr, 11-479-cr (2d Cir. Apr. 19, 2011) (emphasis in original).

Judge Glasser has not yet acted on the government's March 17, 2011 motion to unseal.

We assume the parties' familiarity with the remaining facts and procedural history of the case.

DISCUSSION

(i)

On appeal, Roe argues that the District Court violated his First Amendment rights in permanently enjoining the dissemination of Doe's PSR and requiring him to return it to the government. We review a district court's grant of a permanent injunction for abuse of discretion. *Roach v. Morse*, 440 F. 3d 53, 56 (2d Cir. 2006); *see also Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) (explaining "abuse of discretion").

Under *United States v. Charmer Industries, Inc.*, 711 F.2d 1164 (2d Cir. 1983), third parties must satisfy a heightened standard in order to obtain access to a PSR, which is a sealed "court document designed and treated principally as an aid to the court in sentencing." *Id.* at 1176. Specifically, a third party seeking access to a PSR bears the burden of making a "compelling demonstration that disclosure of the report is required to meet the ends of justice" *Charmer Indus., Inc.*, 711 F.2d at 1175.

Here, Judge Glasser, who had presided over Doe's criminal case and was therefore familiar with the extent of Doe's cooperation and his assistance in obtaining the convictions of myriad violent criminals, explicitly entered a finding that releasing proof of Doe's cooperation would cause him irreparable harm and would put his safety at risk

Judge Glasser also found that Roe had improperly refused to submit an application to the Court to unseal the report, despite his knowledge that the report was sealed and came from a sealed criminal

case. *See id.* at 1170 ("[T]he presentence report is a court document and is to be used by nonjudicial federal agencies and others *only with the permission of the court*" (emphasis supplied)); *see also In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 417 (E.D.N.Y. 2007) (enforcing a preliminary injunction requiring the return of sealed documents pursuant to the court's "inherent authority to enforce [its] orders"), *aff'd*, 617 F.3d 186 (2d Cir. 2010). Judge Glasser found, instead, that Roe had determined unilaterally that he was entitled to publicly disclose the report.

Judge Glasser balanced his findings of physical danger to Doe and the intentional defiance of a sealing order by Roe—findings that we hold were not clearly erroneous—against Roe's asserted need to use the PSR in the SDNY civil case to establish that Doe had defrauded investors and others by not revealing his conviction. Because proof of Doe's conviction (as opposed to his cooperation) remains available from other public documents—including a press release by the United States Attorney's Office for the Eastern District of New York—and because the PSR is an incomplete and ultimately inadmissible document to which neither Doe nor the government will ever have the opportunity to object, *see Charmer Indus., Inc.*, 711 F.2d at 1170-71, the PSR is of dubious utility in the civil case except as a tool to intimidate and harass Doe by subjecting him to danger. Accordingly and in sum, disclosure of the report is not "required to meet the ends of justice," *id.* at 1175—indeed, quite the opposite. The District Court did not err, much less

abuse its discretion, in imposing a permanent injunction against dissemination of the PSR. *See, e.g., United States v. Charmer Indus., Inc.*, 711 F.2d at 1177 (stating that a "central element in the showing required of a third person seeking disclosure is the degree to which the information in the [PSR] cannot be obtained from other sources").

(ii)

Doe argues that the District Court violated his First Amendment rights by temporarily restraining his continued possession and dissemination of the other sealed documents from Doe's criminal case.

A TRO, which is appropriate when "speed is needed . . . to prevent irreparable harm," *Garcia v. Yonkers Sch. Dist.*, 561 F.3d 97, 106 (2d Cir. 2009) (internal quotation marks omitted), is not a final judgment and is not ordinarily appealable. *See Gen. Motors Corp. v. Gibson Chem. & Oil Corp.*, 786 F.2d 105, 108 (2d Cir. 1986). To the extent we may, in our discretion, exercise pendent jurisdiction over the order pursuant to *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 45 (1995), we decline to do so here. Accordingly, Roe's appeal is dismissed insofar as it challenges the District Court's temporary restraining orders of May 18, 2010 and July 20, 2010.

(iii)

On April 8, 2011, Roe filed a notice of appeal with respect to Judge Cogan's orders of April 1 and April 4, 2011. Roe did not raise any arguments with

respect to that appeal in his reply brief of April 18, 2011, nor has he filed a motion for leave to submit supplemental briefing.[2] Accordingly, we hold that Roe has waived his right to challenge Judge Cogan's orders of April 1 and April 4, 2011. *See, e.g., In re Wireless Data, Inc.*, 547 F.3d 484, 492 (2d Cir. 2008) (deeming arguments not raised on appeal waived).

His appeal from those orders is hereby dismissed.

(iv)

Roe appeals from Judge Glasser's scheduling order of March 23, 2011, insofar as it reflects Judge Glasser's factual finding that Roe "knowingly and intentionally flouted" a court order. Scheduling Order, *United States v. Doe* (E.D.N.Y. Mar. 23, 2011).

We do not have jurisdiction over Roe's claim because the March 23, 2011 order was not a final order pursuant to 28 U.S.C. § 1291, nor are any of the exceptions to the "final judgment rule" applicable in the circumstances presented. *See generally*

[2] Although arguments raised for the first time in a reply brief are generally deemed waived, *see Connecticut Bar Ass'n v. United States*, 620 F.3d 81, 91 n.13 (2d Cir. 2010), Roe's opening brief was filed on March 28, 2011, and therefore could not have raised any arguments with respect to Judge Cogan's orders of April 1 and April 4, 2011. Accordingly, we do not base our finding of waiver on Roe's failure to discuss Judge Cogan's orders in his opening brief; rather, our holding is based on his failure to discuss them in his reply brief or in a motion for leave to submit supplemental briefing.

Reiss v. Societe Centrale Du Groupe Des Assurances Nationales, 235 F.3d 738, 745 (2d Cir. 2000) (discussing the "final judgment rule" and its exceptions).

Accordingly, Roe's appeal from the March 23, 2011 order is dismissed.

(v)

On June 15, 2011, Roe filed a notice of appeal with respect to Judge Cogan's order of May 13, 2011. We review Judge Cogan's interpretation of our February 14, 2011 order and his interpretation of the sealing orders of Judge Glasser *de novo*.

After an item-by-item review of the specific information that Roe wished to publicly release—including (a) John Doe's real name, linked with his criminal docket number, (b) the specific nature of the predicate acts leading to his criminal conviction, and (c) the sentence imposed by the District Court—Judge Cogan concluded that the information either was not public at all or was not public to the extent and with the level of detail that Roe intended to disclose. Accordingly, he denied Roe's request for permission to release the information. Order, *United States v. Doe* (E.D.N.Y. May 13, 2011). Upon our own independent review, we agree with Judge Cogan that Roe's proposed disclosures would have violated our temporary injunction of February 14, 2011 and the sealing orders of Judge Glasser. Judge Cogan's order of May 13, 2011 is affirmed.

CONCLUSION

To summarize:

(1) The judgment of the District Court permanently enjoining the dissemination of John Doe's Pre-Sentence Report is **AFFIRMED**.

(2) The appeal in Docket No. 10-2905-cr is **DISMISSED** in part, and the appeal in Docket No. 11-1408-cr is **DISMISSED** in full, insofar as they challenge the District Court's temporary restraining orders of May 18, 2010 and July 20, 2010 and insofar as they challenge any related orders that may have been entered or reaffirmed on May 28, June 11, June 14, or June 21, 2010.

(3) The appeal in Docket No. 11-1411-cr is **DISMISSED** because Roe has waived his opportunity to challenge Judge Brian M. Cogan's orders of April 1, 2011 and April 4, 2011.

(4) The appeal in Docket No. 11-1906-cr is **DISMISSED** for want of jurisdiction.

(5) With respect to Docket No. 11-2425-cr, the order of Judge Cogan is **AFFIRMED**.

(6) The appeal in Docket No. 11-1666-cr by *pro se* appellants is **DISMISSED** in all respects except insofar as it challenges the District Court's permanent injunction against the dissemination of Doe's PSR; with respect to that claim, the judgment of the District Court is **AFFIRMED**.

(7) The Clerk of Court is **DIRECTED** to close Docket Nos. 11-1408-cr, 11-1411-cr, 11-1906-cr, and 11-2425-cr upon entry of this order. The Clerk of Court is also **DIRECTED** to close Docket No. 11-479-cr to the extent it was not already closed upon entry of our February 14, 2011 order. *See* Order, *Roe v. United States*, Docket Nos. 10-2905-cr, 11-479-cr (2d Cir. Feb. 14, 2011).

(8) The remainder of this cause (Docket Nos. 10-2905-cr, 11-1666-cr) is **REMANDED** to the District Court (I. Leo Glasser, *Judge*) for proceedings consistent with this order and with instructions (i) to rule upon the government's unsealing motion of March 17, 2011, (ii) to issue a final determination regarding whether the dissemination of the other (non-PSR) sealed documents in John Doe's criminal case, particularly those that refer to Doe's cooperation, should be enjoined, and (iii) in the event that a final determination regarding the dissemination of the other sealed documents does *not* result in an injunction against the dissemination of documents referring to Doe's cooperation, to enter an order temporarily staying the unsealing of any documents referring to Doe's cooperation pending an appeal by the government to our Court. In the event that the government elects not to appeal the unsealing of any documents that may be unsealed by the District Court, the government is **ORDERED** to notify the District Court and our Court of its

decision not to pursue the appeal within the otherwise applicable time for taking the appeal.

(9) It is further **ORDERED** that, pursuant to *United States v. Jakobson*, 15 F.3d 19 (2d Cir. 1994), this panel shall retain jurisdiction over any further appeals from proceedings in the District Court, including any further petitions for extraordinary writs.

(10) It is hereby **ORDERED** that Judge Cogan shall retain jurisdiction for the limited purpose of enforcing our February 14, 2011 mandate—that is, to ensure the parties' compliance with the orders of this Court and any that have been, or may hereafter be, entered by Judge Glasser. Our panel retains jurisdiction pursuant to *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), over any appeals from any orders or judgments entered by Judge Cogan.

(11) Finally, it is **ORDERED** that appellant Richard Roe is hereby warned that the Court's patience has been exhausted by his filing of six separate notices of appeal regarding the same principal legal dispute—including the filing of an appeal from a March 23, 2011 scheduling order that obviously was not a final order nor subject to any of the exceptions to the "final judgment rule," *see* Part (iv), *ante*—and that any further attempts to re-litigate the issues decided by this order, or other future filings of a frivolous nature, may result in sanctions,

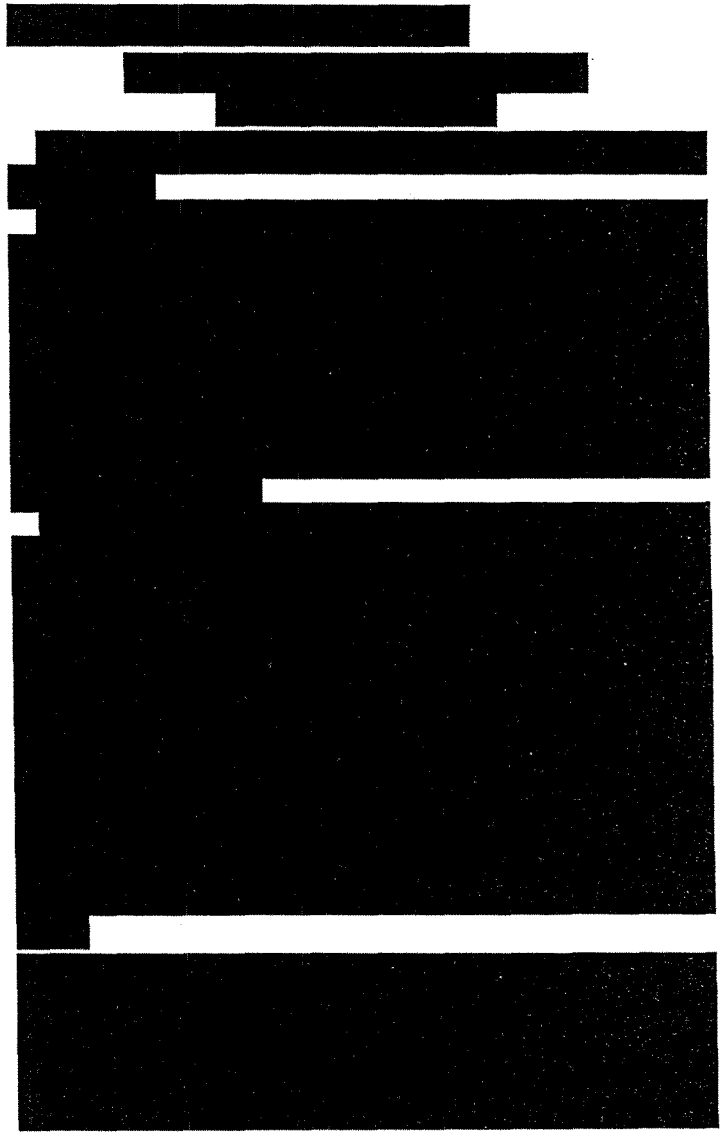
including the imposition of leave-to-file restrictions, requirements of notice to other federal courts, and monetary penalties.

(12) The Clerk of Court is **DIRECTED** to transmit a copy of this order to Judge Cogan.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[ROUND STAMP:
UNITED STATES
COURT OF APPEALS
SECOND CIRCUIT]

/s/ [stamped signature]
CATHERINE O'HAGAN WOLFE



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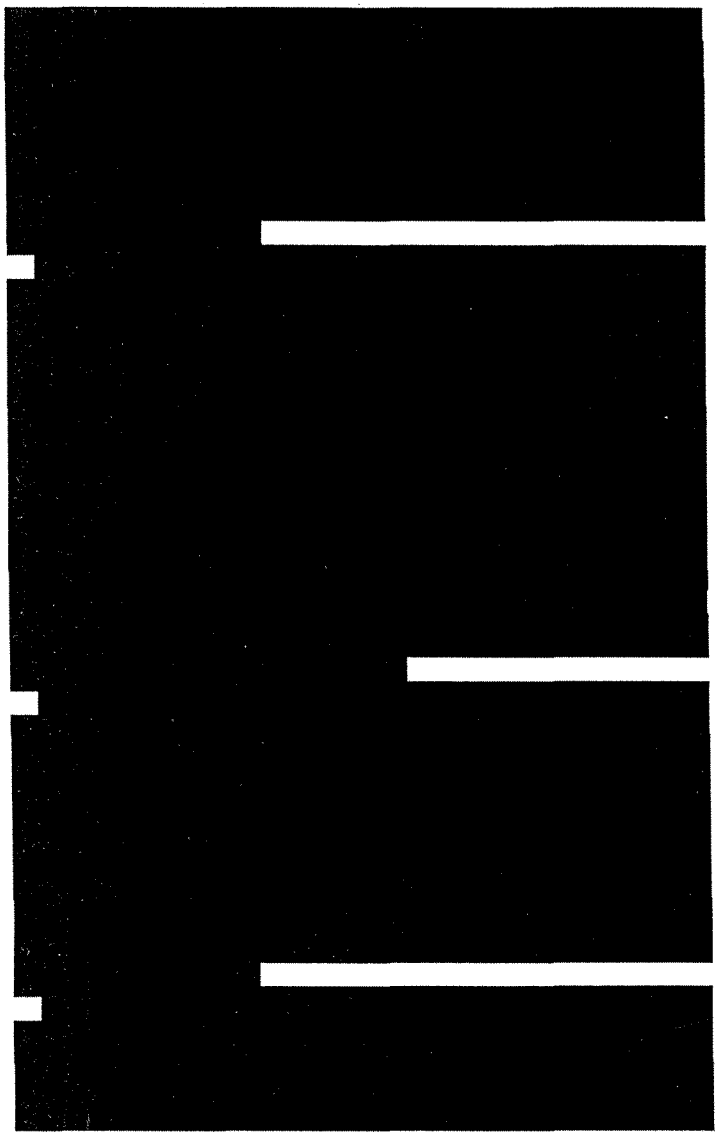

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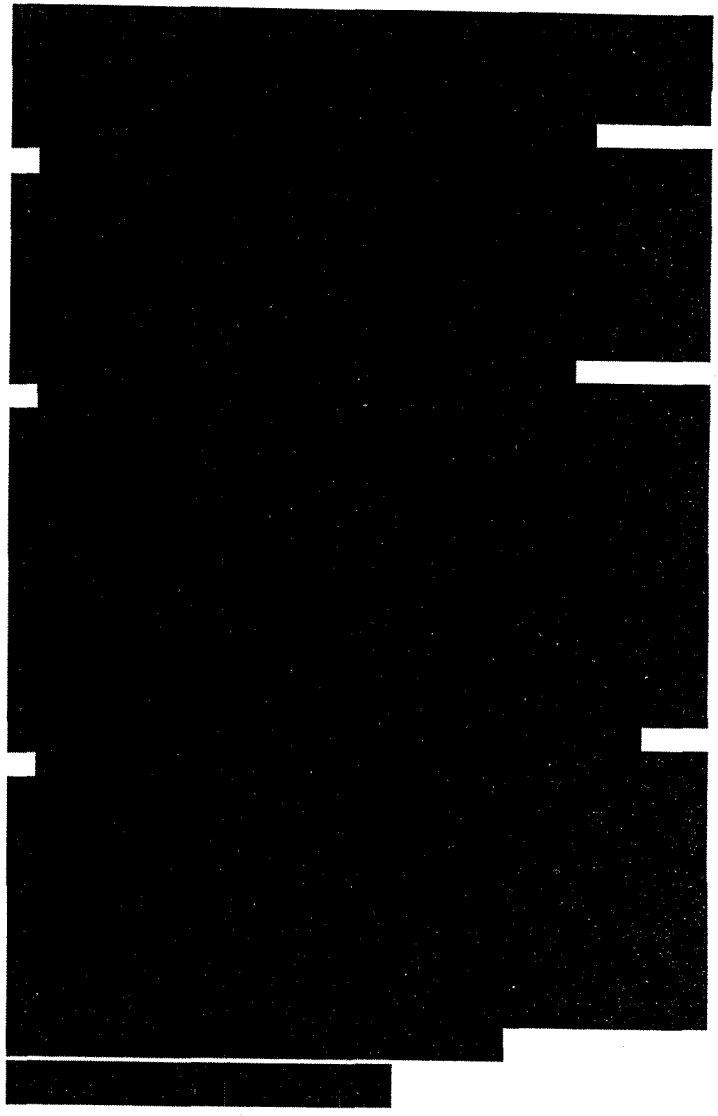

The New York Times
April 23,1982

SECRET PLEAS ACCEPTED BY U.S. ATTORNEY IN CITY

By MARCIA CHAMBERS

At least 75 Federal defendants, and probably more, were permitted to enter guilty pleas in secret proceedings in Manhattan over the last two years in Federal judges' chambers. The practice is considered even by Justice Department officials to be unusual and perhaps contrary to Federal guidelines.

But John S. Martin, the United States Attorney in Manhattan, said the practice was "not uncommon" in his office. Only the judge, the lawyers and the defendant are present at secret proceedings. A record is kept and sealed.

The practice was used by Mr. Martin most recently in two cases involving white-collar crime—one involving Margaret Barbera, who was murdered before she could testify before a Federal grand jury investigating her company's fraud case, and the other involving the chief executives of the O.P.M. Leasing Service Inc., who are accused of masterminding one of the nation's largest fraud cases.

In an interview, Mr. Martin said he had used secret pleas primarily to shield undercover work of Government witnesses, or defendants who become witnesses, and not to protect the witnesses from harm. He said he had not believed that either Miss Barbera or the defendants in the O.P.M. case were

in danger. "I can't remember a witness being murdered in a white-collar case," he said.

In interviews, Justice Department officials, criminal-law and First Amendment scholars and lawyers said the practice raised significant questions of constitutional law. At issue, they say, is the right of the public to view the process to prevent collusion in the taking of a plea and the right of public access to court proceedings. Other Federal prosecutors, whose white collar crime dockets are as heavy as New York's, said they rarely used the device, which has been a fixture in the United States Attorney's office in New York for the last decade.

"I find it hard to believe," said Maryanne Desmond, the first assistant of the United States Attorney in New Jersey. "The Supreme Court has said that the rights of the public as well as the rights of defendants must be considered in closing a procedure."

John Russell, a spokesman for the Justice Department, said the department supported open judicial proceedings and would view taking secret pleas "with a jaundiced eye." Mr. Russell said, however, that where a witness's life was at stake, the prosecutor could seek a secret hearing.

But he added that under a 1980 policy still in force, the Justice Department opposes all defense claims for secret procedures. "If a judge wants to go into chambers, then it's done," he said. "But we attempt to keep it open."

In the interview, Mr. Martin said that he was aware that the department favored open proceedings, but that he thought his policy was "consistent" with the

department's because, he maintained, secret pleas were "ancillary to secret grand jury proceedings." He said he had notified the Justice Department of his secret-plea policy in January 1981.

Abraham S. Goldstein of the Yale Law School, a criminal-law expert, said: "On the face of it, a guilty plea is a trial and the public has a stake in it." Other legal scholars agreed.

A 'Questionable' Proceeding

Mr. Goldstein called secret guilty pleas "a questionable type of proceeding," adding, "the only participants are those who have interests in preserving the secrecy." Safeguards were necessary to monitor the pleas, he said.

Both Miss Barbera and Myron S. Goodman and Mordecai Weissman, the chief executives of O.P.M., had agreed to work for the Government, their unsealed transcripts show. Usually witnesses are fitted with a recording device to tape conversations. Generally such cooperation helps mitigate a prison sentence.

In Miss Barbera's case, she secretly pleaded guilty to conspiracy charges on March 25 in the chambers of Judge Morris Lasker of Federal District Court. She was murdered last week, as were three CBS employees who went to her aid at a West Side parking lot.

The transcript of Miss Barbera's plea—during which she identified Irwin Margolies, the president of the Candor Diamond Corporation, as the architect of a $6 million fraud—was sealed by Judge Lasker last month and unsealed after her murder.

In the O.P.M. case, Mr. Martin arranged to have Mr. Goodman and Mr. Weissman secretly plead guilty to fraud charges in the chambers of Judge Charles S. Haight Jr. of Federal District Court last Dec. 17.

The two men were accused of defrauding some of the nation's largest lending institutions of nearly $200 million over a 10-year period. Last month, presumably after they gathered information against others, Mr. Martin made public their pleas.

The practice also raised the question of when—if ever—the public, which is usually represented by the press, should be barred from hearing pleas.

Floyd Abrams, one of the nation's leading First Amendment lawyers, said there might be an extraordinary occasion when a judge accepted a secret plea. He said:

> "I don't rule out the possibility of exceptional circumstances existing in certain situations where the physical safety of someone is at risk, but one thing is clear, and that is that the First Amendment does not tolerate a system in which pleas are taken as a matter of course in secret."

In the leading case on court access, *Richmond Newspapers Inc. v. Commonwealth of Virginia*, the Supreme Court held in 1980 that the Constitution gave the public and the press an all but absolute right to attend criminal trials.

Jack Landau, the director of the Reporters Committee for Freedom of the Press, said the practice was so extraordinary that only one secret guilty

plea case had ever been officially reported to his organization.

"The Government can't shut down the system because they want an undercover agent," Mr. Landau declared. The 75 secret pleas in Mr. Martin's office in 1980 and 1981 represent only those where initial charges were sealed and the defendants later pleaded guilty at a closed arraignment.

The New York Times
July 4, 1983

AUDIT CRITICIZES U.S. PROSECUTOR ON SECRET PLEAS

By MARCIA CHAMBERS

The United States Attorney's office in Manhattan has "extensively used closed proceedings" for accepting guilty pleas and sentences, according to a Federal audit.

The audit, by the General Accounting Office analyzed the plea practices over the last four years of 12 of the 93 United States Attorney's offices and found the office of the Federal prosecutor for the Southern District of New York, in Manhattan, to be the worst offender. The offices covered in the survey were chosen because they had either the highest criminal caseload or the lowest.

Under Department of Justice guidelines, prosecutors must obtain approval of the department before allowing a secret plea or sentence. The department presumes that judicial proceedings will be open to the public, but on occasion has supported a prosecutor's decision to close such proceedings usually if the life of a witness or defendant is in jeopardy.

Right of the Public at Issue

First Amendment scholars have said that the practice of closed proceedings raises a significant constitutional question. At issue is the right of the public to view the process in order to prevent collu

sion in the taking of a plea and the right of public access to court proceedings.

John S. Martin Jr., who stepped down last month as the United States Attorney for the Southern District of New York, permitted secret pleas. Mr. Martin said in a telephone interview that he had not seen a copy of the audit but defended his use of closed proceedings.

"The whole thing is a tempest in a teapot," he said, adding that he had used the procedure only when he feared that publicity might endanger a defendant's life or compromise an investigation.

"I think sealed pleas serve a legitimate purpose," Mr. Martin said. "It's a better system than private plea bargaining." He said he always had a trial judge supervise such secret proceedings.

Successor Deplores Practice

On the other hand, Rudolph W. Giuliani, who succeeded Mr. Martin last month, said he deplored the practice of taking pleas or sentences in secret. He said his predecessors had failed to follow Federal rules when they did so. Until he took his new post, Mr. Giuliani, was Associate Attorney General, or third ranking officer in the Justice Department. In this position, he investigated the secret proceedings in the Southern District. He said a monitoring system to allow for timely disclosure was now operating.

"It offends me to have a good deal of what went on in this court be secret," Mr. Giuliani said in an interview. "It offends me philosophically and personally."

Mr. Giuliani said he agreed with the audit's recommendation that secret pleas and sentences taken in past years by the office be unsealed as soon as possible. He said that he would try to reconstruct the files, but that that might not be possible because the office had not maintained records of closed proceedings.

The audit, requested by the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, followed an account in The New York Times last year that said that at least 75 defendants had been permitted to plead guilty to criminal charges in secret proceedings in Federal District Court in Manhattan in 1980 and 1981.

Why Some Took Secret Pleas

Several assistant United States attorneys told the auditors that they sometimes accepted secret pleas because "aggressive defense attorneys pressure the United States Attorney's Office to have their cooperating clients shielded."

In interviews, the auditors said they could not determine how widespread the current secrecy practices were because the Justice Department had refused to survey all 93 United States Attorneys' offices. As associate attorney general, Mr. Giuliani had conducted a survey of 20 of these offices—those in high crime districts—and had found that they rarely used such practices.

A prosecutor can achieve the same results without closing a hearing, Mr. Giuliani said. That is, the person who agrees to cooperate first obtains the information for the prosecutor and then pleads

guilty—usually to a reduced charge—in open court. What happened in the Southern District, he said, was that a cooperating witness secretly pleaded guilty and then gathered information for the prosecutor.

The auditors said that with no records records available they had been forced to rely on the "recollections" of 16 assistant United States attorneys in New York. According to the auditors, the prosecutors told them that in the last four years they had been involved in 42 closed pleas and 6 closed sentencing proceedings. There are about 80 assistants in the office assigned to the criminal division.

Independent Actions Cited

In some instances, auditors said, assistant United States attorneys in Manhattan entered into secret negotiations on their own, without getting permission from a superior.

In some instances the prosecutors obtained permission from the chief of the Criminal Division of the Justice Department. Both instances violated Federal guidelines, according to the audit.

Under the current system, a United States Attorney decides when to unseal a secret plea and when—if ever—to announce it publicly. One change that occurred after the practice of secret proceedings was disclosed was that the public was notified of closed plea proceedings by a listing of such a case as "U.S.A. vs. John Doe" on the daily Federal District Court calendar.

The calendar names the judge before whom the plea is taken; however, the proceeding is closed.

Unless the prosecutor makes a disclosure, the public does not know if and when such a case is unsealed because there is no way to distinguish one John Doe case from another.

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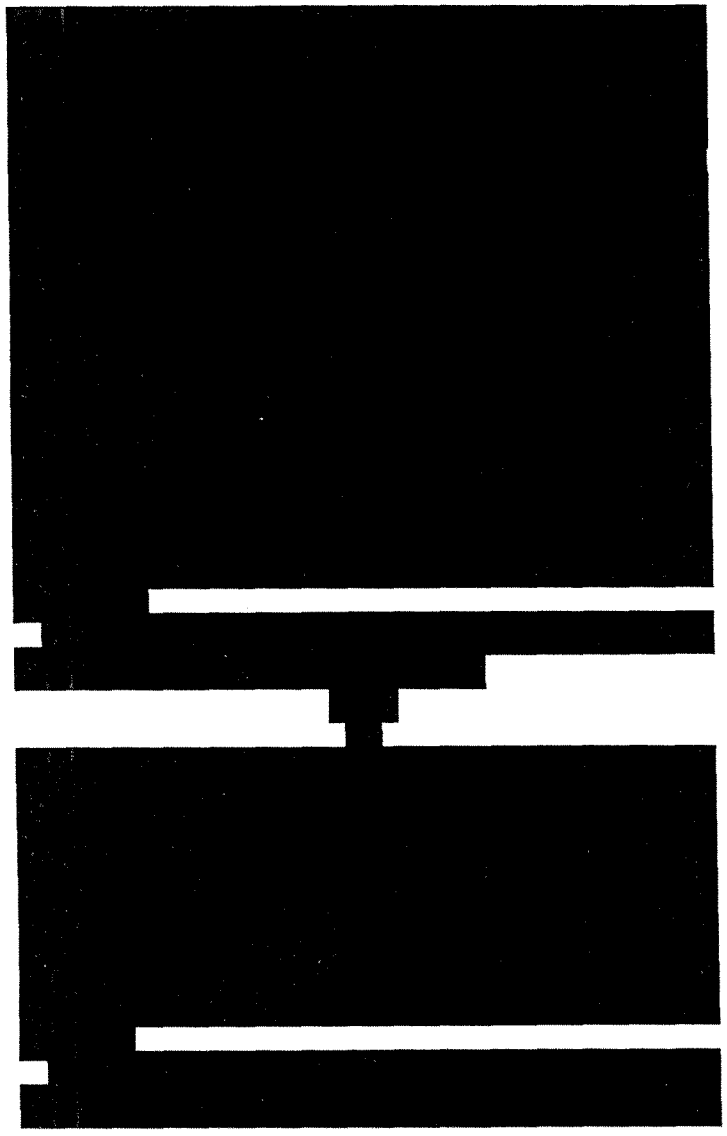

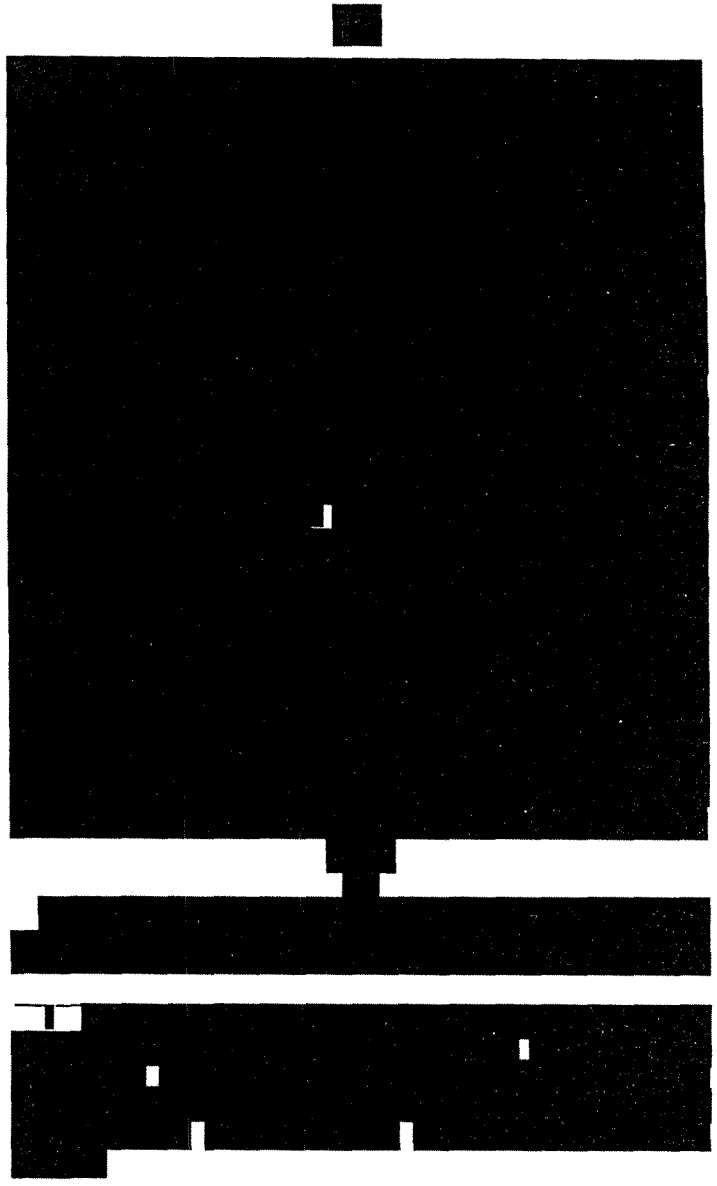

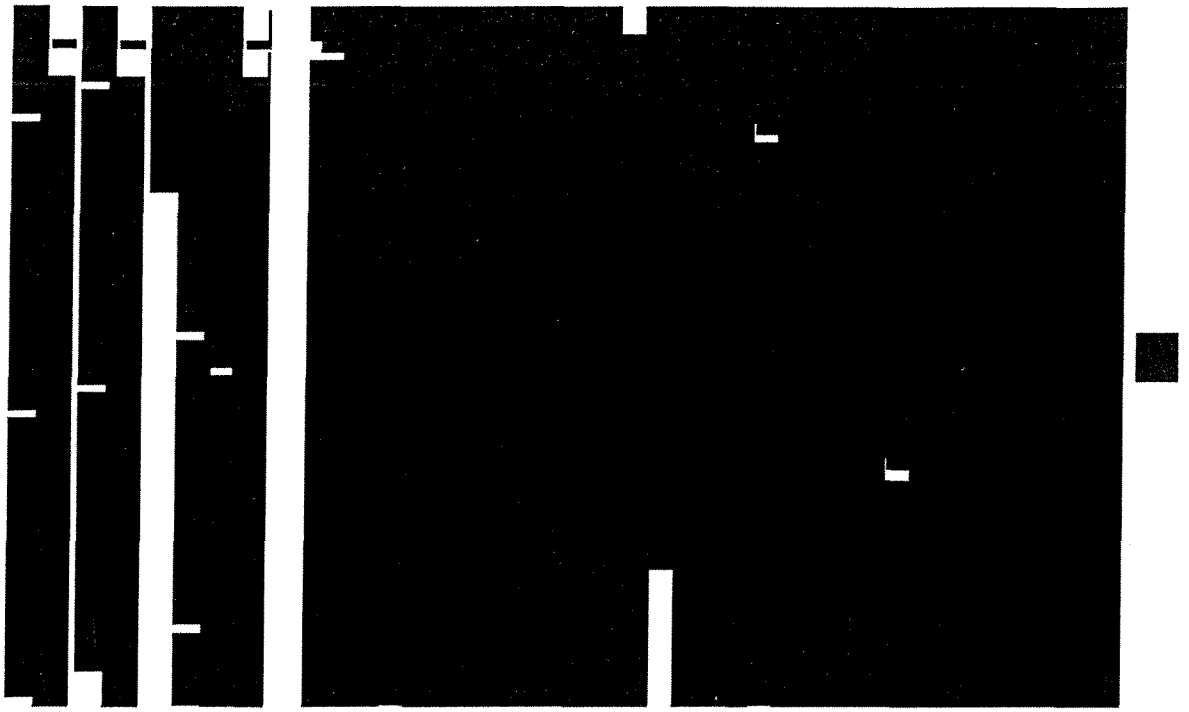

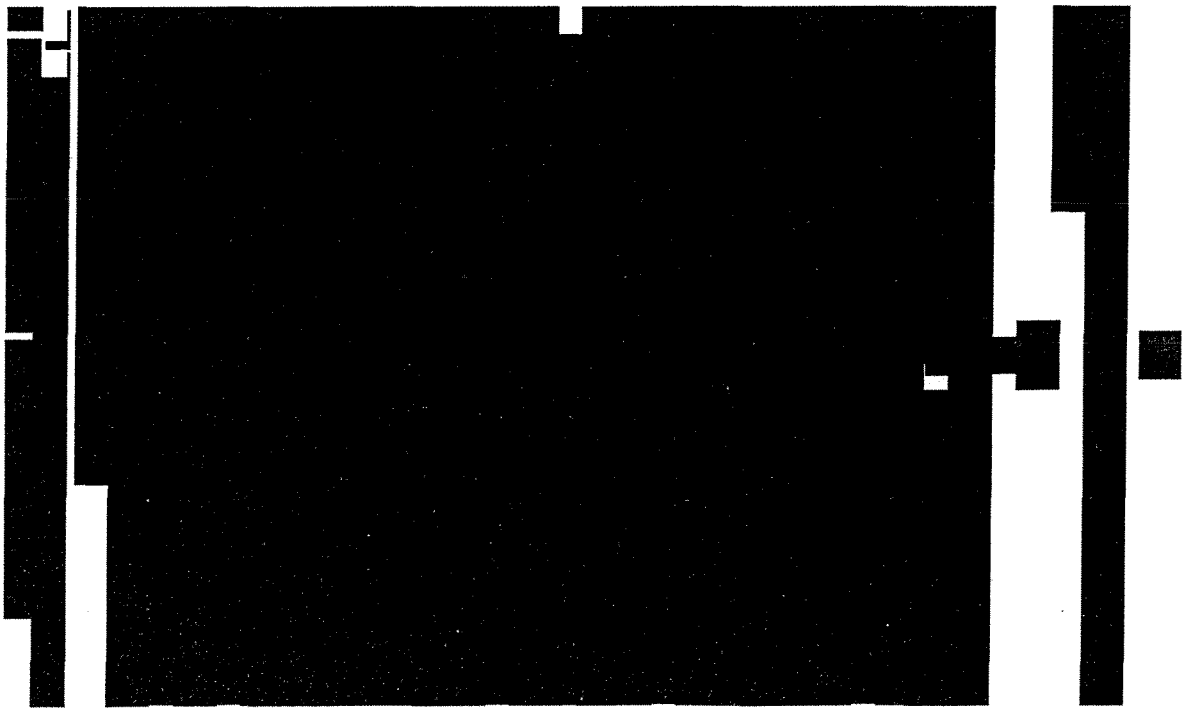

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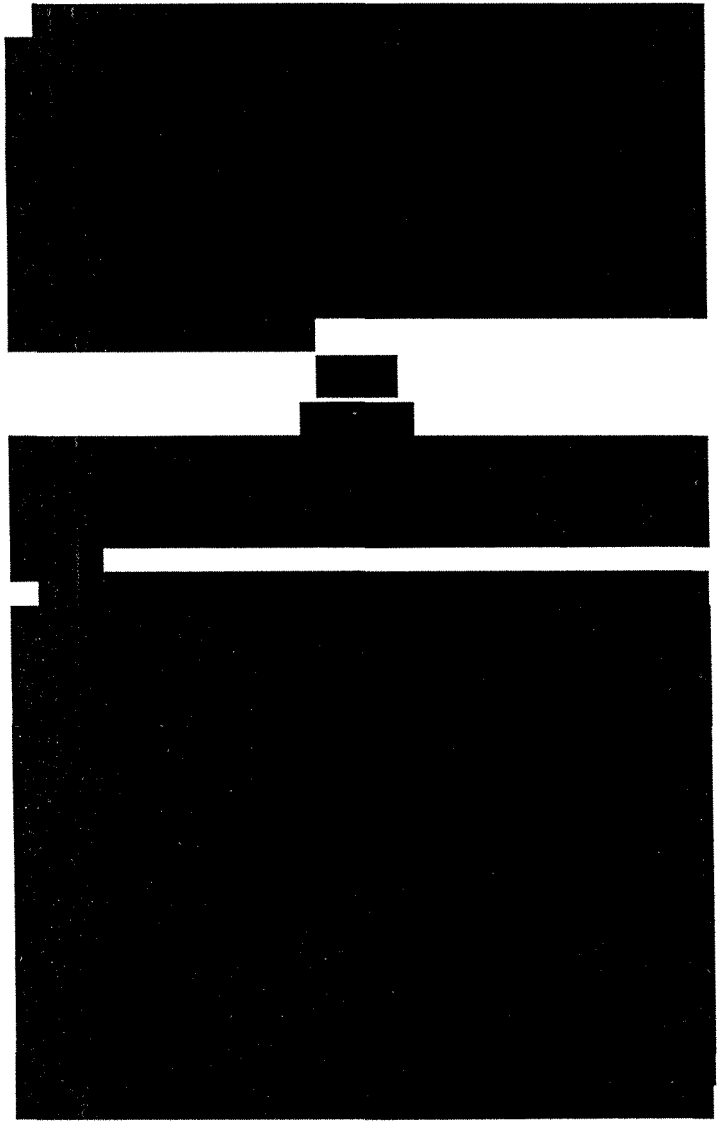

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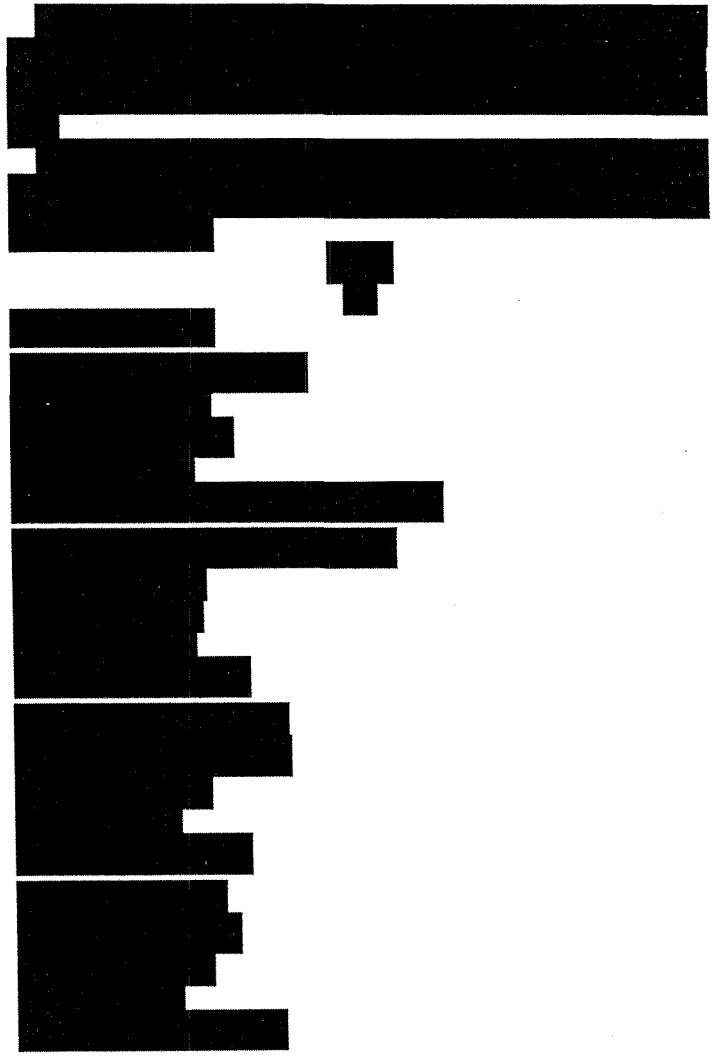

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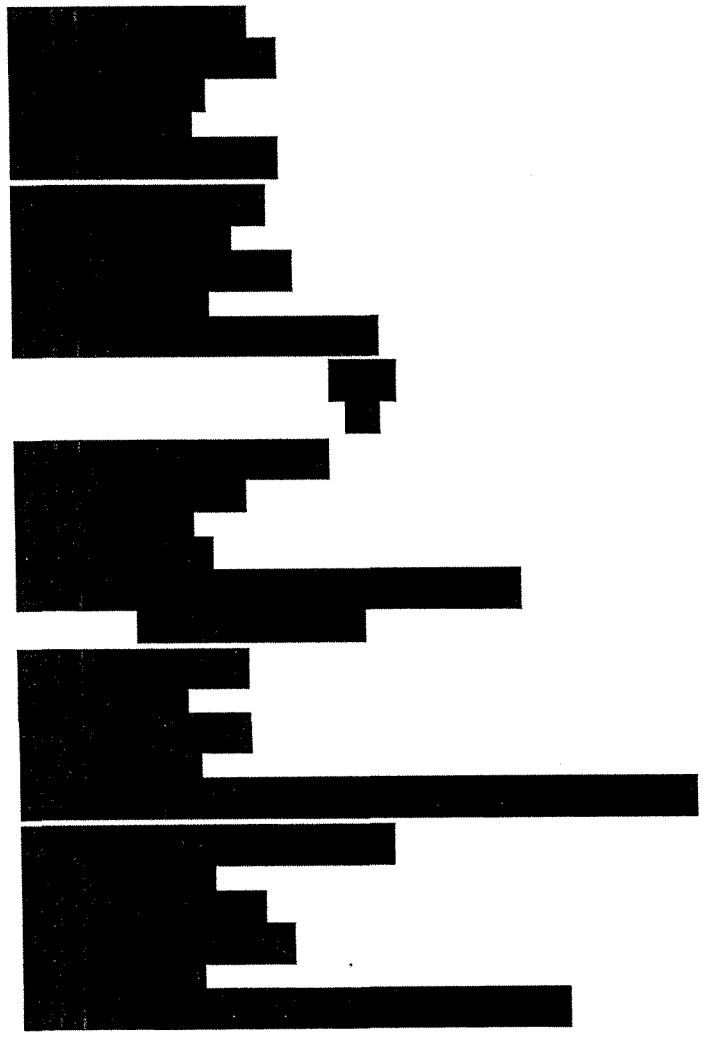

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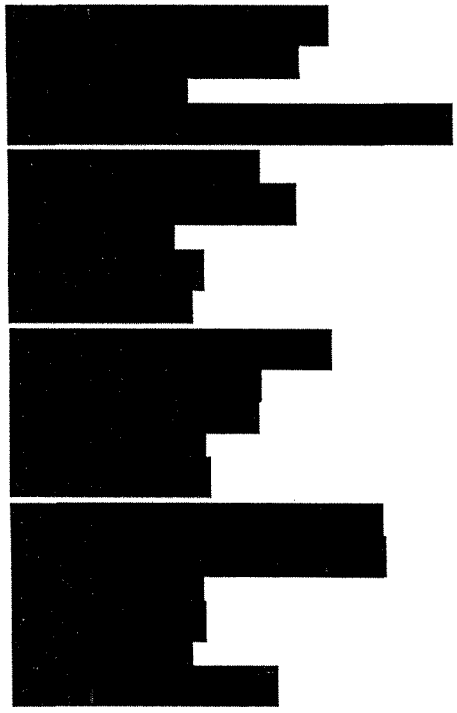

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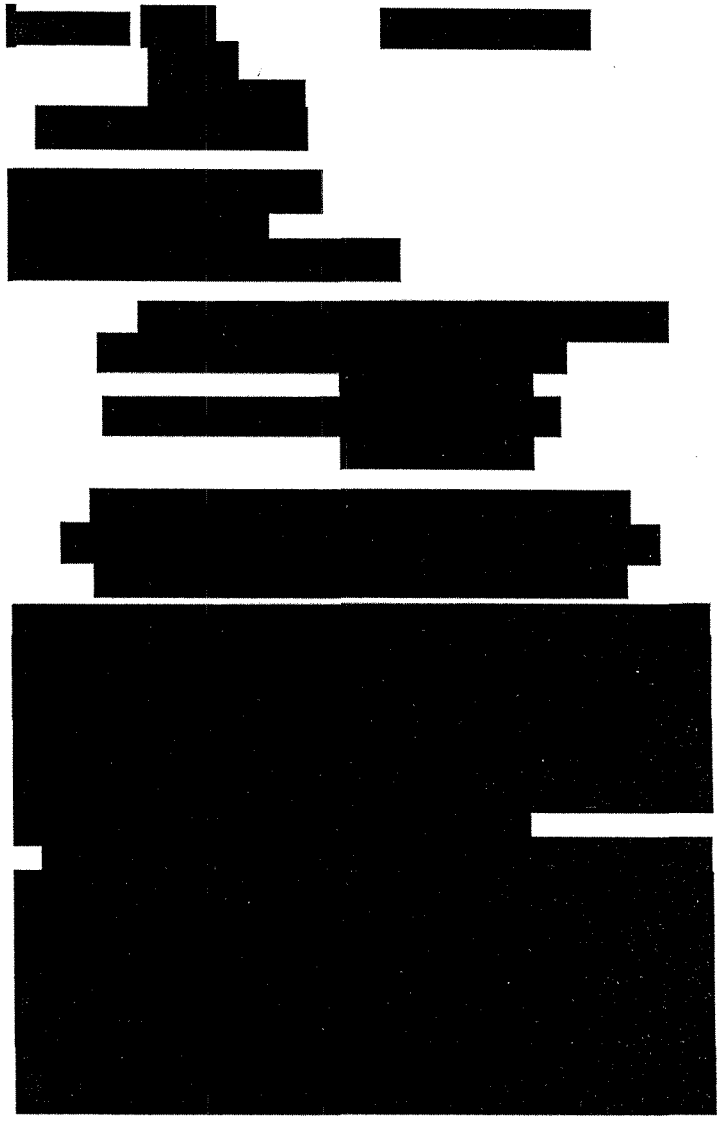

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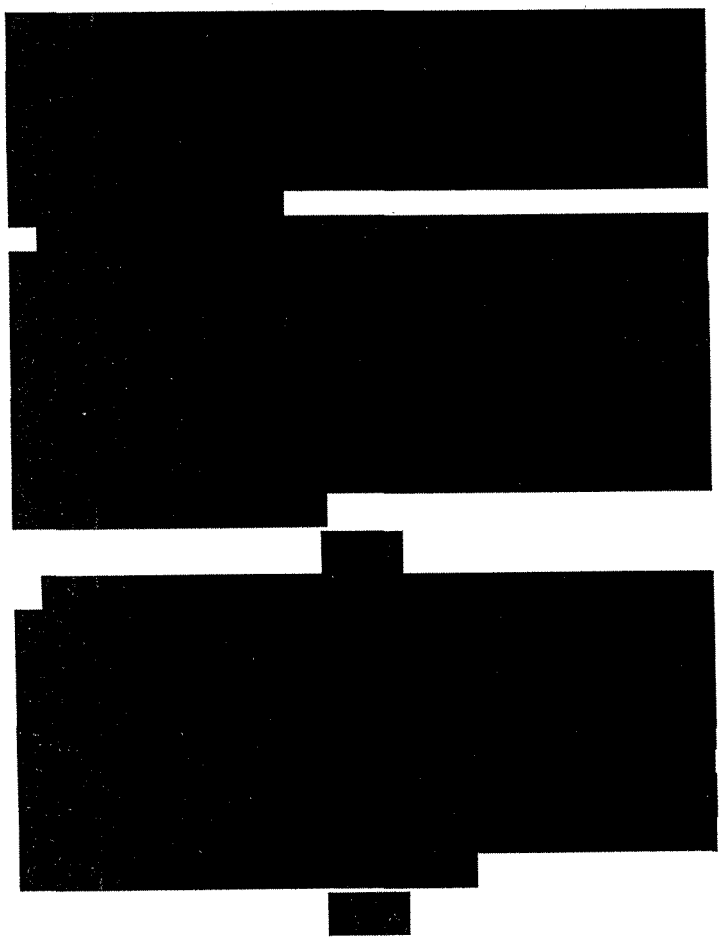

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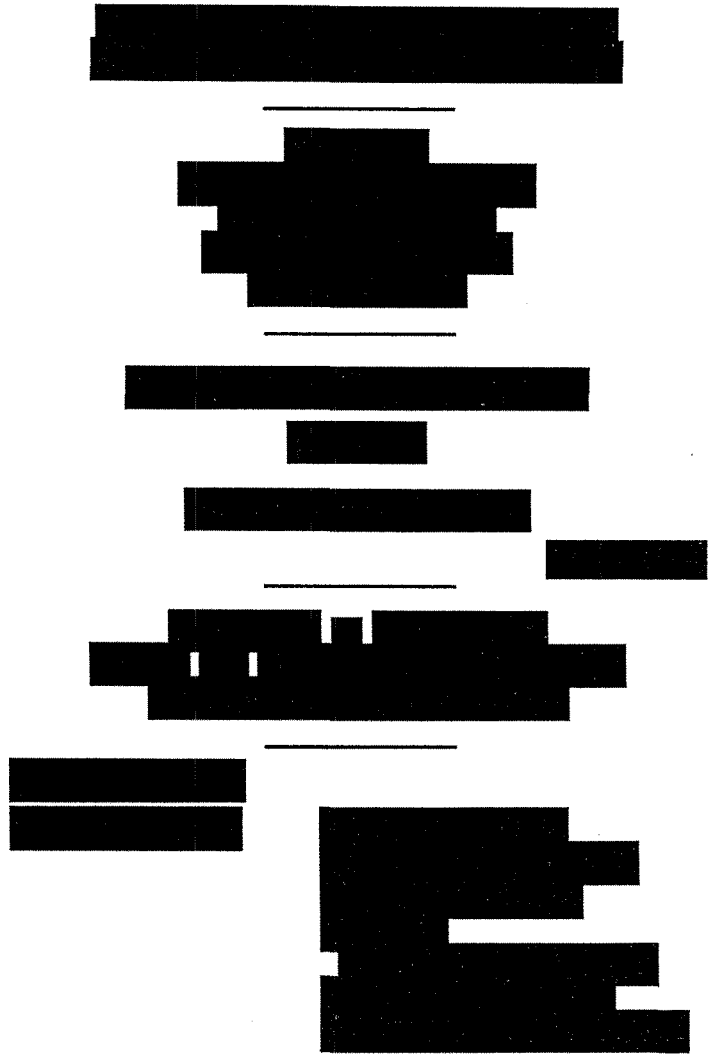

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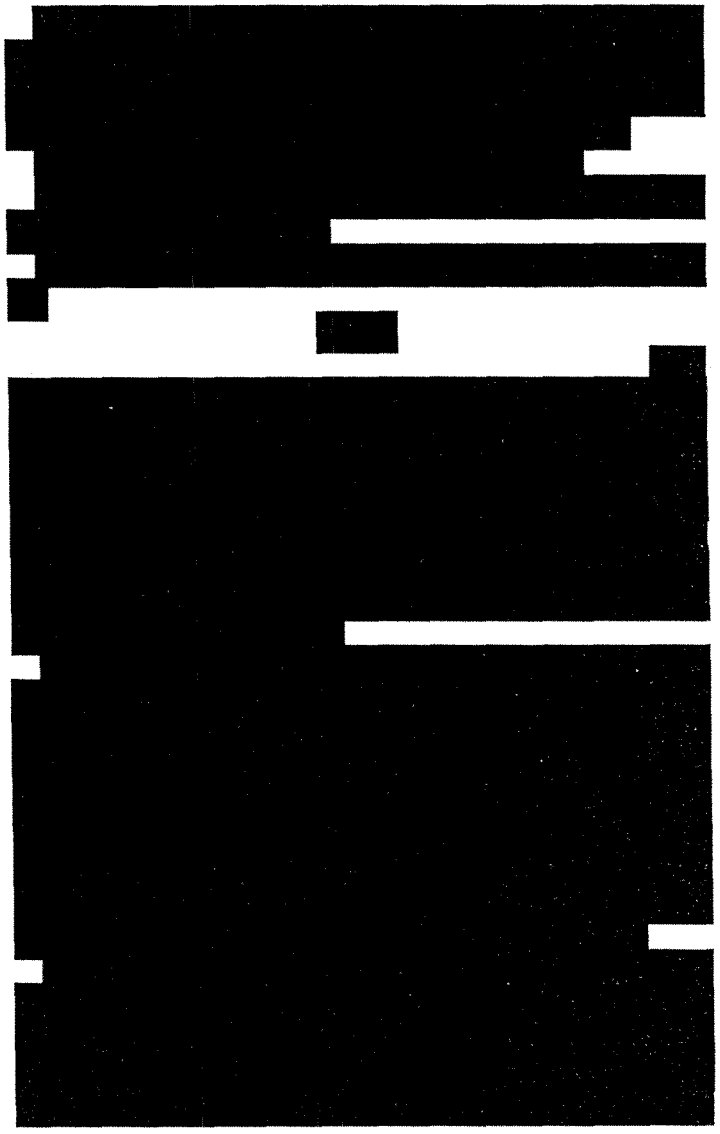

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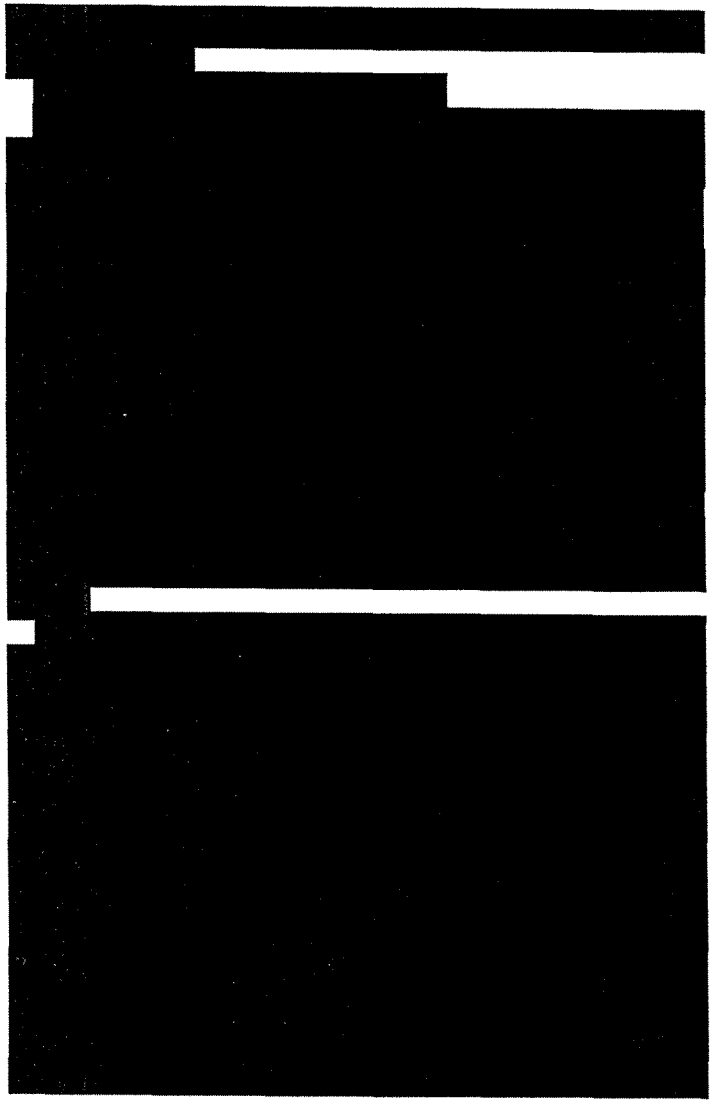

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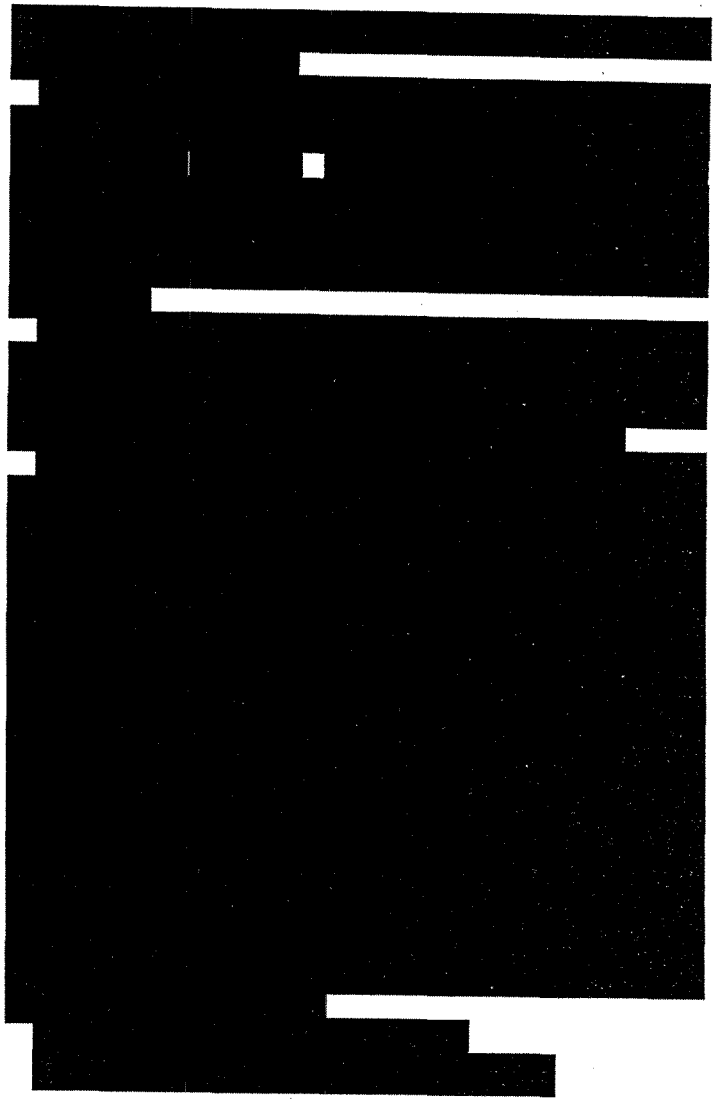

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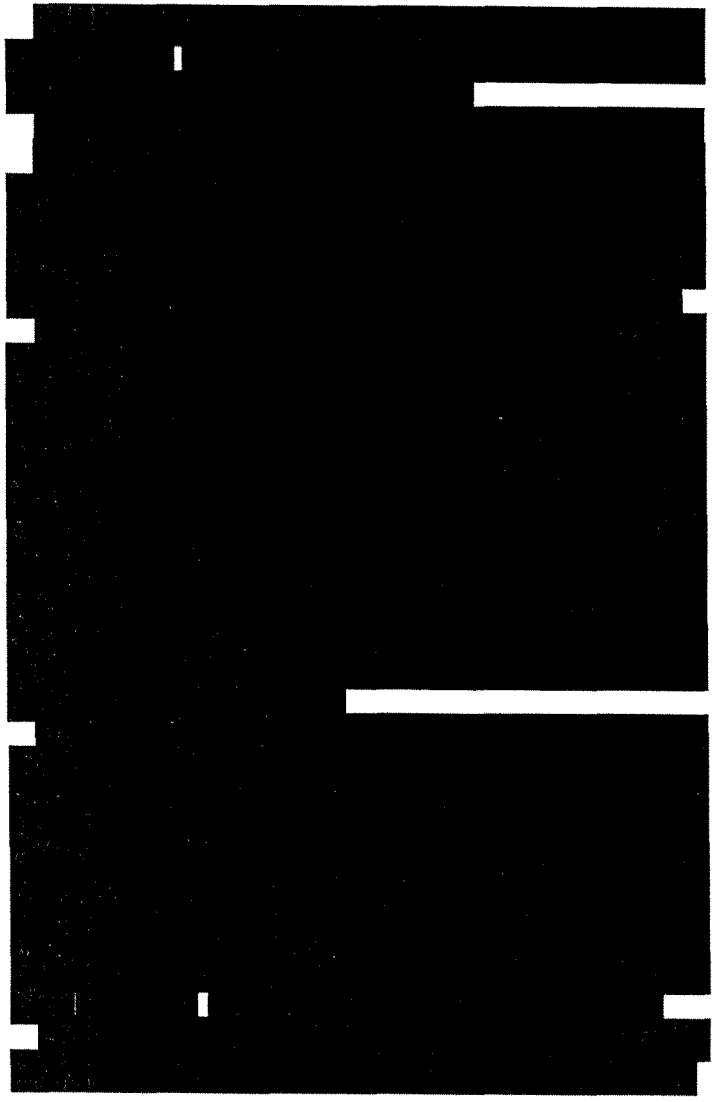

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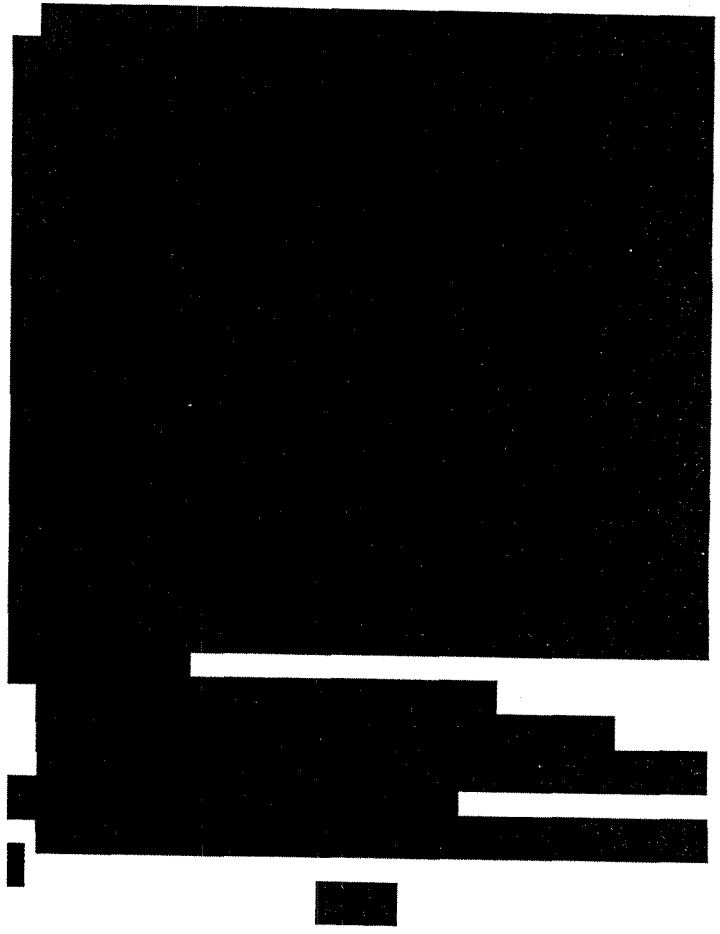

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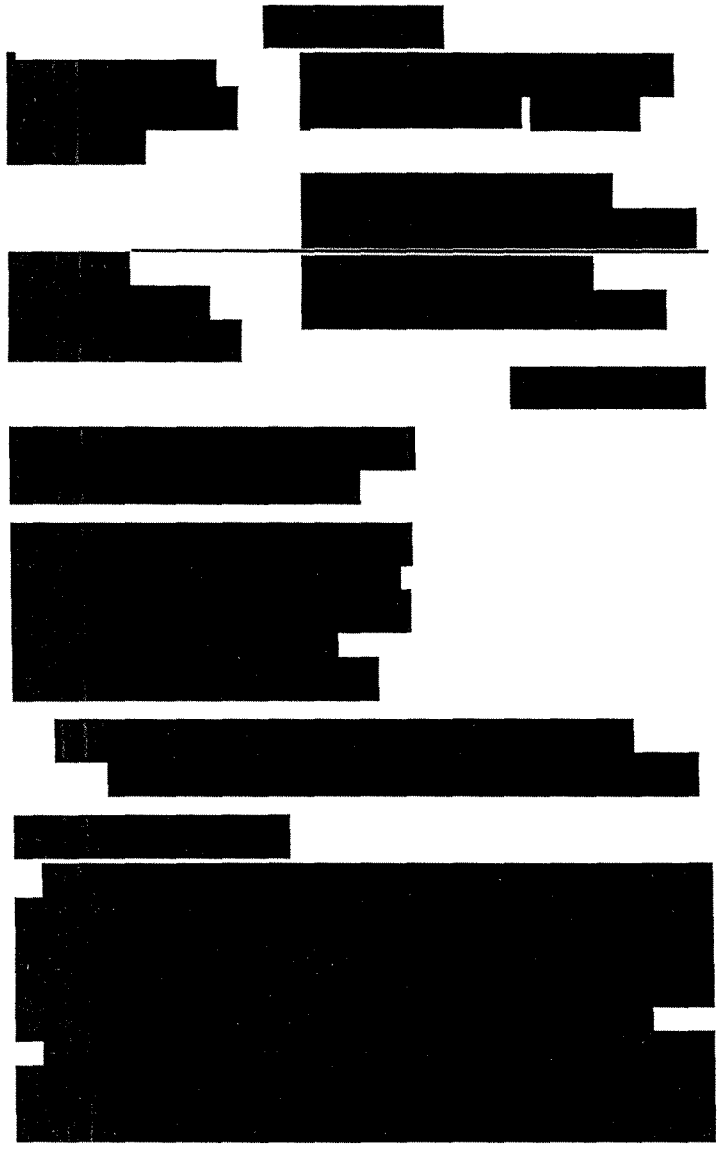

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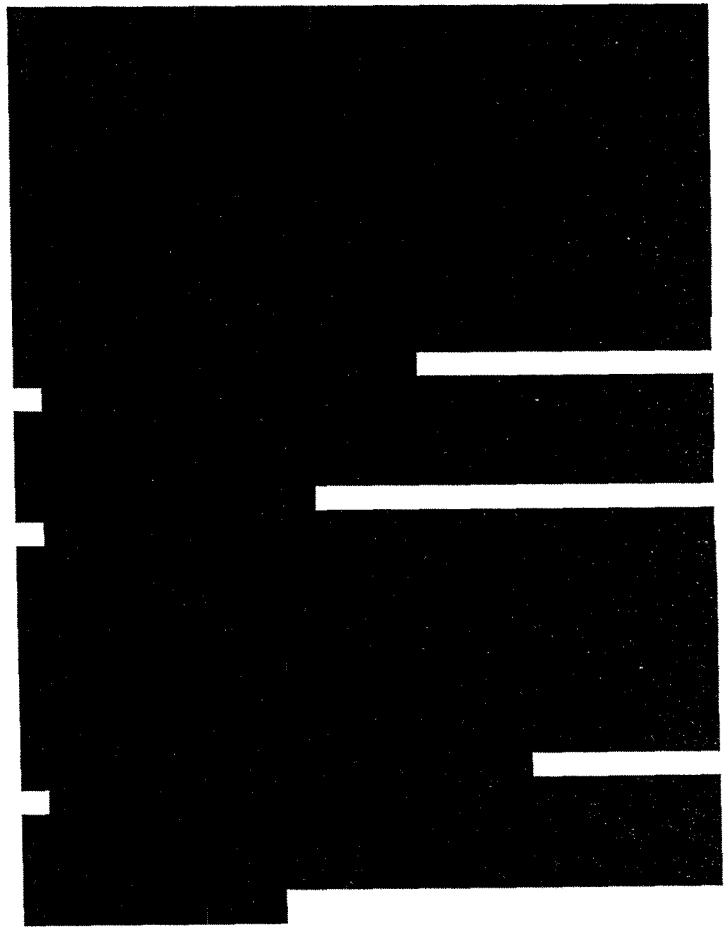

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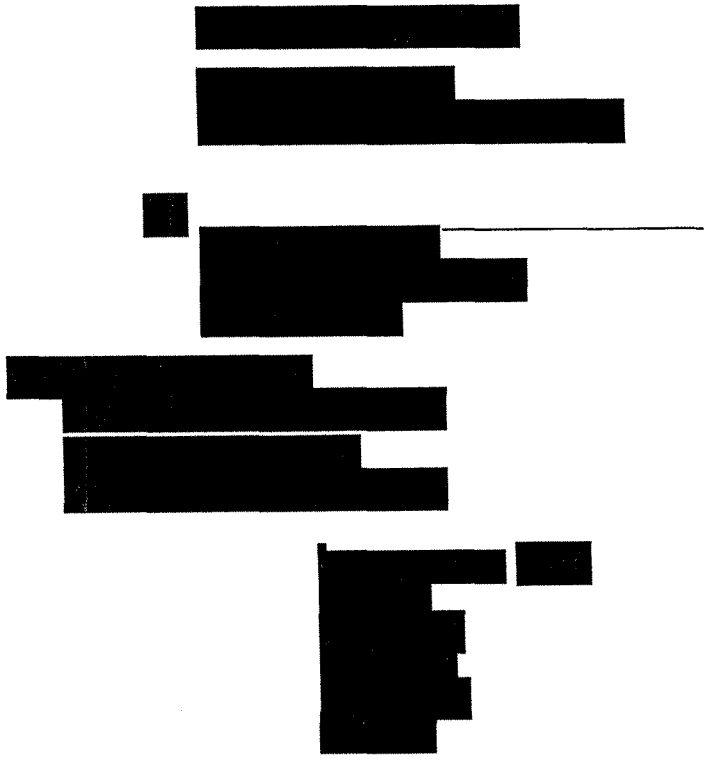

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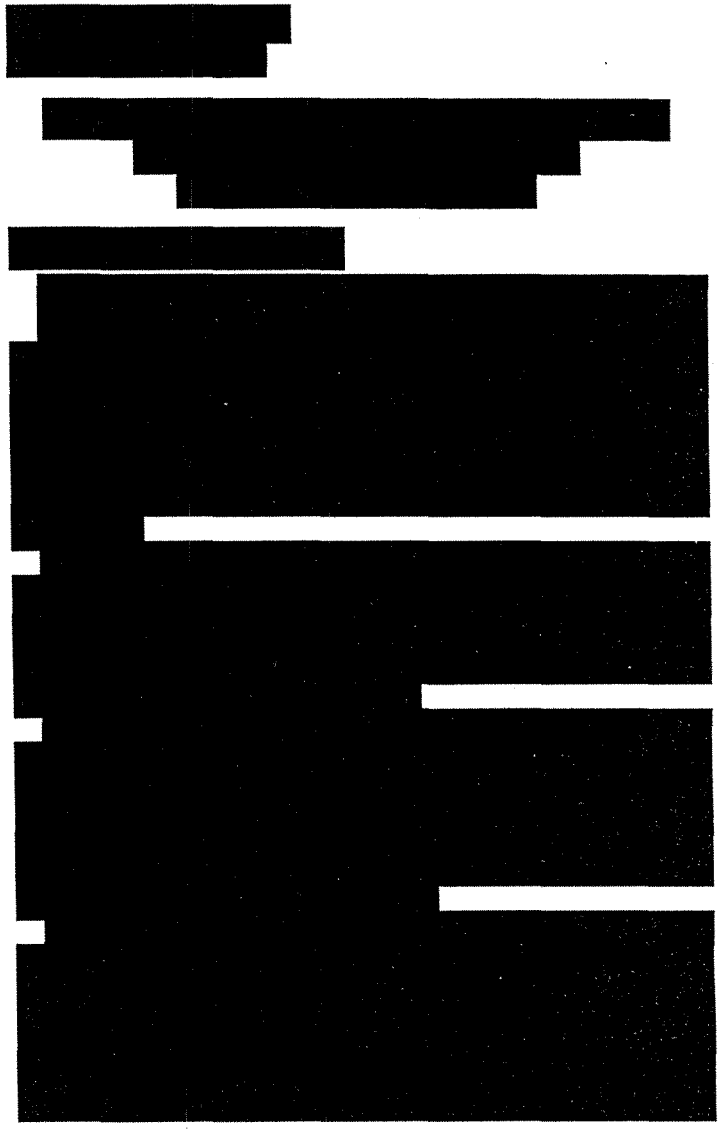

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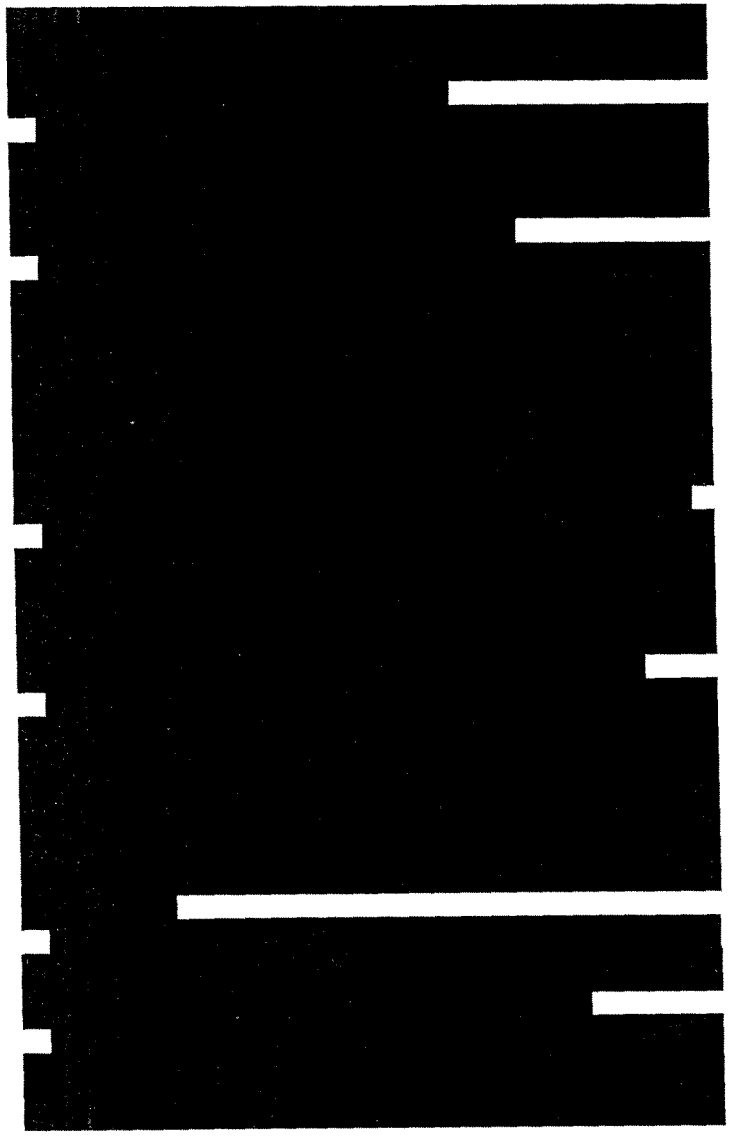

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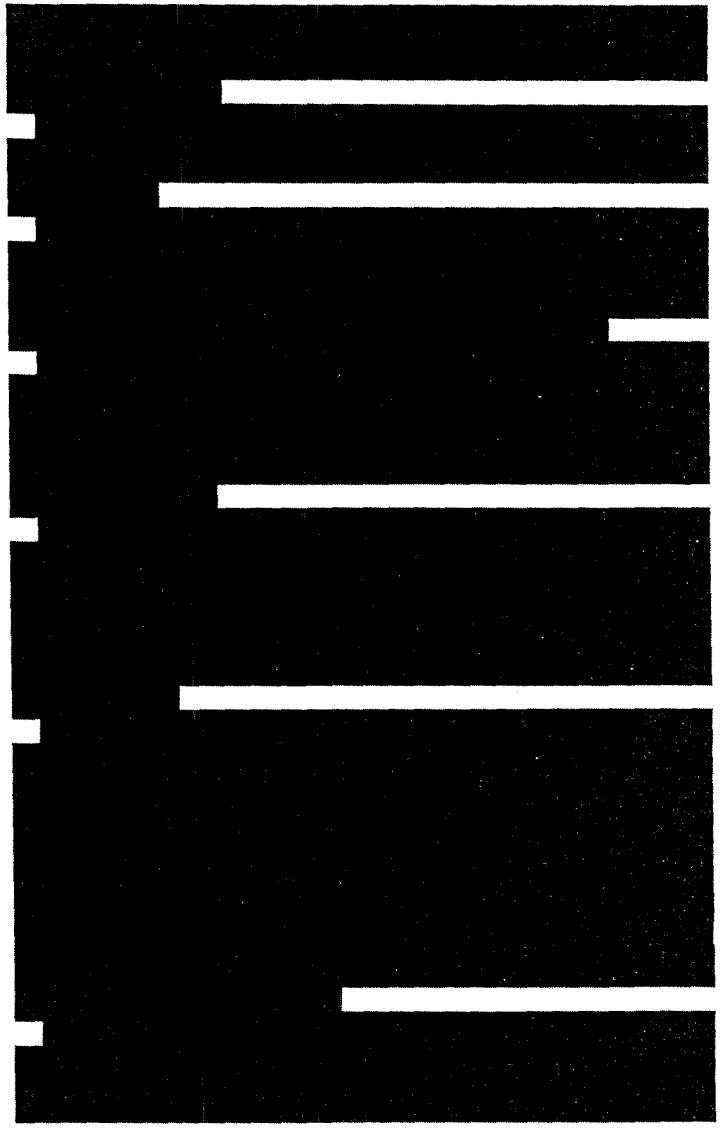

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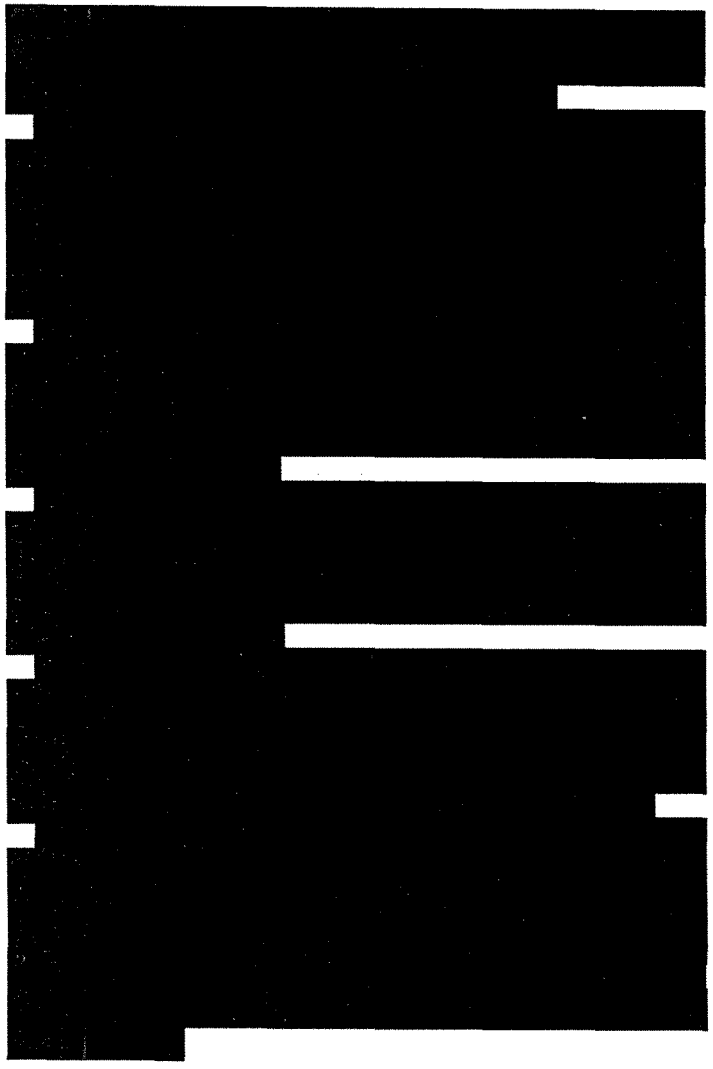

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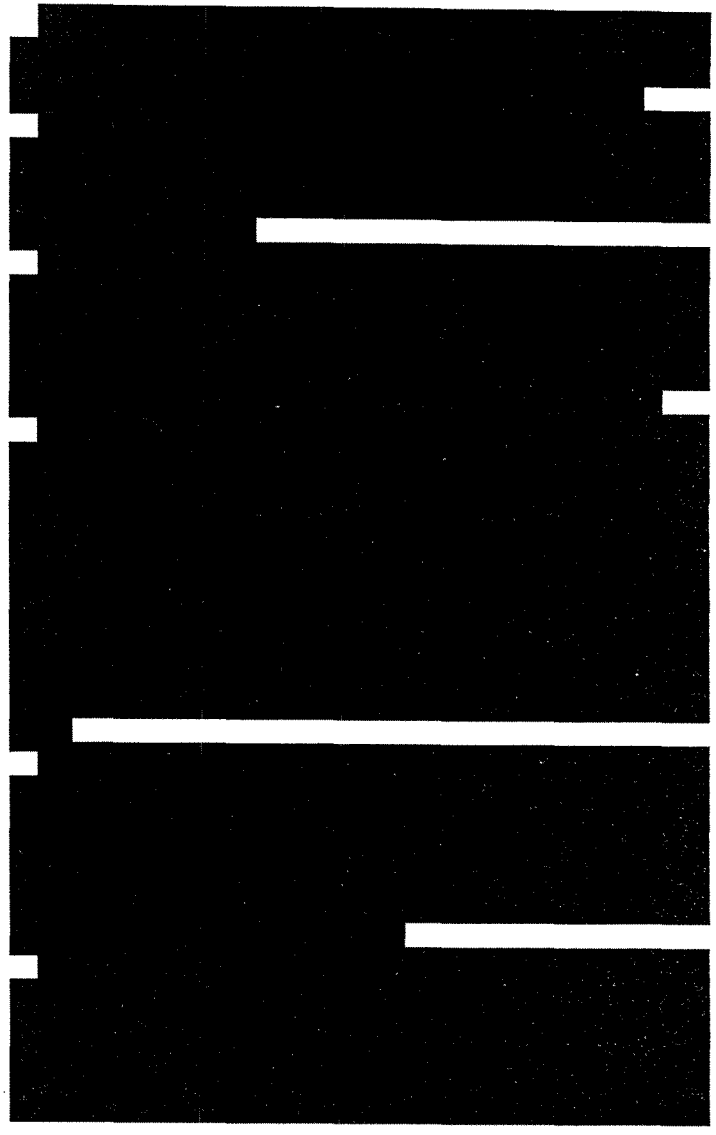

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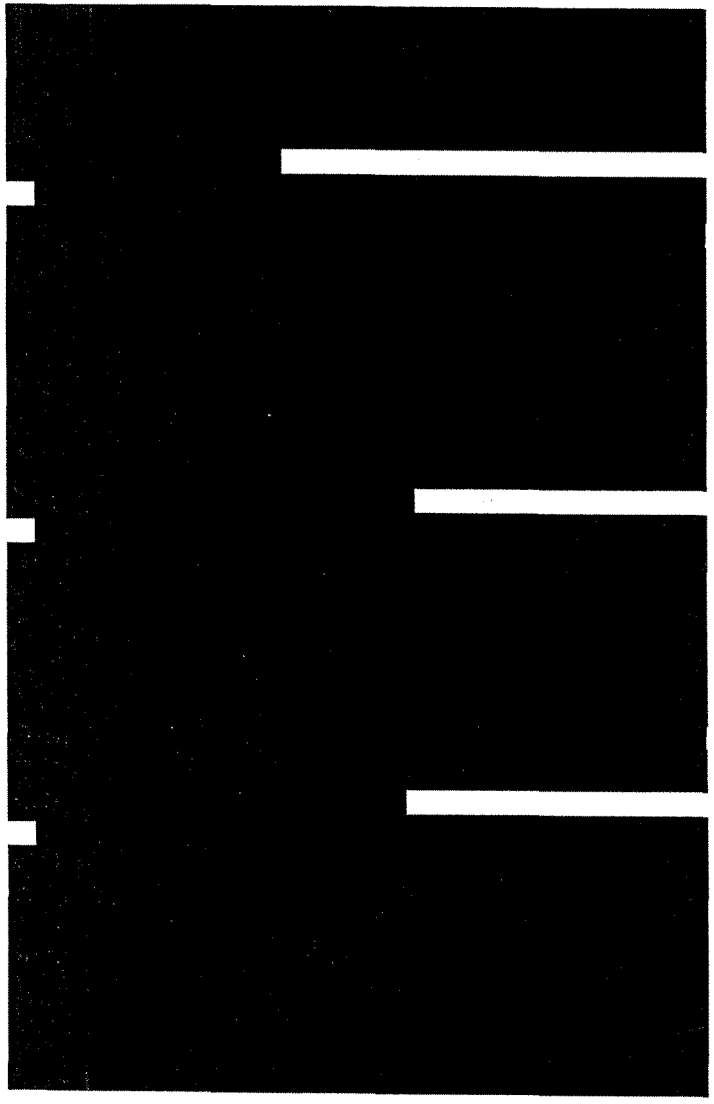

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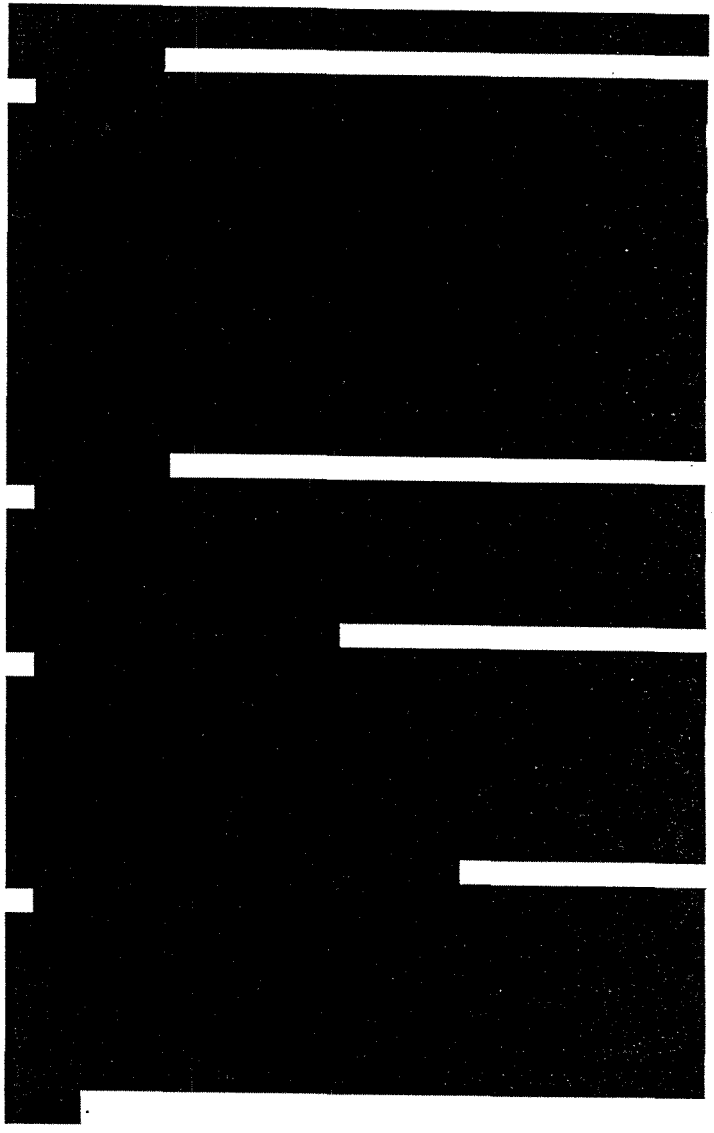

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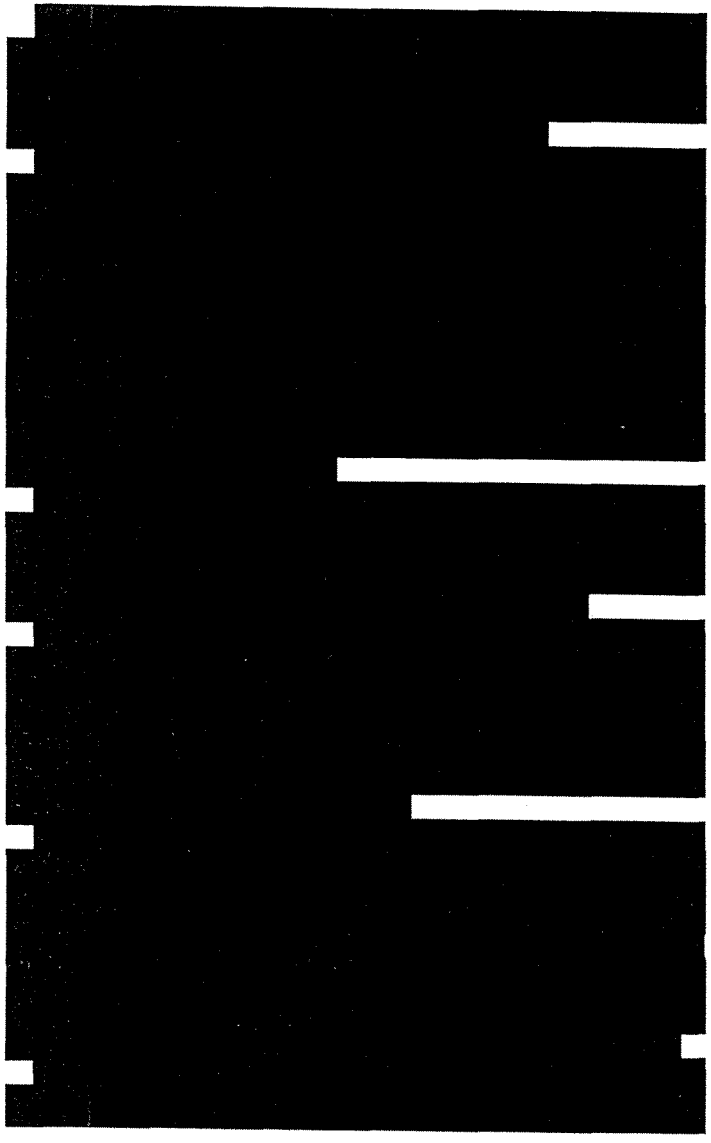

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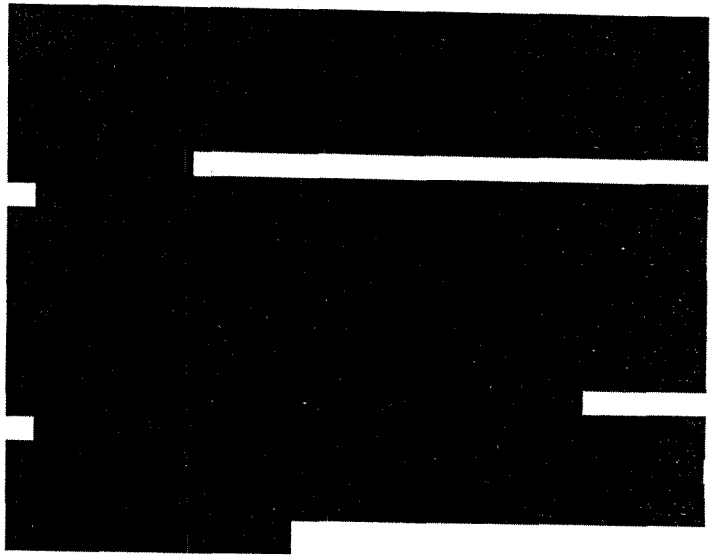

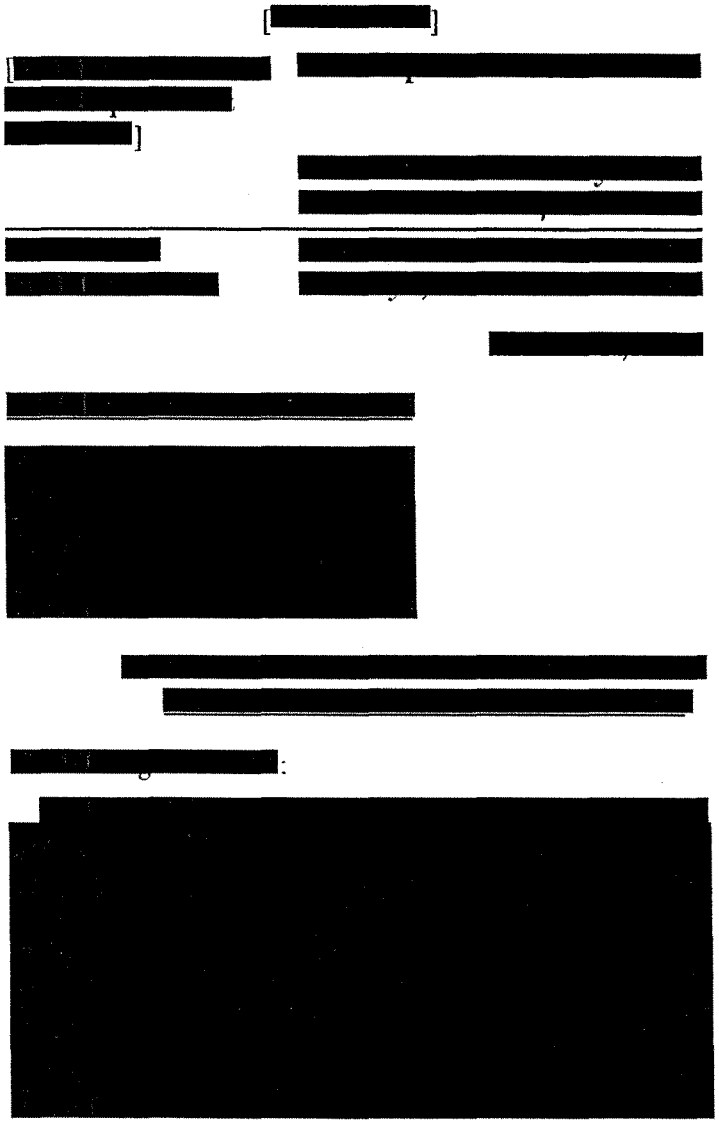

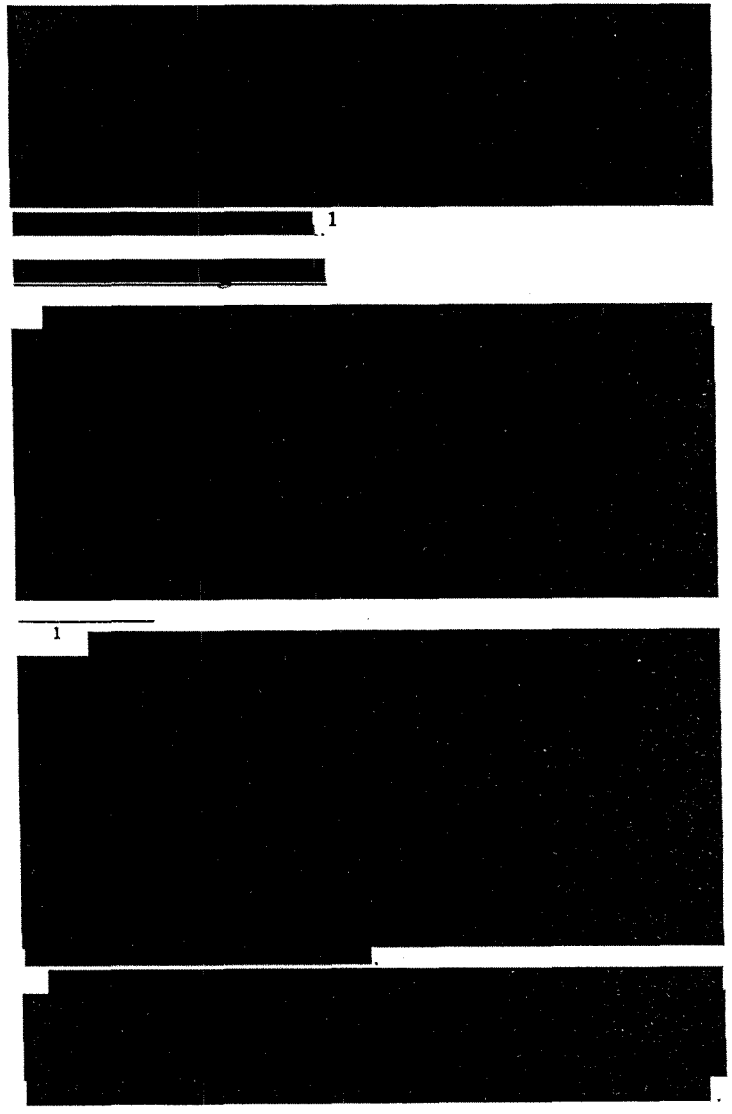

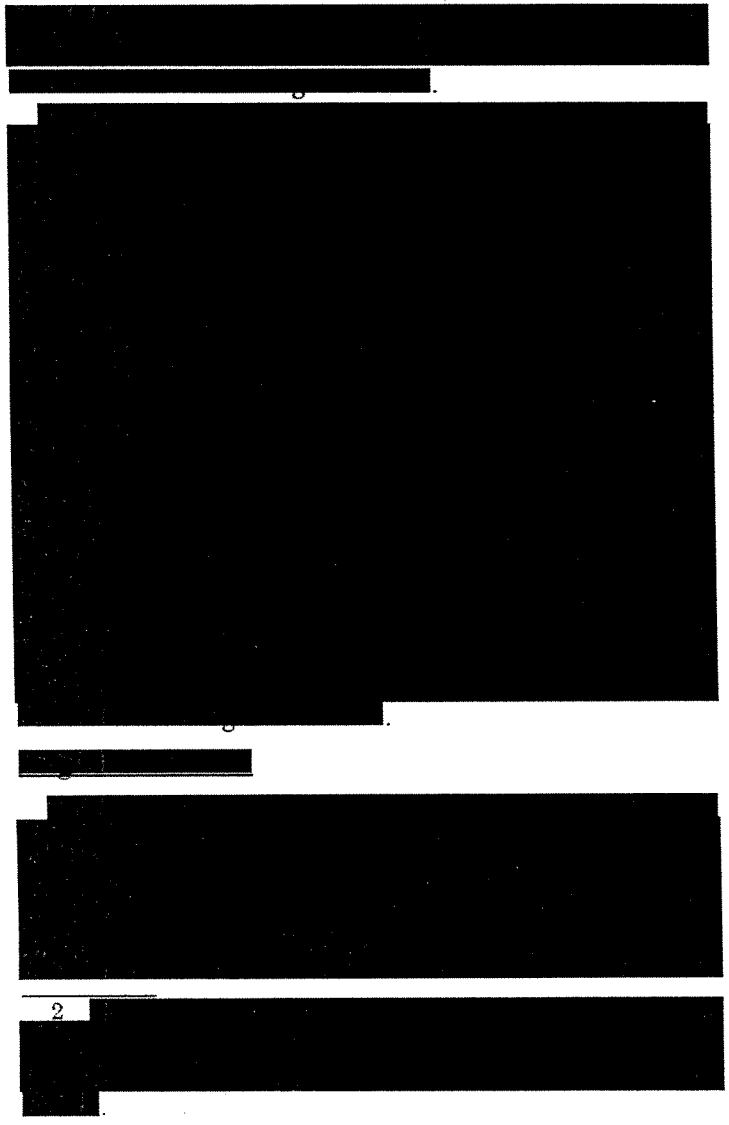

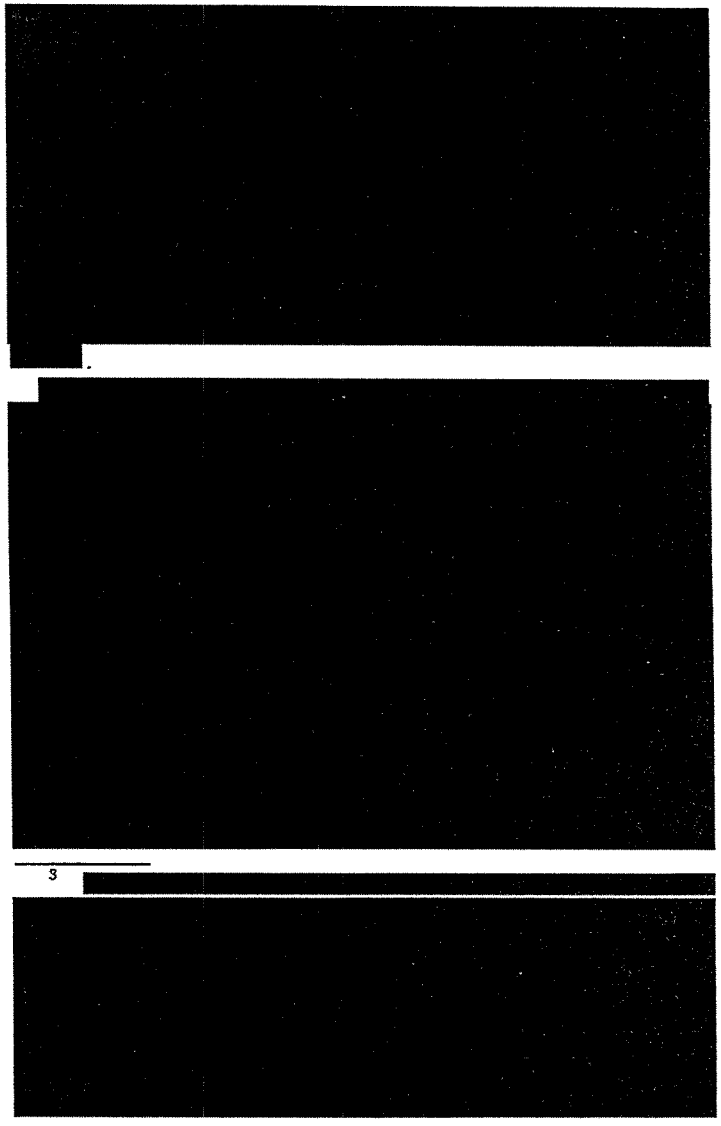

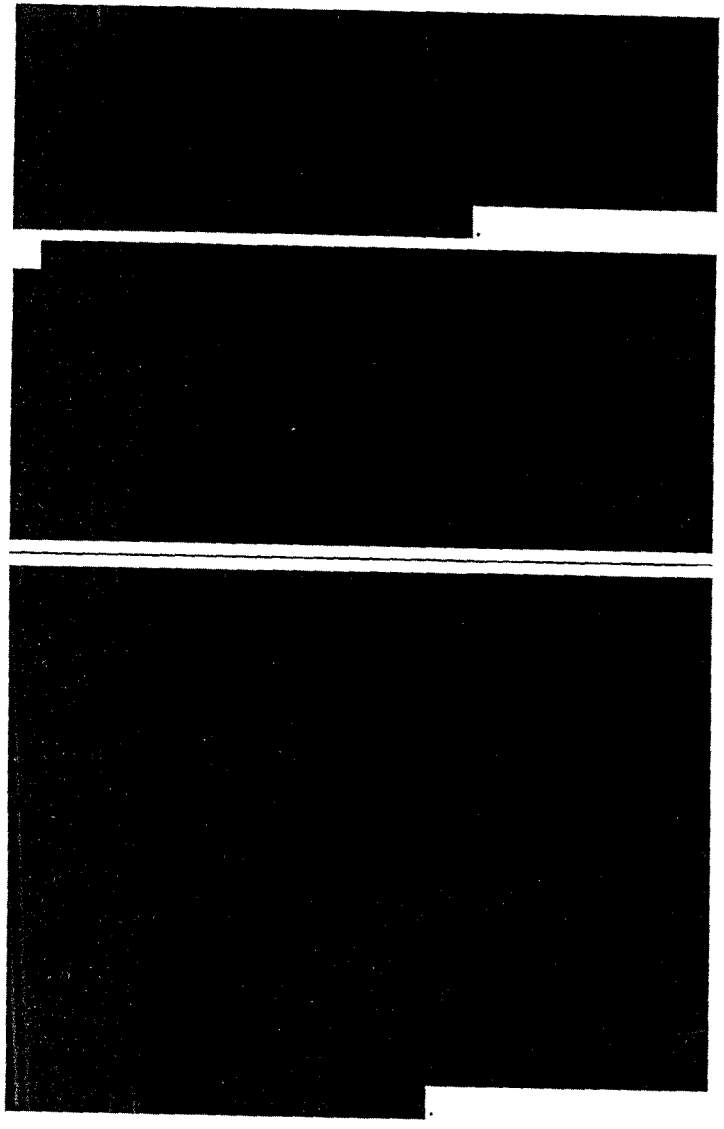

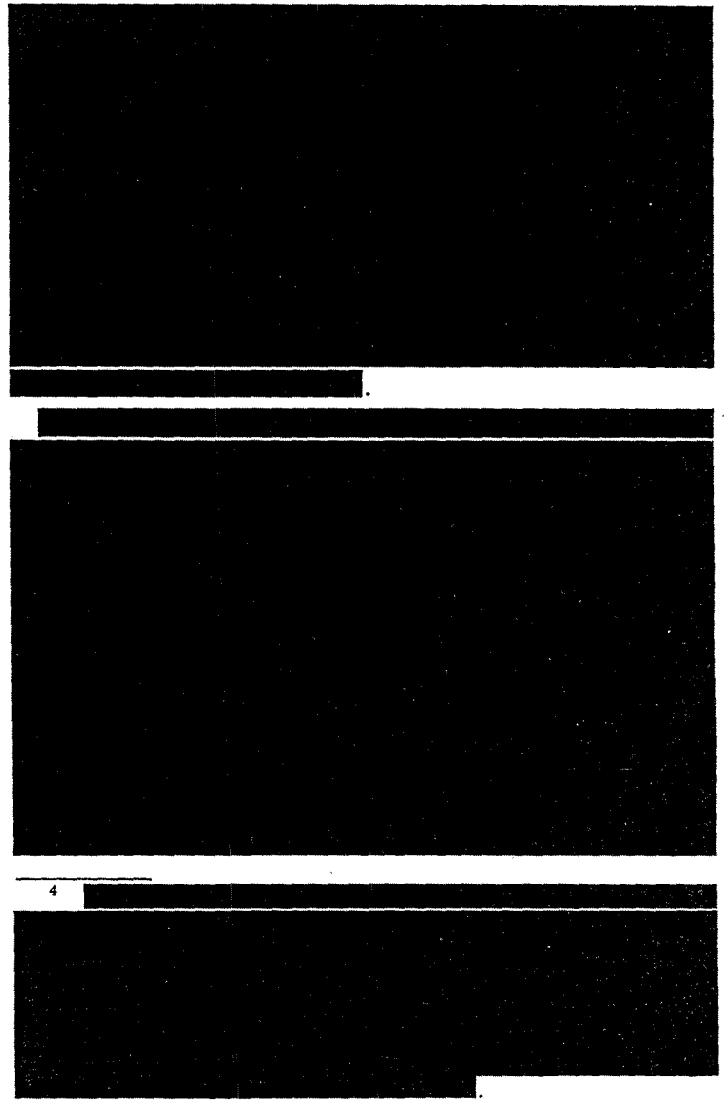

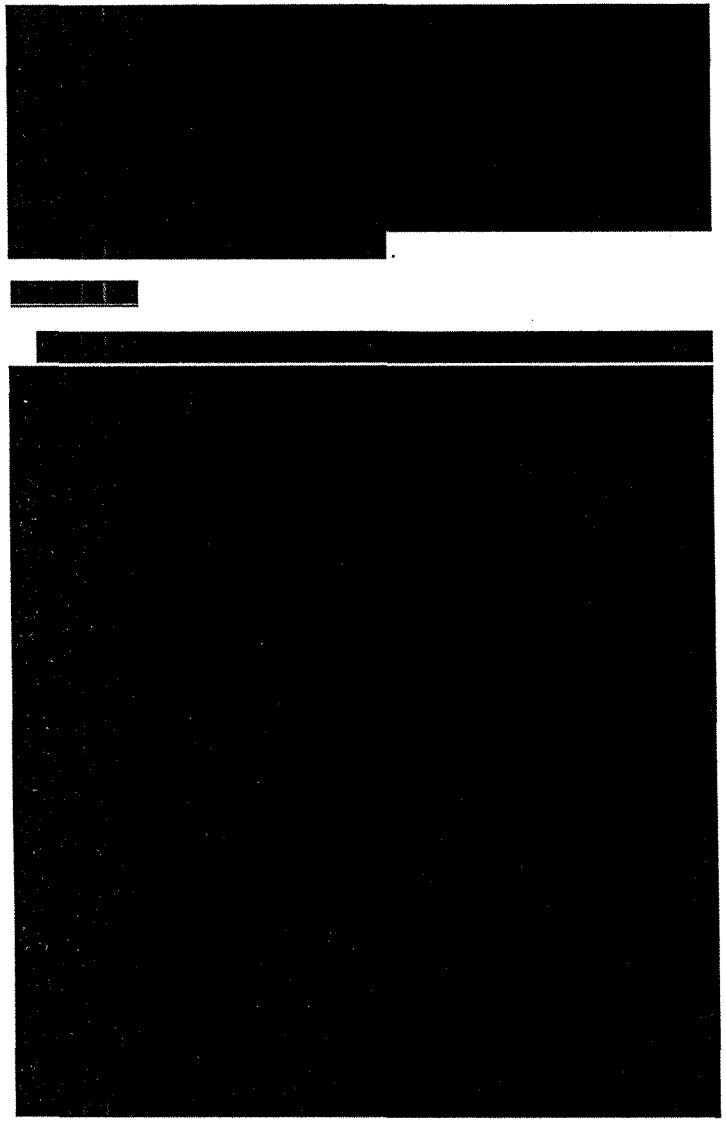

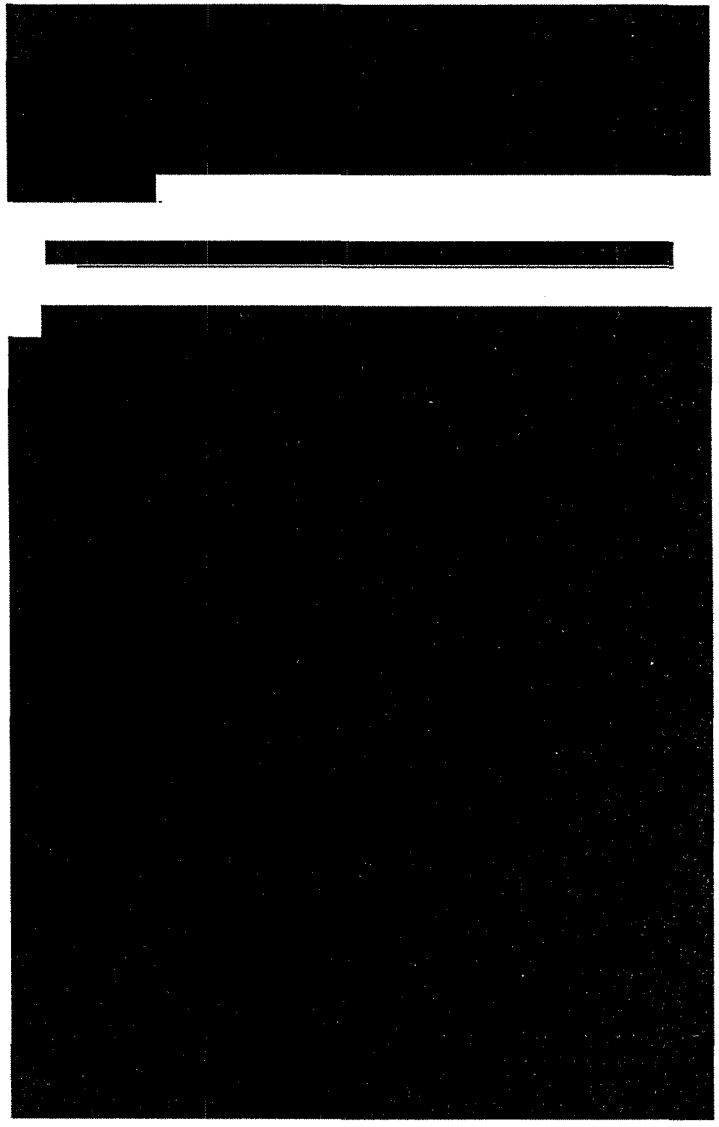

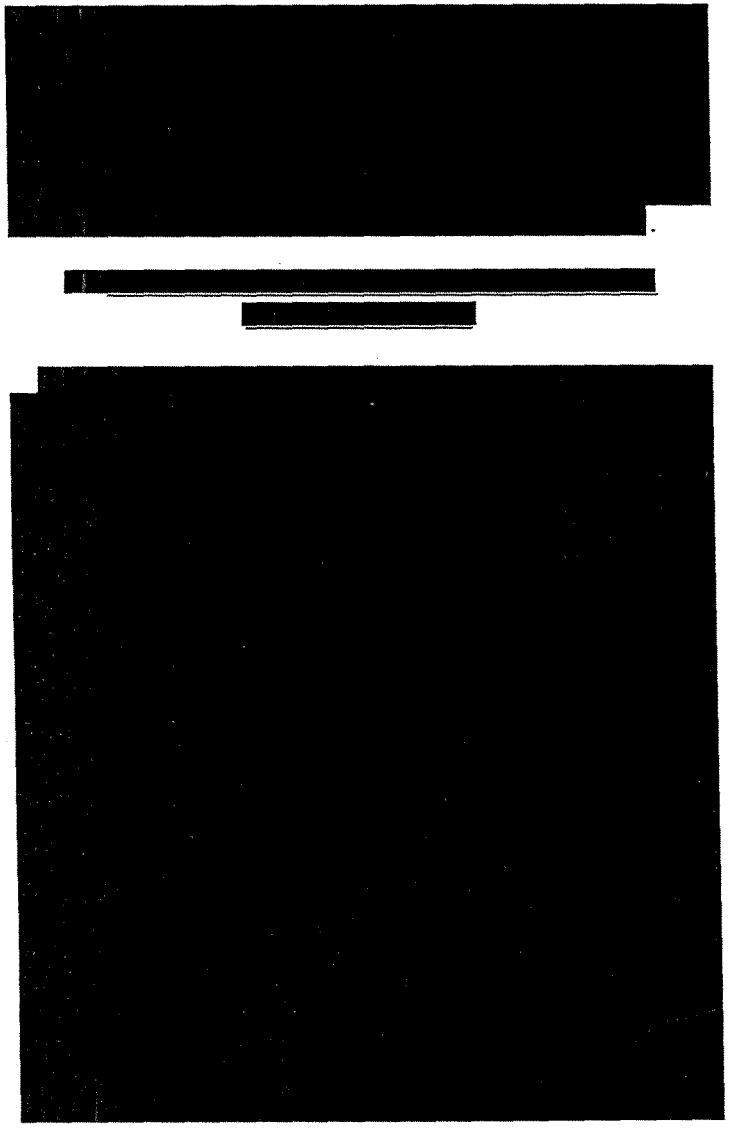

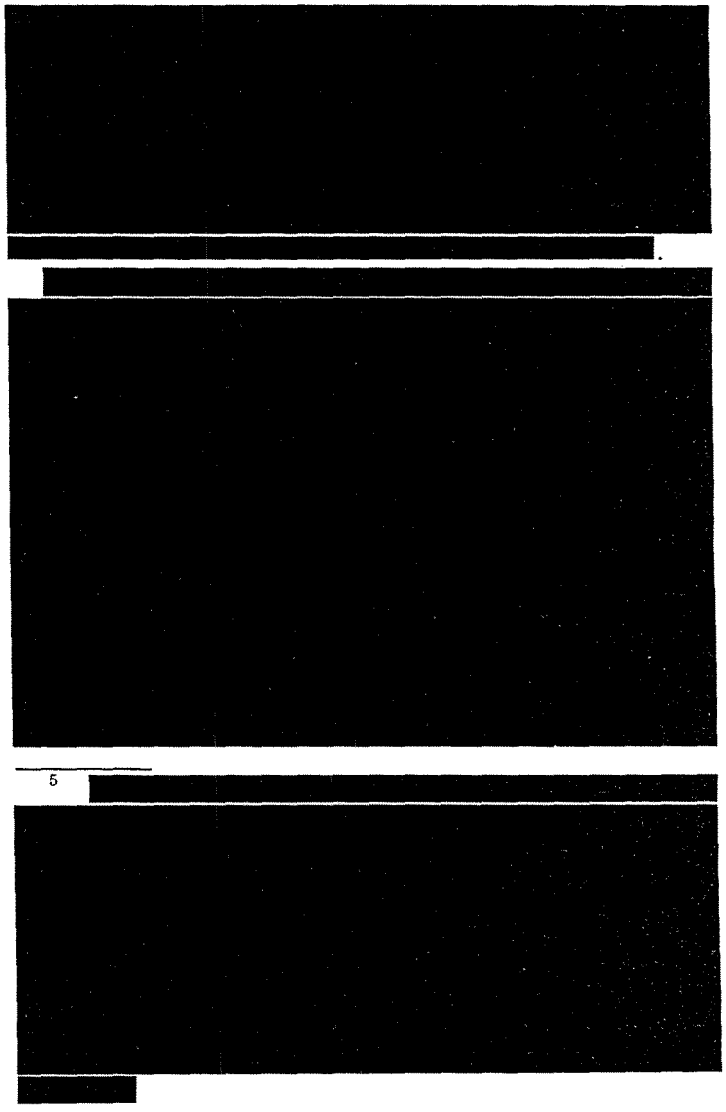

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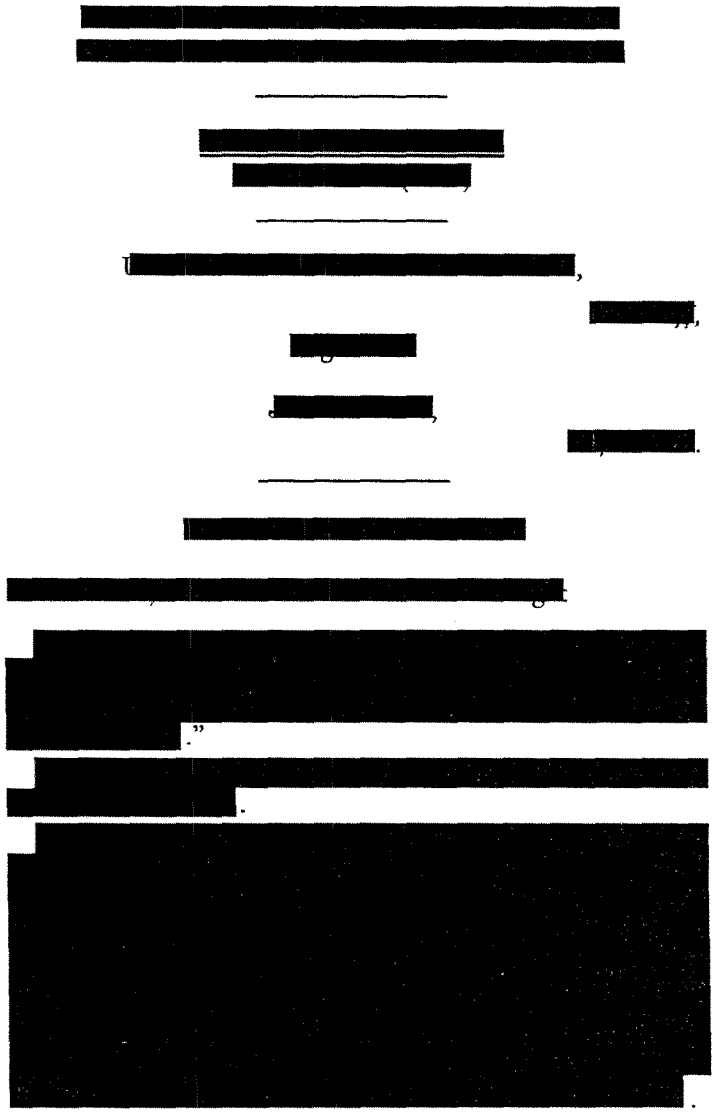

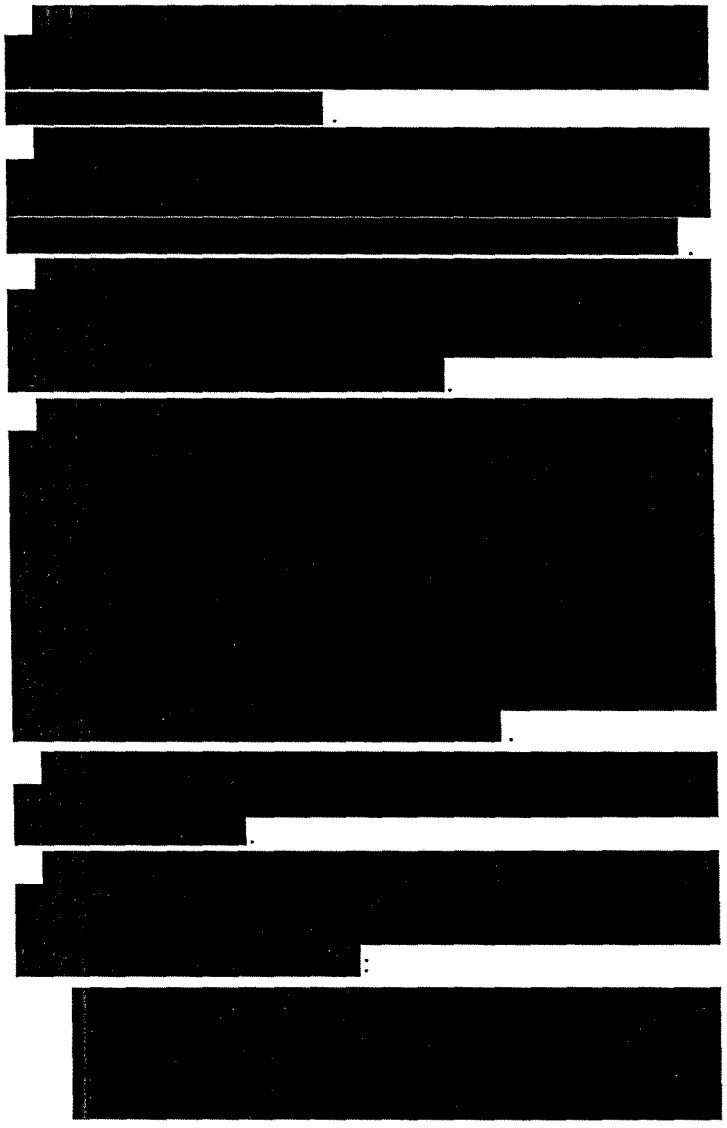

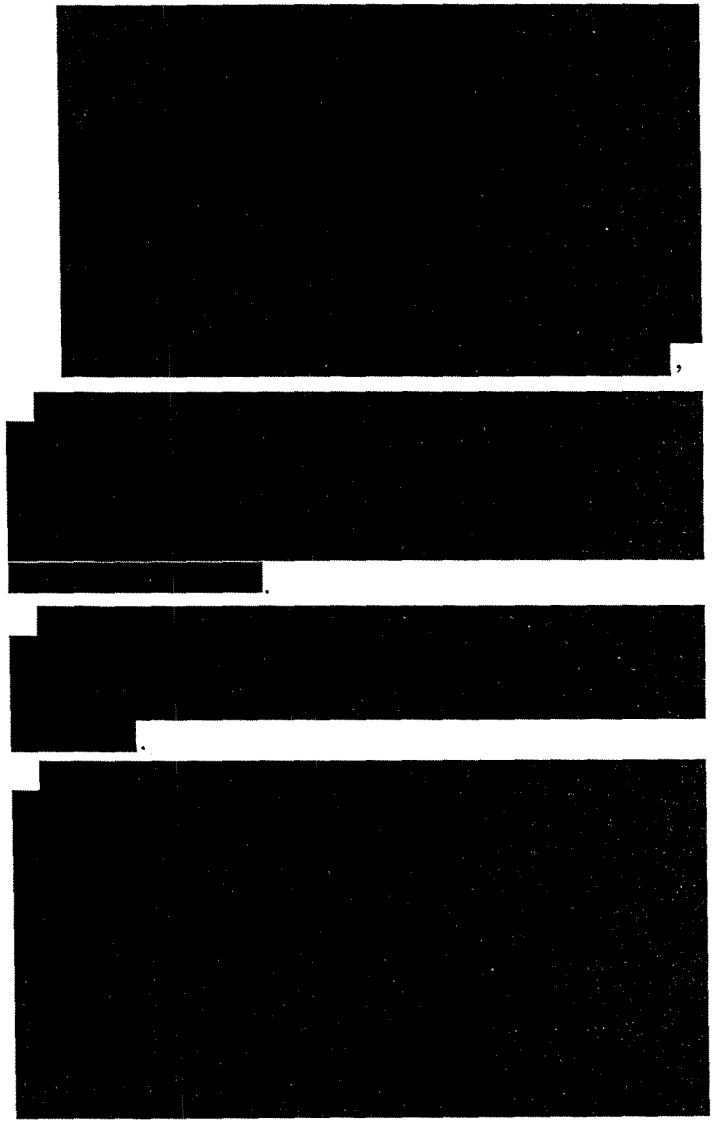

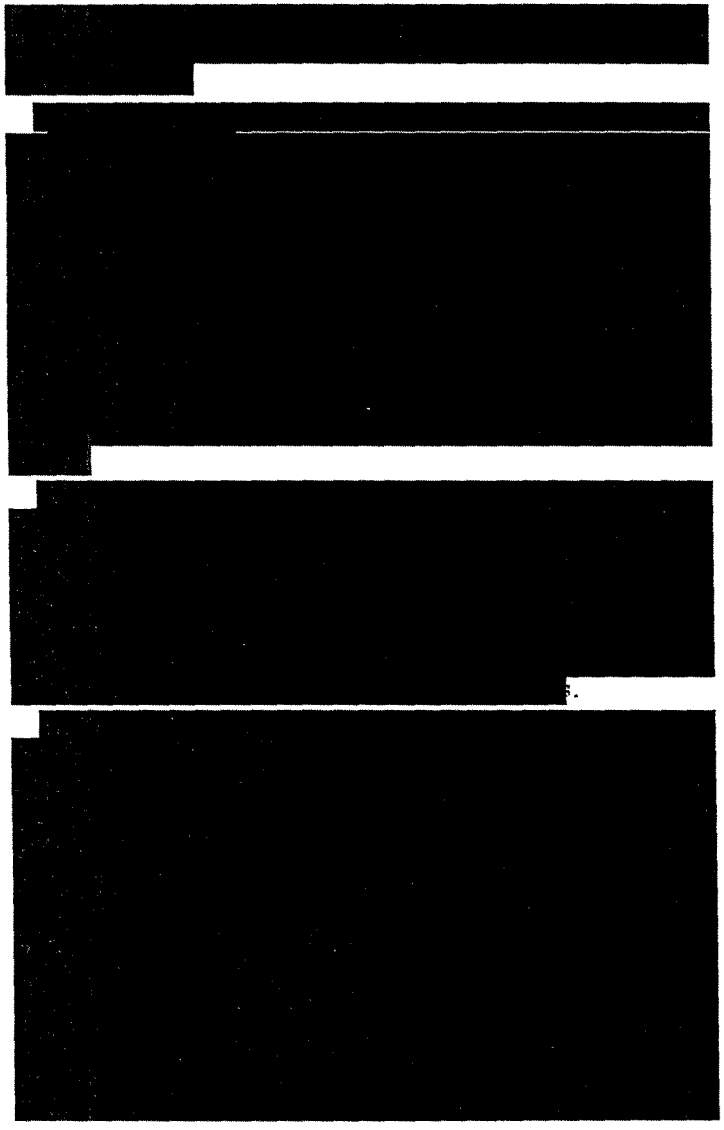

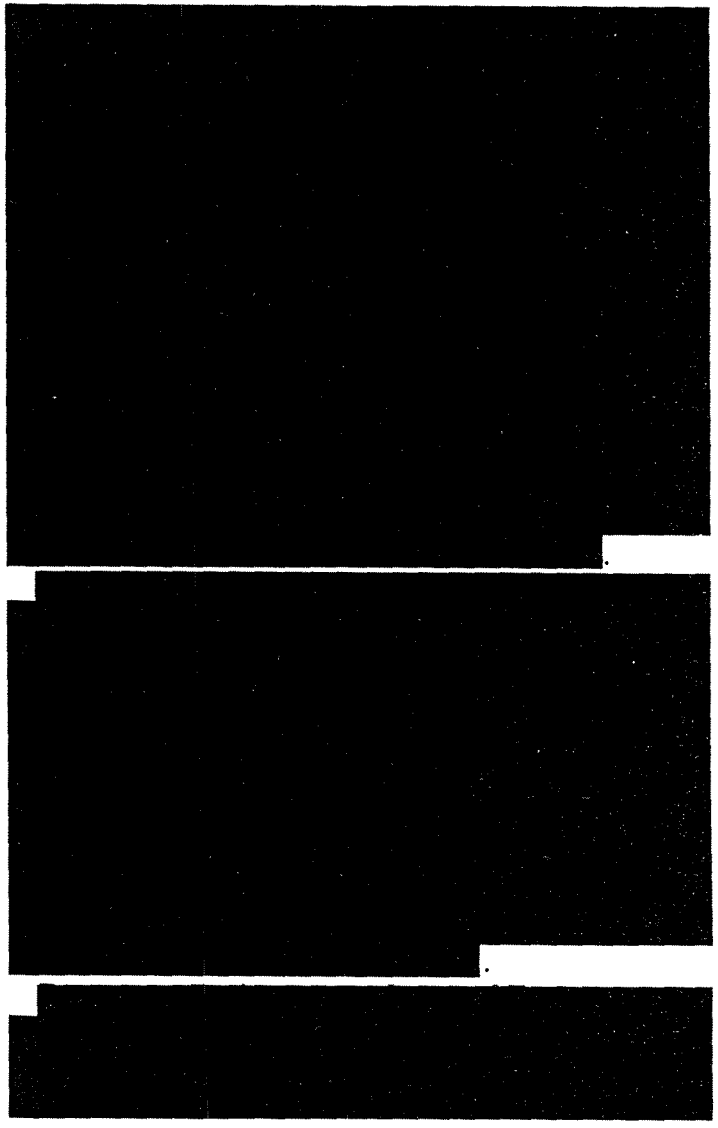

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/s/ [redacted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cr. No. 98-1101 (ILG)

UNITED STATES OF AMERICA,

- against -

JOHN DOE,

Defendant.

SCHEDULING ORDER

Upon the January 26, 2012 application of LORETTA E. LYNCH, United States Attorney for the Eastern District of New York, by Assistant United States Attorneys Todd Kaminsky and Evan M. Norris, and full consideration having been given to this matter,

IT IS HEREBY ORDERED that, in light of the government's withdrawal of its March 17, 2011 motion to unseal and the reasons provided therefore, the only issue ripe for decision following the remand of this case from the United States Court of Appeals for the Second Circuit is whether this Court should permanently enjoin non-party Richard Roe from disseminating the following sealed documents in his possession relating to the defendant John Doe: (a) two proffer agreements, (b) a cooperation agreement, (c) a criminal complaint and (d) a criminal information;

IT IS HEREBY FURTHER ORDERED that the parties file briefs setting forth their respective positions with regard to the matter referred to above pursuant to the following schedule:

1. The government shall file its brief on or before February 7, 2012;

2. Doe and Roe shall file their responsive briefs on or before February 21, 2012;

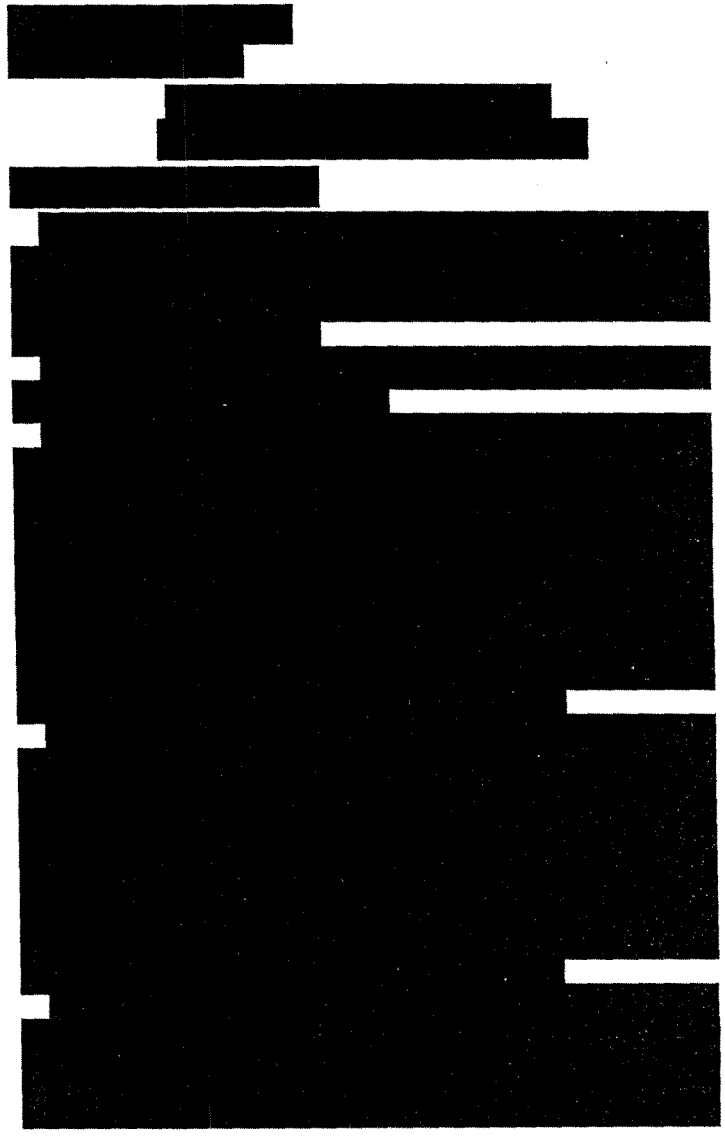
3. The government shall file any reply on or before February 28, 2012; and

IT IS HEREBY FURTHER ORDERED that the Court will hold oral argument on March 9th, 2012 at 11:00 A.M.

SO ORDERED.

Dated: Brooklyn, New York
January 26, 2012

[SIGNATURE] I. LEO GLASSER
THE HONORABLE I. LEO GLASSER
UNITED STATES DISTRICT JUDGE



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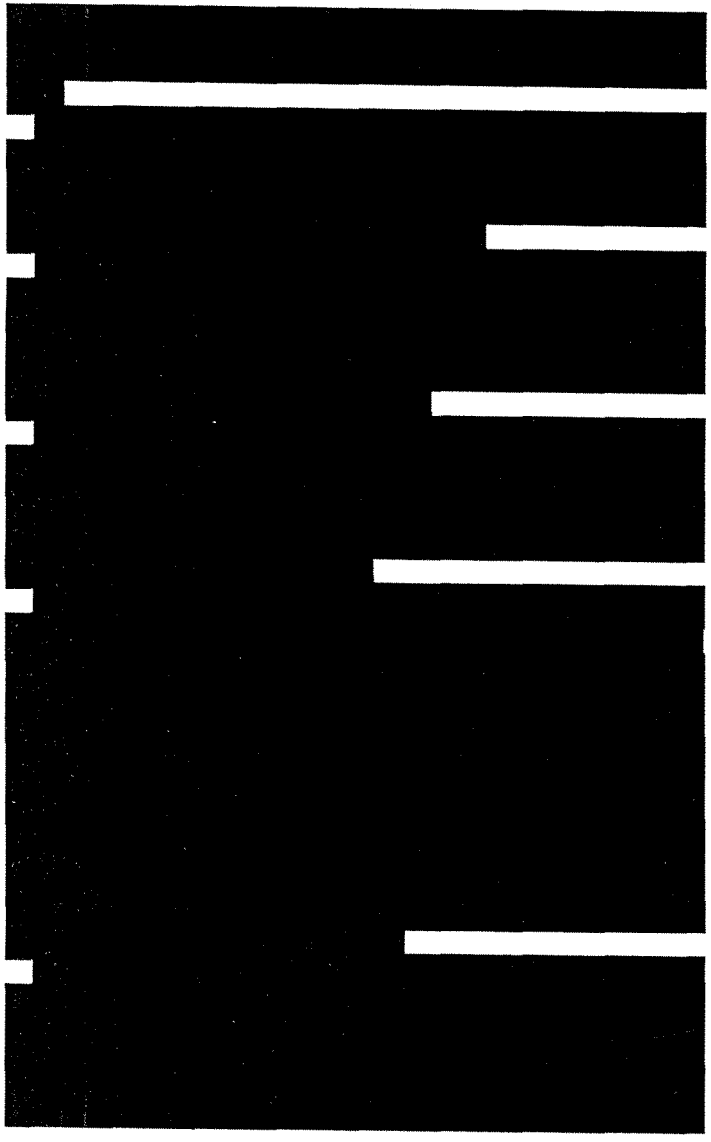

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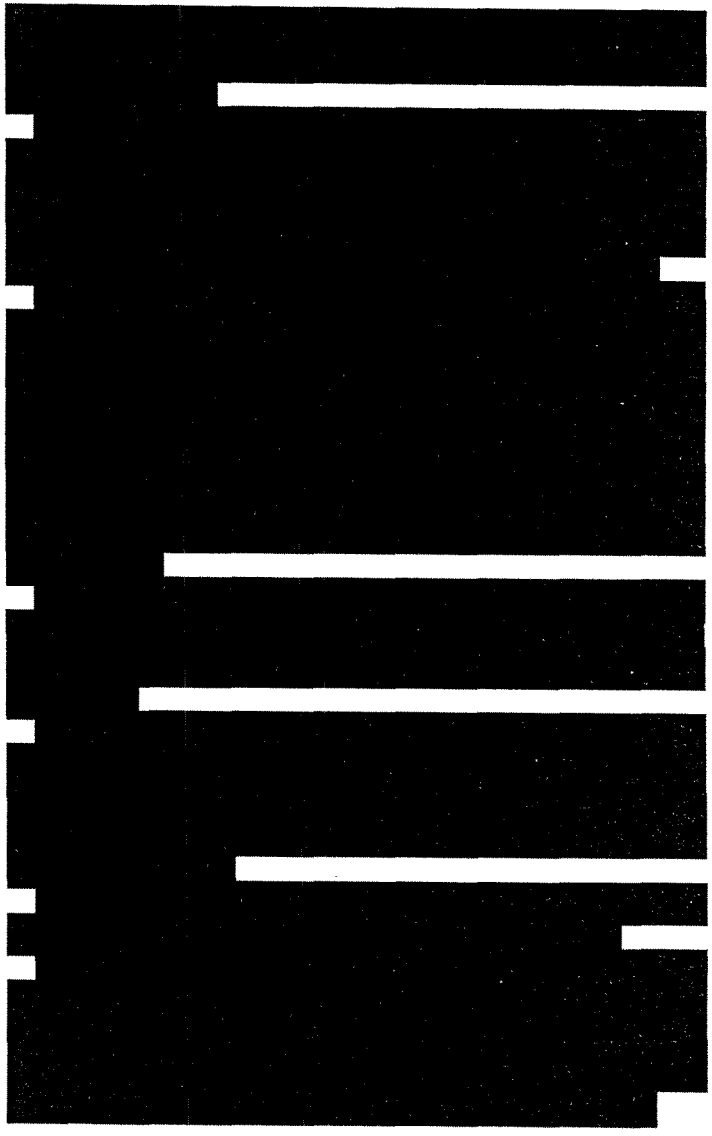

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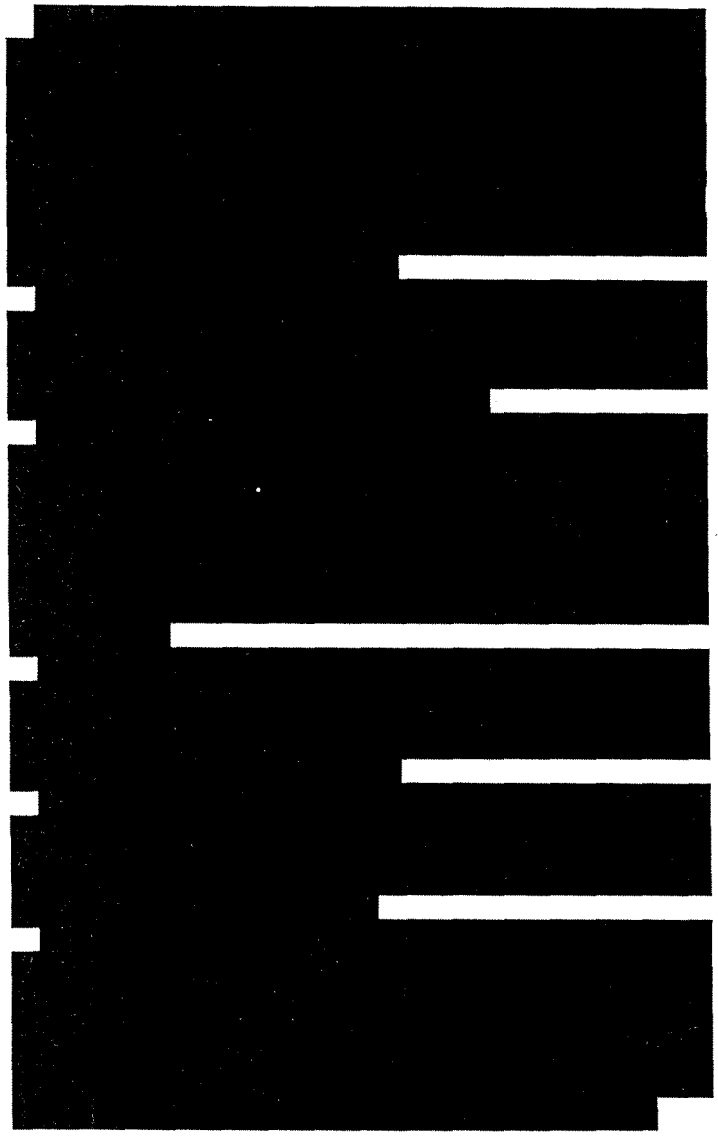

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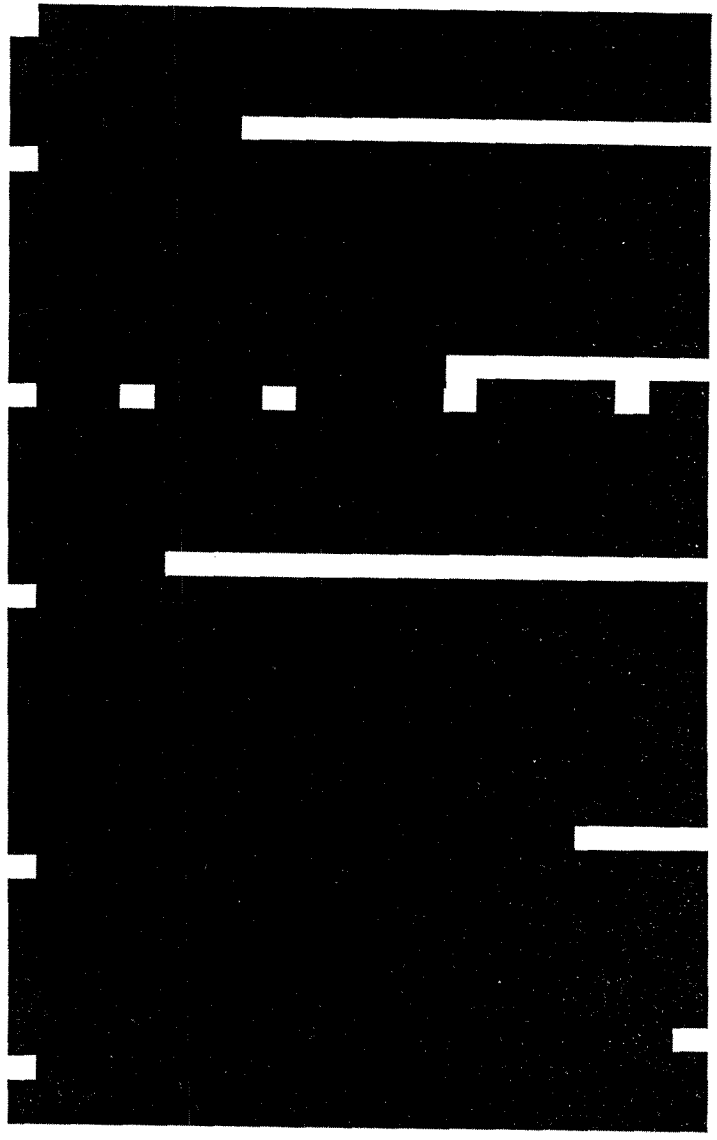
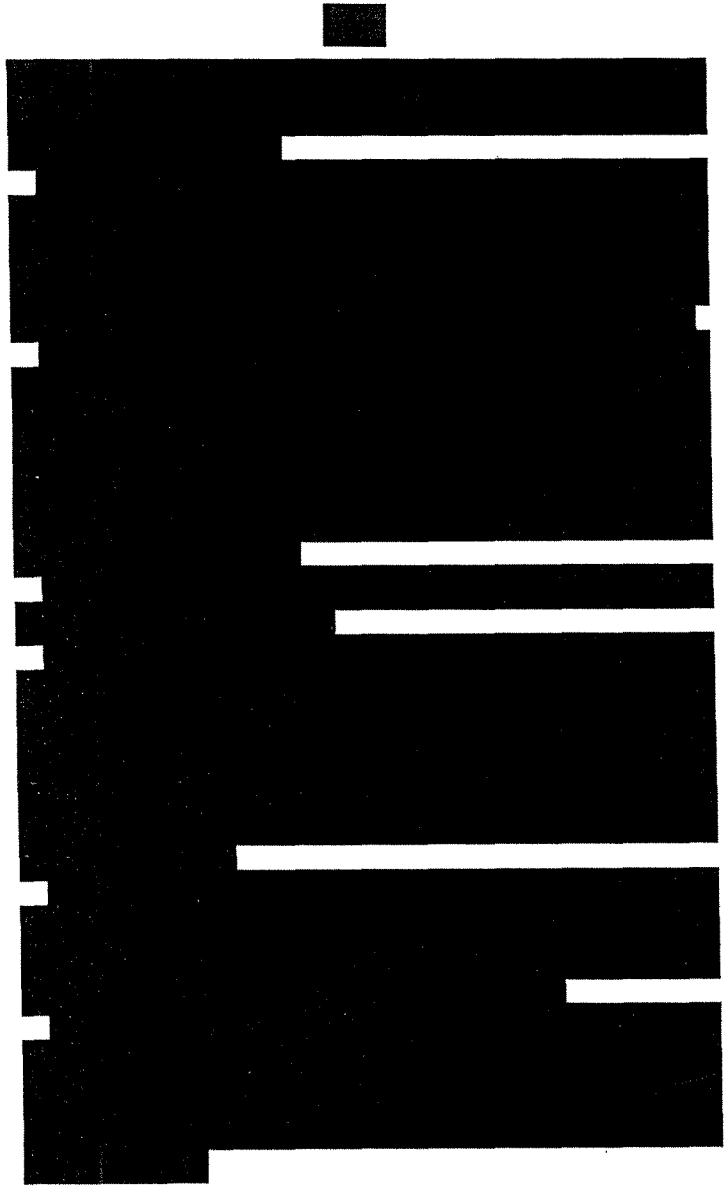
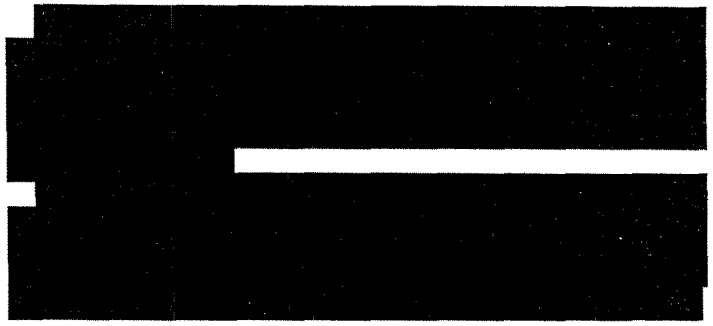






[1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Criminal Action No. 98CR01101
February 27, 2012
10:13 a.m.
Brooklyn, New York

UNITED STATES OF AMERICA,

–against–

JOHN DOE,

Defendant.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE BRIAN M. COGAN
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Government:	LORETTA E. LYNCH, United States Attorney Eastern District of New York 271 Cadman Plaza East Brooklyn, New York 11201 BY: TODD KAMINSKY, Esq. EVAN NORRIS, Esq. LISA KRAMER, Esq. Assistant United States Attorneys

For the Defendant: (John Doe)	MICHAEL P. BEYS, Esq. JASON BERLAND, Esq. NADER MOBARGHA, Esq.
For Richard Roe:	RICHARD E. LERNER, Esq.
Court Reporter:	Lisa Schwam, CSR, CRR, RMR 225 Cadman Plaza East, Room N373 Brooklyn, New York 11201 (718) 613-2268

Proceedings reported by machine stenography, transcript produced by Computer-Aided Transcription.

[2]

THE COURTROOM DEPUTY: Roe v. Doe, Docket No. 98CR1101.

Counsel, please state your appearances, starting with the government.

MR. KAMINSKY: For the United States, Todd Kaminsky, Lisa Kramer, and Evan Norris. Good morning, Your Honor.

THE COURT: Good morning.

MR. BEYS: Good morning, Your Honor. For John Doe, Michael Beys, Jason Berland, and Nader Mobargha from the firm of Beys, Stein & Mobargha. Good morning.

THE COURT: Good morning.

MR. LERNER: Good morning. I'm Richard Lerner. I'm appearing for Richard Roe.

THE COURT: Good morning.

MR. ROE: I am appearing for Richard Lerner. Your Honor asked me to identify myself.

THE COURT: I'm sorry; say that again.

MR. ROE: I'm appearing for Mr. Lerner. Do you wish me to use my name as I'm admitted in this Court or do you wish me to use the--

THE COURT: What do you mean you're appearing for Mr. Lerner? He is not a party here.

MR. ROE: He is indeed. This is a response to an application to hold both of us in contempt.

THE COURT: I see. And so you're appearing--

MR. ROE: I'm representing him in this application.

[3]

THE COURT: And you have no conflict of interest in doing that?

MR. ROE: If we do, you may assume on our representation mutually that it has been waived to our mutual satisfaction.

THE COURT: Well, sir, it's not entirely up to you. As I understand it, there are two parties whom contempt is sought against. You're telling me each of you is representing the other, even though I could find that either one of you is in contempt. Each of you have an incentive to exonerate yourself and, to that extent, you're united in interest. And each of you have an incentive, to the extent you are not exonerated, to pin responsibility on your client.

Why is that not a conflict of interest?

MR. ROE: Well, first of all, as a practical matter--

THE COURT: No. Let's talk about what the rules require.

MR. ROE: I expect that both of us will take testimonial privilege and, therefore, I don't think it's

going to be a problem. I doubt that either one of us will be testifying.

THE COURT: You're--I'm sorry; I don't understand what you just said.

What do you mean, "testimonial privilege"?

MR. ROE: I mean, that I believe, although the issue **[4]** hasn't come up yet, that Mr. Lerner will assert Fifth Amendment, whether this be civil or criminal, and so will I, in which case there isn't going to be testimony from either one of us.

THE COURT: Is there going to be argument from either one of you?

MR. ROE: Yes.

THE COURT: Then the conflict is present, sir.

MR. LERNER: Our arguments are going--

THE COURT: Who are you speaking for now, Mr. Lerner; yourself or your client?

MR. LERNER: I'm speaking for Richard Roe.

THE COURT: All right. Go ahead.

MR. LERNER: There will not be a conflict because we will be presenting--our arguments will be parallel, similar arguments, same position. We are not going to be pointing fingers at each other. And we're both going to--neither of us will be testifying.

MR. ROE: If I may, if Your Honor would give me 30 seconds, we have a motion before the Court to declare that it lacks subject-matter jurisdiction.

THE COURT: Yes. That motion is denied. I have subject-matter jurisdiction.

MR. ROE: May I request, then, a 1292(b) certification on the issue?

THE COURT: You may request it. It is denied.

[5]

MR. ROE: All right. May I request a stay pending a writ of prohibition?

THE COURT: You may request it. It is denied.

MR. ROE: All right. Thank you.

THE COURT: Let me hear from the other parties as to whether there is an objection to proceeding with two alleged condemnors, each representing the other.

MR. KAMINSKY: Your Honor, may I very quickly point out that prior to coming here today, based on the notice of motion filed before Your Honor, it says, "Notice of motion, Richard Lerner, pro se."

THE COURT: Right. That was my understanding.

MR. ROE: I was only admitted today. He couldn't have put anything else on there until I got admitted. Nobody was trying to fool the Court. I became admitted today for this purpose.

THE COURT: Who admitted you today?

MR. ROE: I waived in. I got a Certificate of Good Standing from Southern District at 9 o'clock. Brought it here, paid the money, swore in, and I'm admitted in Eastern District as of 9:45.

THE COURT: Did you disclose when you got your certificate that you were the subject of a contempt motion?

MR. ROE: When I got the certificate from Southern District?

[6]

THE COURT: No. In the Eastern District.

MR. ROE: When I came in here and swore in?

THE COURT: Yes.

MR. ROE: I just did it half an hour ago, and there was nothing that says are you the subject of any disciplinary--if I did it wrong, I apologize, but I haven't been found or adjudged in contempt; and particularly since this is, no matter how they label it, likely a criminal contempt proceeding, I presume incorrectly--and I'll apologize if I'm wrong--that presumption of innocence applies.

THE COURT: Let me return to my original question.

MR. KAMINSKY: Yes, Your Honor. With the caveat, Your Honor, that I'm not exactly certain what Your Honor was planning on going forward with this morning, there is obviously a big problem that counsel is not adequately represented in that there are conflict issues that are obviously present. Should there be anything later that would need to have a standing record that everyone could support, and that would be obviously legitimate, there is clearly a problem right now that the government is loath to continue in this current situation.

MR. BEYS: Judge, if I may, I'd also like to add something to Your Honor's point that Mr. Lerner and Mr. Roe have an incentive to put liability on each other. I would note for the Court a February 10th fax to Judge Glasser which Mr. Lerner writes on behalf of Mr. Roe, basically accusing Judge Glasser of [7] willfully participating in a scheme to defraud Doe's victims in whatever it is they've been claiming all along.

I just want to quote the language because it shows exactly what Your Honor is concerned about, which is the finger pointing and the distancing

from each other. Mr. Lerner is very careful to say, "My client maintains that such acts constitute the willful depravation of and indeed the defrauding of Mr. Doe's crime victims of their property rights." And later on again he is careful to say, "My client."

It's exactly what Your Honor is concerned with, and it's a very real concern.

THE COURT: Okay. Then I take it that both of the proponents of the contempt order see a difficulty in the exchange of representations which I've been advised of for the first time this morning.

All right. We're going to adjourn till Friday at 11:00. I want an exchange of letters from the parties by Thursday morning as to why this proposed representation is or is not proper.

Yes, Mr. Beys?

MR. BEYS: Judge, unfortunately, Mr. Berland and I will be in Miami for the White Collar Conference. I don't know if anyone from the government will be there.

Could I ask for Monday?

MR. ROE: I have no problem, Your Honor.

[8]

MR. LERNER: No problem here.

THE COURT: Monday at 10 o'clock a.m. Now, let me say a couple of things just to clarify. I've already made some rulings.

MR. LERNER--and I'm speaking to you as Mr. Roe's counsel--you are pressing the motion to recuse that's stated in your papers?

MR. LERNER: Yes, we are.

THE COURT: All right. That motion is denied. No reasonably objective person could see any conflict here.

Now, let me also note that what we have here is very clearly a civil contempt. I am not at all sure it works as a civil contempt. The only provision that's been pointed out to me as to which there may be a contempt is the second paragraph in the Court of Appeals summary order filed February 14th, 2011, which simply notes that the Court is referring to Richard Roe as Richard Roe because the disclosure of his true identity might lead to the improper disclosure of materials here at issue.

That is not a decretal paragraph; it is simply a statement of the reason why the Court of Appeals is using a pseudonym. That is not to say that the disclosure of Roe's true identity may not be contemptuous. One inference that could possibly--although I am not presently drawing any such inference--but one inference that could be drawn is that there is a scheme between Mr. Lerner and Mr. Roe, or either one of **[9]** them, to undermine the injunctive orders that have been previously issued, and one means of undermining those injunctive orders would be the disclosure of the true identity of Richard Roe.

That fact, combined with others, both public and nonpublic, might well lead to the harm which the injunctive provisions entered by the Second Circuit and Judge Glasser expressly sought to prevent. But that theory has not been made before me on this motion. I've only been pointed to that first recital

paragraph in the Second Circuit's order. And as I say, it is not a decretal paragraph.

I also think there are limitations in the context of civil contempt with regard to the remedy sought. It is true that if there is a civil contempt, the movant is entitled to recover their attorneys' fees, but so what. If what is being sought here is to stop violations, I think we can all be assured, based upon the conduct of Mr. Roe and Mr. Lerner, that the attorneys' fees incurred on this motion aren't going to do anything.

Because it is entirely possible, although I have formed no conclusion, that there has indeed been a criminal contempt here, I am referring the matter for criminal prosecution to the United States Attorney. That, to me, is the proper mechanism for adjudicating whether a contempt of the injunctive provisions themselves, not mere background recitals, has occurred.

[10]

I will also note that I think it's very unusual that the government is allowing a party that the government might seek to protect to protect himself. I know the U.S. Attorney's Office is quite busy. I have not yet met an Assistant that doesn't work really hard, but I will say I can't think of anything going on there that is more important than letting actual and potential witnesses know that the government will protect them.

That's why I'm referring this for prosecution. It is, of course, the U.S. Attorney's decision whether to prosecute or not. If the U.S. Attorney declines, then it will be up to me to determine whether to

appoint someone to prosecute privately. I would recommend that if there is going to be such a prosecution based upon appropriate charges, that the relief sought be limited to $5,000 and six months imprisonment, but, again, that's the U.S. Attorney's decision.

Now, I want the movants, particularly Mr. Beys, but obviously he is consulting with the government, to determine before this hearing on Monday if we are in the proper forum here based upon what I've said or whether there are other or no actions that should be taken; because if all I've got here is Richard Roe told somebody who he was, I am not sure at all that I can find that, by itself, is a per se violation of any of the injunctive provisions.

So I will see you all Monday at 10:00 a.m. Let me **[11]** check one more thing. I want to make sure there's no more open issues from the emergency motion that Mr. Lerner filed.

MR. ROE: With respect, there are, Your Honor.

THE COURT: Let me hear from Mr. Lerner. He is the attorney who filed it.

What's left, Mr. Lerner?

MR. LERNER: Well, first I'd like to note that this matter is not on the Court's public schedule today. We'd ask that any further proceedings in this court be publicly documented and the proceedings take place in an open courtroom.

THE COURT: I have not sealed this courtroom. Is it anyone's understanding that this transcript is sealed?

Your request is denied as moot. Is there anything you want that you're not getting?

MR. LERNER: Well, Your Honor, the public has a right to advanced public notice of court hearings. This was not posted.

MR. ROE: I believe my client would press that Your Honor docket--

THE COURT: Excuse me. I'm not recognizing you as his attorney until the conflict issue is resolved. I'm recognizing him as the attorney who filed the motion for relief before me, and I will hear only from him.

MR. LERNER: Fine, Your Honor. We've requested that this be docketed under a separate index number.

[12]

THE COURT: Well, I'm not going to do that. I might open this matter; I'll think about that. You can both address that further in the letter I'm going to get on Wednesday.

Anything else in your motion I didn't cover, Mr. Lerner?

MR. LERNER: We'll be moving to disqualify the government. There's ample precedent that the government cannot--

THE COURT: I'm asking what's in your motion. I'm not hearing new motions.

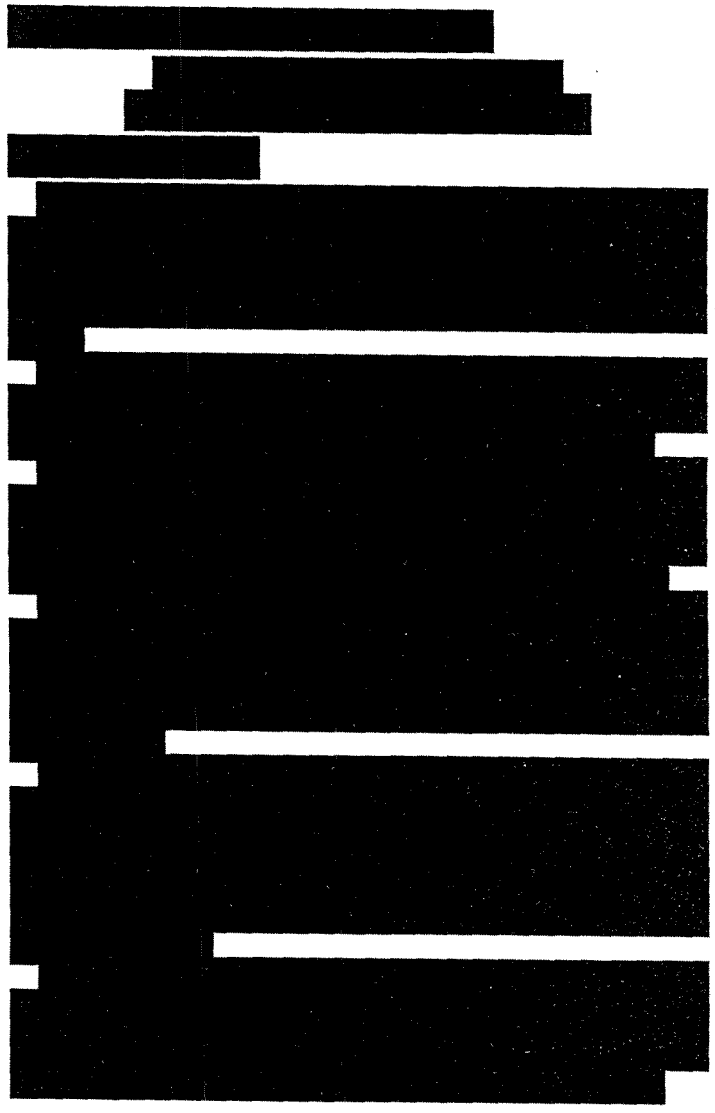
Is there anything else in your motion?

MR. LERNER: No, Your Honor.

THE COURT: All right. Then I'll see you on Monday. Thank you.

(Time noted: 10:31 a.m.)

(End of proceedings.)



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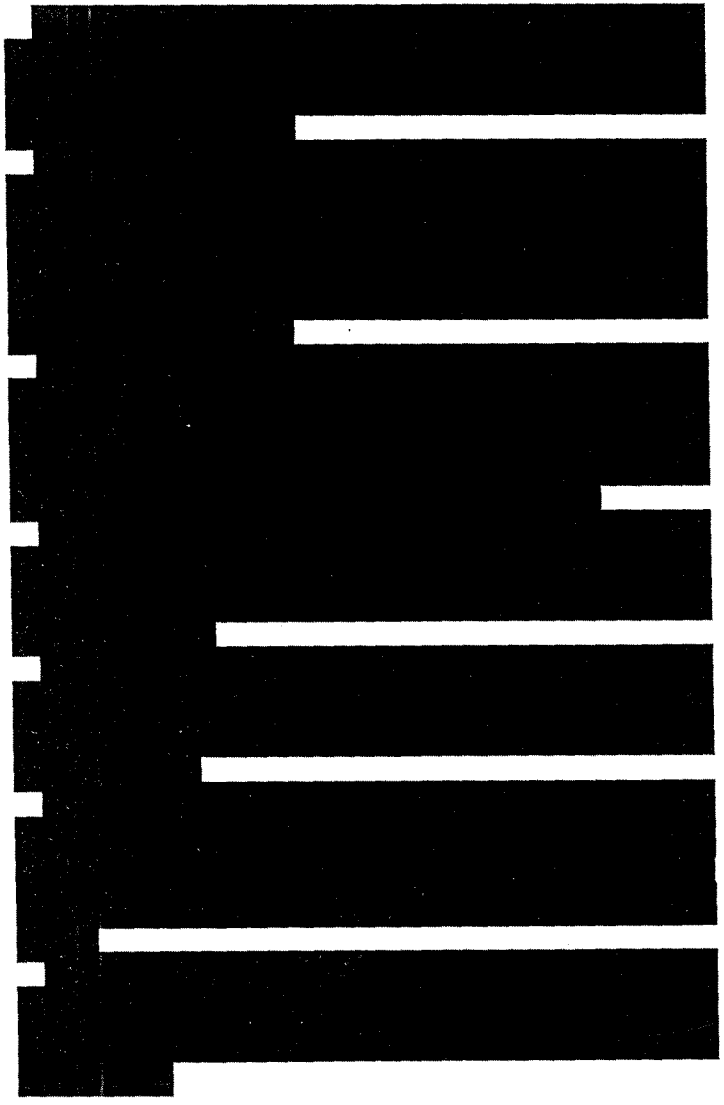

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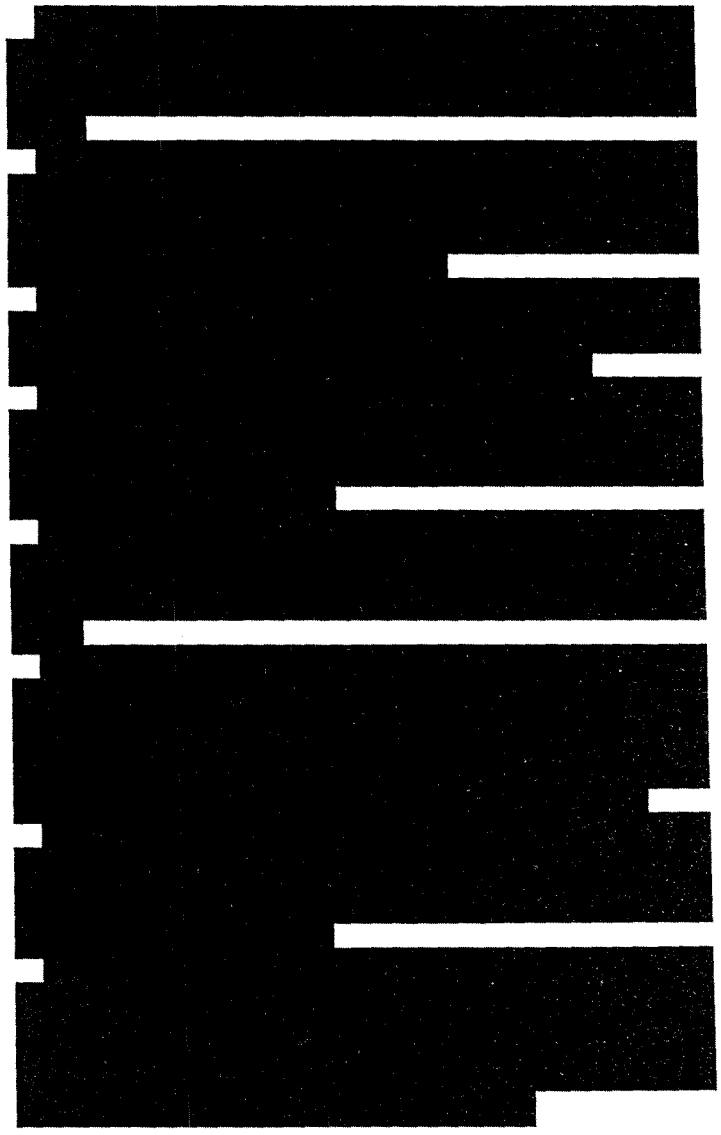

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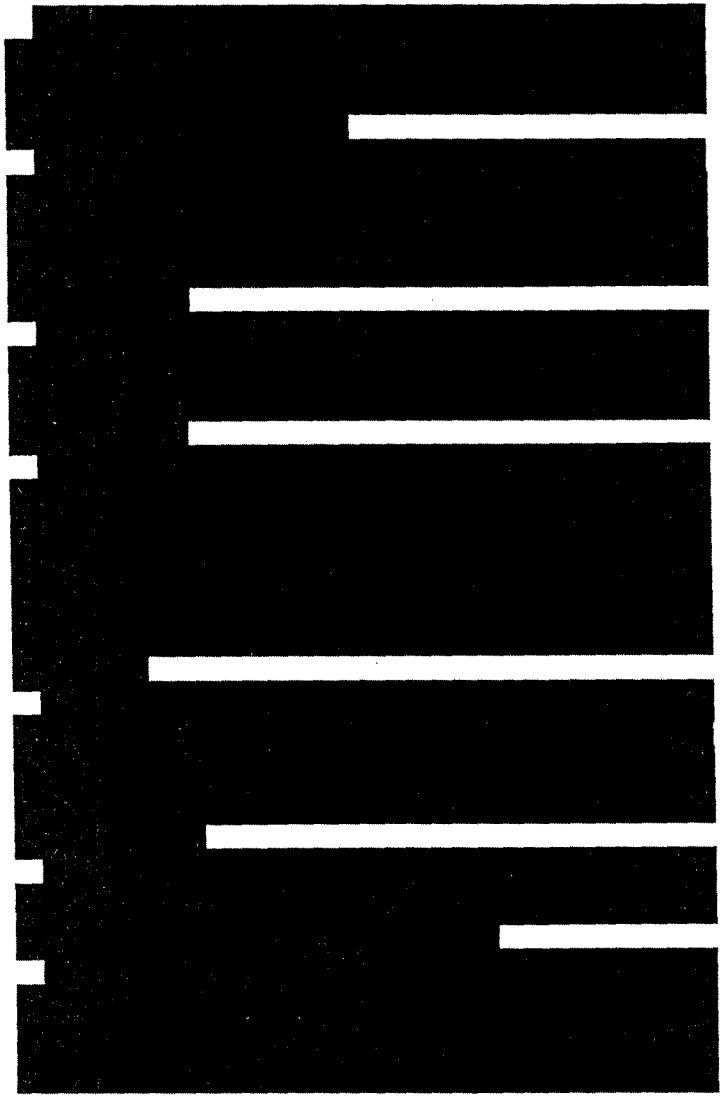

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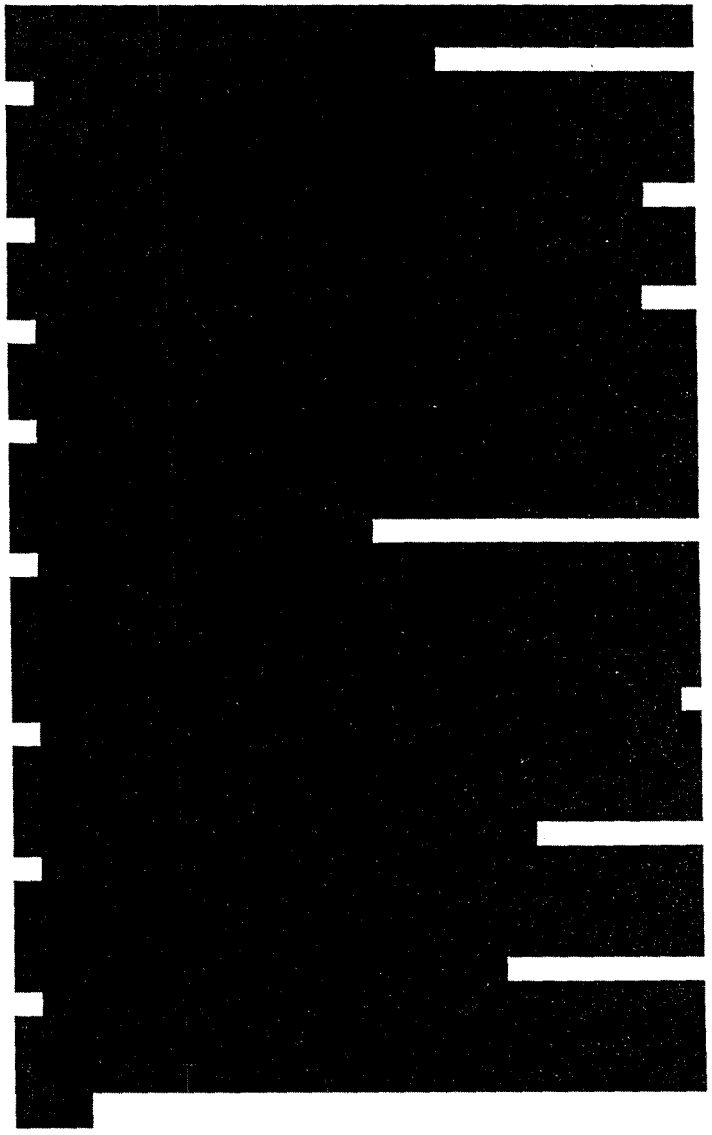

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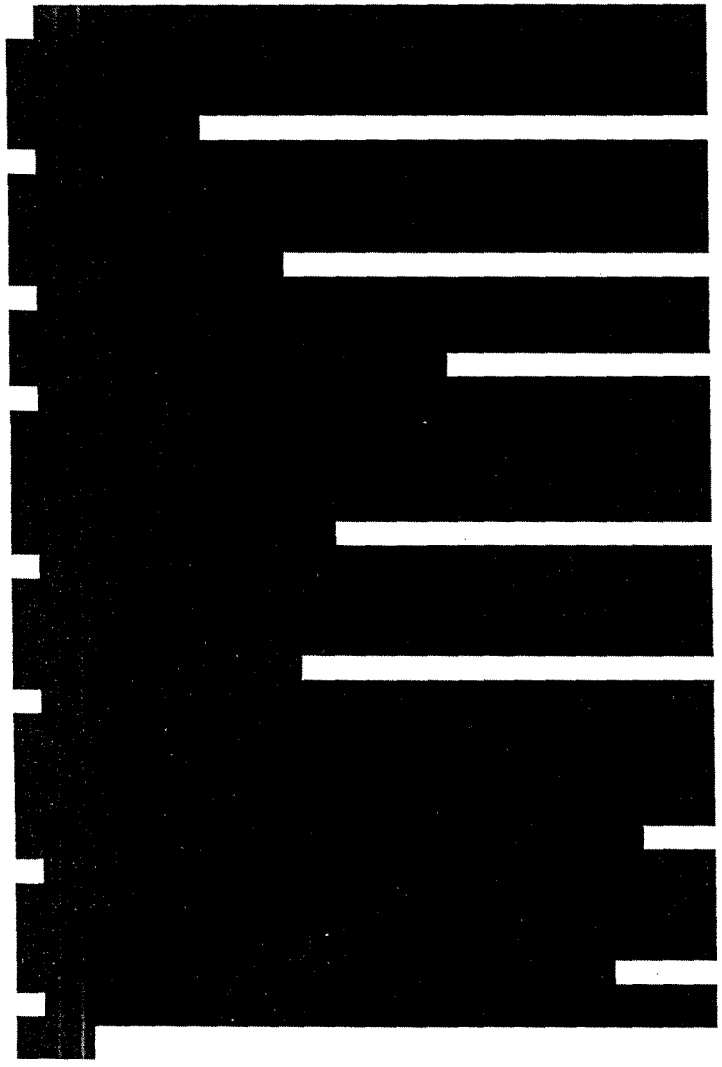

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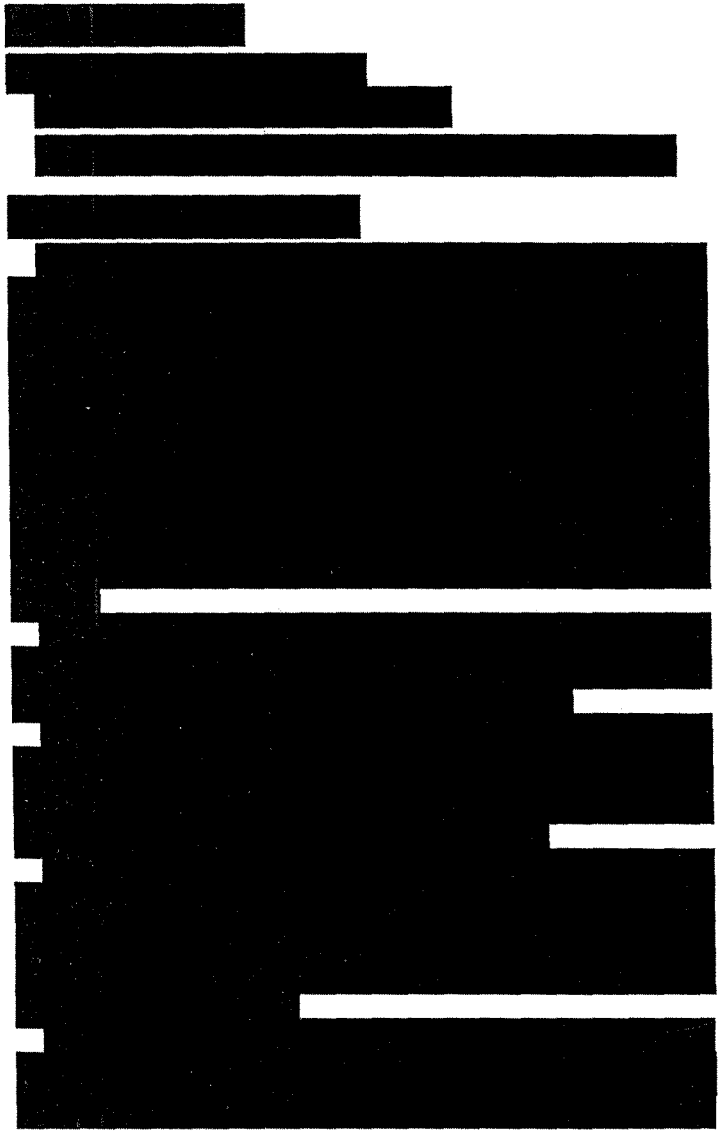

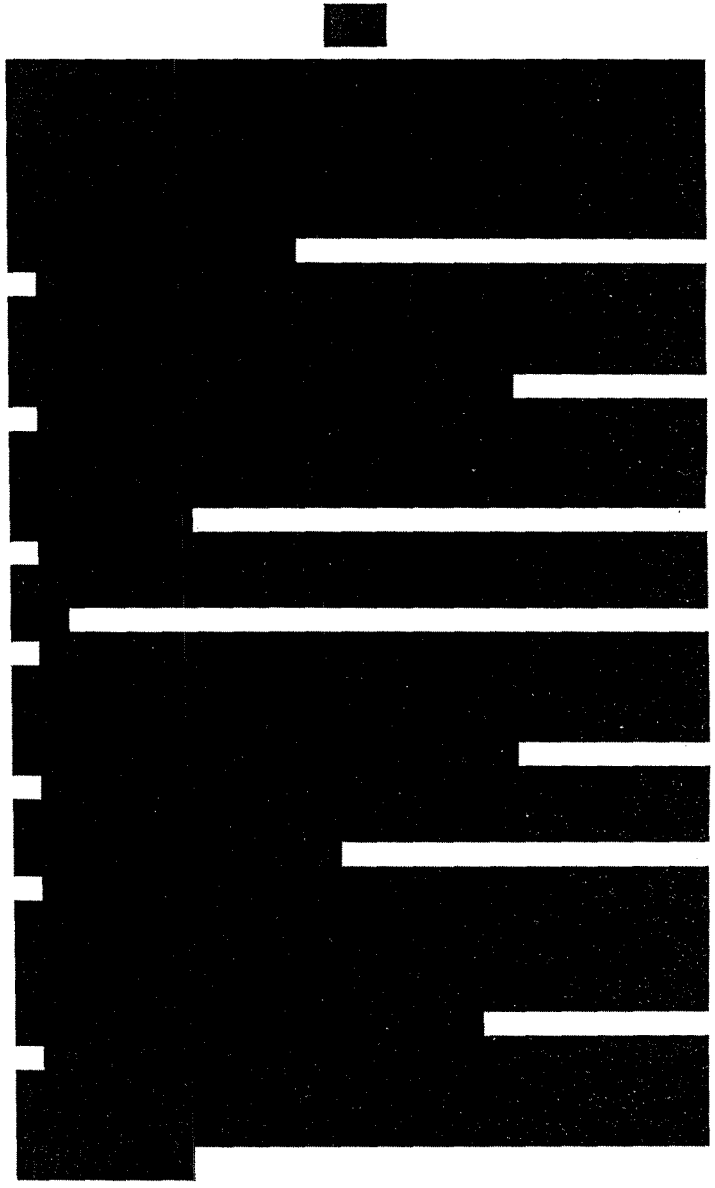

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