

IN THE SUPREME COURT OF THE UNITED STATES

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No. 12A310

ED MOLONEY AND ANTHONY McINTYRE, APPLICANTS

v.

UNITED STATES OF AMERICA, ET AL.

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ON APPLICATION FOR A STAY PENDING THE FILING AND DISPOSITION  
OF A PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The Solicitor General, on behalf of respondents, respectfully files this memorandum in opposition to the application for a stay pending the filing and disposition of a petition for a writ of certiorari.

STATEMENT

1. This case involves a formal request by the United Kingdom to the United States, seeking assistance with a criminal investigation into the 1972 murder and kidnapping of Jean McConville. Appl. App. A10. The mutual legal assistance treaty between the United States and the United Kingdom (U.S.-U.K. MLAT) generally provides that the two governments "shall provide mutual

assistance" with criminal matters, including by "providing documents, records, and articles of evidence" that are located in one country and may be useful for an investigation or prosecution in the other. See Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland on Mutual Legal Assistance in Criminal Matters, S. Treaty Doc. No. 13, 109th Cong., 2d Sess. 354 (Art. 1); see id. at 367 (Art. 19). Pursuant to that treaty and 18 U.S.C. 3512, the United States submitted an application, ex parte and under seal, to the United States District Court for the District of Massachusetts, requesting that an Assistant United States Attorney be appointed commissioner to gather evidence on the United Kingdom's behalf. Appl. App. A9-A10; see 18 U.S.C. 3512(a)(1) (permitting a federal judge, upon application by an appropriate federal official, to "issue such orders as may be necessary to execute a request from a foreign authority for assistance" in a criminal matter). The district court granted the application. Appl. App. A10.

The commissioner subsequently issued two sets of subpoenas to officials at Boston College, requesting materials archived there, many of which had been collected as part of an academic project known as the "Belfast Project." Appl. App. A10. In the Belfast Project, which ran from 2001 to 2006, researchers sponsored by Boston College had interviewed former members of the Irish

Republican Army, the Provisional Sinn Fein, the Ulster Volunteer Force, Protestant paramilitary groups, and law enforcement, who were "involved in the 'Troubles' in Northern Ireland from 1969 forward." Id. at A5-A9. The agreements signed by the interviewees purported to grant them the authority to control the release of their interview materials during their lifetimes, but Boston College has "absolute title" to those materials, and the materials are stored at Boston College. Id. at A8.

The commissioner's first set of subpoenas, issued in May 2011, sought records of interviews with two particular interviewees. Appl. App. A10. The Boston College officials voluntarily produced responsive materials related to one of the interviewees (who was deceased), but not the other. Id. at A11. The second set of subpoenas, issued in August 2011, sought records of "any and all interviews" with certain other interviewees "containing information about the abduction and death of Mrs. Jean McConville." Ibid.

2. The Boston College officials moved to quash both sets of subpoenas. Appl. App. A11. The district court concluded that it had discretion, similar to the discretion it would have in the grand-jury context, to quash these subpoenas, but it declined to do so. 831 F. Supp. 2d 435, 449, 452-453, 459. It rejected the Boston College officials' contention that the requested materials were shielded from disclosure by a First Amendment privilege for confidential academic materials. Id. at 453-458. The court

accepted that "subpoenae targeting confidential academic information deserve heightened scrutiny," but reasoned, based on the evidence of the parties (some of which was submitted under seal), that the subpoenas were "in good faith, and relevant to a nonfrivolous criminal inquiry"; that the requested materials were not "readily available from a less sensitive source"; that the "serious[ness]" of the potential crimes under investigation "weigh[ed] strongly in favor" of enforcement; and that disclosure would cause "no harm to the free flow of information related to the Belfast Project itself because the Belfast Project stopped conducting interviews in May 2006." Ibid.

Although it declined to quash the subpoenas in their entirety, the district court did grant some limited alternative relief. Appl. App. A13-A15. First, it agreed to review the materials requested in the May subpoena in camera before requiring their disclosure. Id. at A12. Following that in camera review, the district court ordered enforcement of the May subpoenas, and the Boston College officials have not appealed that order. Ibid. Second, following extensive in camera review, the district court ordered the disclosure only of some materials in response to the August subpoenas, concluding that certain other materials were beyond the subpoenas' scope. Id. at A15 & n.9. The Boston College officials have appealed that order, id. at A15, and the appeal is still pending.

3. Applicants here are the director of the Belfast Project and one of its primary researchers (who is a former member of the Irish Republican Army). Appl. App. A6-A7. They moved to intervene as of right, or for permissive intervention, in the subpoena proceedings initiated by the Boston College officials, raising arguments that largely tracked the Boston College officials' arguments. Id. at A12; see Fed. R. Civ. P. 24. The district court denied the motion. Appl. App. A13; see 831 F. Supp. 2d at 458. The court reasoned that applicants had no federal statutory right to intervene; that the U.S.-U.K. MLAT "prohibits them from challenging the Attorney General's decisions to pursue the MLAT request"; that the Boston College officials, who were the recipients of the subpoenas, "adequately represent[ed] any potential interests" of applicants; and that those officials had in fact "argued ably in favor of protecting" the interests of applicants and the interviewees. 831 F. Supp. 2d at 458.

Applicants then proceeded to file a separate civil action presenting the same legal theories as their prior intervention complaint. Appl. App. A14. In a ruling from the bench, the district court dismissed the complaint. Ibid. The court concluded that applicants lacked standing to bring claims under the U.S.-U.K. MLAT; that their First Amendment claims were the same as the already-rejected claims of the Boston College officials; that the Attorney General "as a matter of law ha[d] acted appropriately";

and that "were this case to go forward on the merits," it could "conceive of no different result" than the one it had already reached in rejecting the motions to quash. Ibid. (brackets omitted).

4. Applicants appealed both the denial of their intervention motion and the dismissal of their separate civil complaint. Appl. App. A4-A5. The appeals were consolidated, and the court of appeals affirmed. Id. at A1-A46.

The court concluded, as an initial matter, that applicants' "claims under the US-UK MLAT fail because [they] are not able to state a claim that they have private rights that arise under the treaty, and because a federal court has no subject matter jurisdiction to entertain a claim for judicial review of the Attorney General's actions pursuant to the treaty." App. App. A17; see id. at A18-A27. The court emphasized, among other things, that Article 1 of the U.S.-U.K. MLAT expressly states that the treaty "shall not give rise to a right on the part of any private person \* \* \* to impede the execution of a request." Id. at A19 (quoting U.S.-U.K. MLAT, S. Treaty Doc. No. 13, 109th Cong., 2d Sess. 354).

The court of appeals additionally concluded that even assuming the district court had discretion under federal law to quash the subpoenas -- an issue the court of appeals expressly declined to decide -- the district court had not abused its discretion in

determining that the balance of interests favored enforcement. Appl. App. A28-A30. In a footnote, the court of appeals rejected applicants' argument that the district court's discretion should have been guided by the factors set forth in Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004). Appl. App. A28 n.17. The court of appeals observed that those factors had been developed in the context of a different statute -- 28 U.S.C. 1782(a) -- that was not at issue in this case, and that here, the U.S.-U.K. MLAT itself supplies the substantive standards for evaluating a request for assistance. Appl. App. A28 n.17.

Finally, the court of appeals concluded that that applicants' First Amendment allegations were properly dismissed for failure to state a claim. Appl. App. A30-A40. The court of appeals found applicants' assertions of an academic-confidentiality privilege to be foreclosed by this Court's decision in Branzburg v. Hayes, 408 U.S. 665 (1972), "which held that the fact that disclosure of the materials sought by a subpoena in criminal proceedings would result in the breaking of a promise of confidentiality by reporters is not itself a legally cognizable First Amendment or common law injury." Appl. App. A33; see also id. at A35-A36 (relying also on University of Pennsylvania v. EEOC, 493 U.S. 182 (1990), which "rejected" a claim that "peer review materials produced in a university setting should not be disclosed in response to an EEOC subpoena in an investigation of possible tenure discrimination," Appl. App. A35).

Observing that Branzburg had balanced law-enforcement interests against individual interests, the court of appeals reasoned that the law-enforcement interest in this case (which touched on the interests of two separate sovereigns) was potentially even stronger than in Branzburg, and that applicants' interests in non-disclosure were no stronger than the personal-safety, criminal-liability, and job-security interests asserted on behalf of the confidential informants in Branzburg. Id. at A36-A38. The court of appeals additionally concluded that "[e]ven if Branzburg left us free, as we think it does not, to engage in an independent balancing \* \* \* , we would still affirm, for the same reasons." Id. at A36 n.24.

Judge Torruella concurred in the judgment. Appl. App. A42-A46. In his view, applicants "cannot carry the day, not because they lack a cognizable interest under the First Amendment, but because any such interest has been weighed and measured by the Supreme Court and found insufficient to overcome the government's paramount concerns in the present context." Id. at A45-A46. With respect to applicants' intervention motion, Judge Torruella "harbor[ed] doubts as to whether Boston College could ever 'adequately represent' the interest of academic researchers who have placed their personal reputations on the line," but acknowledged that such concerns were "moot" because applicants "are unable to assert a legally-significant protectable interest," as



the federal rules require in the context of a motion to intervene as of right. Id. at A46.

5. The court of appeals denied rehearing and rehearing en banc. Appl. 9. It also denied a motion to stay the mandate pending the filing of a petition for a writ of certiorari, but granted a temporary stay to permit applicants the opportunity to seek a stay from this Court. Appl. App. B1-B2.

#### ARGUMENT

As applicants acknowledge (Appl. 9), a stay pending disposition of a petition for a writ of certiorari is warranted only when the applicant can show "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay." Indiana State Police Pension Trust v. Chrysler LLC, 556 U.S. 960, 960 (2009) (per curiam) (quoting Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, Circuit Justice, in chambers)); see Conkright, 556 U.S. at 1402 (Ginsburg, Circuit Justice, in chambers) (stating that an "applicant must demonstrate" all three factors). Applicants have not made that showing here.

1. The stay application asserts that certiorari is warranted on three issues: (1) whether the lower courts denied applicants a

right to be heard on First Amendment objections to the subpoenas (Appl. 9-16); (2) whether the First Amendment precludes the enforcement of the subpoenas (Appl. 16-21); and (3) whether the court of appeals applied the correct factors in reviewing the district court's exercise of discretion (Appl. 21-24). None of those issues merits further review, nor would review of any of them result in reversal of the court of appeals' decision.

a. Applicants first contend (Appl. 9-16) that they were denied their right to be heard on their First Amendment objections to the government subpoenas. That contention is misplaced. Both lower courts considered on the merits -- and rejected on the merits -- the First Amendment claims raised in applicants' civil complaint. Appl. App. A14 & n.7, A30-A40.

To the extent applicants contend that they should have been allowed to intervene in support of the Boston College officials' motion to quash, that contention does not warrant this Court's review. Not only is the contention immaterial because applicants' First Amendment arguments were later fully heard in the context of their separate civil action, but it is at bottom simply a fact-bound challenge to the district court's conclusion that the Boston College officials adequately represented applicants' interests. See 831 F. Supp. 2d at 458.

Also without merit is applicants' contention that they should have been allowed to submit evidence in support of their First

Amendment contentions. In evaluating applicants' complaint, the court of appeals "accept[ed] as true all well-pleaded facts, analyz[ed] those facts in the light most hospitable to [applicants'] theory, and dr[ew] all reasonable inferences for" applicants, yet nevertheless concluded that applicants had "fail[ed] to state a claim." Appl. App. A16, A30 (internal quotation marks and citation omitted). Applicants cite no case for the proposition that a district court is precluded from dismissing a First Amendment claim at the pleading stage for legal insufficiency. See Fed. R. Civ. P. 12(b)(6); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.") (internal quotation marks and citation omitted). In any event, the district court did in fact consider evidence from applicants, as the Boston College officials submitted affidavits from them in connection with the motion to quash the subpoenas. Gov't C.A. Br. 54.

Because the lower courts addressed applicants' First Amendment arguments on the merits, applicants err in claiming (Appl. 11) that the decision below conflicts with New York Times Co. v. Gonzales, 459 F.3d 160, 165-166 (2006), in which the Second Circuit likewise permitted a declaratory-judgment action challenging a subpoena. Applicants' contention that they were denied a hearing accordingly

does not warrant this Court's review, let alone provides a basis for reversing the court of appeals' decision.

b. Applicants' second contention (Appl. 16-21) is that the court of appeals erred in concluding that their complaint failed to state a valid First Amendment claim. The court of appeals' decision, however, correctly applied settled First Amendment law to the particular facts of this case.

In Branzburg v. Hayes, 408 U.S. 665 (1972), this Court "decline[d]" to "interpret[] the First Amendment to grant newsmen a testimonial privilege" that would preclude enforcement of a grand-jury subpoena, id. at 690. After weighing the competing constitutional and policy concerns, and surveying the relevant history, the Court concluded that reporters may not assert such a privilege either to protect a source who was himself engaged in criminal conduct or to protect a source "not engaged in criminal conduct but [possessing] information suggesting illegal conduct by others." Id. at 692-693; see id. at 682-708. The Court has subsequently applied similar reasoning to reject an "academic freedom" privilege that would have precluded enforcement of a civil administrative document subpoena seeking confidential peer review materials from a university. See University of Pa. v. EEOC, 493 U.S. 182, 195-201 (1990).

The court of appeals in this case determined that Branzburg, as supplemented by University of Pennsylvania, was controlling here

because it demonstrated that, in this context, governmental law-enforcement interests outweigh interests in confidentiality and journalistic or academic freedom. Appl. App. A32-A40; see Branzburg, 408 U.S. at 690 ("Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government."); id. at 696 ("[I]t is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy."). Indeed, the court of appeals reasoned that the government's interest in this case (carrying out its treaty obligation to assist in a foreign sovereign's law-enforcement efforts) was potentially even stronger than the more typical law-enforcement interest that the Court found to be overriding in Branzburg. Appl. App. A36-A37. And while the court of appeals accepted that a potential exception to Branzburg could exist where a subpoena is issued with a "bad faith purpose to harass," it found "no plausible" claim of that here. Id. at A34 n.22.

Applicants identify no decision of any other court of appeals that conflicts with the decision below. To the contrary, circuit decisions they cite that involve journalists' attempts to resist government or grand-jury criminal-investigatory subpoenas have -- in accord with the decision below -- rejected the journalists' arguments. In re Grand Jury Subpoena, Judith Miller, 438 F.3d

1141, 1146-1147 (D.C. Cir. 2006); United States v. Smith, 135 F.3d 963, 968-972 (5th Cir. 1998); In re Shain, 978 F.2d 850, 852-853 (4th Cir. 1992); In re Grand Jury Proceedings, 810 F.2d 580, 583-586 (6th Cir. 1987); see also In re Grand Jury Proceedings, 5 F.3d 397, 399-402 (9th Cir. 1993), cert. denied, 510 U.S. 1041 (1994).

Applicants suggest (Appl. 18-19) that some courts of appeals are more solicitous of journalists' First Amendment concerns in the context of civil subpoenas than in the context of criminal subpoenas. But that issue has no direct bearing on this case, which concerns a law-enforcement investigation. Other decisions cited by applicants involve subpoenas by criminal defendants on collateral or impeachment-related matters, not subpoenas by the government or a grand jury seeking evidence in furtherance of an ongoing criminal investigation. United States v. Caporale, 806 F.2d 1487, 1503-1504 (11th Cir. 1986) (defense request for potential evidence about jury tampering), cert. denied, 482 U.S. 917, and 483 U.S. 1021 (1987); United States v. Burke, 700 F.2d 70, 76-77 (2d Cir.) (defense request for impeachment evidence), cert. denied, 464 U.S. 816 (1983); United States v. Cuthbertson, 630 F.2d 139, 146-147 (3d Cir. 1980) (same), cert. denied, 449 U.S. 1126 (1981); see also McKevitt v. Pallash, 339 F.3d 530, 531-533 (7th Cir. 2003) (rejecting claim of reporter's privilege raised in response to foreign defendant's request for impeachment materials). Whatever the appropriateness of case-specific interest balancing

outside the context of law-enforcement requests, none of those decisions demonstrates that the deciding court would feel free to reexamine Branzburg's balancing of interests in cases, like this one, that involve law-enforcement investigations.

This case would, in any event, be an unsuitable vehicle for addressing any disagreement among the circuits about the scope of Branzburg. First, the court of appeals' interpretation of Branzburg was not outcome-determinative. The court expressly concluded, as an alternative to its main holding, that even were it "free \* \* \* to engage in an independent balancing" of the relevant interests, it "would still affirm, for the same reasons." Appl. App. A36 n.24. Second, this case arises in the unusual context of a subpoena issued under 18 U.S.C. 3512, pursuant to a mutual-assistance treaty, in aid of a foreign criminal investigation. The court of appeals suggested that this might create an even clearer case for rejecting a First Amendment privilege than Branzburg itself (Appl. App. A37), and further review in this case is unlikely to provide useful guidance for the more common scenarios in which Branzburg-type issues typically arise.

c. Applicants' third contention (Appl. 21-24) is that the court of appeals looked to the wrong factors in assessing whether the district court abused its discretion in enforcing the subpoenas. Applicants do not allege that the decision below

creates a circuit conflict on this issue -- or even that any other circuit has addressed the issue -- and for that reason alone, this Court is unlikely to grant certiorari to review it. See Sup. Ct. R. 10; see also Appl. App. A3 ("This appears to be the first court of appeals decision to deal with an MLAT and § 3512.").

Applicants, moreover, demonstrate no error in the court of appeals' judgment. Most of applicants' arguments (Appl. 22-23) are directed to the issue of whether district courts have any discretion to quash subpoenas in this context. The court of appeals, however, assumed (without deciding) that district courts do have such discretion and concluded that the district court did not abuse it here. Appl. App. A28-A30. The actual issue presented, therefore, is a narrow question about the precise factors that bear on a district court's exercise of discretion (assuming such discretion exists at all). In applicants' view, the district court was required to consider various factors that this Court has identified in the context of a request for assistance under 28 U.S.C. 1782(a), "such as the nature of the foreign tribunal, the character of the proceedings underway abroad, whether foreign proceedings were pending or imminent, and whether the same discovery is permitted in the foreign jurisdiction." Appl. 22 (citing Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264-265 (2004)).



Applicants offer no reason to believe that the Section 1782(a) factors have a special significance in the context of a request pursuant to an MLAT and Section 3512. Section 1782(a), which has its genesis in statutes dating back over 150 years, is a general-purpose statute permitting a "foreign or international tribunal" or "any interested person" to ask a U.S. court to procure evidence for use in a foreign proceeding or criminal investigation. 28 U.S.C. 1782(a); see Intel Corp., 542 U.S. at 247-248. Section 3512, which was enacted three years ago, specifically addresses the situation in which an official of the U.S. government seeks the aid of a federal court in carrying out a request from a foreign authority in relation to a criminal matter. See Foreign Evidence Request Efficiency Act of 2009, Pub. L. No. 111-79, § 2(4), 123 Stat. 2087 (2009). Factors drawn from the legislative history of Section 1782(a), see Intel Corp., 542 U.S. at 264, have no obvious application to Section 3512.

Rather than providing a vehicle for general requests for assistance -- such as the private civil discovery request at issue in Intel Corp., see 542 U.S. at 246 -- Section 3512, as applied in this case, enables the United States to comply with its obligations under a mutual legal assistance treaty. Even assuming a court has discretion to deny a request like the one at issue here, that discretion will necessarily be more limited than in the Section 1782(a) context. Requests made pursuant to Section 3512 have

already been vetted by the Executive Branch, which has primary authority over foreign relations, see, e.g., Pasquantino v. United States, 544 U.S. 349, 369 (2005) ("In our system of government, the Executive is the sole organ of the federal government in the field of international relations.") (internal quotation marks and citation omitted); see also Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 348 (2005) (noting Court's "customary policy of deference to the President in matters of foreign affairs").

Applicants' suggestion that the governmental subpoena in this case is no different from a discovery request by a private civil litigant accordingly lacks merit and does not warrant this Court's review. It is far from clear, moreover, that a decision on this issue would be outcome-determinative, as applicants advance no argument that the case would turn out differently even if the Intel factors were, in fact, applicable.

2. The unlikelihood that this Court will grant certiorari and reverse the court of appeals' decision means that a stay is unwarranted irrespective of applicants' arguments (Appl. 24-26) that they will be irreparably harmed in the absence of a stay or that the equities favor one. See Eugene Gressman et al., Supreme Court Practice 876-877 (9th ed. 2007) (citing cases); see also Indiana State Police Pension Trust, 556 U.S. at 960 (noting that "in a close case it may be appropriate to balance the equities")

(quoting Conkright, 556 U.S. at 1402 (Ginsburg, Circuit Justice, in chambers)). No sound reason exists to postpone the effective date of a judgment that this Court is likely to leave undisturbed, particularly when such postponement would further delay the United States in complying with its treaty obligations. See Gressman 877; see also Indiana State Police Pension Trust, 556 U.S. at 961 ("A stay is not a matter of right, even if irreparable injury might otherwise result.") (quoting Nken v. Holder, 556 U.S. 418, 433 (2009))).

In any event, applicants err in analogizing (Appl. 24) the circumstances here to cases in which a stay has been granted to prevent a premature disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. 552. To begin with, applicants are incorrect in asserting that the denial of a stay at this point will necessarily moot further review. Because the Boston College officials' appeal of the district court's rulings on the August subpoenas is still pending, the denial of a stay would not result in the immediate enforcement of those subpoenas. Rather, the only materials at issue in this stay are the remaining materials requested in the more limited May subpoenas, which involve only a single interviewee. See p. 3, supra. Furthermore, whereas in a FOIA case, disclosure would be to a member of the public, the subpoenas here sought disclosure only to the government of the United States, for the sole purpose of transmitting the materials to the

government of the United Kingdom. Applicants do not argue that public dissemination of the information by the United Kingdom itself is imminent, and the British courts have thus far seen no reason to preclude the British government from receiving the subpoenaed materials.

Applicant McIntyre recently sought an order from the High Court of Justice in Northern Ireland to enjoin the Police Service of Northern Ireland (PSNI) from accepting the materials. App., infra, 1a-9a. On October 2, 2012, that court denied relief, concluding in part that McIntyre "failed to make out an arguable case that disclosure of the Boston College tapes would, as he claimed, increase the risk to his life or to his family." Id. at 4a. The British court reviewed affidavits from the senior PSNI investigator on the case, which stated that "the PSNI has extensive experience in the field of identification of risk to the life of individuals and of managing identified risks"; that "the PSNI considered the question of risk to the applicant and are not aware of any risk to the applicant's life connected to the seeking of the Boston College materials"; and that British intelligence authorities had "assessed that the threat to the applicant from Northern Ireland-related terrorist groups would remain LOW in the event that the material from the Boston College tapes were released to the PSNI." Ibid. (emphasis omitted). The British court also observed that applicants had themselves publicized their

involvement in the Belfast Project long before the subpoenas here were issued (including through the publication of a book), and that applicants themselves are responsible for the publicity about the subpoenas, which were originally filed under seal. Id. at 5a-6a.

3. The Justices of this Court "consistently" recognize that a "lower court's resolution of [a] stay application" is "'entitled to great weight.'" Gressman 880 (quoting Holtzman v. Schlesinger, 414 U.S. 1304, 1314 (1973) (Marshall, Circuit Justice, in chambers)). After full briefing, the court of appeals in this case denied the same stay that applicants now seek in this Court. Appl. App. B1-B2. The court of appeals judges are "closer to the facts," "have heard the merits fully argued," and should be trusted to "grant stays in worthy cases." United States ex rel. Knauff v. McGrath, No. 89 (May 17, 1950) (unreported) (Jackson, Circuit Justice, in chambers) (reprinted in 96 Cong. Rec. A3751 (1950) (statement of Rep. Roosevelt)); see Breswick & Co. v. United States, 75 S. Ct. 912 (1955) (Harlan, Circuit Justice, in chambers). Applicants present no persuasive reason to set aside their considered conclusion. See also New York Times v. Gonzales, 549 U.S. 1049 (2006) (denying stay in case raising claims of journalists' privilege in response to grand-jury subpoena).

CONCLUSION

The application for a stay should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.  
Solicitor General  
Counsel of Record

OCTOBER 2012

## APPENDIX

Neutral Citation No:

Ref: TRE8601

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Delivered: 2/10/2012

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF APPLICATION BY ANTHONY McINTYRE FOR LEAVE  
TO APPLY FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION OF THE POLICE SERVICE OF NORTHERN  
IRELAND TO REQUEST THE UNITED STATES GOVERNMENT TO SEEK ON  
ITS BEHALF CONFIDENTIAL MATERIAL HELD BY BOSTON COLLEGE,  
MASSACHUSETTS, USA PURSUANT TO THE TREATY BETWEEN THE  
UNITED STATES AND THE UNITED KINGDOM ON MUTUAL ASSISTANCE  
IN CRIMINAL MATTERS

TREACY J

**Introduction**

[1] The applicant is an oral historian who seeks to prevent the Police Service of Northern Ireland ("PSNI") from obtaining confidential archived material provided to the custody and possession of the Trustees of Boston College, Massachusetts, USA. This case is not concerned with protection of journalistic sources.

[2] The applicant seeks, inter alia, an order restraining the PSNI from receiving the material. The applicant's challenge is predicated on the contention that disclosure of the material will give rise to a materially increased risk to his life. This arises, he says, because the release of the material, gathered for academic or historical purposes, to the PSNI for investigative purposes is likely to be perceived as a betrayal of the IRA's code of silence by militant republicans resulting in his murder.

**Background**

[3] In 2001 the applicant became involved in an academic archiving project known as the "Belfast Project" with the journalist and author Ed Maloney who was the project director. The project was sponsored by Boston College, Massachusetts, USA. The object of the project was to collect and preserve for academic research the



recollections of members of republican and loyalist paramilitary organisations. The methodology was to gather first hand testimony by way of voice recordings from participants.

[4] The project lasted from 2001 until May 2006. It began with interviews of former members of the Provisional IRA and was subsequently expanded to include interviews with former members of the Ulster Volunteer Force. The applicant is a former member of the IRA whose role in the project was that of a researcher. He interviewed past participants in the conflict recording their personal recollections. His experience as a journalist, who had previously been involved in the republican movement, he says, gave him access to these people and enabled them to repose a degree of trust in him which they might not otherwise have had.

[5] Each participant gave the content of their recordings into the possession of Boston College for preservation. Access to the tapes was to be restricted until after the interviewee's death except where they provided prior written authority for their use otherwise.

[6] The applicant avers that it was always understood that the contents of the interviews may be accessible after death – primarily for academic purposes. He says that what was never envisaged was that the contents would be accessed by PSNI for the purposes of criminal investigation or prosecution. Nor, indeed, that this would happen whilst interviewees were still alive. He says that it is the attempt by the PSNI to obtain the material in these circumstances which he believes places his life at risk.

### **The Murder of Jean McConville**

[7] Jean McConville was abducted on 7 December 1972 and subsequently murdered. In March 1999 the IRA admitted that it had killed Mrs McConville. On 26 August 2003 remains, subsequently identified to be those of Mrs McConville, were found on a beach in Co Louth.

[8] Mrs McConville's murder was investigated by the Historical Enquiries Team, as a result of which the matter was referred back for investigation by the PSNI's Serious Crime Branch.

[9] The PSNI is currently conducting a live investigation in an attempt to identify offenders relating to Mrs McConville's abduction and murder, secure admissible evidence against them and instigate prosecutions. The Boston College material represents a significant line of enquiry in the PSNI investigation. The PSNI has become aware that various former members of the IRA, including Brendan Hughes and Dolours Price participated in the Belfast Project regarding their activities in the IRA. In 2010, following the deaths of two of the contributors to the archive, Mr Brendan Hughes and Mr David Ervine, a book "Voices from the Grave" was published based on the contents of their interviews. The applicant avers that none of the interviews with former IRA members were approved by that organisation's hierarchy and that the fact of the interviews and the existence of the Belfast Project was not revealed until the publication of Mr Maloney's book. That book includes an

account of the abduction and murder of Mrs McConville and names others as members of the IRA who were involved.

[10] In and around February/March 2010 newspaper articles in Northern Ireland reported that Dolours Price had been interviewed as part of the Belfast Project and that during the course of the same she had admitted to her involvement in the McConville incident. Both Mr Maloney and the applicant deny that she made any such admissions. In fact, according to Mr Maloney, the subject of Mrs McConville's disappearance "was never mentioned, not even once. Nor ... were the allegations that Dolours Price was involved in any other disappearance carried out by the IRA in Belfast, nor that she received orders to disappear people from Gerry Adams or from any other IRA figure. None of this subject matter was disclosed in her tape interviews with Anthony McIntyre". Mr Maloney avers that the interviews that the applicant conducted with Dolours Price "are notable for the absence of any material that could ever have justified the subpoenas".

### **USA Court Proceedings**

[11] In February 2011 the requisite UK authorities, on behalf of the PSNI, sought mutual legal assistance from the requisite authorities of the USA to obtain certain materials held by Boston College relating to the interviews conducted with Hughes and Price, and with any other participant in the project touching upon the abduction and death of Mrs McConville.

[12] A series of subpoenae were issued by the US District Court requiring Boston College to deliver up these materials. The Applications and the Court Orders were made *under seal*. Boston College brought a motion to quash. There was no challenge however to the subpoena to the extent that they related to the Hughes material which has now been furnished to the PSNI.

[13] The motion to quash was brought publicly rather than *under seal*. In the US Government's opposition to the motion to quash they rejected the claims that the researchers would face retribution as a result of disclosure stating:

"The researchers themselves, and the subject of the interviews, widely publicised their involvement in this oral history project long before the subpoenas in this case were issued. Moreover the respondent's decision to publicise the issuance of the subpoenas – which had been kept *under seal* by the United States – belies any claim of such risk."

[14] The applicant and Ed Maloney sought to intervene in the Boston College challenge. Both raised with the US Court, *inter alia*, the issue of their personal safety and, as we have seen, Boston College also raised the matter of their protection.

[15] On 27 December 2011 the Court, having conducted an *in camera* review of the relevant materials, ordered that the subpoena relating to the Price materials be complied with.

[16] On 20 January 2012 the Court, having considered the materials relating to the second subpoena (the wider materials relating to Mrs McConville) ordered that **some** of the said materials set out in a sealed appendix be provided by Boston College to the authorities.

[17] Appeals against the aforesaid orders have thus far been rejected.

### **Discussion**

[18] As previously pointed out the applicant's challenge to the receipt of these materials by the PSNI is predicated on the contention that their disclosure will give rise to a materially increased risk to his life and that of his family. The Court has before it two affidavits sworn by Detective Chief Inspector Gary Crawford who was, at all relevant times, attached to the PSNI's Serious Crime Branch and undertaking the role as Senior Investigating Officer in the police investigation in respect of the abduction and murder of Jean McConville. He states that the PSNI has extensive experience in the field of identification of risk to the life of individuals and of managing identified risks. He avers that the PSNI considered the question of risk to the applicant and are not aware of any risk to the applicant's life connected to the seeking of the Boston College materials. In his second affidavit he confirms, as was made clear at the leave hearing on Friday 21 September, that the PSNI is not aware of **any** current risk to the applicant.

[19] The second affidavit records that following the granting of interim relief on 7 September 2012 a threat assessment was sought from the Security Authorities. He avers that he was unable to exhibit a full copy of the threat assessment for national security reasons but states that the Security Authorities have assessed that the threat to the applicant from Northern Ireland-related terrorist groups would remain **LOW** in the event that material from the Boston College tapes were released to the PSNI. The definition of LOW is that an attack is unlikely. He confirms that the PSNI position remains that they are not aware of risk to the applicant in connection with the potential disclosure to it of the Boston College material.

### **Conclusion**

[20] In light of the unequivocal response from the PSNI supported by the threat assessment from the Security Authorities I conclude that the applicant has failed to make out an arguable case that disclosure of the Boston College tapes would, as he claimed, materially increase the risk to his life or that of his family.

[21] I note, in passing, that at para12 of his second affidavit the applicant seeks to rely on a piece written about him by the former Sinn Fein Director of Publicity (Danny Morrison) on his website entitled "The Making of a Tout". Interestingly the author of the article, notwithstanding its title, characterises the applicant's claimed risk from disclosure as a "red herring". The article states

"Some months ago it emerged that the British Authorities, supported by the US Department of Justice have issued subpoenas to seize the tapes for

their alleged evidential worth in unresolved killings, presumably involving the IRA. However, instead of refuting on ethical grounds the attempt to seize the material – which could still be potentially used to indict the interviewees or those they have implicated – Anthony and Ed’s (Maloney) first instinct was to run with the *red herring* that if the tapes were handed over they could be killed by the IRA (the IRA that sold out and was infiltrated up to its black berets – according to Anthony when it suited him)! I took umbrage at that nonsense and wrote so.”

[22] The applicant also referred in his affidavit to an incident at a neighbour’s house in 2010 following the publication of the book “Voices of the Grave” based *inter alia* on the Boston Tapes of Brendan Hughes. It was the applicant who had recorded the testimony from Mr Hughes, a former senior IRA figure which contained allegations regarding the Sinn Fein President Gerry Adams.

[23] The Court was furnished with a copy of a statement made by the applicant’s wife to the Irish police on 10 April 2012. In this statement she states as follows:

“The background to my concerns surround the current case in the United States regarding the Boston College Oral History Archives. My husband was the lead researcher for the project and conducted the interviews for the republican half of the interviews. The Historical Enquiries Team of the PSNI have subpoenaed some of the archive material. This subpoena has elevated the risk to our safety. This apparent threat from *loyalists* is a result of that. The matter of the subpoena is currently before the Courts in Boston and may not be resolved for some time. Previously an incident occurred near our home; our next door neighbour’s house was attacked and smeared with excrement [this is a reference to the incident in 2010]. This attack happened at the time of the publication based upon part of the archive, *Voices from the Grave*. We were not at home at the time of the attack, but the Drogheda Leader reported that the home attack was a mistaken identity. Therefore I conclude that the attack was intended for our home. I asked to have my complaint put into your records concerning the apparent threat from the *loyalist* people.”

[24] I note that the applicant avers as to the IRA’s strict code of silence, breach of which is punishable by death. In 2010 “Voices from the Grave” was published



which publication is based *inter alia* on the testimony of Brendan Hughes recorded by this applicant. It appears that it was this publication which alerted the PSNI to the existence of the Boston Archive in the first place.

[25] The US Government, in its opposition to the motion to quash, observed:

“The Researchers themselves, and the subject of the interviews, widely publicised their involvement in this oral history project long before the subpoenas in this case were issued. Moreover, the respondent’s decision to publicise the issuance of the subpoenas, which had been kept *under seal* by the United States, belies any claim of such risk.”

[26] Even if, contrary to my earlier conclusion, a material increase in risk was arguably established by disclosure, it by no means follows that the applicant would have been entitled to relief in the form of an injunction restraining the PSNI from receiving into its custody the Boston College material. Art2(1) of the Convention provides as follows:

“Everyone’s right to life shall be protected by law. No-one shall be deprived of his life intentionally save in the execution of a sentence of a Court following his conviction of a crime for which this penalty is provided by law.”

[27] Art2(1) imposes three different duties on the State – see *Savage v South Essex Partnership NHS Foundation Trust* [2009] 2 WLR 115, at para76 per Baroness Hale. The first is the negative duty to refrain from taking life, save in the exceptional circumstances envisaged by Art2(2). The second is a positive duty properly and openly to investigate deaths for which the State may be responsible. (I shall refer to this as “the investigatory duty”). The third duty requires the State not only to refrain from taking life but to take positive steps to protect the lives of those in their jurisdiction in certain circumstances (see *Osman v United Kingdom* [1998] 29 EHRR 245) (“the protective duty”).

### **The Investigatory Duty**

[28] The first sentence of Art2(1) enjoins a State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. Thus a State is obliged by Art2 to put in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (see for example *Killic v Turkey* [2001] 33 EHRR 1357 at para62 and Lester & Pannick ‘Human Rights Law & Practice’ at para4.2.7).

## The Protective Duty

[29] The State's obligation to secure the right to life in certain well defined circumstances may impose a positive obligation on the authorities to take preventative, *operational* measures to protect an individual whose life is at risk from the criminal acts of another individual. When determining the extent of the positive protective obligation, the Court takes into account "the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources" (see *Osman* at para116). Not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. As established in *Osman* for a violation of the positive obligation to protect the right to life to arise "it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures *within the scope of their powers* which, judged reasonably, might have been expected to avoid that risk".

[30] In *Van Colle v Chief Constable of Hertfordshire Police* [2008] 3 All ER 977 Lord Bingham held that the determination of whether or not the police should have taken protective steps does not depend only on what the authorities knew, but also on what they ought to have known - "stupidity, lack of imagination and inertia" are not an excuse when authorities reasonably ought, in light of what they know, to make further enquiries or investigations. The authorities ought to be treated as knowing what further enquiries would have elicited. The first limb of the test concerns the extent of the State's actual or presumed knowledge and the assessment of risk. The second limb concerns the reasonableness of the steps taken.

[31] In this case, if the requisite risk threshold had been (even arguably) surmounted by the applicant (which it wasn't) the question would then have arisen as to whether the State had fulfilled the second limb of the test concerning the reasonableness of the steps taken. The applicant's claim is that the risk threshold has been surmounted and, that in the circumstances, the measures required to be taken necessitate the PSNI being prohibited by the Court from receiving the Boston materials.

[32] Irrespective of the potential probative force or significance to a murder (or other serious criminal investigation) the Court would, on the applicant's argument, be compelled by Art2 to restrain the PSNI from receiving material which could result in the identification, prosecution and punishment of persons.

[33] Art2 does not, in my view, command such a startling conclusion.

[34] The submission however exposes a potential conflict between the Art2 investigatory duty on the one hand and the Art2 protective *Osman* duty on the other.

[35] However, the qualified nature of the protective *Osman* duty is such that the potential for any meaningful conflict is more illusory than real.

[36] The second limb of the test requires State authorities, in this case the PSNI (and the Court) to take feasible measures “within the scope of their powers”. In the case of the Court this duty is occasionally discharged, for example, by the grant of anonymity, screening or other special measures.

[37] I do not consider that Art2 in this case (or indeed more generally) can have the effect of prohibiting the police from seeking or receiving material relevant to a serious, live criminal investigation. Investigating murder and gathering relevant material is not only a requirement of domestic law but it is also a requirement of the positive investigative duty which Art2 imposes upon contracting States.

[38] I do not consider that it would be Art2 compliant for the PSNI to refuse to receive the Boston material.

[39] Section 6(1) of the Human Rights Act 1998 makes it unlawful for a Court to act in a way which is incompatible with a Convention right. The applicant wants the Court to make an Order preventing the Police from receiving material relevant or potentially relevant to the investigation of the abduction and murder of Jean McConville.

[40] It would not only be extraordinary if the Court were to make such an Order but it would also involve the Court in acting incompatibly with Art2 since the effect of any such Order would be to inhibit the PSNI in the discharge of its Art2 investigatory obligation.

[41] Even if the *Osman* risk threshold were crossed as a result of disclosure of the Boston material the requirement on the PSNI is to take feasible measures within the scope of its powers to protect the persons thereby exposed to any risk. That obligation however does not require or authorise the Police to refuse to receive material potentially relevant to a murder investigation in breach of the Art2 investigatory duty.

[42] On the applicant’s case the PSNI is prohibited from receiving material no matter how probative (even a confession to murder if it exists) because of the risk from the IRA, dissident or otherwise.

[43] The very notion that a risk generated by the perpetrators or their associates could require the PSNI, or indeed the Court, to effectively suppress material potentially relevant to murder is fundamentally inconsistent with the very nature of the rule of law and Art2 itself.

[44] For the reasons I have already give such a prohibition would violate the Art2 investigatory duty so recently stated in a series of cases from Northern Ireland eg *Jordan v United Kingdom* [2003] 37 EHRR 52.

[45] In Art2 cases the State Agencies must investigate, not suppress, potential evidence and it would be alarming, to say the least, if the Court were, as the applicant invites, to require its suppression.

[46] Accordingly the Court concludes that the applicant has not established, even arguably, that the requisite risk threshold has been reached; and, even if he had, it would not be open to the PSNI or the Court in the circumstances to prohibit the receipt of material relevant, or potentially relevant, to a murder enquiry.