UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
El Paso Division

UNITED STATES OF AMERICA	)	
	)	Case No. EP-07-CR-87
v.	)	
	)	The Honorable Kathleen Cardone
LUIS POSADA CARRILES	)	

MIAMI HERALD PUBLISHING COMPANY AND THE ASSOCIATED PRESS' MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF OPPOSING THE GOVERNMENT'S MOTION FOR A PROTECTIVE ORDER

Miami Herald Publishing Company (the "Herald"), publisher of *El Nuevo Herald*, and The Associated Press ("AP") (collectively, the "Movants"), move to intervene in this action for the limited purpose of opposing the United States of America's (the "Government") Motion for a Protective Order (D.E. 145) (the "Motion"). The grounds for this Motion are:

I. Preliminary Statement.

The Government asks this Court, in a case that warrants the maximum transparency, to enter a broad protective order that would violate the Constitution. Specifically, the proposed protective order would unlawfully restrict the press' First Amendment right to gather the news and receive protected speech by prohibiting the parties from disseminating unclassified materials to the public or press. In addition, the proposed protective order would give the Government a blanket license to preemptively cause certain unclassified documents to be filed under seal, without prior review, impermissibly restricting the public and press' First Amendment right to access judicial records. Because the Government has failed to overcome the burden needed to restrict the public and the press' Constitutional rights, the Herald and AP move to intervene for the limited purpose of opposing the Government's Motion.

II. Background.

This is a high profile case brought by the Government against Luis Posada Carriles (the "Defendant"), a Cuban-born anti-Castro Venezuelan militant who has gained notoriety over the past 30+ years and has been accused of being involved in multiple terrorist attacks and plots in the Western Hemisphere. The Defendant has been implicated in, among other events, the 1976 bombing of a Cuban airliner that killed 73 persons and a string of hotel bombings in Cuba nearly 20 years later.[1] Due to the history surrounding the Defendant, which this Court aptly observed "reads like one of Robert Ludlum's espionage thrillers" (see D.E. 26 at 3), the public, both in and outside of the United States, has been closely following the development of this case. The Government now seeks to restrict the dissemination of certain unclassified materials, and, in effect, preemptively restrict the public and press' access to certain judicial records filed in connection with this case.

In its Motion, the Government seeks to restrict the handling of *unclassified* materials of a "potentially sensitive nature" that Defendant may receive during the course of discovery. See Motion at 2-3. The Government sweepingly claims that these materials contain "information [that] potentially implicates the privacy, proprietary, law enforcement, and other interests of third parties and foreign governments."[2] Id. at 3. Specifically, the Government seeks to prevent disclosure of (1) reporters' tapes and transcripts, or related materials, that have not themselves been published; (2) information produced by or for a foreign government; (3) medical and

[1] Defendant has been the subject of several court proceedings in Venezuela, the United States, and elsewhere, and was acquitted by a Venezuelan military court of all charges relating to the 1976 Cuban airliner bombing.

[2] According to the Government, "such material may include information relevant to ongoing national security or criminal investigations and prosecutions, both foreign and domestic; information provided to the United States by foreign law enforcement, or vice versa; and material implicating the privacy, proprietary or economic interests of third parties." Id. at 3.

psychological records or reports; and (4) Giglio material from agent's personnel files (though the Government is not aware of any at this time). Id. at 3 n.1. Defendant opposes the Government's motion. See "Opposition and Response of Luis Posada Carriles to Government's Motion for Protective Order" (D.E. 151).

The Government's proposed protective order would not only restrict the press' ability to gather the news and receive protected speech, it would effectively seal judicial records in advance without review. Indeed, the proposed protective order would authorize the Government to unilaterally label unclassified documents "sensitive", which in turn, would prevent Defendant from disseminating those documents to the public or press. Further, the Government's proposal would compel the parties to file those documents under seal, without prior review.[3] In effect, if the proposed protective order is entered, the press would be barred from obtaining newsworthy information in a high profile case between a public figure and the Government. Moreover, the public and press' ability and Constitutional right to access judicial records without notice or review would be inhibited, as the burden would shift from the Government, which the Constitution mandates must always show an overriding interest to seal documents, to the public and press being forced to make a showing to unseal the documents.

While it seeks to restrict the Constitutional rights of the public and press, the Government does not establish that there is a compelling government interest in secrecy and that the proposed protective order is narrowly tailored to protect that interest. The Government does not even allege that disclosure would impair this Court's administration of justice. Instead, the

[3] Specifically, the proposed protective order would require "that any papers to be filed with the Court by either party which include particularly sensitive discovery materials or quote, summarize, refer to, or otherwise disclose the contents of particularly sensitive discovery materials, or any information therein, shall be filed under seal." It would further require "that any papers to be filed with the Court in response to papers filed in conformity with the preceding [sentence] also be filed under seal."

Government seeks to restrict access to, and the dissemination of, a significant amount of documents without demonstrating that the restriction is narrowly tailored or that the restriction is the least restrictive means available to serve the Government's purported compelling interest.

Accordingly, the Herald and AP hereby move to intervene in this action for the limited purpose of opposing the Government's Motion. While the Government claims that a protective order preventing the disclosure of "sensitive but unclassified discovery materials" will strike an appropriate "balance," the Government fails to recognize or even address both the press' interests to gather the news and receive protected speech, and the public and press' interests in the free dissemination of information under the First Amendment.

III. Memorandum of Law.

A. Entry of the Proposed Protective Order Will Restrict the Press' Constitutional Right to Gather the News and Receive Protected Speech.

1. The Press Has Standing to Intervene to Challenge the Proposed Protective Order.

The Fifth Circuit Court recognizes that the press has standing to challenge confidentiality orders in an effort to obtain access or information concerning judicial proceedings even if the press is not a party to the litigation and not restrained by the order. Davis v. East Baton Rouge Parish Sch., 78 F.3d 920, 926 (5th Cir. 1996) (citations omitted); see also United States v. Brown, 218 F.3d 415, 422 (5th Cir. 2000) (holding that the press has the right, in both civil and criminal trials, to intervene to oppose gag orders imposed against litigant's communications with members of the press) ("Brown I"). The Fifth Circuit also recognizes that the First Amendment protects the press' efforts to gather the news and the press' right to receive protected speech. Davis, 78 F.3d at 926; see also In re Express-News Corp., 695 F.2d 807, 810 (5th Cir. 1982) (the First Amendment right to gather news is a "good cause", and "[if] that right is to be restricted,

the government must carry the burden of demonstrating the need for curtailment"). Without these protections, the Fifth Circuit explains "freedom of the press could be eviscerated." Id. at 927 (citing In re Express-News Corp., 695 F.2d at 810 (internal quotations omitted).

2. The Government Fails to Satisfy Its Burden To Interfere With the Press' Right to Gather the News and Receive Protected Speech.

As explained above, the First Amendment protects the press' right to gather the news and receive protected speech. Here, the Government seeks to restrict the press' rights by preventing Defendant (apparently against Defendant's will) from disseminating *unclassified* "sensitive" documents to the public or press. Such a restriction, which the Government seeks through entry of the proposed protective order, would amount to a global gag order preventing Defendant from communicating with the press regarding certain documents, and would constitute a prior restraint against Defendant.[4] Brown I, 218 F.3d at 424-25; Davis, 78 F.3d at 928. While the Fifth Circuit has not addressed whether such a restriction constitutes a prior restraint against the press,[5] it has held that a confidentiality order's effect on the press' First Amendment rights "must still be justified." Davis, 78 F.3d at 928 (citation omitted). The Davis Court utilized two criteria to determine whether a restriction imposed by a confidentiality order is justified.[6] Id. at 928-29.

First, the Davis Court applied the strict scrutiny standard established in In re Express-News, where the Fifth Circuit held that "an inhibition of press news-gathering rights must be necessitated by a compelling governmental interest, and narrowly tailored to serve that interest."

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[4] Generally, such a prior restraint can only be upheld if the government establishes that the restrained activity poses either a clear and present danger or a serious and imminent threat to a protected competing interest, and the order is narrowly drawn and is the least restrictive means available. Brown I, 218 F.3d at 425.

[5] The Davis Court declined to reach a decision on this very issue and noted a split between the Second and Sixth Circuits on this issue. Davis, 78 F.3d at 928.

[6] The Davis Court utilized both standards, and did not decide which standard should apply because the subject confidentiality order did not satisfy either standard. Id. at 929.

Id. at 928 (citation and internal quotations omitted). Here, the proposed protective order fails under the strict scrutiny standard because the Government has failed to establish a compelling government interest that warrants the non-dissemination of documents. Indeed, the Government concedes that the "sensitive" documents are not classified, and it provides no specific examples as to why the Government has *any* interest in preventing the disclosure of these unclassified documents. Movants also question the "sensitivity" of these documents when many of the allegations regarding the Defendant concern events that occurred decades ago. As the Fifth Circuit has held, the press has "a First Amendment right to receive information and ideas, and a right to receive speech protected by the First Amendment." Id. at 928 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 757 (1976)) (internal quotations omitted). The proposed protective order clearly infringes on this right of the press, and the Government has not explained if and how the proposed protective order is narrowly tailored to serve any government interest.

Second the Davis Court applied the reasonable likelihood standard established in In re Application of Dow Jones & Co., 842 F.2d 603 (2d Cir. 1988), where the Second Circuit held that to gag participants in a criminal trial, there must be a showing that there is a "reasonable likelihood" that the pretrial publicity would prejudice the defendants' Sixth Amendment right to a fair trial, and a determination as to whether less intrusive alternative remedies exist. Id. at 929. Here, nothing in the record indicates that Defendant's rights under the Sixth Amendment would be prejudiced if this Court does not enter the proposed protective order – indeed, the Defendant largely opposes the entirety of the proposed order. The Government does not even address this issue in its Motion and Defendant has not raised this issue with the Court. Moreover, the

Government does not explain if less intrusive alternative remedies exist. Thus, the proposed protective order is not justified under the reasonable likelihood standard.

For the foregoing reasons, the Government cannot justify the effect that the proposed protective order will have on the press' First Amendment rights to gather the news and receive protected speech. It is clear, however, that the proposed protective order, if entered, will restrict these rights of the press. Accordingly, the Government's Motion should be denied.[7]

B. Entry of the Proposed Protective Order Will Restrict the Public and Press' Constitutional Right to Access Judicial Records.

1. The Press Has a Right to Intervene to Access Judicial Records.

The United States Supreme Court has long recognized that there exists a "general right to inspect and copy public records and documents, including judicial records and documents." Nixon v. Warner Commc'ns Inc., 435 U.S. 589, 597 (1978); see also Valley Broad. Co. v. U.S. D. Ct. for the D. of Nev., 798 F.2d 1289, 1293-94 (9th Cir. 1986) (recognizing "strong presumption in favor of copying access" to trial exhibits). This general right to receive information, which is also protected by the First Amendment, provides the public and the press with the presumption of access to criminal trials, including pre-trial and trial proceedings, documents, transcripts, audiotapes, and videotapes. See Tennessee v. Lane, 541 U.S. 509, 523 (2004) (citing Press-Enterprise Co. v. Super. Ct. of Cal., County of Riverside, 478 U.S. 1, 8-15 (1986)); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575, 580 (1980); In re Time Inc., 182 F.3d 270, 271 (4th Cir. 1999).

[7] Should the Court overrule Movants' objections, Movants alternatively request that if Government seeks to produce "sensitive" documents to the Defendant, undersigned counsel be given the opportunity to review the "sensitive" documents and challenge the designations, with the understanding that the burden will lie with the Government to establish why the documents are "sensitive" and should not be disseminated.

Access to judicial records may be denied only in limited circumstances. Globe Newspaper Co. v. Super. Ct. for Norfolk, 457 U.S. 596, 606 (1982); In re Krynicki, 983 F.2d 74 (7th Cir. 1992); Valley Broad., 798 F.2d at 1295, 1297. Specifically, access to a proceeding or record may be denied *only* if the Court finds that the party seeking non-disclosure has satisfied its burden to demonstrate a compelling government interest in secrecy that outweighs the presumption of public interest, and the remedy is "narrowly tailored to serve that interest." Globe Newspaper, 457 U.S. at 606-7; In re Associated Press, 162 F.3d 503, 506 (7th Cir. 1998); United States v. Brown, 447 F. Supp.2d 666, 670 (W.D. Tex. 2006) ("Brown II"). Accordingly, when access to judicial records and documents is at issue, the public and the press have a right to notice and to be heard, so that their rights can be protected. See e.g., Globe Newspaper, 457 U.S. at 609 n.25; United States v. Aref, 533 F.3d 72, 81 (2d Cir. 2008) (recognizing that motions to intervene are common when asserting the public's First Amendment right of access to criminal proceedings); In re Associated Press, 162 F.3d at 507, 510 (recognizing right of newspapers to intervene to seek public access to court proceedings); United States v. Criden, 675 F.2d 550, 552 n.2 (3d Cir. 1982); United States v. Brooklier, 685 F.2d 1162, 1168 (9th Cir. 1982).

2. The Government Fails to Satisfy Its Burden To Interfere With the Public and the Press' Right to Access Judicial Records.

As explained above, the public and press' access to judicial records may be denied *only* if the Court finds that the Government has satisfied its burden to demonstrate a compelling government interest in secrecy that outweighs the presumption of public interest. To protect the public interest, the Fifth Circuit has instructed that "[i]n exercising its discretion to seal judicial records, [a] court must balance the public's common law right of access against the interests favoring disclosure." S.E.C. v. Van Waeyenberghe, 990 F.2d 845, 848 (5th Cir. 1993) (citing Newman v. Graddick, 696 F.2d 796, 803 (11th Cir. 1983) ("The historic presumption of access

to judicial records must be considered in the balance of competing interests.")). Specifically, for the Government to overcome the presumption of openness, "an overriding interest articulated in findings must be shown," and the findings must be "specific enough that a reviewing court can determine whether the closure order was properly entered." Brown II, 447 F. Supp.2d at 670 (citations and internal quotations omitted). Moreover, the findings "must demonstrate that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Id. (citations omitted).

Here, if the Government's Motion is granted, the presumption of openness will fall by the wayside and the burden will shift from the Government to the public and press. Indeed, if the Motion is granted, the Government will not have to demonstrate that "sensitive" documents must be filed under seal to preserve higher values, but instead, any documents marked "sensitive" by the Government, and any filed documents making reference to "sensitive" documents would automatically be filed under seal, without prior review. The burden would then shift to the public and press to make a showing as to why the seal should be lifted. Such a result would infringe upon the First Amendment rights of the public and press, as it would allow the Government to preemptively cause "sensitive" documents, or documents referring to "sensitive" documents to be filed under seal. The process would also pre-empt the Court's obligation to make specific findings as to whether the documents were properly sealed, whether such a result preserves higher values, and whether the sealing is narrowly tailored to serve the Government's interest.

Ignoring these legal requirements, the Government seeks to prevent the dissemination of discovery materials that regard Defendant, a public figure, in an important case that is being

followed by the public.[8] The media's right to access judicial records, however, cannot be taken lightly. As the Supreme Court explained in Globe Newspaper:

> [T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process-an essential component in our structure of self-government.

457 U.S. at 606 (citations omitted); see also United States v. Dickinson, 465 F.2d 496, 501 (5th Cir. 1972) ("The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings."). Thus, if the Government's Motion is granted, the media's "significant role" in the functioning of the judicial process, as well as in informing the public of same, will be restricted. Because the Government has failed to even address the public and press' First Amendment right to the dissemination of judicial records that the Government seeks to restrict, the Government has utterly failed in meeting its burden to interfere with this right. Accordingly, the Government's Motion should be denied.

For the foregoing reasons, the Herald and AP respectfully request the Court to enter an Order:

(1) Allowing the Herald and AP to intervene in this action for the limited purpose of opposing the Government's Motion for a Protective Order;

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[8] Recognizing the import of this case to the general public, the United States District Court for the Western District of Texas has even identified this case as a "notable case" pending within the District. See http://www.txwd.uscourts.gov/opinions/notable.asp.

(2) Denying the Government's Motion for a Protective Order; and

(3) Granting such other and further relief as this Court deems just and appropriate.

Respectfully submitted,

MIAMI HERALD and THE ASSOCIATED PRESS

By their attorneys,

Alejandro Acosta, Jr. (TBN 00835600)
BICKERSTAFF HEATH DELGADO ACOSTA LLP
725 S. Mesa Hills
Building 1, Suite 2
El Paso, Texas 79912
Tel: (915) 533-1810
Fax: (915) 533-1841
Email: aacosta@bickerstaff.com

-and-

Sanford L. Bohrer (FBN 160643)*
Adolfo E. Jiménez (FBN 869295)*
Brian A. Briz (FBN 657557)*
HOLLAND & KNIGHT LLP
701 Brickell Avenue
Suite 3000
Miami, Florida 33131
Tel: (305) 374-8500
Fax: (305) 789-7799
Email: sandy.bohrer@hklaw.com
Email: adolfo.jimez@hklaw.com
Email: brian.briz@hklaw.com

* *Pro Hac Vice* applications pending.

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

John Williams Van Lonkhuyzen, Esq.
john.van.lonkhuyzen@usdoj.gov
U.S. DEPARTMENT OF JUSTICE
10th Street & Constitution Ave. NW
Washington, DC 20530
Tel: (202) 307-1102

Margaret Feuille Leachman, Esq.
margaret.leachman@usdoj.gov
UNITED STATES ATTORNEY'S OFFICE
700 E. San Antonio
2nd Floor
El Paso, Texas 79901
Tel: (915) 534-6884
Fax: (915) 534-3418

Rebekah Lee Sittner, Esq.
rebekah.sittner@usdoj.gov
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Ave., NW
Washington, DC 20530
Tel: (202) 353-8409
Fax: (202) 353-8714

Rhonda A. Anderson, Esq.
randersonlaw@gmail.com
RHONDA A. ANDERSON, P.A.
2655 South LeJeune Road, Suite 540
Coral Gables, Florida 33134
Tel: (305) 567-3004
Fax: (305) 476-9837

Arturo V. Hernandez, Esq.
avhlaw@bellsouth.net
ARTURO V. HERNANDEZ, P.A.
2937 S.W. 27th Avenue, Suite 101
Miami, Florida 33131
Tel: (305) 443-7527
Fax: (305) 446-6150

Felipe D.J. Millan, Esq.
elpasolawboy1@msn.com
1147 Montana Avenue
El Paso, Texas 79902
Tel: (915) 566-9977
Fax: (915) 562-6837

ALEJANDRO ACOSTA, JR.

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