UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, **CBS BROADCASTING INC.,** **SERGIO GOMEZ,** **DANIEL PACHECO** **and UNIVISION.**	Case: 1:15-mc-00411 Assigned To : Walton, Reggie B. Assign. Date : 4/3/2015 Description: Miscellaneous Related to: Criminal No. 1:04-cr-114-RBW-1 Criminal No. 1:04-cr-114-RBW-9 **Oral Argument Requested**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE APPLICATION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, CBS BROADCASTING INC., SERGIO GOMEZ, DANIEL PACHECO, AND UNIVISION TO UNSEAL COURT RECORDS IN CRIMINAL MATTERS NOS. 1:04-CR-114-RBW-1 AND 1:04-CR-114-RBW-9

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The Reporters Committee for Freedom of the Press ("Reporters Committee"), CBS Broadcasting Inc. ("CBS"), Sergio Gomez, Daniel Pacheco, and Univision (collectively, "Applicants") hereby submit this Memorandum of Points and Authorities in support of their application to unseal court documents in the criminal prosecutions of Hernan Giraldo Serna ("Giraldo Serna"), Crim. No. 1:04-cr-114-RBW-1, and Rodrigo Tovar Pupo ("Tovar Pupo"), 1:04-cr-114-RBW-9. Applicants base their Application on the First Amendment and common law rights of the press and the public to access court proceedings and court documents in criminal cases.

BACKGROUND

Applicants seek access to complete docket information and court documents relating to the United States government's prosecution of two internationally infamous criminal defendants. Giraldo Serna and Tovar Pupo (collectively, "Defendants") are former high-ranking leaders of a violent, right-wing paramilitary organization in Colombia known as the United Self-Defense Forces of Colombia ("AUC"). The AUC, which has reportedly been responsible not only for large-scale narco-trafficking, but also the murders of thousands, including countless innocent civilians, in Colombia since the 1990s, was designated a foreign terrorist organization by the U.S. State Department in 2001. The prosecutions of Giraldo Serna and Tovar Pupo in this Court for offenses related to an alleged conspiracy to manufacture and distribute large amounts of cocaine are matters of significant public interest in the United States and abroad.

Both prosecutions, however, have been cloaked in virtually complete secrecy. All or nearly all of the proceedings have been closed to the public, and the cases have been entirely sealed, including the docket sheets themselves. These measures have made it difficult, if not impossible, for the press and public to monitor the progress of these cases. Indeed, because no

public docket exists for the Giraldo Serna and Tovar Pupo cases, Applicants are not aware of their status; neither they nor the public can ascertain whether Giraldo Serna and Tovar Pupo are awaiting trial, have pleaded guilty, have been sentenced, or have been released. Moreover, because none of the sealing orders or motions to seal in these cases are available to the public, the Court's reasons for allowing Defendants to be prosecuted in secrecy are obscure.

On February 4, 2008, Huber Gomez Luna, a co-defendant of Giraldo Serna and Tovar Pupo, requested that the Court unseal the case record as to himself and two other co-defendants proceeding to trial. In doing so, Gomez Luna stated: "Since the inception of electronic filing in this jurisdiction, it has become common practice in multi-defendant criminal cases where some of the defendants have pled guilty for the cases of those defendants proceeding to trial to remain unsealed." Def.'s Joint Consent Mot. to Unseal at 2, *United States v. Huber Gomez Luna*, No. 1:04-114-10 (RBW) (D.D.C. Feb. 4, 2008), ECF No. 92. In this case, however, Gomez Luna asserted: "[T]he general public has been unable to view the status of the case and all defense counsel have been unable to monitor the progress of the case and review pleadings as they are filed." *Id.* at 1.

On December 30, 2014, the transcript of a "bench trial" in Tovar Pupo's case was entered on the "All Defendants" master docket. The bench trial had occurred three months earlier, on September 4, 2014. That transcript is the only document that appears to have been filed in either Tovar Pupo's or Giraldo Serna's case that is currently available on any public docket. As a result of the lack of public docket sheets and the sealing of virtually all documents filed in connection with the prosecutions of Tovar Pupo and Giraldo Serna, the press and the public are unaware of any plea agreements, plea proceedings, or sentencing proceedings relating to Defendants.

Applicants, as representatives and members of the news media, seek access to complete docket sheets and court documents in these cases so that the public may be informed of the criminal proceedings against Giraldo Serna and Tovar Pupo. The conduct of U.S. prosecutors and the disposition of these cases by a U.S. court are matters of significant public interest and concern, and are presumptively open to the press and public as a matter of constitutional and common law. Among the documents that Applicants seek, in addition to docket sheets, are any and all motions to seal filed by the government or Defendants, any sealing or closure orders entered by the Court, any filed hearing transcripts, any plea agreements, any orders of disposition, judgment, and/or sentencing, and any memoranda related thereto, and any other orders entered by the Court.

ARGUMENT

I. Openness is a bedrock principle of the American criminal justice system.

For centuries, openness has been "an indispensable attribute" of the criminal trial. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980). As the Supreme Court has recognized, secrecy breeds "distrust" of the judiciary and its ability to adjudicate matters fairly. *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966). The benefits of an open and transparent criminal justice system are manifold, both to the defendant and the public. Openness gives "assurance that the proceedings [are] conducted fairly to all concerned, and it discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Richmond Newspapers*, 448 U.S. at 569. Public dissemination of final dispositions and sentences also enable closure for victims, their families, and communities, serve as a deterrent to future crimes, and permit the public to evaluate the performance of its law enforcement and

judicial officers. *See Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508–09 (1984) ("*Press-Enterprise I*"); *see also Wash. Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991) ("*Robinson*") (explaining that the First Amendment right of access to criminal proceedings "serves an important function of monitoring prosecutorial or judicial misconduct").

The nexus between openness and fairness in criminal proceedings and the role of an unfettered press is well-established. "A responsible press has always been regarded the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard*, 384 U.S. at 350 (internal quotation marks and citations omitted). Indeed, as this Court has noted, the U.S. Supreme Court has "recognized that the public may obtain its access to judicial proceedings through the media." *In re Special Proceedings*, 842 F. Supp. 2d 232, 239 n.9 (D.D.C. 2012) (quoting *Richmond Newspapers*, 448 U.S. at 572–73 ("Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. . . .")). Thus, while "media representatives enjoy the same right of access as the public," they "function[] as surrogates for the public" by attending court proceedings, reviewing court documents, and reporting on what has transpired. *Richmond Newspapers*, 448 U.S. at 572–73.

II. The press and the public have both a constitutional and common law right to access criminal proceedings and court documents.

The First Amendment guarantees the press and the public a presumptive right of access to criminal trials, as well as other pre- and post-trial documents and court proceedings. *Id.* at 580–81; *Robinson*, 935 F.2d at 283; *In re Special Proceedings*, 842 F. Supp. 2d at 239; *see also* LCrR 17.2(a) ("Unless otherwise provided by law or by this Rule, all criminal proceedings, including

preliminary examinations and hearings on pretrial motions, shall be held in open court and shall be available for attendance and observation by the public."). Although the First Amendment right of access to criminal proceedings and documents "is not absolute, the standard to overcome the presumption of openness is a demanding one." *In re Special Proceedings*, 842 F. Supp. 2d at 239. Specifically, the presumption of openness may be overcome "*only* by an overriding interest based on findings that closure is *essential* to preserve higher values and is *narrowly tailored* to serve that interest." *Press-Enterprise I*, 464 U.S. at 510 (emphasis added); *In re Special Proceedings*, 842 F. Supp. 2d at 239. Moreover, orders sealing documents or closing proceedings to which the First Amendment right of access applies must be supported by findings on the record that are "specific enough that a reviewing court can determine whether the [] order was properly entered." *Press-Enterprise I*, 464 U.S. at 510; *Robinson*, 935 F.2d at 283; *see also* LCrR 49(f)(6)(i) ("Absent statutory authority, no case or document may be sealed without an order from the Court. . . .").

In addition to the presumptive right of access guaranteed by the First Amendment, the common law also provides a right of access to court documents that play a role in the "adjudicatory process." *United States v. El-Sayegh*, 131 F.3d 158, 160, 161 (D.C. Cir. 1997); *see also Nixon v. Warner Commc'ns, Inc.* 435 U.S. 589, 597–98 (1977). That right of access "is largely controlled by the second of the First Amendment criteria—the utility of access as a means of assuring public monitoring of judicial or prosecutorial misconduct." *El-Sayegh*, 131 F.3d 158 at 163. Under common law, if a court document is a "public record," then it must be disclosed unless the "government's interest in keeping the document secret" outweighs the "public's interest in disclosure." *Washington Legal Found. v. U.S. Sentencing Comm'n,* 89 F.3d 897, 899 (D.C.Cir.1996). In balancing these interests, the district court has "substantial

discretion to make a decision in light of the relevant facts and circumstances of the particular case." *In re Application of N.Y. Times Co. for Access to Certain Sealed Court Records*, 585 F. Supp. 2d 83, 92 (D.D.C. 2008).[1]

III. The broad, presumptive right of access guaranteed by the First Amendment extends to pre- and post-trial criminal proceedings and related documents, including plea agreements and other documents sought by Applicants.

The right of access guaranteed by the First Amendment "is not limited to the criminal trial itself, but extends to many pre- and post-trial proceedings and documents." *In re Special Proceedings*, 842 F. Supp. 2d at 239 (collecting cases); *see also Press-Enterprise I*, 464 U.S. at 508–09 (First Amendment right of access to voir dire); *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*") (First Amendment right of access to pre-trial preliminary hearings); *El-Sayegh*, 131 F.3d at 160–61 (First Amendment right to documents); *Robinson*, 935 F.2d at 283 (First Amendment right to plea agreements and related documents); *In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (First Amendment right to written documents submitted in connection with judicial proceedings); *Associated Press v. U.S. District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (First Amendment right of access to pretrial documents). Indeed, this presumptive right of access applies even if no criminal trial is ever held. *See Robinson*, 935 F.2d at 283; *El-Sayegh*, 131 F.3d 158, 160–61 (stating that because a plea agreement "substitutes for the entire trial," it "makes sense to treat a completed plea agreement as equivalent to a trial, and therefore as an item that 'historically has been available'" to the public).

In determining whether a First Amendment right of access attaches to a particular process, courts must consider both "whether the place and process have historically been open to

[1] In conducting this balancing, courts have considered the following factors: "(1) the need for public access to the documents at issue; (2) the public use of the documents; (3) the fact of objection and the identity of those objecting to disclosure; (4) the strength of the generalized property and privacy interests asserted; (5) the possibility of prejudice; and (6) the purposes for which the documents were introduced." *Id.* (citation omitted).

the press and general public" as well as "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8. Applying this "experience and logic" test to specific categories of proceedings, documents, and records that Applicants seek to have unsealed, such as plea agreements and sentencing memoranda, this Circuit and other circuit courts of appeal have expressly found that the press and the public have a First Amendment right of access.

A. Docket sheets.

As the Second Circuit has recognized, docket sheets "provide a map of the proceedings in the underlying cases." *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 95 (2d Cir. 2004). Open docket sheets permit the public and the press to "intervene and present their objections to the court" when proceedings are closed. *In re Wash. Post Co.*, 807 F.2d at 390. They also serve the interests of efficiency, because "[w]ithout open docket sheets, a reviewing court cannot ascertain whether judicial sealing orders exist." *Hartford Courant*, 380 F.3d at 94.

It is difficult to imagine a scenario where merely acknowledging that a filing has been made or a hearing held would so compromise a compelling state interest as to justify its total exclusion from the docket under either the *Press-Enterprise* or common law tests. *See Hartford Courant*, 380 F.3d at 96 ("'There are probably many motions and responses thereto that contain no information prejudicial to a defendant, and we cannot understand how the docket entry sheet could be prejudicial'") (quoting *In re State-Record Co., Inc.*, 917 F.2d 124, 129 (4th Cir. 1990)). And the lack of *any* public docket, whatsoever, in Giraldo Serna's and Tovar Pupo's cases, without any articulated justification for such extreme secrecy, plainly cannot satisfy the First Amendment's demand of openness. *See Press-Enter. I* at 510 (requiring that closure be "essential" and "narrowly tailored").

The lack of publicly available docket sheets in the cases against Giraldo Serna and Tovar Pupo makes it impossible to ascertain whether criminal proceedings, including plea proceedings, have been completed or are ongoing. This level of secrecy prevents the press and the public from monitoring the progress of these cases, and continues to prevent the public from understanding, even in broad strokes, how (or even whether) these criminal cases are being adjudicated. In criminal proceedings such as these, "[e]xperience casts an affirming eye on the openness of docket sheets and their historical counterparts." *Hartford Courant*, 380 F.3d at 94. In light of the strong constitutional and common law presumption of openness in criminal proceedings, this Court should order the clerk to immediately make public the complete docket sheets in the above-captioned matters.

B. Plea proceedings and plea agreements.

This Circuit has expressly recognized the public's constitutional right of access to plea proceedings and plea agreements. *See Robinson*, 935 F.2d at 288. Indeed, since a plea agreement often "substitutes for the entire trial," *El-Sayegh*, 131 F.3d at 161, "[i]t makes little sense to recognize a right of public access to criminal courts and then limit that right to the trial phase of a criminal proceeding, something that occurs in only a small fraction of criminal cases." *United States v. Alcantara*, 396 F.3d 189, 199 (2d Cir. 2005) (quoting *In re The Herald Co.*, 734 F.2d 93, 98 (2d Cir. 1984)).

Where the government seeks to close proceedings or seal documents in connection with a guilty plea, the law of this Circuit "requires the government to file a written motion to seal the plea agreement, and requires the court to enter notice of that motion in the public docket and to give interested parties a chance to be heard." *El-Sayegh*, 131 F.3d at 159; *see also* LCrR 17.2(c)

(governing closure of pretrial proceedings) ("Any news organization or other interested person may be heard orally or in writing in opposition to a closure motion by a party"). This requirement of public notice is necessary to protect the ability of the press and the public to assert their rights of access, advocate for open court proceedings, and challenge requests to seal court documents. Indeed, even though the government's motion to seal may itself be filed under seal under certain circumstances, "notice of the sealed motion must still be entered in the public docket. . . ." *Id.* at 159–160 (internal citations omitted). To overcome the constitutional presumption of openness with respect to plea agreements, "specific findings must be articulated on the record *at the time a plea agreement is sealed*." *See Robinson*, 935 F.2d at 288 (emphasis added); *El-Sayegh*, 131 F.3d at 159. And "[t]he court may file under seal the details of its resolution of the motion, but only to the extent necessary to protect the secrecy of the sealed agreement." *El-Sayegh*, 131 F.3d at 159–160 (internal citations omitted).

Because of the wholesale sealing of the dockets in the proceedings against Giraldo Serna and Tovar Pupo, Applicants cannot tell whether either defendant has pleaded guilty. If plea proceedings have occurred, there has been a complete lack of notice to the press and the public of the plea proceedings themselves, or any motion to seal those proceedings. If plea proceedings have not occurred, but are scheduled to occur, the press and the public should be given notice of and permitted to attend those planned proceedings. Further, this Court should immediately unseal and docket all documents and hearing transcripts filed in connection with any plea proceedings, including any executed plea agreements.

C. Sentencing proceedings and memoranda.

While the D.C. Circuit has not squarely considered the applicability of the *Press-Enterprise* requirements to hearings and documents in connection with sentencing proceedings,

other circuits have recognized that, like plea proceedings, sentencing proceedings occur "within the scope of the criminal trial itself," and are, thus, presumptively open. *In re Wash. Post Co.*, 807 F.2d 383, 398 (4th Cir. 1986). Because sentencing hearings have traditionally been open and because of the integral nature of those hearings to the criminal process, the Fourth Circuit has also held that the "First Amendment right of access applies to documents filed in connection with plea hearings and sentencing hearings in criminal cases, as well as to the hearings themselves." *Id.* at 390. And, as the Fifth Circuit has recognized, "[t]he First Amendment right of access to a sentencing proceeding is especially salient . . . where, as in the vast majority of criminal cases, there was no trial, but only a guilty plea." *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 177 (5th Cir. 2011). District courts around the country have similarly recognized the public's "strong right" of access to sentencing memoranda. *United States v. Dare*, 568 F.Supp.2d 242, 244 (N.D.N.Y. 2008); *see also United States v. James*, 663 F. Supp. 2d 1018 (W.D. Wash. 2009) (recognizing right of access to sentencing memoranda); *United States v. Kushner*, 349 F. Supp. 2d 892, 905 (D.N.J. 2005) (recognizing strong right of access to sentencing memoranda and to sentencing letters upon which the court relies in sentencing a defendant).

Here, it appears that neither Giraldo Serna nor Tovar Pupo have been sentenced. *See* Gov't's Mem. of Relevant Cases, *United States v. Mancuso*, No. 1:02-cr-388-2 (D.D.C. Mar. 23, 2015) ("Tovar-Pupo, Giraldo-Serna, and Mejia-Munera have not been sentenced."). To the extent that sentencing is imminent in either case, the Court should give notice to the press and the public of any planned sentencing proceedings, and ensure that those proceedings are open to the public. In addition, the Court should immediately docket all documents filed in connection with those proceedings.

CONCLUSION

For these reasons, Applicants request that the Court provide the public with access to complete docket information and court documents relating to the prosecutions of Giraldo Serna and Tovar Pupo, Criminal Nos. 1:04-cr-114-RBW-1 and 1:04-cr-114-RBW-9. Among the documents that Applicants seek to unseal, in addition to the docket sheets, are any and all motions to seal and any sealing or closure orders; any hearing transcripts; any plea agreements; any orders of disposition, judgment, and/or sentencing, and all related memoranda; and any other orders of the Court. Applicants respectfully request that their application to unseal be granted, that the relief requested therein be granted, and that they be awarded any additional relief that this Court deems fair and just.

Dated: April 3, 2015

Respectfully submitted,

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