

**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

Misc. Action No. 15-mc-410

Related to: Criminal Nos. 1:02-cr-388

MOTION TO CLARIFY AND/OR AMEND ORDERS

Pursuant to Federal Rule of Civil Procedure 59(e), the Reporters Committee for Freedom of the Press (“Reporters Committee”), CBS Broadcasting Inc., Sergio Gomez, Daniel Pacheco, and Univision (collectively, “Applicants”) respectfully seek clarification and modification of orders issued by the Court in the above-captioned matter. Specifically, Applicants seek clarification of the scope of this Court’s Minute Orders unsealing certain documents and maintaining certain other documents under seal in the criminal prosecutions of Salvatore Mancuso Gomez (“Mancuso”), Crim. No. 1:02-cr-388-ESH-2, and Juan Carlos Sierra Ramirez (“Sierra Ramirez”), Crim. No. 1:02-cr-388-ESH-3. In addition, Applicants request that this Court amend its Minute Orders to set forth its findings justifying the continued sealing of certain documents, as required under *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (“*Press-Enterprise I*”); *Washington Post v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991).

BACKGROUND

On April 3, 2015, Applicants filed an application to unseal docket entries and court records in the criminal prosecutions of Mancuso and Sierra Ramirez. On April 14, 2015, this Court issued two Orders to Show Cause requiring that “for the documents and proceedings that” Mancuso, Sierra Ramirez, or the government seek to keep “under seal in whole or in part, the party shall . . . show cause, as required by the overriding-interest test articulated in [*Press-Enterprise I*, 464 U.S. at 510] and the LCrR 17.2(b) factors, why these documents and proceedings should remain under seal.” See ECF Nos. 8 and 9 (hereinafter, the “OSCs”). The OSC as to the application to unseal Mancuso’s case required the parties to respond by April 30, 2015; the OSC as to the application to unseal Sierra Ramirez’s case required the parties to respond by May 4, 2015. *Id.*

Sierra Ramirez was the only party to timely respond to the OSC issued in connection with his case. Sierra Ramirez’s counsel publicly filed a short, two-page response accompanied by a sealed motion requesting permission to submit—also under seal—a list of those court documents that he agrees should be made public, and those that he contends should remain sealed either in whole or in part. See ECF Nos. 11 & 12. On May 5, 2015, this Court issued a Minute Order granting Sierra Ramirez’s sealed motion to seal “for good cause shown.” ECF No. 15. This Court also issued a contemporaneous order in *United States v. Sierra-Ramirez* unsealing certain documents and maintaining others under seal pending further order of the Court. Order, Crim. No. 1:02-cr-388-ESH-3 (D.D.C. May 5, 2015), ECF No. 155.

Neither the Government nor Mancuso timely responded to the OSC issued in connection with the sealed documents and proceedings in his criminal case. Accordingly, on May 5, 2015, five days after the deadline set by the Court in its OSC, Applicants filed a request for entry of

their previously submitted proposed order unsealing the docket entries and court documents in Mancuso's case. *See* ECF No. 14.

In response to Applicants' request, the government submitted to the Court's clerk a motion to late-file a response to the OSC accompanied, in the same document, by a request that a portion of a single sealed court document remain under seal. Specifically, the government requested that five pages of its Memorandum in Aid of Sentencing and Motion Pursuant to U.S.S.G. Section 5K1.1 remain sealed because that document "describes the assistance provided by the defendant in United States connected cases." The government's motion and late-submitted response, a courtesy copy of which was emailed to Applicants' counsel, does not appear on the public docket in this case.¹

On May 6, 2015, this Court issued a Minute Order unsealing most of the filings in *United States v. Mancuso-Gomez*, but maintaining under seal, "pending further order of the Court," the "government's sentencing memorandum and motion pursuant to U.S.S.G. 5K1.1 (Feb. 18, 2015 [ECF Nos. 114–115]) and defendant's memorandum in aid of sentencing and motion pursuant to U.S.S.G. section 5K1.1 (Mar. 31, 2015, Ex. to Mot. for Leave to File Doc. [ECF No. 131] Under Seal, [ECF No. 130-2]; Apr. 1, 2015 [ECF No. 131]." *See* Order, Crim. No. 1:02-cr-388-ESH-2 (D.D.C. May 6, 2015), ECF No. 156 (as modified).

¹ In response to Applicants' filing of their request for entry of the proposed order unsealing the docket entries and court documents in Mancuso's case, counsel for the government sent an email to Applicants' counsel indicating that the government intended to file a motion seeking permission to file an untimely response to the OSC. Shortly thereafter, counsel for the government sent another email to Applicants' counsel indicating that the government had submitted such a motion, along with its late-filed response, via email to the Clerk of the Court, and attaching a courtesy copy.

**REQUEST TO CLARIFY AND/OR AMEND AS TO THE SCOPE OF THE
MINUTE ORDERS**

The Sierra Ramirez Minute Order

Applicants are unable to ascertain the scope of the Court’s Minute Order that was issued in connection with Sierra Ramirez’s case because (1) Applicants do not have access to the sealed list of documents and proceedings that the Court has ordered be kept under seal in that case, and (2) it does not appear that all sealed court documents and proceedings in that case are reflected on the public docket.

Applicants understand from the public record that Sierra Ramirez filed under seal a list of documents and proceedings that both he and the government agreed should be unsealed, as well as a list of documents and proceedings that Sierra Ramirez asserts should be kept under seal either in whole or in part. Sierra Ramirez’s publicly filed response accompanying those sealed filings states only that “compelling interests” justify such continued sealing. Because Applicants have no access to that list, they do not know what documents and proceedings—or portions thereof—Sierra Ramirez requested, and the Court subsequently ordered, be kept under seal in his case. Moreover, because it does not appear that all documents and proceedings in Sierra Ramirez’s case are reflected on the public docket, Applicants are unable to determine what remains under seal simply by referring to the docket. Indeed, while the Minute Order issued by the Court unsealed a significant number of documents which had not previously been reflected on the public docket, *see, e.g.*, Crim. No. 1:02-cr-388-ESH-3, ECF Nos. 52, 65 & 69, the public docket still appears to have gaps where filings, orders, and/or proceedings are missing.² For

² For example, on September 2, 2011 Sierra Ramirez filed a Notice of Filing of Sentence Hearing Exhibit on Behalf of Defendant Juan Carlos Sierra submitting an “attached letter as an exhibit to his previously filed Memorandum in Aid of Sentencing.” *See* Crim. No. 1:02-cr-388-ESH-3 (D.D.C. May 5, 2015), ECF No. 168. However, there is no indication on the public docket that Sierra Ramirez filed a Memorandum in Aid of Sentencing.

these reasons, Applicants respectfully request that the Court clarify the Minute Order issued in connection with Sierra Ramirez’s case to identify those documents and proceedings that the Court has ordered be kept under seal.

In addition, Applicants respectfully request that the Court further clarify its Minute Order to explicitly reflect its ruling concerning Applicants’ request that “all filings, orders, and other entries” related to Sierra Ramirez’s criminal prosecution be reflected on the public docket. Appl. to Unseal ¶¶ 1, 24, ECF No. 1. As set forth in the Memorandum of Points & Authorities at 10–11, ECF No. 1-1, the First Amendment right of access attaches to docket sheets, which provide the press and the public, as well as reviewing courts, with “a map of the proceedings in the underlying cases.” *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 95 (2d Cir. 2004); *see also In re Wash. Post Co.*, 807 F.2d 398, 390 (4th Cir. 1986) (explaining that open docket sheets make it possible for the public to “intervene and present their objections to the court” when documents are sealed and proceedings are closed). To the extent that the Court has determined that a compelling reason requires that certain filings or proceedings in the Sierra Ramirez case not be listed on the public docket, Applicants respectfully request that the Court clarify its Minute Order to so indicate.

The Mancuso Minute Order

In its untimely response to the OSC issued in connection with the Mancuso case, the government requested that the Court maintain a portion of one document—five pages of its Memorandum in Aid of Sentencing and Motion, Crim. No. 1:02-cr-388-ESH-2 (D.D.C. Feb. 18, 2015), ECF Nos. 114 & 115—under seal. According to the government’s response: “The release of this information may threaten an ongoing criminal investigation, and may threaten the safety of other cooperators identified in that portion of the document, as well as the families of

those other cooperators.” Mot. for Extension of Time at 2, Crim. No. 1:02-cr-388-ESH-2 (D.D.C. May 5, 2015), ECF No. 154. The government conceded that the remainder of the documents and proceedings in the Mancuso case should be unsealed in their entirety.

The Minute Order issued by the Court, however, maintains under seal “the government’s sentencing memorandum and motion pursuant to U.S.S.G. 5K1.1 (Feb. 18, 2015 [ECF Nos. 114–115]),” in its entirety, and also maintains under seal “defendant’s memorandum in aid of sentencing and motion pursuant to U.S.S.G. section 5K1.1 (Mar. 31, 2015, Ex. to Mot. for Leave to File Doc. [ECF No. 131] Under Seal, [ECF No. 130-2]; Apr. 1, 2015 [ECF No. 131]).”

Notwithstanding the Court’s unsealing of the majority of the documents and proceedings in the Mancuso case, as in the case against Sierra Ramirez, it does not appear that all documents and proceedings are reflected on the public docket. While the Court’s Minute Order indicates, for example, that “defendant’s memorandum in aid of sentencing and motion pursuant to U.S.S.G. section 5K1.1” was filed on March 31, 2015 and is docket entry No. 131, that docket entry does not appear on the docket. Accordingly, Applicants respectfully request that the Court clarify its Minute Order to address Applicants’ request that the public docket reflect all filings and proceedings in that case.

REQUEST TO CLARIFY AND/OR AMEND THE MINUTE ORDERS TO SET FORTH THE COURT’S FACTUAL FINDINGS IN SUPPORT OF CONTINUED SEALING

The standard for overcoming the presumptive right of access to criminal proceedings guaranteed by the First Amendment is a “demanding” one. *In re Special Proceedings*, 842 F. Supp. 2d 232, 239 (D.D.C. 2012). Sealing orders must be accompanied by “specific, on the record findings” that demonstrate that sealing “is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 13–14 (1986) (“*Press-Enterprise II*”) (quoting *Press-Enterprise I*, 464 U.S. at 510).

Such findings must be “specific enough” that a reviewing court can determine whether the order “was properly entered.” *Press-Enterprise I*, 464 U.S. at 510–511. While a trial court may, in rare cases, “file its findings under seal if it is necessary,” *Robinson*, 935 F.2d at 289, even then the court “must make every effort to explain as much of its decision as possible on the public record to enable an interested person to intelligently challenge the decision.” *Id.* at 289 n.9.

This Court’s Minute Orders in both the Mancuso and Sierra Ramirez cases require that certain documents be kept under seal “for good cause shown,” but neither Minute Order “articulate[s] the reason for the closure or the evidence that supported the need for closure.” *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1030 (11th Cir. 2005). Maintaining sealed documents under seal, while “a passive act,” is “an active decision requiring justification under the First Amendment.” *United States v. Antar*, 38 F.3d 1348, 1363 (3d Cir. 1994). Accordingly, Applicants respectfully request that this Court amend its Minute Orders to articulate, in accordance with standards set forth in *Press-Enterprise I* and *Robinson*, its reasons for maintaining certain documents and proceedings, or portions thereof, under seal in the Mancuso and Sierra Ramirez cases, as well as the reasons why certain documents and proceedings, to the extent they are not reflected on the public docket in those matters, should not be listed publicly.

Such specific, on-the-record findings are particularly important with respect to the Mancuso case, where, despite the government’s representation that only a portion of one document—five-pages of its Memorandum in Aid of Sentencing and Motion—should remain under seal, the Court’s Minute Order seals that document in its entirety, as well as another document, the docket entry for which is not reflected on the public docket. To Applicants’ knowledge, there was no showing made in response to the OSC or otherwise that such additional sealing is necessary to serve a compelling government interest; to the contrary, the government

conceded that, apart from the portion of the document it identified in its response, the remainder of the documents and proceedings in the Mancuso case should be unsealed. Thus, the Court's findings with respect to its decision to go beyond the sealing request made by the government are particularly vital to the ability of the press and the public to understand the Court's ruling.³

CONCLUSION

For the foregoing reasons, Applicants respectfully request that the Court clarify and/or amend its Minute Orders unsealing certain documents and maintaining certain other documents under seal in the criminal prosecutions of Mancuso and Sierra Ramirez to (1) specify the documents and proceedings, or portions thereof, that are being kept under seal, and (2) set forth its findings that justify such continued sealing, as required by *Press-Enterprise I*, 464 U.S. 501.

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³ Any findings that sealing is necessary to preserve a compelling government interest, and “narrowly tailored” to serve that interest, should take into account information which is already public. When a fact is publicly known, “the genie is out of the bottle,” and continued secrecy is unnecessary. *In re Charlotte Observer*, 882 F.2d 850, 854–55 (4th Cir. 1989). Here, much information about Defendants’ cooperation with U.S. authorities is already public. For example, Mancuso’s plea agreement, filed in 2008, contains an agreement to cooperate with the U.S. government, and anticipates that the government would “file a departure motion pursuant to Section 5K.1 of the Sentencing Guidelines.” *See* Plea Agreement, Crim. No. 02-388-02 (filed Oct. 14, 2008), ECF No. 148. Further, in his motion to enforce the plea agreement, Mancuso argues that the government “induced” him to “cooperate in sensitive Colombian cases,” as well as cases that “benefited Colombia and the U.S.” *Mot. to Enforce Plea Agreement*, Crim No. 02-388-02 (filed Apr. 21, 2015), ECF No. 143. In that document, Mancuso acknowledges that he provided testimony against high-ranking Colombian officials. *Id.* Similarly, Sierra Ramirez’s plea agreement includes an acknowledgment of his cooperation with the U.S. government. *Plea Agreement*, Crim. No. 02-388-03 (Nov. 19, 2008), ECF No. 31. And facts surrounding Sierra Ramirez’s cooperation with authorities were also made public when the government requested that certain records be unsealed so that Sierra Ramirez could testify in a separate proceeding. *See Order for Limited Unsealing of Record*, Crim. No. 02-388-03 (Jan. 7, 2011), ECF No. 38.

Dated: May 18, 2015

Respectfully submitted,

/s/ Katie Townsend

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **MOTION TO CLARIFY AND/OR AMEND ORDERS** was filed with the Clerk of Court using the CM/ECF system, which will automatically send notification of such filing and serve counsel for the following parties:

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I further certify that the foregoing **MOTION TO CLARIFY AND/OR AMEND ORDERS** was served via email and U.S. Mail on counsel for the following parties:

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This the 18th day of May, 2015.

/s/ Katie Townsend