UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO.: 8:03-CR-77-T-30-TBM

SAMI AMIN AL-ARIAN,
SAMEEH TAHA HAMMOUDEH,
GHASSAN ZAYED BALLUT,
HATEM NAJI FARIZ

RESPONSE OF THE UNITED STATES TO MOTION OF MEDIA GENERAL OPERATIONS FOR LEAVE TO INTERVENE AND FOR ORDER ESTABLISHING GUIDELINES FOR MEDIA ACCESS

The United States of America by Paul I. Perez, United States Attorney, Middle District of Florida, hereby responds to the motion filed by Media General Operations, Inc., d/b/a *The Tampa Tribune* (hereinafter "the Tribune"), for "leave to intervene and for order establishing guidelines for media access." Doc. 910. The United States opposes in part the motion to intervene and opposes in part the underlying motion for various orders.

I. Introduction and Summary of Argument

The Tribune asks to "intervene" in this criminal case to request three orders establishing prospective "guidelines" regarding eight different areas of concern:

> **(1)** an order granting the Tribune permission to "inspect and copy all physical and documentary evidence published to the jury or admitted into evidence in the trial of this matter, including, without limitation, [**(a)**] audiotapes and videotapes, [**(b)**] photographs, (**[c]**) transcripts of recordings and translations." Motion at 2-3.

> **(2)** an order granting the Tribune "[**(a)**] access to the voir dire proceedings, [**(b)**] a transcript of same, and [**(c)**] identifying information (names and addresses) concerning those who appear for voir dire examination, as well as those who are actually seated as jurors in the case." Motion at 9.
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> **(3)** an order establishing "[**(a)**] guidelines regarding the manner in which sidebar conferences will be conducted and [**(b)**] the Tribune's rights to be heard on the issue of its entitlement to transcripts thereof." Motion at 12.

Additionally, this Court has asked the parties to include in their responses their position on providing for the press's use copies of materials received in evidence during trial.

Taking the Court's request first, the United States has no objection to providing for the press (to include the Tribune), to the extent practical based on the nature of the exhibit, a single copy of each documentary exhibit it introduces during trial that is released into the public domain (i.e., each item of admitted documentary evidence that this Court, in the exercise of its discretion, does not order sealed before or after publication or otherwise protect).[1] The United States can, if the Court wishes, provide that additional copy with the exhibit when it moves for admission of the evidence.

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[1]The United States attaches for this Court's perusal the rules for press management set forth by the Southern District of Florida in United States v. Hernandez, 124 F. Supp. 2d 698, 706 (S.D.Fla. 2000). The Court may want to promulgate similar rules.

To the extent that the Court in Hernandez intended those rules also to provide access to particular documents prospectively, however, see Rule 1 ("Beginning [today], at the end of each trial day, the press and news media shall have access to all evidence admitted into the trial record on that day."), the United States notes that, in that case, "[n]either the Government nor Defendants object[ed] to Intervenors' standing to request" such prospective relief; thus, the Court found "[]accordingly, . . . that Intervenors have standing to seek access in suits to which they are not a party." Hernandez, 124 F. Supp. 2d 700 (citing Newman v. Graddick, 696 F.2d 796, 800 (11th Cri. 1983), internal quotation marks omitted). As argued herein, the United States does object to the Tribune's ability to intervene merely to request prospective "guidelines" for access.

Regarding the Tribune's motion to intervene, the United States submits that the Tribune has provided no authority for a motion by a third party to intervene in a criminal trial in order to establish prospective guidelines for access to proceedings and documents. Any authorized intervention is largely premature, both because the Tribune has suffered no potential or actual denial of access necessitating intervention and may suffer none and because the Court cannot at this time conduct the necessary balancing tests dictating the extent of access to particular evidence.

The only area of concern arguably ripe for intervention is **2(c)**, the list of names and addresses of venire members and jurors, as this Court already has issued an order preventing release of that information. To the extent that this Court construes the Tribune's motion as one to intervene to challenge the Court's November 10, 2004 order for an innominate jury (Doc. 728), that motion is untimely and, in any event, fails.

These preliminary matters aside, the United States likely will raise no opposition to the Tribune in any of its areas of concern, other than the United States' objections to overturning this Court's innominacy order.

II. Argument

A. Propriety of motion to intervene.

The Tribune has provided no authority either for its ability to "intervene" in this criminal case nor its ability to request prospective "guidelines" for this Court's management of evidence and proceedings. The Tribune asserts that it may become a party to these proceedings to seek such guidelines because, "[a]s a member of the news media, [it] has standing to intervene for the limited purpose of seeking access to judicial proceedings and records," citing United States v. Ellis, 90 F.3d 447, 449 (11th

Cir. 1996); In re Subpoena to Testify Before Grand Jury, 864 F.2d 1559, 1561 (11th Cir. 1989); Newman v. Graddick, 696 F.2d 796, 799 (11th Cir. 1983). Motion at 2. This assertion is flawed on at least two levels, and the Tribune's cases do not support it.

First, the Tribune has not established its right to intervene as a party to a criminal case. Importantly, the Tribune's asserted rights to access proceedings and evidence do not stem from its status as a "member of the news media," but from its status as a member of the public; the Tribune enjoys no special right of access. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 684 (1972) ("[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."); Garrett v. Estelle, 556 F.2d 1274, 1279 (5th Cir. 1977) ("[T]he [F]irst [A]mendment does not accompany the press where the public may not go."); United States v. Trofimoff, 2001 WL 1644230 at *1 (M.D.Fla. June 12, 2001) ("[M]edia access to trial evidence flows strictly from the public's general, common-law right to inspect and copy judicial records."). When evaluating the Tribune's motion to intervene, therefore, this Court should consider the impact of its decision on the right of other members of the general public, including other media outlets that have not yet moved to intervene as well as private individuals, also to request that this Court issue "guidelines" regarding access to anticipated proceedings and documents. The United States respectfully submits that, if this Court must grant the public leave to intervene to seek prospective rulings regarding disclosure of particular anticipated evidence or the degree of access to portions of the trial, it may soon be doing little else.

In any event, none of the Tribune's cited cases provides it the ability to "intervene" in this Court. Those cases concern only constitutional standing to appeal.

Indeed, other federal courts of appeals have questioned media "intervention" in a criminal trial, noting that there is no statute or rule governing intervention of private parties in a criminal case. See United States v. Perry, 360 F.3d 519, 532 n.10 (6th Cir. 2004); In re: Globe Newspaper Co., 729 F.2d 47, 50 & n.2 (1st Cir. 1984) (noting various avenues for the media to enter a criminal case recognized by different courts of appeals and stating: "We have not decided--nor do we here--whether a media representative may, absent a rule for intervention analogous to Fed. R. Civ. P. 24, 'intervene' in a criminal action for the purpose of appealing a closure order"). The Tribune, therefore, has provided no clear authority for its motion.[2]

Second, even if intervention is the proper vehicle for the Tribune to assert an interest in this case, it has provided no authority for its right to intervene to establish prospective "guidelines" concerning access. It is clear that the Tribune must have some way to challenge a denial of access, see cases cited in Motion at 2; but, except for one area discussed below, the Tribune has not yet, and may not ever, suffer any such denial. Indeed, the Tribune's cited authorities all require the existence of an injury--i.e., denial of access--to create a "case and controversy" for appeal and to bestow "standing" on the media outlet seeking relief. See cases cited in Motion at 2; United States v. Valenti, in re: Times Publishing Co., 987 F.2d 708, 711 (11th Cir. 1993) (noting Times's "standing to intervene" on appeal); see also United States v. Cianfrani, 573 F.2d 835,

[2]Furthermore, the United States respectfully suggests that any right to intervene cannot be absolute, and, if allowed, should be governed by standards akin to those set forth in Fed. R. Civ. P. 24, as media intervention in a criminal case is a collateral, civil matter. Cf. United States v. Perry, 360 F.3d 519, 523 (6th Cir. 2004) (applying civil rules to third party's appeal in criminal case); ABC Inc. v. Stewart, 360 F.3d 90, 97 (2d Cir. 2004) (noting that media intervention for right of access may be treated as separate civil case).

845 (3d Cir. 1978). One, Ellis, states that the media outlet also "had standing to challenge the denial of access to judicial proceedings" in the district court, 90 F.3d at 449, but, again, the outlet in that case actually had suffered a denial of access.

Even apart from constitutional questions of the propriety of prospective relief, it makes little sense to issue advisory "guidelines" regarding the extent of the Tribune's access to particular evidence before the parties have introduced evidence to access. To address the Tribune's areas of concern, this Court will have to balance competing interests. See argument below. It cannot logically do so before actually confronted with particular evidence. Furthermore, it should do so on a case-by-case basis. Nixon v. Warner Communications, Inc., 435 U.S. 589, 599 (1978) ("The few cases that have recognized [a common-law right of access] do agree that the decision . . . is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."). Thus, this Court need not grant third-party intervention merely to establish "guidelines" for its management of the trial.

The Tribune asks for prospective intervention "to lessen the disruptiveness of intervention motions throughout the course of the trial." Motion at 2. Intervention at this point, however, threatens to create more disruption, not less. The Tribune asks this Court to consider, in the abstract, a plethora of issues regarding events that may not even occur, thus necessitating a large expenditure of judicial resources at a time when those resources are necessary to solve numerous other issues in advance of trial. Furthermore, an order setting forth "guidelines" for inspecting evidence, etc., threatens to create additional litigation later if unforeseen circumstances arise and/or the Tribune

seeks to enforce and expand those guidelines regarding particular documents and proceedings. Once such guidelines are in place, it is unclear whether the parties will have to litigate whether a particular piece of evidence falls within them and whether, if evidence does fall within the guidelines, the parties will have to suggest that the Court reconsider the guidelines. Finally, should a requested guideline--for example, the guideline the Tribune seeks governing the "manner in which sidebar conferences will be conducted"--satisfy the Tribune but not other members of the public, this Court may find itself embroiled in brokering disputes among media outlets and/or private citizens in advance of trial.

At bottom, unless and until the Tribune is denied the ability to inspect records, access hearings, or obtain transcripts, it need not take part in these proceedings. Accordingly, this Court need not address the Tribune's requests for relief except to the extent it challenges a specific denial of access. As stated below, the Tribune has suffered only one such denial among its eight areas of concern.

B. Propriety of relief requested by Tribune.

1. Order granting the Tribune permission to "inspect and copy all physical and documentary evidence published to the jury or admitted into evidence in the trial of this matter, including, without limitation, [(a)] audiotapes and videotapes, [(b)] photographs, ([c]) transcripts of recordings and translations."

(a), (c) To the extent the Tribune seeks an order regarding its right to access particular materials if and when admitted as evidence at trial--namely, "portions of the 21,000 hours of surreptitiously recorded conversations" bearing on this case, "videotapes depicting activities of one or more Defendants prior to their arrest," id. at 5-6, and "translations of . . . materials," id. at 7-8--the United States foresees no

opposition to release of such materials once admitted at trial and, as previously stated, will provide a single extra copy of any documentary materials, to the extent practical, to the Court for press use.

(b) The United States will, however, object to any public dissemination of "sensitive information," including photographs, already protected in this case.

Last year, during discovery, the United States moved for a protective order covering certain materials, referred to as "sensitive information," that were provided by the Israeli government to the United States government for use as evidence in this case: namely, "photographs and medical reports of victims of terrorist attacks described in hospital reports, autopsy reports, bomb technician reports and similar documents." Doc. 468. The United States invoked as authority for the order the need to protect the privacy rights of the terrorism victims depicted in these materials as well as Israel's national security interest in preventing their dissemination. Doc. 468 at 1.

On March 17, 2004, the Magistrate Judge ordered:

> Prior to its use as evidence at . . . the trial of this cause, [materials obtained from the State of Israel that] contain highly personal information about the victims of the bombings and alleged terrorist[] attacks, such as their medical reports, autopsy reports, and related photographs, which are necessary to be filed with the court shall be filed with the court under seal.

Doc. 485.

This order still stands and contemplates protection of the sensitive information throughout trial. Moreover, the United States intends to move for a similar order preventing dissemination of the same information if and when introduced at trial.

Until the United States moves for protection, it makes little sense to discuss the propriety of sealing or other protective measures for any particular evidence.[3] Different countervailing concerns may counsel sealing each different piece of evidence, and the Court may wish to take different precautionary measures for different documents. Thus, it is difficult to establish any "guidelines" dictating the degree of access the Tribune might have to the documents. If the Court protects any documents during trial, the Tribune may at that time challenge the protective measure or move to lift it.

In any event, the Court undoubtedly will be well within its discretion to seal following publication or otherwise prevent from further dissemination the sensitive documents already discussed by the United States in its motion for the existing protective order.

The Tribune has, as a member of the public, the "general right to inspect and copy public records and documents, including judicial record and documents" recognized in Nixon v. Warner Communications, 435 U.S. 589, 597 (1978). See United States v. Trofimoff, 2001 WL 1544230 (M.D.Fla. June 12, 2001) ("Media access to trial evidence flows strictly from the public's general, common-law right to inspect and copy judicial records."). That common-law right, however, "is not absolute . . . the trial court may properly balance this right against important competing interests." United States v. Rosenthal, 762 F.2d 1291, 1294 (11th Cir. 1994); Nixon, 435 U.S. at 598 (the Court's "supervisory power over its own records and files" has allowed denial of access when

[3]For instance, the United States might ask the Court to consider, as an alternative to sealing before or after publication to the jury, a protective order allowing inspection but preventing copying and dissemination. The sensitivity of the particular documents will, of course, dictate the scope of appropriate protective measures.

sought for "improper purposes"). The correct balance of interests is within the Court's sound discretion, Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 430 (5th Cir. Unit A 1981); United States v. Trofimoff, 201 WL 1644230 (M.D.Fla. June 12, 2001), and the Court must conduct that balance with a "sensitive appreciation of the circumstances that led to the production of the particular document in question," Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1311 (11th Cir. 2001) (internal quotations and citation to Nixon omitted).

When balancing interests concerning access to documents, the Court should first consider the weight of reasons favoring access. See United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995). As the Tribune itself explains (Motion at 4), the common-law right of access to judicial documents is part of the general right to monitor the workings of the government; it exists to further respect for judicial proceedings and ensure fairness and accuracy in those proceedings. See Amodeo, 71 F.3d at 1049. Thus, although there often exists a "presumption" of access, the weight of that presumption is directly related to the importance of the particular documents to the public's monitoring function. See Id. at 1048-49. The less the importance, the weaker the presumption. Id.

Against the public's monitoring interest the Court must balance both the rights of those in the proceeding and the rights of third parties. In particular, the Second Circuit has held that "the privacy interests of innocent third parties should weigh heavily" in the equation, United States v. Amodeo, 71 F.3d 1044, 1050 (2d Cir. 1995) (citation and alterations omitted). This makes sense both because such parties are not to benefit from the proceedings and are implicated only in the name of the greater public good

and because they cannot defend their own interests before the Court; thus, the Court should err on the side of caution in protecting such parties' privacy interests.

As the United States explained in its motion for the existing protective order, Doc. 468, strong interests counsel against dissemination of a small number of documents obtained from the Israeli government that the United States may seek to introduce at trial; namely, pathological reports and accompanying photographs of bombing victims and documents concerning in-depth analyses of the bombs themselves and their constituent materials.[4] Dissemination of those documents threatens to embolden terrorist groups and enable terrorist activity. Thus, not only the Israeli government but the United States government and many other governments have a national security interest against disclosure of the documents. Dissemination also will violate the privacy of the surviving victims of the bombings as well as the dead victims' families. Either of these interests alone would outweigh the limited common-law right to the documents;[5] indeed, each would outweigh a First Amendment right of access, were such at issue here.

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[4]The United States does not address the defendants' interests in non-disclosure of particular materials, which may weigh extremely heavily against dissemination of such materials. See generally Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. Unit A 1981). Undoubtedly, defendants themselves will raise those interests where appropriate.

[5] Regarding the former, see United States v. Shiue, In re: Application of KSTP Television, 504 F. Supp. 360 (D.Minn. 1980) (refusing to provide for reproduction and dissemination videotapes of kidnapping victim taken by kidnapper that had been entered into evidence at kidnapper's trial, as to do so would violate victim's privacy and promote "sensationalism"). Regarding the latter, see the pleadings before the Court concerning the FISA wiretaps in this case, etc.

The Court, therefore, need not promulgate any "guidelines" at this time regarding the Tribune's access to evidence at trial. It is clear, however, that the Court will be within its discretion to seal or otherwise protect[6] the "sensitive information" already the subject of its pretrial discovery order.

2. Order granting the Tribune "[(a)] access to the voir dire proceedings, [(b)] a transcript of same, and [(c)] identifying information (names and addresses) concerning those who appear for voir dire examination, as well as those who are actually seated as jurors in the case."

(a)-(b) The press has been welcome at the jury proceedings conducted thus far. Accordingly, the Tribune clearly has its desired "media access to jury selection" and access to "voir dire," see Motion at 8, and there is no need for this Court to enter any order regarding access to voir dire proceedings or transcripts thereof.[7] In any event, the United States does not anticipate opposing the Tribune's access in these areas.

(c) Regarding the Tribune's request for jurors' and potential jurors' names and addresses, this Court's rules provide:

> A list of the venire will be furnished to counsel only at the time the case is called for trial, and prior to commencement of *voir dire* examination . . . and must be returned to the Clerk when the jury is empaneled. No person shall copy from or reproduce, in whole or in part, any list of veniremen.

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[6]Even if the public has a common-law right to inspect particular sensitive information once introduced at trial, this Court may reasonably restrict that access along the lines suggested in note 2 above. See United States v. Hernandez, 124 F. Supp. 2d. 698, 702-03 (S.D.Fla. 2000).

[7]The Court may, of course, seal portions of the jury selection process to protect jury privacy should particularly sensitive juror inquiries occur. See Press-Enterprise I, 464 U.S. at 511-12.

Rules 5.01(b) of the District Court for the Middle District of Florida. See also 28 U.S.C. § 1867(f).[8] The Tribune does not challenge this rule. Thus, the list of venire members, which includes names and addresses, is not a document available to the public that is subject to the Tribune's common-law right of access.

Furthermore, the venire list does not support Article III adjudication but is, rather, an administrative document enabling efficient courtroom procedure. See Globe Newspaper Co. v. Hurley, 920 F.2d 88, 94 (1st Cir. 1990) (stating that juror names and addresses are "collateral information kept by the court for its necessary administrative purposes, rather than being court proceedings or records of such proceedings"). Thus, even if the list were public, the Court need not afford any weight to the public's right of access, and, especially in light of the venire members' privacy interest, see Hurley, 920 F.2d at 93 ("[T]he jurors themselves have an interest in having their privacy protected."), neither the Tribune nor any other member of the public is entitled to view the venire list.

Regarding the names and addresses of seated jurors, this Court already has ordered that information protected. On November 10, 2004, this Court entered an order overruling Defendant Fariz's objection to an innominate jury, stating:

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[8]The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1863(b)(4) of this title and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than $1,000 or imprisoned not more than one year, or both.

> [T]he Court determines that an innominate jury is appropriate for this case. This case involves allegations of support for terrorism and the U.S. Marshal's Office has made a determination (Dkt. #S-687) that protecting the identity of the jurors is advisable. Further, there has been extensive pre-trial publicity that enhances the possibility that jurors' names will become public and expose them to influence, intimidation, or harassment. In fact, the trial of this case has been continued because of such pre-trial publicity. The Court is very concerned that jurors might be approached by members of the public to encourage the jurors to talk about the proceedings in the case, the evidence being presented, and to influence the exercise of the jurors' judgment in rendering a verdict.

Doc. 738 at 1.

The Tribune did not seek to challenge this order, and jury selection of an innominate jury has now begun. Thus, to the extent that the Tribune seeks to intervene to challenge the court's innominacy order, the United States submits that the motion is untimely. Cf. Stallworth v. Monsanto Co., 558 F.2d 257, 263-66 (11th Cir. 1977) (setting forth factors that inform court's assessment of timeliness for intervention under Fed. R. Civ. P. 24). The Tribune may, of course, renew its motion following trial if this Court does not lift the innominacy order.

Regardless, the Tribune raises no doubt as to the propriety of the Court's innominacy order and, concomitantly, raises no valid rationale for public access to information enabling the public to find jurors or potential jurors outside of court.

The Tribune cites its qualified First Amendment right of access to a criminal trial, including voir dire proceedings, then asserts that, "like voir dire examination, the names and addresses of jurors also are entitled to a presumption of openness," citing In re. Baltimore Sun Co., 841 F.2d 74, 75076 (4th Cir. 1988). The Tribune, however, cannot rely on its right of access to voir dire to obtain jurors' personal information, as any public right to access juror information does not rise to the level of the public's interest the voir

dire proceeding itself. As the Supreme Court stated in Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501 (1984) (commonly referred to as "Press-Enterprise I"), the value of the public's First Amendment right to access particular court proceedings, like its common-law right of access to records, "lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed[.]" Id. at 508. Access to information that enables members of the public to find particular jurors outside the courtroom, however, increases that confidence incrementally, see Hurley, 920 F.2d at 94,[9] if at all. The public's interest in the selection of jurors as it bears on judicial proceedings lies in the jurors' impartiality, not their identity, and access to voir dire will sufficiently satisfy that interest. Cf. United States v. Edwards, 823 F.2d 111, 120 (5th Cir. 1987) (upholding redaction of jurors' names from transcripts of hearings even regarding alleged juror misconduct and stating: "The usefulness of releasing jurors' names appears to us highly questionable. The transcripts will reveal the substance and significance of the issues"). Thus, there is no right of access to juror information equivalent to that of the public to attend the voir dire.[10]

[9]As argued herein, the United States respectfully disagrees with the First Circuit's view of the weight to be afforded such incremental benefit.

[10]Indeed, the Court in Baltimore Sun, on which the Tribune heavily relies, did not order disclosure of jurors' names and addresses as a matter of constitutional law, see 841 F.2d at 75 n.4 ("We see no need to and do not base our decision on the First Amendment"); see also Globe Newspaper Co., 920 F.2d at 95-97 (avoiding question of whether non-disclosure of juror information violated First Amendment rights by construing local rule preventing disclosure to require higher standard than unbridled discretion).

It follows, therefore, that the public's right of access to jurors' identifying information, if any, must give way within the Court's discretion based on the circumstances of the case and in light of countervailing interests. See United States v. Gurney, 558 F.2d 1202, 1210 (5th Cir. 1977) (holding that district court acted "well within the bounds of [its] discretion" in preventing dissemination of jurors' names and addresses). This Court need not, as the Tribune suggests, Motion at 9, hurdle the same obstacles when preventing dissemination of jurors' names and addresses during trial that it would encounter when sealing a voir dire proceeding. Cf. ABC Inc. v. Stewart, 360 F.3d 90, 104 (2d Cir. 2004) (suggesting, upon holding that closure of voir dire proceedings violated First Amendment right of access, that court lawfully could "simply [have] conceal[ed] the identities of prospective jurors"); United States v. Antar, 38 F.3d 1348, 1357 (3d Cir. 1994) (refusing to address separate "press . . . right of access to the jurors' identities" when the court had protected those identities by excluding the press from voir dire proceedings, thus necessitating First Amendment analysis of whether closure of proceeding was appropriate). In particular, it need not find a "compelling interest" in favor of non-disclosure or narrowly tailor its protection of juror information as it might need to under a First Amendment analysis.

In any event, the Court's findings supporting its innominacy order are sufficient to overcome any competing right of access. The Court found non-disclosure necessary to prevent harassment and influence of jurors, to protect jurors' safety, and to prevent further delay due to pretrial publicity. Doc. 738 at 1. The Tribune specifically recognizes all of these concerns as valid counterweights to its asserted right of access, see Motion at 10 ("[A]bsent a threat of jury tampering, or risk of personal harm to

individual jurors, or any other harm that could affect the administration of justice, the Tribune would submit that information concerning jurors' names and addresses should be available for public access." (Emphasis added.)), and it does not challenge the Court's findings regarding them. Moreover, courts have recognized that such concerns support non-disclosure of juror information even against the criminal defendant's constitutional right to a fair trial. See, e.g., United States v. Ross, 33 F.3d 1507, 1520-21 (11th Cir. 1994) (finding "strong reason" to empanel anonymous jury when defendant was leader of large-scale criminal organization with means to harm jurors who had committed violence and had attempted to interfere with the judicial process by violent means and who faced substantial penalties if convicted); United States v. Branch, 91 F.3d 699, 724 (5th Cir. 1996) (upholding empanelment of anonymous jury solely because of excessive media attention and "emotionally charged atmosphere" of trial); United States v. Wong, 40 F.3d 1347, 1377 (2d Cir. 1994) ("The prospect of publicity militates in favor of jury anonymity to prevent exposure of the jurors to intimidation or harassment."). And one of these concerns, that with preventing juror harassment, is necessarily heightened when balanced against the public's right of access. Thus, the district court's findings support a denial of access to the jurors' names and addresses regardless of the authority for access.

This Court, therefore, need not issue an order regarding access to juror proceedings or information. To the extent that the Tribune challenges this Court's innominacy order, that challenge is untimely and lacks merit. In any event, a post-trial hearing will sufficiently vindicate any interest the Tribune has in the jurors' personal information. Cf. United States v. Valenti, in re: Times Publishing Co., 987 F.2d 708, 713

(hearing regarding release of transcripts within reasonable time after closed hearing occurred sufficient even to protect First Amendment access interest in the hearing).

3. Order setting forth "[(a)] guidelines regarding the manner in which sidebar conferences will be conducted and [(b)] the Tribune's rights to be heard on the issue of its entitlement to transcripts thereof."

(a) Regarding its request that this Court "propound guidelines regarding the manner in which sidebar conferences will be conducted," Motion at 12, the Tribune has no right to question this Court's management of its own courtroom. Indeed, this request highlights the concern with granting the media the right generally to "intervene" in a criminal case and request prospective guidelines governing access to the proceedings. The media should not stand at the shoulder of the defendants or the United States.

To the extent that the Tribune requests access to sidebar conferences, it correctly recognizes both that "the right of access to sidebar colloquies 'is not a right of contemporaneous presence,'" Motion at 11 (citations omitted), and that the former Fifth Circuit (in an opinion binding on this Court), held that it is within the trial court's sound discretion to "screen[sidebar conferences] from access by the press," Motion at 12 (citing United States v. Gurney, 558 F.2d 1202, 1210 (5th Cir. 1977)). The Tribune asserts that "subsequent decisions of federal courts have recognized that the common law right of access applies under some circumstances to certain sidebars or bench conferences," but cites only extra-circuit law. Motion at 11-12. Thus, Gurney still stands. As the Eleventh Circuit in Gurney recognized, conferences "between judge and counsel outside of public hearing are an established practice." Gurney, 558 F.2d at 1210. The Eleventh Circuit more recently reaffirmed that practice in United States v. Valenti, in re: Times Publishing Co., 987 F.2d 708 (11th Cir. 1993). Thus, the Tribune

has no right to contemporaneous access of sidebar or other judicial conferences. Any right of access is limited to obtaining transcripts thereof.

The United States anticipates it will have no independent objection to the release of transcripts of sidebar or other judicial conferences.

(b) Regarding the Tribune's request for "guidelines regarding the . . . right to be heard on the issue of its entitlement to transcripts thereof," Valenti establishes the Tribune's right to be heard within a "reasonable time" regarding the sealing of any transcripts of conferences to which it is denied access. See id. at 713-15. No further "guidelines" are necessary.

Conclusion

For the foregoing reasons, the motion of Media General to intervene should be denied and the motion should otherwise be denied in part.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2005, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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