THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI,	)	
a/k/a "Shaqil,"	)	
a/k/a "Abu Khalid al Sahrawi,"	)	
	)	
Defendant	)	
	)	
THE ASSOCIATED PRESS,	)	
CABLE NEWS NETWORK LP, LLLP,	)	
THE HEARST CORPORATION,	)	
NBC UNIVERSAL, INC.,	)	
THE NEW YORK TIMES COMPANY,	)	
WP COMPANY LLC, d/b/a	)	
"THE WASHINGTON POST,"	)	
USA TODAY, and THE REPORTERS	)	
COMMITTEE FOR FREEDOM	)	
OF THE PRESS,	)	
Movants-Intervenors	)	

GOVERNMENT'S OPPOSITION TO MOTION FOR CONTEMPORANEOUS ACCESS TO BENCH-CONFERENCE TRANSCRIPTS AND ALL ADMITTED DOCUMENTARY EXHIBITS

Movants-Intervenors, hereinafter "Media Intervenors," challenge this Court's orders denying the press and public access to trial exhibits and bench-conference transcripts while the trial is in progress. For the reasons discussed below, the Court properly exercised its discretion in both orders, and the sweeping requests of the Media Intervenors should be denied.

STATEMENT

Defendant Moussaoui, a member of al Qaeda, has pleaded guilty to capital offenses arising out of his complicity in a terrorist plot to murder thousands of innocent victims on

American soil, including those who died during the horrendous events of September 11, 2001. A jury will now determine whether Moussaoui should be sentenced to death for his crimes. This trial will be open to the public and the media and they will hear and see during the trial all that transpires in open court. In addition, the Media Intervenors will have access to daily transcripts of the testimony presented to the jury and arguments presented in open court. Thus, the Media Intervenors will be in the same position as the jurors or members of the public who choose to attend the proceedings.

On February 14, 2006, this Court ordered that representatives of the media will not be given access to trial exhibits admitted into evidence while trial is in progress. See D.E. 1539. The Court noted that "publication of the exhibits and comment on them before the jury begins its deliberations, if viewed by a juror, could improperly taint the jury" (Order at 2) and thereby threaten the parties' "rights to due process" (id. at 3). Moreover, access to the exhibits while trial is ongoing cannot be granted as a "practical matter." As the Court explained:

> The Court is obligated to protect the integrity of the exhibits admitted into evidence. If control of the evidence is compromised, the potential for a mistrial increases. * * * Only a portion of the exhibits are in electronic format, the remaining exhibits will be presented in print or other non-electronic format. Moreover, some exhibits may be declassified only for the limited purpose of being discussed in court and shown to the jury without unrestricted public access. Because the courtroom deputy is the only person responsible for maintaining the admitted evidence, she will simply not have the time to segregate the evidence and make copies of the nonsensitive exhibits for the public while the trial is in progress. Given the volume and character of the anticipated evidence, the court staff, which must be able to concentrate on the trial, cannot take the time to make these documents available.

In this regard, the Court also noted that "counsels' resources are also totally focused on conducting the trial. The burden of requiring them to provide an extra copy of all trial exhibits so

that those exhibits could be available publicly would place an unreasonable burden on their limited resources * * * ."

Also on February 14, the Court announced that transcripts of bench conferences would not be made public during the trial (Tr. 15):

> Now, the whole point of having a bench conference is that there's some matter of sensitivity that the jury is not supposed to be exposed to. If the transcript of bench conferences is publicly out in the world, then that increases the possibility of a juror seeing something that he or she should not see, and so unless I have an objection from counsel, I plan to adopt the same reasoning that I had in the order I issued this morning, that is, that the bench conference transcripts will be available to counsel only under seal.

The Court clarified that representatives of the media will have electronic access to the transcripts of all proceedings held in open court, and that it will unseal the bench conference transcripts after trial "unless there's some sensitive matter that couldn't be public." Tr. 16. The parties did not object to either ruling.

ARGUMENT

The Media Intervenors have challenged the Court's rulings sealing the bench conference transcripts and restricting access to the exhibits during trial. They concede that they have no right to attend bench conferences that occur out of earshot of the jury while the trial is ongoing, but they nonetheless contend that they have a right to receive contemporaneous copies of the transcripts of those bench conferences. They also argue that they have a right to copies of all the documentary exhibits as soon as they are admitted into evidence. The Court acted well within its discretion in restricting access to these materials while the trial is ongoing. See Motion ¶ 5. After the jury has reached its verdict, the Court can — as it indicated it would — release the non-

sensitive portions of the bench conferences and exhibits, as appropriate.[1]

1. The Bench-Conference Transcripts. Although there is a presumption of openness to criminal trials, a trial judge may, "in the interest of the fair administration of justice, impose reasonable limitations on access to a trial." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 n. 18 (1980) (plurality opinion). Sidebar or bench conferences are one such reasonable limitation. Historically, they have been conducted out of earshot of the jury and the public specifically so that the jury is not tainted by information that it cannot and should not consider. The bench conference also avoids disrupting the trial by eliminating the need to remove the jury each time an issue arises. See United States v. Smith, 787 F.2d 111, 114 (3d Cir. 1980) ("it may be more efficient for counsel and the trial judge to speak at sidebar or in chambers than for the jury to be removed from the courtroom when questionable evidence is at issue"). The Media Intervenors do not suggest that they have a right to attend these conferences, and indeed, they do not. See Richmond Newspapers, 448 U.S. at 598 n. 23 (Brennan, J., concurring) ("when engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle. Nor does this opinion intimate that judges are restricted in their ability to conduct conferences in chambers, inasmuch as such conferences are distinct from trial proceedings."); United States v. Valenti, 987 F.2d 708, 714 (11th Cir. 1993) (upholding a district court's "traditional authority to conduct closed bench conferences"); United States v. Edwards, 823 F.2d 111, 116 (5th Cir. 1987) ("bench conferences are outside public hearing and the

[1] The Media Intervenors argue that the Court should have given them an opportunity to be heard prior to entering its February 14 orders. The Court is now giving them that opportunity, and therefore that portion of their claim is moot. Accordingly, we address here only the ultimate issue of whether the Media Intervenors have a right of access to bench conference transcripts and all documentary exhibits during trial.

protection of their privacy is generally within the court's discretion"); Rovinsky v. McKaskle, 722 F.2d 197, 201 (5th Cir. 1984) (the public right of access does not include a "right to intrude uninvited into conferences at the bench and in chambers").

Instead, the Media Intervenors argue that they have a "contemporaneous" right of access to the transcript of the bench conference. They rely on Smith, in which the Third Circuit held that there is a right of access to bench conference transcripts. But the Third Circuit in Smith did not decide "precisely when" such transcripts must be furnished (787 F.2d at 114), and indeed in Smith, the trial was already over when the court of appeals considered the question. As the Third Circuit acknowledged, the question when the transcripts should be furnished (assuming that they do not discuss national security or other sensitive information) is committed to the discretion of the district court, and in making that decision, a court may appropriately consider the need to protect against tainting the jury with information that it must not hear.

In contrast to Smith, which did not resolve the issue of "precisely when" the public must be given access to bench-conference transcripts, the Fifth Circuit in Edwards held that the press does not have a right of access to such transcripts until the trial is over. The Edwards court noted that bench conferences have traditionally been closed to the public and that their closure plays a "significant positive role in the functioning" of the criminal trial. 823 F.2d at 115 (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986)). Although the court agreed that the public has an eventual right of access to the transcripts, that right does not ripen midtrial. 823 F.2d at 118. The Court noted that even when a jury is sequestered, midtrial publicity "continue[s] to threaten the impartiality of the jurors." Ibid. The court thus concluded:

> Given the paramount interest in maintaining an impartial jury, and its inherent vulnerability, we find no error in the district court's refusal to release transcripts of the closed proceedings before the jury reached its verdict.

823 F.2d at 119.

The Media Intervenors urge the Court to adopt the procedure used previously for Moussaoui's *pro se* filings, that is, his filings are sealed for a limited period to give the parties an opportunity to review and redact them. In the absence of a request by a party to maintain under seal all or a portion of a *pro se* filing, it is released to the public and the press at the expiration of the limited period. See United States v. Moussaoui, 65 Fed. Appx. 881, 887-888, 2003 WL 21076836 (4th Cir. 2003).

The *pro se* filing procedure addressed different concerns, however, such as Moussaoui's penchant for including in his filings "irrelevant and inflammatory material" and the need to prevent him from communicating with others. Moussaoui, supra. A limited period is all that is required to separate the *pro se* filings that can be released from those that cannot. The same cannot be said about matters discussed at sidebar. These conferences take place outside the presence of the jury precisely so that the jury will not be prejudiced by references to inadmissible evidence, comments regarding the conduct of the parties, or assorted other issues that arise during a trial but that are not appropriate for the jury to hear. A media report about a piece of evidence that was excluded or a critique of counsel's performance could easily reach the jury and undermine the very reason for discussing the matter outside the jury's presence. This risk will not evaporate if there is a "limited" waiting period, as the Media Intervenors propose. Rather, as the Edwards court held, the risk of jury taint will continue until the jury completes its

deliberations.

Moreover, once trial begins, the parties and the Court will be especially busy and they cannot be expected to review at the end of each day bench-conference transcripts to assess the potential for prejudice if the transcripts are released. The Court is entitled to presume that their release will be prejudicial because bench conferences are held only when the matter is not appropriate for the jury to hear. In short, the Media Intervenors do not have a constitutional or common law right to "intrude upon the huddle" of the bench conference in the middle of trial merely because the bench conference has been transcribed.

2. All Documentary Exhibits. The Media Intervenors contend that they have a right of access to all documentary exhibits and that the Court should accommodate this right by requiring the party introducing the exhibits to provide the press pool with copies of the admitted exhibits either at the lunch break or at the end of the day. The press pool will, in turn, make the necessary additional copies for its members. With respect to exhibits that contain classified information, or are declassified only for the limited purpose of being discussed in court, the Media Intervenors propose that the party introducing the exhibit should give the press pool a single redacted copy.

Although there is a common-law right to inspect and copy public records, including "documents submitted in the course of trial" (In re Time Inc., 182 F.3d 270, 271 (4th Cir. 1999)), that right is not absolute. Nixon v. Warner Communications Inc., 435 U.S. 589, 598 (1978). As the Supreme Court has held, "[e]very court has supervisory power over its own records and files," and there is no single list of factors that must be weighed in determining whether or when

access is appropriate. Id. at 598-599. Ultimately, "the decision as to access 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." Id. at 600.

The Court's Order here serves to protect the jury from improper taint. Indeed, Local Rule 57(G) authorizes the Court to issue such orders when necessary during highly publicized cases. The *voir dire* to this point has demonstrated the dangers of taint and the Court has a responsibility to protect the integrity of the sentencing process. The Order on the handling of the exhibits seeks to prevent such taint.

Although a court may provide for access to exhibits during the trial, it is not required to do so. For example, in Nixon, the Supreme Court held that the common-law right of access does not "permit copying on demand" of tape recordings admitted into evidence in a criminal trial. 435 U.S. at 603 (noting that tape recordings can easily be used for an improper purpose with "no corresponding assurance of public benefit"). Accord United States v. Beckham, 789 F.2d 401 (6th Cir. 1986). Indeed, it is well settled that "[a] trial judge has the discretion to manage [her] courtroom, and to control access to trial exhibits if that aids in the conduct of an orderly trial." United States v. Peters, 754 F.2d 753, 763 (7th Cir. 1985). In this case, the penalty trial is expected to last several weeks and the quantity of exhibits will be substantial (approximately 1,000) and in a variety of forms, including audio tapes, photographs, phone and other business-type records, redacted versions of classified documents, and exhibits in electronic format. The sheer quantity of exhibits will provide a substantial challenge for the courtroom deputy and counsel, and the need to provide the press with copies of all exhibits could jeopardize the integrity of the exhibits before the jury has an opportunity to examine them during its

deliberations. See, e.g., United States v. Lentz, 383 F.3d 191, 205-221 (4th Cir. 2004) (new trial required where unadmitted evidence was erroneously mixed in with admitted exhibits and given to the jury for use in its deliberations); Valley Broadcasting v. District Court, 798 F.2d 1289, 1293-94 (9th Cir. 1986) ("[W]e do not believe that the common law right of access requires that a district court open its files to the press and risk the loss or destruction of documents therein. The district court should carefully weigh the danger of such risks in each case where access is sought. If there is a reasonable possibility of the destruction of original exhibits, the district court could deny access."). Moreover, many of the exhibits, especially the victim impact evidence, are personal in nature, and publication of some of this evidence will serve no legitimate public interest other than sensationalism but could cause substantial harm to the thousands of victims and their families.

To support their demand for access to all documentary exhibits, the Media Intervenors cite cases in which the relief granted was more modest; none involves the sweeping request for copies of the enormous quantity of documentary exhibits that will be introduced into evidence in this case. See, e.g., In re Time Inc., 182 F.3d 270, 271 (4th Cir. 1999) (granting access to exhibits attached to defendant's pretrial motions); Valley Broadcasting v. District Court, 798 F.2d at 1293-94 (granting access to audio and video tapes admitted in RICO burglary/fencing prosecution); United States v. Peters, supra (cocaine distribution case; district court abused its discretion when it disciplined individual reporter by denying her access to exhibits available to other reporters); United States v. Criden, 648 F.2d 814, 823 (3d Cir. 1981) (granting access to video and audio tapes in Abscam (political corruption) prosecution); United States v. Myers, 635 F.2d 945 (2d Cir. 1980) (granting access to video tapes of Congressman accepting a bribe);

United States v. Sampson, 297 F. Supp. 2d 342, 346 (D. Mass. 2003) (providing access to copies of audio tapes in murder trial; noting that "it has not been argued that the release of the recordings will injure the privacy interests of the victims, their families, or any other third parties") .

In contrast to the limited requests in those cases, the Media Intervenors' request in this case is sweeping and unduly burdensome and ignores the sensitive nature of many of the exhibits. They have not homed in on a particular document or set of documents that will be especially newsworthy, but instead, they ask the Court to require the parties to provide them with copies of all admitted documentary exhibits over the lunch break and at the end of each day, forgetting, perhaps, that the parties will be fully engaged in trying the case and preparing for the next session.

It is important to remember that the Court has not permanently denied the press an opportunity to inspect and copy the exhibits. Rather, it has merely postponed access until the jury has completed its examination of the evidence. At that time, the Court can provide the Media Intervenors with copies of exhibits as appropriate.

In the event that the Media Intervenors are interested in a particular document during the trial, a document in which the public interest is especially strong, they can request a copy of that document. But the process they propose places an extraordinary burden on the parties and the Court and threatens the ability of each to try this case without error. Neither the First Amendment nor the limited common-law right of access requires the Court to take such a risk.

CONCLUSION

For the foregoing reasons, the motion of the Media Intervenors for contemporaneous access to all the admitted documentary exhibits and the bench-conference transcripts should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February 2006, I caused true and correct copies of the foregoing Government's Opposition to Motion for Contemporaneous Access to Bench-Conference Transcripts and All Admitted Documentary Exhibits to be served by the means indicated, upon counsel for the Movant-Intervenors (the Media Intervenors) and defendant Moussaoui as follows:

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