

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

FILED
2008 AUG 26 AM 8:50
DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____
CLERK

UNITED STATES OF AMERICA,

v.

JOHN TRAVIS KETNER, *et al.*,
Defendants

v.

EL PASO MEDIA GROUP, INC.
d/b/a THE NEWSPAPER TREE
Intervenor

§
§
§
§
§
§
§
§
§
§
§

No. EP-06-CR-1369-FM

**MOTION OF EL PASO MEDIA GROUP, INC. D/B/A THE NEWSPAPER TREE
TO INTERVENE TO UNSEAL COURT DOCUMENTS
AND TO OPEN COURT HEARINGS
AND REQUEST FOR HEARING ON THE MOTION**

STATEMENT OF FACTS

In June 2004, the Federal Bureau of Investigation began an expansive investigation into public corruption within El Paso County, Texas.¹ Thirty-five of eighty people targeted by the FBI are “past or current public officials,” and some “are prominent community figures.”²

Since the first public official pled guilty, nearly all the Court’s documents and hearings have been sealed under court order, although, upon motion of Carl Starr, an earlier intervenor, the Court did make public some documents in redacted form. That result, however, in Intervenor’s view did not comply with the mandate of the First Amendment to the United States Constitution because of its narrowness and the extraordinarily long period of secrecy.

As the public’s “eyes and ears”³, the press plays a critical role in informing and engaging our nation’s citizenry. Secrecy and silence on government corruption is contrary to our nation’s values and detrimental to the ability of El Paso’s local governments to govern themselves.

¹ *United State. v. Ketner*, No. EP-06-CR-1369-FM, slip op. at 5 (W.D. Tex. May 28, 2008).

² *Id.* at 6.

INTERVENOR

Newspaper Tree, operated by the El Paso Media Group, Inc., is an online news publication based in El Paso, Texas, which emphasizes on quality writing and critical thinking regarding business, politics and culture in the region. Its website is visited thousands of times daily by opinion leaders and professionals, mostly in El Paso, but also regionally and statewide.

Newspaper Tree exercises its right under the First Amendment to the U.S. Constitution and requests that this Court open court documents and hearings in this case, and related cases, as well as hold a hearing with the parties and the press to evaluate the necessity of such a high level of secrecy by the Court.

I. Preliminary Procedural Considerations

A. Newspaper Tree has Standing Through the First Amendment to Challenge the Court's Order

Under the First Amendment, Newspaper Tree, an El Paso on-line newspaper, has a right to intervene in the instant criminal litigation for sealed court records. In *United States v. Davis*, a newspaper filed a motion to intervene in a criminal trial on First Amendment grounds. *Davis*, 902 F. Supp. 98, 101 (5th Cir. 1995). Although it was unclear precisely what to name the motion, the court held that the “newspaper clearly has standing.” *Id.* (“Whether the newspaper voices its objections by filing a separate miscellaneous action, a motion for intervention, a writ of mandamus, or an interlocutory appeal merely elevates form over substance.”). *See also United States v. Ketner*, No. EP-06-CR-1369-FM, slip op. at 3 (W.D. Tex. May 28, 2008) (noting the First Amendment right of the press to object “to a judicial decision closing hearings

³ *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978) (noting the important role of the media).

and sealing documents”). Accordingly, Newspaper Tree has standing to contest this Court’s sealing of documents and closing of hearings.⁴

II. Constitutional Balancing

A. First Amendment Law Presumes Openness in Criminal Trials and Other Proceedings

The First Amendment proscribes governments’ actions on freedom of speech and the press. “These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning government.” *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 575 (1980). A vibrant press fosters an active citizenry, which is fundamental to democracy’s self-governance. This principle is critical to the current case, involving corruption of public officers. If their criminal actions as well as justice are silenced, it is impossible for community members to engage in self-governance. “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” *Id.* at 572.

The First Amendment is not absolute and often a constitutional tug-of-war develops between the First and Sixth Amendments, but it is a fundamental right and only a compelling governmental interest can trump it. The Supreme Court observed that our Founders were certainly aware “of the potential conflict between the right to an unbiased jury and the guarantee of freedom of press.” *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 690 (1976). Tainted jury pools, overwhelming publicity and witness protection are only a few of the court’s concerns. Yet, the Supreme Court held that the First Amendment implies “the right to attend criminal

⁴ Strangely enough, the Court relies on an article from *The Texas Monthly*, replete with hearsay, double hearsay, and speculation as authority for its order, while on the other hand denying the media access to the very official court documents that would test *The Texas Monthly* premises on which the order rests. *Ketner, supra*, slip op. at 21–22.

trials” and directs “preferential seating for media representatives.” *Richmond Newspapers*, 448 U.S. at 580-81.

Although the current case involves criminal plea hearings and various preliminary pre-trial hearings, the press still has a First Amendment right of access. *Press-Enterprise Co. v. Superior Court (Press Enterprise II)*, 478 U.S. 1, 7 (1986) (“However, the First Amendment question cannot be resolved solely on the label we give the event, i.e., ‘trial’ or otherwise, particularly where the preliminary hearing functions much like a full-scale trial.”).

The Supreme Court articulated a two-step analysis to determine the press’ right of access: (1) “whether the place and process have historically been open to the press and general public,” and (2) “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.* at 8 (citing *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606 (1982)). If “closure is essential to preserve higher values,” it must be “narrowly tailored to serve that interest” and specified so “a reviewing court can determine whether the closure order was properly ordered.” *Id.* at 9-0 (citing *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510 (1984)). *See also Ketner, supra*, at 18 (citing Fifth Circuit application of this analysis in *United States v. Edwards*, 823 F.2d 111 (1987)).

The American democracy and the press are not comfortable with, and hold great mistrust for, closed proceedings and secret dockets. For example, in 2001, public outcry caused New Hampshire state courts to dismantle their secret docket. Meliah Thomas, Comment, *The First Amendment Right of Access to Docket Sheets*, 94 CAL. LAW REV. 1537, 1546 (2006). In this case, public concern over corruption heightens the need for openness in this criminal case. *See Press-Enterprise I*, 464 U.S. at 508 (“Openness thus enhances ... the appearance of fairness so essential to public confidence in the system.”). The Supreme Court captured the essence of the First Amendment and self-government:

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

Mills v. Alabama, 384 U.S. 214, 218-19 (1966).

Accordingly, corruption of public officials relates to the political process. The public's interest in self-governance and a functioning democracy require dialogue and transparency. A silent courthouse, absent of the press, does not foster our nation's values. Therefore, the *Ketner* files must be opened fully.

B. The Court's Actions Mirror a Prior Restraint and are Presumptively Invalid

In June 2007, the first public official, John Travis Ketner, plead guilty in a court proceeding. His plea hearing, however, was not published "on the Court's public calendar or the electronic case management system. The Court closed the plea proceeding to the public. It additionally sealed the minutes and transcript of the plea proceeding." *Ketner, supra*, at 10. The Court repeated this procedure for other defendants as well. *Id.* at 10-13.

With a secret docket and closed hearings, legal professionals, the public, and the press have no glimpse of the Court's administration of justice. For the press, "finding out about the hearings is a matter of luck or persistence, which requires staking out the courthouse for entire days to see who goes in." David Crowder, *Public Corruption, Closed Courts*, NEWSPAPER TREE, May 12, 2008, available at <http://newspapertree.com/news/2439>. A retired reporter described the situation, "Reporters are never allowed inside the courtroom for those hearings. They don't even tell us what's going on. The just say we can't go back there." *Id.*

In essence, the press has been issued a *de facto* gag order. The Court's overwhelming secrecy and barricade against the press mirrors a prior restraint. Prior restraints are presumptively invalid, so much so that even the United States government could not bar the *New*

York Times from publishing classified information about the Vietnam War. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

To avoid prior restraints of publication, the Supreme Court has articulated alternatives such as changing trial venue, allowing public attention to subside, and “searching questioning of prospective jurors.” *Nebraska Press Assn.*, 427 U.S. at 563-64 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 357–62 (1966)). Notably, *Ketner* was conducted in the San Antonio courthouse, evidencing reasonable alternatives. *Ketner, supra*, at 10.

In this case, press scrutiny is all the more important because there is question as to why no grand jury⁵ is overseeing government conduct by issuing indictments – the traditional, and constitutionally recognized, method of checking official overreaching. Rather, it appears that a judge alone is administrating justice in a way that is secretive to the public and El Paso community.⁶

The Court’s veil of secrecy abrogates the special First Amendment function of the press in the absence of an indicting grand jury, creating great risk since “public opinion is an effective restraint on possible abuse of judicial power.” *Gannett Co., Inc. v. Depasquale*, 443 U.S. 368, 380 (1979) (citing *In re Oliver*, 333 U.S. 257, 270 (1948)). Importantly, even proceedings executed by grand juries do not require “the secrecy to be absolute.” *United States v. Stanford*, 589 F.2d 285, 290 (7th Cir. 1978) (“the assumption that [Federal Rules of Criminal Procedure] Rule 6(e) shields every item of evidence considered by the grand jury, whether or not obtained by subpoena, with an impenetrable cloak of secrecy” is not absolute). Therefore, since there is

⁵ *Ketner* and other defendants waived their rights to a grand jury. *Ketner, supra*, at 9 n.8, 11 nn.12 & 13, 12 n.14, 13 n.15. Further, the Court notes “there is no trial in sight.” *Id.* at 28.

⁶ The lack of transparency raises the question of whether the government, without grand jury oversight in the indictment process, may be using coercive means or “sweetened” plea bargains to further its goals in a way the public might not find acceptable, by allowing people to plead guilty to informations instead of asking a grand jury for indictments.

no grand jury exercising an indictment function, but a sole judge, the need for public information is substantial.

Moreover, the Supreme Court has recognized that public access to preliminary hearings in such situations is “even more significant,” because a jury is “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” *Press-Enterprise Co. II*, 478 U.S. 1, 13 (citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

In light of the press’s inability to access information pertaining to *Ketner*, Newspaper Tree questions the Court’s exercise of such sweeping, broad discretion. With no grand jury issuing indictments in these cases and a change of venue implemented, it is necessary to announce proceedings on the docket, unseal documents, and open hearings. Public confidence can only be gained through the release of information.⁷ The Court’s order is overly overbroad and must be revised significantly to accommodate public need of governmental transparency and self-governance and to protect judicial neutrality, narrowly tailored to a compelling government interest. Otherwise, the Court must allow complete access to all documents on file, without sealing or redaction.

C. The Court’s Order is Not Narrowly Tailored

The Fifth Circuit and this Court hold that court closure must be “narrowly tailored to serve [the compelling] interest.” *Ketner, supra*, at 19 (citing *Edwards*, 823 F.2d at 115). The Court states the government’s compelling interests for closure are “protecting the integrity of its investigation and preventing witness intimidation.” *Id.* at 31. However, the Court only acknowledged its rationale in response to a *pro se* motion to open the record. For over a year,

⁷ Another matter, based upon information and belief and a recorded hearing before the U.S. Fifth Circuit Court of Appeals, is that this Court, without public explanation, disqualified one of the defense attorneys in this case. Obviously, this also would be something of great public interest and raises questions as to whether there is an ulterior motive (such as making a prosecution easier for the government) or a legitimate reason for such disqualification.

nearly all the Court's records pertaining to *Ketner* have been closed. In May 2008, in response to the *pro se* motion, the Court released some form documents as well, such as "Order Setting Bond" and "Release Orders." *Id.* at 33. The fact this Court released some documents evidences the possibility its closure order is not narrowly tailored.

This Court and the Fifth Circuit acknowledge that the release of transcripts and similar documents should occur within a "reasonable time." *Ketner, supra*, at 19 (citing *Edwards*, 823 F.2d at 118). The *Edwards* Court noted that transcripts of a closed proceeding should be released "as soon after verdict as possible." *Edwards*, 823 F.2d at 119. The court reasoned that the media's work ensures that important judicial proceedings are exposed promptly:

We recognize the worth of timely news reported on the front page and ... [it] is the fair assumption that significant news will receive the amount of publicity it warrants. The value served by the first amendment right of access is in its guarantee of a public watch to guard against arbitrary, overreaching, or even corrupt action by participants in judicial proceedings. Any serious indication of such an impropriety, would, we believe, receive significant exposure in the media
.....

Id.

The media acts as a check on the judiciary to ensure the release of information. *See Press Enterprise I*, 464 U.S. 501 (vacating order closing pre-trial proceedings and sealing transcripts), *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143 (9th Cir. 1983) (vacating trial court's order that sealed all pre-trial documents), *United States v. Haller*, 837 F.2d 84 (2nd Cir. 1988) (vacating trial court order that denied public access to plea agreement), *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569 (noting district court docket sheets had been improperly sealed). Therefore, Newspaper Tree questions the Court's actions; the release of only some form documents pertaining to public corruption a year after the first plea hearing is not reasonable. The Court's secrecy, including no notice of hearings on the Court's calendar, has distracted the press with a game of hide and seek. *See Crowder, supra*.

Moreover, the Court states that its compelling interest outweighs public access to “plea hearings, plea transcripts, and plea agreements” “*as to the defendants who have plead guilty in this case thus far.*” *Id.* at 31 (emphasis added). Hence, concern is raised over what procedures will be followed for future defendants as well as if future proceeding will be omitted from docket sheets. Certainly, no notice of court hearings is not narrowly tailored to the government’s interests, as required by the First Amendment.

The Court argues plea-hearing documents may not be released because they “identify alleged unindicted co-conspirators by name.” *Id.* at 29. There are options to protect due process rights, such as temporary or permanent redaction and the use of pseudonyms, as the government did in its unsealed Information. *Id.* at 9.

Additionally, the “prosecutorial stage of the case formally began” when the government “filed an unsealed, four-count, eighteen-page Information” against Ketner. *Id.* To legal professionals, the Court’s actions are baffling because the original Information was not sealed. Typically, sealed dockets and closed hearings are common in cases where “a defendant is secretly pleading guilty and offering future assistance.” Crowder, *supra*. Here, the government first made its charges unsealed.

Hence, contradictory actions and disputed facts raise concerns over the Court’s order. The question is whether the Court’s findings for closure are specific and is the closure narrowly tailored. Newspaper Tree believes the Court’s sweeping actions evidence that the closure is neither narrowly tailored nor have documents been released within a reasonable time.

III. Newspaper Tree Requests a Hearing Regarding this Motion

This Court has recognized the press’ right to a hearing in the present circumstances. *Ketner, supra*, at 19 (“[F]or the required proceeding-by-proceeding resolution of issues concerning closure of presumptively open proceedings to be effective, ‘the press and general

public must be give an opportunity to be heard on the question of their exclusion.” (citing *Edwards*, 823 F.2d 119, internal citation omitted)). The Court did not allow the press or public to challenge its order, because the plea hearing did not even appear on the docket. *Id.* at 10. The Court made it virtually impossible for the press to object. The Court states, “The public should trust the system, because the procedures in place have withstood the test of time.” *Id.* at 32. The system, however, did not honor its obligations to the public; the press was not given a meaningful opportunity to be heard. The very essence of the American democracy and its watch guard, the press, is to keep the system honest and transparent; “trust me” doesn’t work, and hasn’t worked in history, which is why our Founders set up our form of self-government in the way they did.

Therefore, Newspaper Tree requests its First Amendment safeguards, fair notice, and an opportunity to be heard on this matter. *See also United States v. Brown*, 447 F. Supp.2d 666 (5th 2006) (describing the procedural safeguards for an intervenor). *Compare Gannett Co.*, 443 U.S. at 375 (closure motion was upheld in part because the press was in the courtroom and did not object to the motion).

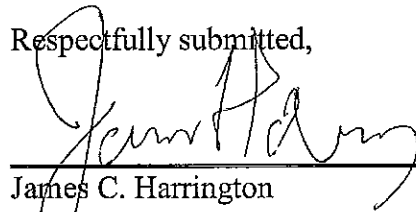
CONCLUSION

From an objective observer’s perspective, this Court has acted in unilateral secrecy, expelling the press from hearings, and even their proximity. The Court delivered its most insightful information about *Ketner*, a year after the information against him, in response to Carl Starr’s *pro se* motion to unseal documents. Although the Court claims an ongoing investigation dictates its order, the order is not narrowly tailored. There are less onerous options available to the Court to protect the integrity of an investigation than refusing to release official court documents and burdening the First Amendment without any compelling interest to do so.

Therefore, under the First Amendment, Newspaper Tree challenges the court order and requests the Court to unseal documents, announce hearings on the docket, and respectfully requests a hearing to examine the Court's actions, specific findings, and disputed facts.

Dated: August 6, 2008.

Respectfully submitted,



James C. Harrington
State Bar No. 09048500
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, Texas 78741
(512) 474-5073 telephone
(512) 474-0726 facsimile

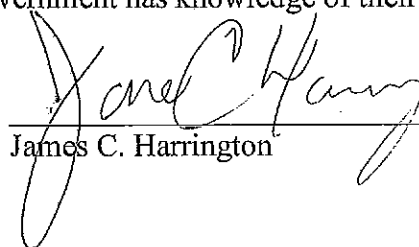
Briana Stone
State Bar No. 24056384
PASO DEL NORTE CIVIL RIGHTS PROJECT
1317 Rio Grande
El Paso, TX 79902
(915) 532-3799 telephone
(915) 532-8892 facsimile

ATTORNEYS FOR INTERVENOR

CERTIFICATE OF SERVICE

I certify that on August 6, 2008, I filed the foregoing with the Clerk of the Court. I also certify that notice of the filing was served on Deborah P. Kanof, U.S. Attorney's Office, 700 E. San Antonio Street, Suite 200, El Paso, TX 79901, and William Franklin Lewis, Jr., Assistant U.S. Attorney, U.S. Attorney's Office, 700 E. San Antonio, Suite 200, El Paso, TX 79901 via certified mail.

Since no attorneys of record are listed in Pacer for Defendants, service is made on the Defendants in care of the U.S. Attorney because Defendants are believed to be under the custody/control of the government or the government has knowledge of their whereabouts.



James C. Harrington

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA,

v.

JOHN TRAVIS KETNER, *et al.*,
Defendants

v.

EL PASO MEDIA GROUP, INC.
d/b/a THE NEWSPAPER TREE
Intervenor

§
§
§
§
§
§
§
§
§
§
§
§
§

No. EP-06-CR-1369-FM

ORDER

The Court having considered the Motion of El Paso Media Group, Inc. D/B/A The Newspaper Tree to Intervene to Unseal Court Documents and to Open Court Hearings and Request for Hearing on the Motion, finds there should be a hearing on the matter.

The Court sets the matter for hearing on _____ day of _____, 2008 at _____ a.m./p.m..

Date: August ____, 2008.

United States District Judge