

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | CIVIL ACTION |
| |) | FILE NO. 1:06-CR-147-CC- |
| SYED HARIS AHMED and |) | GGB |
| EHSANUL ISLAM SADEQUEE, |) | (superseding) |
| |) | |
| Defendants. |) | |
| |) | |
| |) | |
| |) | |

**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF
GEORGIA, INC. AND GEORGIA FIRST AMENDMENT FOUNDATION
IN OPPOSITION TO THE GOVERNMENT’S MOTION FOR
CLARIFICATION AND/OR RECONSIDERATION OF ORDER DENYING
MOTION FOR PROTECTIVE ORDER FOR UNCLASSIFIED
DISCOVERY MATERIALS**

I. INTRODUCTION

The American Civil Liberties Union of Georgia, Inc. (“ACLU”) and the Georgia First Amendment Foundation (“FAF”) (collectively, “*Amici*”) respectfully urge this Court to deny the Government’s Motion for Clarification and/or Reconsideration of Order Denying Motion for Protective Order for Unclassified

Discovery Materials [112] (“Motion to Reconsider”).¹ The Court’s Protective Order of April 19 adequately protects the public’s right of access to criminal trials and proceedings, while addressing the Government’s and the Defendants’ interests in maintaining the confidentiality of certain documents. In contrast, the Government’s revised Protective Order for Unclassified Discovery Materials [112-2] (“Revised Rule 16 Protective Order”), as did its predecessor, falls short of meeting the constitutional standards set forth by the Supreme Court and applied by the Eleventh Circuit and other courts. In short, the provisions of the Revised Rule 16 Protective Order overstep the Government’s articulated interests of privacy, confidentiality, and the Defendants’ right to a fair trial. Thus, *Amici* urge the Court to keep in place its Protective Order of April 19 and to deny the Government’s Motion to Reconsider.

II. BACKGROUND

The Government filed its First Rule 16 Protective Order, as well as a Motion for a Protective Order for Classified Material and accompanying protective order

¹ The Government’s original Motion for a Protective Order for Unclassified Materials and its first proposed Protective Order for Unclassified Materials [66] will be referred to collectively as the Government’s “First Rule 16 Protective Order.” The Court’s Order of October 26, 2006 [106], denying the Government’s First Rule 16 Protective Order, will be referred to as the Court’s “Order of October 26.” The Protective Order issued in this case on April 19, 2006 [20] will be referred to herein as the “Protective Order of April 19.”

for classified materials [65], on August 31, 2006. On September 25, 2006, the *Atlanta Journal-Constitution*, Associated Press, CNN, and WSB-TV (collectively, the “Media Intervenors”) submitted a response to the Government’s First Rule 16 Protective Order and its protective order for classified materials, arguing that the proposed protective orders swept beyond the exchange of discovery and were unconstitutionally broad. *Amici* filed its First Motion for Leave to File, as well as its Brief in opposition to the First Rule 16 Protective Order (“First Brief”), on October 25, 2006, urging the Court to reject the Government’s proposed protective orders as written.

On October 26, 2006, the Court denied the Government’s First Rule 16 Protective Order and ordered that the Court’s Protective Order of April 19 remain in effect as to unclassified discovery materials. The Protective Order of April 19 states in part:

[T]he defendant and ... counsel for the defendant, shall have access to this material, but shall not disclose or disseminate the material without first seeking the agreement of the government. In the event that ... counsel for the defendant believes that it is necessary to disclose or disseminate this material to anyone other than his client, including other identified members of the defense team, ... counsel shall first seek the agreement of the government. If a dispute arises, the parties will ask the court for resolution of the issue.

(Protective Order of April 19 at 2).

In ruling that the Protective Order of April 19 governs in this case, the Court stated that “the previous protective order ... entered by the Court on April 19, 200[6], adequately restricts the disclosure and dissemination of unclassified discovery in this case without automatically sealing from public view virtually all filings and without imposing an additional administrative burden on the court.”

(Order of October 26 at 3).

III. ARGUMENT AND CITATION OF AUTHORITIES

A. Constitutional Principles

The First Amendment to the United States Constitution provides a right of access to criminal trials. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) (stating that there is a constitutional right to open criminal trials); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 558-81 (1980) (establishing constitutional right of access to criminal trials); *United States v.*

Ochoa-Vasquez, 428 F.3d 1015, 1028-29 (11th Cir. 2005), *cert. denied*, 2006 U.S. Lexis 7505, 75 U.S.L.W. 3194 (U.S. 2006). The presumption of this right of access applies equally to pretrial proceedings. See *Press-Enterprise Co. v. Superior Court of Cal. for the County of Riverside*, 478 U.S. 1, 10-11 (1986) (*Press Enterprise II*) (finding right of access to pretrial hearings and applying First Amendment scrutiny); *Press-Enterprise Co. v. Superior Court of Cal., Riverside County*, 464 U.S. 501, 510 (*Press-Enterprise I*) (1984) (vacating state court's closure of voir dire proceedings); *Ochoa-Vasquez*, 428 F.3d at 1028-31 (denying access to sealed records unconstitutional). Further, the Supreme Court has recognized a common law right of access to judicial records, and this Circuit has recognized that the presumption of access equally applies to court records. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597-98 (1978); *Ochoa-Vasquez*, 428 F.3d at 1028-31.

The public's constitutional right of access to trials is based on important policy rationales and is reflected in this country's long history of public trials. See *Globe Newspaper*, 457 U.S. at 604-05; *Richmond Newspapers*, 448 U.S. at 573; see also *In re Oliver*, 333 U.S. 257, 266 (1948) (noting that the Court could not find a single *in camera* criminal trial conducted in the United States in any federal, state, or municipal court since the nation's birth, nor in England since abolition of

the Court of Star Chamber in 1641); *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (“Though the publication of [judicial] proceedings may be to the disadvantage of the [parties] concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known.”).

“The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise I*, 464 U.S. at 510. Further, when sealing documents in a judicial proceeding, the Court must articulate that overriding interest, “along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *Id.*; see also *Ochoa-Vasquez*, 428 F.3d at 1030 (quoting *Press-Enterprise I*, 464 U.S. at 510); *United States v. Kooistra*, 796 F.2d 1390, 1391 & n.1 (11th Cir. 1986) (remanding with instructions to trial court to articulate specific findings supporting closure).

B. While the Court’s Protective Order of April 19 Provides Sufficient Public Access to Non-Classified Information, the Government’s Revised Rule 16 Protective Order Does Not.

The Court’s Protective Order of April 19 adequately balances the Government’s and the Defendants’ interests in maintaining the confidentiality of certain documents against the public’s interest in open court proceedings. That Protective Order does not provide for the automatic sealing of any judicial

documents or absolutely prohibit the dissemination of all discovery materials to the public. (*See* Protective Order of April 19 at 2-3). Further, it makes no restrictions on the use of or publication of discovery documents during the pre-trial phase or at trial. (*See generally* Protective Order of April 19). Instead, it places the burden on the parties to seek guidance from the Court in the event that a dispute over disclosure arises. (*Id.*). And, in requiring the Defendants to obtain Government approval prior to disclosing discovery materials, including potentially those that are referred to in or attached to court filings (*see* Protective Order of April 19 at 7), it allows the Government to review discovery materials prior to their being filed, and thus, prior to their public disclosure. It does so, however, without requiring that those documents be sealed as a default measure. Finally, nothing in the Protective Order of April 19 prevents either party from filing a motion to seal any discovery material or associated judicial filing that it deems too sensitive for public disclosure. (*See* Protective Order of April 19 at 2-3). While the Protective Order of April 19 does place certain burdens on the parties vis-à-vis seeking sealing orders and determining the appropriateness of disclosure, such burdens do not run counter to addressing the Government's interests. Indeed, it is the burden of the party seeking closure to illustrate an overriding interest in it and to ensure that any

closure is narrowly tailored to serve that interest. *See Press-Enterprise I*, 464 U.S. at 510.²

The Government's Revised Rule 16 Protective Order, on the other hand, is not "narrowly tailored" to serve interests that "override" the public's access to criminal proceedings. *See Press-Enterprise I*, 464 U.S. at 510. The Revised Rule 16 Protective Order contravenes basic constitutional principles because, as written, it makes open judicial proceedings a near impossibility. Specifically, Paragraphs Ten and Eleven fail to provide for any public access to discovery materials made part of the court record, either through court filings, during pre-trial hearings, or at trial.

Paragraph Ten of the Revised Rule 16 Protective Order states that: "No party or agent thereof shall disseminate to the media or the public *any* of the discovery materials in this case." (Revised Rule 16 Protective Order ¶ 10

² The Government raises one issue that, perhaps, is not addressed in the Protective Order of April 19. That Protective Order, which was not consented to by counsel for Defendant Sadequee, does not provide for open sharing of discovery materials between the two Defendants. (*See Motion to Reconsider* at 7). *Amici* do not suggest that such a provision would be inappropriate, but it could simply be added to the Court's Order of April 19 rather than require dismissing that Protective Order in its entirety.

As for any confusion as to whether the Government's approval is required before the Defendant may refer to or include any discovery materials in court filings, such confusion also could be addressed by an amendment to the Court's Protective Order of April 19 adding a provision to that effect.

(emphasis added)). Paragraph Ten thus prohibits the dissemination of any discovery materials, whether general or sensitive. The Government has articulated no interest in prohibiting public access to non-sensitive, unclassified discovery materials. (*Cf.* Revised Rule 16 Protective Order n.2 (defining and describing “sensitive discovery materials”)).

Further, nowhere in Paragraph Ten, or elsewhere in the Revised Rule 16 Protective Order, is there a provision that provides for the redaction of previously undisclosed materials (or certain portions of those materials) during court proceedings so that those proceedings may remain open to the public. Thus, by its terms, and taken to its logical conclusion, Paragraph Ten would close from the public’s view all discovery materials – sensitive or general – whether or not the materials were associated with a court filing or presented during a court proceeding.

The effect of the Government’s unspecific Revised Rule 16 Protective Order is to close all judicial documents and proceedings in this case from the public. Without any articulation from the Government as to why it is necessary to keep *all* such documents confidential through trial, and without any provision providing for the redaction of certain portions of those documents so that the proceedings may remain open, this provision is unconstitutionally broad. *See Richmond*

Newspapers, 448 U.S. at 573 (where no findings to support closure of trial were made, no inquiry was made as to whether alternative solutions would have addressed interests in closure, and where trial court did not recognize constitutional right of public or press to attend trial, closure was improper).³

The Government appears to recognize the problems with the language in its Revised Rule 16 Protective Order and has stated in that motion that Paragraph Ten, among other provisions, was “primarily intended to protect discovery materials from inappropriate disclosure *outside* the court proceedings.” (Motion to Reconsider at 5). The Government, however, has failed to include such limiting language in its Revised Rule 16 Protective Order. Thus, if the Government’s

³ *Amici* recognize that, in their First Brief, they did not expressly challenge an identical restriction against discovery materials being disseminated to the media or to the public. (See First Brief at 8; First Rule 16 Protective Order at 10). Instead, *Amici* focused on Paragraph Eleven of the Government’s First Rule 16 Protective Order, specifically challenging that Paragraph’s sealing provisions. *Amici* do not suggest that it has a constitutional right of access to discovery materials, *see, e.g., United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986), and thus do not oppose all attempts at restricting the dissemination of discovery materials, particularly those that are not associated with court filings or that are not otherwise a part of the court record (for example, as evidence admitted during pretrial hearings or at trial). Nor does it oppose a restriction on the dissemination of other discovery materials, so long as court proceedings and filings remain sufficiently open to the public. As *Amici* stated in their First Brief, however, “[t]o the extent that the proposed [First] Rule 16 Protective Order is intended to restrict the public’s access to the trial of this case, such a limitation is subject to the same scrutiny as the provisions of Paragraph Eleven ...” (First Brief at n.6).

articulated position is genuine, then, at a minimum, additional language would be needed in the Revised Rule 16 Protective Order to that effect.

In addition, Paragraph Eleven of the Revised Rule 16 Protective Order, which the Government specifically re-drafted in response to the concerns of the Court, the Media Intervenors, and *Amici*, still falls short in providing sufficient access to judicial documents. It is true that Paragraph Eleven includes some necessary provisions addressing the sealing of motions or other filings that refer to or attach sensitive discovery materials. Further, as drafted, Revised Paragraph Eleven is more narrowly tailored than its companion provision in the First Rule 16 Protective Order. Revised Paragraph Eleven, however, fails to provide for any unsealing or disclosure of sealed documents during evidentiary hearings or at trial, and thus, is impermissibly broad.

The Government admits that its Revised Rule 16 Protective Order fails to address these concerns. (*See* Motion to Reconsider at 10 (“The Government notes that the proposed Protective Order (or Doc. 20, if that protective order is left in place) will likely need to be adjusted to address disclosures of discovery materials in filings and in open court during any evidentiary hearings and trials in this case.”)) The Government suggests that the Court wait until such proceedings are “closer in time and their circumstances are more defined” for such restrictions to

be put into place. (*Id.*) *Amici*, however, submit that such a position is not constitutionally permissible. While the Government may not intend to hide the trial or pretrial proceedings from public view, the Revised Rule 16 Protective Order, which contains no safeguards for the disclosure of any category of documents or filings during court proceedings, has that precise effect. By essentially cutting off the entire pretrial process and trial from the public, the Government's approach is not narrowly tailored to serve its articulated interests in national security and the Defendants' right to a fair trial. *See Press-Enterprise II*, 478 U.S. at 10-11 (finding right of access to pretrial hearings and applying First Amendment scrutiny); *Press-Enterprise I*, 464 U.S. at 510 (vacating state court's closure of voir dire proceedings). *See also El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 148 (1993) (*per curiam*) (requirement that preliminary hearing be held privately unless defendant requests otherwise violates First Amendment); *Waller v. Georgia*, 467 U.S. 39, 48-49 (1984) (applying First Amendment standards under the Sixth Amendment and holding that closure of entire suppression hearing relating to information derived from wiretaps was plainly unjustified because state's proffer was not specific as to whose privacy interests might have been infringed if the hearing were open to the public, how they would

have been infringed, what portions of the wiretap tapes might have infringed them, and what portion of the evidence consisted of the tapes).

In effectively sealing pretrial proceedings and the trial itself from public view, the Government imperils centuries-old Anglo-American tradition and firmly established legal precedent. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

The Supreme Court has noted that opening trials to the public promotes participation in public affairs, which is essential to self-government. *Globe Newspaper*, 457 U.S. at 604. Specifically in the criminal context, the Court has determined that “scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact finding process,” thus “foster[ing] an appearance of fairness” and “heightening public respect for the judicial process.” *Id.* at 605. Both society and the defendant benefit as a result. *Id.*

Here, the Revised Rule 16 Protective Order has the effect of hiding judicial proceedings from public view. Although this Court can, under certain circumstances, close a criminal trial or other court proceedings, given the centuries of legal tradition and persuasive policy rationales supporting openness, if the Court chooses to close any of the pre-trial proceedings or the trial, it should proceed hesitantly and cautiously, carefully weighing the interests of the parties against

those of the public. Thus, it should firmly reject any protective order that has the effect, even if unintended, of preemptively closing the proceedings in this case from the public.

In contrast, as discussed above, the Court's Protective Order of April 19 addresses *Amici's* concerns while accounting for the Government's and the Defendants' interests in confidentiality. Thus, *Amici* respectfully encourage the Court to stand by its previous ruling.

IV. CONCLUSION

For the foregoing reasons, ACLU and FAF respectfully urge the Court to deny the Government's Revised Rule 16 Protective Order as written.

Respectfully submitted this 17th day of November 2006.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Local Rule 7.1D, this is to certify that this brief has been prepared using Times New Roman font, 14 point type, which is one of the font and print selections approved by the Court in Local Rule 5.1C.

This 17th day of November 2006.

s:/Bryan M. Ward

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2006, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System which will automatically send e-mail notification of such filing to the following attorneys of record:

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