



to pretrial proceedings,<sup>1</sup> the docket sheet,<sup>2</sup> and individual documents filed on the record.<sup>3</sup> Accordingly, there is a presumption of openness as to any document filed with the court.

“A party may overcome that presumption if it can show ‘an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.’” *Ochoa-Vasquez*, 428 F.3d at 1030 (quoting *Press-Enterprise I*, 464 U.S. at 510). “When sealing proceedings or documents, a court must articulate the overriding interest ‘along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.’” *Id.* (quoting *Press-Enterprise I*, 464 U.S. at 510).

With this framework in mind, the court turns to Defendant’s Motion. In support of his Motion, Defendant articulates his concern for his ability to obtain a fair trial “if the public discussion were poisoned through the Government’s airing of a one-sided, partial, and incorrect set of allegations or information before trial.” Motion (Doc. #66) at 2. Thus, Defendant appears to put forth his right to a fair trial as a higher value than the public’s right to openness.<sup>4</sup>

However, Defendant is unable to overcome the presumption of openness. Even taking

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<sup>1</sup> *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cnty.*, 464 U.S. 501 (1984) (*Press-Enterprise I*); *Press-Enterprise II*, 478 U.S. at 7.

<sup>2</sup> *United States v. Valenti*, 987 F.2d 708, 725 (11th Cir. 1993).

<sup>3</sup> *Ochoa-Vasquez*, 428 F.3d at 1030-31.

<sup>4</sup> *But see Press-Enterprise II*, 478 U.S. at 7 (“Plainly, the defendant has a right to a fair trial but, as we have repeatedly recognized, one of the important means of assuring a fair trial is that the process be open to neutral observers.”).

Defendant's allegations in the Motion as true, that this "is a very high profile case that has already garnered an enormous amount of discussion in the news media, in online commentary, and among the public in general," Defendant can not show that his right to a fair trial has been infringed. Whether or not "public discussion" is affected by Government filings is not this court's concern, unless it improperly affects prospective jurors.

At this point, any attempt to determine whether future filings by the Government will improperly affect members of the jury pool, such that the public's First Amendment rights must be limited, would be based on speculation and fall well short of the requirement that a court must articulate the overriding interest along with specific findings. "The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant" of a fair trial. *Press-Enterprise II*, 478 U.S. at 15.<sup>5</sup>

Finally, Defendant's right to a fair trial through the seating of an impartial jury can be ensured through other means, such as *voir dire*, without creating such a drastic remedy and interfering with the public's constitutional rights. *See id.* ("Through *voir dire*, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict.").

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<sup>5</sup> Similarly, the court finds unavailing Defendant's assertions that, because in a separate case in 2004, prosecutors in the Northern District of Alabama may have improperly used the press to set forth allegations in a high-profile case, the government's filings in this case should be sealed. Even taking those assertions as true, it is mere speculation to assume the same will occur in this case. The court can not make specific findings sufficient to overcome the presumption of openness based on what happened six years ago in an unrelated case in a different district.

Accordingly, it is

ORDERED that the Motion For Order Requiring Government Filings Under Seal (Doc. #66), is DENIED.

Done this 12th day of October, 2010.

/s/ Wallace Capel, Jr.  
WALLACE CAPEL, JR.  
UNITED STATES MAGISTRATE JUDGE