IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. TRAVIS MCMICHAEL and GREG MCMICHAEL, Defendants.	Case No. CR2000433

MOTION TO INTERVENE FOR LIMITED PURPOSE OF RESPONDING TO DEFENDANTS' MOTION FOR CLOSURE OF JURY SELECTION

Pursuant to O.C.G.A. § 9-11-24, The Associated Press, The Atlanta Journal-Constitution, CNN, Cox Media Group for Action News Jax, WSB-TV and WSB Radio, and Gannett, publisher of USA Today (collectively, the "Media Intervenors") hereby move to intervene for the limited purpose of responding to Defendants' "Motion for Specific Procedures Necessary to Ensure the Selection of a Fair and Impartial Jury" (the "Motion").

The Motion asserts "no Press [should] be permitted to be present for individual, sequestered voir dire." Motion at 4. In requesting this relief, the Motion is directly in conflict with precedent from the U.S. Supreme Court and the Georgia Supreme Court holding that voir dire must be open to the public and press and closure may only be considered in extraordinary circumstances upon the affirmative request of a potential juror where record evidence establishes significant privacy interests would be harmed. *Presley v. Georgia*, 558 U.S. 209 (2010) (reversing closure of voir dire); *Press Enterprises Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501 (1984) (reversing closure of voir dire).

Pursuant to Uniform Superior Court Rule 6.1, a memorandum in support of this motion is submitted herewith.

Dated this the 20th day of July, 2021

Respectfully submitted,

FOR: KILPATRICK TOWNSEND & STOCKTON LLP

s/Thomas M. Clyde
Thomas M. Clyde
Georgia State Bar No.: 170955
tclyde@kilpatricktownsend.com
Lesli N. Gaither
Georgia State Bar No.: 621501
lgaither@kilpatricktownsend.com
Suite 2800, 1100 Peachtree Street, N.E.
Atlanta, Georgia 30309
Phone: (404) 815-6500

FOR: SHULLMAN FUGATE PLLC

s/Rachel E. Fugate
Rachel E. Fugate,
pro hac vice application forthcoming
rfugate@shullmanfugate.com
SHULLMAN FUGATE PLLC
Florida Bar No. 0144029
100 South Ashley Drive, Suite 600
Tampa, FL 33602
Phone: (844) 554-1354

Attorneys for Intervenors

IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. TRAVIS MCMICHAEL and GREG MCMICHAEL, Defendants.	Case No. CR2000433

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE FOR LIMITED PURPOSE OF RESPONDING TO DEFENDANTS' MOTION FOR CLOSURE OF JURY SELECTION

The Associated Press, The Atlanta Journal-Constitution, CNN, Cox Media Group for Action News Jax, WSB-TV and WSB Radio, and Gannett, publisher of USA Today (collectively, the "Media Intervenors") hereby respectfully submit this memorandum of law in support of their motion to intervene for the limited purpose of responding to Defendants' "Motion for Specific Procedures Necessary to Ensure the Selection of a Fair and Impartial Jury" (the "Motion").

INTRODUCTION

This case is a matter of significant public concern to this County, this State and this Nation. To foster public confidence in the fairness of the trial and the verdict reached by the jury, it is vital that the public and press be permitted to observe all portions of the trial, including voir dire. In their Motion, Defendants' counsel assert that sweeping closure of individual voir dire is necessary to protect the Defendants' constitutional right to a fair trial. By their motion, Defendants' counsel contend, in effect, that the First Amendment rights of the public and press should be sacrificed to protect the Sixth Amendment rights of their clients.

The Motion is misguided. The United States Supreme Court and the Georgia Supreme Court have repeatedly rejected the false dichotomy that these constitutional rights cannot co-exist with the one another in high profile cases. *See, e.g., R.W. Page Corp. v. Lumpkin*, 249 Ga. 576 (1982) (rejecting claim that these constitutional rights were on "a collision course" in a high profile criminal trial and noting the Georgia constitution point-blankly states that criminal trials shall be public, so a Georgia trial court judge "must approach these issues possessed of less discretion than his federal counterpart because our constitution commands that open hearings are the nearly absolute rule and closed hearings the very rarest of exceptions.").

A trial that is both fair to the Defendants and respectful to the First Amendment rights of the public and press can be achieved in this case. It has been accomplished in numerous prominent trials in this State and others over the last decade. The Motion's request for the systematic closure of individual voir dire would be a striking step in the wrong direction. Case law is well-settled that the entire voir dire process, including individual voir dire, should take place in open court, and limited closure should only occur in the event a specific line of questioning prompts a juror to make "an affirmative request" for closure, and the request is supported by "a significant interest in privacy." *Press Enterprises Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501, 512, (1984) (*Press-Enterprise I).*

Because Defendants' Motion proactively seeks close all individual voir dire without an individualized determination, the Motion should be denied.

ARGUMENT

I. GEORGIA LAW IS CLEAR THAT THE MEDIA HAS A RIGHT TO INTERVENE WHERE ACCESS TO JUDICIAL PROCEEDINGS AND RECORDS ARE AT ISSUE.

The right of the media to intervene in legal actions to object to the closure of court proceedings is well-established. *See, e.g. R.W. Page Corp. v. Lumpkin*, 249 Ga. 576 (1982) (recognizing right of the press to challenge order excluding the public and press from criminal proceedings and instituting procedure where the news media must be provided notice and an opportunity to be heard prior to consideration of motions seeking restrictions on access to court proceedings); *Atlanta Journal-Constitution v. State,* No. A03A0695 (January 29, 2003) (Georgia Court of Appeals reversing its initial dismissal of an appeal by media intervenors finding that The Atlanta Journal-Constitution and WSB-TV had standing to challenge a gag order: "they in fact have standing under both Georgia law and persuasive federal precedent") (citing *R.W. Page Corp.*).

On July 16, 2020, the Court issued an order granting an initial group of the Media Intervenors the right to intervene to oppose a gag order requested by one of the Defendants. Intervention should now be permitted again.

II. THE FIRST AMENDMENT AND THE GEORGIA CONSTITUTION GUARANTEE PUBLIC ACCESS TO THE TRIAL PROCESS, INCLUDING VOIR DIRE.

Operating the judicial branch of government in an open and public manner is fundamental to our system of justice as a matter of both federal and state constitutional law.

The United States Supreme Court has repeatedly recognized that public access to the judicial system is not only deeply ingrained in our history, but is also an "indispensable attribute" of our judicial system protected by the First Amendment to the United States Constitution. *See,*

e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) ("From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice."). As the Court recognized in *Richmond Newspapers*, public scrutiny of the court system is essential to its institutional well-being for numerous reasons, including because it is vital to obtaining the public's trust. "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." 448 U.S. at 572.

In addition to the protections afforded by the First Amendment, the Georgia Supreme Court has held that the Georgia Constitution independently requires our judicial system to operate in an open and public manner.

> This court has sought to open the doors of Georgia's courtrooms to the public and to attract public interest in all courtroom proceedings because it is believed that open courtrooms are a *sine qua non* of an effective and respected judicial system which, in turn, is one of the principal cornerstones of a free society.

R.W. Page Corp. v. Lumpkin, 249 Ga. 576 (1982). As mentioned above, because the Georgia Constitution states that criminal trials shall be public, *Page* makes clear that Georgia law is "more protective of the concept of open courtrooms than federal law." 249 Ga. at 578.

This protection extends with full force to the jury selection process. The U.S. Supreme Court made this clear in *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"). In *Press Enterprise I*, the Supreme Court observed:

> Public jury selection was the common practice in America when the Constitution was adopted. For present purposes, how we allocate the "right" to openness as between the accused and the public, or whether we view it as a component inherent in the system benefiting both, is not crucial. No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is

> difficult to separate from the right of everyone in the community to attend the voir dire which promotes fairness.

Id. at 510. Given the importance of the "right of everyone in the community to attend" voir dire, the Supreme Court emphasized that closure of voir dire may only be permitted under the most limited and narrowly tailored circumstances. "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. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." 464 U.S. at 510.

In connection with the jury selection process, the Supreme Court explained that this standard means a trial court must not make sweeping decisions about closing proceedings based on anticipated concerns of the parties, but must instead depend on individual jurors making an "affirmative request" to be heard in camera and permit such in camera questioning only if the response "would give rise to legitimate privacy interests of those persons." 464 U.S. at 512. As the Supreme Court explained, "[b]y requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy. This process will minimize the risk of unnecessary closure." *Id.*

Our Georgia Supreme Court has similarly emphasized the importance of maintaining a public jury selection process. The Court has confirmed that "the criminal trial itself, and all its consequent hearings on motions (pre-trial, mid-trial and post-trial) shall be open to the press and public on equal terms unless the defendant or other movant is able to demonstrate on the record by 'clear and convincing proof' that closing the hearing to the press and public is the only means by which a 'clear and present danger' to his right to a fair trial or other asserted right can be

avoided." *R.W. Page. Corp.*, 249 Ga. at 579. After being reversed by the U.S. Supreme Court in *Presley v. Georgia*, 558 U.S. 209 (2010),[1] for authorizing limited closure of jury selection in a criminal cases where the defendant proposed no alternatives to closure, the Georgia Supreme Court re-emphasized that it is incumbent on trial court judges to consider alternatives to closure on their own initiative. *Presley v. State*, 287 Ga. 234 (2010). The Georgia Court of Appeals has echoed this sentiment, observing that closure of any part of the trial process is highly restricted under Georgia law.

> The Spanish Inquisition and the English Court of Star Chamber shared a common practice: secret trials. To prevent the recurrence of similarly abusive institutions, English common law developed a requirement that trials be public. This mandate that trials be public is firmly established in both the U.S. Constitution and the Georgia Constitution. Only under very limited circumstances and by using very specific procedures can a trial court close part of a trial; failure to follow those procedures is error. And so it is here.

Jackson v. State, 339 Ga. App. 313, 313 (2016) (reversing criminal conviction based on improper closure of trial proceedings) (citations omitted) (Peterson, J.).

Given this well-established law, Defendants' request to close all of the individual voir dire in this case should be denied.

III. DEFENDANTS' MOTION CONTAINS NO EVIDENCE OF PREJUDICE NECESSARY TO SUPPORT THE REQUESTED RESTRICTIONS.

It is well-established that publicity alone is not a basis for a trial court to take the extraordinary step of trying to stifle informed public discussion or reporting on a case. *See, e.g., Rockdale Citizen Publ'g Co. v. State*, 266 Ga. 579, 581 (1996) ("Pretrial publicity – even

[1] *Presley* involved a criminal defendant asserting error based on closure of voir dire in conflict with his Sixth Amendment right to a public trial. However, the Court recognized that by excluding the public from a criminal trial without meeting the exacting standards set forth by the Court's precedent, a trial court harms not just the Sixth Amendment rights of the accused but the First Amendment rights of the public. "The Court has further held that the public trial right

pervasive, adverse publicity – does not inevitably lead to an unfair trial.") (quoting *Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 554 (1976)). Indeed, the Georgia Supreme Court has recognized that the vast majority of cases do not garner public attention, so public understanding of and faith in the court system depends on the system's continued openness in those proceedings that do capture public interest. *See R.W. Page*, 249 Ga. at 576 n.1. (1982). As the Court has repeatedly emphasized, the issue a trial court must consider with respect to a defendant's rights to a fair trial is not publicity, but prejudice. *See generally WXIA-TV v. State*, 303 Ga. 428, 439 (2018).

In this case, the Motion does not offer the Court any actual evidence of prejudice beyond the public interest in the case. As a fundamental matter, Defendants' counsels' speculation about juror candor is simply insufficient to proactively close the entirety of the individual voir dire process. *See, e.g., Press Enterprise I*, 464 U.S. at 503 (finding the State's generalized concerns that "juror responses would lack the candor necessary to assure a fair trial" insufficient to justify six weeks of closed jury selection); *see also Rockdale Citizen Pub. Co.*, 266 Ga. at 580 ("Assumptions and speculation [about the impact of media coverage on a fair trial] can never justify the infringement of First Amendment rights which the closure of criminal proceedings creates.").[2]

---

extends beyond the accused and can be invoked under the First Amendment." *Presley*, 558 U.S. at 212-213.

[2] *See also Presley*, 558 U.S. at 215 ("If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course."); *Cable News Network, Inc. v. United States*, 824 F.2d 1046, 1049 (D.C. Cir. 1987) (per curiam) (closure requires "*individualized* findings that specific jurors had compelling reasons for wishing to keep private responses to particular questions" (emphases added)).

The insufficiency of the Defendants' evidence is particularly clear because voir dire has been conducted in a generally public fashion in this State in wide variety of high profile cases, including *State v. Ross Harris, State v. Andrea Sneiderman, State v. Lynn Turner, State v. Brian Nichols,* and *State v. Sidney Dorsey*. It is also worthy of note that in *State of Minnesota v Derek Chauvin*, the trial court explicitly required that voir dire questioning take place in a public in a video recorded setting that was streamed and televised to encourage confidence in the trial process. Video clips of jury selection remain widely available online.[3] Jury selection proceeded without incident. Defendants' concerns about juror candor are not sufficient to support the closure requested by their Motion.

CONCLUSION

For these reasons, the sweeping request for closure of voir dire in Defendants' Motion should be denied

Dated this the 20th day of July, 2021

Respectfully submitted,

FOR: KILPATRICK TOWNSEND & STOCKTON LLP

s/Thomas M. Clyde
Thomas M. Clyde
Georgia State Bar No.: 170955
tclyde@kilpatricktownsend.com
Lesli N. Gaither
Georgia State Bar No.: 621501
lgaither@kilpatricktownsend.com
Suite 2800, 1100 Peachtree Street, N.E.
Atlanta, Georgia 30309
Phone: (404) 815-6500

[3] See, e.g., https://www.youtube.com/watch?v=UNKEBjZ9y6o; https://www.youtube.com/watch?v=gqFgYAqfGWk; https://www.youtube.com/watch?v=Ck5UIfBcbUs

s/Rachel E. Fugate
Rachel E. Fugate,
pro hac vice application forthcoming
rfugate@shullmanfugate.com
SHULLMAN FUGATE PLLC
Florida Bar No. 0144029
100 South Ashley Drive, Suite 600
Tampa, FL 33602
Phone: (844) 554-1354

Attorneys for Interveners

IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	)	
v.	)	
	)	Case No. CR2000433
TRAVIS MCMICHAEL and GREG MCMICHAEL,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing MOTION TO INTERVENE and MEMORANDUM OF LAW by statutory electronic service through the Court's electronic filing system and by email upon the following:

Linda Dunikoski, Esq.
(linda.dunikoski@cobbcounty.org)
Kevin Gough, Esq.
(kevingough.firm@gmail.com)
Franklin Hogue, Esq.
(frank@hogueandhogue.com)
Laura Hogue, Esq.
(laura@hogueandhogue.com)
Jason Sheffield, Esq.
(jasonsheffieldattorney@gmail)
Robert Rubin, Esq.
(robertrubin@justiceingeorgia.com)

DATED this the 20th day of July, 2020

s/Thomas M. Clyde
Thomas M. Clyde