IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. GREG MCMICHAEL, TRAVIS MCMICHAEL, and WILLIAM R. BRYAN, Defendants.	Case No. CR 2000433

BRIEF BY MEDIA INTERVENORS IN OPPOSITION TO 4.69 STATE'S MOTION FOR AN ORDER RESTRICTING EXTRAJUDICIAL STATEMENTS

The Atlanta Journal-Constitution, Action News Jax, WSB-TV and WSB Radio, respectfully submit this brief in opposition to the State's Motion for an Order Restricting Extrajudicial Statements (the "Motion").

INTRODUCTION

The above-referenced media organizations previously intervened to oppose a motion to limit speech about this case that was filed by Defendant Bryan on May 27, 2020.[1] That motion was subsequently withdrawn. The current Motion to restrict extrajudicial statements, now filed by the State, is equally without merit and should be denied by the Court.

Our legal system has always recognized that criminal prosecutions are an important component of American government and, thus, they can and should be a matter of public discussion, debate and scrutiny. The United States Supreme Court has long acknowledged that our judicial system benefits from "[t]he knowledge that every criminal trial is subject to

[1] The Court granted the intervention in an Order issued on July 16, 2020.

contemporaneous review in the forum of public opinion."[2] For this reason, a heavy burden must be met before a Court issues an order attempting to restrict what attorneys for either the State or defense can say in the courtroom or outside of the courthouse "in the forum of public opinion" to protect their client's interests. This burden has not been carried here.

The State's Motion appears to be primarily premised on a single statement by defense counsel regarding public evidence relevant to a pretrial ruling. The State's motion does not mention or acknowledge that the media has frequently and appropriately reported on condemnation of the Defendants expressed by government institutions and private counsel representing Mr. Arbery. This condemnation has been expressed in press conferences, press releases and interviews given by, for example, the United States Department of Justice, the Georgia Governor, the Georgia Attorney General and the prominent civil rights attorneys working with Mr. Arbery's family. Because the public interest in this case is strong and such statements on behalf of Mr. Arbery and his family are part of appropriate public discourse, it is essential that the media be in a position to obtain comment from the Defendants' counsel as a matter of fairness, balance and sound journalism.

Not surprisingly, Georgia courts have repeatedly struck down trial court orders that have attempted to restrict the "extrajudicial statements" of counsel in high-profile cases. These Georgia courts have emphasized that such restrictions on speech should not be considered unless there is clear evidence of prejudice to a fair trial. The State's primary focus on a single statement demonstrates that such prejudice has not and cannot be shown here. The State's Motion should be denied.

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[2] In re Oliver, 333 U.S. 257, 270 (1948) ("The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on the possible abuse of judicial power.").

I. THE GUARANTEES OF PUBLIC ACCESS TO THE JUDICIAL SYSTEM IS A CENTRAL FEATURE OF THE FIRST AMENDMENT AND OF THE GEORGIA CONSTITUTION.

It is well-established that protection of an open court system is not limited to allowing the public and press inside the physical confines of the courthouse, but also encompasses a freedom to discuss, report, and comment on court proceedings.

> The First Amendment, in conjunction with the Fourteenth, prohibits government from abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.

Richmond Newspapers v. Virginia, 448 U.S. 550, 575 (1980). In fact, the United States Supreme Court has repeatedly recognized a special solicitude for speech about the court system. See, e.g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975) ("With respect to judicial proceedings in particular, the functioning of the press serves to guarantee the fairness of trials and to bring to bear the effects of public scrutiny upon the administration of justice.").

It is for this reason that the law requires that a demanding standard be met before a trial court enters an order that restricts the ability of the media to report on court proceedings, either directly by expressly enjoining publication of certain information, or indirectly by restricting the right of defense counsel or other persons with knowledge about the case from speaking to the news media. See WXIA-TV v. State, 303 Ga. 428 (2018) (reversing gag order restricting speech of attorneys and certain law enforcement personnel). In Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 558 (1976), the United States Supreme Court held that an order directly restraining the news media from reporting certain evidence in a criminal case was a form of "prior restraint,"

which carried a "heavy presumption" against its constitutional validity. After discussing a series of prior restraint cases beginning with Near v. Minnesota, 283 U.S. 697 (1931), the Court concluded: "The thread running through all these cases is that prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." Nebraska Press, 427 U.S. at 559. The Court emphasized that the First Amendment provides especially forceful protection to the rights of individuals and the press to speak and publish about criminal proceedings, "whether the crime in question is a single isolated act or a pattern of criminal conduct." Id. at 559. As the Court noted, "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field….The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public criticism." Id. at 559-60 (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)).

Even if an order does not directly restrain the press and public, but instead restrains only "trial participants," it nonetheless faces substantial constitutional barriers. In WXIA v. State, 303 Ga. 428 (2018) the Georgia Supreme Court reversed a gag order entered in a high profile murder prosecution involving the death of Tara Grinstead. While making clear that a "gag order is a prior restraint of those to whom it applies" that is "presumptively unconstitutional," id. at 434, the Court found that the gag order at issue did not even meet the lesser "reasonable likelihood of prejudice" standard to the extent it indirectly burdened the news media's First Amendment rights. Id. at 439.

> A reasonable likelihood of prejudice sufficient to justify a gag order cannot simply be inferred from the mere fact that there has been significant media interest in a case. After all, "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial," Nebraska Press, 427 U.S. at 554 (IV), 96 S.Ct. 2791, and "[i]n the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to [the right to trial by an impartial jury]." Id. at 551 (IV), 96 S.Ct. 2791. See also

Rockdale Citizen Publishing Co. v. State of Ga., 266 Ga. 579, 581, 468 S.E.2d 764 (1996).

WXIA, 303 Ga. at 439.

Similarly, in Atlanta Journal-Constitution v. State, 266 Ga. App. 168, 170 (2004), the Georgia Court of Appeals reversed a gag order entered in a high profile case involving the prosecution the Reverend Arthur Allen of the House of Prayer Church. The Court emphasized that "[a] conclusory representation that publicity might hamper a defendant's right to a fair trial is insufficient to overcome the protections of the First Amendment.'" Atlanta Journal-Constitution v. State, 266 Ga. App. 168, 170 (2004) (quoting United States v. Noriega, 917 F.2d 1543, 1549 (11th Cir.)).

The gag orders struck down in WXIA-TV and Atlanta Journal-Constitution arose in criminal cases of significant public interest that were the subject of broad local and national reporting. Just as the movants in those cases failed to meet their burden, the State has not and cannot offer any evidentiary basis to support the extraordinary relief it seeks here.

II. THE STATE'S MOTION DOES NOT CONTAIN EVIDENCE OF PREJUDICE NECESSARY TO SUPPORT THE REQUESTED RESTRICTIONS.

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 v. Lumpkin, 249 Ga. 576, 576 n.1. (1982). Thus, 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 pervasive, adverse publicity – does not inevitably lead to an unfair trial.") (quoting Nebraska Press Assn. v. Stuart, 427 U.S. 539, 554, 96 S. Ct. 2791, 2800 (1976)).

As Georgia's Supreme 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, 303 Ga. at 439.

In this case, the State's Motion does not offer sufficient evidence of such prejudice. In its Motion, the State generally focuses on a single statement from defense counsel, but it fails to explain how this statement alone, found in a "sea" of other reporting on this case, could support the heavy burden the State must meet on the issue of prejudice. In lieu of focusing on prejudice, the State instead suggests that statement is problematic because it is critical of the Court and the State. *See, e.g.*, Motion at 1, n. 1 ("[P]ublicly criticizing the Court's evidentiary rulings . . . has caused the State grave concern."); Supplemental Motion at 3, n. 4 (requesting an order stopping all comments that constitute "criticism of the State or this Court"). However, stopping criticism of the Court or the State has *never* been an approved purpose of a gag order. Indeed, Georgia's appellate courts have long recognized that trial court judges and other court officers must endure the speech that comes with public office. See, e.g., Thibadeau v. Crane, 131 Ga. App. 591 (1974) (stating with respect to a trial judge asserting a defamation claim that criticism "is [what] President Truman referred to in saying "if you can't stand the heat get out of the kitchen'"). Critical statements about public officials are both a natural consequence of democracy and at the core of protected speech under the First Amendment: "The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office." Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53-55 (1988). See also Cox Enterprises. Inc. v. Carroll City/County Hospital Auth., 247 Ga. 39, 40 (1981) ("[c]riticism of government is at the very center of the constitutionally protected area of free speech." (citation omitted)).

III. THE RELIEF REQUESTED IS OVERLY BROAD.

Courts have repeatedly recognized that the terms of a restrictive order must themselves survive constitutional scrutiny. See, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976) ("The precise terms of the restraining order are also important."). Accordingly, courts have vacated orders that sweep too broadly in silencing speech. See, e.g., Atlanta Journal-Constitution, 266 Ga. App. at 170 (finding proposed gag order overbroad ask it restricted more than what was allowed by the Rules of Professional Conduct); CBS Inc. v. Young, 522 F.2d 234, 239-40 (6th Cir. 1975) (invalidating as overly broad order that by "its literal terms [permitted] no discussions whatever about the case . . . whether prejudicial or innocuous, whether subjective or objective, whether reportorial or interpretive").

Here, the Motion proposes a gag order that is *not* narrowly tailored. In the Motion, the State attempts to rewrite State Bar Rule 3.6 in a manner that conflicts with the Rule and the First Amendment. State Bar Rule 3.6 was never intended to gag attorneys or be imposed in the form of a gag order. The Rule acknowledges the need for "balance" with respect to speech about pending court actions because "there are vital societal interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves." *See* Comment 1. Likewise, Rule 3.6 recognizes that "extrajudicial statements" must be permissible where "a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client." *See* Comment 7. The State's suggested remedy ignores this attempt at balance and instead suggests counsel should only provide public record information "without comment," which the State defines in a sweeping fashion. Supplemental Motion at 3, n. 4 (requesting an order stopping all "comment" in the form of "criticism of the

State or this Court, advocacy for particular evidentiary rulings (outside of written motions and courtroom arguments), arguments and positioning of the facts and evidence in order to sway jurors or potential jurors outside the courtroom.").

Such a restriction would be overbroad on its face and disrupt the "balance" that Rule 3.6 is intended to protect. The State's Motion should be denied.

CONCLUSION

For these reasons, Intervenors respectfully request that the State's Motion be denied.

Dated this the 4th day of October, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served opposing counsel with a true and correct copy of the above BRIEF BY MEDIA INTERVENORS IN OPPOSITION TO 4.69.1 STATE'S MOTION FOR AN ORDER RESTRICTING EXTRAJUDICIAL STATEMENTS via the Odyssey E-File System to:

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DATED this the 4th day of October, 2021

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