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FOR FREEDOM OF THE PRESS

1156 15th St. NW, Suite 1020
Washington, D.C. 20005
(202) 795-9300 • www.rcfp.org

Bruce D. Brown, Executive Director
bruce.brown@rcfp.org

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By email

Feb. 14, 2024

District Attorney Stephen M. Billy
Post Office Box 993
Brewton, AL 36427-0993

Re: Arrests of Sherry Digmon and Don Fletcher.

Dear District Attorney Billy:

The Reporters Committee for Freedom of the Press and the Committee to Protect Journalists, national organizations that advocate for the legal rights of journalists and freedom of the press, write to express our significant concern with the arrests and indictments of Atmore News publisher Sherry Digmon and reporter Don Fletcher. These actions were taken pursuant to Alabama's grand jury secrecy law and followed the publishing of what the complaints against Digmon and Fletcher describe as "an article containing Grand Jury Investigation information." *See, e.g., Complaint and Order on Initial Appearance, Alabama v. Digmon (Escambia County, Alabama, filed Oct. 30, 2023).*

Even in instances where journalists are suspected of having committed a criminal offense, subjecting them to arrest is extremely rare and disruptive to newsgathering. And courts have repeatedly warned of the potential for public officials to "exploit the arrest power as a means of suppressing speech." *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1953 (2018). Further, the bond conditions for Digmon and Fletcher include what appears to be an overbroad gag provision, preventing them from engaging in "communications about ongoing criminal investigations including schools and other(s) until they are public record." *See Complaint, supra.* Regardless of the underlying issues, both actions were excessive and threaten to chill public interest newsgathering and reporting more broadly. We urge you to reconsider the charges against Digmon and Fletcher and to agree to modify the terms of their bail to ensure they can continue to engage in newsgathering and reporting, in accordance with the First Amendment.

With respect to the arrests of journalists, the law is clear that "law enforcement officers may not arrest an individual as a way 'to thwart or intrude upon First Amendment rights otherwise being validly asserted.'" *Toole v. City of Atlanta*, 798 Fed. Appx. 381, 387 (11th Cir. 2019) (quoting *Kelly v. Page*, 335 F.2d 114, 119 (5th Cir. 1964)). And the United States Supreme Court has cautioned that legal process implicating First Amendment interests must be deployed with "scrupulous exactitude." *Stanford v. Texas*, 379 U.S. 476, 485 (1965). Indeed, in doing so, the Court emphasized the long history of the First and Fourth Amendments as bulwarks against the "the use by government of the power of search and

seizure as an adjunct to a system for the suppression of objectionable publications.” *Id.* at 484 (citing *Marcus v. Search Warrant*, 367 U.S. 717, 724 (1961)). This is so as “the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power.” *Marcus*, 367 U.S. at 724 (internal citations omitted); *see also* 28 C.F.R. § 50.10(a)(1) (implementing federal Justice Department policy requiring pre-approval for arrest of journalist because “free and independent press is vital to the functioning of our democracy” and protections necessary to avoid “unreasonably impair[ing] newsgathering”).

For precisely this reason, arrests and criminal charges against journalists based on newsgathering and reporting are uncommon, and most occur in the protest context (where they rarely result in charges). *See* Grayson Clary, *Arrests of Journalists Continued Their Decline in 2022, But 2020 Still Casts a Shadow*, Reporters Comm. for Freedom of the Press (May 17, 2023), <https://www.rcfp.org/2022-press-freedom-tracker-part-3/>. In fact, based on a search of news reports and state and federal court filings nationwide, we are unable to find another instance of a journalist being arrested under a statute similar to the Alabama grand jury secrecy law. *See Newspaper Publisher and Reporter Arrested and Accused of Revealing Grand Jury Information*, A.P. (Nov. 1, 2023), <https://apnews.com/article/atmore-alabama-publisher-reporter-arrested-7be92929b415d668bec9c1141578725b> (quoting general counsel of Alabama Press Association as saying that he has, in 40 years of practice, “never seen a reporter arrested for publishing truthful information about the existence of a grand jury subpoena”).

The potential interference in newsgathering and reporting is significantly heightened in this instance by the imposition of a broad gag order that extends to all “communications about ongoing criminal investigations including schools and other(s) until they are public record.” *See* Complaint and Order on Initial Appearance, *Alabama v. Digmon* (Escambia County, Alabama, filed Oct. 30, 2023) (handwritten note); *No Secrets*, Atmore News (Nov. 2, 2023), <https://atmorenews.com/2023/11/02/no-secrets/> (transcribing handwriting).

As such, the terms of Digmon’s and Fletcher’s bonds act as a functional prior restraint on news reporting, the “most serious and least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 558 (1976). Such an order is the “most extraordinary remedy” reserved only for the “exceptional case” where the “evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures.” *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994). In practice, even when a news organization is a defendant, restrictions on newsgathering or reporting are virtually always rejected or invalidated on appeal. *See, e.g., Freedom Commc’ns, Inc. v. Superior Court*, 167 Cal. App. 150, 155 (Cal. Ct. App. 2008) (ordering superior court to vacate restraint on Orange County Register reporting on trial testimony of witnesses in wage-and-hour case against the Register); *cf. Seattle Times v. Rhinehart*, 467 U.S. 20, 34 (1984) (holding news organization may freely report on information identical to that covered by protective order if acquired independently of discovery).

The same principles would apply here, especially the need to carefully tailor any bond condition affecting newsgathering or reporting. Restricting the defendants from “communications” regarding criminal investigations with no connection to the underlying matter is manifestly overbroad. *Cf. United States v. Ford*, 830 F.2d 596, 598 (6th Cir. 1987) (holding “no discussion-of-the-case” gag on criminal defendant unconstitutional). And to the extent the gag order interferes with the ability of the defendants’ publications to report on their arrests and charges, that would likewise violate the First Amendment—and would impair the free flow of important information to the community. *Id.*

In sum, we would urge you to consider the implications your actions with respect to Digmon and Fletcher could have on other journalists in your community and beyond. The deployment of state power to arrest or indict a journalist for any conduct with a nexus to newsgathering and reporting is intensely destructive to the press’s watchdog role with respect to the government. As such, to the extent the arrests and charges here have such a nexus, they should be expunged and dropped, and we urge you to do so.

Please do not hesitate to contact Gabe Rottman, the director of the Technology and Press Freedom Project at the Reporters Committee (grottman@rcfp.org), or Katherine Jacobsen, U.S. and Canada Program Coordinator at the Committee to Protect Journalists ([kjacobson@cpj.org](mailto:kjacobsen@cpj.org)), with any questions.

Sincerely,

The Reporters Committee
for Freedom of the Press

Committee to Protect Journalists