

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel. THE  
TOLEDO BLADE CO.,

\*

Relator,

\*

-vs-

\*

CASE NO. 10-161

ORIGINAL ACTION IN  
PROHIBITION

THE COURT OF COMMON PLEAS OF  
HENRY COUNTY, OHIO, et al.,

\*

Respondents.

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**BRIEF *AMICUS CURIAE* IN SUPPORT OF RELATOR ON BEHALF OF THE  
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS**

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On February 26, 2010, The Reporters Committee for Freedom of the Press (“the Reporters Committee”) requested admission *pro hac vice* to file a brief *amicus curiae* in support of relator The Toledo Blade. *Amicus* now provisionally files this brief pending the Court’s decision on *pro hac vice* admission of attorneys for *amicus*.

### **INTEREST OF THE AMICI**

The Reporters Committee is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and freedom of information litigation in state and federal courts since 1970.

The interests of *amicus*, and the reporters it serves across the country, are implicated by the trial court’s order preventing members of the media from published or broadcast reporting of trial proceedings until a jury is impaneled in a related trial. The two primary issues before the Court at this time are: (1) whether the prior restraint against the press is constitutional; and (2) whether pretrial publicity will truly affect potential jurors to the extent where a defendant is unable to obtain a fair and impartial trial.

### **STATEMENT OF THE FACTS**

Jayne Schwenkmeyer and David E. Knepley are defendants in two separate trials arising out of the same incident, the death of Ms. Schwenkmeyer’s daughter. On December 4, 2009, respondents Judge Keith P. Muehlfeld and The Court of Common Pleas of Henry County, Ohio issued an order barring members of the print and broadcast media from publishing or broadcasting reports of trial proceedings until the jury is impaneled in the second trial. *Joint Submission of Evidence, Exhibit I* (filed Feb. 10, 2010). Per request of relator The Toledo Blade, respondents The Court of Common Pleas of Henry County, Ohio and Judge Keith P. Muehlfeld

reconsidered the December 4, 2009 order and held oral arguments on the issue on January 26, 2010 (hereinafter, “January hearing”). *Id.* at *Exhibit P*. Respondents then denied relator’s motion for reconsideration and affirmed the December 4, 2009 order. *Id.* at *Exhibit O*.

*Amici* further adopts the Summary of Facts provided in relator’s brief.

### **SUMMARY OF THE ARGUMENT**

First Amendment jurisprudence has long recognized the right of public access to criminal trial proceedings. More often than not, this public access right is exercised through the press, which has two primary roles during a criminal trial: (1) to provide citizens with a means of evaluating the administration of justice through the judicial system; and (2) to act as an independent watchdog over the judicial system by exposing those involved in trials to public scrutiny. Given these critical roles, the press is entitled to protection under the First Amendment, the “chief purpose” of which is to “prevent previous restraints upon publication,” according to the U.S. Supreme Court. *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

Because the role of the press in criminal trials is so critical, the U.S. Supreme Court has repeatedly refused to uphold orders barring the press from reporting on criminal trials. *See Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976). State and federal courts around the country, including this Court, have followed suit and have repeatedly found that prior restraints are a significant and serious infringement upon constitutional rights. *See, e.g., State ex rel. Dayton Newspapers, Inc. v. Phillips*, 351 N.E.2d 127, 130 (Ohio 1976).

Even if a prior restraint on reporting and publication was not unconstitutional *per se*, such an order is completely overbroad and inappropriate, given the speculative nature of the impact of pretrial publicity on jurors. Historically, courts have found that an adequate number of jurors remain untainted by press coverage because they do not pay as much attention to it or think

about it to the same extent the legal community does, or because they are able to disregard prior press coverage and base their verdict on evidence presented in court. Notably, in one high-profile capital murder case before this Court, the lower trial court found that although all jurors had some knowledge about the case, seven of the jurors had not even formed an opinion about it. *State v. McKnight*, 837 N.E.2d 315, 333 (Ohio 2005).

Furthermore, cases in this Court and in federal courts around the country have repeatedly established that voir dire of the jury is an effective safeguard against juror prejudice, even in the face of pervasive pre-trial publicity. Voir dire gives the court an opportunity to evaluate the effect of pretrial publicity on potential jurors; any potential juror that is deemed unable to remain fair and impartial may be dismissed. In multiple cases involving extensive pretrial publicity, however, courts have successfully seated a sufficient number of jurors that are able to disregard prior knowledge of a case and base their verdict upon the evidence presented in court. Because jury voir dire is so effective in ensuring that the defendants will receive a fair and impartial trial, there is no need to infringe upon the constitutional rights of the public and the press through an order that prohibits the press from immediately reporting on the trial.

This Court should reverse the order barring the press from reporting and publishing on the first trial until the jury in the second trial is impaneled. Such an order infringes upon the basic First Amendment rights of the public and the press, is not the best method of ensuring a fair and impartial jury, and ignores the extensive number of cases demonstrating that claims of adverse pretrial publicity are often overstated and speculative. Any affirmation of this order would have effects far beyond this case, as it would provide precedent for silencing the press and denying the public the right to obtain information regarding trial proceedings in a timely manner.

## ARGUMENT

### **I. A prior restraint on the press is unconstitutional *per se* because it infringes upon clearly established rights under the First Amendment.**

First Amendment jurisprudence firmly establishes that prior restraints are incompatible with the notion of a free press that acts both as an independent watchdog over the judicial system and a mechanism through which the public gains access to criminal trials. In fact, the U.S. Supreme Court has declared prior restraints on speech and publication to be “the most serious and least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n*, 427 U.S. at 559. Although freedom of the press is not absolute, any prior restraint on expression has a “heavy presumption against its constitutional validity.” *Id.*, at 558; *see also News Herald v. Ruyle*, 949 F.Supp. 519, 522 (N.D. Ohio 1996). Indeed, the U.S. Supreme Court has suggested that prior restraints against the press are only appropriate in limited, “exceptional” cases, such as when the nation is at war. *See Near*, 283 U.S. at 716.

This Court has also found that prior restraints against the news media infringe upon state and federal constitutional rights, even when there is an argument that a prior restraint is necessary to ensure that a defendant receives a fair criminal trial. In 1976, the defendants in *State ex rel. Dayton Newspapers v. Phillips* argued for a prior restraint of publication against a newspaper covering a murder/kidnapping trial, yet when considering whether a prior restraint against the news media was constitutional, this Court decided that the “answer is simple” because “the First Amendment to the Constitution of the United States and Section 11 of Article I of the Ohio Constitution prohibit any abridgment of the freedom of the press.” 351 N.E.2d at 130.

The answer to the question in this case is also simple – this order infringes upon the same constitutional rights enumerated in *Dayton Newspapers* and should be prohibited. The exact same concern that the respondents have expressed regarding the right of the defendants to a fair

trial was present in *Dayton Newspapers* and *Nebraska Press Ass'n* as well, yet both this Court and the U.S. Supreme Court found that that concern did not overcome the heavy presumption against constitutionality of a prior restraint on the press. Both cases involved highly publicized murders that garnered a great deal of media attention,<sup>1</sup> and the crime at issue in *Nebraska Press Ass'n* also took place in a small town of approximately 850 people. There is nothing substantially different about the factual scenario in the current case that would justify overcoming the heavy presumption against constitutionality of the trial court order.

Furthermore, respondents' order and statements from the bench during the January hearing ignore the critical role of the press during criminal proceedings. "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 scrutiny and criticism." *Nebraska Press Ass'n*, 427 U.S. at 560 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)). Therefore, the media's role in this case goes beyond simply reporting on the trial proceedings; the media is also there as an independent watchdog over the judicial system by acting as the eyes and ears of the public, whom, although permitted to attend the trial under the order at issue, may not be able to be present. "The public is entitled to know what is happening to the accused. There is no other way the busy ordinary citizen can evaluate how the judicial system is administering justice except through the media he reads, hears or watches." *State ex rel. Dayton Newspapers*, 351 N.E.2d at 134.

Any delay in the media's ability to convey information on the judicial system to the public impairs its ability to fulfill its role, even if the media is allowed to be present during the

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<sup>1</sup> This Court described the crime at issue in *Dayton Newspapers* as a "sensational kidnapping and murder case." 351 N.E.2d at 130. In *Nebraska Press Ass'n*, the defendant was charged with killing six members of a single family. 427 U.S. at 542.



proceedings on which it is not allowed to report. If judges could freely issue prior restraint orders for the purposes of delaying the release of information on judicial proceedings, it would decimate the benefits of a free press that is representing the public in ensuring the integrity of the judicial process. Restricting the public right of access through a prior restraint on the media would set a dangerous precedent by removing what is a standard criminal trial from the scrutiny of the public.

Additionally, if members of the public did attend the trial, there is nothing prohibiting them from discussing the first trial with the general venire for the second trial, meaning that the prior restraint would not even serve its alleged purpose of insulating the prospective jury pool. *See, e.g., Nebraska Press Ass'n*, 427 U.S. at 540, 567 (noting that the prior restraint may not effectively protect the defendant's rights, given the practical problem of drafting an order that would keep prejudicial information from prospective jurors in a "small community where rumors would travel swiftly by word of mouth," and further noting that such rumors "could well be more damaging than reasonably accurate news accounts"). This prior restraint, which represents a significant infringement upon First Amendment rights, does not even adequately protect the defendants' right to a fair trial, and is therefore improper.

## **II. Pre-trial press coverage does not typically impair the jury, even in highly publicized cases.**

Respondents' primary reason for issuing a prior restraint was to prevent potential jurors from becoming tainted due to press coverage of the trials. History has shown, however, that claims of jury taint from pretrial publicity are speculative, difficult to determine, and often overstated. *E.g., Nebraska Press Ass'n*, 427 U.S. at 599-600 (Brennan, J., concurring) (noting that it would be difficult to predict the scope of the audience that may be exposed to information or to evaluate the effect of that information on the potential jurors). Any affirmation of the prior restraint

would ignore the fact that many jurors remain unaffected by press coverage and are still able to discharge their duties.

**a. Press coverage in a criminal trial often does not significantly affect potential jurors, even if the coverage is extensive.**

Arguments that pervasive pretrial publicity prevents defendants from obtaining fair and impartial juries for criminal trials are not new. In the overwhelming majority of cases, however, courts have found that these claims amount to little more than speculation regarding the purported impact of the press coverage, especially since jurors do not pay as much attention to press coverage as the legal community seems to assume.

For example, courts around the country have found that the impact of press coverage on the general venire is very limited, even in national, highly publicized cases. In the Watergate prosecutions of top governmental officials, the Court of Appeals for the District of Columbia noted that the potential jurors “simply did not pay an inordinate amount of attention to Watergate,” and added that “[T]his may come as a surprise to lawyers and judges, but it is simply a fact of life that matters which interest them may be less fascinating to the public generally.” *United States v. Haldeman*, 559 F.2d 31, 63 n.37 (D.C. Cir. 1976). During the Oklahoma City bombing case, the Tenth Circuit found that more than one half of the potential jurors were unaware of Timothy McVeigh’s purported confession, despite intensive press coverage. *United States v. McVeigh*, 153 F.3d 1166, 1181, 1184 n.6 (10<sup>th</sup> Cir. 1998). While examining claims of juror bias in highly publicized criminal cases, the Ninth Circuit found that “even when exposed to heavy and widespread publicity many, if not most, potential jurors are untainted by press coverage.” *Columbia Broad. Sys., Inc. v. U.S. District Court*, 729 F.2d 1174, 1179 (9th Cir. 1984). Finally, the Fourth Circuit summarized its experience with high-profile criminal prosecutions as follows:

Cases such as those involving the Watergate defendants, the Abscam defendants, and more recently, John DeLorean, all characterized by massive pretrial media reportage and commentary, nevertheless proceeded to trial with juries which – remarkably in the eyes of many – were satisfactorily disclosed to have been unaffected (indeed in some instances, blissfully unaware of or untouched) by that publicity.

*In re Charlotte Observer*, 882 F.2d 850, 855-56 (4<sup>th</sup> Cir. 1989).

Respondents argue that it is “obvious that a good portion of the population had heard about and knew about the facts or at least what they had heard, were the facts surrounding the circumstances of the case.” *Joint Submission of Evidence, Exhibit P*, p. 18, lines 3-6. It is highly likely that a good portion of the population had also heard about the facts in the national cases discussed above, yet multiple courts throughout the country have still found that exposure to press coverage did not taint the jury. This Court has previously found that there is no requirement for jurors to be “totally ignorant of the facts and issues involved” in a matter and “an important case can be expected to arouse the interest of the public in the vicinity.” *State v. Landrum*, 559 N.E.2d 710, 722 (Ohio 1990). It is easy to assume that pretrial publicity will lead to a biased jury, but the cases above demonstrate just the opposite. In light of this, a prior restraint against the press for purposes of insulating the jury is inappropriate.

**b. When reviewing the issue of whether pretrial press coverage was so pervasive that it affected the jurors, this Court and others have usually found that the jury was not impaired.**

This Court has recognized that “[e]ven pervasive adverse publicity does not inevitably lead to an unfair trial.” *State v. Ahmed*, 813 N.E.2d 637, 649 (Ohio 2004). In reviewing cases requesting a change of venue due to alleged pervasive pretrial publicity, this Court has almost always found that press coverage was not so pervasive as to impair the jury.

For example, in *State v. Ahmed*, this court considered whether “pervasive, prejudicial pretrial publicity” involving a capital murder defendant required a change of venue, and found that even though “[u]ndoubtedly, there was extensive pretrial publicity about the murders in the local media,” each impaneled juror confirmed that he or she had not formed an opinion regarding the guilt or innocence of the accused and could ignore any information he or she had previously heard regarding the matter. *Id.* In another case considered by this Court, *State v. McKnight*, almost all of the jurors admitted to having some knowledge of the case. 837 N.E.2d at 333. Yet, the court found that seven of the jurors had formed no opinion about the case and all twelve jurors “agreed to set aside anything that they had heard and decide the case solely upon the evidence presented in court.” *Id.* Likewise, in *State v. Trimble*, a capital murder case with extensive publicity in the newspapers, television, and radio, two of the seated jurors and one of the alternate jurors did not even remember any pretrial publicity. 911 N.E.2d 242, 258 (Ohio 2009). All of the jurors reassured the court that they were able to remain fair and impartial, despite being exposed to pretrial publicity. *Id.* There is no reason to believe that the potential jurors in the current case would be tainted any more than the jurors in *McKnight*, *Trimble*, or *Ahmed*, who were all able to follow the judge’s instructions to disregard prior publicity, to set aside what they hear outside of the courtroom, and to remain fair and impartial.

Additionally, defendants in highly publicized criminal cases have still been acquitted of charges, and courts have recognized that acquitting on certain counts or with respect to certain defendants indicates that a jury discharged its responsibilities impartially. *See, e.g., United States v. Ruggiero*, 20 F.3d 1387, 1392 (6<sup>th</sup> Cir. 1994) (court noted that the jury’s acquittal on some counts shows it was not influenced by exposure to prejudicial television reports); *United States v. Haldeman*, 559 F.2d at 60 n.28 (that jury acquitted one defendant “is some indication

that the voir dire examination succeeded in eliminating any unfairness that might otherwise have resulted from the pretrial publicity”).

The cases above demonstrate that in the experience of this Court and others, the defendants’ constitutional right to a fair trial is adequately protected through voir dire and the trial process. Rather than affirming a prior restraint against publication that infringes upon First Amendment rights, this Court should reaffirm that jury voir dire is, in fact, a constitutionally adequate means of seating an impartial jury.

**III. Jury voir dire is the best method of ensuring an unbiased jury, not prior restraints on the press.**

The U.S. Supreme Court and this Court have ruled that careful voir dire of the jury is the best way to ensure a fair and impartial jury. “We have stated that ‘a careful and searching voir dire provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality.’” *State v. McKnight*, 837 N.E.2d at 333 (citing *State v. Bayless*, 357 N.E.2d 1035, 1051 (Ohio 1976)). Although the voir dire process in a multi-defendant prosecution such as this may be more complicated and time-consuming than average, it is still the most effective way of finding fair and impartial juries.

Even in the face of consistent, adverse publicity, voir dire has ensured that defendants in criminal cases receive a fair trial. In *State v. Trimble*, the publicity surrounding a defendant that was convicted of three counts of aggravated murder and sentenced to death included reports in local newspapers that discussed the defendant’s criminal record and probation for a federal firearms conviction, local radio broadcasts, and television broadcasts. 911 N.E.2d at 258. After conducting “in-depth voir dire that encompass[ed] over 2,450 pages of the record,” the trial court selected jurors that all said they could set aside what they had heard or read in the news media; a determination that was upheld by this court on appeal. *Id.* Likewise, in *State v. Ahmed*, another

case before this Court where the defendant had been sentenced to death, this court found that despite extensive pretrial publicity, the “extensive, individual, sequestered voir dire of prospective jurors...helped insulate against any negative effect of the pretrial publicity.” 813 N.E.2d at 649.

In this case as well, jury voir dire may need to utilize more in-depth methods, such as individual questioning of jurors or the use of jury questionnaires to uncover biases that jurors may not admit to in oral voir dire. *See, e.g.,* Richard Waites, *Mastering Voir Dire and Jury Selection*, 780 PLI/Lit 65, 81-83 (2008) (stating that juror questionnaires offer an opportunity to find out more meaningful information about jurors that they may not admit to during oral voir dire, in order to ensure “that the ultimate jury is fair and impartial”); Michael J. Ahlen, *Voir Dire: What Can I Ask and What Can I Say?*, 72 N.D.L.Rev. 631, 647-49 (1996) (noting that individualized questioning of prospective jurors in chambers may make jurors more willing to admit sensitive information that demonstrates bias). Jury sequestration may also be necessary. *See State v. Ahmed*, 813 N.E.2d at 649. The cases previously before this Court demonstrate, however, that in-depth voir dire process results in a fair and impartial jury.

This current case offers no reason to suddenly disregard the judicially recognized “best test” of voir dire in favor of a prior restraint on the press. Defendants’ right to a fair trial is protected through voir dire, but the First Amendment rights of the public and the press will not be protected if the prior restraint is affirmed by this Court.

### **CONCLUSION**

Prior restraints on the media have been found to be presumptively unconstitutional by both the U.S. Supreme Court and by this Court. Such restraints on the press infringe upon basic constitutional rights and prevent the press from being an independent watchdog over the judicial

system and a source of information for busy citizens. Furthermore, in cases such as this one, prior restraints on the press are unnecessary, because ample alternatives exist to ensure that jurors remain unaffected by press coverage and can set aside what they have seen and heard in the news while discharging their duties in courts, particularly voir dire.

There is a heavy presumption against constitutionality of prior restraint orders and respondents have not demonstrated an interest that would override this presumption. *Amici* respectively ask the court to protect the First Amendment rights of the press and issue a writ of prohibition forbidding the trial court's order barring publication of news about the trial until all jurors are seated.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I do hereby certify that a copy of the foregoing document has been mailed via Federal Express, postage prepaid, to the following individuals on this the 26th day of February, 2010:

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