IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO. 592012CF001083A

STATE OF FLORIDA

vs.

GEORGE ZIMMERMAN,

Defendant.
_____/

MEDIA COMPANIES' MOTION TO INTERVENE AND RESPONSE TO STATE'S MOTION TO CLOSE HEARINGS AND SEAL DOCUMENTS

The McClatchy Company, publisher of *The Miami Herald* and *The Bradenton Herald*; Dow Jones & Company, Inc., publisher of *The Wall Street Journal*; CBS News, a division of CBS Broadcasting Inc., and WFOR-TV, owned and operated by CBS Television Stations Inc.; Gannett Co., Inc., publisher of *USA TODAY*, *The News-Press*, *Pensacola News Journal*, *FLORIDA TODAY*, *The Tallahassee Democrat*, and owner of First Coast News and WTSP-TV; Times Publishing Company, publisher of *The Tampa Bay Times*; The Associated Press; The E.W. Scripps Company, publisher of *Naples Daily News*, *Stuart News, Ft. Pierce Tribune*, and *Vero Beach Press Journal*, and owner of WPTV-TV and WFTS-TV; Morris Publishing Group, LLC, d/b/a *The Florida Times-Union*; The New York Times Company, publisher of *The New York Times*; NBCUniversal Media LLC; Cable News Network, Inc.; The Hearst Corporation, owner of WESH-TV and WPBF-TV; The First Amendment Foundation; and Florida Press Association (collectively, the "Media Companies"), move to intervene for the limited purpose of opposing closure of hearings and public and/or judicial records, and submit their response to the

motion filed by the State on September 19, 2012[1] (the "Motion"). The Motion should be denied for the following reasons:

I. INTRODUCTION

Through the Motion, the State asks the Court to abrogate First Amendment and Florida precedent mandating open court hearings and records, and to instead order blanket, preemptive closure. The closure of hearings and sealing of records can be done, if at all, only on a case-by-case basis following an evidentiary hearing and specific record findings by the Court. Otherwise, and as the Court has repeatedly ruled in this action, hearings and judicial records are presumptively open to the press and public.

The Motion asks the Court to issue a prophylactic order with respect to hypothetical future subpoenas *duces tecum* that Defendant might issue.[2] The State asks the Court to enter a blanket order, right now, providing:

- Future motions filed by Defendant seeking leave to issue future subpoenas must be filed under seal;
- Future hearings of such future motions will be held *in camera* and outside the presence of the press and public;
- Future subpoenas *duces tecum* that Defendant might be permitted to issue must be sealed; and

[1] Although it was styled as a response to Defendant's notice of production, the State's filing is a motion because it asks the Court to take judicial action and enter an order.

[2] At this juncture, the Media Companies do not challenge the portion of the Motion addressing subpoenas *duces tecum* that Defendant issued for Trayvon Martin's school records, and the documents that were produced to Defendant in response to those subpoenas. The school records are exempt from Florida's Public Records Law, Chapter 119, Florida Statutes. As such, the relief the State seeks with respect to those records is entirely unnecessary. The Media Companies reserve the right, however, to seek access to those records if they are filed with the Court. Additionally, if the State or Defendant wishes to file those records under seal, they are required first to provide notice to the Media Companies. *See Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1, 8 (Fla. 1983).

- Documents produced to Defendant in response to any future subpoena *duces tecum* must be sealed until the Court determines whether they should be released to the public.

There is no support for the blanket order the State seeks. Indeed, the State's request turns the presumption of openness on its head, and would have the Court instead impose an unlawful presumption of closure.

II. THE MEDIA COMPANIES HAVE STANDING TO CHALLENGE CLOSURE

Through the Motion, the State seeks closure of hearings and public and/or judicial records. The Media Companies publish and broadcast news throughout Florida, and thus have standing to challenge and oppose any attempt to close proceedings and seal records. *See, e.g., Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113, 118 (Fla. 1988); *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1, 4 (Fla. 1983).

III. THERE IS NO BASIS FOR THE STATE'S PROPOSED BLANKET ORDER

The precedent uniformly and unambiguously provides that pretrial hearings and judicial and public records are presumptively open unless and until someone proves, and the Court makes specific findings based on record evidence, that they should be closed. *See Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1, 8 (Fla. 1983) (pretrial hearings); *Rameses, Inc. v. Demings*, 29 So.3d 418, 421 (Fla. 5th DCA 2010) ("the Public Records Act is construed liberally in favor of openness, and exemptions from disclosure are construed narrowly and limited to their designated purpose"); Rule 2.420 of the Florida Rules of Judicial Administration (limiting the circumstances in which judicial records may be deemed confidential). A party seeking to close hearings or seal records – which, in this context, is the State – bears the burden of proving each of the following elements of the test set out in *Lewis*, 426 So.2d at 6:

> 1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;

> 2. No alternatives are available, other than a change of venue, which would protect a defendant's right to a fair trial; and
>
> 3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

See also Florida Freedom Newspapers, Inc. v. McCrary, 520 So.2d 32, 35 (Fla. 1988) (applying *Lewis* test to discovery documents).

In order to satisfy the burden of the *Lewis* test, the party seeking closure must do more than offer the argument of counsel; the proponent of closure must come forward with evidence on which the Court can make findings of fact supporting a conclusion that closure is necessary. *See Lewis*, 426 So.2d at 7-8. As the Fifth District Court of Appeal has made clear:

> The three-pronged test contemplates an evidentiary hearing. At the hearing, the party seeking closure has the burden of proving by the greater weight of the evidence that closure is necessary to prevent a serious and imminent threat to the administration of justice.
>
> * * *
>
> [A closure order] "cannot rest in air," but rather, "must be a conclusion reached after considering relevant factors." Here, no evidentiary hearing was conducted . . . . Under *Lewis* and *McCrary*, this was error. (internal citation omitted).

See WESH Television v. Freeman, 691 So.2d 532, 534-35 (Fla. 5th DCA 1997) (citing and quoting *McCrary*, 520 So.2d at 35; *Lewis*, 426 So.2d 1).

There are two reasons why the *Lewis* test, by its very nature, prohibits the entry of the blanket order requested by the State.

First, *Lewis* requires a presumption of openness, but the State wants the Court to enter a blanket order – right now – sealing all future motions relating to subpoenas *duces tecum*, closing all future hearings relating to future subpoenas *duces tecum*, and sealing all future subpoenas *duces tecum* and responses. Thus, rather than beginning with the presumption of access and its

burden on the proponent of closure to establish grounds for a narrow closure, the State wants the Court to start with a presumption of closure and require the press and public subsequently to prove why access should be granted. Although that would certainly make things easier for the State, that decidedly is *not* the law.

Second, the State cannot begin to meet its burden under *Lewis*. For example, the State cannot prove that it will be deprived of a fair trial unless future hearings are closed or future documents are sealed because – right now – no one knows what issues might be raised, or information revealed, at a future hearing or in future documents. Similarly, and in light of *Lewis*'s requirement that trial courts make express findings of fact justifying closure, there is no evidence that the Court could cite as support for a conclusion that preservation of a fair trial requires closure of hypothetical future hearings and documents relating to currently unidentified and unidentifiable information.

Closure simply cannot be ordered on a blanket, preemptive basis; the issue of closure requires case-by-case consideration of a factual record and how that record relates to the issues of compelling need, no alternatives to closure, and narrow tailoring. *See, e.g., Miami Herald v. Morphonios*, 467 So.2d 1026, 1029 (Fla. 3d DCA 1985) ("The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and the closure or restraint order must be narrowly tailored to serve that interest. A trial court can determine, on a case by case basis, whether these legitimate concerns necessitate closure."). Unsupported speculation about potential future events cannot support requests such as the State's because closure orders "cannot rest in air." *See Freeman*, 691 So.2d at 534-35.

IV. CONCLUSION

For these reasons, the State's Motion should be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via facsimile and U.S. Mail on this 11th day of October 2012 on **Bernardo de la Rionda**, Office of the State Attorney, 4th Judicial Circuit, 220 East Bay Street, Jacksonville, Florida 32202; **Mark O'Mara**, 1416 East Concord Street, Orlando, Florida 32803; **Rachel E. Fugate**, Thomas & LoCicero PL, 400 N. Ashley Dr., Suite 1100, Tampa, Florida 33062.

By: _____

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