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 SECOND MOTION FOR GAG ORDER

The McClatchy Company, publisher of *The Miami Herald* and *The Bradenton Herald*; Dow Jones & Company, Inc., publisher of *The Wall Street Journal*; The New York Times Company, publisher of *The New York Times*; The Associated Press; NBCUniversal Media LLC; The Hearst Corporation, owner of WESH-TV and WPBF-TV; 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; Times Publishing Company, publisher of *The Tampa Bay Times*; 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; Morris Publishing Group, LLC, d/b/a *The Florida Times-Union*; The First Amendment Foundation; and Florida Press Association (collectively, the "Media Companies"), move to intervene for the limited purpose of opposing the State's Second Motion for Gag Order (the "Motion"). The Motion should be denied for the following reasons:

I. INTRODUCTION

For the second time in six months, the State is asking the Court to violate the media's First Amendment right to gather news and information by ordering Counsel for Defendant to stop speaking publicly about these proceedings. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both."). Incredibly, the State seeks this drastic relief without citing or coming forward with any evidence relating to – much less satisfying – the demanding standard governing the issuance of "gag orders." The Motion should be denied, just as the State's first motion for a gag order was denied.

II. THE MEDIA COMPANIES HAVE STANDING TO OPPOSE THE STATE'S ATTEMPT TO OBTAIN A GAG ORDER.

The Media Companies publish and broadcast news throughout Florida, and rely upon comment from trial participants as some of their principal sources of newsgathering. The Media Companies thus have standing to oppose any attempt to limit their ability to gather the news by gagging trial participants. *See, e.g., Miami Herald Publishing Company v. McIntosh*, 340 So.2d 904, 908 (Fla. 1976) ("It has been recognized in Florida and elsewhere that the news media, even though not a party to litigation below, has standing to question the validity of an order because its ability to gather news is directly impaired or curtailed.").

III. THERE IS NO BASIS FOR ISSUING A GAG ORDER.

Judge Lester denied the State's first motion seeking a gag order. *See* Order dated April 30, 2012. In denying the State's motion, he admonished counsel for the State and Defendant to guide themselves by Rule 4-3.6 of the Rules Regulating the Florida Bar, which applies to extrajudicial comments by attorneys in Florida. Judge Lester wrote that the Court would

reconsider the issue if Rule 4-3.6 were violated in the future. The Motion does not identify any violation of Rule 4.3-6 warranting reconsideration of Judge Lester's Order and, indeed, there is none.

However, even if this were the first time this issue was before the Court, there still would be no basis for issuing the gag order requested by the State. Courts may gag an attorney only upon a showing that he or she knows or reasonably should know that extrajudicial statements are substantially likely to materially prejudice a trial. *See, e.g., Gentile v. State Bar of Nevada*, 501 S.Ct. 1030, 1075 (1991); *Rogriguez v. Feinstein*, 734 So.2d 1162, 1164-65 (Fla. 3d DCA 1999); *E.I. Du Pont de Nemours & Co. v. Aquamar, S.A.*, 33 So.3d 839, 841 (Fla. 4th DCA 2010).

In this context, just as in the context of sealing court records or closing hearings, avoiding prejudice and protecting the right to a fair trial does *not* mean ensuring that jurors have never read or heard comments made by counsel for the parties. Instead, the United States Supreme Court has repeatedly held that the parties in criminal proceedings are entitled to impartial jurors – not ignorant jurors – and that prominence and publicity are not synonymous with prejudice and impartiality. *See, e.g., Skilling v. United States*, __ U.S. __, 130 S.Ct. 2896, 2914-15, 2916 (2010):

> Prominence does not necessarily produce prejudice, and juror impartiality, we have reiterated, does not require ignorance.
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> * * *
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> "[P]retrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976). (emphasis in original).

Murphy v. State of Florida, 421 U.S. 794, 799-800 (1975) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)):

> The constitutional standard of fairness requires that a defendant have "a panel of impartial, 'indifferent' jurors." Qualified jurors need not, however, be totally ignorant of the facts and issues involved.
>
> "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." (internal citations omitted).

As applied here, this means it is not enough for the State merely to show that potential jurors may remember reading or hearing comments made by Counsel for Defendant. Far from it. The State's burden is to prove a substantial likelihood of material prejudice; that not only will potential jurors remember reading or hearing comments made by counsel, but that the substance of the comments is such that jurors cannot be impartial. The State has not cited or come forward with any such evidence, and applications for gag orders unaccompanied by evidence proving a substantial likelihood of material prejudice are properly and routinely denied. *See, e.g., Rodriguez*, 734 So.2d at 1165 (granting certiorari and quashing gag order) ("There was no evidence presented or findings made that any extra-judicial statements or proposed extra-judicial statements made to the media by counsel or the parties posed a substantial and imminent threat to a fair trial."); *Aquamar*, 33 So.3d at 841 (reversing gag order) (same); *Gentile*, 501 U.S. at 1039 (Kennedy, J.):

> The record does not support the conclusion that petitioner knew or reasonably should have known his remarks created a substantial likelihood of material prejudice, if the Rule's terms are given any meaningful content.
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> * * *
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> The only evidence against Gentile was the videotape of his statements and his own testimony at the disciplinary hearing. The Bar's whole case rests on the fact of the statements, the time they were made, and petitioner's own justifications. Full deference to these findings does not justify

abdication of our responsibility to determine whether petitioner's statements can be punished consistent with First Amendment standards.

The State has not met its burden.

IV. CONCLUSION

For these reasons, the 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 23rd 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.

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