IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	)	
	)	
	)	
	)	
	)	Case No. 13SC117954
v.	)	
	)	
BEVERLY HALL, ET AL.	)	
	)	
Defendants.	)	

MOTION TO STRIKE GAG ORDER PROVISIONS OF CONSENT BONDS

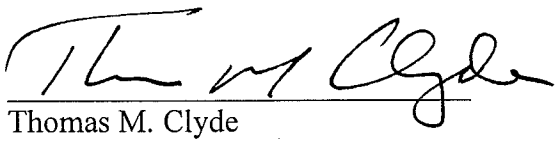
Pursuant to the First Amendment to the United States and Georgia Constitutions, Georgia Television Company d/b/a WSB-TV and The Atlanta Journal-Constitution hereby respectfully move this Court for an order striking the gag order provisions of the Consent Bonds previously entered in this action.

Pursuant to Uniform Superior Court Rule 6.1, this Motion is accompanied by the attached memorandum of law in support. A Rule Nisi is filed concurrently herewith.

DATED this 23d day of April, 2013.

Respectfully submitted,

FOR: DOW LOHNES, PLLC



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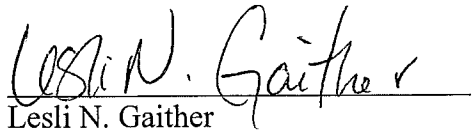

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MEMORANDUM IN SUPPORT OF MOTION TO STRIKE GAG ORDER PROVISIONS OF CONSENT BONDS

Pursuant to Uniform Superior Court Rule 6.1, Georgia Television Company d/b/a WSB-TV and The Atlanta Journal Constitution respectfully submit this Memorandum in Support of Motion to Strike Gag Order Provisions of Consent Bonds.

Entered as an express condition of bond and release from jail, without hearing or evidentiary support, the 35 gag order provisions entered in this case are unconstitutional and should be stricken.[1]

[1] Under well-established law, WSB-TV and The Atlanta-Journal Constitution have standing to challenge these provisions because they interfere with the media's ability to obtain newsworthy information about a judicial proceeding from the participants with the most knowledge of the issues. See, e.g, Atlanta Journal-Constitution v. State, No. A03A0695 (Ga. January 29, 2003) (finding that The Atlanta Journal-Constitution and WSB-TV had standing to challenge a gag order entered against trial participants and witnesses in House of Prayer child abuse case: "they in fact have standing under both Georgia law and persuasive federal precedent") (citing R.W. Page Corp. v. Lumpkin, 249 Ga. 576, 292 S.E. 2d 815 (1982)) (attached with corresponding orders as Exhibit A); Application of Dow Jones & Co., Inc., 842 F.2d 603, 607-08 (2d Cir. 1988) (Because "the First Amendment unwaveringly protects the right to receive information and ideas," news agencies have standing to challenge a gag order prohibiting trial participants from speaking with the media, because they were potential "recipients" of speech, even though "they are neither named in nor restrained by the order.")

BACKGROUND

On March 29, 2013, a Fulton County Grand Jury indicted 35 individuals in connection with allegations of widespread cheating on standardized testing within Atlanta Public Schools.

The indictments in what has been come to be known as the "APS cheating scandal" are a matter of profound public interest. They raise questions about whether recent improvements in the Atlanta Public School system have been a sham and whether children were denied an adequate education in an effort to portray the system as a success.

In response to the public interest in this case, the State held a lengthy press conference on the afternoon the indictments were returned. Not only did District Attorney Paul Howard speak about the State's planned prosecution, but the State also arranged for public comments to be made by an APS parent and a former student regarding the harm they had allegedly suffered as a consequence of the misconduct. Superintendent Erroll Davis and Special State Investigator Mike Bowers also spoke on the State's behalf. A copy of the press conference is included on the disk attached hereto as Exhibit B.

Unsurprisingly, the APS cheating scandal has been the subject of significant reporting, both locally and nationally. In much of this reporting, APS officials and individual teachers have professed their innocence. For example, on the eve of the indictments and District Attorney's press conference, WSB-TV broadcast an interview with three former-APS officials who anticipated being indicted, Defendants Sharon Davis-Williams, Tamara Cotman, and Michael Pitts. All of them forcefully asserted that they had nothing wrong. A copy of WSB-TV's broadcast is included on the disk attached hereto as Exhibit B.

Thereafter, within days of the indictments, the State entered into Consent Bonds with each of the Defendants. Each of the 35 Consent Bonds contained a gag order which stated: "Defendant shall refrain from discussing this criminal prosecution with any media or the public

until further order of the Court." See Consent Bonds, attached hereto as Composite Exhibit C. The provisions were entered without an evidentiary hearing or factual findings on the record.

These gag order provisions are patently unconstitutional. Pursuant to well-established law under the First Amendment to the United States Constitution and the Georgia Constitution, the entry of an order restricting speech about litigation can only be supported where: (1) record evidence establishes a serious, imminent threat to the administration of justice; and (2) the order is narrowly drawn to minimize that threat. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976); R.W. Page Corp. v. Lumpkin, 249 Ga. 576, 576 n. 5 (1982) (citing Nebraska Press as the controlling authority for "gag orders"). No such showing has been made here, and WSB-TV and The Atlanta Journal-Constitution respectfully request that the gag order provisions be stricken from each of the 35 Consent Bonds.

ARGUMENT

I. The Guarantee of Public Access to the Judicial System is a Central Feature of the First Amendment and of the Georgia Constitution.

Operating the judicial branch of government in an open and public manner is fundamental to our system of justice as a matter of both federal and state constitutional law.

The United States Supreme Court has repeatedly recognized that public access to the judicial system is not only deeply ingrained in the history of our system, but is an "indispensable attribute" of our judicial system protected by the First Amendment to the United States Constitution. See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) ("From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice."). As the Court recognized in Richmond Newspapers, public scrutiny of the court system is essential to its institutional wellbeing for numerous

reasons, including because it is vital to obtaining the public's trust. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." 448 U.S. at 572.

In addition to the protections afforded by the First Amendment, the Georgia Supreme Court has held that the Georgia Constitution independently requires our judicial system to operate in an open and public manner.

> This court has sought to open the doors of Georgia's courtrooms to the public and to attract public interest in all courtroom proceedings because it is believed that open courtrooms are a *sine qua non* of an effective and respected judicial system which, in turn, is one of the principal cornerstones of a free society.

R.W. Page Corp. v. Lumpkin, 249 Ga 576 (1982). Indeed, Page makes clear that Georgia law is "*more protective of the concept of open courtrooms than federal law.*" 249 Ga. at 578 (emphasis supplied). "[The Georgia] constitution commands that open hearings are the nearly absolute rule and closed hearings are the very rarest of exceptions." Id.

It is also 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, 448 U.S. at 575. Indeed, the United States Supreme Court has repeatedly demonstrated 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); 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.").

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 persons with knowledge about the case from speaking to the news media.[2] 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 right of individuals and the press to

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[2] Many courts have recognized that the threat that gag orders pose to the First Amendment arise not only when the news media is gagged directly, but also when the same result is achieved indirectly by silencing all persons with knowledge about the case. See, e.g., CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) (gag order on trial participants "directly impaired or curtailed" the media's "constitutionally guaranteed right" to gather the news); United States v. Salameh, 992 F.2d 445 (2d Cir. 1993) (overturning overbroad gag order on participants because trial court did not undertake required narrow tailoring, consideration of less restrictive means, or an assessment of likely effectiveness); Central South Carolina Chapter, Soc. of Professional Journalists, 556 F.2d at 708 (gag order on criminal trial participants caused journalists "difficulties in seeking to perform their reportorial functions").

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)). Moreover, the Court added, if the press is to fulfill its function as the "handmaiden of judicial administration," coverage of court proceedings must be timely, and not — as occurs with gag orders — after "[d]elays imposed by governmental authority." Id. at 560.

In Page, the Georgia Supreme Court made clear that gag orders in criminal cases must meet the demanding standards announced in Nebraska Press, see Page, 249 Ga. at 576 n.5 (citing Nebraska Press as the controlling authority for gag orders), and reiterated that "Georgia law, as we perceive it, regarding the public aspect of hearings in criminal cases is more protective of the concept of open courtrooms than federal law." Id. at 578.

Consistent with Page, the Georgia Court of Appeals reversed a gag order entered by a trial court in a high profile criminal prosecution. Despite enormous local and national publicity involving the House of Prayer Church and the criminal prosecution of its Pastor, Reverend Arthur Allen, the Court of Appeals reversed the trial court's entry of a gag order, noting among other defects that the trial court's attempt to gag persons other than the counsel in the case stepped into a constitutional abyss. See Atlanta Journal-Constitution v. State, 266 Ga. App. 168, 170 (Ga. App. 2004) (questioning "whether the preindictment publicity justified restraining the non lawyers, i.e. the parties, experts, witnesses, and investigators").

II. There is No Showing of the Prejudicial Publicity Needed to Support the Entry of a Gag Order in This Case.

A. The Court's Failure to Support the Gag Order Provisions with Factual Findings On the Record of Actual Prejudice is Fatal to Their Entry.

Georgia law is clear that as a procedural and substantive matter, gag orders are not to be entered without sufficient constitutional safeguards. Such safeguards were not met here.

Specifically, the Court of Appeals has made explicitly clear that the entry of a gag order requires "specific findings of fact based on evidence of record regarding the possible impact of extrajudicial statements upon the forthcoming trial." Atlanta Journal-Constitution v. State, 266 Ga. App. 168, 170 (2004). The gag order provisions in this case were entered without any hearing or evidentiary basis. For this reason alone, they should be stricken.

Moreover, "conclusory allegations" of prejudice would not suffice. While this case has undoubtedly been the subject of significant news reporting, it is well-established that the mere fact that this case has received publicity, even if widespread, does not establish such a threat. "'Pretrial publicity — even pervasive, adverse publicity — does not inevitably lead to an unfair trial.'" Rockdale Citizen Pub. Co. v. State, 266 Ga. 579, 581 (1996) (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 554 (1976)); see also id. at 580 ("A review of the records and the superior court's order establishes uncontrovertibly that there was no evidence adduced in this case to support the superior court's finding that there is a 'clear and present danger' that [defendant] will not receive a fair trial before jurors from the changed venue county.").

Indeed, 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). As the 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, e.g., Miller v. State, 275 Ga. 730, 735 (2002) ("Even in cases of widespread pretrial publicity, situations where such publicity has rendered a trial setting inherently prejudicial are extremely rare... we are inclined to agree with those prospective jurors who reported during voir dire that the pretrial publicity they had seen tended to make them feel empathy for both appellant and [the victim].").

The need to find prejudice, not just publicity, is fully applicable to requests for gag orders. Indeed, the Georgia Court of Appeals has 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, 266 Ga. App at 170-71 (quoting United States v. Noriega, 917 F.2d 1543, 1549 (11th Cir.)). See generally Nebraska Press., 427 U.S. at 565 ("We have noted earlier that pre-trial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial."); United States v. Scarfo, 263 F.3d 80, 94 (3rd Cir. 2001) (requiring "credible findings of... [a] risk of material prejudice"); Twohig v. Blackmer, 121 N.M. 746, 754 (N.M. 1996) (invalidating gag order based only on generalized conclusions about publicity); NBC v. Court of Common Pleas, 556 N.E.2d 1120 (Ohio 1990) (invalidating gag order based on absence of specific findings regarding prejudice); In re: Application of the New York Times Co., 878 F.2d 67, 68 (2nd Cir. 1989) (vacating gag order because no showing was made that prejudice may result from statements made to press by counsel).

Moreover, the First Amendment requires a court to explore other available remedies — including change of venue, extensive voir dire, and emphatic jury instructions — before entering enjoining speech about a judicial proceeding. Nebraska Press, 427 U.S. at 562. There is

absolutely no indication that such mitigating measures will not suffice to protect the rights of the Defendants or of the State in this action.

B. The Gag Order Provisions Are Plainly Not "Narrowly Tailored."

Even assuming *arguendo* that there was a serious, imminent threat to judicial administration of this case, the gag order provisions also are invalid under the First Amendment because they are not "narrowly tailored." To the contrary, the provisions expressly prohibit Defendants from speaking about this case with anyone.

Courts have repeatedly recognized that the terms of a gag order must themselves survive constitutional scrutiny. See, e.g., Nebraska, 427 U.S. at 562 ("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 (questioning "whether the preindictment publicity justified restraining the non lawyers, i.e., the parties, experts, witnesses, and investigators"); 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"). Similarly, courts have rejected orders that fail to precisely define the persons to whom they apply. See, e.g., News-Journal Corp. v. Foxman, 539 So.2d 1227, 1228 (Fla. Dist. Ct. App. 1990) (gag order imposed on "all person[s] affiliated" with trial stricken for vagueness); State, ex rel. The Cincinnati Post v. Court of Common Pleas, 570 N.E.2d 1101, 1104 (Ohio Sup. Ct. 1991) (order prohibiting "everyone" from contacting jurors about deliberations invalid as overly broad).

By their express terms, the provisions prohibit discussion of "this criminal prosecution with any media or the public." This could, among other things, preclude any of the 35

Defendants from discussing their own cases, reacting to misinformation, or asserting their innocence. In no way, shape, or form can the provision be considered to be "narrowly tailored."

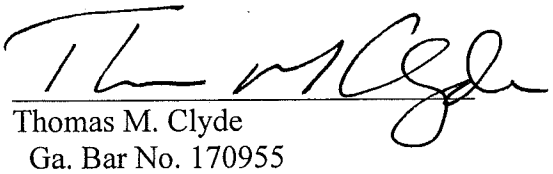
CONCLUSION

For the foregoing reasons, WSB-TV and The Atlanta Journal-Constitution respectfully requests that the gag order provisions in the Consent Bonds be stricken.

DATED this 23d day of April, 2013.

Respectfully submitted,

FOR: DOW LOHNES, PLLC



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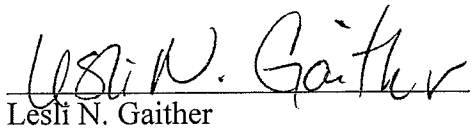

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing MOTION TO STRIKE GAG ORDER PROVISIONS OF CONSENT BONDS and MEMORANDUM IN SUPPORT on counsel of record by facsimile and United States mail to the following:

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