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PAULDING COUNTY COURTS
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IN THE SUPERIOR COURT OF PAULDING COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,)
)
v.)
)
MICHAEL WILLIAM LEDFORD)
)
Defendant.)
_____)

WARRANT NO. 06-2311-FW
PRE-INDICTMENT

**THE ATLANTA JOURNAL-CONSTITUTION,
AND WSB-TV'S OPPOSITION TO DEFENDANT'S
MOTION FOR RESTRICTIVE ORDER**

The Atlanta Journal-Constitution and WSB-TV hereby file this opposition to Defendant Michael William Ledford's Motion for Restrictive Order, filed August 2, 2006.

BACKGROUND

Defendant Michael Ledford is charged with felony murder and filing a false statement to the police in connection with the death of Jennifer Ewing, a cyclist on the Silver Comet Trail.

The crimes involved are a matter of profound public interest. This is so not just because of the violent nature of the alleged crimes, but also because these crimes occurred on one of the state's most popular recreational areas, the Silver Comet Trail. The crimes were not just shocking examples of violence, they were also crimes that profoundly shook the public's confidence in public safety in the area.

Notwithstanding the need for public reassurance about the safety of the Silver Comet Trail and the events of July 15, 2006, the Defendant now asks this Court to enter an order to silence any further discussion of these matters by unspecified "participants in this case and other state employees." Defendant's Motion for Restrictive Order ("Motion") at 2. As examples of

persons he would like to silence, Defendant mentions everyone from “trial participants” to District Attorney Drew Lane to Governor Perdue. Id.

Defendant’s request is patently unconstitutional. In numerous respects, the sweeping nature of the gag order he requests violates the First Amendment to the United States Constitution and the Constitution of the State of Georgia. The basis for the order is improper and without evidentiary support, and the breadth of speech it purports to silence exceeds any rational limit.

ARGUMENT

The gag order proposed by Defendant would improperly infringe on the public’s right to information concerning not only the crimes at issue, but also the government’s response to concerns about public safety.

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, 100 S. Ct. 2814, 2825 (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 well being 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, 100 S. Ct. at 2825.¹

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.

¹ See also Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S. Ct. 2735 (1986) (“Press-Enterprise II”) (recognizing right of access to pretrial hearings and records); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 104 S. Ct. 819 (1984) (“Press-Enterprise I”) (recognizing right of access to voir dire examinations); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S. Ct. 2613 (1982) (closure rule for state trials involving specified sexual offenses against juvenile victims violates the First Amendment).

Richmond Newspapers, 448 U.S. at 575, 100 S. Ct. at 2826. 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, 95 S. Ct. 1044-1045 (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, 68 S. Ct. 499, 506 (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, 96 S. Ct. 2791, 2802 (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, 51 S. Ct. 625 (1931), the Court concluded: “The thread running

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”).

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, 96 S. Ct. at 2803. The Court emphasized that the First Amendment provides especially forceful protection to the right of individuals and the press to 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, 86 S. Ct. 1507, 1514 (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. In the years since, the Georgia Supreme Court has continued to cite Page, as well as the case of Georgia Gazette Publishing Co. v. Ramsey, 248 Ga. 528, 284 S.E.2d 386 (1981), as defining Georgia’s protection of speech concerning the judicial system. See, e.g., Davis v. City of Macon, 262 Ga. 407 (1992) (citing Ramsey, for the proposition that “[i]n the realm of personal liberties, freedom of expression under the Constitution of Georgia remains safe and strong”) (Weltner, J., concurring); Rockdale

Citizen Pub. Co. v. State, 266 Ga. 579, 580 (1996) (citing Page for proposition that closure is only warranted based on specific findings supporting a clear and present danger to defendant's rights because "Georgia law dictates that all facets of a criminal trial should be and remain open to the press and public.").

Consistent with Georgia's history of openness, 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. Defendant Cannot Demonstrate the Prejudicial Publicity Needed to Support the Entry of a Gag Order.

A. Conclusory Allegations of Prejudice are Insufficient.

It is well-established that publicity alone is not a basis for a trial court to take the extraordinary step of trying to stifle informed public discussion or reporting on a case. See, e.g., Rockdale Citizen Publ'g Co. v. State, 266 Ga. 579, 581 (1996) ("Pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial.") (quoting Nebraska Press Assn. v. Stuart, 427 U.S. 539, 554, 96 S. Ct. 2791, 2800 (1976)). 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 v. State 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, 96 S. Ct. at 2805 ("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).

B. Defendant Has Not Shown Prejudice to His Ability to Receive a Fair Trial.

In his motion, Defendant does not cite a single statement or explain in any fashion how his rights have been prejudiced by the publicity connected to this case. While Defendant does attach several articles to his motion, see Motion at Ex. A, Defendant fails to explain how, exactly, any of the communications identified in Exhibit A would prejudice a jury's ability to determine fairly whether he was the person who committed the alleged crimes. Indeed, the substance of the articles do not come close to establishing the high risk of actual prejudice needed to sustain the proposed gag order.

In all, the reporting identified by Defendant establishes nothing but the unremarkable proposition that the public is interested in the investigation of the murder, the trial of the Defendant, and the measures taken to ensure safety on the Silver Comet Trail. It is well-established that such publicity is not, standing alone, a basis for a trial court to take the extraordinary step of trying to stifle informed public discussion or reporting on a case. See, e.g., Rockdale Citizen, 266 Ga. at 581 (“Pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial.”) (quoting Nebraska Press Assn. v. Stuart, 427 U.S. 539, 554, 96 S. Ct. 2791, 2800 (1976)).³

The reporting in this case stands in sharp contrast to the kind of real prejudicial publicity that has been found sufficient to overturn a criminal conviction. See, e.g., Sheppard v. Maxwell,

³ When closely examined, the articles show the care that public officials have taken in making statements to the media. Among other things, the persons Defendant seeks to silence have repeatedly refused to answer certain questions. See, e.g., Authorities Continue Investigation in Cyclist's Death, AccessNorthGa.com (Motion Ex. A) (“On Thursday, they declined to reveal details of the case as they waited for the results of her autopsy to be released by the Georgia Bureau of Investigation.”); Id. (“Walker declined to say Thursday whether any suspects have been named but said they have been questioning a person of interest in the case.”); Man Charged with Jennifer Ewing Murder, 13wmaz.com (Motion Ex. A) (“District Attorney Drew Lane refused to talk about the evidence which led to the arrest but said Ledford was the only person under arrest at this time.”).

384 U.S. 333, 86 S.Ct. 1507 (1966) (overturning conviction in light of prejudicial pretrial publicity, during which police and prosecutors publicly criticized defendant's refusal to immediately answer police questions and submit to lie-detector test and spoke at length to the press about circumstantial evidence implicating defendant in the crime; other evidence of prejudicial publicity included numerous editorials pronouncing defendant guilty before trial and the publication of prospective jurors' names and addresses).

III. The Gag Order Sought By Defendant Is Not Narrowly Tailored.

The gag order sought by Defendant is also improper because it is not narrowly tailored in terms of time, the scope of the speech it forbids or of the individuals covered. Courts have repeatedly recognized that the terms of a gag order must themselves survive constitutional scrutiny. See, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562, 96 S. Ct. 2791, 2804 (1976) ("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., 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).

While Defendant does not attach a proposed order, he apparently seeks to silence all "trial participants" and "other state employees and agents from making extra judicial statements

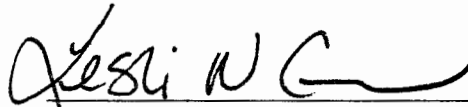
to the media.” Motion at 1-2. Rather than being narrowly tailored, this request is overbroad on its face. It seeks, without limitation, to prohibit *any* “trial participant” or “other state employees and agents” from speaking about *any* aspect of the case. Motion at 1-2. Indeed, it is impossible to know at this point who would even be covered by the order, as the case is in the early stages and not all witnesses have been identified. In no way, shape, or form can the proposed gag order be considered to be “narrowly tailored.” This defect is fatal to Defendant’s motion.

For these reasons, The Atlanta Journal-Constitution and WSB-TV respectfully request that Defendant’s Motion for Restrictive Order be denied.

DATED this 9th day of August, 2006.

Respectfully submitted,

FOR: DOW LOHNES PLLC



Peter C. Canfield
Ga. Bar No. 107748
Thomas M. Clyde
Ga. Bar No. 170955
Lesli N. Green
Ga. Bar No. 621501

Attorneys for The Atlanta Journal-Constitution,
and WSB-TV.

Suite 1800
Six Concourse Parkway
Atlanta, Georgia 30328
770/901-8800

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STATE OF GEORGIA

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v.

MICHAEL WILLIAM LEDFORD

Defendant.

WARRANT NO. 06-2311
PRE-INDICTMENT

CERTIFICATE OF SERVICE

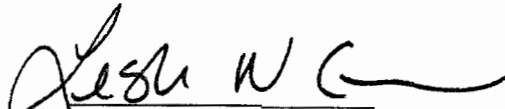
I HEREBY CERTIFY that a true and correct copy of THE ATLANTA JOURNAL-CONSTITUTION AND WSB-TV'S OPPOSITION TO DEFENDANT'S MOTION FOR RESTRICTIVE ORDER was served via overnight mail, this 9th day of August, 2006, upon:

Mr. F. Andrew Lane
District Attorney
11 Courthouse Square, Room 101
Dallas, Georgia 30132

Mr. Thomas M. West
400 Colony Square, Ste. 200
Atlanta, Georgia 30361

Mr. Jimmy D. Berry
236 Washington Ave.
Marietta, Georgia 30060

DATED this 9th day of August, 2006.


Lesli N. Green