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.

_______________________/

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MEDIA COMPANIES' MOTION TO INTERVENE, TO VACATE CLOSURE ORDER, AND TO UNSEAL JUDICIAL AND PUBLIC RECORDS

The McClatchy Company, publisher of *The Miami Herald* and *The Bradenton Herald*; Times Publishing Company, publisher of *The Tampa Bay Times*; Cable News Network, Inc.; 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; 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; New York Times Company, publisher of *The New York Times*; Morris Publishing Group, LLC, d/b/a *The Florida Times-Union*; NBCUniversal Media LLC; and The First Amendment Foundation (collectively, the "Media Companies"), move to intervene in these proceedings for the limited purpose of opposing the closure of judicial and public records, and move for the entry of an Order vacating the existing closure order and unsealing the judicial and public records that were improperly sealed. The records should be unsealed for the following reasons:

1. **The Media Companies Have Standing To Intervene For The Purpose Of Opposing Closure.**

The Court has sealed various records, including records that have been or will be filed with the Clerk and/or provided to Defendant through discovery.[1] The Media Companies publish and broadcast news throughout Florida, and thus have standing to challenge and oppose any attempt to seal records, and to petition for records to be unsealed. *See, e.g., Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113, 118 (Fla. 1988).

2. **Defendant Has Failed To Establish That Sealing Is Warranted.**

At a hearing on April 12, 2012, Defendant asked the Court to seal materials that were soon to be filed with the Clerk and/or provided to Defendant as discovery. The State indicated that it did not oppose Defendant's request. Based on the lack of opposition from the State – and without receiving evidence on the issue of closure or requiring the presentation of any evidence, without reviewing the records, and without giving the public and press an opportunity to oppose closure – the Court sealed the records. The closure order and the manner in which it was entered are contrary to law.

In *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So.2d 32, 35 (Fla. 1988), the Florida Supreme Court held that in order to seal records (as requested by Defendant), the party seeking closure bears the burden of satisfying the three-prong test set out in *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1 (1983). *Lewis*, in turn, provides that closure is warranted *only* where the party seeking closure establishes:

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

[1] Once discovery materials are provided to the person arrested, they become public records. *See* §119.011(3)(c)(5), Florida Statutes.

> 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 Lewis, 426 So.2d at 6; *see also* Rule 2.420 of the Florida Rules of Judicial Administration (incorporating *Lewis* test); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) (collecting decisions addressing First Amendment and common law right of access to records filed in criminal proceedings); *United States v. Blagojevich*, 662 F.Supp.2d 998, 1003-04 (N.D. Ill. 2009) (same); *Newman v. Graddick*, 696 F.2d 796, 802-03 (11th Cir. 1983) (same). 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 closure. *See Lewis*, 426 So.2d at 7-8.

In requesting that the records be sealed, Defendant did not address any of those prongs, much less present any evidence establishing that any of the prongs are satisfied. In ordering closure, the Court did not address any of those prongs, or make any findings of fact or conclusions of law explaining how or why the prongs, as applied to evidence, warranted closure. Indeed, because Defendant did not present any evidence, it was not possible for the Court to make the requisite findings. This, alone, requires that the closure order be vacated and the records unsealed. *See, e.g., 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):

> 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 to the administration of justice.
>
> * * *

> The court in *McCrary* also pointed out that [a closure order] "cannot rest in air," but rather, "must be a conclusion reached after considering relevant factors." Here, no evidentiary hearing was conducted and no *in camera* review of the tapes was made. Under *Lewis* and *McCrary*, this was error. (internal citation omitted).

Nonetheless, even if Defendant had addressed the *Lewis* test, he would not have been able to establish that its factors warrant closure. The first prong of the *Lewis* test considers whether "[c]losure is necessary to prevent a serious and imminent threat to the administration of justice." Typically, defendants in criminal proceedings argue that publicity regarding the records will permeate the county in which trial will be held to such a degree that it will be impossible to empanel an impartial jury.

Here, these proceedings are at the earliest possible stage and no trial date has been set. It is facially implausible to suggest that public disclosure of these judicial and public records will taint citizens of a county as large as Seminole County to such a degree that it will be impossible to empanel an impartial jury at some unknown time in the future in connection with a trial for which no trial date has been set. In fact, closure would not be warranted even if every juror in the county were to read articles regarding the records. In case after case in Florida, courts – including the United States Supreme Court – have held that prominence and publicity are not synonymous with prejudice and impartiality, and have cautioned against assuming that all potential jurors follow the news and retain what they read and watch. *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.
>
> * * *
>
> "[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). In this case, as just

> noted, news stories about Enron did not present the kind of vivid, unforgettable information we have recognized as particularly likely to produce prejudice, and Houston's size and diversity diluted the media's impact. (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).

State v. Kozma, 1994 WL 397438 at *2 (Fla. 17th Cir. Ct. 1994):

> The few instances in which extensive pretrial publicity has been found to pose a serious and imminent threat to fair trial rights have been in much smaller communities than Broward County, such as Jackson County (population 41,375 according to the 1990 census) which was inundated with prejudicial pretrial publicity in *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So.2d 32 (Fla. 1988). The large size and urban nature of the jury pool in Broward County essentially precludes the type of showing required by the strict three-part *Lewis* test. This Court agrees with the observation of another circuit judge in a different high profile case: "A significant number of the public does not retain what is disseminated by the media or, simply, does not read newspapers or watch television. As a result, the feared impact on the fair trial rights of criminal defendants often does not occur – even in matters that have received extensive media coverage."

State v. McTear, 37 Med.L.Rptr. 2209, 2211 (Fla. 13th Cir. Ct. 2009):

> At this point in these proceedings, it is premature to characterize the current adverse publicity as a serious and imminent threat to the administration of justice. It has not been shown that Defendant's right to a fair trial is in any reasonable way threatened by the reports surrounding the trial and the parties. The argument that members of the public will lack impartiality due to the existence of adverse reports in the news is not compelling. Moreover, this Court has the responsibility to ensure the

fundamental fairness of these proceedings and possesses the inherent authority to take any means necessary to ensure such fairness.

For some members of the public, these matters are an important event and are worthy of public discussion. This does not imply the partiality of these individuals; merely their interest and their absolute right to be informed of these proceedings and this process. For others in the community, the events giving rise to this case may have been noted and dismissed. And yet, for some members of the community, even these reports noted by the Defendants, have drawn no interest or attention. Ignorance of such publicity may yet insure their impartiality. Testing the impartiality of jurors in this case is ultimately best left to the process of voir dire. The fact that new evidence or opinions can be expected to arise during the discovery process does not militate against this conclusion. Further, it is axiomatic that this case will not reach trial in the near future due to the protracted nature of discovery and pretrial matters in cases carrying even the potential of the ultimate penalty.

State v. Sharrow, 29 Med.L.Rptr. 2503, 2504 (Fla. 17th Cir. Ct. 2001):

> [T]he few instances in which pretrial publicity has been found to pose a serious and imminent threat to fair trial rights have been in communities with a population size much smaller than Broward County. *See Florida Freedom Newspapers, Inc. v. McCrary*, 520 So.2d 32 (Fla. 1988). This Court points to the recent case involving Lionel Tate which received international attention. The parties in that instance were able to empanel a jury with no threat to the defendant's fundamental trial rights.
>
> This Court has personally dealt with several high profile capital cases that received much more media attention than presented here. In those instances this Court was faced with similar problems, no substantial or imminent threat to the administration of justice was posed that would justify a closure of the proceedings to the media. Such a case is not presented here as the defense has failed to demonstrate that closure is necessary to prevent a serious and imminent threat to the administration of justice . . . . The defense has failed to carry its burden and prove the elements of *Miami Herald v. Lewis*, to a degree sufficient that would justify closing the proceedings to the public.

State v. Black, 24 Med.L.Rptr. 2117, 2118 (Fla. 20th Cir. Ct. 1996):

> In spite of the extensive pretrial publicity, the Defendant has failed to satisfy his burden. The Defendant has not yet demonstrated by a preponderance of evidence that a "serious and imminent threat to the administration of justice" even exists at this early stage of the proceedings;

> thus we do not reach the issue of whether closure is necessary to prevent it from occurring.

The first prong cannot be satisfied here.

The second prong of the *Lewis* test focuses on whether "alternatives are available, other than a change of venue, which would protect a defendant's right to a fair trial." There is no reason why such "alternatives" could not be employed here to protect Defendant's right to a fair trial. For example, *Lewis*, 426 So.2d at 8, expressly lists voir dire as an alternative to closure, and there is no reason why the process of voir dire could not be used here to screen out potential jurors who are unable to set aside any biases related to their exposure to reporting regarding discovery. *See also Murphy*, 421 U.S. at 800-03 (explaining how voir dire screened for possible animus).

Lewis lists the use of peremptory challenges an alternative to closure, *see id.*, and there is no reason why peremptory challenges could not be used here to strike any potential juror who displays or suggests partiality during voir dire.

Lewis lists admonition of the jury as yet another alternative to closure, *see id.*, and there is no reason why, if empanelled jurors indicated a familiarity with prior reporting of these proceedings, the jurors would ignore an admonition by the Court that their verdict can be based only on the evidence presented during the trial.

The second prong cannot be satisfied here.

The third prong of the *Lewis* test requires the party seeking closure to:

> [D]emonstrate there is a substantial probability that closure will be effective in protecting against the perceived harm. Where prejudicial information has already been made public, there would be little justification for [closure] in order to prevent only the disclosure of details which had already been publicized.

See Lewis, 426 So.2d at 8.

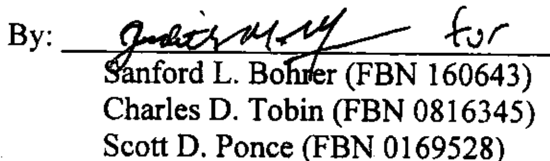
Here, numerous details regarding Defendant and the underlying events have been publicly disseminated, including statements that Defendant's father (a former magistrate) made to the media regarding his son. Copies of articles and broadcasts demonstrating the breadth of information already in the public record can be made available to the Court. Thus, to the extent the sealed records contain information that has not already been publicly disseminated, Defendant must show that the release of such additional information will deprive him of his right to a fair trial, which is a showing he cannot make. *See, e.g., State v. Bush*, 31 Med.L.Rptr. 2194, 2199 (Fla. 9th Cir. Ct. 2002) ("There is no doubt that in this particular case, the information has already been well publicized. Accordingly, this Court finds that Defendant cannot meet her burden under *Lewis*."); *State v. Smith*, 34 Med.L.Rptr. 2336, 2339 (Fla. 2d Cir. Ct. 2006) ("As to the third prong of the *Lewis* test, the Defendant failed to show that granting his motion would be effective in protecting against the perceived harm. Since much of this information has already been made public, there is little justification for granting the motion."); *Sharrow*, 29 Med.L.Rptr. at 2504 ("This case has already received publicity. The Defendant's confession has already been disseminated in various newspaper articles and the perceived harm has already been done to a large extent. Closure at this point will have little if any affect on any potential jury pool."); *State v. Parks*, 28 Med.L.Rptr. 1381, 1383 (Fla. 12th Cir. Ct. 2000) ("Lastly, the defense has failed to establish that keeping the identified materials sealed would be effective in preserving his right to a fair trial. The print media has already placed much of this material before the public prior to the filing of the defendant's motion."). Defendant cannot meet the third prong.

3. Conclusion.

For these reasons, the closure order should be vacated and the records should be unsealed.

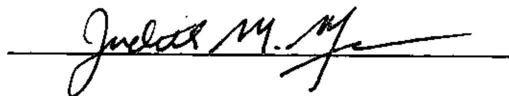
Respectfully submitted,

HOLLAND & KNIGHT LLP
Attorneys for The Media Companies
701 Brickell Avenue
Suite 3000
Miami, Florida 33131
(305) 374-8500 (telephone)
(305) 789-7799 (facsimile)

By: 
Sanford L. Bohrer (FBN 160643)
Charles D. Tobin (FBN 0816345)
Scott D. Ponce (FBN 0169528)

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 16th day of April, 2012 on **Angela B. Corey**, Special Prosecutor, Office of the State Attorney, 4th Judicial Circuit, 220 East Bay Street, Jacksonville, Florida 32202; and **Mark O'Mara**, 1416 East Concord Street, Orlando, Florida 32803.



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