IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

Case No. _____

Lower Court Nos.: 16-2006-CF-018283-aXXX-MA, Division: CF-R
16-2006-CF-018284-aXXX-MA, Division: CF-R
16-2006-CF-018285-aXXX-MA, Division: CF-R

MORRIS PUBLISHING CO., LLC, d/b/a *THE FLORIDA TIMES-UNION*,

Petitioner,

vs.

STATE OF FLORIDA, TAJUAN DUBOSE, TERRELL DUBOSE, and RASHEEM DUBOSE,

Respondents.

EMERGENCY PETITION FOR REVIEW OF ORDER DENYING MOTION TO ALLOW ACCESS OF REPORTER TO TRIAL WITH LAPTOP

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I. EMERGENCY NATURE OF PETITION

Pursuant to Florida Rule of Appellate Procedure 9.100(d) and Rule 2.450, Florida Rules of Judicial Administration, Morris Publishing Co., d/b/a *The Florida Times-Union* ("Newspaper"), seeks emergency review of an order denying its reporter the ability to use a laptop in the courtroom during the trial of the instant case which is presently in progress below for the purpose of providing a contemporaneous "blog" with explanation and commentary of the trial proceedings.

Emergency review is warranted because the trial court's Order denies the press to ability to report and comment on the trial proceedings contemporaneously with the trial events. Specifically, the court below expelled the Newspaper's reporter from the courtroom and prohibited her from using a laptop computer to provide simultaneous comments, answers, and explanations of the trial proceedings to the Newspaper's readers. The Newspaper has and will continue to suffer harm each moment the trial court's order remains in effect. "News delayed is news denied. To be useful to the public, news events must be reported when they occur." Miami-Herald Publishing Co. v. McIntosh, 340 So. 2d 904, 910 (Fla. 1977). "As a practical matter . . . the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

Expedited review of the closure order is also warranted because it is anticipated that the criminal trial will be completed by the end of next week. Thus, the Newspaper's ability to contemporaneously cover the trial proceedings depend son immediate access while the trial is still pending.

Consequently, in this petition, the Newspaper seeks review, pursuant to Rule 9.100(d), of the Circuit Court's order excluding the Newspaper's reporter and prohibiting her from using her laptop to take notes and post information and contemporaneous commentary about the criminal trial to its readers. Rule 9.100(d) implements a requirement laid down by the United States Supreme Court in National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977), that state restraints on activities protected by the First Amendment must be either immediately reviewable or subject to a stay pending review. See Committee Notes to Rule 9.100(d), Florida Rules of Appellate Procedure.

II. JURISDICTION

This Court's jurisdiction is based on Florida Rule of Appellate Procedure 9.100(d), which provides members of the media immediate review of orders excluding the press from access to or reporting about judicial proceedings. Times Publishing Co. v. State, 903 So. 2d 322, 324 (Fla. 2d DCA 2005); WFTV, Inc. v. State, 704 So. 2d 188, 190 (Fla. 4th DCA 1997); In re Petition of Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 793 (Fla. 1979) (holding that

"review of an order excluding electronic media from access to any proceeding . . . shall be pursuant to Florida Rule of Appellate Procedure 9.100(d)").

Furthermore, the Newspaper has standing to bring this appeal, because the trial court's order without question enjoins its exercise of freedom of speech and of the press. See Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113, 118 (Fla. 1988) ("the public and the news media shall have standing to challenge any closure order"); WESH Television, Inc. v. Freeman, 691 So. 2d 532, 534-35 (Fla. 5th DCA 1997) (holding that the press has the right to be heard prior to the entry of an order closing public records); News-Press Publishing Co. v. State, 345 So. 2d 865, 866 (Fla. 2d DCA 1977) (newspapers were entitled to intervene in criminal case to seek access to sealed deposition transcripts because closure order had the "practical effect of making it more difficult for the press to obtain information [that] it may wish to publish").

III. STATEMENT OF FACTS AND PROCEDURE

On Wednesday, January 13, 2010, the murder trial of three brothers, Tajuan Dubose, Terrell Dubose, and Rasheem Dubose began in Jacksonville, Duval County, Florida. The three brothers are accused of shooting dozens of bullets into a home, where a nine-year-old girl, DreShawna Davis, was watching a "Cat in the Hat" video in her bedroom with two younger cousins. DreShawna dived on top of her cousins to protect them, but one of the bullets struck the nine-year-old, killing

her. The three Dubose brothers are indicted for her murder and face the death penalty.

In 2006, when the shooting occurred, DreShawna Davis' murder caused a great community uproar. At that time, the City of Jacksonville was experiencing an unprecedented increase in the murder rate, and citizens were constantly reminded that Jacksonville's murder rate was the highest in the state. In many respects, DreShawna Davis' murder was a "final straw" for the community. Her murder is cited as a principal reason behind the City's decision to hire more police officers, among other things, in an effort to reduce the crime and murder rates.

The Honorable L. Page Haddock is the presiding judge for the Dubose brothers' murder trials. Pursuant to regular court practice, one television camera and one still photographer are allowed at the proceedings. The Newspaper's reporter, Bridget Murphy, also sat in the second row to the back of the courtroom in the gallery during the entire first day of trial and half of the second day of trial, taking notes on her computer, which contemporaneously transmitted the notes to the Newspaper's on-line blog. The blog was available to readers on the Newspaper's web site, as well as the web site for a local television news station, First Coast News. A transcript of the entire blog is attached hereto at **Appendix 2**.

Judge Haddock did not prohibit laptop use in the courtroom by any prior order in these criminal trials. In fact, the Newspaper has covered other high profile

murder trials via an on-line blog in the recent past. No judge or court officer ever indicated that such use of a computer was prohibited or would violate any court order or rule. To the contrary, on the first day of trial the Newspaper's reporter arranged with a courtroom bailiff to sit in the back of the gallery near a wall with access to an electrical outlet.

The blog was popular with the Newspaper's readers, having over 1,000 people view it during the first day of trial. Some of the readers who posted comments asked questions about trial procedure and strategy, which were answered by the reporter. In addition to being able to answer reader's questions about the trial, the blog also demonstrates that some of the blog's readers had technical trouble viewing the streaming video coverage, so the blog kept them informed of the trial's progress when the streaming video was not available. The blog answered questions about the testimony and other evidence, including explaining why certain procedures were occurring.

For example, two juries were empanelled by the court. One of the three brothers allegedly made incriminating statements about the other two brothers, and those statements have been ruled inadmissible in those two brothers' trials. Thus, the court seated two juries, and one jury has to leave at certain times before evidence about the third brother can be presented. The reporter explained the

procedure and the reasons behind the procedure to the blog's readers, answering specific questions posted by the readers in real time.

One would be hard pressed to imagine a better civics lesson in how the Florida criminal court system works than a play-by-play explanation of the trial proceedings contemporaneous with the streaming video. The media's role in our system of government is not just to gather information and pass it along to its readers. Rather, the media has always served the important function of being an educator to the public. It does not just critique the government (of which the courts are a part), but educates the public about how the government works and is structured. Otherwise, bare information would mean nothing to a reader for there would be no context in which to place that information.

No parties to the criminal trial moved the court to exclude the blogging. In fact, the opposite could be said. During the first day of trial, the State Attorney for the Fourth Judicial Circuit, Angela Corey, stopped by the trial in her supervisory capacity. While there, she spoke with the reporter and told the reporter that she is a fan of the live coverage, calling it "awesome." See Blog, Appendix 2, for Wednesday at 9:53 a.m.

Therefore, there was no notice to the media that use of a laptop to take notes during the trial and having those notes posted on a blog was improper or prohibited

by the court. To the contrary, the blog was well received and educational to the public.

So it came as a surprise to the reporter and Newspaper when the trial court judge *sua sponte* and without notice ordered the reporter out of the courtroom at approximately 2:10 p.m. on the second day of the trial. The trial court said that the computer was distracting for the jury, although no such complaints had been made. The judge stated that blogging live from the courtroom violates a Supreme Court order about how many transmitting devices are allowed in the room. He also stated that he had consulted with the Chief Judge, who agreed that anything more than two transmitting devices could be banned from the courtroom.[1]

When the judge first told the reporter of his decision, she asked for him to hear argument from counsel for the Newspaper, but he denied the request. Thus, the reporter left the courtroom as ordered. A reporter from the local Fox affiliate was also required to leave the courtroom.

At approximately 3:00 p.m. that same day, legal counsel for the Newspaper arrived and was allowed to present argument to the trial court. Nonetheless, the trial court refused to allow the reporter to use her laptop during the trial to take notes and post those notes in a blog. The Newspaper followed its oral argument

[1] A partial transcript of the court proceedings, covering the trial court's order and legal argument, has been ordered on an expedited basis and Petitioner will file it with the Appellate Court as soon as it is received.

with submission of a written motion. See **Appendix 3**. The judge signed an order on January 14, 2010, denying the motion. A copy of the order is attached as **Appendix 1**. The order provides that "the Motion to Allow Access of Reporter to Trial with Laptop for the purpose of communicating outside of the courtroom is hereby DENIED." (emphasis in original).

After the reporter was expelled from the courtroom, she reported the judge's order on the blog. The readers were disappointed and upset at the judge's actions. See Blog at Appendix 2.

Upon resuming the trial Friday morning, another of the Newspaper's reporters asked for clarification about whether he could use his laptop to take notes during the trial, without using it to post to a blog. The judge prohibited use of the laptop to take notes.

On Friday, January 15, 2010, the trial court issued an Addendum to Order Denying Motion to Allow Access of Reporter to Trial with Laptop. That Addendum provides:

> 1. The Order of January 14, 2010, was issued because of the presence in the courtroom of a video camera with live streaming video available to all stations and networks, and a still photographer with two cameras, and is effective only when that video equipment is being used. This Order in no way prohibits the media from substituting more modern, unobtrusive types of electronic media for the devices named in the rule, provided the total number is still limited to two.
> 2. No radio station has attended the trial.

Thus, it is clear that the trial court is relying upon Rule 2.450, Florida Rules of Judicial Administration as the basis for its orders. The trial court also bases its rulings on the belief that Rule 2.450 limits the media to only two transmitting devices, and as such is now allowing access for a blogger if the still camera is removed. So, access is still being denied without any stated reason other than the rule.

The instant appeal, brought pursuant to Rule 9.100(d), Florida Rules of Appellate Procedure, seeks to reverse the trial court's January 14, 2010 Order and allow the Newspaper's reporter to sit in the courtroom gallery at all times like any other reporter and also be allowed to take notes of the trial on a computer where her observations and comments are posted to an electronic blog.

IV. RELIEF SOUGHT

The Newspaper requests that this Court enter an order reversing the trial court's Order of January 14, 2010, prohibiting the Newspaper's reporter from using a laptop computer to take notes of the trial full time and to contemporaneously post those notes on an informational blog about the trial.

V. STANDARD OF REVIEW

The standard of review for a petition for writ of certiorari is whether the trial court departed from the essential requirements of law. See Combs v. State, 436 So. 2d 93, 95 (Fla. 1983); National Union Fire Ins. Co. of Pittsburgh Pennsylvania

v. Florida Constr., Commerce and Indus, Self Insurers Fund, 720 So. 2d 535, 535-36 (Fla. 2d DCA 1998).

VI. SUMMARY OF ARGUMENT

Criminal trials are presumptively open to public access under the United States and Florida Constitutions, Florida Statutes, and the common law. The Florida Rules of Judicial Administration incorporate this presumption in Rule 2.450, where that rule provides that the media "shall be allowed" to have television, audio, and still photography equipment to record proceedings. Nonetheless, that rule says nothing about computers or laptop computers. Indeed, even if the Rule were interpreted to apply to all technology used by the media, it is not as restrictive as the trial court's interpretation. The court may allow multiple television cameras in its discretion.

There is no bright-line limit in Rule 2.450 to only two recording or broadcasting devises, which the Judge referred to when excluding the Newspaper's reporter. Thus, the trial court has erred by (1) interpreting Rule 2.450 to limit the media to a *maximum* of two transmitting devices, and (2) failing to use its discretion and weigh the burden placed on the Newspaper with the purported (and undocumented) distractions caused by the use of a laptop computer.

Moreover, the trial court's order is not narrowly tailored to address the perceived problem articulated by the trial court and the trial court did not explore

any other potential alternatives that would be less restricting than a complete ban. See Miami Herald Publishing Company v. Lewis, 426 So.2d 1, 6 (Fla. 1982). The Florida Supreme Court has held in no uncertain terms that "there must be a strict and inescapable necessity for closure." Lewis, 426 So.2d at 8. But no such findings were made.

In order to deny access to judicial proceedings, the must be a finding by the trial court that: (1) the closure is "necessitated by a compelling governmental interest," and (2) that the closure is "narrowly tailored to serve that interest." Globe Newspaper Co. v. Superior Court for County of Norfolk, 457 U.S. 596, 606 (1982). The trial court made no such findings.

VII. LEGAL ARGUMENT

A. *Court proceedings are presumptively open and newsgathering is a protected activity.*

"There is no private litigation in the courts of Florida." Florida Freedom Newspapers, Inc. v. Sirmons, 508 So. 2d 462, 463 (Fla. 1st DCA 1987), aff'd sub nom, Barron v. Fla. Freedom Newspapers, Inc., 531 So. 2d 113 (Fla. 1988). Florida's strong public policy in favor of open courts and access to judicial records has been reiterated time and time again. See, e.g., Miami Herald Publishing Co. v. Lewis, 426 So. 2d 1, 6 (Fla. 1982) ("a concern for open government is not new to us, nor is the application of a policy of open government to the judicial branch").

Indeed, as the Florida Supreme Court has noted, "[t]he reason for openness is basic to our form of government." Barron, 531 So. 2d at 116.

Time and again the United States Supreme Court and Florida courts have reinforced the principle that the free speech and press clauses of the First Amendment would be meaningless if the public were denied access to the workings of government, including the courts. "[*A*]*ll* trials, civil and criminal, are public events and there is a strong presumption of public access to these proceedings and their records, subject to certain narrowly defined exceptions." Barron, 531 So. 2d at 114 (emphasis in original).

The Supreme Court has emphasized that "what transpires in the courtroom is public property," Craig v. Harney, 331 U.S. 367, 374 (1947), and that the public has a strong interest in a full opportunity to know whatever happens in a courtroom. See Press-Enterprise v. Superior Court, 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

For example, in Richmond Newspapers, Inc. v. Commonwealth of Virginia, 448 U.S. 555, 592 (1980), the United States Supreme Court held that

> [T]he right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated.

* * *

> While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This 'contribute[s] to public understanding of the rule of law and to comprehension of the function of the entire criminal justice system. . . . '"

Id. at 573, 580 (citations omitted).

In addition to serving as a bedrock for the Constitution's guarantees of the rights of self-expression, open court proceedings also enhance "the basic fairness" of the judicial process. Perhaps more significant than that, openness also provides the "appearance of fairness [that is] so essential to public confidence in the system." Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984). In this context, the media serves as a surrogate for the public. The media's ability to report on judicial proceedings informs the public. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559-60 (1976).

Thus, there can be no question that newsgathering is protected by the First Amendment. Branzburg v. Hayes, 408 U.S. 665, 681 (1972); CBS, Inc. v. Young, 522 F.2d 234, 237-38 (6th Cir. 1975). In CBS, Inc. v. Young, the Court recognized that the "protected right to publish the news would be of little value in the absence of sources from which to obtain it." 522 F.2d at 238. The United States Supreme Court has opined that "without some protection for seeking out the

news, freedom of the press could be eviscerated." Branzburg v. Hayes, 408 U.S. at 681.

Accordingly, an order that inhibits newsgathering carries a presumption against its constitutionality. "If a court order burdens constitutional rights and the action proscribed by the order presents no clear and imminent danger to the administration of justice, the order is constitutionally impermissible." Koch v. Koch Industries, Inc., 6 F. Supp. 2d 1185, 1188 (D. Kan. 1998). An order that impinges on the "journalistic right to gather news" must therefore be "narrowly tailored to prevent a substantial threat to the administration of justice." In re Express-News Corp., 695 F.2d 807, 810 (5th Cir. 1982); CBS, Inc. v. Smith, 681 F Supp. 794, 796 (S.D. Fla. 1988). A court must also consider less restrictive alternatives before restraining newsgathering activities. Id..

B. ***Rule 2.450 does not address laptop computers.***

The trial court based its decision on an interpretation of Rule 2.540, Florida Rules of Judicial Procedure. But by its plain language, that rule only addresses television cameras, still photography, and audio recordings for radio. Nowhere in the rule does it mention computers or laptop computers. Moreover, the laptop used to blog is not used to record the proceedings. It is not used to take photographs, record video, or broadcast radio.

Rather, the laptop is a tool the reporter uses to take notes. It is incidental – and undetectable to anyone in the courtroom – that the computer wirelessly transmits the notes to an on-line blog. Thus, Rule 2.450 is inapplicable.

C. *Rule 2.450 Does Not Limit the Media to Only Two Transmitting Devices*

Even if Rule 2.450 were applicable to laptop computers, the trial court's interpretation is erroneously restrictive. The trial court's statements in open court, as well as the written orders, interpret Rule 2.450 as restricting the media to a *maximum* of two recording devices. Nowhere in the rule is any such limitation.

Rule 2.450 provides that "electronic media and still photography coverage of public judicial proceedings in the appellate and trial court of this state ***shall be allowed*** in accordance with the following standards of conduct and technology promulgated by the Supreme Court of Florida." Rule 2.450(a) (emphasis added). The rule then specifically addresses television cameras, still photography, and audio equipment for radio broadcasts. The rule does not mention computers or laptop computers.

While the rule limits audio systems and still photographers to one, it does not so limit portable television cameras. Instead, the rule provides that "***At least*** 1 portable television camera . . . shall be permitted in any trial or appellate court proceeding." Rule 2.450(b)(1), Fla.R.Jud.Admin. (emphasis added). The court may allow multiple television cameras in its discretion. There is no bright-line

limit to only two recording or broadcasting devises, as interpreted by the trial court.

Thus, the trial court has erred by interpreting Rule 2.450 to limit the media to a *maximum* of two transmitting devices. There is simply no such requirement in the rule. To the contrary, the rule provides that electronic media should be accommodated within the court's discretion to allow electronic coverage of trials. It is a further abuse of discretion to automatically limit the media to only two transmitting devices, when the rule clearly contemplates at least three different types of transmitting devises and the possibility of multiple television cameras.

D. *The Trial Court Erred by Not Weighing Possible Alternatives and Using the Least Restrictive Means Necessary Before Limiting the Media's Ability to Report on Trial Proceedings*

An order that impinges on the "journalistic right to gather news" must be "narrowly tailored to prevent a substantial threat to the administration of justice." In re Express-News Corp., 695 F.2d 807, 810 (5th Cir. 1982); CBS, Inc. v. Smith, 681 F Supp. 794, 796 (S.D. Fla. 1988). A court must also consider less restrictive alternatives before restraining newsgathering activities. Id. See also Florida Freedom Newspapers, Inc. v. Sirmons, 508 So. 2d 462 (Fla. 1st DCA1987).

Thus, the trial court's order is unconstitutionally overbroad because it places an outright ban on all blogging where limited use restrictions to maintain courtroom decorum would be sufficient. By using a bright-line rule instead of a

balancing of the media's interests against the need to protect from courtroom distractions, the trial court failed to use its discretion at all. That too was error.

This is especially true in this instance, where no complaints about the loptop or blogging were made to the trial court by the jurors, the parties, or their legal counsel. Indeed, the trial court would appear to be the only one distracted by or not liking the Newspaper's blogging.

VIII. CONCLUSION

This Court should exercise its original jurisdiction and quash the order below as an unconstitutional restriction on a free press and allow the Newspaper's reporter to take notes on her computer and transmit those notes simultaneously to an electronic blog.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 15th day of January, 2010, via U.S. Mail to:

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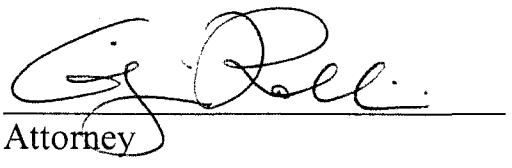

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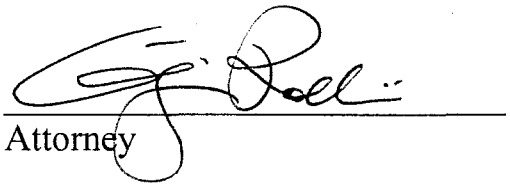
CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Petitioners certifies that this Petition for a Writ of Certiorari is typed in 14 point (proportionately spaced) Times New Roman, in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.



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