Thomas-DM-47

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION I

STATE OF TENNESSEE	)	
	)	
	)	**CAPITAL CASE**
v.	)	**NO. 86216 C**
	)	
	)	
GEORGE THOMAS	)	

MOTION TO IMPOSE REASONABLE RESTRICTIONS TO ONLINE COMMENTS POSTED ON WEBSITES PUBLISHED BY THE PRINT AND BROADCAST MEDIA

Comes the defendant, George Thomas, through counsel and pursuant to the U.S. Const. Amend. V, VI, VIII and XIV, Tennessee Constitution, Art. I, §§ 8, 9, 14, 17, and 19, and respectfully moves this Honorable Court for the entry of an Order requiring the media outlets covering this case that have the ability for viewers of their respective websites to post blog entries after articles to no longer allow entries concerning articles about this case, or, in the alternative, to continuously monitor, in real time, and remove blog entries that otherwise would not be printable or publishable by the news outlet personnel themselves and require persons who post entries after the online articles to do so under their actual names.

These measures are narrowly tailored to address actual concerns of unfair prejudice, contamination of the prospective jury pool, and infringements of the right to an impartial jury and a fair trial that are implicated by the media coverage in this case.

In further support of this motion, defendant states the following:

(1) The First Amendment provides the press and the public with a right of access to criminal trials, which is a corollary right to a criminal defendant's Sixth Amendment right to a

public trial. In Richmond Newspapers v. Virginia, 448 U.S. 555 (1980), the U.S. Supreme Court "established for the first time that the press and general public have a constitutional right of access to criminal trials." Globe Newspaper Co. v. Superior Court of Norfolk, 457 U.S. 596 (1982). However, the Court was able to recognize that, "[a]lthough the right of access to criminal trials is of constitutional stature, it is not absolute." Globe Newspaper, 457 U.S. at 606-07. For example, the general presumption of openness and access exists only "so far as that object can be attained without injustice to the persons immediately concerned." Estes v. Texas, 381 U.S. 532, 542 (1965).

(2) The right to a fair trial and the right to a public trial are not co-equal. The U.S. Supreme Court has explained that, "[H]ow we allocate the right to openness as between the accused and the public, or whether we view it as a component inherent in the system benefitting both, is not crucial. **No right ranks higher than the right of the accused to a fair trial.**" Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 508 (1984) (emphasis added). Because the purpose of the presumption that a trial should be open is to ensure a fair trial, that presumption is "not absolute or irrebutable." Globe Newspaper, 457 U.S. at 619.

(3) The Sixth Amendment right to a public trial is the defendant's right, not the public's right. As stated by Justice Harlan:

> Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings. A fair trial is the objective, and public trial is an institutional safeguard for attaining it. Thus the right of public trial is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered.

Estes v. Texas, 381 U.S. 532, 588-89 (1965) (Harlan, J., concurring), quoted in Douglas v. Wainwright, 712 F.2d 1532 (11th Cir. 1983).

(4) The public's right, then, is either derivative of the defendant's Sixth Amendment right or an implied, non-textual First Amendment right. Compare Waller v. Georgia, 467 U.S. 39, 47 n.5 (1984) ("To the extent there is an independent public interest in the Sixth Amendment public-trial guarantee, it applies with full force to suppression hearings.") with Globe Newspaper, 457 U.S. at (In Richmond Newspapers, "seven Justices recognized that this right of access is embodied in the First Amendment, and applied to the States through the Fourteenth Amendment."). By comparison, the defendant's right to a public trial is directly and expressly stated in the Sixth Amendment.

(5) "[E]xperience teaches that there are numerous situations in which [media coverage] might cause actual unfairness -- some so subtle as to defy detection by the accused or control by the judge." Estes v. Texas, 381 U.S. 532, 544-45 (1965).

> The Supreme Court has recognized that prejudicial pretrial publicity can defeat a defendant's right to a fair trial by an impartial jury. *Irvin v. Dowd,* 366 U.S. 717 (1961); *see Patterson v. Colorado,* 205 U.S. 454, 462 (1907) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."). The Court has placed an *affirmative duty* on trial courts to guard against prejudicial pretrial publicity:
>
> To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary. *Gannett Co. v. DePasquale,* 443 U.S. 368, 378 (1979).

United States v. Noriega, 917 F.2d 1543, 1549 (11th Cir. 1990) cert. denied, 498 U.S. 976.

(6) Restrictions on media coverage of a criminal proceeding depend on whether there is a compelling governmental interest to do so; any restriction must be narrowly tailored to serve that interest. Globe Newspaper Co., 457 U.S. at 606-07 (closure mandated by State: "[I]t must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."); Richmond Newspapers, 448 U.S. at 580-81 (closure requested by Defendant: no "alternative solutions" and "overriding interest articulated in findings").

(7) While defendant Thomas does not request the extraordinary relief of banning all media coverage concerning the case, closing the courtroom, or withdrawal of counsel requested in Mr. Cobbins' motion (DM-116, filed Feb. 13, 2009), the factual averments concerning the blog entries contained within that motion, to include the samples of blog entries and news articles, are incorporated herein by specific reference. The limited relief requested by defendant Thomas, detailed below, is narrowly tailored to preserve a fair trial.

(8) The anonymous blog entries on media outlet websites are particularly troubling for a variety of reasons.

(a) First, under the veil of anonymity, it is clear that persons will write and express reactionary, vitriolic, and often unconsidered statements about this case that, if linked publicly to their name, would undoubtedly be expressed with more caution, if at all.

(b) Second, given the nature of online media and the state and region wide interest in this case, there is no guarantee that those who post such comments are within Knox County. The Court has already indicated its concern that pretrial publicity has prejudiced the jury pool within Knox County, with a potential remedy being the picking of a venire from

another county within the state. However, the pervasive nature of the online media coverage, and the prejudicial nature of the blog commentary following the online media coverage, coupled with the state and region wide publicity, implicates concerns for jury selection even if the prospective venire is from outside of this county.[1]

(c) Third, many of the posters to the various blog entries following online news articles about this case published on the print and broadcast media websites reflect that some members of the general public, in an anonymous fashion and with no way of telling if they are from this or another county or even out of state, have expressed opinions concerning the innocence or guilt of those charged, the potential punishment, the ability to follow the law, and other relevant considerations, and, in an effort to get on the jury, would be inclined to not voice during voir dire those anonymously expressed sentiments.[2]

(d) Fourth, the anonymous blog entries placed on websites for established media outlets elevate the postings to the level of sanctioned journalism by clothing them with the imprimatur of the established local print and broadcast media, even though the opinions and

---

[1] Notably, Mr. Thomas has not moved the Court for a change of venue.

[2] While it is impossible to list herein, without making this motion literally hundreds of pages in length, all of the blog entries, below is one exchange that reflects the concern discussed above:

From: http://www.knoxnews.com/news/2008/may/15/first-christian-newsom-case-state-court-set-august/

> Posted by **kingofnone** on May 15, 2008 at 1:22 p.m.
> in response to **Bailey**
> *I was actually thinking about that earlier. Everyone in Knoxville knows about these murders and most details. There's no way they could get an impartial jury from this city, not that it matters since they will fry.*
>
> Posted by **Bailey** on May 15, 2008 at 1:47 p.m.
> in response to **kingofnone**
> *I hate to say it but people love to lie to get on these jurys [sic] to fry people like this.*

sentiments expressed in the anonymous blogs could not be expressed by responsible journalists. For example, when one reads the online version of an article published in the Knoxville News-Sentinel through the paper's online publication, www.knoxnews.com, the blog entries are located immediately below and are a part of the article itself. With the heightened attention the media provides by giving a forum to the anonymous commentary comes heightened responsibility for its content.

(9) Accordingly, for the foregoing reasons, the defendant requests the following, narrowly-tailored relief: (1) the comment sections following articles on all local news organizations' websites (e.g., www.knoxnews.com and www.wbir.com) should be disabled for all stories related to this case; (2) in the alternative, individuals wishing to comment on these websites must use their true name and other identifying information, as is required for letters to the editor;[3] (3) the media must establish clear guidelines for acceptable comments, such as the same guidelines journalists employ with respect to their articles and reports, and employ real-time monitors to ensure that the comments comply with those guidelines.[4]

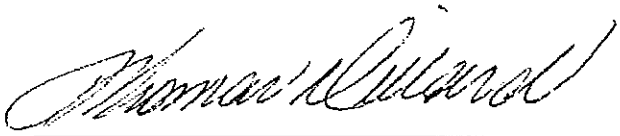
---

[3] For example, the Knoxville News Sentinel requires that each letter to the editor "should have a name, street address and phone number. Unsigned letters will not be considered." How To Send Us A Letter, KNOXVILLE NEWS SENTINEL, Feb. 20, 2009, at B2.

[4] 47 U.S.C. § 230(c) establishes that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

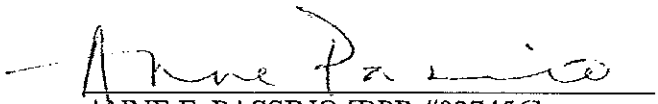
Respectfully submitted,

RITCHIE, DILLARD & DAVIES, P.C.



W. THOMAS DILLARD [BPR #002020]

STEPHEN ROSS JOHNSON [BPR #022140]



ANNE E. PASSINO [BPR #027456]
606 W. Main Street, Suite 300
Knoxville, TN 37902
(865) 637-0661
www.rddlawfirm.com

Counsel for George Thomas

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing pleading was forwarded, via e-mail transmission, by hand delivery and/or by placing the same in the United States mail, with proper postage affixed thereon, to:

Randall E. Nichols,
District Attorney General
Leland Price,
Assistant District Attorney
Takisha Fitzgerald,
Assistant District Attorney
City County Building
400 Main Street, Suite 168
Knoxville, TN 37902

David M. Eldridge
The Cherokee Building
Suite 101
400 West Church Ave
Knoxville, TN 37902

Douglas A. Trant
900 S. Gay St., Suite 1502
Knoxville, TN 37902

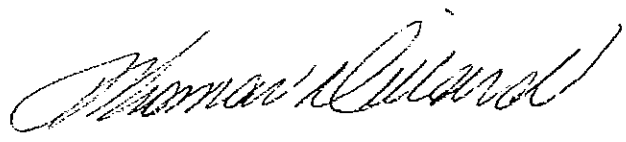
Kimberly A. Parton
P.O. Box 116
Knoxville, TN 37901

G. Scott Green
800 S. Gay Street, Suite 1600
Knoxville, TN 37929-1600

Theodore H. Lavit
Joseph R. Stewart
One Court Square
PO Box 676
Lebanon, KY 40033

Russell T. Greene
800 S. Gay Street, Suite 1920
Knoxville, TN 37902

This the 25th day of February, 2009.



W. THOMAS DILLARD
STEPHEN ROSS JOHNSON
ANNE E. PASSINO