

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally
Known as HULK HOGAN,

Plaintiff,

Case No. 12012447 CI-011

vs.

GAWKER MEDIA, LLC aka GAWKER MEDIA;
NICK DENTON; A.J. DAULERIO,

Defendants.

TIMES PUBLISHING COMPANY,
FIRST LOOK MEDIA, INC.,
WFTS-TV and WPTV-TV,
SCRIPPS MEDIA, INC., and WFTX-TV,

Intervenors.

**NEWS MEDIA INTERVENORS' MOTION TO VACATE UNCONSTITUTIONAL
PRIOR RESTRAINING ORDER BARRING RELEASE OF JURORS' NAMES**

News Media Intervenors, Times Publishing Company, First Look Media, Inc., WFTS-TV, WPTV-TV, Scripps Media, Inc., and WFTX-TV move the Court to vacate its Order Barring Release of Jurors' Names entered March 4, 2016, as an unconstitutional prior restraint, and in support hereof state:

1. The Court's Order commands that "members of Court Administration, the Clerk of Court of Pinellas County, and all attorneys associated with this case and their clients shall not release the name of any potential juror including those who have been released in this case, the name of any actual juror or any other information in connection with those jurors until the trial in this case is completed." (emphasis supplied). The Order was entered without prior notice to the News Media Intervenors, despite their previous appearances in this matter to contest orders barring

access to information, and the pendency of their Petition for Writ of Certiorari presently pending in the Florida Second District Court of Appeal.

2. The Order, which was served by email on the undersigned counsel with instructions to email back to the Court acknowledgment of receipt (*see* the Court's email, attached as Exhibit A), plainly interpreted, indicates that the Court intended the Order to apply to the News Media Intervenors and their counsel.

3. News Media Intervenors move this Court to vacate this unconstitutional Order for several reasons:

- *First*, as written, the Order constitutes a presumptively unconstitutional prior restraint against the News Media Intervenors in that it directly bars the media from publishing information it may lawfully have obtained, both before and after entry of the Order.
- *Second*, the Order prohibits not just release of formerly potential and current actual juror names but also "any other information in connection with those jurors"—which on its face would bar even mere descriptions of the demographic composition of the jury, and is therefore overly broad and too vague to pass constitutional muster.
- *Third*, to the extent that the Order seals the Clerk of the Court's records concerning dismissed and seated jurors until the trial is over, it is too broad to meet the requirements of Florida law because it extends to every possible item of juror information, including records concerning persons who are not jurors in the case.

The Court's stated grounds for the Order—"the need to protect the integrity of our justice system by assuring the jurors' rights to safety and privacy," "the trial court's discretion in

administering the courtroom" and potential jurors' "inherent right of privacy"—do not present the compelling governmental interests of the highest order required under First Amendment and Florida law. Nor does the wholesale prior restraint reflect the requirement that an order be narrowly tailored, and arrived at after exploration and rejection of all potential alternatives.

The Order is an Unconstitutional Prior Restraint Against the News Media

4. Court orders directing the news media not to publish information, also called "prior restraints," "are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558-59 (1976). Such orders are constitutionally prohibited in all but the most exceptional cases, *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 716 (1931), and are "presumptively invalid." *Gawker Media, LLC v. Bollea*, 129 So.3d 1196, 1200 (Fla. 2d DCA 2014), *citing, inter alia, New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) ("the Pentagon Papers case").

5. To the extent that information about jurors was or is revealed to the media in open court the Order is clearly an unconstitutional prior restraint. *See, e.g., Chavez v. State*, 832 So.2d 730, 760 (Fla. 2002) (order cannot "act as an unconstitutional prior restraint by precluding the broadcasting of any juror information revealed in open court"); *Times Publishing Co. v. State*, 632 So.2d 1072, 1074 (Fla. 4th DCA 1994) (quashing order prohibiting media from reporting "identifying information" about jurors revealed in open court "because it is well settled that once a public hearing is held, the media is free to publish what transpired therein and cannot be subject to a prior restraint with respect thereto").

6. With respect to information obtained by the media outside of an open court proceeding, even where a source has improperly provided the news media with some information or material, the publication of truthful information obtained lawfully by the media is protected by

the First Amendment. *See Bartnicki v Vopper*, 532 U.S. 514, 534-35 (2001). It has been long established that prior restraint is not a lawful means to prohibit the publication of such information, absent highly exceptional circumstances. *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (prior restraint improper even where third party stole information of public concern and provided it to media). Thus, "[a]lthough a government may deny access to information and punish its theft, government may not prohibit or punish the publication of the information once it falls into the hands of the press unless the need for secrecy is manifestly overwhelming." *Sarasota Herald-Tribune v. State*, 916 So.2d 904, 910 (Fla. 2d DCA 2005) (quashing portion of order prohibiting media from publishing information about jurors obtained outside of court proceeding). "Manifestly overwhelming" circumstances for an unprecedented order prohibiting news publication are not presented here.

7. Indeed, the generally established test for analyzing a restraint against the news media requires not only such manifestly overwhelming circumstances but also evidence and findings that "there are no less extreme measures available to mitigate the effects of unrestrained ... public[ation]" and that the restraint will indeed effectively accomplish its purpose." *Gawker*, 129 So.3d at 1999-1200, *citing Nebraska Press*, 427 U.S. 539, 558-59; *see also Sarasota Herald-Tribune*, 916 So.2d at 909; *Times Publishing*, 632 So.2d at 1074 (calling the test "stringent" and quashing order). Moreover, the First Amendment does not countenance vagueness in orders restraining publication, nor does it countenance overbreadth. *See Sarasota Herald-Tribune*, 916 So.2d at 911; *Times Publishing*, 632 So.2d at 1074-75.

8. Finally, the Movants request that this Court address these issues raised by its March 4, 2016 Order on an expedited basis because "[w]here ... a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable

infringement of the First Amendment." *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (Blackmun, Circuit Justice, 1975).

The Order Seals Too Much Information

9. There is no provision in Florida law for the wholesale or routine sealing of juror names, addresses or other information, including that disclosed on juror questionnaires. Such records are subject to the same Florida Rule of Judicial Administration, Rule 2.420, as other court records and no special mention, or exemption, is made for them. Although there is a presumption of openness of such records even during trial, courts have said that there may be "unusual circumstances" in which it is appropriate not to provide the media with the names and addresses of jurors during the trial. *See Times Publishing*, 632 So.2d at 1074. While there is precedent for trying cases with anonymous juries, such cases have been in very limited circumstances not present here. They have largely been criminal cases involving organized crime, or the killing of children where the emotional response of the public to the proceedings has run high and threatening in nature.

10. The Court's Order here sweeps too broadly where it not only makes sitting jurors anonymous, but also restricts availability of any information at all about them.

11. The Order also extends to sealing records, and directs court personnel, parties and their counsel not to provide information about excused venire members. To the extent the Order prohibits public access to information about potential jurors who have been dismissed, it is fatally overbroad. *See Sarasota Herald-Tribune*, 916 So.2d at 911.

WHEREFORE Times Publishing Company, First Look Media, Inc., WFTS-TV, WPTV-TV, Scripps Media, Inc., and WFTX-TV respectfully request that this Honorable Court vacate its unconstitutional March 4, 2016 Order concerning jury information in its entirety, lift the prior

restraint, and remove any sealing instruction on information about the pool of potential jurors in this action.

Respectfully submitted this 11th day of March, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of March, 2016 a true and correct copy of the foregoing has been served via the Florida Courts' E-Filing Portal on the following:

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