IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	CP-14-CR-2421-2011
	:	CP-14-CR-2422-2011
	:	
GERALD A. SANDUSKY	:	
	:	

EXPEDITED MOTION TO INTERVENE AND TO CLARIFY DECORUM ORDER

Non-party media entities ABC, Inc. (on behalf of WPVI-TV), Advance Publications, Inc. (publisher of the *Harrisburg Patriot-News*), The Associated Press, CNN, *The Daily Collegian*, Dow Jones & Company, Inc. (publisher of *The Wall Street Journal*), Dow Jones Local Media Group, Inc. (publisher of *The Pocono Record*), ESPN, NBCUniversal, Inc. (on behalf of WCAU-TV), The New York Times Co. (publisher of *The New York Times*), Philadelphia Media Network, Inc. (publisher of the *Philadelphia Inquirer*), The Scranton Times, L.P. (on behalf of *The Citizen's Voice* and *Standard-Speaker*), and Tribune Company (on behalf of *The Morning Call*) (collectively "the Media Entities"), by and through their undersigned counsel, hereby respectfully request, on an expedited basis, that the Court clarify its Decorum Order Governing Jury Selection and Trial, entered on May 30, 2012 (hereinafter, "the Order") in the above-captioned case, and aver as follows in support thereof:

1. The trial of defendant Gerald Sandusky is scheduled to begin on June 5, 2012. For this reason, the Media Entities ask that the consideration of this motion be expedited by the Court.

I. THE MEDIA ENTITIES MOVE TO INTERVENE FOR THE LIMITED PURPOSE OF SEEKING TO MODIFY THE ORDER

2. Consistent with long-standing Pennsylvania precedent, the Media Entities respectfully request permission to intervene in this matter for the limited purpose of requesting

modification of the Order. *See Commonwealth v. Upshur*, 592 Pa. 273, 278 n.2, 924 A.2d 642, 645 n.2 (2007) (recognizing that Pennsylvania Supreme Court has "long held that a motion to intervene is an appropriate method for the news media to assert the public right of access to information concerning criminal cases"); *see also, e.g.*, *Commonwealth v. Long*, 592 Pa. 42, 47 n.1, 922 A.2d 892, 895 n.1 (2007) ("In Pennsylvania, a Motion to Intervene is the proper vehicle for the press to raise a right of access question"). As the Supreme Court has explained, the media's intervention "is provisional in nature and for the limited purpose of permitting the intervenor to file a motion, to be considered separately, requesting that access to proceedings or other matters be granted." *Commonwealth v. Fenstermaker*, 515 Pa. 501, 504 n.1, 530 A.2d 414, 416 n.1 (1987). The Order is directed at the conduct of the press and public and, therefore, in this instance and for this limited purpose, the Media Entities should be permitted to intervene.

II. THE MEDIA ENTITIES MOVE FOR CLARIFCATION OF THE ORDER TO PERMIT THE USE OF DIRECT QUOTATIONS IN THEIR ELECTRONIC BASED COMMUNICATIONS FROM THE COURTROOM WHILE COURT IS IN SESSION

3. Consistent with the Court's ongoing practice in this case, Section 7(b) of the Mandatory portion of the Order provides that credentialed reporters are permitted to bring electronic devices into the courtroom and can use them for "electronic based communication" – such as tweeting, emailing, blogging, and otherwise transmitting text – during the trial. That section also provides that "the devices may not be used to take or transmit photographs in Courtroom 1 or the satellite courtroom; or to record or broadcast any verbatim account of the proceedings while court is in session."

4. Upon reading the Order, the Media Entities understood this provision to mean that reporters are not permitted to take photographs in court and are barred from recording and broadcasting any audio or video of the proceedings from either of the courtrooms. Thereafter,

however, they were advised by James Koval of the Administrative Office of Pennsylvania Courts ("AOPC") that the Order bars the press from using direct quotations from the proceedings in the tweets, emails, blogs, and other text-based reports that are written and sent from inside the courtroom. He explained both to reporters and their counsel that reporters are free to paraphrase the lawyers' questions and witnesses' testimony, but that they cannot include "verbatim accounts" of what is said in court. Mr. Koval further advised counsel for the Media Entities that, while he had no authority to advise the Media Entities regarding where the line would be drawn on the use of direct quotations, it was possible that the Court would take punitive action against those publishing "verbatim accounts."

5. The AOPC's interpretation is inconsistent with the text of the Order and this Court's previous orders governing pretrial proceedings, and the Media Entities therefore seek clarification of the Order on this point.

6. In addition to the fact that the use of direct quotations is permitted on the face of the Order, there are a number of independent reasons why the use of such quotations in the electronic based communication from the courtroom should not be restricted.

7. First, such a restriction would risk diminishing the accuracy of reports on the trial. News reports of courtroom proceedings routinely contain direct quotations from trial participants. The typical smattering of the most important or interesting direct quotations in news reports is nothing like the "verbatim accounts" the Court appears to wish to avoid. News reports are simply not transcriptions of proceedings. Indeed, their role is to enable readers and viewers to understand the proceedings without having to wade through a verbatim account. As this Court understands, the point of permitting electronic communications from the courtroom is to increase the likelihood that the press can give the public an accurate account of what is

transpiring during the trial, thus fulfilling the promise of the state and federal constitutional rights to access court proceedings. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (reporters "function[] as surrogates for the public," transmitting "what people in attendance have seen and heard"); *United States v. Criden*, 648 F.2d 814, 822 (3d Cir. 1981) (right of access to public trials "can be fully vindicated only if the opportunity for personal observation is extended to persons other than those few who can manage to attend the trial in person"). If the press is prohibited from providing the actual words spoken during the trial, and forced to spend time searching for appropriate synonyms and straining to avoid quoting the Court, lawyers and witnesses, this benefit will surely be lost.

8. In addition, a prohibition against the use of direct quotations is impractical and difficult to implement. Would a 140-character tweet that contains a single sentence from a witness's testimony be considered a "verbatim account"? Would a blog that contains a quoted phrase from a lawyer's question cross the line? Would an email from a reporter that uses the single word "overruled" after Your Honor rules on an evidentiary objection, or "yes" or "no" in quoting a response to a question be prohibited? There simply is no workable way for reporters to avoid using any direct quotes in their text-based reports, and there is no clear line that can be drawn to inform them about what is permissible and what is prohibited, which will possibly subject them to serious sanctions.

9. Moreover, the restriction contemplated in the AOPC's explanation would not serve any of the interests at stake here. Using direct quotes in reports from the courtroom does not prejudice any interest or in any way impede the judicial process. Indeed, such quotations are used routinely in proceedings across the country every day while court is in session. In fact, reports containing portions of the actual questions and responses, and the Court's decisions and

instructions, far better serve the public's right to access these proceedings than do simple summaries devoid of any of the actually spoken words. With no discernible danger posed, the restriction as described by Mr. Koval is as unnecessary as it is harmful to the public right of access.

10. Finally, and perhaps most importantly, any restriction on reporting direct quotations would be unconstitutional. Barring the press from accurately reporting what transpires in open court would be a classic prior restraint, "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976). The "dominant purpose" of the First Amendment's free-speech clause is to outlaw prior restraints. *New York Times Co. v. United States*, 403 U.S. 713, 723-24 (1971). Any attempt to restrict the press from using quotes in news reports would run counter to an unbroken line of precedent rejecting prior restraints in all but the most "exceptional cases" – such as the intended publication of military plans during wartime. *Near v. Minnesota*, 283 U.S. 697, 716 (1931). For this reason, courts throughout the country have repeatedly held that prior restraints restricting reports about court proceedings are unconstitutional, for, as the United States Supreme Court has explained, "those who see and hear what transpired [in the courtroom] can report it with impunity." *Craig v. Harney*, 331 U.S. 367, 374 (1947); *see, e.g., Okla. Publ'g Co. v. Dist. Court of Okla. Cnty.*, 430 U.S. 308, 310 (1977) (holding that First Amendment barred court's effort to "prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public"); *Nebraska Press Ass'n,* 427 U.S. at 568 ("To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles: '[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom.'") (citation omitted).

11. Likewise, any effort to punish reporters after they accurately quote from testimony, questions and remarks made at trial – including by fining or incarcerating them as set forth in Section 8 of the Order – would be unconstitutional. Indeed, the Supreme Court has "repeatedly held that 'if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.'" *Bartnicki v. Vopper*, 532 U.S. 514, 527-28 (2001) (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)); *accord, e.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524, 541, 546 (1989) (newspaper cannot be punished for publishing sexual assault victim's name even though the reporter understood she was not allowed by regulations "to take down that information"); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (When "true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.").

12. Counsel for the Media Entities today contacted the prosecution and defense in this case to ask whether they would agree with the relief sought by this Motion, but have not yet received a response.

WHEREFORE, the Media Entities respectfully request that the Court clarify the Order to make clear that it permits the press to include direct quotations from the proceedings in their electronic based communications while court is in session.

June 1, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2012, I caused to be served by email and Federal Express overnight delivery a true and correct copy of the foregoing Expedited Motion to Intervene and to Clarify Decorum Order and proposed order upon the following counsel of record:

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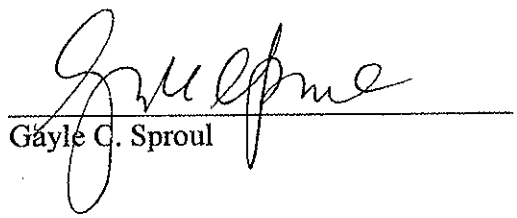

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