IN THE
SUPERIOR COURT
OF DOUGHERTY COUNTY
OF THE STATE OF GEORGIA

CASE NO. 04R09

STATE OF GEORGIA,

versus

AMAAD RASHAD JONES,

Defendant

BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF GEORGIA

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The American Civil Liberties Union of Georgia, Inc. (ACLU) files this brief of Amicus Curiae and urges this Court to reverse the Order barring extrajudicial statements and the Order sealing documents in this case. Specifically, the ACLU urges this Court to hold that these orders were was not justified and\or that this Court failed to explain whether alternatives to closure were carefully considered and why such alternatives are unsatisfactory.

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The American Civil Liberties Union is a nationwide, non-partisan organization of more than 300,000 members dedicated to defending the principles embodied in the Bill of Rights. The American Civil Liberties Union of Georgia, Inc. is a state affiliate of the ACLU with more than 5,000 members.

The ACLU has long supported both the right of accused persons to receive a fair trial and the right of the public and the press to attend judicial proceedings. At times, there may be a tension between these rights. This tension often results in very difficult weighing and balancing of important constitutional rights.

II. Factual Summary

In Georgia v. Amaad Rashad Jones, No, 04R09, the Defendant is charged with the possession of marijuana with intent to distribute. As part of his defense, the Defendant alleges racial profiling by law enforcement. In response, the Prosecution asked the Court to place a gag order on the Defendant and his attorney from making statements that would allegedly affect "jurors and voters." The Defendant objected to the gag order. On June 21, 2004, the Court ordered:

> **[A]ll** attorneys, parties, witnesses, and persons who are connected to the defense of this case, are prohibited from making or participating in making **any extra-judicial statement** that a reasonable person would

expect to be disseminated by meand of public communication, or to any agent or employee of any news media, **concerning any aspect of the proceeding.** (Appendix 1, emphasis added).

Eleven days later, the Court held a hearing to determine whether to maintain the protective order. Twenty-two days after the issuance of the protective order, however, the gag order still remains binding with no further modifications, findings, or rulings by the Court.

The Court also issued a verbal order that the Defendant's motion to dismiss should be sealed. Thereafter, without a hearing or briefing on the matter, the Court ordered that all subsequent filings be placed under seal.

III. Anaylsis

A. The Gag Order Exceeds the Scope of Rule 3.6 and is Unconstitutional.

1. The Gag Order Is Improper Under Rule 3.6 Because There Are No Findings That Extrajudicial Statements Will Prejudice the Proceedings.

Rule 3.6 of the State Bar of Georgia Rules of Professional Conduct sets out the rule pertaining to restrictions on extrajudicial statements and the prejudice of an adjudicative proceeding. It states that a lawyer

> shall not make any extrajudicial statement that a person would **reasonably believe** to be disseminated by means of public communication if the lawyer **knows or reasonably should know** that it **will** have a substantial likelihood of materially prejudicing an **adjudicative proceeding** in the matter.

In Atlanta Journal Constitution v. Georgia, 596 S.E. 2d 694, 696 (Ga. Ct. App. 2004), the Georgia Court of Appeals held that Rule 3.6 "requires a finding that extrajudicial statements to the media *will* have a *substantial* likelihood of materially prejudicing the trial."[1] AJC, 596 S.E.2d at 696 (emphasis included). This finding must be based on "evidence of record regarding the possible impact of extrajudicial statements upon the forthcoming trial." Id. at 697. A mere "conclusory representation that publicity might hamper a defendant's right to a fair trial is insufficient to overcome the protections of the First Amendment." Id. at 696 quoting United States v. Noriega, 917 F.2d 1543, 1549 (11th Cir. 1990).

[1] A lesser standard could not withstand constitutional muster. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991). However, some Courts hold that an **even more stringent** standard should apply to witnesses, parties and other individuals. United States v. Ford, 830 F.2d 596, 598 (6th Cir. 1987) (applying "clear and present danger test" because individuals should not be subject to a lesser standard than that which is granted to the press.). Moreover, a gag order would have to withstand strict scrutiny, and would unlikely survive, if the Court provided a reason other than a "prejudicial effect on an adjudicative proceeding." AJC, 596 S. E. 2d at 696. (explaining that the Supreme Court established this standard by balancing "the First Amendment with a "defendant's Sixth Amendment to a fair trial").

In AJC, therefore, an order that cited "extensive pre-indictment press coverage; "highly emotionally charged" allegations in the case; and "a *reasonable* likelihood that each defendant's right to a fair trial *could* be prejudiced by pretrial publicity," was insufficient and overturned. Id. at 696-97; see also United States v. Lousiana Clinic, No. Civ. A. 99-1767, 2002 WL 32850 (E.D. La. Jan. 10, 2002) (stating that there was "no wide-spread or pervasive media coverage of this case" justifying a gag order).

The June 21 Order in this case, however, **makes no findings** that extrajudicial statements to the media *will* have a *substantial* likelihood of materially prejudicing the trial. Indeed, it does not even make a conclusory representation that publicity would hamper the defense. There is no evidence in the record regarding the potential impact of extrajudicial statements. Thus, the Order must be vacated.

2. The Order Exceeds the Type of Statements That May Be Gagged in Accordance with Rule 3.6 and in Unconstitutionally Overbroad.

Even if the Order were justified by specific findings, the order sweeps so broadly in its restrictions on speech that it is unconstitutionally overbroad. AJC, 596 S.E.2d at 696. The Court must craft the gag order so that it is "sufficiently narrow to eliminate substantially only that speech having a meaningful likelihood of materially impairing the Courts ability to conduct a fair trial." United States v. Brown, 218 F.3d

415, 429 (5th Cir. 2000).

Rule 3.6 clarifies that a "lawyer may usually state . . . the claim, offense, or defense involved . . . {and} . . . information contained in a public record" because such statements are "more likely than not to have **no** material prejudicial effect on a proceeding."Commentary at 5B; AJC, 596 S.E.2d at 697. Accordingly, the Rule itself is not overbroad: Indeed, in a four-judge opinion in Gentile v. State Bar of Nevada, 501 U.S. 1030, 1077 (1991) (Rhenquist, CJ, concurring & dissenting)[2], the Supreme Court held that a rule nearly identical to Rule 3.6 was saved from an overbreath claim because "even those lawyers involved in pending cases can make extrajudicial statements as long as such statements do not present a substantial risk of material prejudice to an adjudicative proceeding."

In AJC, the Georgia Court of Appeals, however, held that limiting press comments to "no comment" or "whatever we have to say will be [or has been said] in court" "contravene[d] Rule 3.6" and thus was overbroad. 596 S.E. 2d at 696. Similarly, a gag order that "prohibits *all* comments concerning the case" was struck down as overbroad in United States v. Simon, 664 F. Supp. 780 (S.D. N.Y. 1987),

[2]Kennedy, in his four-judge ruling, did not address overbreadth, Id. at 1058 n.3. Nor did Jusitice O'Connor address overbreadth in her concurrence. Justice Rhenquist, who was joined by White, Scalia, and Souter, did address overbreadth.

because "[s]uch a sweeping prohibition includes factual statements and descriptions of pending motions or other matters of public record for which there can be no reasonable likelihood of prejudicial impact." See also Brown, 218 F. 3d at 430 ("First, we observe that the district court did not impose a 'no comment' rule, but instead left available to the parties various avenues of expression."); Ford, 830 F.2d at 600 (permitting only a "no comment" statement was overbroad).

The June 2001 Order applies to **"any** extrajudicial statements . . . concerning **any aspect** of this proceeding." (emphasis added). Thus, the gag order applies to statements that **will not** have a substantial likelihood of materially prejudicing the trial. Neither the Defendant nor his attorney may discuss **any** matter publically: they may not alert press to a court date, may not refer to documents filed with the Court, may not reference prior cases or public records; nor may they discuss their defense publically. In fact, the order does not even explicitly permit those subject to the gag order to even say "no comment." This clearly contravenes Rule 3.6 and is, therefore, unconstitutionally overbroad.[3]

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[3]In Brown, 218 F. 3d at 430, the court's analysis of overbreath also considered that the district court made special allowances by lifting most of the order for the duration of the Defendant's campaign. It noted that the Petitioner address the issues in the case throughout the campaign. Id. Such is not the

B. The Documents in the Case Are Improperly Sealed.

In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), the United States Supreme Court held that the right to attend criminal trials is protected by the First Amendment. See also Globe Newspaper Company v. Superior Court, 457 U.S. 596 (1982) (mandatory closure rule for trials involving specified sexual offenses where the victim is less than 18 years old violates the First Amendment).

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case here, where the primary for the Defendant's attorney's United States Senate race and the District Attorney's race take place on Tuesday, July 20.

Whether the right of access to proceedings and records is constitutional or based on the common law, the legal standard is the same: "where, as in the present case, the [court] attempts to deny access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to that interest." Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983) (quoting Globe Newspapers Co., 457 U.S. at 606-07(emphasis added)[4]; In re Four Search Warrants, 945 F. Supp. 1563 (N.D. Ga. 1996) (opening sealed affidavits to the public because the government's interest in keeping them sealed was not compelling); United States v. Eaves, 685 F. Supp. 1243 (N.D. Ga. 1988) (applying this standard when asking whether the Court could seal video and audiotapes).

The verbal order sealing the record in this case does no such strict scrutiny. Although the government has a compelling interest in assuring the Defendant a fair trial, there is no indication that sealing all records in the case will further that interest. Furthermore, the order is not narrowly tailored, as it seals all documents, not just those proven to threaten the fair trial.

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[4]As the Eleventh Circuit explained in United States v. Kooistra, 796 F.2d 1390, 1391 n. 1 (11th Cir. 1986): "Although the constitutional and common law rights may differ in some respects, we have applied the same standards of Newman to the right to inspect court records and documents other than trial exhibits."

In R. W. Page Corp. v. Lumpkin, 249 Ga. 576 (1982), the Georgia Supreme Court cited Richmond Newspapers but found that "Georgia law, as we perceive it, regarding the public aspect of hearings in criminal cases is more protective of the concept of open courtrooms than federal law,"[5] and therefore extended this principle so as to afford a constitutional right of access "as applicable to pre-trial, mid-trial and post-trial hearings as to the trial itself." 249 Ga. at 578-79. Georgia's strict standard for closure is grounded in a commitment to the importance of openness:

> This court has sought to open the doors of Georgia's courtrooms to the public and to attract public interest in all courtroom proceedings because it is believed that open courtrooms are a sine qua non of an effective and respected judicial system which, in turn, is one of the principal cornerstones of a free society. 249 Ga. at 576 n.1.

WALB-TV v. Gibson, 269 Ga. 564, 567 (1998) (Georgia has an "open courthouse door

policy") (Hunstein, J.) (concurring in judgment); R.W. Page, 292 S.E. 2d at 820 (""Open hearings are nearly absolute rule and closed hearings the very rarest of excetptions.")

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[5] The Court's basis for this conclusion rests upon a plain reading of the Georgia Constitution: "Although the sixth amendment to our federal constitution . . . affords the accused a right to a public trial, our state constitution point-blankly states that criminal trials shall be public." 249 Ga. at 578. (emphasis in original).

Pre-trial, mid-trial, and post-trial proceedings in a criminal case must remain open unless "the defendant or other movant is able to demonstrate on the record by **'clear and convincing proof'** that closing the hearing to the press and public is the **only means** by which a **'clear and present danger'** to his right to **a fair trial or other asserted right** can be avoided". R.W. Page, 249 Ga. at 579**.** An order closing any of the criminal proceedings to the public "shall only be entered pursuant to **written findings of fact** fully articulating the **alternatives to closure considered** by the trial court and the **reason or reasons why such alternatives would not afford the movant an adequate remedy**." Id. at 580.[6]

There is no written order or oral explanation of the order to seal records in this case. Thus, there are no written findings of fact, no articulation of alternatives considered, nor any reasons given for why alternatives would not afford an adequate remedy. Therefore, the sealing of the records must be lifted.

[6] The Georgia Supreme Court reinforced the public's presumptive right of access when it again ordered the unsealing of court records in a *civil* case. Atlanta Journal and Atlanta Constitution v. Long, 259 Ga. 23, 23 (1989) (Long II) (in Long I, "we held that the requirement to overcome the presumptive public right of access -- that the harm otherwise resulting to the party seeking to seal the records **must clearly outweigh** the public interest -- had not been fulfilled"); id. ("the trial court shall make the records in this case available to the public").

C. <u>The Court Should Act Expeditiously.</u>

The Defendant, Defendant's attorney, and witnesses in this case have been subject to an improper gag order that violates their first amendment rights for **twenty-two (22)** days. The gag order should be lifted as soon as possible, as "the loss of First amendment freedoms for even minimal periods of time [] unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373-74 (1976).

IV. Conclusion

Accordingly, we ask the Court to reverse its Order barring extrajudicial comments and sealing records in this case.

On this ____ day of July, 2004.

Respectfully submitted,