IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
vs.	)	
	)	CRIMINAL ACTION
DESMOND POST,	)	CASE NO. 100998
JOSEPH BROWN,	)	
and **ROLAUNDA FRIPP**,	)	
	)	
Defendants.	)	
	)	

DEFENDANT'S RESPONSE AND OBJECTION TO THE STATE OF GEORGIA'S EMERGENCY MOTION TO RESTRICT EXTRAJUDICIAL COMMUNICATIONS BY COUNSEL AND DEFENDANT'S CROSS-MOTION FOR COSTS

Defendant, Desmond Post ("Post" or "Defendant"), by and through his undersigned counsel, and files his Response and Objection to The State of Georgia's Emergency Motion to Restrict Extrajudicial Communications by Counsel ("Motion") and, pursuant to this Court's inherent authority, also files his Cross-Motion for Costs ("Motion For Costs") and respectfully prays that the Court deny the Motion and grant Defendant's Motion For Costs, showing the Court further as follows:

DEFENDANT'S RESPONSE AND OBJECTION TO THE STATE OF GEORGIA'S EMERGENCY MOTION TO RESTRICT EXTRAJUDICIAL COMMUNICATIONS BY COUNSEL

INTRODUCTION

The State is attempting to improperly shift the blame for one juror's misconduct to the defendants and intimidate and silence defense counsel in violation of their free speech rights under the First Amendment and Georgia Rule of Professional Conduct 3.6

("Rule 3.6"). There is no factual or legal basis for the Motion.[1] Defense counsel in this case did nothing improper, and the Motion is the latest in a series of acts designed to chill defense counsel's advocacy. Had the juror simply followed the Court's clear instruction not to perform "research", and not discuss any outside knowledge of this case with other jurors, the juror would not have learned about any Facebook posts, could not have shared that information with other members of the panel, and there would not have been a mistrial based on her review of any Facebook posts. More importantly, however, none of the referenced posts by defense counsel are in any way improper, much less in violation of the Georgia Rules of Professional Conduct.[2] In keeping with the recent practice of the Cobb County District Attorney's Office, the State has leveled serious, but meritless, accusations against defense counsel in attempt to gag the defense lawyers.

As shown further below, however, Rule 3.6 does not prohibit a lawyer from discussing the facts of a pending case and, in fact, binding Supreme Court precedent provides that a lawyer serves an integral role in ensuring that the operation of the American court system remains open and transparent. Rule 3.6 only prohibits extrajudicial statements that a lawyer would reasonably believe to be disseminated by

[1] There also is no "emergency" justifying expedited treatment of this Motion. Denoting this Motion as an emergency is just a tactic to elevate its priority, and, as shown further below, attempt to control and intimidate defense counsel. There is no merit in the Motion, and it certainly does not deserve "emergency" treatment, particularly since this case will not be tried until at least December of this year.

[2] It is not clear who obtained copies of the posts or in what manner they were obtained, and it appears they were printed from potentially three different unidentified devices. The State has not provided any evidence regarding their authenticity in accordance with O.C.G.A. 24-8-803(6) and 24-9-902(11) or (2). Thus, the exhibits to the Motion currently are not evidence, and Defendant does not waive any right to challenge the authenticity or admissibility of Exhibits A-G attached to the Motion and hereby fully preserves and reserves his right to challenge the admissibility of the exhibits on these and other grounds allowed under applicable law.

means of: (1) "public" communication; and (2) if the lawyer "knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Not only were the Facebook posts not "public" within the meaning of the applicable rule, no lawyer would reasonably believe that any of the information contained in any of the referenced posts would have any likelihood of materially prejudicing this case, much less a "substantial likelihood" of doing so. Despite the State's protest that all of these posts were "public", printouts of the privacy settings for defense counsel's Facebook pages reflect that all but one of the posts at issue were not categorized as "Public" and were limited to a small audience of Facebook "friends".

In no shape or manner did the posts at issue come close to being objectionable, and the State's Motion highlights it is just another vindictive attempt to harm defense counsel. The State knew its Motion was meritless when it was filed, and the State chose to attack defense counsel personally without any substantiation, so Defendant is also moving this Court for an Order requiring the District Attorney's Office to reimburse the Cobb County Circuit Defender's Office for all costs associated with defending against the Motion—a public filing that serves only one purpose-- to disparage defense counsel, who are long-time members of the Georgia Bar and lawyers in good standing in this State.[3] It

[3] Given the serious nature of these false accusations, some of the statements in the Motion (and which counsel anticipates will be made in court on Monday) border on libel and slander under O.C.G.A. 51-5-1, et seq. In addition, the holding in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991)(discussed at length below) reflects that the law was "clearly established" at the time each of the statements at issue was made that defense lawyers have a First Amendment right to discuss a pending case in accordance with established rules. Retaliation against the exercise of First Amendment rights is a well-established basis for civil liability under 42 U.S.C. 1983. *See Bennett v. Hendrix*, 423 F.3d 1247, 1255–56 (11th Cir. 2005). It is not clear how the State obtained the posts, but the State and/or its employees or agents may also have violated defense counsel's right to privacy and Facebook's terms and conditions.

is evident the State's allegations have been made in bad faith solely to impugn the character and personal and professional reputation of defense counsel and intimidate counsel into backing down in their advocacy. For this reason, counsel for the State should be personally admonished and the costs associated with having to respond to the Motion should be borne by the State.

For these and all of the reasons set forth below, Defendant Post respectfully requests that the State's Motion be denied, that Defendant's Motion for Costs be granted, that State's counsel, Jesse Evans and Rachel Hines be publicly admonished, and the State be required to repay the costs associated with the preparation of the instant response and cross-motion and attendance at any court proceedings associated therewith.

STATEMENT OF THE CASE AND FACTS

A. General Background and Procedural Posture of Case

Defendant Post was indicted on March 4, 2010 for a crime alleged to have occurred on December 10, 2009, now more than eight years ago. Following a jury trial, Post was convicted on March 30, 2012. The trial transcripts were completed and filed by the Court reporter roughly a year later in March 2013. The Court then denied Post's Motion for New Trial on November 18, 2013 and Post appealed to the Supreme Court who, on November 17, 2015 reversed the convictions and remanded with instructions. Upon remand, defendant Post's case was reassigned to this Court. The Court's staff attorney circulated a proposed order on March 9, 2016 regarding the posture of this case. In response, the State objected and argued that the Supreme Court did not order recusal in regards to Post but instead that another judge should be assigned to hear the recusal issue. Then, on May 31, 2016, based on the State's objection to the granting of the recusal in

Post's case, this Court entered an order assigning the Post recusal matter to be heard before another judge. On July 13, 2016, Judge Howe was appointed to hear the recusal issue in the Post matter. On October 3, 2016 this matter was set for hearing before Judge Howe on November 3, 2016. This hearing was rescheduled for January 19, 2017 before Judge Howe.

On January 13, 2017, Judge Howe was replaced by Judge Sutton to hear the recusal motion for Post. On January 31, 2017, the recusal motion was reset for March 2, 2017 before Judge Sutton. On March 7, 2017, the State withdrew it's opposition to Post's Recusal Motion and a consent order was entered that allowed Post's case to re-join Fripp and Brown's cases for trial before this Court. At that point, the cases were all re-assigned to this Court, which began setting them for motions and trial. Post filed a pretrial motion to dismiss based on a violation of Post's Sixth Amendment right to a speedy trial after the March 15, 2018 mistrial, this Court schedule a trial date for December of 2018..

B. Juror Misconduct and The Unopposed Motion For Mistrial

On March 12, 2018, jury selection began in the retrial of Defendants Post, Fripp and Brown. After three days of jury selection, it was discovered that juror 44 on the fourth panel, was Facebook "friends" with Fripp's attorney, Kim Frye ("Ms. Frye"). On the fourth day of jury selection, the parties were able to conduct individual *voir dire* of Juror 44 to determine if her relationship with Ms. Frye would create a reason for her to be removed from the jury panel. After questioning, all parties agreed that Juror 44 should be excluded. The questioning of Juror 44 regarding her friendship with Ms. Frye and her knowledge of the instant case was conducted outside the presence of any other jurors.

After learning that Juror 44 had knowledge of case and she had spoken to several other jurors about what she knew, Defendant Post moved for a mistrial. The Court, without objection from the State, granted the mistrial.

C. The Facebook Posts At Issue

The State takes issue with the posts attached as Exhibits A-G to the State's Brief. For the sake of brevity, the posts are discussed, in turn, in the Argument section below.

ARGUMENT AND CITATION OF AUTHORITIES

I. THE COBB COUNTY DISTRICT ATTORNEY'S PRACTICE OF ATTEMPTING TO INTIMIDATE DEFENSE COUNSEL.

Before addressing the substance of the State's Motion, Defendant believes it imperative to address the motive behind the Motion because the allegations leveled at defense counsel are serious, implicate their bar licenses, cast aspersions on their professionalism and threaten their livelihoods. Undersigned counsel believes the Motion is just the latest attempt by the Cobb County District Attorney's Office to stifle voiced opposition to the office, particularly when the office suffers a legal setback in a case. Over the past several years, the office has engaged in a pattern of using the Georgia bar rules and threats of criminal prosecution against defense counsel in certain cases where the district attorney's office has not obtained a favorable outcome. On one occasion, the tactics employed were so obvious and alarming that a sitting judge with the Georgia Court of Appeals wrote separately to specifically admonish one senior employee in the office for using the power of the district attorney's office to threaten the prosecution of a defense lawyer during a trial when there was no factual basis given for the threat—a threat leveled solely because the defense lawyer chose not to call a witness listed on both the State's and defense's witness lists.

While there is no criminal prosecution threatened here (yet), the district attorney's office is once again attempting to bully and intimidate defense counsel by leveling serious, but completely unsubstantiated, allegations. As is evident below, there is no basis whatsoever for these allegations, and the State's Motion is just the latest in a series of acts designed to silence defense counsel. Whether the State is disappointed or not at a mistrial, it is entirely improper for the State in the wake of its loss to use the Georgia Bar rules for the obvious purpose of chilling the defense's advocacy and their free speech rights. The State's Motion is clear evidence that the State will stop at nothing to threaten and harass defense counsel, hoping defense counsel will simply back down.

Defense counsel respectfully asks this Court to view the most recent attacks on counsel through this lens. If the State is permitted to continue using such completely unfounded threats purposely and maliciously designed to strike at the heart of counsel's personal and professional lives, no defendant in Cobb County can be confident that his counsel can and will fulfill his or her constitutional duty to the client. Using the Georgia Bar rules solely to intimidate lawyers has one purpose and one purpose only—to instill a fear of reprisal for advocating. The practice of the district attorney's office is detrimental to our profession, and there is an opportunity to ensure it ends now.

II. THE GEORGIA RULES OF PROFESSIONAL CONDUCT AT ISSUE

While the State has asserted alleged violations of Georgia Rule of Professional Conduct 3.3 ("Candor Towards Tribunal")("Rule 3.3), Rule 3.6 and Georgia Rule of Professional Conduct 8.4 ("Misconduct")("Rule 8.4") by defense counsel, (*see* Motion, pp.4-5), the primary thrust of the Motion is an alleged violation of Rule 3.6.[4] As shown below, there has been no violation of Rule 3.6—and it is not even a close question.

A. Rule 3.6

Rule 3.6 provides, in pertinent part:

> a. A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an 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.
>
> . . .
>
> c. Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
>
> . . .

(emphasis added). The Comments to Rule 3.6 are instructive.

Comment 1 to Rule 3.6 recognizes the importance of the public's access to judicial proceedings. *See id*. (". . . there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves."); (The public "has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern."); (The "subject

[4] *See* State's Brief, pp. 1-4 discussing Facebook comments. It is worth noting that the State failed to cite a single case in its Motion. (*See generally*, Motion).

matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.") In keeping with these principles, Rule 3.6's prohibition is limited to a lawyer "making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *See* Rule 3.6, Comment 3.

Comment 5A recognizes the scenarios where there is a greater likelihood of a statement having a material prejudicial effect on a proceeding, and they relate to:

a. the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

b. in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

c. the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

d. any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

e. information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

f. the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Importantly, Comment 5B makes clear that, "there are certain subjects which are more likely than not to have no material prejudicial effect on a proceeding. Thus, a lawyer may usually state:

a. the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

b. information contained in a public record;

c. that an investigation of a matter is in progress;

d. the scheduling or result of any step in litigation;

e. a request for assistance in obtaining evidence and information necessary thereto;

f. a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

g. in a criminal case, in addition to subparagraphs (1) through (6):

i. the identity, residence, occupation and family status of the accused;

ii. if the accused has not been apprehended, information necessary to aid in apprehension of that person;

iii. the fact, time and place of arrest; and

iv. the identity of investigating and arresting officers or agencies and the length of the investigation."

B. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

The United States Supreme Court has recognized that "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 575, 100 S.Ct. 2814, 2826, 65 L.Ed.2d 973 (1980). In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), a landmark decision involving a criminal defense attorney's right to talk publicly about a pending case, the United States Supreme Court explained, "[p]ublic vigilance serves us well, for '[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.... Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.'" *Gentile*, at 1035 (quoting *In re Oliver,* 333 U.S. 257, 270-271, 68 S.Ct. 499, 506-507, 92 L.Ed. 682 (1948)). "The press ... guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and

criticism." *Sheppard v. Maxwell,* 384 U.S. 333, 350, 86 S.Ct. 1507, 1515, 16 L.Ed.2d 600 (1966).

Addressing the corollary to Rule 3.6 in Nevada, *Gentile* reversed a decision of the Nevada Supreme Court sanctioning a defense lawyer for holding a public press conference shortly after indictment during which the lawyer read a prepared statement and answered questions about the case six months before the case was tried. The attorney gave statements demonstrating his client's innocence, stated that the likely perpetrator was a police detective, and indicated that the victims and witnesses were not credible. *Gentile,* at 1045. During the press conference, the attorney also strongly implied that the police officer could be seen suffering from symptoms of cocaine use. *Id*. The defense lawyer was sanctioned by the State Bar of Nevada for the comments.

Reversing that decision, the *Gentile* court held that, "Nevada's application of Rule 177 [corollary to Rule 3.6] in this case violates the First Amendment." *Gentile*, at 1033. "Because attorneys participate in the criminal justice system and are trained in its complexities, they hold unique qualifications as a source of information about pending cases." *Id*. at1056. "Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion." *Id.* (internal quotations omitted). Going further, the *Gentile* court emphasized that:

> To the extent the press and public rely upon attorneys for information because attorneys are well informed, this may prove the value to the public of speech by members of the bar. If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command

assent.

Id., at 1056–57. The court also explained that "[a] defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried." *Id.,* at 1043.

Rejecting the State of Nevada's attempt to sanction the lawyer for discussing the case in public, *Gentile* explained, "[p]etitioner spoke at a time and in a manner that neither in law nor in fact created ***any threat of real prejudice*** to his client's right to a fair trial or to the State's interest in the enforcement of its criminal laws." *Id*. (emphasis added). The court also recognized that the speech at issue was "classic political speech" and that:

> There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment. Nevada seeks to punish the dissemination of information relating to alleged governmental misconduct, which only last Term we described as speech which has traditionally been recognized as lying at the core of the First Amendment.

Id., at 1034-35 (quoting *Butterworth v. Smith,* 494 U.S. 624, 632, 110 S.Ct. 1376, 1381, 108 L.Ed.2d 572 (1990))(internal quotations omitted). The *Gentile* court stressed that, "[t]he judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations." *Gentile*, at 1035. The *Gentile* court reasoned that:

> Much of the information provided by [the defense lawyer] ***had been published in one form or another, obviating any potential for prejudice***. See ABA Annotated Model Rules of Professional Conduct 243 (1984) (extent to which information already circulated significant factor in determining likelihood of prejudice). The remainder, and details [the defense lawyer] refused to provide, ***were available to any journalist willing to do a little bit of investigative work***.

Gentile, at 1046-47 (emphasis added). Expanding on the rarity of prejudice under such circumstances, the court explained that, "[o]nly the occasional case presents a danger of prejudice from pretrial publicity." *Id*. at 1054. "Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court." *Id*. at 1054-55.

In *Mu'Min v. Virginia,* 500 U.S. 415, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991), the community had been subjected to a barrage of publicity prior to the defendant's trial for capital murder. News stories appeared over a course of several months and included, in addition to details of the crime itself, numerous items of prejudicial information inadmissible at trial. Eight of the twelve individuals seated on the defendant's jury admitted some exposure to pretrial publicity. In that case, the United States Supreme Court held that the publicity did not rise even to a level requiring questioning of individual jurors about the content of publicity. In *Gentile*, the court noted that, "[i]n light of [the *Mu'Min*] holding, the Nevada court's conclusion that petitioner's abbreviated, general comments six months before trial created a 'substantial likelihood of materially prejudicing' the proceeding is, to say the least, most unconvincing." *Gentile*, at 1039.

As shown below, when the principles of Gentile and Rule 3.6 are applied to the posts at issue, there is no conceivable way they constitute anything other than protected First Amendment speech and there is no imaginable interpretation that would render them prejudicial to the instant case.

C. The Facebook Posts At Issue Are Supported by *Gentile* and Do Not In Any Way Violate Rule 3.6 Because They Present No Likelihood of Prejudice.

At the outset, it is again worth noting that but for one juror's failure to follow the Court's instructions, the Facebook posts at issue would not have been seen, disclosed or known. All of the statements were posted on Facebook pages of defense counsel, and only one of the Facebook posts—the one posted 2 ½ years prior to trial—was set to "Public". The few other Facebook posts at issue were all limited to the network of defense counsel's Facebook "friends".[5] Defense counsel did not hold any public press conferences, issue any public written statements, or make comments to any news media about the instant case (though they would have the right to do so under certain circumstances). Thus, the intended audience (and scope) of the posts at issue was limited to defense counsel's Facebook "friends" and the posts were never intended for viewing by the general public.[6] Based on this point alone, the statements were never "public". If

[5] Printouts showing Ms. Frye's Facebook privacy settings for the posts identified in Exhibits B-D of the State's Motion are attached hereto as Exhibit 1. Printouts showing Ms. Merchant's privacy settings for the Facebook posts identified in Exhibits F and G of the State's Motion are attached hereto as Exhibit 2. As indicated in these settings, the audience for the posts is not "Public", but rather limited to "Friends". Thus, only "Friends" could see posts on defense counsel's Facebook timelines, only "Friends" could see what defense counsel posted on each other's timelines, and only "Friends" could see posts in which defense counsel were "tagged".

[6] The State attempts to create a firestorm by alleging that it was somehow improper for Ms. Frye to be Facebook "friends" with one of the jurors, and the State implies this was some clandestine effort to "taint" the jury. The State's blustering aside, it is not uncommon for the lawyers trying a case to know jurors. One of the purposes of *voir dire* is to uncover such information and whether the knowledge affects the juror's ability to hear and weigh the evidence fairly. This purpose does not change simply with the advent of social media, and there was nothing nefarious about defense counsel knowing one of the jurors. It was unfortunate the juror failed to follow the Court's instructions, but defense counsel cannot control the actions of the prospective jurors.

the State is to be believed, the posts only became known (even after several years had passed), because one juror failed to follow her oath and discussed things she saw on defense counsel's Facebook page with other jurors.

Notwithstanding these general considerations, and taking each of the alleged posts in turn in order of their appearance as Exhibits to the State's Motion, it is abundantly clear to everyone, including the State, that they are all innocuous, do not violate Rule 3.6, and constitute protected speech under the First Amendment.

1. *Exhibit A: November 17, 2015 Post By Ms. Frye*

This post was published roughly 2 and ½ years before trial began. That is, it was published two more years in advance of trial than the public statements made by defense counsel in *Gentile*. Given that the *Gentile* court reasoned that statements six months in advance of trial were sufficiently "cold" to find any alleged prejudice, it is hard to imagine how a statement made on a Facebook page 2 ½ years prior to trial could be "prejudicial" to the State.

Furthermore, the content of the post does not come close to the statements made (and protected by the Supreme Court) in *Gentile*. To the contrary, the December 15, 2015 post simply identifies that the case was reversed by the Georgia Supreme Court based on the trial judge's recusal because of ties to the district attorney's office and that her client would receive a new trial. (*See* State's Motion, Ex. A). Ms. Frye also provided a legal citation to the opinion and thanked other defense counsel who assisted on the case. (*See id*).

There is nothing in the bar rules that prevent a lawyer from stating a fact that a case has been decided, what the outcome was, and thanking counsel for working hard on

a case. This is particularly true since one of the rationales in *Gentile* was that most of the information provided by the defense lawyer was already in the public domain, and, here, the decision has been available on the Georgia Supreme Court's public website for the public to view since it was decided.[7] There is no statement in this post that is even marginally false, misleading, fraudulent, dishonest, or deceitful.[8] Counsel was simply conveying facts about the decision—2 ½ years prior to the start of the re-trial. If the speech in *Gentile* is protected, then Ms. Frye's innocuous statements in the December 17, 2015 post are most certainly protected.

2. *Exhibit B: December 15, 2017 By Ms. Frye*

The State does not elaborate as to what exactly is objectionable about this post. The post reads, "Double murder motions continue on today…", and the post contains two hashtags: #eightyearslater and #retrial. (*See* Motion, Ex. B). Ms. Frye did not identify any defendants, the case, or any parties, and did not make any statements concerning the case at all in the original post. In the comments, Ms. Frye explained the facts of the case; namely, that the defense had sought to recuse Judge Green, Judge Green objected, the parties tried the case for two weeks, and explained how long the case had been pending

[7] The Supreme Court's opinion, available in the public domain, goes into the factual and legal detail regarding the history of the case and the reasons for the recusal and reversal. Simply typing one of the defendant's names into a Google search would bring any person quickly and easily to a publically available copy of the opinion.

[8] It defies credulity to understand how any of this could possibly be prejudicial to the State. This is exactly the type of information Gentile explained was permissible, not only because it was in the public domain or easily located with a little investigative work, but also because it would not reasonably be expected to have any impact on the case whatsoever. While the State talks in generality about the "potential" for prejudice, it has not identified, nor could it, any specific ways the information *is or has been* prejudicial. A mistrial caused by a juror not following instructions is not the prejudice envisioned by Rule 3.6 or *Gentile*.

and what she believed it had and would cost the county to try the case. (*See id*.) Ms. Frye made no comments whatsoever about the evidence or witnesses and did not say anything that could even arguably be prejudicial to the State's ability to try the case. Indeed, as in *Gentile*, the statement was made months prior to trial, and this post was available only in a private Facebook post to an audience of Facebook "friends" and not intended for the public to view.[9]

3. *Exhibit C and D: March 13, 2018 Post By Ms. Frye And Comments*

There is no greater example of the State's attempt to make a tempest in a teapot than its argument relating to Exhibits C and D. The State claims that it only learned Ms. Merchant had "participated" in the post during jury selection, claiming that Ms. Frye and Ms. Merchant would receive notifications about the post, and that their "public" comments "tainted the jury pool" and they failed to disclose these comments to the Court. (*See* Motion, p.4). The State then claims that it learned about this only after the mistrial was granted—"without an opportunity for objection by the State." (*See id*.)

This argument is entirely disingenuous and completely meritless. While the State is long on argument, it is short on facts or legal authority. The post at issue is so innocuous, no reasonable person could find it objectionable. The original post at issue made by Ms. Frye read only, "**Day 2 of jury selection**. . ." The post does not identify

[9] This Facebook post simply "checked in" the lawyers to the Cobb County Courthouse and contained publicly available information. The motions calendar was published and was publically available. An order specially setting the case for these motions hearings is part of the public record available online and at the Superior Court Clerk's Office. The indictment showing that this alleged crime occurred eight years earlier is publically available at the Clerk's Office. The fact that this was a retrial is also publically available, not only at the Clerk's office, but also at the Supreme Court of Georgia and on various legal search engines.

any parties, does not identify the case by name, does not discuss the facts, law, the State, or any potential witnesses. In short, Ms. Frye simply stated in a private Facebook post that she was still picking a jury. There is nothing even arguably objectionable or prejudicial to the State in disclosing that counsel is picking a jury. And then there are Ms. Merchant's allegedly objectionable comments to the post. What nefarious and deceitful things could Ms. Merchant possibly say in the comments to the post to violate Rule 3.6 and "taint" the jury pool?[10] She *dared* write to another commenter, "you know the case" and "Still no jury…day 3 of picking[.]"

The fact that the State has used these completely innocuous posts containing no information whatsoever about the specific case and which were contained entirely in a private Facebook post reflects that its Motion was filed in bad faith solely to infringe upon counsel's First Amendment rights under *Gentile*. There is no possible construction or interpretation of Rule 3.6 or *Gentile* that would indicate that the posts in Exhibits C and D are objectionable, much less prejudicial in any way to the State's case. Finally, and importantly, the statements at issue were identified, not because of any action on the part of defense counsel, but because a juror violated the Court's instruction to not discuss any outside knowledge she might have about the case with other jurors.[11]

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[10] The State's objection to Exhibits C and D, in particular, explains the danger in allowing the State to continue to accuse, in a public filing, counsel of violating their ethical obligations. The fact that the State made such allegations on clearly non-objectionable statements highlights the vindictive nature of the accusations and highlights the lengths to which the State will go to silence counsel. The allegations call into question the personal and professional responsibility of defense counsel, and the State's counsel should be admonished. Without an admonishment, the State's counsel will only feel more emboldened to make additional unfounded allegations in the future.

[11] The State implies without any factual basis or legal justification that defense counsel was somehow obligated to make a disclosure about these completely innocuous posts and

4. *Exhibit E: Photograph of Counsel for Defendants Post and Fripp*

It is clear the State is upset at the mistrial and the further delay it will cause in getting the instant case tried. In reference to Exhibits E, F and G, the State argues that counsel for Defendants "continue to post public statements about the case, some of which are false." (*See* Motion, p.4). The State, however, does not explain how any of the referenced posts are false.

Exhibit E to the Motion is a photograph of counsel for Defendants Post and Fripp and it ***contains no statements***.[12] It only contains the hashtags #stillnotguilty and #mistrialmeansnotguiltystill. (*See* Motion, Ex. E.) There are no references to any specific case, no references to the defendants' names, no references to any facts or rulings, no comments on the evidence or witnesses, no identification of the venue for the case, and no other statements whatsoever. In fact, unless one knew the date and time of the mistrial, the venue, the case, the counsel involved and the specific meaning of the hashtags, no one would even be able to understand why counsel is smiling in the photograph. Accordingly, it is hard to see how this photograph somehow prejudices the State in any way, much less in a way that violates Rule 3.6.

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that this constitutes an alleged violation of Rule 3.3. (*See* Motion, p.4). Ms. Frye, however, asked the Court if it wanted her to print out her post *and all of it's comments* and the Court said he was not concerned with the post. Now, days later after the State realizes that it will not be able to try this case for another nine months due to the extensive leaves of absence of the assigned prosecutor, the State implies some wrongdoing on behalf of counsel for not standing up and telling the Court that counsel wrote in a private Facebook post. This is hardly a "newly discovered fact" since counsel even offered to print the entire post to preserve it for the record. Furthermore, neither lawyer made any "false statement" of "material fact", never failed to disclose any "material fact" necessary to "avoid a criminal or fraudulent act by the client" and did not "offer evidence the lawyer knows to be false." In short, Rule 3.3 has no application whatsoever to this issue.

[12] It is inconceivable how a photograph can be "false" as alleged by the State here.

The State also claims that Exhibit E shows defense counsel "celebrating the mistrial they helped create" and that "these continuing acts of misconduct represent an ongoing risk to the fair administration of justice in this case." (*See* Motion, p.4). As noted above, there has been no misconduct,[13] and the State's argument is nothing but an effort to silence defense counsel after a mistrial the State hoped had not happened.[14] Just because defense counsel advocate for their clients and are happy for an outcome does not mean counsel helped create the outcome. The defense again reiterates the retrial was created by a juror who did not follow instructions, not defense counsel.

5. *Exhibits F and G: Posts From March 15, 2018 (Day After Mistrial)*

As an initial matter, Exhibits F and G are Facebook posts by Ms. Merchant that post-date the mistrial so, by definition, they could not have had any impact whatsoever on jury selection in the instant case. The State does not allege, nor could it, that anything contained in Exhibits F and G had any role in "tainting" the jury. The State apparently argues that Exhibits F and G show some amorphous "ongoing risk". (*See* Motion, p.4).

As has been true with all but one of the prior posts at issue, these posts are limited to Ms. Merchant's Facebook "friends". They are not "public", as the State has alleged.[15]

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[13] The State cites to Rule 8.4, but does not specify how this rule has been violated. Presumably, the conduct at issue is the same conduct used to support the State's argument related to Rule 3.6, but as shown above, there has been no violation of Rule 3.6. In turn, there has been no violation of Rule 8.4.

[14] The State uses blustery language to "argue" there has been prejudice, but the State noticeably has failed to produce any "facts" or "evidence" showing any prejudice. Indeed, there is none.

[15] Since Ms. Merchant's settings limited these posts to her Facebook "Friends", it is still not clear why the State believes they were "Public", and it is still not clear how the State obtained the posts. Given the State's claim that these posts were "Public", Ms. Merchant

Thus, the public does not have access to them unless someone with whom she is Facebook "friends" screenshots them and attaches them to a pleading. The State took the extraordinary step of making these posts "public" by printing them and attaching them to the Motion, now making them accessible to the "public" at large. That does not change the fact that they had no impact, much less caused any prejudice to, the instant case.

As important, however, there is nothing in the posts that creates any "risk" to justify curtailing Ms. Merchant's First Amendment rights. She has every right to state that after four days of jury selection (a fact), that there was a mistrial (a fact) due to juror misconduct (a fact) before the jury was chosen (a fact). (See Motion, Ex. F). It was also true that it was a gorgeous day and counsel was more excited to be by her pool than in the courtroom. These are not exactly cutting edge statements intentionally designed to test the boundaries of Rule 3.6 or the kind that present any potential "risk" to the State's ability to present the case. It's nothing more than a lawyer stating she would rather spend her Friday sitting in the sun next to her pool than sitting inside in a courtroom. It's hard to imagine how such a statement presents an unethical risk to "administration of justice" or how such a statement could possibly create any prejudice.[16]

Exhibit G is simply a comment from Ms. Merchant on her original post (Exhibit F) that discusses the factual basis for the mistrial. There is nothing false about the post,

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has asked the State to identify from whom they were obtained, how they were obtained, and when they were obtained, but the State has refused to disclose this information. Correspondence between Ms. Merchant and Mr. Evans related to this issue are attached collectively hereto as Exhibit 3.

[16] As with each of the other posts at issue, the statement did not identify the defendants, the parties, the venue, did not discuss the material facts of the case, or comment on the witnesses or their testimony. In short, no one would know which case this post would apply unless they had been involved with the case as a party or lawyer.

and it merely relays the facts concerning the juror's misconduct leading to the mistrial. And again, since it occurred after the mistrial, it did not affect, nor could it, any aspect of the instant case. There is nothing specific about the case in the post, so only someone close to the case could possibly know to which case this post applied, if at all. Additionally, the post only contained information that was available publically regarding the mistrial. In short, there is nothing in Exhibit G that shows how the State has suffered any prejudice or how Ms. Merchant should reasonably expect any prejudice to the instant case as a result of her statements. Accordingly, there has been no violation of Rule 3.6 (or any other rule of professional conduct), and the Motion should be denied.

D. The Motion Improperly Seeks A Unilateral and Impermissible Gag Order Against Protected Speech.

While the Motion is not couched as a motion for gag order, that is exactly what it seeks—but only as to defense statements. The State claims that the instant case "has received considerable pretrial and post-conviction publicity which may further impact the ability to get a fair and impartial jury at a future trial date." (Motion, p.1). The State seeks a "restrictive order enforcing" to prevent defense counsel from making additional statements about the case. (*See id*., p.6).

This argument, however, was specifically rejected this month by the Georgia Supreme Court. In *WXIA-TV v. State*, No. S17A1804, 2018 WL 1143889, at *1 (Ga. Mar. 5, 2018), the superior court issued a gag order without an evidentiary hearing, finding that "this case is high profile and has generated extensive media coverage." The court concluded that "there is a reasonable likelihood that [Duke]'s Sixth Amendment right to a fair trial by an impartial jury may be prejudiced by extrajudicial statements," and for that reason, "an [o]rder restricting statements made outside the courtroom is necessary and

proper."

Following objection by several news agencies, the trial court modified the gag order and limited the order to information tracking the language of Rule 3.6. See *WXIA-TV*, at *2. The Georgia Supreme Court noted that:

> A reasonable likelihood of prejudice sufficient to justify a gag order cannot simply be inferred from the mere fact that there has been significant media interest in a case. After all, "pretrial publicity, even pervasive, adverse publicity does not inevitably lead to an unfair trial," Nebraska Press, 427 U.S. at 554 (IV), 96 S.Ct. 2791, and "[i]n the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to [the right to trial by an impartial jury]." Id. at 551 (IV), 96 S.Ct. 2791. See also Rockdale Citizen Publishing Co. v. State, 266 Ga. 579, 581, 468 S.E.2d 764 (1996).

WXIA-TV, at *7. Importantly, in vacating the gag order, the court noted that "[m]ost of the reports purport to share information gleaned from arrest warrants and other public and court records[,] and "[t]he record certainly does not suggest that any lawyers, court personnel, or law enforcement personnel have disclosed sensitive or confidential information or have attempted to effectively put [the defendant] on trial in a court of public opinion." *Id*.

Based on the foregoing, a "gag" order, which the State effectively seeks in this case, would be improper. The State has failed to make any showing other than a generalized media interest in the case, that a gag order that restricts First Amendment rights is proper. There has been no showing of prejudice or harm to any party or that the State cannot receive a fair trial in this case. None of the comments at issue justify the extreme action of gagging the parties, so the Motion should be denied.

E. By Asserting Alleged Violations Of The Georgia Rules of Professional Conduct, The State Has Invoked The Court's Equity Jurisdiction, And Because The State Has Unclean Hands, It Is Not Entitled To Any Relief.

An alleged violation of the Georgia Rules of Professional Conduct is a claim sounding in equity. *See e.g., Zelda Enterprises, LLLP v. Guarino*, 343 Ga. App. 250, 250–51, 806 S.E.2d 211, 212 (2017). Under Georgia law, before a party is permitted to seek equitable relief, the party must have "clean hands". See O.C.G.A. 23-1-10 ("He who would have equity must do equity and must give effect to all equitable rights of the other party respecting the subject matter of the action."); *Krieger v. Bonds*, 333 Ga. App. 19, 28, 775 S.E.2d 264, 271 (2015)("Georgia law prevents a party who is guilty of unclean hands from obtaining the equitable relief of specific performance."). *See also Bazemore v. U.S. Bank, N.A.*, 167 F. Supp. 3d 1346, 1357 (N.D. Ga. 2016), aff'd, 692 F. App'x 986 (11th Cir. 2017).

Here, the State has no entitlement to relief because it has unclean hands. On several occasions, it has issued press releases and made other statements in violation of Rule 3.6.[17] These press releases go far beyond the specificity provided in any Facebook post by defense counsel in the instant matter. (*See* Ex. 4). Since the State has violated the same rule it accuses defense counsel of violating, the State does not have clean hands, and, under Georgia law, is not entitled to equitable relief, and its Motion should be denied.

CONCLUSION

For each of the foregoing reasons, Defendant, Desmond Post, respectfully requests that the Court deny the State's Motion.

[17] A sampling of these press releases is attached hereto collectively as Exhibit 4.

DEFENDANT'S CROSS-MOTION FOR COSTS

Defendant, Desmond Post, hereby moves the Court, pursuant to the Court's inherent authority, to require that the State repay Cobb County's costs incurred by the county for Defendant having to respond to a frivolous and unfounded Motion filed in bad faith solely to intimidate defense counsel. In further support of the instant motion, Defendant shows the Court further as follows:

FACTUAL BACKGROUND

For the sake of brevity, Defendant incorporates as if set forth fully herein the facts set forth in his response to the State's Motion, *supra*. Additional facts are set forth below.

ARGUMENT AND CITATION OF AUTHORITIES[18]

I. THE STATE SHOULD BE ASSESSED COSTS FOR FILING IN BAD FAITH A FRIVOLOUS MOTION SOLELY TO IMPUGN THE PERSONAL AND PROFESSIONAL CREDIBILITY OF DEFENSE COUNSEL.[19]

Courts have inherent authority to regulate the conduct of attorneys as officers of the court and to control and supervise the practice of law generally, in and out of court. *Wallace v. Wallace*, 225 Ga. at 109, 166 S.E.2d 718. "[R]egulation of the practice of law is the function of the judiciary." 225 Ga. at 112, 166 S.E.2d 718. *Judicial Qualifications Comm'n v. Lowenstein*, 252 Ga. 432, 433, 314 S.E.2d 107, 108 (1984).

[18] Defendant incorporates as if set forth fully herein each of the arguments set forth in his response to the State's Motion, *supra*.

[19] The Court has previously found that all Defendants to the instant action, including Defendant Post, are indigent, and the Court appointed counsel to defend each of them in the instant case. Thus, payment for the legal services is borne by the Cobb County Circuit Defender's Office.

As shown above, the State filed its Motion with absolutely no factual or legal basis, and it was filed in bad faith solely to intimidate, harass and disparage defense counsel. But for the State's filing of a meritless motion, none of the costs associated with responding to the Motion would have been incurred, and the Cobb County taxpayers should not be required to pay these unnecessary costs.

Accordingly, Defendant respectfully requests that the Court grant the instant Motion for Costs and enter an Order requiring the Cobb County District Attorney's Office to pay these costs, including attorney's fees, transcript costs, and copying and other related costs. In support of Defendant's Motion For Costs, undersigned counsel is happy to submit an affidavit of costs detailing these costs.

Respectfully submitted this 23rd day of March, 2018.

THE MERCHANT LAW FIRM, P.C.

_____

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Attorney for Defendant, Desmond Post

EXHIBIT 1

EXHIBIT 2

EXHIBIT 3

EXHIBIT 4

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
vs.	)	
	)	CRIMINAL ACTION
DESMOND POST,	)	CASE NO. 10098
JOSEPH BROWN,	)	
and **ROLAUNDA FRIPP**,	)	
	)	
Defendants.	)	
_____	)	

CERTIFICATE OF SERVICE

The undersigned certifies that she has personally served the State Of Georgia with a true and correct copy of ***DEFENDANT'S RESPONSE AND OBJECTION TO THE STATE'S EMERGENCY MOTION TO RESTRICT EXTRAJUDICIAL COMMUNICATIONS BY COUNSEL AND DEFENDANT'S CROSS-MOTION FOR COSTS*** by hand delivery, addressed to the following:

Jesse Evans
Cobb County District Attorney's Office
70 Haynes Street
Marietta, GA 30090

This 23rd day of March, 2018.

THE MERCHANT LAW FIRM, P.C.

_____
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