IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. _____

In re

LYGLENSON LEMORIN,
CHARLENE MINGO LEMORIN,
JOEL DEFABIO, and
DAVID OSCAR MARKUS

Petitioners.

On Petition for Writ of Mandamus to the United States District Court for the Southern District of Florida

Dist. Ct. No. 06-20373-Cr-Lenard

PETITION FOR WRIT OF MANDAMUS AND REQUEST FOR EXPEDITED REVIEW

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In re LEMORIN, et al.,

Petitioners.
_____/

CASE NO. _____
(Dist. Ct. No. 06-20373-CR-Lenard)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I hereby certify that the following persons and/or entities have an interest in the outcome of this petition and the lower court proceedings:

Abraham, Patrick	Co-defendant
Acosta, R. Alexander	United States Attorney
Arango, Jacqueline M.	Assistant United States Attorney
Augustin, Burson	Co-defendant
Augustin, Rotschild	Co-defendant
Batiste, Narseal	Co-defendant
Clark, Nathan	Counsel for Rotschild Augustin
DeFabio, Joel	Petitioner / Trial counsel for Lemorin
Getchell, Jr., Richard E.	Assistant United States Attorney
Gregorie, Richard	Assistant United States Attorney
Fritz, Allyson	Assistant United States Attorney
Herrera, Naudimar	Co-defendant
Houlihan, Richard K.	Counsel for Naudimar Herrera
Jhones, Ana Maria	Counsel for Narseal Batiste
Lemorin, Charlene Mingo	Petitioner / Acquitted defendant's wife
Lemorin, Lyglenson	Petitioner / Acquitted defendant

Lenard, Joan A.	District Court Judge
Levin, Albert C.	Counsel for Patrick Abraham
Markus, David O.	Petitioner / Counsel for attorney DeFabio
O'Donnell, Adrienne E.	Counsel on writ of mandamus
Phanor, Stanley	Co-defendant
Prebish, Gregory A.	Counsel for Burson Augustin
Srebnick, Scott A.	Counsel on writ of mandamus
Vereen, Roderick D.	Counsel for Stanley Phanor

Scott A. Srebnick, Esq.

I. RELIEF SOUGHT

Petitioners LYGLENSON LEMORIN, CHARLENE MINGO LEMORIN, JOEL DEFABIO, Esq., and DAVID OSCAR MARKUS, Esq., (hereinafter "Petitioners"), through counsel, respectfully petition this Honorable Court, pursuant to the All Writs Act, 28 U.S.C. §1651(a) and 11th Cir. R. 21-1, to issue a writ of mandamus to vacate a prior restraint on speech, which violates the First Amendment.

Specifically, the petitioners seek a writ directing the district court to vacate the following orders issued in *United States v. Narseal Batiste*, Case No. 06-20373-Cr-Lenard (commonly known as the "Liberty City Seven" case), insofar as they apply to the petitioners:

> (a) the December 13, 2007, oral gag order which prohibits acquitted defendant Lyglenson Lemorin, his counsel, agents, and witnesses from making any comments to the media, and
>
> (b) the January 9, 2008, Endorsed Order granting in part and denying in part Lyglenson Lemorin's Emergency Motion to Clarify, Modify, or Vacate Oral Order, which expressly applied the oral gag order to acquitted defendant Lemorin, his attorney DeFabio, and DeFabio's attorney Markus.

See Orders (Exhibit A). Petitioners respectfully request expedited review of this petition.

II. THE ISSUE PRESENTED

> Whether a district court may, without making any findings regarding possible prejudice to the jury pool, gag an acquitted defendant and his agents (including his wife and court-appointed lawyer) from having ***any*** contact with the press – even from making comments designed to restore the acquitted defendant's reputation and to protest the acquitted defendant's continued detention in immigration custody – simply because the co-defendants are pending retrial?

III. INTRODUCTION

This petition seeks a writ of mandamus to vacate a post-trial gag order imposed by the district court on Lyglenson Lemorin, an ***acquitted defendant***, and his lawyer, his lawyer's agents, and others. The prior restraint on speech, issued without any findings, prohibits the petitioners from speaking to the media about ***any*** matter. Thus, the gag order prohibits the petitioners from publicly clearing Lemorin's name and protesting the government's past and continued mistreatment of him. This mistreatment includes the fact that, upon his acquittal, Lemorin was whisked away by federal authorities to a deportation center for undisclosed reasons, despite his status as a lawful United States resident. The gag order violates petitioners' rights under the First Amendment, and an immediate remedy is required.

IV. THE PETITIONERS

Lyglenson Lemorin ("Lemorin") was one of seven defendants charged in the highly-publicized "Liberty City Seven" case in Miami. Lemorin, a Haitian national, is a lawful United States resident who has lived in Miami for more than two decades and has no criminal history. He has a wife (Charlene) and two children. After a lengthy trial, Lemorin was acquitted of all charges, but the jury was deadlocked on the other six defendants. A retrial for the other six defendants – now the "Liberty City Six" – commenced on January 22, 2008.

Charlene Mingo Lemorin ("Mrs. Lemorin") is Lemorin's wife.

Joel DeFabio, Esq., ("attorney DeFabio") is the court-appointed attorney who obtained the acquittal for Lemorin at the first trial.

David Oscar Markus, Esq., ("attorney Markus") is the attorney who represents attorney DeFabio in his effort to lift the gag order in the district court.

V. FACTUAL BACKGROUND

1. In June 2006, a grand jury in the Southern District of Florida indicted seven defendants, including Lemorin, on charges that they conspired to support a foreign terrorist organization (al Qaeda), maliciously damage important targets in the United States (including an FBI building and the Sears Tower), and levy war against the United States.

2. In connection with the arrests, the Department of Justice held a press conference and issued a press release on June 23, 2006. *See* Press Release (Exhibit B). Attorney General Alberto Gonzalez described the defendants as "[h]omegrown terrorists" who "wished to harm our country and its citizens." *Id.* The government asserted that Lemorin and his co-defendants "pledged an oath of allegiance to al Qaeda" and "had the intent and took several steps toward fulfilling their plan of blowing up the Sears Tower and the Miami FBI building." *Id.* The government heralded the arrests in the media as "an important victory in the war on terrorism," but warned that the arrests were a "grim reminder of the persistent threat environment that exists here at home . . . ." *Id.* The press release complimented the South Florida Joint Terrorism Task Force, which "performed its mission to prevent terrorism by identifying, disrupting and prosecuting these individuals before they posed an immediate threat to our nation." *Id.*

3. The defendants were dubbed the "Liberty City Seven," in reference to the Miami neighborhood where several of the defendants resided and associated.

4. The district court ordered Lemorin detained pretrial.

5. Trial commenced on September 18, 2007. Lemorin was represented by attorney DeFabio, court-appointed counsel.

6. On November 27, 2007, at the close of the evidence, and after an article critical of the district judge appeared in the New Times (a weekly publication), (*see* Exhibit C), the district court imposed a gag order on the parties. Specifically, the district court stated as follows:

> At this juncture, based upon what has transpired in this case, I am going to order that no one associated with the case, lawyers, investigators, agents, have any conversations whatsoever with the media at this juncture, including providing transcripts to them or directing them towards anything . . . So I am going to order that nobody have any conversations whatsoever with the media at this juncture, since we've now had the close of evidence in this case.

Tr. 11/27/07, at 242-43 (attached as Exhibit D).[1]

7. The gag order was all-encompassing and substantially broader than the local rule, which prohibits a lawyer, "in connection with pending or imminent criminal litigation with which the lawyer or the firm is associated," from releasing "information or opinion" that the lawyer would expect to be disseminated publicly "if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice." S.D. Fla. L.R. 77.2.A(1).

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[1] Not a single juror acknowledged reading the article. Tr.11/27/07, at 85 (Exhibit D).

8. On December 13, 2007, after nine days of deliberation, the jury acquitted Lemorin of all charges, but failed to reach a verdict as to the other six defendants. Tr.12/13, at 4-7 (attached as Exhibit E).

9. After declaring a mistrial as to the other six defendants, the district court stated that "I absolutely am going to continue with the [gag] order. All counsel, witnesses, agents, investigators are not to talk to the media." (Exhibit E, at 14).

10. Lemorin's counsel, DeFabio, asked to be released from the gag order: "I understand the local rule as far as any comments regard the – that might affect the next jury. However, I don't believe that I should be precluded from ***any*** contact with the media now that Mr. Lemorin has been found not guilty." (Exhibit E, at 18) (emphasis added). The district court rejected the request as follows:

> I'm going to cover you by that ruling, Mr. DeFabio, as I don't find it appropriate for any of the attorneys that have been involved in this case and this trial to be making comments to the media, nor any of your agents or investigators or your witnesses. You are still covered.

(Exhibit E, at 18-19).

11. The government refused to release Lemorin after the acquittal. Instead, the government charged him with unspecified "administrative immigration violations" and whisked Lemorin to an immigration deportation center in Lumpkin, Georgia, even though he is lawful permanent resident. The government initially refused to disclose Lemorin's whereabouts to his counsel or his family and declined to discuss Lemorin's alleged immigration violations, other than to say "[h]e was detained by ICE, and for safety and security reasons, we can't say where he is." (DE:731) (Exhibit F, attached article).

12. On December 20, 2007, attorney DeFabio, as counsel for Lemorin, filed an emergency motion to clarify, modify, or vacate the gag order. (DE:721).

13. On December 31, 2007, the government filed a response in opposition, and further requested that the Court admonish Lemorin's wife Charlene for speaking to the Miami Herald. (Exhibit F, at p.2). Specifically, in an article published in the Miami Herald about the government's post-acquittal treatment of Lemorin, his wife Charlene was quoted about Lemorin's possible deportation to Haiti:

> He has kids here, and we really need him home. He can't do anything for us in Haiti. Everything was settled by the jury. He was found not guilty. It's like the nightmare is not over.

(Exhibit F, attachment).

14. On January 8, 2008, attorney David Oscar Markus filed an appearance on behalf of attorney DeFabio and requested a hearing on DeFabio's emergency motion regarding the gag order. (DE:753). Attorney Markus had not represented any of the defendants or otherwise previously been involved in the case.

15. On January 9, 2008, the court entered an Endorsed Order which denied the request for a hearing, reaffirmed the gag order, and extended it even to attorney Markus, who runs a popular legal blog about the Southern District of Florida:[2]

> [T]he gag order previously issued by the Court on December 13, 2007 applies to Lyglenson Lemorin, who is now a witness for the defense in this case (*see* D.E. 772), and his agents, as well as to Joel DeFabio, Esq., who has been appointed by the Court to represent Mr. Lemorin as a witness associated with the defense in this case, ***and to Mr. DeFabio's agents as well***.

[2] Located at: www.sdfla.blogspot.com.

(Exhibit A) (emphasis added). The district court's order referenced the fact that it had recently granted the request of one of the remaining defendants to make Lemorin a material witness at the second trial.

16. Ironically, although the district court gagged the acquitted defendant and his agents, the district court expressly permitted the jurors from the first trial to speak to the press. (Exhibit E, at 16) ("But you are free to discuss the case with anyone, if you want to, including the media."). Several jurors accepted that invitation and spoke with the media, going so far as to publicly predict that the second jury will likewise be unable to reach a verdict as to the remaining six defendants. *See, e.g.*, Kirk Semple, *Jurors Deadlock on 6 of 7 in Sears Plot*, N.Y. Times, Dec. 13, 2007 (comments by the jury foreman); *Jurors: Expect Liberty City 7 Deadlock*, News Daily, Jan. 7, 2008 ("'From now on, they are going to have a hung jury just as we did,' Jose Viola, 58, who works for Miami-Dade public schools, told the Herald. Viola sat on the original jury and said he believed all seven to be innocent.") (attached as Exhibit G).

17. On January 11, 2008, the petitioners moved to stay the gag order. (DE790). That motion remains pending. However, because of the continuing First Amendment violation, petitioners are filing this petition for a writ of mandamus.

VI. REASONS WHY THE WRIT SHOULD ISSUE

The gag order violates the First Amendment rights of the petitioners because it is overbroad and was issued without any findings to support it. The gag order precludes petitioners from discussing anything with the press, even matters that occurred in open court and are thus public knowledge, and even unrelated matters

such as Lemorin's immigration case. It precludes Lemorin and his counsel from taking reasonable steps to restore Lemorin's tarnished reputation and "reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1043 (1991) (Kennedy, J., concurring). The gag order also includes "witnesses," which may or may not include the defendant's wife (who was on Lemorin's witness list at the first trial but was not called), and it also includes DeFabio's agents, such as his attorney Markus, who entered an appearance on behalf of DeFabio to protest the gag order.

A. Mandamus Is The Appropriate Vehicle

A writ of mandamus is authorized by 28 U.S.C. §1651(a). That statute grants federal courts the power to issue writs. Traditionally, such writs have been used in the federal courts "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). While mandamus is an exceptional remedy, there is no question that mandamus is an appropriate vehicle to challenge an interlocutory order restraining speech during the pendency of a trial. *See, e.g., In re Russell*, 726 F.2d 1007 (4th Cir. 1984) (writ of mandamus brought by potential witnesses in criminal proceeding to challenge gag order); *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1294 (3d Cir. 1994). Petitioners should not be required to subject themselves to contempt in order to obtain a final appealable order. *See Chase v. Robson*, 435 F.2d 1059, 1061-62 (7th Cir. 1970).

Mandamus relief is particularly appropriate in the prior restraint context because "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). In fact, there is a "special importance of swift action to guard against the threat to First Amendment values posed by prior restraints." *Capital Cities Media v. Toole*, 463 U.S. 1303, 1304 (1983) (Brennan, Circuit Justice) ("It is clear that even a short-lived 'gag' order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect."); *see also Neb. Press Ass'n*, 427 U.S. at 559 ("A prior restraint, [] by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."). Stated simply, this Court has the authority to grant mandamus relief under the circumstances presented here.

B. Petitioners' Rights To Issuance Of The Writ Is Indisputable

Petitioners' entitlement to the issuance of the writ of mandamus is clear and indisputable because the district court's gag order (I) prevents any discussion of any type with the press, even though the district court made no findings to support the necessity of such a broad restraint on speech, (ii) extends to individuals who had and continue to have no role in the proceedings, and (iii) limits "speech critical of the exercise of the State's power," which "lies at the very center of the First Amendment." *Gentile*, 501 U.S. at 1034 (Kennedy, J., concurring).

i. The Standard of Review

In the First Amendment context, reviewing courts have a duty to engage in a searching, independent factual review of the record to ensure "that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485, 499 (1984) (*citing N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)).

ii. General Principles

"It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." *N.Y. Times Co. v. Sullivan*, 376 U.S. at 269 (citation omitted). At the same time, "a trial judge has the affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity," *Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1978), because a defendant's right to a fair trial must not be compromised. While "the guarantees of freedom of expression are not an absolute prohibition under all circumstances, . . . the barriers to prior restraint remain high and the presumption against its use continues intact." *Neb. Press Ass'n*, 427 U.S. at 570 (holding that a prior restraint on the press was overbroad, vague, and unsupported by any showing that lesser measures could not have guaranteed the defendant's right to a fair trial).

To be sure, the freedoms guaranteed under the First Amendment may be trumped by a defendant's right to a fair trial, but only upon a showing that press statements relating to judicial matters pose a "clear and present danger" to the administration of justice. *Craig v. Harney*, 331 U.S. 367, 372 (1947); *see also Neb. Press Ass'n*, 427 U.S. at 569 (requiring a showing that "further publicity, unchecked,

would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court."). As we will demonstrate below, the gag order should not apply to petitioners, who are non-parties to the criminal case. Even if they were parties, the gag order is overbroad. Furthermore, the district court made no findings to support this order.

iii. The Gag Order Should not Reach Non-parties

The "clear and present danger" standard regulates the speech of "strangers" to a criminal proceeding. *Gentile*, 501 U.S. at 1070-71 (before the state can prohibit media speech, it must show a "clear and present danger" that a malfunction in the criminal justice system will be caused by further publicity); *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1443 (9th Cir. 1995) ("[L]awyers' statements unrelated to a matter pending before the court may be sanctioned only if they pose a clear and present danger to the administration of justice."). By contrast, a lower standard than "clear and present danger" applies when the speech sought to be regulated is that of a lawyer representing a party in a pending matter. Thus, in *Gentile*, the Supreme Court held that an attorney representing a defendant in a pending matter could be required by local rule to refrain from making an extrajudicial statement "that a reasonable person would expect 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."[3] *Id.* at 1076 (emphasis added).

Gentile, however, did not address the situation involving a lawyer for an acquitted defendant who is no longer a party to a pending criminal proceeding. *Id.* at 1073, n.5 ("We express no opinion on the constitutionality of a rule regulating the statements of a lawyer who is not participating in the pending case about which the statements are made."). Nor did the Court address a gag order prohibiting ***any*** press contact; it considered the validity of a local rule limiting specific attorney speech during a pending criminal case. *Id.* at 1075-76. Finally, the Court made it clear that it "expressly contemplated that the speech of *those participating before the courts* could be limited," distinguishing participants from strangers to the litigation. *Id.* at 1072-73; *see also United States v. Scarfo*, 263 F.3d 80, 93 (3d Cir. 2001) ("*Gentile* pertains to gag orders on trial participants."); *Yagman*, 55 F.3d at 1443.

Plainly, attorney Markus and Mrs. Lemorin were never parties or participants in the lower court proceeding. Likewise, Lemorin and his attorney DeFabio are no

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[3] S.D. Fla. L.R. 77.2 imposes a stricter standard than that found constitutional in *Gentile*. Local Rule 77.2.A(1) provides:

> It is the duty of the lawyer or law firm not to release or authorize the release of information or opinion which a reasonable person would expect to be disseminated by means of public communications, ***in connection with pending or imminent criminal litigation with which the lawyer or the firm is associated***, if there is a ***reasonable likelihood*** that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

S.D. Fla. L.R. 77.2.A(1) (emphasis added). Of course, the gag order in this case is substantially broader than the local rule; it prohibits any contact with the media whatsoever.

longer trial participants in the proceeding below, notwithstanding the fact that Lemorin is a potential witness. Thus, the "clear and present danger" standard should apply to any restrictions on their speech. To be sure, undersigned counsel have found no reported cases where attorney speech was entirely prohibited after the conclusion of a judicial proceeding in which the attorney's client was acquitted.

Nonetheless, under either standard – *i.e.*, "clear and present danger" or "substantial likelihood of material prejudice" – the gag order fails because of its incredible and unprecedented breadth. In *Scarfo*, 263 F.3d at 94-95, the Third Circuit overturned a gag order barring an attorney from speaking "to the press about this case at all." The attorney had been disqualified from representing a defendant in a still-pending case, *id.* at 83, and the court found that extrajudicial comments about the case by the attorney caused no prejudice to the power of the court or the fairness of the trial. *Id.* at 95.

iv. The Gag Order is Overbroad

The gag order is overbroad because it prohibits **any contact** with the press, and the Supreme Court has repeatedly held that in a prior restraint context, an order should be clear and sweep no more broadly than necessary. *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183-84 (1968) ("An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order . . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case."). Similarly, the Supreme Court has held that where a regulation prohibits all First Amendment activities, it is

substantially overbroad. *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575, 577 (1987).

The gag order prohibits the exercise of all First Amendment activities – petitioners are unable to talk to the press on any subject. When petitioners asked for clarification as to whether petitioners could speak to the press regarding matters of public record, including Lemorin's acquittal, Lemorin's continued detention, or anything else unrelated to the second trial, (DE:753), the district court refused to modify the order prohibiting any discussion with the press. (DE:773, 789). The Supreme Court has refused to permit "restrictions on the publication of information that would have been available to any member of the public who attended an open proceeding in a criminal trial." *Capital Cities Media*, 463 U.S. at 1306 (Brennan, Circuit Justice, granting stay of gag order) (*citing Okla. Publ'g Co. v. Dist. Ct.*, 430 U.S. 308, 311-12 (1977); *Neb. Press Ass'n*, 427 U.S. at 568. The restriction on petitioners' ability to discuss Lemorin's immigration case, his acquittal, and any public events at the previous trial violates petitioners' rights under the First Amendment.

As an acquitted defendant, Lemorin should not be subject to a gag order that prohibits his ability to clear his own name and minimize the effects of government statements labeling him a "homegrown terrorist," as well as substantial negative press regarding the "Liberty City Seven" defendants. Information relating to alleged government misconduct is "speech which has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990). While it may be appropriate, especially in a high profile trial, to limit the statements

of potential witnesses about their testimony, it is constitutionally impermissible to restrain the petitioners' right to talk to the press about any and every subject. Lemorin is seeking the ability to rehabilitate his own name and reputation – not the reputation of his co-defendants – and to publicly challenge his continued detention in immigration custody after a jury acquitted him of all wrongdoing. A "blanket" gag order which restricts Lemorin and his agents from communicating with the press, however, is not narrowly tailored to achieve the important objective of protecting the interest of the public, the government, and the remaining defendants in a fair trial.

It is entirely reasonable to expect lawyers, even those who are only tangentially involved in this case, to abide by S.D. Fla. L.R. 77.2, and avoid making any comments that are reasonably likely to interfere with the fairness of the second trial or otherwise prejudice the due administration of justice. "Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct." *Gentile*, 501 U.S. at 1074 (holding that the "substantial likelihood of material prejudice standard" is a "constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials"). Even assuming that DeFabio and Markus are covered by the local rule (despite Lemorin's acquittal and discharge from the case), however, they cannot be prohibited from speaking to the press on any issue. "[B]lanket rules restricting speech of defense attorneys should not be accepted without careful First Amendment scrutiny." *Id.* at 1056 (Kennedy, J., concurring).

This is because "the criminal defense bar [] has the professional mission to challenge the actions of the State." *Id.* at 1051 (Kennedy, J., majority opinion).

The restrictions upheld in *Gentile* were aimed at "two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found." *Id.* at 1075 (Rehnquist, J., majority opinion). The "blanket" restraint on DeFabio and Markus thus sweeps too broadly and exceeds the bounds of permissible restraint on attorney speech.

v. The District Court Held no Hearing and Made no Findings

The Supreme Court has stated that the State "carries a heavy burden of showing justification for the imposition of [prior restraints of expression]." *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). Any prior restraint must be narrowly tailored to achieve a "pin-pointed" objective. *Carroll*, 393 U.S. at 183; *Tory v. Cochran*, 544 U.S. 734, 738 (2005). The district court did not hold a hearing on the issue of the continued gag order as applied to petitioners. The court made no findings to explain the necessity for the "blanket" restraint on speech. Where a gag order is entered "without a hearing, and without findings of fact that would justify it" and the judge has not raised any concern specific to the case in support of the order, the gag order is unjustified. *Capital Cities Media*, 463 U.S. at 1307 (Brennan, Circuit Justice, granting stay of gag order).

VII. REQUEST FOR EXPEDITED REVIEW

Petitioners seek expedited review of this petition because 1) the violation of their First Amendment rights is ongoing; 2) the immigration detention of Lemorin continues (despite his acquittal after 18 months of pretrial detention) and 3) the issue may become moot when the retrial concludes.

VIII. CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for writ of mandamus should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent by overnight delivery to the following named addressees, this 23rd day of January, 2008:

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