IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	**FILED UNDER SEAL**
	§	
v.	§	No. 3:12-CR-317-L
	§	No. 3:12-CR-413-L
BARRETT LANCASTER BROWN	§	No. 3:13-CR-030-L

GOVERNMENT'S BRIEF IN SUPPORT OF
LIMITING EXTRAJUDICIAL STATEMENTS

The United States, by and through the undersigned Assistant United States, files this brief in support of the government's request that this Honorable Court limit the extrajudical statements from and pretrial publicity caused by the parties.

Extrajudicial Statements are Prejudicing Barrett Brown's Ability to Have a Fair Trial

1. Barrett Brown has a Sixth Amendment right to be tried before an impartial jury that has not been exposed to extrajudicial statements or online postings causing it to convict Brown for "evidence" acquired outside of the courtroom. The Sixth Amendment also provides Brown the right to confront witnesses against him at trial and to issue legal process for witnesses to testify on his behalf. This, of course, assumes the witnesses' knowledge of the pertinent facts had not been tainted by extrajudicial statements or online postings. Witnesses and jurors repeatedly exposed to a media barrage containing false information, inadmissible evidence, character defamations, and information inculpating Brown seriously undermines Brown's right to a fair trial. Unfortunately for

Brown and the government, the Constitution prohibits enforcing a duty on the media or the public to act *responsibly*, and to not publicize (1) unsubstantiated opinions on the character or guilt of witnesses and/or the defendant, (2) unsubstantiated opinions on Brown's case, or (3) false, inadmissible, or incriminating information. While the Court cannot control the media or the public's postings, it can control the conduct of the parties in a criminal case. At the end of the day, the burden to provide Brown a fair trial rests on the government. *Neb. Press Ass'n v Stuart*, 427 U.S. 539, 588 n. 15 (1976)(Brennan, J., concurring).

2. Barrett Brown and his defense team have demonstrated a desire to encourage and manipulate media coverage to promote Brown's beliefs and his causes, and to enhance fund raising. The defense has engaged in conduct expressly discouraged in May 2013 by United States Magistrate Judge Stickney, to *not* try Brown's case in the media.[1] In 1941, in *Bridges v. California*[2], United States Supreme Court Justice Hugo Black stated, "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." What may have been problematic in 1941, has become catastrophic in 2013. Intense media coverage, especially coverage that continually espouses character assassinations and publicizes and perpetuates false and incriminating information, may destroy a defendant's chances for a fair trial.

[1] On May 1, 2013, at the conclusion of a hearing before United States Magistrate Judge Stickney, Brown's current counsel assured Magistrate Judge Stickney that they did not intend to try the case in the media.

[2] 314 U.S. 252, 271 (1941).

Government's Request

3. The government respectfully requests this Honorable Court to limit the extrajudicial statements made by the parties that have a substantial likelihood to adversely affect the defense's and the government's ability to have a fair trial. The order must be "sufficiently narrow to eliminate substantially only that speech having a meaningful likelihood of materially impairing the court's ability to conduct a fair trial." *United States v. Brown*, 218 F. 3d 415, 429 (5th Cir. 2000). The government suggests the following language.

> Without obtaining prior approval from this Court, no party[3] shall intentionally directly or indirectly contact or communicate or cause contact or communications with any member of the media[4] or openly discuss the case knowing that the media is present or that the communication will be repeated in the media. Neither shall any party post, directly or indirectly, or cause another to post, any comment or information pertaining to this case in the media except for information made public on the Court's docket sheet.

Restricting Pretrial Publicity

4. In certain situations, the Court may enjoin the attorneys of record from making statements to the media about a case when those statements and the resulting media coverage presents a substantial likelihood of prejudicing the trial's integrity. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1033-58 (1991). See, e.g., Radio & *Television News Ass'n v. United States Dist. Court*, 781 F.2d 1443, 1446 (9th Cir. 1986) (noting that while

[3] Party is defined as the prosecution team and staff, the defendant, and his defense team (the attorneys of record and their staff, any other persons employed or retained by the defense in support of the defendant's defense).

[4] Media is defined as a means of mass communication (especially television, radio, newspapers, and the Internet) regarded collectively.
http://oxforddictionaries.com/us/definition/american_english/media

the media may question attorneys about the trial if they wished, the lawyers just may not be free to answer); *Levine v. United States Dist. Court*, 764 F.2d 590, 598 (9th Cir. 1985) (citing circus-like atmosphere that surrounds highly publicized trials and threatens integrity of the judicial system); *People v. Buttafuoco*, 599 N.Y.S.2d 419, 420-24 (N.Y. Co. Ct. 1993) (holding regulation of the attorneys' speech was constitutionally sanctioned). Any order restricting the pretrial extrajudicial statements must be sufficiently limited in scope and adequately supported by the Court's factual findings.

5. As this Court knows, the government is limited in its ability to communicate with the media[5], and therefore cannot correct all the false information spouted and regurgitated by the media, much of which in this case came from or was condoned by the defendant, his attorneys and supporters.

6. In its Code of Professional Responsibility (CPR) Rule 3.6(a), the American Bar Association provided some guidance limiting an attorney's manipulation of trial publicity, specifically stating that "[a] lawyer who is participating or has participated in the investigation or litigation of a matter shall **not** make an extrajudicial statement that

[5] 28 C.F.R. 16.26(b) provides that the government should avoid any statement or presentation that would prejudice the fairness of any subsequent legal proceeding by violating any statute or specific regulation, or by disclosing classified information, a confidential source, investigatory records compiled for law enforcement purposes that would impair the effectiveness of investigatory techniques, or reveal a trade secret. 28 C.F.R. 50.2 provides that the government should (1) avoid disseminating any information that could influence the outcome of a trial or that serves no particular law enforcement function; (2) refrain from subjective observations about the accused's arrest, charges, character, or credibility; (3) avoid revealing the accused's prior criminal record, statements, admissions, confessions, or alibi except in extraordinary circumstances or where such information is an element of the charge or is part of the public record in the case at issue; (4) refrain from providing opinions as to the guilt of the accused or the possibility of a plea; (5) refrain from making reference to investigative procedures or results of examinations or tests (such as fingerprints, ballistics or laboratory tests) or the refusal by the accused to submit to such tests; and (6) refrain from making statements concerning the identity, testimony or credibility of prospective witnesses.

the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." (emphasis added).

7. The Texas Disciplinary Rules of Professional Conduct (TDRPC) Rule 3.07 provided extensive guidance addressing an attorney's role regarding trial publicity:

> (a) In the course of representing a client, a lawyer shall not make 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 adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.
> (b) A lawyer ordinarily will violate paragraph (a), and the likelihood of **a** violation increases if the adjudication is ongoing or imminent, by making an extrajudicial statement of the type referred to in that paragraph when the statement refers to:
>
> > (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness; or the expected testimony of a party or witness;
> > (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense; 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;
> > (3) the performance, refusal to perform, or results of any examination or test; the refusal or failure of a person to allow or submit to an examination or test; or the identity or nature of physical evidence expected to be presented;
> > (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or
> > (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

8. The Court in *Gentile v. State Bar of Nevada* silenced the extrajudicial speech of the attorneys in the case, relying heavily on the concept that the attorneys were officers of the court and trusted with a fiduciary duty not to disrupt and manipulate the integrity of judicial system. *Gentile v. State Bar of Nevada*, 501 U.S. at 1056-57, 1074-75. The substantial likelihood standard, also the standard in the Fifth Circuit, was found to be constitutional. *Gentile v. State Bar of Nevada*, 501 U.S. at 1074-75; *Brown*, 218 F.3d at 428.

9. When considering whether to issue restraining pretrial publicity, the Supreme Court in N*eb. Press Ass'n v. Stuart* instructed lower courts to determine "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger." N*eb. Press Ass'n v. Stuart*, 427 U.S. at 562.

In Barrett Brown's Case the Alternatives are Insufficient

10. While the Court has other tools to address pretrial publicity, such as protective orders, change of venue, sequestration, and specific instructions to the jurors, none of these can undo the harm already done or prevent the ongoing harm. The Court's Agreed Protective Order[6] has not thwarted the defense's media strategy. The media coverage is nationwide, and thus a change of venue will not help. Sequestration and jury instructions are trial remedies, and do not address the pretrial extrajudicial statements occurring now

[6] On June 20, 2013, this Honorable Court issued an agreed protective order. The government began negotiating that agreed protective order with the current defense counsel on May 29, 2013.

and expected to continue to occur up until and during the trial in the case, approximately seven months from now.

Rolling Stone Article (August 29, 2013)

11. A review of the most recent article published about Barrett Brown in Rolling Stone (August 29, 2013) reveals several violations of the Texas Disciplinary Rules of Professional Conduct. The article appears to start with a first-hand description of a meeting between Barrett Brown and his attorney Ahmed Ghappour, quoting statements from Brown to Ghappour. However, the Rolling Stone author was not present and has never talked on the telephone to Brown from jail. Ghappour provided information to the Rolling Stone author that would be inadmissible in court. The author quoted Ghappour expressing his opinion about the charges, and stating false facts about the evidence in the case.

12. Perhaps without realizing the prejudicial effects on Brown, the media repeatedly has publicized potentially inadmissible and prejudicial information, such as Brown's (1) incarceration status, (2) anarchist idealology, (3) three indictments and potential sentences, (4) admissions of conduct and involvement in Anonymous activities, (5) relationship to other Anonymous figures or hackers, (6) troubled childhood and alternative schooling, (7) declaration that he was an atheist, (8) use and abuse of ecstasy, acid, heroin, suboxine, and marijuana, (9) lack of steady employment, (10) claimed diagnoses of ADHD and depression, (11) associates descriptions of Brown as a junkie, name fag, moral fag, court jester, (12) self-proclaimed and otherwise assigned titles with Anonymous (spokesperson, senior strategist), (13) receipt of data stolen through hacks

conducted by other Anonymous members, (14) use of the stolen data to prank call individuals, publicize personal and confidential information, (15) associates and Brown opining that Brown would end up in jail, and (16) property seized by FBI. See, 9/29/2013 Article in Rolling Stone by Alexander Zaitchik entitled *Barrett Brown Faces 105 Years in Jail. But No One Can Figure Out What Law He Broke.*

13. In *Brown* the court recognized that "[a]lthough litigants do not surrender their First Amendment rights at the courthouse door, those rights may be subordinated to other interests that arise in the context of both civil and criminal trials." *Brown*, 218 F. 3d at 424, citing *Seattle Times Co. v. Rhinehart*, 476 U.S. 20, 104 S.Ct. 2199, 2207–08 n. 18 (1984). *Brown* provides guidance to deal with what is possibly a prior restraint.

14. In *Brown*, the court opined that a gag order applicable to the lawyers and participants was constitutionally permissible because it was based on a "reasonably found substantial likelihood that comments from the lawyers and parties might well taint the jury pool." Id., at 423, 427. In *Brown*, the court determined that disseminating evidence and information to the media threatened the integrity of the judicial proceeding because the evidence or information disseminated may ultimately be inadmissible. *Brown*, 218 F. 3d at 423 n. 8.

Conclusion

15. In the instant case, Barrett Brown, directly and indirectly, has disseminated false and misleading information to the media that would never be admissible, and which surely would influence and prejudice the potential witnesses and the jury pool. Barrett Brown, directly and indirectly, has disseminated opinions as to the parties, the evidence,

and witnesses which would influence and prejudice the potential witnesses and the jury pool. For these reasons, the government respectfully requests that this Honorable Court limit the extrajudical statements from and pretrial publicity caused by the parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2013, I electronically filed the foregoing document with the clerk for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to Brown's attorneys of record Ahmed Ghappour, Charles Swift, and Marlo Cadeddu, who consented in writing to accept this Notice as service of this document by electronic means.

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