

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE OF ALABAMA

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v.

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* CASE NO. CC 11-1569

CARLOS KENNEDY,

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Defendant.

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ORDER REGARDING ELECTRONIC DEVICES AND CONTACT WITH
JURORS, POTENTIAL JURORS AND WITNESSES

This ORDER applies to ANYONE who receives a copy of it; receives notice of its issuance; and/or knows or should know that an Order of this type has probably been issued but declines to inquire regarding its specifics. Additionally, it applies to anyone entering or outside of the Ceremonial Courtroom or Courtroom 6600. It covers all "Parties" and agents, employees or relatives of a "Party". "Party" as herein used is defined as the District Attorney Office for the 13th Circuit and the Defendant and his counsel. However, the provisions of paragraph #2 DO NOT APPLY to Counsel for the State, Counsel for the Defendant or any employee acting on their behalf. **ALL** provisions of this Order apply to any and all family members of the victim if they attend any session of Court on this matter even one time and any and all family members of the Defendant, if they attend any session of Court even one time.

The Sixth Amendment to the United States Constitutions states, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial" The Framers had seen firsthand to despotism of

the British Monarchy holding secret trials or trials based upon written affidavits.

Because of this history, they enshrined in our Constitution the right to a public trial in all criminal cases. The right to a public trial in criminal cases is also guaranteed specifically in Alabama by Article I, Section 6 of the Alabama Constitution of 1901:

That in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; and to have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and, in all prosecutions by indictment, a speedy, public trial, by an impartial jury of the county or district in which the offense was committed;

The right to a public trial necessarily involves the right to not only observe but to take notes of the proceedings.

The Court is aware that technology has advanced to a point that pen and pad have been replaced with the Iphone, laptop, Blackberry, and Android/smart phone. These devices not only allow a spectator, including members of the press, to take notes but allow the transmission of these notes outside the courtroom to the public, including witnesses. These devices are normally used to take and transmit notes and not to make verbatim recordings.

Questions have arisen in some jurisdictions over the propriety of allowing the use of these electronic devices by members of the news media and spectators to take notes and transmit these notes to media sites outside the courtroom including Twitter. Rule 615 of the *Alabama Rules of Evidence* governs the exclusion of witnesses. This is often

referred to as “The Rule,” but more properly as “The Rule on Sequestration of Witnesses”.

Rule 615, *Alabama Rules of Evidence* provides:

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, (2) an officer or employee of a party which is a natural person designated as its representative by its attorney, (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a victim of a criminal offense or the representative of a victim who is unable to attend, when the representative has been selected by the victim, the victim's guardian, or the victim's family.

It is of no significance whether the courtroom spectator using an electronic device is a *bona fide* member of the mainstream news media or not. “*The First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, the public's right of access to information is coextensive with that of the press.*” *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978).

Rule 615 *Alabama Rules of Evidence* empowers a circuit judge to keep witnesses from speaking to other witnesses about each other’s testimony. *See Gautney v. State*, 222 So.2d 175 (Ala. 1969).

The reasoning for “The Rule” is to prevent witnesses from hearing the testimony of other witnesses and perhaps then having their testimony corrupted. However, “The Rule” as usually applied, does not prevent a witness from reading a newspaper account of opening statements or some other non-testimonial portion of the trial. This conduct must be addressed by

specific Motion and Order which is all but impossible if the conduct occurs before the trial starts.

The sequestration of witnesses under 'The Rule' while rarely to be withheld upon request, is nevertheless discretionary with the trial court. And, where, for instance, a witness has remained in the courtroom in violation of the rule, the trial court's decision as to his testifying or not is not open to review.

Wilson v. State, 52 Ala. 299 (1875) Note: case tried in Mobile before the Hon. Oliver J. Semmes, circuit judge (nephew of Raphael Semmes); *Teague v. State*, 245 Ala. 339 (1944).

The effectiveness of sequestration-which can only occur during the trial-is probably overrated. The law has moved from oath-taking to cross examination in its search for the truth. *Lewis v. State*, 313 So.2d 566 Ala.Cr.App. (1975).

For the reasons cited above, the Court finds that using and transmitting information regarding what is happening in the courtroom by the use of Twitter, text messaging, email through the use of portable electronic devices and all other non-vocal communications while court is in session is simply the 21st Century equivalent of a 18th Century scrivener, quill pen and parchment in hand, taking notes. Thus, the Court finds that using a laptop, "smart-phone", or any other electronic device to take notes and send messages, is protected by both the First Amendment to the Constitution of the United States and by Article I, Section 4 of the Constitution of Alabama (1901).

The same rules of courtroom courtesy apply to those in the courtroom who may be using an electronic device to take notes. Among these Rules are:

1. The requirement to remain silent.
2. The requirement not to talk or communicate with any witnesses or parties.
3. The requirement not to talk to or attempt to talk to any member of the trial jury or of the jury pool or venire (the 30-100 or more jurors who are questioned during *voir dire*) either before the trial, during the trial, or during deliberations. A Post Trial Jury Contact Order will be issued at the conclusion of the trial.

4. No recording of any matter in the courtroom will be permitted, whether by audio or video as it is a violation of the law. This includes photographs and video which might be taken from inside the courtroom.

5. Paragraph 4 does not apply to the tradition in this Circuit of photography or videography taken from outside the courtroom through the glass windows.

Violations of any of the above provisions will be dealt with harshly, which can include a custodial sentence in Mobile County Metro Jail.

DONE and ORDERED this 8th day of May, 2013.

s/JOSEPH S. JOHNSTON
CIRCUIT JUDGE
13TH JUDICIAL CIRCUIT
STATE OF ALABAMA