

IN THE CIRCUIT COURT
FOR WILLIAMSON COUNTY, TENNESSEE

STATE OF TENNESSEE,

Plaintiff

v.

I-CR-086639-B

DONALD POWELL,

Defendant

**RESPONSE TO GOVERNMENT'S MOTION IN LIMINE TWO —
"The Government"**

The government has moved to ban the word "government." The State of Tennessee offers precisely zero legal authority for its rather nitpicky position, and the defense can find none. The Plaintiff has failed to carry its burden on this motion. Moreover, the Plaintiff's proposed ban on speech would violate the First Amendment. The motion should be denied.

First, numerous courts do frequently use the term "the government" to describe the prosecution. After all, "[t]he prosecutor's office is an entity[,] and as such it is the spokesman for the Government." *Giglio v. United States*, 405 U.S. 150, 154 (1972). For other instances, including many instances where the term is applied to state governments, *see, e.g., Bell v. Wolfish*, 441 U.S. 520 (1979); *Brewer v. Williams*, 430 U.S. 387 (1977); *In re: Winship*, 397 U.S. 358 (1970). And although Tennessee state courts more commonly use the designation "the State," even they sometimes use the phrase "the government," and *not* just when quoting another court, either. *See, e.g., Hickman v. State*, 153 S.W.3d 16, 26 (Tenn. 2004); *House v. State*, 44 S.W.3d

508, 512, 513 (Tenn. 2001). *State v. Caughron*, 855 S.W.2d 526, 545-46 (Tenn. 1993); *State v. Turnbill*, 640 S.W.2d 40, 43 (Tenn. Crim. App. 1982); *see also* Tenn. R. Crim. P. 16(a)(1)(F)(ii).

Overall, it thus seems doubtful that all these judges are trying to demean prosecutors.

In any event, such a ban on terminology would violate the First Amendment. In *Gentile v. State Bar of Nevada*, a divided Supreme Court noted (in various split opinions) that the First Amendment *does* protect a lawyer working on a criminal case. 501 U.S. 1030 (1991) (Reversing disciplinary sanction against lawyer who held a press conference). However, the court could not fully agree on to what extent. But even when a court may regulate speech, this fact alone "does not mean . . . that lawyers forfeit the First Amendment rights, only that a less demanding standard applies," compared, e.g., to regulations affecting the press. *Id.* at 1082 (O'Connor, concurring). In *Gentile*, the court upheld a restriction on speech posing a "substantial likelihood of materially prejudicing an adjudicative proceeding." *See id.* at 1033. In the case *sub judice*, the proposed word ban would not even come close to meeting this standard. Nor does it basically serve any legitimate governmental purpose. Therefore, the ban violates the First Amendment.

Should this Court *disagree*, and feel inclined to let the parties basically *pick* their own designations and ban words, then the defense has a few additional suggestions for amending the speech code. First, the Defendant no longer wants to be called "the Defendant." This rather archaic term of art, obviously has a fairly negative connotation. It unfairly demeans, and dehumanizes Mr. Donald Powell. The word "defendant" should be banned. At trial, Mr. Powell hereby demands be addressed only by his full name, preceded by the title "Mister." Alternatively, he may be called simply "the Citizen Accused." This latter title sounds more respectable than the criminal "Defendant." The designation "That innocent man" would also be acceptable.

Moreover, defense counsel does not wish to be referred to as a "lawyer," or a "defense attorney." Those terms are substantially more prejudicial than probative. *See* Tenn. R. Evid. 403. Rather, counsel for the Citizen Accused should be referred to primarily as the "Defender of the Innocent." This title seems particularly appropriate, because every Citizen Accused is presumed innocent. Alternatively, counsel would also accept the designation "Guardian of the Realm." Further, the Citizen Accused humbly requests an appropriate military title for his own representative, to match that of the opposing counsel. Whenever addressed by name, the name "*Captain Justice*" will be appropriate. While less impressive than "General," still, the more humble term seems suitable. After all, the Captain represents only a Citizen Accused, whereas the General represents an entire State.

Along these same lines, even the term "defense" does not sound very likeable. The whole idea of being *defensive*, comes across to most people as suspicious. So to prevent the jury from being unfairly misled by this ancient English terminology, the opposition to the Plaintiff hereby names itself "the Resistance." Obviously, this terminology need only extend throughout the duration of the trial — not to any pre-trial motions. During its heroic struggle against the State, the Resistance goes on the attack, not just the defense.

WHEREFORE, Captain Justice, Guardian of the Realm and Leader of the Resistance, primarily asks that the Court deny the State's motion, as lacking legal basis. Alternatively, the Citizen Accused moves for an order in limine modifying the speech code as aforementioned, and requiring any other euphemisms and feel-good terms as the Court finds appropriate.

Respectfully submitted,

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Certificate of Service

The undersigned counsel certifies that he has mailed or personally delivered a copy of this filing to Assistant District Attorney Tammy Rettig, P.O. Box 937, Franklin, TN 37065.

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