IN THE CIRCUIT COURT OF
MACON COUNTY, MISSOURI

State of Missouri,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No. 12MA-CR00085
	)	
Justina Griffin,	)	
	)	
Defendant.	)	

SUGGESTIONS IN SUPPORT OF MOTION TO VACATE

I. Background

As set forth in the motion, Defendant, Justina Griffin, was ordered on September 27, 2012, "to write a letter of apology to the Prosecutor's staff and clerk's staff" and to deliver the same on or before November 1, 2012. The case is set for review on November 1, 2012.

II. Argument

a. This Court lacked jurisdiction to order Defendant to write letters of apology

"Once judgment and sentencing occur in a criminal proceeding, the trial court has exhausted its jurisdiction. It can take no further action in that case except when otherwise expressly provided by statute or rule." *State ex rel. Mertens v. Brown*, 198 S.W.3d 616, 618 (Mo. 2006). Judgment and sentencing occurred on June 14, 2012. The Court thereafter exhausted its jurisdiction, except as expressly provided by statute or rule. There is no statute or rule that provided jurisdiction for this Court to order Defendant to write a letter of apology. Judicial action taken without jurisdiction "are absolutely void." *State v. Armstrong*, 605 S.W.2d 526, 529 (Mo. App. E.D. 1980).

Because this Court lacked jurisdiction to enter it, the portion of the September 27, 2012, order directing Defendant "to write a letter of apology to the Prosecutor's staff and clerk's staff" and to deliver the same on or before November 1, 2012, is void and should be vacated.

b. This Court's order requiring Defendant to author and deliver letter of apology violates the First Amendment.

The First Amendment protects both the freedom to speak and the freedom from compelled speech. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, (1943). "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted).

The order requiring Defendant to apologize violates the First Amendment in two ways. First, it represents the government placing a requirement on a citizen for that citizen's speech about a matter of public concern. Second, it is compelled speech.

"Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011)(internal quotations omitted). "Speech on matters of public concern is at the heart of the First Amendment's protection." *Id.* at 1215 (alterations and quotations omitted). "The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-

open.'" *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Defendant's speech was public employees carried out their official duties. In addition, she expressed her preference for a particular candidate in an upcoming election. These are matters of public concern.

The Supreme Court has recognized certain categories of speech that are not protected; however, nothing Defendant wrote falls into these limits, which include obscenity (*Roth v. United States*, 354 U.S. 476, 483 (1957)), defamation (*Beauharnais v. Illinois*, 343 U.S. 250, 254–255 (1952)), fraud (*Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)), incitement (*Brandenburg v. Ohio*, 395 U.S. 444, 447–449 (1969) (per curiam)), and speech integral to criminal conduct (*Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). Indeed, "[c]omments regarding pending court cases—when made by non-lawyers—are protected by the First Amendment." *Smith v. Pace*, 313 S.W.3d 124, 133 (Mo. 2010). Defendant's speech is entitled to First Amendment protection.

In addition, an apology was directed because of the viewpoint of Defendant's speech. An apology would not have been required had Defendant taken to Facebook to praise this Court's conduct or to commend the professionalism of the Prosecutor's staff. "Viewpoint discrimination by a state actor is antithetical to the First Amendment, one of our country's most cherished constitutional rights." *Parents, Families, & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888, 902 (W.D. Mo. 2012).

Even if Defendant had been given the procedural safeguards of an indirect contempt proceeding, the court would be impotent to punish her speech. "[S]tatements about pending cases by non-lawyers are protected by the First Amendment under a 'clear and present danger' standard." *Smith v. Pace*, 313 S.W.3d 124, 134 (Mo. 2010). Smith described a previous case in

which Mr. McMilian was charged with indirect criminal contempt for his statements about a judge regarding a pending case. *McMilian v. Rennau*, 619 S.W.2d 848, 850 (Mo.App.1981). McMilian had telephoned the court and asked to speak to Judge Gant about criminal charges that were pending involving McMilian's son. *Id.* When the bailiff informed him that the judge would not engage in ex parte discussions regarding a pending case, McMilian told the bailiff: " 'Tell Judge Gant that all judges are full of sh*t and tell Judge Gant to stick it up his f**king *ss.' " *Id.* The court echoed the Supreme Court's decisions and held that a contempt conviction requires "a demonstrated impediment to the judicial process, real, threatened and imminent." *Id.* at 853. The court noted that although McMilian's remarks were "offensive and boorish, [they] were far less egregious than the widely published statements [protected in previous cases]." *Id.* Defendant's statements posed no impediment to the judicial process.

The remedy ordered —an apology—is also unconstitutional. The order compels Defendant to engage in actual (and symbolic) speech by writing letters apology for statements made on Facebook and delivering them to offended public employees. This is compelled speech—like the government-enforced association in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995); the required salute of the flag in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 628 (1943); and the mandate to show the words "Live Free or Die" on state license plates in *Wooley v. Maynard*, 430 U.S. 705 (1977). Speech compelled by the government was held unconstitutional in each instance and is unconstitutional here.

III. Conclusion

For these reasons, Defendant respectfully requests that this Court vacate the portion of its September 27, 2012, order directing Defendant "to write a letter of apology to the Prosecutor's staff and clerk's staff" and to deliver the same on or before November 1, 2012.

Respectfully submitted,

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Certificate of Service

I certify that a copy of the foregoing was mailed and faxed on October 18th, 2012, to the following:

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