

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

Derek Michael Chauvin,

Defendant.

Court File No. 27-CR-20-12646

**DEFENDANT’S OBJECTION
TO THE COURT’S
SUA SPONTE GAG ORDER**

TO: THE HONORABLE PETER A. CAHILL, JUDGE OF HENNEPIN COUNTY DISTRICT COURT; AND KEITH ELLISON, ATTORNEY GENERAL OF MINNESOTA.

INTRODUCTION

On July 9, 2020, this Court issued a Gag Order in the above-captioned case, as well as in the matters of Defendant Derek Michael Chauvin’s co-defendants. The Court’s stated bases for doing so were that it had “been made aware that two or more attorneys representing parties in the above-captioned cases granted interviews or talked with the media” on July 8, 2020, as well as its belief that “continuing pretrial publicity in this case by the attorneys involved will increase the risk of tainting a potential jury pool and will impair all parties’ right to a fair trial.” (Gag Order at 1). Defendant Chauvin’s counsel has not spoken with the press or granted an interview at any point in this matter. The Court issued its order *sua sponte*, without sufficient notice to Defendant, without citing legal authority, and without a hearing. Defendant objects to the Court’s Gag Order and requests that it be vacated.

OBJECTION

The Minnesota Constitution provides that “all persons may freely speak, write and publish their sentiments on all subjects” with the caveat that they shall also be “responsible for the abuse

of such right.” Minn. Const., Art. I § 2. The Constitution further provides that all criminal defendants “shall enjoy the right to a... public trial.” *Id.* at § 6. By issuing its gag order without notice or hearing, the Court has deprived the Defendant of these rights “without due process of law,” as required by Article I, section 7 of the Minnesota Constitution and the Fourteenth Amendment to the United States Constitution (“nor shall any State deprive any person of life, liberty, or property, without due process of law”). “[N]otice and a meaningful opportunity to be heard are the basic requirements of procedural due process.” *State v. Hentges*, 844 N.W.2d 500, 508 (Minn. 2014).

While the Court may have a legitimate interest in reducing prejudicial pretrial publicity to ensure that defendant’s Article I, section 6 right to “an impartial jury” be protected, this is by no means a usual case. The present matter is, without qualification, one of the most closely watched cases, not only in Minnesota or the United States, but in the world right now.

We have not yet reached the omnibus hearing in this case, yet Mr. Chauvin has frequently been called a “murderer”¹ or “killer”² in the press, and the death of George Floyd has been referred to as a “murder” in global media³ and across news headlines countless times. Since the week of the incident, Attorney General Keith Ellison, who was charged with prosecuting this case, has appeared in the local and national press, making statements like, “Nor would I be part of a

¹ See, e.g., <https://www.washingtonpost.com/opinions/2020/05/31/filing-charges-george-floyds-death-was-easy-part/>, accessed Jul. 11, 2020.

² See, e.g., <https://www.bet.com/news/national/2020/06/13/derek-chauvin-could-receive-pension.html>, accessed Jul. 11, 2020.

³ See e.g., <https://www.newyorker.com/news/daily-comment/the-death-of-george-floyd-in-context>; <https://www.aljazeera.com/news/2020/07/officer-lawyer-seeks-dismissal-george-floyd-murder-charges-200708204031706.html>; <https://abcnews.go.com/US/minority-jail-officers-barred-guarding-cop-charged-george/story?id=71370624>, all accessed Jul. 11, 2020.

prosecution unless I believed the person was guilty and... needed to be held accountable”⁴ and “This case is unusual because of the way Mr. Floyd was killed and who did it: at the hands of the defendant, who was a Minneapolis Police officer.”⁵ The Hennepin County Attorney’s Office, which initially charged Mr. Chauvin, unethically⁶ leaked plea negotiation information to the media, which was reported locally, at first, and then picked up by the national news media.⁷

Minneapolis Police Chief Medaria Arradondo⁸ and Commissioner of Public Safety John Harrington⁹ have both called George Floyd’s death a “murder” in the press. Minneapolis Mayor Jacob Frey also called the death a “murder” in the national news media.¹⁰ President Trump has weighed in, saying he “couldn’t really watch” the bystander video and that “it doesn’t get any more obvious or it doesn’t get any worse than that.”¹¹ Senate Majority Leader Mitch McConnell referred to “the murder of George Floyd” in a public statement.¹² On June 8, 2020, Minnesota Governor Tim Walz issued a proclamation, declaring a statewide 8 minutes and 46 seconds of silence to honor George Floyd, noting that the “world watched in horror as George Floyd’s humanity was

⁴ <https://www.nbcnews.com/podcast/into-america/american-uprising-keith-ellison-george-floyd-s-death-n1222271>, accessed Jul. 12, 2020.

⁵ <https://minnesota.cbslocal.com/2020/05/31/attorney-general-keith-ellison-to-take-over-george-floyd-case/>, accessed Jul. 12, 2020.

⁶ See Minn. R. Prof. Resp. 3.6 and 3.8.

⁷ <https://abcnews.go.com/US/derek-chauvin-guilty-plea-deal-fell-prosecutors-office/story?id=71180109>, accessed Jul. 12, 2020.

⁸ <https://www.cnn.com/2020/06/24/us/minneapolis-police-chief-comment-george-floyd-trnd/index.html>, accessed July 12, 2020.

⁹ <https://bringmethenews.com/minnesota-news/dps-commissioner-calls-george-floyd-death-a-murder-thats-what-it-looked-like-to-me>, accessed July 12, 2020.

¹⁰ <https://www.nytimes.com/2020/06/03/podcasts/the-daily/jacob-frey-george-floyd-protests-minneapolis.html>, accessed July 12, 2020.

¹¹ <https://www.cbsnews.com/news/donald-trump-george-floyd-death-video/>, accessed Jul. 12, 2020.

¹² See <https://www.nytimes.com/2020/06/17/us/politics/congress-police-reform-bill.html>, accessed Jul. 11, 2020.

taken away from him.”¹³ Singer Jon Bon Jovi has already written, recorded, and released for download, a song about the death of George Floyd, which is referred to as “a murder” in publicity surrounding the song’s release.¹⁴ Finally, the Minnesota Attorney General’s son, Jeremiah Ellison, who is a Minneapolis City Council member, referred to Floyd’s death in at least one interview, saying, “I think it was murder. I think that’s evident from the video. And not only on officer Chauvin’s part[.]”¹⁵ Ellison is now spearheading the effort to dismantle and defund the Minneapolis police department while his father prosecutes this case.

For more than a month, the press, popular figures, high ranking politicians, and the attorney leading this prosecution—as well as his city councilman son—have all rendered their verdicts in this case publicly and on the most public stages possible. And they have all deemed the Defendant guilty. On the other hand, one would be hard pressed to locate any pretrial publicity referring extensively to Mr. Chauvin’s innocence until proven guilty or that his alleged actions were justifiable in the line of his duties as a Minneapolis Police Officer and a licensed peace officer in the State of Minnesota—certainly not in national or global media, and certainly not in proportion to reports and opinions to the contrary. In fact, unlike Mr. Chauvin’s codefendants and their attorneys, neither Mr. Chauvin nor his counsel have spoken publicly about this case outside the courtroom.

Yet, in light of the overwhelming pretrial publicity damning Mr. Chauvin —likely more publicity than any court in this state has seen in a very long time, if ever—this Court’s response to

¹³ *See* https://mn.gov/governor/assets/Moment%20of%20Silence%20for%20George%20Floyd_tcm1055-435186.pdf, accessed July 11, 2020.

¹⁴ *See* <https://ultimateclassicrock.com/bon-jovi-american-reckoning/>, accessed Jul. 11, 2020.

¹⁵ <https://www.democracynow.org/2020/5/29/minneapolis>, accessed Jul. 11, 2020.

an interview given by *another attorney in another case* was to restrict Mr. Chauvin's right to speak freely on any subject—without cause, notice or hearing. There is absolutely no reason that Mr. Chauvin's case or counsel should be treated the same as those of his codefendants. His counsel has not spoken to the media, he is facing a different set of charges, and his rights were not addressed by the Court when it issued the gag order.

This Court cites no statute, rule, or case to support its *sua sponte* gag order. In fact, the only authority cited at all in the order is a reference to Minn. R. Crim. P. 25.03—under which the Court insists it's not restricting access to public records in this case. Because it's the only authority cited by the Court, however, one must presume that this is the rule from which the Court attempts to derive its authority to issue such an order. However, the plain language of rule 25.03, states that a “restrictive order may be issued *only on motion, and after notice and hearing.*” *Id.* at subd. 2(a). None of these occurred here. If rule 25.03 is not the basis for the gag order, then the Defendant is entitled to know the authority on which the Court relies.

At this stage of the proceedings, after more than six weeks of one-sided global news cycles, the Court's gag order is clearly not preventing pretrial publicity that may taint the jury pool and violate Mr. Chauvin's right to trial by an “impartial jury.” The Court justifies its order as a way to curtail the “risk of tainting a potential jury pool [that] will impair all parties' right to a fair trial.” (Gag Order at 1). However, the Constitutional right to a fair and public trial by an impartial jury belongs to the Defendant—not the State. *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (the trial rights guaranteed by the Constitution are “for the benefit of the accused”). Moreover, a defendant's right to a public trial applies to pretrial proceedings. *State v. Smith*, 876 N.W.2d 310, 328 (Minn. 2016) (right to a public trial “applies to all phases of a trial”). The Court cannot waive this constitutional right on Mr. Chauvin's behalf by issuing a *sua sponte* gag order without notice or the opportunity

to be heard—especially since the State is the only party to this matter that has benefitted from the pretrial publicity in this case and their efforts reasonably be known “substantial likelihood of materially prejudicing a jury trial in a criminal matter.” Minn. R. Prof. Resp. 3.6(a).

The Court’s gag order outright prevents any mitigating or exculpatory information from entering the public conversation. Given the global extent and tenor of the pretrial publicity in this case, halting the flow of any information from Mr. Chauvin, through his counsel—before even a single statement has been made—to the public is more likely to prejudice the jury pool (to the extent that it has not already) than to prevent a taint. The Court’s order effectively allows the repeated and unmitigated condemnation of a criminal defendant by non-party public officials and celebrities.

Neither Minnesota courts nor the Eighth Circuit appear to have discussed the constitutionality of gag orders as applied to a defendant or his counsel. The Seventh Circuit, however, has held that, in order to overcome constitutional speech protections, “lawyers’ comments about pending or imminent litigation must be proscribed” only if they pose a “serious and imminent threat of interference with the fair administration of justice.” *Council of Lawyers v. Bauer*, 522, F.2d 242, 249-50 (7th Cir. 1975). Here, again, Mr. Chauvin’s counsel has made ***no extrajudicial comments*** about this case, so it is impossible for this Court to say that his comments would pose a serious and imminent threat to the fair administration of justice. If anything, the gag order should apply only to the State and county prosecutors, who have enjoyed a lengthy, unrestricted media honeymoon, during which to comment and posit and discuss this case at length—likely in violation of their ethical duties to “refrain from making extrajudicial comments before or during trial that promote no legitimate law enforcement interests and that serve solely to heighten public condemnation of the accused.” *NDA National Prosecution Standards* (3rd ed.) §

2-14.2; *see also* ABA *Criminal Justice Standards for the Prosecution Function*, Std. 3-1.10(c). The only party whose comments have proven to pose a “serious and imminent threat of interference with the fair administration of justice” in this matter is the State.

Because the same cannot be said about Mr. Chauvin or his counsel in this case, constitutional speech protections still apply and cannot be stripped without due process of law. By issuing its gag order without notice and without an opportunity to be heard, the Court has deprived Mr. Chauvin of his constitutional rights to “freely speak,” through counsel, and to a “public trial”—ostensibly to protect his right to trial by an “impartial jury,” which most likely has already been compromised—without due process of law. As such, Defendant Derek Chauvin respectfully requests that this Court vacate its gag order as to his case or, in the alternative, vacate the gag order until Mr. Chauvin has been given the opportunity to be heard on the matter.

Respectfully submitted,

HALBERG CRIMINAL DEFENSE

Dated: July 13, 2020

/s/ Eric J. Nelson

Eric J. Nelson
Attorney License No. 308808
Attorney for Defendant
7900 Xerxes Avenue S., Ste. 1700
Bloomington, MN 55431
Phone: (612) 333-3673