

**STATE OF MINNESOTA
IN COURT OF APPEALS**

In re Mail Media, Inc.,
Daily Mail, and DailyMail.com

Petitioners.

State of Minnesota,

Plaintiff,

v.

Derek M. Chauvin,

Defendant.

**PETITION FOR
WRIT OF PROHIBITION**
(Expedited Review Requested)

TRIAL COURT CASE NUMBER:
#27-CR-20-12646

APPELLATE COURT CASE NUMBER:

TO: The Court of Appeals of the State of Minnesota

Petitioners request a writ of prohibition restraining the Hennepin County District Court from enforcing an Order issued by Chief Judge Toddrick Barnette on March 24, 2021 denying Petitioners' request for access to trial exhibits, other public court records, and public court information in the above-entitled matter.¹ These restrictions on Petitioners' access have been imposed by the Court as an "equitable consequence" for Petitioners' publication of police body camera video recorded during the arrest of George Floyd, even though Petitioners have at all times acted lawfully, and despite the fact that Petitioners' newsgathering activities are protected by Minnesota law and the First Amendment.

Petitioners request expedited review because the records at issue are critical to

¹The Order is at Add. 1.

Petitioners' planned news coverage of the impending trial in the above-entitled matter, *State v. Chauvin*. The trial is currently scheduled to begin on March 27.

1. Statement Of Facts Necessary To An Understanding Of The Issues Presented.

The facts pertinent to Petitioners' request are not complicated. Daily Mail and DailyMail.com are print and internet news organizations, respectively, that cover both national and international news, including matters relating to politics, sports, business, finance, health, science, law, and crime. In the United States, they have offices in New York and Los Angeles, and are commonly owned. Their reporters and editors in the U.S. are employed by Petitioner Mail Media, Inc., a Delaware corporation with its principal place of business in New York. Affidavit of Mark R. Anfinson, ¶1.

The events surrounding the death of George Floyd while in police custody have generated world-wide attention, and Petitioners have provided regular news coverage of those events since May, 2020, including the criminal charges that were lodged against four Minneapolis police officers. *Id.*, ¶2.

As the criminal cases against the officers unfolded, body camera video obtained by two of the officers during Mr. Floyd's arrest was submitted to the trial court in support of a pretrial motion. Order, 1-2. Presiding Judge Peter Cahill then entered an order on July 9, 2020 directing that the video (and other "non-documentary evidence") would be available for viewing at the Hennepin County Government Center by appointment, but that members of the public and news media who viewed it "were not allowed to record or re-transmit any portions of the video." *Id.*, 2.

Not long thereafter, Petitioners were leaked a copy of the video from a third party

source not associated with the court, and published an article that included the video on August 3, 2020.² Only a few days later, Judge Cahill acknowledged that the video should be directly accessible to the public and news media, and on August 7, 2020, he lifted his prior restriction on copying and public distribution of the video.³ Anfinson Affidavit, ¶4.

On approximately February 14, 2021, a reporter for Petitioners who is covering the criminal case against Derek Chauvin, one of the police officers charged in connection with the Floyd arrest, requested access to proposed trial exhibits that had been filed with the court. Access by other news organizations to those exhibits has been routinely permitted, and the organizations have relied on the exhibits in their reporting. However, the access request from Petitioners' reporter was denied by Judge Barnette, who informed her of this in an email, stating as follows:

I have received your request about the process for media credentials for the State v. Chauvin trial. I have directed the staff not to provide media credentials to the Daily Mail for this case. The Daily Mail made a decision to pay for stolen video footage taken from our courthouse. This has jeopardized the integrity of the court process and the court's relationship with community and the media.

Add. 5. However, no Order was issued by Judge Barnette. Anfinson Affidavit, ¶5.

On February 16, 2021, Cameron Stracher, counsel for Petitioners based in New York, contacted Judge Barnette and sought to persuade him to reverse his decision. In response to Mr. Stracher's email, Judge Barnette stated:

² See <https://www.dailymail.co.uk/news/article-8576371/Police-bodycam-footage-shows-moment-moment-arrest-George-Floyd-time.html>.

³ See <https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12951-TKL/Memorandum08112020.pdf>

There is nothing in your email that changes my decision. However, if you would like to turn over the name(s) and contact information of the person(s) that Daily Mail paid for the published video footage stolen from our courthouse, I will gladly reconsider my decision.

Add. 6. Again, no Order was issued by Judge Barnette. Anfinson Affidavit, ¶6.

Over the next several days, a few additional, informal, and inconclusive exchanges occurred between Judge Barnette and Mr. Stracher. Petitioners then retained the undersigned as local counsel, who reached out to Judge Barnette requesting another conversation about the embargo that he had imposed. Judge Barnette agreed to this request, and on March 18, he spoke via Zoom with Petitioners' counsel, during which the undersigned explained why Petitioners believed his decision was unsupportable as a matter of law. In the course of this discussion, Petitioners' counsel asked Judge Barnette to issue a formal Order, should he decide not to modify his position. The above-described conversations with Judge Barnette were not on the record. *Id.*, ¶7.

On Monday, March 22, Petitioners' counsel received an email from Judge Barnette stating in pertinent part as follows: "I have reviewed the cases that we discussed. I have not changed my decision. The Daily Mail will not be given access to the exhibits." Add. 7. No Order accompanied this message. Petitioners' counsel then emailed Judge Barnette asking if he intended to issue an Order. Finally, on Wednesday afternoon, March 24, Petitioners' counsel received an Order from Judge Barnette, confirming the sanction that he had previously imposed on Petitioners:

The Court has therefore determined that the Daily Mail will be denied media credentials for the upcoming trial in *State v. Derek Chauvin* (27-CR-20-

12646). Its staff and reporters will be denied access to all trial exhibits, to the media center, and to all media updates related to the trial.

Order, 3.⁴ See Anfinson Affidavit, ¶8

As the basis for the Order, Judge Barnette pointed to the “theft” of the video, and its subsequent publication by Petitioners. According to Judge Barnette, “It has not been proven to the Court whether the Daily Mail did or did not play a role in the theft of the footage. It is clear, however, that the Daily Mail was the first media outlet to publish the stolen footage.”

Order, 3. Anfinson Affidavit, ¶10.

Regardless of Judge Barnette’s characterization, however, the video was almost certainly not “stolen.” More importantly, Petitioners played absolutely no role in the copying of the video, notwithstanding Judge Barnette’s speculation to the contrary. Furthermore, in none of the email exchanges with Judge Barnette described above did he ever suggest that Petitioners had violated any law, rule, or court order in obtaining the body camera video, nor has any contrary evidence been cited to Petitioners, either in the March 24 Order or otherwise.

It is troubling that the Court would use such pejorative terms in referring to the actions of Petitioners, despite the complete absence of evidence showing that they played any role in copying the video. And the Court’s insinuation that Petitioners are guilty until proven innocent flies in the face of fundamental principles of American law, disregarding the constitutional protections afforded to Petitioners’ newsgathering and reporting on a matter of

⁴On March 19, Petitioners’ reporter had submitted a separate request to the district court’s communications specialist Spenser Bickett, asking “Can you add me to the list of media receiving updates/info as [the Chauvin] proceedings go along?” On March 22, Bickett responded as follows: “The Court will not provide Chauvin trial updates or information to the Daily Mail.” Add. 8. Anfinson Affidavit, ¶9.

national consequence.

2. *Statement of the Issues.*

a. Did the trial court comply with Minn. R. Crim. P. 25.03 in denying Petitioners' request for access to criminal court records in *State v. Chauvin*?

b. Do the restrictions imposed by the trial court on Petitioners' access to criminal court records in *State v. Chauvin* infringe on Petitioner's First Amendment rights?

3. *Argument and Statement of the Reasons Extraordinary Relief is Necessary.*

The restrictions imposed by Judge Barnette on Petitioner's access to the court records in *State v. Chauvin* have been adopted with virtually no effort to comply with the requirements of Minn. R. Crim. P. 25.03, and in complete disregard of the fact that presumptive access to criminal court records is mandated by the First Amendment. Extraordinary relief is called for here pursuant to Rule 25.03, subd. 6(a), which states that "[a]nyone aggrieved by an order granting or denying a restrictive order may petition the Court of Appeals for review," which "is the exclusive method for obtaining review." In addition, time is of the essence, since access to the records at issue is vital to Petitioner's ability to fully and accurately cover the trial in *State v. Chauvin*, which is scheduled to begin on Monday, March 27.

a. Minnesota Rule of Criminal Procedure 25.03

Rule 25.03, subd. 1 states that "this rule governs the issuance of any court order restricting public access to public records relating to a criminal proceeding." It further provides that a trial court "may issue a restrictive order under this rule only if the court concludes that:"

(a) Access to public records will present a substantial likelihood of interfering

with the fair and impartial administration of justice.

(b) All reasonable alternatives to a restrictive order are inadequate.

The Rule further states that “[a] restrictive order must be no broader than necessary to protect against the potential interference with the fair and impartial administration of justice.” *Id.*

In addition, Rule 25.03 sets out a detailed and stringent procedure that the trial court must follow in considering a proposed restriction on access to criminal court records, directing that a “restrictive order may be issued only on motion and after notice and hearing,” *id.*, subd. 2(a), that the party seeking the restriction on access “has the burden of establishing a factual basis for the issuance of the” restriction, *id.*, subd. 3(a), and that “[t]he Court must make written findings of the facts and reasons supporting the conclusions on which an order granting or denying the motion is based. If a restrictive order is granted, the order must address possible alternatives to the restrictive order and explain why the alternatives are inadequate.” *Id.*, subd. 5.

But none of these requirements have been observed by Judge Barnette. There has been no motion or hearing, and no presentation of specific evidence that could justify the access restrictions—indeed, Judge Barnette ignores the directive in subdivision 3(a) that the party seeking the restrictions “has the burden of establishing a factual basis for the issuance of the” restrictions, and instead suggests that the burden is somehow on Petitioners to show that the restrictions should not be imposed (“It has not been proven to the Court whether the Daily Mail did or did not play a role in the theft of the footage,” Order, 3). Most importantly, in his Order Judge Barnette provides no “written findings of the facts and reasons supporting the

conclusions” on which the restrictions are based that reflect the criteria found in the Rule, which means Judge Barnette fails to explain how “[a]ccess to [the] public records will present a substantial likelihood of interfering with the fair and impartial administration of justice,” and that “[a]ll reasonable alternatives to a restrictive order are inadequate.”

Because Judge Barnette has egregiously failed to comply with Rule 25.03 in imposing the access restrictions on Petitioners, his Order should be overturned on that basis alone.

b. Application of the First Amendment.

As the comment to Rule 25.03 describes, the Rule was adopted in the wake of two decisions issued by the Minnesota Supreme Court acknowledging that public access to court records in a criminal case was presumptively required by the First Amendment. *Minneapolis Star and Tribune Co. v. Kammeyer*, 341 N.W.2d 550 (Minn. 1983); *Northwest Publications, Inc. v. Anderson*, 259 N.W.2d 254 (Minn. 1977).

The Court’s recognition of a constitutional right of access was derived from and amplified by a series of decisions issued by the U. S. Supreme Court, culminating with *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“*Press-Enterprise II*”), in which the Court defined a First Amendment right of public access to judicial proceedings in criminal cases. It held that public access can only be restricted where closure is essential to avoid a substantial probability of harm to some overriding interest and no effective alternative exists. Since *Press Enterprise II*, at least eleven federal courts of appeal and many state appellate courts have held that the constitutional access right applies to most types of judicial records in criminal proceedings.

In the present case, the only reason identified by Judge Barnette for restricting Petitioners' access to the court records is that the body camera video was "stolen" by someone, that Petitioners subsequently published it, that Petitioners therefore "knowingly exploit[ed]" the violation of the Court's order, and that the Court "is required to pursue an equitable consequence." Order, 3. However, this explanation comes nowhere close to satisfying the constitutional standard (codified in Rule 25.03), which is especially apparent because, as noted, there has never been any evidence presented suggesting that Petitioners' decision to obtain a copy of the body camera recording was in any way unlawful, that Petitioners themselves violated any law, rule, or court order, or that Petitioners in any way worked with, encouraged, or incentivized whoever it was that improperly copied the body camera video in violation of the court's Order. Under these circumstances, precedent demonstrates that it would be impossible to establish that Judge Barnette's restrictions on access are "essential to avoid a substantial probability of harm to some overriding interest," as that standard has been construed by the courts.

This conclusion is buttressed by a long line of Supreme Court decisions holding that where a news organization receives and disseminates records or information that were allegedly obtained illegally or improperly by a third party, the news organization is protected by the First Amendment, and cannot be sanctioned unless it was complicit in the illegal or improper activity. Of particular relevance is *Bartnicki v. Vopper*, 532 U.S. 514, 527, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001), in which the Court considered a claim that a radio station which had been given a recording of an unlawfully-intercepted cell phone conversation and then broadcast portions of the recording should be punished along with

those who made the recording, even though the station had no role in the illegal interception.

Relying on the First Amendment, the Court categorically rejected this claim, ruling that when “a newspaper lawfully obtains truthful information about a matter of public significance [] state officials may not constitutionally punish publication of the information, absent a need ... of the highest order.” *Bartnicki*, 532 U.S. 514, 527, 121 S.Ct. 1753 (second alteration in original), quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979). See also *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (per curiam) (upholding First Amendment right to publish information of great public concern obtained from documents stolen by a third party); *Florida Star v. B.J.F.*, 491 U.S. 524, 533, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (First Amendment barred penalizing newspaper that published name of sexual assault victim in violation of state law).

Should Judge Barnette’s frame of reference be accepted, it could be argued in every one of these cases that the news organization “knowingly exploit[ed] the violation” that had occurred, and that the courts were “required to pursue an equitable consequence.” Order, 3. Instead, however, the Supreme Court’s decisions demonstrate the deep flaws in Judge Barnette’s reasoning, as a matter of constitutional law.

Equally objectionable in constitutional terms is Judge Barnette’s assertion that

No provision of this Order stops the Daily Mail from obtaining the trial exhibits from other media outlets. This Court assumes that the Daily Mail paid for the stolen video footage. The Court is therefore confident that the Daily Mail can pay to obtain the trial exhibits associated with this case. This is not a hardship for the Daily Mail, it is merely an inconvenience.

Order, 3.

The suggestion that a news organization's First Amendment right to directly access criminal court records can be waved aside in any case where the news organization might be able to obtain the records, for a fee, from "other media outlets," so long as doing so is "merely an inconvenience" exhibits a pronounced lack of respect for the protections of the Constitution, and why they exist.

It can hardly be disputed that in the present case, the body camera video acquired and disseminated by Petitioners consists of truthful information about a matter of great public significance. Thus *Bartnicki* and the other decisions cited above demonstrate that Judge Barnette's restrictions on Petitioners' access to the court records in *State v. Chauvin* are constitutionally indefensible.

4. Request for Expedited Review.

Minn. R. Civ. App. P. 102 provides that the Court may for good cause suspend the requirements of the appellate rules, and expedite the consideration of any matter. Petitioners respectfully request that the Court exercise its discretion here, and expedite its review of the Petition. As noted, access to the records at issue is critical to Petitioners' planned news coverage of the trial in *State v. Chauvin*, which is currently scheduled to begin on March 27. Combined with the fact that the restrictions imposed by Judge Barnette plainly appear to offend constitutional guarantees that protect Petitioners' newsgathering and reporting activities, Petitioners believe that expedited review is warranted.

DATED: March 26, 2021

s/ Mark R. Anfinson

Mark R. Anfinson
Attorney for Petitioners
Lake Calhoun Professional Building
3109 Hennepin Ave. S.
Minneapolis, MN 55408
Phone: 612-827-5611
mranfinson@lawyersofminnesota.com
Atty. Reg. No. 2744

OF COUNSEL:

Cameron Stracher
51 Astor Place, 9th Floor
New York, NY 10003
Phone: 646-992-3850
cam@Stracherlaw.com