

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT
Court File 27-CR-21-7460

State of Minnesota,

Plaintiff,

vs.

**DEFENDANT'S MEMORANDUM IN
OPPOSITION TO THE STATE'S
MOTION FOR VISUAL AND
AUDIO COVERAGE OF TRIAL**

Kimberly Ann Potter,

Defendant.

The State's filled-with-footnotes Memorandum is soft and fuzzy, and makes amorphous claims that ignore the import of Rule 4.02, Minnesota Rules of General Practice. The pleading suggests this Court rely on the memories of Mr. Dante Wright, who had an active warrant for his arrest. Had Mr. Wright complied with the reasonable orders of the police, and had he not attempted to flee a police officer, a violent felony, Sykes v. United States, 564 U.S. 1 (2011), he would be alive today.

Lauding a subjective "therapeutic value to the community," Motion filed June 30, 2021, at p. 5, and how the "vigorous protests in the community" will

somehow be vindicated, Id. at p. 8, the State argues the trial should be on television because it wants it to be. In the same moment, the State ignores Officer Potter's interests, and suggests her preference, her lack of consent, is inconsequential.

The alleged victim's relatives and an undefined community support do not ordain this Court's decision. Minn. Stat. 611A.02 sets out the rights Mr. Wright's family has, which include notice of the charge, "to be informed of and participate in the prosecution," and to apply for "reparations to cover losses . . ." The right to "participate in the prosecution process" is not the right to eviscerate the rule making function of the Minnesota Supreme Court.

Rule 4.02, Minnesota General Rules of Practice, governs this Court's decision. Only if Officer Potter "consents" may this Court "authorize" the "visual or audio recording and reproduction" of her trial. Subd. (d)(ii) prohibits "visual or audio coverage of any witness who objects thereto in writing or on the record before testifying." The intention of the Supreme Court was quite clear: Rule 4.02, sans consent of Officer Potter, "operates to effectively bar electronic coverage of public criminal proceedings." 2015 Order, at *7.

Yes, there are exceptions within the Rule for, say, "ceremonial or naturalization proceedings," or after "a guilty plea," or "a guilty verdict." Rule 4.02(e). But the Rule recognizes the "profound privacy and safety interests of trial

participants.” In re Order Promulgating Amendments to Minnesota Gen. Rules of Practice. No. ADM09-8009, 2015 WL 6467107 (Minn. Aug. 12, 2015), at *10.

Officer Potter’s life has been threatened; near daily protests take place at her abode where she can no longer live.

Additional safety concerns have surfaced. After his live testimony, the Chauvin use of force expert’s former house was vandalized, protesters smearing blood, a severed pig’s head left on the front porch. See e.g., the Associate Press article, “3 Arrested in Vandalism of Chauvin Defense Witness’ Old Santa Rosa Home” (May 12, 2021). Officers of this Court have likewise been placed in harm’s way. See Chao Xiong, “Defense Attorney in George Floyd Case Renews Call to Move Ex-cops’ Trial After Armed Protester’s Arrest” (October 16, 2020).

The Rule was not drafted to be situational in its enforcement. A lawyer who violates the text will be investigated for professional misconduct. See In re MacDonald, 906 N.W.2d 238, 245 (Minn. 2018) (noting Rule 4.01 and Local Dakota County District Court Rule, both ban photography in Court, and disciplining the attorney for her violation).

Officer Potter alone has due process protections, not the Wright family, not the press. “[T]he most fundamental of all freedoms” is a fair trial to the defendant. Estes v. Texas, 381 U.S. 532, 540 (1965).

The law is settled. “Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.” Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).

The Supreme Court has emphasized that “[o]nce beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter’s constitutional rights are not greater than those of any other member of the public. Within the courthouse the only relevant constitutional consideration is that the accused be afforded a fair trial.” Estes, 381 U.S. 589 (1965) (J. Harlan, concurring).

The State predicts Rule 4.02 may be amended by an advisory committee. See In re the Minnesota Supreme Court Advisory Committee on the Rules of Criminal Procedure, No. ADM 10-8049, at 2 (Minn. Filed June 18, 2021). The future of law will always be, to a degree, uncertain. An imagined change isn’t persuasive of anything.

What remains, for today, by the Rule and case law, is that there has never

been a Sixth Amendment guarantee to the State, the media, or Mr. Wright's family, for a streamed out trial. No constitutional right exists that requires witness "testimony to be recorded and broadcast. . . Nor does the Sixth Amendment require that the trial – or any part of it – be broadcast live or on tape to the public." Chandler v. Florida, 449 U.S. 560, 569 (1981) (quoting Nixon v. Warner Communications, Inc., 435 U.S. 589, 610 (1978)). So it is and has been that the First Amendment's core purpose in ensuring public scrutiny of Mrs. Potter's trial can be easily met without live broadcasting. Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 606 (1982); see also In re Extension of Media Coverage for a Futher Experimental Period, 472 A.2d 1232, 1234 (R.I. 1984)("We begin with the recognition that the electronic media have no First Amendment right to photograph or broadcast judicial proceedings").

We are not suggesting a closure of the courtroom doors, which would be structural error. United States v. Thunder, 438 F.3d 866, 867 (8th Cir. 2006) (trial court reversed for excluding the public during child victim testimony). But once the public is permitted access, even if not every spectator gets a hard seat, the Sixth Amendment requirement has been vindicated. Estes, 381 U.S. at 588-589 (J. Harlan, concurring).

We welcome press scrutiny of Mr. Wright's lawlessness, though space can

be limited. Reporters are not by law in a leveraged line position over the public. Chandler, 449 U.S. at 569. To the extent more want to attend than seats available, a closed circuit television in a neighboring Courtroom will suffice. If, as we anticipate, this Court authorizes an overflow Courtroom for the press and public, there will be abundant opportunity for those “to attend and to report what they have observed.” Chandler, 449U.S. at 569 (quoting Nixon, 435 U.S. at 610).

The State relies on Judge Cahill’s Order in State v. Chavin, 27-CR-20-12646, filed November 14, 2020, permitting a televised trial. That Order was influenced by the COVID-19 crisis. The Court observed that “[t]he instant situation” is “abnormal.” Order at p. 7. The pandemic’s social distancing requirements had created “a higher demand on the space within the courtroom, *Id.*, and “little, if any, room for any spectators” and the press. *Id.* at p. 8.

Judge Cahill’s Order was thus premised on “the unique circumstances currently prevailing in the COVID-19 pandemic and the intense public and media interest in these cases.” Order at p. 9 (emphasis added). The COVID-19 spatial and mask restrictions have been rescinded. We’ve returned to what was. The rationale for that decision has been vaccinated away.

A pre-COVID-19 model already exists for cases like this one, a model which satisfies all interests and comports with Rule 4.02. The first police officer

homicide case tried in Minnesota was State v. Yanez, 62-CR-16-8110, in 2017.

This Court may recall that the Yanez press coverage exceeded Officer Potter's.

For Yanez, Ramsey County District Court Judge Leary chose a medium sized Courtroom (so as to afford adequate security for what was a volatile case). Front row seats were designated for the families of Officer Yanez and Philando Castile. Six or seven rows were taken each day by the press – newspaper, television, radio, internet, the coverage of the trial robust. The public was afforded access.

Judge Leary's Order, filed February 13, 2017 and attached, reads in part:

9. No courtroom attendee shall receive, transmit or record information by any means in the courtroom, or in the other area of floor where the courtroom is located, without the prior authorization of the court. All persons shall also follow the Second Judicial District's standing order, bench policy, and Rule 4 of the General Rules of Practice regarding recording, receiving, and transmitting devices.

This arrangement satisfied the Sixth Amendment's demand for public access, while adhering to Rule 4.02. The public trial in Ramsey County was fair to all sides.

Dated: June 13, 2021

Respectfully submitted,

/s/ Paul Engh

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MINNESOTA
JUDICIAL
BRANCH

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
CRIMINAL COURT

State of Minnesota,

Court File Number: 62-CR-16-8110

Plaintiff,

ORDER 1 -
CONDUCT AT HEARINGS

vs.

Jeronimo Yanez,

Defendant.

Assigned Judge: William H. Leary III

As with all criminal proceedings, it is the responsibility of the courts to provide a fair and open process that recognizes the responsibility of the State, the rights of Defendant, and the public interest. Consistent with that responsibility is the further responsibility to provide safe and secure facilities for those in attendance. For those reasons, this court issues the following order as to the above-captioned matter.

IT IS ORDERED:

1. This order pertains to members of the public and media attending public hearings in this matter and subject to further orders of this court. References to the "government building" and "building" are to the St. Paul City Hall and Ramsey County Courthouse.
2. Hearings shall begin promptly. Persons arriving on the building floor after the time scheduled to commence a hearing shall be directed to leave the floor.

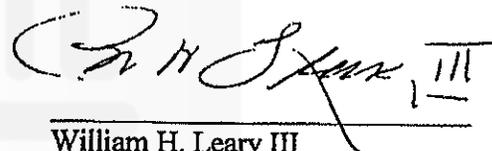
3. Courtroom attendance shall be limited to the seating available in the courtroom to be assigned. Standing room shall not be allowed. If the seated courtroom capacity has been filled, then any additional persons will be directed to leave the floor.
4. A request to accommodate attendance by immediate family members or friends of Decedent Philando Castile or Defendant Jeronimo Yanez shall be made through counsel for the respective parties no less than 24 hours prior to a hearing. Counsel shall direct the request to the undersigned or his designee. Any person who cannot be accommodated by such a request may still attend a hearing as a member of the general public and as courtroom space allows.
5. No one shall be permitted to leave a hearing prior to recess without the prior authorization of the court.
6. At the assigned time for the commencement of a hearing, the area outside of the courtroom on the assigned floor shall be cleared of all persons other than law-enforcement personnel.
7. Courtroom attendees shall not wear or carry signs, buttons, articles of clothing or attire, or engage in other forms of expression that refer to or call attention to this matter, the Decedent, parties or witnesses.
8. Courtroom attendees shall not make any facial expression, gesture, utterance, or change of demeanor that conveys any opinion or belief in response to a statement of a party or witness, argument or statement of counsel, or ruling of the court.
9. No courtroom attendee shall receive, transmit or record information by any means in the courtroom, or in the other areas of floor where the courtroom is located, without the prior authorization of the court. All persons shall also follow the Second

Judicial District's standing order, bench policy, and Rule 4 of the General Rules of Practice regarding recording, receiving, and transmitting devices.

10. Blocking of or loitering in walkways, doorways, staircases, or near elevator access shall not be permitted in any part of the government building.

11. A violation of this order may result in sanctions, including but not limited to, the confiscation of property, removal from the courtroom or government building, and/or arrest.

February 13, 2017



William H. Leary III
Judge of District Court

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