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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Court File No. 27-CR-20-12646

State of Minnesota,

Plaintiff,

vs.

Derek Michael Chauvin,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW OPPOSING THE STATE'S MOTION FOR RECONSIDERATION

TO: THE ABOVE-NAMED COURT; THE HONORABLE PETER A. CAHILL, JUDGE OF HENNEPIN COUNTY DISTRICT COURT; AND MATTHEW FRANK, ASSISTANT MINNESOTA ATTORNEY GENERAL.

INTRODUCTION

On November 4, 2020, this Court issued an Order Allowing Audio and Video Coverage of Trial 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 the global public interest in this matter, the defendants' constitutional rights to a public trial, and the global public health crisis caused by the COVID-19 pandemic. On November 25, 2020, the State moved this Court to reconsider its order. Mr. Chauvin, through his attorney Eric J. Nelson, Halberg Criminal Defense, joins in the Media Coalition's Opposition to the State's Motion for Reconsideration and offers the following on his behalf in opposition to the State's motion.

THE COURT'S ORDER CORRECTLY BALANCES THE DEFENDANT'S CONSTITUTIONAL RIGHTS WITH THE EXTRAORDINARY PUBLIC INTEREST IN THIS CASE AND THE CURRENT COVID-19 HEALTH CRISIS.

The Sixth Amendment to the United States Constitution and Article I, section 6, of the Minnesota Constitution both guarantee a criminal defendant "the right to a speedy and public trial,

by an impartial jury." Although the First Amendment guarantees public access to certain court proceedings, the Sixth Amendment right to a public trial is a right bestowed upon the defendant, not on the public. *Gannett Co., Inc. v. DePasquale,* 443 U.S. 368, 381 (1979); *State v. Lindsey,* 632 N.W.2d 652, 660 (Minn. 2001). The Sixth Amendment thus ensures that "the public may see [that the defendant] is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and the importance of their functions." *Gannett,* 443 U.S. at 380. Historically, it has been held that the right to a public trial does not envelop the right to a televised trial. *See Estes v. Texas,* 381 U.S. 532, 541-42 (1965).

In Minnesota, this limitation is reflected in Minn. R. Gen. Prac. 4, which only permits audio and video recordings of certain court proceedings. At the same time, a criminal proceeding may, under limited circumstances, be televised with the consent of all parties. *Id.* at 4.02(d). However, in promulgating the current version of the rule and a pilot project permitting limited courtroom access for the purposes of televising proceedings, the Minnesota Supreme Court recognized that the time had come "for Minnesota to gain some experience with electronic coverage of public courtroom criminal proceedings in the context of proceedings in Minnesota courts." *Order Promulgating Amendments to the Minnesota General Rules of Practice,* No. ADM09-8009, 2015 WL 6467107 at *10 (Minn. Aug. 12, 2015). In recognizing this need, the Court reiterated that "[t]rial court judges have a 'grave responsibility' and 'broad discretion' to 'oversee and regulate courtroom conduct and procedures during… criminal trials." *Id.* at *9 (quoting *State v. Lindsey,* 632 N.W.2d 652, 658 (Minn. 2001). Here, this Court has properly exercised its discretion to fulfill its "grave responsibility" to safeguard Mr. Chauvin's constitutional right to a public trial while astutely recognizing that the overwhelming public interest in this matter and global health crisis

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create a further opportunity for "Minnesota to gain some experience with electronic coverage of public courtroom criminal proceedings."

As the Court recognized in its November 2, 2020, order, the COVID-19 pandemic, alone, creates a situation that courts in this state have never before faced. Since March 13, 2020, the Minnesota Supreme Court has issued a series of extraordinary administrative orders in response to the pandemic—most recently delaying in-person trials for several weeks. *See Order Governing the Continuing Operations of the Minnesota Judicial Branch,* ADM20-8001 (Minn. Nov. 20, 2020). In courts at all levels, significant portions of this year's calendars have proceeded electronically, over video and audio streams. Clearly, the current global health crisis has required courts to exercise their broad discretion and be flexible when it comes to balancing calendar management with the constitutional rights of criminal defendants.

When the pandemic is combined with the global public interest in and scrutiny of this case, however, the situation is wholly unlike that faced by a Minnesota court in any other case. The interest and publicity it has generated could be likened to that of the 1995 trial of O.J. Simpson, although one could argue that the social and societal ramifications of this case cut much more deeply than those of the Simpson matter. At this same time, all this is occurring in the context of an unprecedented global public health crisis.

The combination of extraordinary public interest and the COVID-19 pandemic does not merely create a "limited seating" situation as the State seems to imply. (*See* State's Memo at 10). Seating the public in any enclosed room, whether it be the courtroom gallery, or an "overflow" room served by closed-circuit television, creates a public health risk. The World Health Organization warns that to avoid the risk of COVID-19 infection, individuals must "avoid crowded

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places, close-contact settings and confined and enclosed spaces."[1]

As the Court noted in its Order and Memorandum, hearings in this matter have already attracted crowds of people and protesters numbering in the hundreds, and the trial will most certainly do so, as well, and in greater numbers. Confining a limited number of people into one or several enclosed rooms, while frustrating throngs of others who will not be permitted to enter, will not alleviate the health risks posed by the situation—rather, it will surely exacerbate them. Forcing spectators to vie for a limited number of seats to a public trial during a pandemic can be likened to Wisconsin's requirement of in-person voting during its primary elections this spring. Wisconsin saw a spike in COVID-19 cases after the primary elections because voters were not offered alternative means to cast their ballots.[2] Likewise, members of the public who wish to exercise their civic right to watch a public trial would have to put their health on the line to do so. On the other hand, a publicly televised trial would offer members of the public an opportunity to exercise their constitutional rights to observe the proceedings without having to risk their health and safety to do so. Clearly, in light of the overwhelming public interest in this trial, the only practical way to mitigate the public health risks, while ensuring that Mr. Chauvin's constitutional right to a public trial is vindicated, is to publicly televise the proceedings.

As demonstrated by this Court's Order, the Minnesota Supreme Court's administrative

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[1] *See* "Transmission of SARS-CoV-2: implications for infection prevention precautions: Scientific Brief," available from https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions, accessed Dec. 11, 2020.
[2] Nicholas Reimann, "Coronavirus Infections Spiked in Wisconsin After In-Person Election, Study Says," *Forbes,* May 19, 2020, available from https://www.forbes.com/sites/nicholasreimann/2020/05/19/coronavirus-infections-spiked-in-wisconsin-after-in-person-election-study-says/?sh=3704da9614b3, accessed Dec. 11, 2020.

orders related to COVID-19, and those by other state and federal courts throughout the country,[3] the pandemic has created an unprecedented challenge to courtroom management at all levels. However, this crisis is not a time for dogmatic adherence to archaic[4] procedural rules and opinions. Some courts have used the pandemic as a basis to close courtrooms to the public, in spite of the defendant's Sixth Amendment rights. *See, e.g., United States v. Richards,* No. 2:19-cr-353-RAH, 2020 WL 5219537 (M.D.Ala. Sep. 1, 2020). But without a defendant's waiver—and Mr. Chauvin does not intend to waive his right to a public trial—any exclusion of the public from the courtroom risks running afoul of his rights under both the United States and Minnesota Constitutions, the latter of which has been interpreted, in certain instances, to offer broader protections to citizens of this state than its federal counterpart. *See, e.g., Friedman v. Comm'r of Public Safety,* 473 N.W.2d 828, 833 (Minn. 1991) (Minnesota Constitution affords broader rights than Sixth Amendment to the United States Constitution)*; see also State v. Leonard,* 943 N.W.2d 149, 156 (Minn. 2020); *State v. Carter,* 697 N.W.2d 199, 210-11 (Minn. 2005); *State v. Askerooth,* 681 N.W.2d 353, 363 (Minn. 2004).

A strong disinfectant is the best way to balance the rights and the interests of the public and those of Mr. Chauvin with the health risks posed by COVID-19. "Our country's public trial guarantee reflects the founders' wisdom of the need to cast sunlight—the best of disinfectants—on criminal trials." *State v. Silvernail,* 831 N.W.2d 594, 607 (Minn. 2013) (Anderson, J., dissenting). However, the right to a public trial "was conceived in a different time, one without the

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[3] *See, e.g.,* COVID-19 Update: General Order No. 22: In Re: Updated Guidance to Court Operations under the Exigent Circumstances Created by COVID-19 (D.Minn. Nov. 24, 2020), available from https://www.mnd.uscourts.gov/news/covid-19-update-general-order-no-22, accessed Dec. 11, 2020.

[4] When *Estes* was handed down, a plurality opinion, color television had only recently come into vogue, cable and satellite television were not available to the public, and consumer access to the Internet would not be available for nearly 30 years.

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ability to memorialize the details of a trial—stenographically, visually, or aurally. Today, verbatim transcripts, audio recordings, and video may provide the needed 'sunlight' shed on trial proceedings in a way that did not exist centuries ago." Stephen E. Smith, "The Right to a Public Trial in the Time of COVID-19," 77 *Wash. and Lee L. Rev.* 1, 12 (May 19, 2020). Although *Estes* held that a televised trial is not encompassed by the right to a public trial, 381 U.S. at 541-42, in light of the pandemic, "[a]lternate means of publicizing a trial's contents" may be required to vindicate Mr. Chauvin's constitutional right to a free trial "while benefitting our present-day public health needs." Smith, 77 *Wash. and Lee L. Rev.* at 12. Although, "the Constitution protects against invasions of individual rights, it is not a suicide pact." *Id.* at 15 (quoting *Terminiello v. City of Chicago,* 337 U.S. 1, 37 (1949) (Jackson, J. dissenting)). This Court has appropriately utilized its broad discretion to protect the rights of the public against both constitutional infringement and the unprecedented risks presented by the current global health crisis while protecting Mr. Chauvin's constitutional guarantee of a public trial. The State's motion to reconsider must, therefore, be denied.

Respectfully submitted,

HALBERG CRIMINAL DEFENSE

Dated: December 14, 2020

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