

In the Arkansas Supreme Court

Arkansas Democrat-Gazette, Inc.; and
Arkansas Press Association

Petitioners

vs.

Case No. CV-

State of Arkansas; Shaivonn Robinson;
Le’Kamerin Tolbert; Quincy Isaiah Lewis;
Odies Wilson; In Re Gag Order in the Matter
of the Investigation in the Death of Joshua
Keshun Smith

Respondents

Petition for Writ of Certiorari

Petitioners, Arkansas Democrat-Gazette, Inc. and the Arkansas Press
Association, state:

1. Petitioners seek relief from four identical orders entered by the Circuit Court of Columbia County Arkansas in related criminal cases. The gag orders purport to restrict what “any media outlet” may publish regarding the proceedings. Because the gag orders are an unconstitutional prior restraint and an unconstitutional content-based restriction on speech, the circuit court is proceeding in excess of its authority, and this writ request is Petitioners’ only remedy.

Jurisdiction & Parties

2. Jurisdiction is proper in this Court based on its constitutional and superintending control over a lower court that is proceeding illegally where no other mode of review has been provided. Ark. Const., Amend. 80, § 2(E); Ark. Sup. Ct. Rules 6-1, 1-2(a)(3). *Arkansas Democrat-Gazette v. Zimmerman*, 341 Ark. 771, 20 S.W.3d 301 (2000).

3. Each respondent is a party to the underlying action before the circuit court. Ark. Sup. Ct. Rules 6-1(a)(2).

Factual Background

4. On August 11, 2020, a shooting occurred on the campus of Southern Arkansas University.

5. Four men were arrested in connection with the shooting: Shaivonn Robinson, Le’Kamerin Tolbert, Quincy Isaiah Lewis, Odies Wilson. **Exhibit 1.**

6. On August 17, 2020, the four men appeared for the first time before the circuit court in connection with this matter. **Exhibit 2, p. 3** (exempting from the gag order “[a]ny information discussed at the Defendant’s first appearance on August 17, 2020.”).

7. On that same day, the circuit court directed the Columbia County Circuit Clerk to seal all documents related to the cases, including probable cause affidavits filed in the matter. **Exhibit 3.**

8. On August 19, 2020, the circuit court entered the gag orders that are the subject of this writ, styled in each case as an Order Regarding Publicity. **Exhibit 2.**

9. On August 19, 2020, a reporter for the Democrat-Gazette sent a FOIA request to Southern Arkansas University for information about the case. That FOIA request was denied the next day in reliance on the gag order. **Exhibit 4.**

10. On August 20, 2020, the same reporter sent a FOIA request to the prosecuting attorney who denied the request, in part, due to the gag orders. **Exhibit 5.**

The Terms of the Gag Order

11. The gag orders apply to *any media outlets* as well as a wide range of participants in the proceedings and several groups not participating in the proceedings. **Exhibit 2, p. 1.**

12. In addition to media outlets, the gag orders apply to (1) any “party” to the criminal proceedings; (2) all family members of any party; (3)

all friends of any party; (4) any person subpoenaed to testify at trial; (5) all attorneys “connected with” the proceedings; (6) all agencies “connected with” the proceedings; (7) all judicial employees; (8) all of law enforcement; (9) any “officer of this Court;” (10) “South Arkansas University,” which presumably includes anyone affiliated with the school; and even (11) any public officials now holding office (as well as their employees). **Exhibit 2, p. 1**

13. The gag orders are written broadly, such that all persons subject to the orders are prohibited from releasing nearly any information about the case. *Id.* at pp. 2-3.

14. For example, the orders prohibit covered persons—including the media—from publishing (1) “any purported extrajudicial statement of the Defendant related to this case”; (2) any statements regarding any “documents or exhibits or any evidence, the admissibility of which may have to be determined by the Court”; (3) any statements about the “effect of any testimony that has been given”; (4) statements about the “identity of any prospective witnesses”; and (5) any statement “with any attorney of record” regarding the “content, nature, substance, or effect of any testimony which may be given” at any point in the proceeding.” **Exhibit 2, p. 2.**

15. The gag orders also prohibit all covered persons, including the media, from making *opinion* statements about the case. **Exhibit 2, p. 2** (prohibiting the publishing “outside of the Court an opinion or make any comment for public dissemination as to the weight, value, or effect of any evidence as tending to establish the guilt or innocence of the Defendant.”).

16. The gag orders are in effect from August 19, 2020 until the “case has been disposed of” or until the circuit court “orders otherwise.” **Exhibit 2, p. 3.**

17. The gag orders are not limited geographically.

Writ of Certiorari

18. A circuit court lacks authority to enjoin speech in a manner that violates the First Amendment to the federal constitution and article 1, section 6 of the Arkansas constitution. *See Zimmerman*, 341 Ark. at 786, 20 S.W.3d at 310 (issuing writ of certiorari and directing the lower court to revise an unconstitutional gag order on the media).

19. “A writ of certiorari lies to correct proceedings erroneous on the face of the record where there is no other adequate remedy; it is available to the appellate court in its exercise of superintending control over a lower court that is proceeding illegally where no other mode of review has been provided.”

Cooper v. Circuit Court of Faulkner Cty., 2013 Ark. 365, 6, 430 S.W.3d 1, 5. The writ of certiorari is granted when “there is a lack of jurisdiction, an act in excess of jurisdiction on the face of the record, or the proceedings are erroneous on the face of the record.” *Conner v. Simes*, 355 Ark. 422, 428, 139 S.W.3d 476, 479 (2003).

20. The writ lies where “(1) it is apparent on the face of the record that there has been a plain, manifest, clear, and gross abuse of discretion, or (2) there is a lack of jurisdiction, an act in excess of jurisdiction on the face of the record, or the proceedings are erroneous on the face of the record,” and there must be no other adequate remedy. *Cooper*, 2013 Ark. 365, at 6, 430 S.W.3d at 5.

21. This Court has held that a petition for a writ of certiorari is the appropriate method for a news-media organization may challenge the validity of a circuit court’s gag order that that purports to govern what the media may publish. *Zimmerman*, 341 Ark. at 779, 20 S.W.3d at 305 (reviewing this Court’s case law on which writ is appropriate in prior-restraint cases);

22. The gag orders at issue here are in excess of the circuit court’s authority, erroneous on their face, and an abuse of discretion because each are (1) an unconstitutional prior restraint and content-based restriction on speech;

(2) unconstitutionally vague and overbroad; (3) violative of Arkansas Rule of Criminal Procedure 38.1; and (4) unconstitutionally impinges on the press's right to gather information.

Prior Restraint on the Press

23. A prior restraint is “a governmental restriction on speech or publication before its actual expression.” *Helena Daily World v. Simes*, 365 Ark. 305, 308, 229 S.W.3d 1, 3 (2006) (quoting *Black's Law Dictionary*).

24. “[P]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.” *Zimmerman*, 341 Ark. at 780, 20 S.W.3d at 306 (quoting *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976)). Accordingly, any prior restraint is presumed to be unconstitutional. *Orrell v. City of Hot Springs*, 311 Ark. 301, 304, 844 S.W.2d 310, 312 (1992) (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, (1990)).

25. Furthermore, “any restraint on the freedom of the press, even though narrow in scope and duration, is subject to the closest scrutiny and will be upheld only upon a clear showing that an exercise of this right presents a clear and imminent threat to the fair administration of justice.” *Arkansas Gazette Co. v. Lofton*, 269 Ark. 109, 110, 598 S.W.2d 745, 746 (1980) (citation

omitted); *see also* Ark. Const. art. II, § 6 (“The liberty of the press shall forever remain inviolate.”).

26. The gag orders, which are expressly directed at the all media outlets, restricts speech and publication before its actual expression.

27. They are by definition, a prior restraint on Petitioners and are, therefore, presumptively unconstitutional.

28. Under the First Amendment, three requirements must be met to justify a gag order on the press to protect a defendant’s right to a fair trial. *See Nebraska Press*, 427 U.S. at 562 (considering whether the evidence before the trial court when the gag order was entered was necessary to “justif[y] such [an] invasion of free speech”).

29. First, the lower court must reasonably conclude that, based on the individual circumstances of the case, extensive publicity will jeopardize the ability to select a fair and impartial jury. *Nebraska Press*, 427 U.S. at 562–63. The mere fact that there has been publicity about a case “is hardly dispositive.” *In re Murphy-Brown, LLC*, 907 F.3d 788, 798 (4th Cir. 2018). To the contrary, there must be record evidence supporting a conclusion that publicity in a particular case presents an actual danger to the defendant’s right to a fair trial. *Id.* (“The question, therefore, is neither whether a case has garnered public

attention nor whether public discussion of it risks revealing potentially prejudicial information. . . . The question is whether the judge finds it likely that he or she will be unable to guide a jury to an impartial verdict. If judges can guide the jury to an impartial verdict, then no gag order may issue.”); *see also Nebraska Press*, 427 U.S. at 562 (finding, based on the record evidence in the case, that the district court could reasonably conclude that pretrial publicity could impair the defendant’s right to a fair trial).

30. Apart from a conclusory statement about the “extensive news media coverage” of the case, the gag order contains no findings of fact regarding the extent and scope of such publicity. Nor do the gag orders make any findings that publicity would jeopardize the ability to select an impartial jury.

31. Second, the circuit court must determine that “measures short of an order restraining all publication” would not have ensured “the defendant a fair trial.” *Id.* at 563.

32. The gag orders here make no findings about whether other measures short of those used in the gag orders would ensure a fair trial—indeed, the orders do not even address this issue.

33. Third, even if the foregoing two elements are met, a prior restraint (like the gag orders here) must actually be a feasible and effective method of

securing a fair trial. *Id.* at 565. The circuit court made no findings on whether the orders will actually have a positive effect on defendants' right to a fair trial.

34. For these reasons, the gag orders are an unconstitutional prior restraint on Petitioners and should be vacated.

Prior Restraint on Others

35. The gag orders are also a prior restraint on the other individuals subject to the orders. 2 Smolla & Nimmer on Freedom of Speech § 15:42 (2020) (“A statement directed against participants in a judicial proceeding that forbids them, under pain of contempt, from making statements that they would otherwise be free to make certainly *is* a prior restraint.” (Emphasis in original.)

36. Most courts hold that the press has standing to challenge gag orders that apply to people outside the press because such orders function as indirect gag orders on the press and inhibit the press's First Amendment rights to have full access to criminal proceedings and gather news. *See WXIA-TV v. State*, 811 S.E.2d 378, 383 (Ga. 2018) (collecting cases). This Court should follow suit and find that, in addition to challenging the restrictions on the media.

37. Petitioners have standing to challenge the prior restraint imposed on other individuals subject to the orders, particularly given our constitution's express and broad protections of the press. Article 1, section 6 (“[t]he liberty

of the press shall forever remain inviolate. The free communication of thoughts and opinions, is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects . . .”).

38. The gag orders are unconstitutional as applied to those outside the press because the circuit court failed to make any findings regarding the likelihood that persons covered by the gag order would make prejudicial statements, nor do the orders note even a single instance of such statements. *See WXIA-TV*, 811 S.E.2d 386–87 (reviewing the cases and standards); see also *Journal Publishing Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986) (dissolving a posttrial order prohibiting press interviews with certain jurors as a “prior restraint on the gathering of news”).

Content-Based Restriction

39. Gag orders, regardless of whose speech they restrict, are also presumptively unconstitutional because they are content-based restrictions on speech. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *In re Murphy-Brown, LLC*, 907 F.3d 788, 797 (4th Cir. 2018) (“gag orders are presumptively unconstitutional because they are content based.”).

40. Content-based restrictions target “particular speech because of the topic discussed or the idea or message expressed.” *In re Murphy-Brown*,

LLC, 907 F.3d at 797 (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163). In this case, the gag orders target speech relating to pending litigation, a topic right at the core of public and community life. *Id.*

41. Because content-based restrictions on speech are subject to strict scrutiny, the restrictions must be narrowly tailored to achieve a compelling government interest. *Reed*, 576 U.S. at 163.

42. The gag orders are not narrowly tailored to achieve the compelling government interest in preserving rights to a fair trial. They include no findings regarding the specific individuals restricted from speaking. Indeed, the orders treat attorneys no differently from parties, who themselves are treated the same as potential witnesses. Each category of restricted persons—including all public officials anywhere in the state—are all treated the same regarding the proceedings and potential trial. *See In re Murphy-Brown, LLC*, 907 F.3d 788, 799 (4th Cir. 2018) (noting each of these characteristics as indicia of failure to narrowly tailor a gag order).

43. Like the order vacated in *In re Murphy-Brown*, the gag order here refers to the “unclear yet extraordinary” phrase “prospective witnesses,” when listing the set of items the media are not permitted to speak about. *Id.* at 800.

44. The gag order's blanket treatment of all covered persons and the scope of the restrictions far exceed what would be needed to preserve rights to a fair trial.

45. Accordingly, they are an unconstitutional content-based restriction on speech.

Vagueness and Overbreadth

46. The gag orders are also unconstitutionally vague and overbroad.

47. For example, the gag orders apply to "friends" of parties in this case. The gag orders are void for vagueness because an acquaintance of the parties cannot know whether they qualify as a "friend," making them subject to the gag orders.

48. The order applies to "any public official now in office," which is overbroad, presumably even encompassing the members of this Court. The gag order contains no findings about why each public official must be treated the same.

49. Several areas of proscribed speech are also unconstitutionally vague. For example, the gag orders restrain speech regarding "any documents or exhibits or any evidence, the admissibility of which may have to be determined by the Court." There is no way for Petitioners, or anyone else

covered by the order, to determine at this time what information “may” be offered into evidence in the proceeding. Likewise, covered persons are prohibited from “making any statement...as to the identity of any prospective witness.” There is no way to know who might be a witness in these proceedings.

50. Therefore, Petitioners cannot conform their conduct to these restrictions. The orders are also overbroad. For example, they apply to “any public official now in office,” which presumably even includes the members of this Court. The gag order contains no findings about why each public official must be treated the same.

51. Under the overbreadth doctrine, this Court should apply the foregoing content-based analysis to each party covered by the gag order and hold that they are not narrowly tailored.

Ark. R. Criminal Procedure 38.1

52. The gag orders also violate Rule 38.1 of the Arkansas Rules of Criminal Procedure which provides that no “judicial order shall be promulgated that prohibits representatives of the news media from publishing any information in their possession relating to a criminal case.”

53. Yet the gag order expressly prohibits “any media outlets” from publishing a wide range of statements about this criminal proceeding, including

any documents, witnesses' identities, etc. This unequivocally violated Rule 38.1.

54. Therefore, the gag order violates Rule 38.1 when it prohibits "any media outlet" from publishing information in their possession in connection with the underlying criminal proceedings.

Request for Relief

These gag orders are unconstitutional and are restricting the Petitioners' rights to speak and gather information about the case from willing speakers to disseminate to the public. Therefore, Petitioners respectfully ask this Court to:

- (1) grant temporary relief from the gag orders while this Court considers this writ; or, alternatively, to expedite these proceedings;
- (2) vacate the gag orders as unconstitutional prior restraints, unconstitutional content-based regulations on speech, violations of Rule 38.1 of the Arkansas Rules of Criminal Procedure; and as unconstitutional impingements on the press's right to gather information; and,
- (3) to award all other relief to which Petitioners are entitled.

Respectfully submitted,

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Certificate of Service

In compliance with Ark. Sup. Ct. Rule. 6-1, I certify that on 28 August 2020, a copy of the foregoing was served via electronic mail and US mail to the following:

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