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STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Case Type: Criminal

State of Minnesota,

Plaintiff,

vs.

Derek Michael Chauvin,
Tou Thao,
Thomas Kiernan Lane,
J. Alexander Kueng,

Defendants.

Court File No. 27-CR-20-12646
Court File No. 27-CR-20-12949
Court File No. 27-CR-20-12951
Court File No. 27-CR-20-12953

STATE'S RESPONSE TO DEFENDANTS' MOTIONS TO LIFT/OBJECTIONS TO GAG ORDER, MOTIONS FOR FINDING OF CONTEMPT/SANCTIONS, AND REQUEST FOR PUBLIC ACCESS TO BODY-WORN CAMERA FOOTAGE

TO: The Honorable Peter A. Cahill, Judge of District Court; counsel for the above-named defendants; and attorneys for Media Coalition.

INTRODUCTION

On July 9, 2020, this Court entered a sua sponte Gag Order in the above-captioned matters. On July 13, 2020, each of the above-named defendants filed an objection to, or motion to lift, the Gag Order. In his objection, defendant J. Alexander Kueng's further seeks public release of the body-worn camera footage filed by defendant Thomas Kiernan Lane in connection with his motion to dismiss. Additionally, on July 13, 2020, the Media Coalition filed a motion requesting access to the body-worn camera footage. On July 14, 2020, defendants Tou Thao and Thomas Kiernan Lane each filed a motion for a finding of contempt and/or sanctions. A hearing on the motions is scheduled for July 21, 2020 at 3:00 p.m.

BACKGROUND

On June 29, 2020, this Court held hearings for all of the above-named defendants. During the hearing pertaining to defendant Derek Michael Chauvin on that date, which the

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parties in all four cases attended, counsel for defendant Chauvin indicated that, should public statements about the case continue, he intended to file a motion for a gag order. (OH Tr. 3.) The Court cautioned the parties as follows: "[I]t is in everyone's best interest that no statements be made publicly about the merits of the case, opinions about guilt or innocence or possible evidence that might be allowed at trial; I think everyone would agree with that." (OH Tr. 3-4.) Undersigned counsel for the State and counsel for defendant Chauvin agreed. (OH Tr. 4.) The Court noted its concern of "endangering the right to a fair trial for all parties" and acknowledged that counsel for defendant Chauvin could file a motion for an appropriate order "if things continue to progress." (OH Tr. 4.) The Court gave similar admonitions at all four of the June 29, 2020 hearings in each of the above-captioned cases.

After "two or more" defense attorneys in this matter conducted interviews with the media on July 8, 2020, during which they "expound[ed] on the merits of the case or comment[ed] on other aspects of the case" after the filing of a defense motion to dismiss, this Court entered the sua sponte Gag Order the following day. (Gag Order at 1.) For one, Earl Gray, counsel for Thomas Kiernan Lane, participated in interviews with the Star Tribune[1] and KSTP,[2] during which he discussed the evidence in the case and asserted his client's position.

As a result, the Court ordered the parties to this matter and their attorneys not to "disclose, directly, indirectly, or through third parties, any information, opinions, strategies, plans or potential evidence that relate to any of the above-captioned cases," and included "discovery provided to the parties, and any exhibits in the cases" in its order. (*Id.*)

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[1] Chao Xiong, "Former Officer Thomas Lane's Attorney Seeks Dismissal of Charges in George Floyd Killing," Star Tribune (July 8, 2020), *available at* https://www.startribune.com/officer-lane-seeks-dismissal-in-floyd-killing/571675112/.

[2] Jay Kolls, "Attorney for Fired MPD Officer Talks About New Evidence," KSTP (July 8, 2020), *available at* https://kstp.com/news/attorney-for-fired-mpd-officer-talks-about-new-evidence-thomas-lane/5786705/.

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On July 13, 2020, the Office of the Minnesota Attorney General released the names and biographical information of four attorneys who have joined the prosecution team as Special Assistant Attorneys General. Since the Court issued its Gag Order on July 9, 2020, however, the Office of the Minnesota Attorney General and Attorney General Keith Ellison have made no public statements as to the evidence or the merits of any of the above-captioned cases.

ARGUMENT

I. Gag Order

This Court has the authority to manage extra-judicial statements in a pending criminal matter. *See* Minn. R. Crim. P. 26.03, subd. 7. The Minnesota Rules of Professional Conduct also place limitations on lawyers regarding trial publicity. *See* Minn. R. Prof. Cond. 3.6(a). The State does not object to a fair and reasonable gag order that applies to all parties in the above-captioned cases, and preserves the State's responsibilities under the Victims' Rights Act, Minn. Stat. §§ 611A.01-611A.06, and 611A.51-611A.68.

A. Defendants' Objections

Defendants request that the Gag Order be vacated and assert that the issuance of the order was improper. In his motion, defendant Thao acknowledges that "[n]either party" (neither the State nor defendant Thao) "made a statement in violation of the Court's admonition on June 29th, 2020." (Court File No. 27-CR-20-12949, Doc. No. 46.) Defendants argue that there is no basis for a gag order in these matters and challenge the constitutionality of the Court's order.

"Few interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors, and the State has a substantial interest in preventing officers of the court from imposing costs on the judicial system and litigants arising from measures, such as a change of venue, to ensure a fair trial." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1031-32 (1991).

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Moreover, a "trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." *Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979). As such, a district court may issue a gag order under Minnesota Rule of Criminal Procedure 26.03, subdivision 7. *See* Minn. R. Crim. P. 26.03, subd. 7 ("The court may order attorneys, parties, witnesses, jurors, and employees and officers of the court not to make extra-judicial statements relating to the case or the issues in the case for public dissemination during the trial.").

Nevertheless, such an order "must not unconstitutionally infringe on the First Amendment rights of those whose speech is limited by [the order]." *State v. Clifford*, No. 02-CR-12-4361, 2012 WL 7849528 (Minn. Dist. Ct. Oct. 03, 2012). In general, to impose a prior restraint requires a finding that "the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest.'" *In re Goode*, 821 F.3d 553, 559 (5th Cir. 2016). In the context of a criminal trial, "an individual's right to free speech must be balanced with the state and the defendant's interest in a fair trial." *Id.*

A "trial by newspaper" poses significant dangers to a fair trial, including, most significantly, "the possibility that pretrial publicity will taint the jury venire." *Id.* As such, courts must "balance the First Amendment rights of trial participants with [their] 'affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity.'" *Id.* at 559-60.

Because lawyers' extra-judicial statements "are likely to be received as especially authoritative," such statements "pose a threat to the fairness of a pending proceeding." *Gentile*, 501 U.S. at 1074. Given the potential impact on the jury pool, "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press." *Id.* at 1074.

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In *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000), the Fifth Circuit rejected a First Amendment challenge to the district court's gag order, which prohibited "attorneys, parties, or witnesses from discussing with 'any public communications media' anything about the case 'which could interfere with a fair trial,' including statements 'intended to influence public opinion regarding the merits of this case,' with exceptions for matters of public record and matters such as assertions of innocence." *Brown*, 218 F.3d at 418. The Fifth Circuit lowered the "showing of harm necessary" to impose a prior restraint on trial participants and found that "a district court may . . . impose an appropriate gag order on parties and/or their lawyers if it determines that extrajudicial commentary by those individuals would present a 'substantial likelihood' of prejudicing the court's ability to conduct a fair trial." *Id.* at 425, 427. The Court further explained that prior restraints on trial attorneys must be narrowly tailored to only prohibit speech that has a "meaningful likelihood of materially impairing the court's ability to conduct a fair trial." *Id.* at 428–29. The prior restraint must also be the "least restrictive means available." *Id.* at 425.

The Minnesota Rules of Professional Conduct also impose obligations on attorneys with respect to extrajudicial statements. Rule 3.6(a) restricts an attorney in a criminal case from making extrajudicial statements "that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing a jury trial in a pending criminal matter." MINN. R. PROF. COND. 3.6(a). "[A]s officers of the court, attorneys are already ethically bound to limit extrajudicial statements through the Minnesota Rules of Professional Conduct" and, as such, the attorneys' ethical obligation to refrain from making prejudicial comments about these matters "will exist whether

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an order under Rule 26.03 is in place or not." *State v. Clifford*, No. 02-CR-12-4361, 2012 WL 7849528 (Minn. Dist. Ct. Oct. 03, 2012) (citing Minn. R. Prof. Cond. 3.6(a)).

The State does not oppose a gag order applicable equally to all parties and narrowly tailored in accordance with the authorities discussed above. The State also respectfully requests that any order issued specifically exempt the State's communications required by the Victims' Rights Act, Minn. Stat. §§ 611A.01-611A.06, and 611A.51-611A.68.

B. Motions for Contempt/Sanctions

Contempt is divided into two types: remedial (civil) and punitive (criminal), depending on the court's purpose. *In re Cascarano*, 871 N.W.2d 34, 37 (Minn. Ct. App. 2015). Civil or remedial contempt seeks to compel future compliance with a court order, while the primary purpose of criminal contempt is punitive—"to vindicate the court's authority by punishing past misconduct." *Id.* Pursuant to Minn. Stat. § 588.02, a court may punish contempt by imposing a fine, imprisonment, or both. *Id.*; *see also* Minn. Stat. § 588.20 (defining criminal contempt punishable as a felony or misdemeanor).

Contempts may be direct or constructive. Minn. Stat. § 588.01. Direct contempts occur "in the immediate view and presence of the court," and may arise from "disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to interrupt the due course of a trial or other judicial proceeding," or "a breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the business of the court." Minn. Stat. § 588.01, subd. 2. "Constructive contempts, on the other hand, are not committed in the immediate presence of the court and may arise from any of 11 different acts or omissions, including "disobedience of any lawful judgment, order, or process of the court." *Cascarano*, 871 N.W.2d 34, at 38 (citing Minn. Stat. § 588.01, subd. 3). Constructive contempts may not be punished summarily and

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require procedural protections "including prosecution by the state, trial by jury, and proof beyond a reasonable doubt." *Id.* Defendants appear to seek a finding of constructive criminal contempt in this case without any of the statutorily required procedural safeguards, or without addressing any of these requirements.[3]

Moreover, while the State does not object to such an order, by no means has the State violated the Gag Order issued by this Court on July 9, 2020. Defendants Lane and Thao argue that the release of the identities of the Special Assistant Attorneys General appointed in this matter on July 13, 2020 constituted a violation of the Court's Order. Defendant Lane goes so far as to argue that Attorney General Keith Ellison and Deputy Chief of Staff John Stiles "should be jailed." (Court File No. 27-CR-20-12951, Doc. No. 58 at 1.) Defendant Lane asserts that the announcement constitutes a "statement to the public that these 'super stars' believe that our clients are guilty." (*Id.*)

Defendants' claims are entirely baseless. The July 13, 2020 release does nothing of the sort; it contains no statements as to guilt or innocence and is completely silent as to the evidence in the cases at hand. It does nothing more than identify the additional members of the prosecution team. The fact that these attorneys are working on a pro bono basis says absolutely nothing about the merits of the underlying matters. As such, the Attorney General's announcement cannot be construed in any way to be a disclosure of "information, opinions, strategies, plans or potential evidence that relate to any of the above-captioned cases," as prohibited by the Gag Order. (Gag Order at 1.) Nor can it constitute "information . . . that relate[s]" to the case because it is not about the case itself; it is about staffing matters at this

[3] Before a party may be held in criminal or civil contempt, "the trial court must find that the underlying order is valid. . . ." *River Towers Ass'n v. McCarthy*, 482 N.W.2d 800, 803 (Minn. Ct. App. 1992). Curiously, in this matter, defendants have simultaneously argued that the Order is not valid.

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office. The scope of "information" is informed by this Court's statements at the hearings preceding the Order: the parties should not discuss the merits of the case, opinions about guilt or innocence, or possible evidence. The State did not do so.

Defendants' motions for contempt/sanctions are a complete distraction from the intended purpose behind the Court's Gag Order and must be denied. They should be seen for what they are: a ploy to publicly smear the office tasked with prosecuting this matter and a tacit attempt to taint the jury pool in an effort to encourage the Court to later order a change of venue.

II. Access to Body-Worn Camera Footage

Defendant Thomas Kiernan Lane filed the body-worn camera footage at issue with this Court as exhibits in conjunction with his motion to dismiss. The Media Coalition and defendant J. Alexander Kueng now seek public access to the records.

A. Applicable Rules

Once Defendant Lane submitted these matters as exhibits, they became records of the judicial branch. The Minnesota Rules of Public Access to Records of the Judicial Branch and the Minnesota Rules of Criminal Procedure govern access to judicial branch case records.

1. Minnesota Rules of Public Access to Records of the Judicial Branch

Rule 2 of the Minnesota Rules of Public Access to Records of the Judicial Branch provides that "[r]ecords of all courts . . . in the state of Minnesota are presumed to be open to any member of the public for inspection" with certain limited exceptions. MINN. R. PUB. ACCESS TO RECS. OF JUD. BRANCH 2. Case records include "any recorded information that is collected, created, received, maintained, or disseminated by a court or court administrator, regardless of physical form or method of storage." Minn. R. Pub. Access to Recs. of Jud. Branch 3, subd. 5.

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Subdivision 2 of Rule 4 sets forth the procedure for restricting access to criminal case records as follows:

> Procedures for restricting access to case records shall be as provided in the applicable court rules. A court may restrict access to public case records in a particular case only if it makes findings that are required by law, court rule, or case law precedent. The factors that a court must consider before issuing a restrictive order in regard to criminal case records are discussed in MINN. R. CRIM. P. 25, *Minneapolis Star & Tribune v. Kammeyer*, 341 N.W.2d 550 (Minn. 1983), and *Northwest Publications, Inc. v. Anderson*, 259 N.W.2d 254 (Minn. 1977). . . .

Minn. R. Pub. Access to Recs. of Jud. Branch 4, subd. 2. In order for a court to issue a restrictive order, the Rule requires specific findings and consideration of certain factors set forth in Minnesota Rule of Criminal Procedure 25 and pertinent case law.

2. Minnesota Rule of Criminal Procedure 25.03

Minnesota Rule of Criminal Procedure 25.03 governs access to public records in criminal proceedings. To restrict access to otherwise public records requires a motion, notice, a hearing and specific findings. Minn. R. Crim. P. 25.03, subds. 2-5. The rule further provides:

> **Subd. 4. Grounds for Restrictive Order.** The 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.
>
> A restrictive order must be no broader than necessary to protect against the potential interference with the fair and impartial administration of justice.

Minn. R. Crim. P. 25.03, subd. 4.

While there is no motion to restrict access currently before the Court with respect to the body-worn camera footage, the State acknowledges that, should the public have access to the footage, it is likely to be played repeatedly by the media. In determining whether to restrict access to that footage, the Court may consider the potential impacts on the parties' respective

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rights to a fair trial, including the likelihood of tainting the jury pool, the potential for misuse of the footage in the media, and any sensitive or otherwise protective information that may be contained in the footage.

The State acknowledges that the Hennepin County District Court has in place a Standing Order on Disclosure of Portable Recording Systems Data Provided Pursuant to Discovery in Criminal and Juvenile Delinquency Cases ("Standing Order"), dated December 19, 2016. The Standing Order places certain limitations on further disclosure of such footage on parties to criminal proceedings. Specifically, the Standing Order prohibits litigation parties from disclosing portable recording system data obtained from the prosecution pursuant to the rules of discovery to anyone else, absent court order or agreement from the prosecution that the data would be otherwise subject to disclosure under the Minnesota Government Data Practices Act. Active police investigative data is generally non-public under Minn. Stat. § 13.82, subd. 7. The State notes, however, that the Minnesota Government Data Practices Act does not apply to "records of the judiciary." Minn. Stat. § 13.01, subd. 5(b)(1); *see also* Minn. Stat. § 13.90, subd. 2 ("Access to data of the judiciary is governed by rules adopted by the supreme court.")

The State further notes that a defendant's Sixth Amendment right to a public trial does not extend to judicial records. Rather, the right "to inspect and copy" such materials is a common law right that "is not absolute." *United States v. Hernandez*, 124 F. Supp. 2d 698, 702 (S.D. Fla. 2000) ("Even though the press and public have a First Amendment right of access to criminal trials, the right of access to judicial records is not of constitutional dimension but rather derives from common law."). "[I]n contrast to the compelling justification required for closure of criminal trials, the trial court has broad latitude where only the common-law right of access to court records is implicated." *Id.*; *see also Minneapolis Star & Tribune v. Kammeyer*, 341

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N.W.2d 550 (Minn. 1983) (holding that closure of pretrial hearing requires finding of "substantial likelihood" that prejudicial evidence will be revealed at the pretrial hearing that would interfere with the defendant's right to fair trial).

With respect to any restrictive orders in these matters, the State requests that the Court follow the procedure set forth in Minnesota Rule of Criminal Procedure 25.03. If the Court concludes that access to the body-worn camera footage in this case "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," the State asks the Court to so find in imposing a restrictive order that is "no broader than necessary" to protect against such potential interference. Minn. R. Crim. P. 25.03, subd. 4.

CONCLUSION

For all the foregoing reasons, should the Court determine that extrajudicial commentary by the attorneys presents a substantial likelihood of prejudicing the Court's ability to conduct a fair trial, the State does not object to a narrowly tailored gag order in this case. Additionally, the State respectfully requests the Court deny defendants' motions for a finding of contempt/sanctions. The State further asks that the Court follow the procedures set forth in Minnesota Rule of Criminal Procedure 25.03 and make the requisite findings with respect to any orders restricting access to judicial records in these matters.

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Dated: July 20, 2020

Respectfully submitted,

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