Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

**STATE OF MINNESOTA,**

Plaintiff,

vs.

**MOHAMED MOHAMED NOOR,**

Defendant.

Case Type: Criminal
Court File No. 27-CR-18-6859
Hon. Kathryn L. Quaintance

**ORDER AND MEMORANDUM OPINION REGARDING: (1) MEDIA/PUBLIC RIGHT TO OBSERVE BODY-WORN CAMERA VIDEO IF SUCH EVIDENCE IS PLAYED TO JURY DURING TRIAL, AND (2) MEDIA SKETCH ARTIST**

This case has been highly publicized and extensively covered by local, regional, national, and even international media since its filing. Indeed, in the undersigned's almost two decades as a judge on this court, no criminal case has been the subject of greater pretrial publicity or received greater media interest, as evidenced by twenty notices filed by various media entities seeking to video and/or audio record various pretrial hearings and the trial and to have a sketch artist present (*see, e.g.*, Dk ## 25, 50-67, 91) and the countless published articles and broadcasts regarding various aspects of this case and the trial.

The level of media interest and coverage has resulted in substantial efforts by this Court to manage the pretrial and trial proceedings so as to secure a fair trial before an impartial jury and to protect jurors from unwanted publicity (and possible harassment) that could compromise their impartiality. For example, in view of the parties' joint objection[1] to the video or audio recording by the media of a scheduled March 1, 2019 pretrial hearing and of the trial, and in keeping with applicable Minnesota law, this Court previously ordered that no video or audio recordings would be permitted of pretrial hearings or the trial. *See* Order on Requests for Visual or Audio Coverage

[1] *See* "Parties Joint Response to Requests for Media Coverage" (filed Feb. 22, 2019, Dk # 83).

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

(filed Feb. 22, 2019, Dk # 84). This Court also filed Orders regarding Conduct at Trial (March 28, 2019, Dk # 124) and for a Confidential Jury (April 1, 2019, Dk # 129).

In the wake of extensive publicity and media coverage, on March 29, 2019, this Court issued a preliminary oral order regarding certain trial management issues. This Court was seeking to strike an appropriate balance between protecting:

(1) the public's and press' rights of access to an open and public trial;

(2) the Defendant/former Minneapolis Police Officer Mohamed Noor's (Noor) and the State's rights to a fair and public trial before an impartial jury; and

(3) the privacy rights and interests of the deceased victim, Justine Damond Ruszczyk (Victim), and her family in not having video images of her during the final minutes of her life displayed to the general public and to the press during the trial.

On April 2, 2019, a coalition of intervening media entities filed a motion (the "Intervening Media Coalition Motion") and supporting papers (Dk ## 134-136) objecting to two of this Court's preliminary March 29, 2019 oral orders:

(1) That the video monitor in courtroom 1953 should, during publication of body-worn camera recordings (BWCs)[2] depicting CPR being performed on the Victim, her struggle for breath, and her ultimate death, be positioned with its back to the gallery. The plan was that only the jury, Noor, and the prosecuting and Defense lawyers (as well as this Court and court staff, as appropriate) would be able to see the video images on those specific BWCs during the trial. Media representatives and members of the public observing the trial in courtroom 1953 or via the live video feed in the overflow courtroom, courtroom 1957, would not be able to see the video images from those BWCs but would be able to hear the audio from those BWCs and witness any testimony discussing the contents of the BWCs.

(2) That the press courtroom sketch artist would not be permitted, during the trial, to sketch the jury -- whether single jurors, some combination of jurors, or the jury as a whole -- for broadcast or print reproduction while the trial was ongoing. This Court's intent was to attempt to shield the members of the jury from unwanted publicity and from potential direct contacts by members of the public or the media

[2] Noor and fellow Minneapolis Police Officers Matthew Harrity (Harrity), Scott Aikins (Aikins), and Thomas Fahey (Fahey) were wearing body-worn cameras. Based on pretrial filings and this Court's discussions with the prosecutors and Defense counsel, the Court anticipates that portions of some and potentially all of those officers' BWCs might be offered and received into evidence during the trial and played to the jury.

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

during the trial[3] and also to protect Noor's right to a fair trial before a fair and impartial jury.

A hearing on the Intervening Media Coalition Motion was scheduled before the undersigned for 3:00 p.m. on April 5, 2019 (Hearing). The Defense had initially declined to weigh in or even to appear at a hearing on the Intervening Media Coalition Motion. On April 4, 2019, this Court ordered Noor's presence out of concern for his Sixth Amendment rights, which this Court has an independent obligation to protect. *See, e.g., United States v. CBS, Inc.*, 497 F.2d 102, 104 (5th Cir. 1974) (noting "heavy obligation rests on trial judges to effectuate the fair-trial guarantees of the Sixth Amendment"); *United States v. Gurney*, 558 F.2d 1202, 1209 (5th Cir. 1977) ("it is the trial judge's primary responsibility to govern judicial proceedings so as to ensure that the accused receives a fair, orderly trial comporting with fundamental due process").

Ninety minutes prior to the Hearing on April 5, the Defense filed a "Defense Objection to Limitations on Access to Information" (Dk # 141) in which, *inter alia*, the Defense noted its objection to this Court's March 29 order, which the Defense characterizes as "limiting access to information during trial" and "restricting access to information." The State has not made any filings in connection with the Intervening Media Coalition Motion. Neither the State nor the Defense opposed intervention by the Intervening Media Coalition.

Amy Sweasy, Esq., and Patrick Lofton, Esq., appeared at the Hearing on behalf of the State of Minnesota.

Thomas Plunkett, Esq., and Peter Wold, Esq., appeared at the Hearing on behalf of Noor, who was also present.

Leita Walker, Esq., appeared at the Hearing on behalf of the Star Tribune Media Company LLC, CBS Broadcasting Inc., Minnesota Public Radio, TEGNA Inc., Fox/UTV Holdings, LLC, the

[3] The *Noor* jury is not, as yet, being sequestered.

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

Associated Press, Hubbard Broadcasting, and the Minnesota Coalition on Government Information (collectively, the "Intervening Media Coalition").

Based upon all the files, records, and proceedings herein, and the parties' and the Intervening Media Coalition's written submissions and oral arguments at the Hearing, the Court enters the following Order.

**ORDER**

1. This Court must follow legal precedent and allow publication to the gallery of any portions of the BWCs the Court receives into evidence during the trial despite its highly-sensitive nature but reserves all substantive rulings on the admissibility of any such evidence to the trial.

2. Similarly, despite this Court's concerns about undue influence on the jurors that may result from publication of their identities via press sketches, the law requires that the media courtroom sketch artist be allowed to depict jurors. The only cure is sequestration, which this Court continues to consider but which would be a tremendous hardship for the jurors for whom the legislature has allotted compensation of only $20/day.

3. The attached Memorandum Opinion is incorporated herein.

**BY THE COURT:**

DATED: April 10, 2019

Kathryn L. Quaintance
Judge of District Court

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

## MEMORANDUM OPINION

## FACTUAL BACKGROUND[4]

Late in the evening of July 15, 2017, the Victim died from a gunshot fired by Noor while he was on duty and seated in the front, passenger-side seat of a Minneapolis Police squad car responding to a 9-1-1 call to a south Minneapolis residential neighborhood. Noor is charged in the Amended Complaint with one count of intentional, non-premeditated second-degree murder in violation of Minn. Stat. § 609.19 subd. 1(1), one count of unintentional third-degree murder (perpetrating an eminently dangerous act and evincing a depraved mind) in violation of Minn. Stat. § 609.195 subd. (a), and one count of second-degree manslaughter (culpable negligence creating unreasonable risk) in violation of Minn. Stat. § 609.205 subd. 1.

The State alleges, in the Amended Complaint, that the Victim called 9-1-1 at 11:27 p.m. on July 15, 2017 from her home at 5024 Washburn Avenue South in Minneapolis to report what she characterized as distressed sounds from a woman who was either having sex or being raped in the alley behind Victim's house. Forty-five seconds later, Noor and his partner Harrity were dispatched to the location on an "unknown trouble" report based on a 9-1-1 report of a "female screaming behind building." At the time of dispatch, they were patrolling in the vicinity of 36th Street and Blaisdell/Nicollet Avenues at the northern end of the 5th Precinct. The Victim placed another call to the 9-1-1 operator at 11:35 p.m., expressing concern that perhaps police had been provided an incorrect address as no officers had yet arrived. She was assured that police were on the way.

Two minutes later, the Victim called her fiancé and spoke to him for less than two minutes regarding the noises she had heard and her two 9-1-1 calls. Just after 11:39 p.m., the Victim, still inside her home, told her fiancé that the police had arrived and ended her call to him.

---

[4] The facts summarized here are derived from the Statement of Probable Cause in the Amended Complaint. They are not intended as, and do not constitute, formal findings of fact by this Court.

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

Harrity and Noor's squad car had entered the north end of the alley behind Washburn Avenue at 50th Street, heading south toward 51st Street. Harrity was driving; Noor was in the passenger seat. Upon entering the alley, Harrity turned off the squad's headlights, using a spotlight (his driver-side window was completely open) to search for any people on his side of the squad facing the Washburn Avenue homes' backyards. Harrity and Noor reported hearing nothing other than a dog as they drove slowly down the alley. Harrity never stopped the squad car and neither Harrity nor Noor got out. They did not stop behind the 9-1-1 caller's house. They never attempted to talk to her. They also did not encounter any people while driving through the alley, which took less than two minutes. As they approached 51st Street, Harrity increased speed slightly and turned the squad's lights back on. Noor then entered "Code 4" into their squad's computer, communicating to dispatch their status as being safe and not requiring assistance.

Upon reaching the end of the alley at 51st Street, Harrity stopped the car as a bicyclist, traveling on 51st Street between Washburn and Xerxes Avenues, passed in front of their squad car. According to Harrity's subsequent statements, he then "heard a voice, a thump somewhere behind him on the squad car, and caught a glimpse of a person's head and shoulders outside his window." Harrity was not able to see if the person was a man or woman, an adult or a child. Harrity did not observe any weapons on the person, who was on his side of the squad car.

At 11:40:15 p.m. (per surveillance video), Noor, while seated on the passenger side of the squad, fired the shot that struck the Victim, as she was standing outside the driver's side of the squad. Looking out his window, Harrity saw a woman – the Victim – placing her hands on a gunshot wound on the left side of her abdomen, exclaiming "I'm dying." Harrity got out of the squad and assisted the Victim to the ground. Noor got out on the passenger side of the squad, still carrying his handgun. Harrity told Noor to re-holster his gun and turn on his BWC. Video from

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

their BWCs establishes that Harrity and Noor were standing over the Victim, where she lay in the alley, by 11:40:29 p.m., less than 15 seconds after the shot was fired.

As depicted on the BWC, Harrity radioed "shots fired, one down" and requested immediate emergency assistance. Harrity radioed that he had begun performing CPR on the Victim at 11:41:39 and Noor took over CPR efforts about a minute later. The video and audio on Noor's and Harrity's BWC recordings show them administering CPR to the Victim and speaking to her before Minneapolis Fire Department (MFD) personnel arrived almost seven minutes after the shot had been fired. HCMC paramedics arrived a couple minutes later. The Victim's labored breathing is audible on the BWCs. Efforts to resuscitate her were unsuccessful. She died at the scene within minutes. It is these intense minutes that are captured by Noor, Harrity's and Aikin's BWCs.

Noor's BWC recording runs about 5:17; Harrity's about 9:47. Both recordings start after the shot was fired and the officers were out of the squad. The recordings capture images of Harrity and Noor each administering CPR, their statements to the Victim (who does not appear to be conscious), and her gasping for breath. In Noor's BWC recording, personnel from the MFD arrive about four minutes into the recording, and take over the CPR efforts from Noor and Harrity. In Harrity's longer BWC recording, the MFD personnel arrive on scene a little more than six and a half minutes into the recording, after which the Victim is largely out of view. Harrity's BWC recording also captures an approximate twenty-second Q&A between Harrity and a supervising sergeant after she had arrived on the scene. In the video footage in both Noor's and Harrity's BWC recordings, the Victim is fully clothed before the arrival of the HCMC EMT team.

Two other BWC recordings supplied to the Court are those of Scott Aikins and Thomas Fahey. The Aikins BWC, which is more than 24 minutes, shows HCMC EMT personnel arriving at the scene several minutes into the recording. The Victim can be observed roughly seven minutes into the recording. The EMT personnel cut through the Victim's shirt and bra; at this point, the

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

Victim's right breast is exposed on the Aikins BWC while the EMTs are working to resuscitate her. A couple minutes later, a voice is heard indicating they are unable to detect a pulse and roughly 25 seconds later the announcement is made "we're calling it," indicating resuscitation efforts were being stopped and they were declaring the Victim had died. Thereafter, the Aikins BWC contains only a few intermittent images, viewed from afar, of the Victim's body, which by then had been placed in a bag for transport to the medical examiner.

The final BWC recording, the Fahey, which is almost 22 minutes, has few direct images of the Victim. Several minutes into that recording, Noor and Harrity are seen performing CPR on the Victim and the Victim's breathing can still be heard. Soon thereafter, personnel from the MFD arrive on the scene and take over the CPR efforts, at which point the Victim can still be heard breathing. The EMT vehicle appears to arrive a couple minutes later, and a voice can be heard stating the expectation this would likely be a "load and go" – presumably reflecting a belief the Victim would immediately be placed in the ambulance and taken to a hospital -- but within seconds the question is asked if anyone had seen the Victim alive. Three and a half minutes later (in this recording), the "call" is made. This recording contains few views of the Victim receiving CPR by Noor, Harrity, and MFD personnel. The audio of this recording includes various voices commenting about the background of the shooting before Harrity can be heard stating that this was "an officer shooting" and there were no suspects.

The Court was made aware by the prosecution during pretrial proceedings of the graphic and disturbing nature of the videos depicting Noor and Harrity and other responders trying to save the Victim's life. For several minutes she can be seen gasping for breath before eventually succumbing. The parties' motions in limine regarding BWC recordings gave rise to this Court's comments and preliminary oral ruling during the March 29 hearing. It is these videos that are now the focus of the Intervening Media Coalition Motion. The Court has had a single viewing of the

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

contested footage and offered to make every effort to minimize the portion withheld from the press and public viewing. The Intervening Media Coalition was not interested in a compromise. Clearly, as of this ruling, none of the BWC footage has been introduced or admitted as evidence and is subject to the ordinary evidentiary analysis.

The Court has no interest in limiting access to the Fahey BWC recording, should it be offered and received into evidence during trial. However, this Court has multiple concerns about publication of the Noor, Harrity, and Aikins BWCs to the press and public. The footage on these BWCs shows the last moments of a human life and the struggles of police and medical personnel to save that life. These are moments well outside the personal experience of most people. Most lay people are not well equipped to take in such visceral and shocking material. The videos speak for themselves and any attempts by the press to explain it to the public risk misrepresentation. In this Court's view, the Victim and her family have privacy interests in these last moments of her life, played out under the glare of emergency medical intervention. There is an interest, which this Court shares, in protecting these vulnerable moments – vulnerable moments for the professionals and the Victim – from prurient interests and from tabloid grandstanding.

This Court, however, is sworn to follow the law and will do so, despite the fact that the analysis in the precedential caselaw this Court has reviewed does not, in this Court's view, adequately consider victim interests and privacy concerns in the context of the First and Sixth Amendment rights at stake in the criminal trials in which these issues typically arise.

## DISCUSSION

### I. The Intervening Media Coalition Has Standing to Intervene to Challenge This Court's Preliminary Oral March 29, 2019 Orders.

Whether an intervenor has standing requires a showing (1) of a claim of injury in fact, and (2) that the interest sought to be protected is arguably within the zone of interests to be

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

protected or regulated by the statute or constitutional guarantee in question. *Data Processing Service v. Camp*, 397 U.S. 150, 153-54 (1970). Those elements are present here.

In criminal proceedings, "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 609 n. 25 (1982) (internal quotation source omitted); *Northwest Publications, Inc. v. Anderson,* 259 N.W.2d 254, 256 (Minn. 1977) (allowing media intervention to challenge trial court orders sealing complaints in murder prosecution cases in effort to prevent public access to them, court held newspapers have standing to challenge trial court orders having "the effect of either directly or indirectly interfering with [press] functions of collecting or disseminating the news"); *accord State v. Clifford,* 41 Media L. Rep. 1273 (Minn. Dist. Ct. Oct. 3, 2012).[5]

The Minnesota Rules of Criminal Procedure expressly confer standing on the news media to challenge certain orders restricting public access (and, derivatively, the media's role in vindicating public access to open and public aspects of criminal trials as well as the press' First Amendment rights). *See, e.g.,* Minn. R. Crim. P. 25.03 subds. 1, 2 (requiring notice of hearing be given to the news media prior to "the issuance of any court order restricting public access to public records relating to a criminal proceeding" and further providing that the "public and news media have a right to be represented and to present evidence and arguments in support of or in opposition to the motion, and to suggest any alternatives to the restrictive order"); Minn. R. Crim.

---

[5] That rule is widely adopted in the federal courts as well. *See, e.g., In re Application of Dow Jones & Co.,* 842 F.2d 603, 608 (2d Cir. 1988); *Pansy v. Borough of Stroudsburg,* 23 F.3d 772, 777 (3d Cir. 1994); *Davis v. East Baton Rouge Parish School Board,* 78 F.3d 920, 926-27 (5th Cir. 1996); *CBS Inc. v. Young,* 522 F.2d 234, 237-38 (6th Cir. 1975); *Radio & Television News Ass'n v. U.S. District Court,* 781 F.2d 1443, 1445 (9th Cir. 1986); *Journal Publishing Co. v. Mechem,* 801 F.2d 1233, 1235 (10th Cir. 1986).

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

P. 26.03 subd. 6 (3)(4) (reporters must be allowed opportunity to be heard and to suggest alternatives to orders restricting public access to portions of trial conducted outside jury's presence, restricting access to trial transcripts, or orders arising from closed portion of trial).

A motion is the appropriate mechanism by which the media is afforded the opportunity to assert its interests.[6] The Intervening Media Coalition has standing to intervene for purposes of challenging this Court's preliminary oral rulings at the March 29 hearing regarding limitations to be placed on the press sketch artist's ability to sketch renderings of the jurors during this trial as well as regarding limitations on the ability of the press and public to view certain video images on BWC recordings received in evidence during the trial and published to the jury.

## II. The Press and General Public Have a Right to View the Evidence Presented During Trial to the Jury.

The Intervening Media Coalition challenges this Court's preliminary March 29 oral ruling regarding the anticipated positioning of the courtroom video monitor directly in front of the jury box and squarely facing the jurors, thereby preventing those in the public gallery in courtroom 1953 and as well as those in the overflow courtroom from seeing images on Noor's,

---

[6] Here, too, federal courts have extrapolated from the rules of civil procedure and found that "a motion to intervene to assert the public's First Amendment right of access to criminal proceedings is proper." *See United States v. Aref,* 533 F.3d 72, 81 (2d Cir. 2008); *accord United States v. Preate,* 91 F.3d 10, 12 n.1 (3d Cir. 1996); *In re Associated Press*, 172 Fed. Appx.1, 4 (4th Cir. 2006) (unpublished); *In re Associated Press,* 162 F.3d 503, 508 (7th Cir. 1998); *In re Search Warrant for Secretarial Area Outside Office of Gunn,* 855 F.2d 569, 572-73 (8th Cir. 1988); *United States v. Valenti,* 987 F.2d 708, 711 (11th Cir. 1993). Rule 24.01 of the Minnesota Rules of Civil Procedure provides:

> Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

Harrity's, and Aikins' BWCs. As this Court explained at the March 29 hearing, this case arises from the shooting of the Victim, an unarmed woman who had called 9-1-1 minutes earlier to express concerns about a possible ongoing crime behind her home. These BWCs, on which the recordings started after the Victim had been shot, include video images depicting the Victim in the final minutes of her life, gasping for breath as she struggles for life, and the Aikins BWC also contains images in which one of the Victim's breasts is exposed while HCMC EMTs were working frantically to revive her. The Court appreciates how emotionally devastating such images can prove to a crime victim's surviving family members and to a lay jury.

The Court does not know which of those recordings, or which portions of them, either of the parties may seek to introduce at trial, nor has the Court made rulings on their admissibility. The *Noor* jury will be asked to decide Noor's guilt on three separate criminal charges arising from the Victim's from Noor's gunshot wound. The portions of the Noor, Harrity, and Aikins BWCs, some of which are cumulative, are a small part of the facts the jury will be considering in deciding Noor's guilt.[7] As the State pointed out during the oral argument, the State's purpose in seeking to introduce (all or portions) of these BWCs into evidence is to show the actions and statements by the police officers in the immediate aftermath of the shooting; the State's focus is not on the Victim and, in the State's view, it is coincidental that she is captured in the last minutes of her life in some of that footage.

This Court never suggested it intended to "close the courtroom" for any portion of the *Noor* trial, in the sense of ordering the public and press to leave courtroom 1953 while specific

---

[7] The parties have indicated this trial may last three weeks. The aggregate running time of the Noor, Harrity, and Aikins BWCs is only about 40 minutes, with the images giving rise to the Court's concerns comprising fewer than 25 minutes. Even there, some of those images are duplicative, as similar images of Harrity, Noor, and MPD personnel administering CPR to the Victim appear on more than one of these BWCs.

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

testimony was being taken. Assuming the parties elect to offer portions of some or all of those BWCs and the Court rules any of the offered portions will be received in evidence, the Court always expected the press and public would be present in courtroom 1953 when the admitted portions of those BWCs were published to the jury and would be able to listen to the audio on those recordings and the questioning of witnesses regarding those recordings. The Court intended only to protect the video images on the recordings. This Court upholds First Amendment freedoms, the rights of the press, the press and the public's right of access to public criminal trials, and a defendant's Sixth Amendment right to a fair, public trial before an impartial jury. This Court also sought to balance all of those critical rights and freedoms with important rights of the Victim in this case and her family's right to privacy. This Court also sought to prevent the Victim's dying moments from being the subject of sensationalism or voyeurism or from being disseminated on the internet.

The First Amendment provides a constitutional right of the public and the press to attend criminal trials. *Richmond Newspapers v. Virginia,* 448 U.S. 555, 580 (1980) ("We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment"); *see also Waller v. Georgia*, 407 U.S. 39, 44 (1984) ("the press and public have a qualified First Amendment right to attend a criminal trial); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603, 606 (1982) ("*Richmond Newspapers* firmly established for the first time that the press and general public have a constitutional right of access to criminal trials"); *Craig v. Harney,* 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property."). As the Eighth Circuit has stated, "We have an open government, and secret trials are inimical to the spirit of a republic, especially when a citizen's liberty is at stake. The public, in a way, is necessarily a party to every criminal case." *United States v. Thunder,* 438 F.3d 866, 867 (8th Cir. 2006).

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

There are several policy reasons mandating press and public access to criminal trials conducted in open public court. As the Court observed in *Richmond Newspapers*, 448 U.S. at 572:

> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.

Both the public and criminal defendants have important interests that are vindicated by ensuring criminal trials remain open to the public and press:

> The purpose of the public trial guarantee is for the benefit of the accused; that the public may see he 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 to the importance of their functions.

*State v. Brown*, 815 N.W.2d 609, 616 (Minn. 2012) (internal marks and citations omitted); *see also Globe Newspaper*, 457 U.S. at 606 ("[I]n the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process-an essential component in our structure of self-government"); *Richmond Newspapers*, 448 U.S. at 580 ("[W]ithout the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated." (internal marks and citation omitted)).

There is also the public's perception that criminal trials are conducted fairly and criminal defendant are treated fairly:

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

*Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*"). Indeed, even when "scrupulously fair in reality," secret hearings are "suspect by nature. Public confidence

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 429 (Blackmun, J., concurring in part and dissenting in part) (citation omitted).

Finally, the Constitution and common law guarantees of press and public access to criminal trials also vindicate the following additional policy consideration and constitutional values in our form of representative and participatory self-government as that access:

(1) protects the free discussion of governmental affairs;

(2) provides what the United States Supreme Court has described as a "community therapeutic value" in that allowing the public to see that the law is being enforced and the criminal justice system is functioning, helps obviate an otherwise potential community urge to retaliate and also can work to minimize community outrage and hostility in the face of violent crimes; and

(3) educates the public about the judicial process and fosters an informed electorate.

*See, e.g.*, *Richmond Newspapers*, 448 U.S. at 592–93; *Globe Newspaper*, 457 U.S. at 604–05; *Press-Enterprise I*, 464 U.S. at 508–09.

The Intervening Media Coalition argues persuasively that it is important that evidence presented to the jury be viewed by the press and public sitting in the courtroom at the time that evidence is being discussed by trial participants to ensure the public and press are able to understand the evidence that has been presented to the jury as well as how the jury may be reacting to the evidence. There is a First Amendment interest in contemporaneous access. *Richmond Newspapers*, 448 U.S. at 592 (Brennan, J., concurring) (noting importance of "contemporaneous review in the forum of public opinion" as "an effective restraint on the possible abuse of judicial power" (citations omitted)). As the Second Circuit put it, "[t]he ability to see and to hear a proceeding as it unfolds is a vital component of the First Amendment right of access—not . . . an incremental benefit." *ABC v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004); *see also Detroit Free Press v. Ashcroft*, 303 F.3d 681, 710–11 (6th Cir. 2002) (explaining that "no subsequent measures [after

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

closure] can cure this loss, because the information contained in the appeal or transcripts will be stale, and there is no assurance that they will completely detail the proceedings").

Judicial attempts to place restrictions on the manner in which the press and public have complete contemporaneous access to evidence in criminal trials where the evidence may be prone to sensationalism or injurious to the privacy rights and interests of victims typically have not withstood constitutional scrutiny. *See, e.g., Globe Newspaper*, 457 U.S. at 610 (rejecting trial closure for testimony of child sexual assault victims); *In re The Spokesman-Review*, 569 F. Supp. 2d 1095, 1105 (D. Idaho 2008) (rejecting prosecution request -- for asserted purposes of preserving eight-year old child victim's dignity and personal privacy interests, to prevent undue embarrassment, and to safeguard the minor child's psychological well-being -- to close courtroom, in a murder trial in which the child victim had been sexually assaulted and several family members murdered, while graphic video tapes were published to jury); *People v. Holmes*, No. 12CR1522, slip. op. (Colo. Dist. Ct. Mar. 24, 2015) (denying prosecution request that "graphic images" – including photographs and videos taken during autopsies, at hospitals, and at crime scene of homicide victims be visible only to the jury, parties and Court but not to people seated in public gallery); *State v. Cox*, 297 Kan. 648, 304 P.3d 327 (2013) (rejecting closure of courtroom during display of photographs of minor child victims' genitalia and sexual assault nurse's testimony regarding those photographs and her examination of the victims).

Although courts have articulated these standards in varying formulations, the constitutional presumption that criminal trials are to be open to the public and the press may be overcome only under limited circumstances:

1. If failure to restrict access creates a substantial probability of prejudice to a compelling or overriding interest. *See, e.g., Press-Enterprise. Co. v. Superior Court*, 478 U.S. 1, 13–14 (1986) ("*Press-Enterprise II*"); *Waller,* 467 U.S. at 45, 48; *Press-Enterprise I,* 464 U.S. at 510; *Richmond Newspapers*, 448 U.S. at 580–81; *accord Northwest Publications,* 259 N.W.2d at 257 (party seeking restrictive measures must establish, "in an adversary setting at which the

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

public must be represented and afforded an opportunity to be heard . . . a strong factual basis" for the requested restriction).

2. No reasonable alternatives exist to adequately protect the threatened compelling or overriding interest. *E.g., Press-Enterprise II*, 478 U.S. at 13–14; *Waller v. Georgia*, 467 U.S. at 48.

3. Any restrictions on access are narrowly tailored to serve the threatened interest, *i.e.*, the restrictions must be no broader than necessary to protect the compelling or overriding interest. *E.g., Press- Enterprise II*, 478 U.S. at 13–14; *Press-Enterprise I*, 464 U.S. at 510; *Waller*, 467 U.S. at 45, 48.

4. Any restrictions on access must be effective in protecting the threatened compelling or overriding interest for which the limitation is imposed—a constitutional right may not be restricted for a futile purpose. *E.g., Press-Enterprise II*, 478 U.S. at 14; *Waller*, 467 U.S. at 48.

5. The court must first provide prior notice and must also either issue written findings of fact or make detailed findings of fact on the record demonstrating that these standards have been met. *E.g., Press-Enterprise II*, 478 U.S. at 13–14; *Waller*, 467 U.S. at 45, 48; *Press-Enterprise I*, 464 U.S. at 510; *Northwest Publications,* 259 N.W.2d at 257.

The Court concludes application of these criteria here does not clearly support the Court's original plan to restrict the manner in which video images on the Noor, Harrity, and Aikins BWCs would be published to the jury during trial so those images could not be seen by the press representatives and members of the public in the public gallery in courtroom 1953 over the overflow courtroom, courtroom 1957.

*First*, to date there has been no showing that allowing the press and public to view the video footage on the BWC recordings would create a substantial probability of harm to a compelling interest. Notwithstanding this Court's expressed concerns about the Victim's and her family members' privacy rights and interests, the Intervening Media Coalition has brought to the Court's attention *In re Nelson*, No. 27-FA-06-3597, slip op. at 12 (Henn. Cty. Aug. 15, 2016), concluding, in a case involving the musician Prince, that a cause of action for invasion of privacy does not generally survive an individual's death. *See also Estate of Benson v. Minnesota Board of Medical Practice*, 526 N.W.2d 634 (Minn. App. 1995) (claim for invasion of statutory privacy

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

rights under Minnesota Government Data Practices Act does not survive decedent's death); Restatement (Second) of Torts § 652I cmt. b ("In the absence of statute, the action for the invasion of privacy cannot be maintained after the death of the individual whose privacy is invaded.").

Other courts handling high-profile criminal trials have concluded that concerns similar to those expressed by this Court at the March 29 hearing are insufficient to prevent the press and members of the public from being able to view graphic and disturbing video images when such recordings are published to the jury during trial. For example, in *In re The Spokesman-Review*, the district court concluded,

> Though the videos in question are disturbing, they are direct evidence of the crimes and are necessary to the jury's consideration and must be presented to the jury. The Court is sensitive to the family's interest in maintaining their privacy and the dignity of the victim. However, ours is an open judicial system that requires a compelling interest that outweighs the lengthy history of public access to open court proceedings. . . . such interests that outweigh the public's right of access as to the videos have not been shown here [and] the courtroom will remain open during the presentation of the videos in question.

569 F. Supp. 2d at 1105.

Similarly, during the trial of James Holmes for the murder of twelve people at an Aurora, Colorado movie theater, the prosecution moved to prevent the gallery from being able to view autopsy and crime scene photographs and video footage containing images of the homicide victims. *See Holmes,* No. 12CR1522, slip. op. (Walker Aff., Exh. 1) The court rejected the request, ruling that "[t]he wishes of a deceased victim's relatives for privacy, while completely understandable, are not sufficient to warrant partial closure of the trial as graphic images of the deceased victims are displayed in the courtroom." *Id.* at 14-15; *see also id.* at 23 ("As much as the court understands and respects the family members' desire for privacy, under the law, this is not a compelling and overriding interest that outweighs the defendant's constitutional right to a public trial or the public and the media's right of access to

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

open proceedings."). The *Holmes* Court noted that its research had unearthed no homicide case "in the rich history of American jurisprudence in which a trial court has granted the relief [the prosecution] requests here." *Id.* at 18.

Likewise, in *State v. Cox*, 297 Kan. 648, 304 P.3d 327, 329-30, 332-35 (2013), the Kansas Supreme Court held that a trial court order that had closed a criminal trial involving sexual assault charges with minor children victims during testimony by a sexual assault nurse, during which that witness displayed photographs of the victims' genitalia and discussed her physical examinations of them, violated the constitutional right to a public trial, mandating reversal of the defendant's conviction and remand for a new trial.

In *State v. McRae*, 494 N.W.2d 252 (Minn. 1992), the Minnesota Supreme Court reversed a conviction for criminal sexual conduct involving a minor victim. The trial court had closed the courtroom to the public during the victim's trial testimony because the victim was only 15[8] and it appeared to the court, based on an off-the-record conference, that the victim "was extremely apprehensive" about testifying in the trial. *Id.* at 258. Although the objection in *McRae* came from the Defense, based on the defendant's Sixth Amendment right to an open, public trial, rather than a First Amendment claim by the press as the Court is confronting here, citing the *Globe Newspaper* and *Waller* line of cases, the Minnesota Supreme Court held the trial court had erred by ordering closure for the victim's testimony as

---

[8] Minn. Stat. § 631.045 authorizes a judge, in trials for specified criminal sexual assault charges, sexual predatory conduct charges, or charges involving dangerous sex offenders, to exclude the public from the courtroom during the victim's testimony if the victim of the charged crime is under 18 years of age, the judge determines such closure is necessary to protect a witness or to ensure fairness, the prosecutor, the defense and members of the public have been afforded an opportunity to object before the closure order, and the judge specifies the reasons for closure in an order.

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

the record did not include evidence or specific factual findings by the trial court that closure was necessary to protect the victim or to ensure fairness in the trial. *Id.* at 259.

*Second,* there has been no showing that alternatives to closure will not adequately protect the interests at stake here. The court will continue to instruct jury members not to listen to broadcasts or to read any news reports on the *Noor* case or the trial. *See* CRIMJIG 1.02. That instruction may prevent exposure to "inflammatory" reporting. *In re Associated Press*, 172 Fed. Appx.1, 4 (4th Cir. 2006) (unpublished, noting with approval trial court's repeated instructions to jury not to expose themselves to media coverage of trial and where trial court's daily questioning demonstrated the jurors had been complying with court's instruction); *Valley Broad Co. v. United States District Court*, 798 F.2d 1289, 1297 (9th Cir. 1986) (rejecting as speculative supposition that jurors might disregard trial court instructions not to watch media coverage of trial). This Court can also alert the Victim's family members before portions of the Noor, Harrity, or Aikins BWCs are published to the jury, thereby affording them the chance to leave the courtroom while those recordings are played, if they wish to do so. *See, e.g., Holmes,* slip op. at 4.

*Third,* a blanket ban on public viewing of the video images in the Noor, Harrity, and Aikins BWCs while they are presented to the jury is not narrowly tailored. Under existing precedent, this Court would first have to make a specific decision with regard to each discrete segment of each of the BWCs admitted in evidence and limit the manner in which the video was displayed in the courtroom for particular images. Proceeding in such a fashion could significantly and unwarrantedly distract and unduly impede the orderly and timely presentation of the evidence.

*Finally*, as the Intervening Media Coalition argues, the Court's earlier plan would, in the press' view, negatively impact the press' ability to observe and report on the video evidence being presented, how the jury reacts to it, and how the evidence might impact the jury's verdict. Caselaw

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

establishes that such decisions are journalistic decisions necessarily left to the attending reporters and their editors, even if this Court would prefer different judgments be made in response to the evidence as it is presented during trial. Moreover, even were the Court to move forward and implement its preliminary plan announced at the March 29 hearing, the Court's stated objectives of protecting privacy rights of the Victim's family and also preventing publicity regarding "inflammatory" or "emotional" images might in the end prove unavailing: counsel for the Intervening Media Coalition informed the Court that the press has sought to obtain the evidence under provisions of the Minnesota Government Data Practices Act (MGDPA), thereby undermining any attempts to limit access to this material.

## III. The Court Will Not Prohibit the Press Sketch Artist from Sketching the Jurors.

The freedoms of the press guaranteed in the First Amendment to the United States Constitution and in Article 3 of the Minnesota Constitution are phrased as prohibitions on the prior restraint of publication. *Northwest Publications,* 259 N.W.2d at 256. A "prior restraint" includes an order that prohibits or imposes some limits on the right to publish or broadcast (as opposed to a sanction imposed after publication based on the substantive content in a broadcast or print article). *Near v. Minnesota*, 283 U.S. 697, 713-14, 716-17, 718-19 (1931); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976).

Because prior restraints are "the essence of censorship," the First Amendment "accords greater protection against prior restraints than it does against subsequent punishment for a particular speech." *Nebraska Press Ass'n*, 427 U.S. at 588-89 (Brennan, J., concurring in the judgment); *see also id.* at 556 (First Amendment guarantees afforded press provide "special protection against orders that impose [prior restraints] on speech."). "A gag order seeks to prevent publication before it happens and is, therefore, a prior restraint of speech." *Minneapolis Star & Tribune Co. v. Lee*, 353 N.W.2d 213, 214 (Minn. App. 1984).

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

Prior restraints on speech constitute "one of the most extraordinary remedies known to our jurisprudence" and are universally recognized to be "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n*, 427 U.S. at 559, 562. Every request for a prior restraint thus comes to a court with "a heavy presumption against its constitutional validity," *id.* at 558; *Organization for a Better Austin v. Keefe*, 402 U.S. 416, 419 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Northwest Publications*, 259 N.W.2d at 257, particularly in the context of reporting on criminal proceedings, where the press "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Nebraska Press Ass'n*, 427 U.S. at 559-60 (citation omitted); *Northwest Publications*, 259 N.W.2d at 257. As Justice Brennan noted in his concurring opinion in Nebraska Press Association:

> Settled case law concerning the impropriety and constitutional invalidity of prior restraints on the press compels the conclusion that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained.

427 U.S. at 587-88. As a general proposition, orders that proscribe publication regarding matters transpiring in open court "are constitutionally infirm, absent some compelling justification." *United States v. Gurney*, 558 F.2d 1202, 1208 (5th Cir. 1977); *Columbia Broadcasting System, Inc. v. Young*, 522 F.2d 234 (6h Cir. 1975).

This protection is at its highest when a prior restraint relates to reporting about criminal proceedings. *Neb. Press*, 427 U.S. at 559–60. As Justice Douglas observed elsewhere, "[t]hose who see and hear what transpired [at a trial] can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.'" *Craig*, 331 U.S. at 374. "[O]nce a public hearing had been held, what transpired there [can] not be

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

subject to prior restraint." *Nebraska Press Ass'n*, 427 U.S. at 568; *accord Estes v. Texas*, 381 U.S. 532, 589 (1965) (Harlan, J., concurring) ("Once 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.").

The Intervening Media Coalition advise that the media sketch artist will be observing, among other things, the *Noor* trial participants – the members of the jury as well as this Court, Noor, the prosecutors, and the Defense lawyers. The sketch artist may also observe the Noor and Damond families. Even if no media sketch artist was present for the *Noor* trial, members of the public in the gallery as well as members of the press attending the trial will be able to watch the jurors, see what they look like, how they react to certain testimony (as well as whether they are paying attention, as the Intervening Media Coalition took pains to point out in their supporting brief). Such observations, lawfully obtained, could then be shared with anyone else outside of the courtroom, whether that sharing takes the form of written words or visual art. *KPNX Broadcasting Co. v. Superior Court*, 678 P.2d 431 (Ariz. 1984) (media representatives attending public criminal trial can observe jurors' likenesses while in the courtroom; "sketches depicting jurors' reactions and behavior," because garnered from information in the public domain, are protected by the First Amendment). As counsel also noted during oral argument, even were the Court to proceed with its previously announced plan to prohibit the media sketch artist from sketching members of the jury during trial, any attending members of the public would be free to record their own images, or describe any of the jurors to a sketch artist outside the courtroom, and this Court could not then prevent the media from publishing or broadcasting such images.

In deciding whether to enter an order restraining speech, a trial court must consider:

(1) the gravity of the harm posed by media coverage;

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

(2) whether other measures short of a prior restraint would adequately have protected the defendant's right to a fair trial and would likely have mitigate other undesired effects of unrestrained publicity; and

(3) how effectively a restraining order would operate to prevent the threatened danger.

*Nebraska Press Ass'n*, 427 U.S. at 562; *see also Craig*, 331 U.S. at 376 (to warrant trial judge imposing a prior restraint, even for purposes of seeking to ensure a fair trial, there must be "an imminent, not merely a likely, threat to the administration of justice [and the] danger must not be remote or even probable; it must immediately imperil"). The proposed order prohibiting the media sketch artist from sketching jurors in the courtroom during trial does not pass muster under these criteria.

In *KPNX Broadcasting*, a trial judge in a murder trial had not barred the media sketch artist from sketching the jurors but rather had ordered that any courtroom sketches of the jury drawn for television broadcast be submitted to the court for review before they could be released for broadcast in an effort to protect the jury from public identification in order to allay jurors' fears about possible retribution. The Arizona Supreme Court found that none of *Nebraska Press Association*'s three prongs were met, and reversed the trial judge's order. 678 P.2d at 437.

In *KTTC Television, Inc. v. Foley*, 7 Media Law Rep. 1094 (Minn. 1981), the Minnesota Supreme Court, in a brief order without opinion, stated "sketching should be allowed absent extraordinary circumstances where to do so would disrupt the proceedings or distract the participants").

In *United States v. CBS, Inc.*, 497 F.2d 102 (5th Cir. 1974), in seeking to prevent prejudicial publicity, a trial judge had issued orders barring not only in-court sketching but also publication of sketches of courtroom scenes during a criminal trial for prosecution of several individuals charged with conspiring to disrupt the 1972 Republican National Convention. The Fifth Circuit vacated those orders, concluding they were unconstitutionally overbroad. That court distinguished the prejudicial impact on having television cameras in the courtroom during a trial

Filed in District Court
State of Minnesota
4/10/2019 3:07 PM

with the unobtrusive nature of sketching, which "requires only a writing instrument and sketch pad" and can be done from memory completely outside the courthouse as well as in the courtroom. *Id.* at 106.

Under these precedents, this Court concludes that it may not lawfully prohibit the media sketch artist from sketching members of the jury during the *Noor* trial.

K.L.Q.