Filed in District Court
State of Minnesota
10/15/2020 9:09 AM

STATE OF MINNESOTA
HENNEPIN COUNTY

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota

Plaintiff,

The Honorable Peter A. Cahill

vs.

Derek Michael Chauvin	Dist. Ct. File 27-CR-20-12646
Tou Thao	Dist. Ct. File 27-CR-20-12949
Thomas Kiernan Lane	Dist. Ct. File 27-CR-20-12951
J. Alexander Kueng	Dist. Ct. File 27-CR-20-12953

Defendants

MEDIA COALITION'S OPPOSITION TO STATE'S MOTION TO RESTRICT ACCESS TO DEFENDANT LANE'S OCTOBER 12 FILINGS AND STATE'S MOTION FOR A "TEMPORARY" PROTECTIVE ORDER

American Public Media Group (which owns Minnesota Public Radio); The Associated Press; Cable News Network, Inc.; CBS Broadcasting Inc. (on behalf of WCCO-TV and CBS News); Court TV Media LLC; Dow Jones & Company (which publishes *The Wall Street Journal*); Fox/UTV Holdings, LLC (which owns KSMP-TV); Hubbard Broadcasting, Inc. (on behalf of its broadcast stations, KSTP-TV, WDIO-DT, KAAL, KOB, WNYT, WHEC-TV, and WTOP-FM); Minnesota Coalition on Government Information; The New York Times Company; The Silha Center for the Study of Media Ethics and Law; TEGNA Inc. (which owns KARE-TV); and Star Tribune Media Company LLC (collectively, the "Media Coalition") by and through undersigned counsel, hereby submit this Opposition to State's Motion to Restrict Access to Defendant Lane's October 12 Filings and State's Motion for a "Temporary" Protective Order.

The Media Coalition respectfully requests that the Court, consistent with its obligations under the common law, its own rules of access, the First Amendment—and, indeed, consistent

Filed in District Court
State of Minnesota
10/15/2020 9:09 AM

with its own August 7 Order and August 11 Memorandum Opinion—immediately make the motion papers that Defendant Thomas K. Lane filed on October 12, 2020, including all video exhibits, available to the press and public and that it deny the State's motion requesting their continued sealing. The Coalition further requests that the Court deny the State's Motion for Order Temporarily Restricting Public Access to Motions and Exhibits.

INTRODUCTION

On October 12, Defendant Thomas K. Lane ("Defendant") filed a Motion to Admit Floyd's May 6, 2019 Incident. In addition to the memorandum accompanying the motion, Defendant filed seven exhibits—three body-worn camera ("BWC") videos from the May 6 incident and their accompanying transcripts and a fourth transcript from an audio-only file. The motion was highly substantive: Defendant argues that the "body camera footage shows exactly how the [May 6] stop played out in real time," and that the similarities in Floyd's behavior in two encounters with police—the first on May 6, 2019, the other on May 25, 2020, when he died— is "unreal, his behavior is almost an exact replica." Def. Br. at 2, 5.

As counsel for the Media Coalition, which previously intervened in this matter, the undersigned received through the Court's electronic filing system Defendant's motion, memorandum, and transcripts, but did not receive copies of the three BWC videos. The general public, meanwhile, does not have access to any of it, even though Defendant apparently filed his motion papers publicly. Nor did it initially receive any explanation for the lack of access. No sealing order appears on the public docket. Indeed, until late yesterday afternoon, neither did a motion to seal.

Finally—two days into the *de facto* sealing and less than 24-hours before the hearing on this matter—the State formally moved "to restrict public access" to Lane's motion papers

Filed in District Court
State of Minnesota
10/15/2020 9:09 AM

"unless and until this Court finds the evidence admissible." See State's Mot. for Order Restricting Public Access to Motion and Exhibits at 1 (Oct. 14, 2020) ("State Oct. 14 Br."). The State did not bother to serve this Motion on the undersigned, despite knowing of the Media Coalition's intent to oppose it, and it did not respond when the undersigned learned it had been filed and requested a copy (court staff kindly provided a copy after close of business).

The State's approach has put the Media Coalition "on the spot" and forced it to marshal arguments in a vacuum and in a rush. This is not how it's supposed to work. *See Minneapolis Star & Tribune Co. v. Kammeyer*, 341 N.W.2d 550, 558 (Minn. 1983) ("If the public is required to respond on the spot, the hearing would be unlikely to provide any assistance to the court. . . . We think that actual notice to a representative of the press would be unworkable and conclude that notice by docket entry at least 24 hours before hearing a motion to close is sufficient to protect the public's right of access.").[1]

In any event, the State has not met its burden under applicable law to keep the BWC videos (or any portion of Defendant's motion) under seal. In addition, its other motion—requesting a two-business-day, "temporary" seal on all filings going forward—turns the common law and the First Amendment on their head. The Court should deny both motions and make Defendant's motion papers, the accompanying BWC videos, and all other filings in this case immediately public. As this Court previously recognized, "secrecy in connection with public aspects of criminal case proceedings serves no useful purpose." *See* Aug. 11 Slip Op. at 8, 11-13. (alterations omitted).

[1] The Media Coalition therefore respectfully requests that, should the Court be inclined to grant in whole or in part either the State's pending motions, the Court first provide to the Coalition a brief extension of time within which to more fully respond to the matters at hand.

Filed in District Court
State of Minnesota
10/15/2020 9:09 AM

ARGUMENT[2]

I. Defendant's October 12 motion papers, including the BWC videos filed as exhibits, should be made immediately available to the press and public.

The *de facto* and ongoing sealing of Defendant's October 12 motion papers, including the BWC videos, was done without affording any notice to the press or public, without any opportunity to be heard, and without any findings of fact or conclusions of law. Indeed, it appears to have been done without any motion or showing by the State whatsoever. Like the restrictions on access to the BWC footage showing Floyd's May 25 arrest and death—which restrictions the Court rightfully lifted—the secrecy surrounding Defendant's October 12 motion violates the common law, the court's own rules, and the First Amendment.

1. Under the common law, this Court's rules and the First Amendment, the press and the public have a presumptive right of access to the October 12 motion papers, including the BWC videos.

The common law is clear that exhibits filed with substantive pleadings in criminal proceedings are presumptively public, and the State has a high burden to overcome that right of access. *See Nixon v. Warner Comm'cns.*, 435 U.S. 589, 597 (1978) ("[i]t is clear that the courts of this country recognize a general right to inspect and copy . . . judicial records and documents"); *Kammeyer*, 341 N.W.2d at 557 (noting that an order for closure must be "supported by findings of fact" that includes "a review of any suggested alternatives to closure

[2] As the Court is well aware, it has previously acknowledged the Media Coalition's right to intervene in these criminal proceedings and the Coalition's previous filings address many of the legal principles once again before the Court. *See* Mem. in Support of Media Coalition's Mot. Objecting to Limits on Access to Body-Worn Camera Footage Publicly Filed by Def. in Support of His Dispositive Mot. (July 13, 2020) ("July 13 Br.") and Mem. in Support of Media Coalition's Mot. Objecting to the Court's July 9 Gag Order (July 17, 2020). For the sake of brevity and out of respect for this Court's time ahead of today's hearing, the Coalition incorporates by reference its previous arguments concerning the press' and public's right of access under the common law, the court's rules, and the First Amendment.

Filed in District Court
State of Minnesota
10/15/2020 9:09 AM

and a statement of why those alternatives are inadequate"). At the very least, the State must show that access to the October 12 filings would "interfere with an overriding interest" and that there are no adequate, "reasonable" alternatives to sealing those filings. Aug. 11 Slip Op. at 18. Further, any decision by this Court to limit access to any item in its file may only be made after providing the press and the public the opportunity to be heard, *Kammeyer*, 341 N.W.2d at 558, and the limitations must be "no broader than necessary to protect against the potential interference with the fair and impartial administration of justice," Aug. 11 Slip Op. at 18. So far as the Media Coalition can tell, Defendant's October 12 filing, including the video exhibits, have been withheld from the press and the public without any factual analysis or consideration of alternative means. The Coalition certainly did not have an opportunity to assert its rights before such sealing.

Although the Court previously declined to conduct a constitutional analysis in connection with the Media Coalition's motion for greater access to the May 25 BWC footage, the First Amendment clearly applies to these pretrial proceedings and, like the common law, provides the press and public with a presumptive right of access to the October 12 motion papers. *See Kammeyer*, 341 N.W.2d at 556 ("*We conclude that the public does have a First Amendment right of access to pretrial proceedings in criminal cases.* Pretrial proceedings play a major role in the modern criminal trial, and public access tends to strengthen this important component of the criminal justice system." (emphasis added)). Meanwhile, the State's burden to overcome the First Amendment presumption is distinct and more onerous than that imposed by the common law. As this Court recognized back in August, the presumption can be overcome only where necessary to serve "a compelling governmental interest, and is narrowly tailored to serve that

Filed in District Court
State of Minnesota
10/15/2020 9:09 AM

interest" and, in addition, the restriction must "be effective" as "a constitutional right may not be restricted for a futile purpose." Aug. 11 Slip Op. at 20-21 (internal marks and citations omitted).

The State cannot meet its burden to seal the October 12 motion papers under even the common law. But to the extent the Court disagrees, it *must* then reach the First Amendment analysis, and the State certainly cannot meet the Constitution's compelling interest/narrowly tailored test.

2. The State cannot satisfy its burden to overcome the presumptive right of access.

The Court previously permitted robust access to the May 25 BWC footage on the basis that the video exhibits were likely to be presented as evidence during Defendant's trial. *See* Aug. 11 Slip Op. at 19. To the extent that is true here, the same logic applies.

However, contrary to the State's assertion that Defendant's motion papers should remain sealed "unless and until this Court finds the evidence admissible," State Oct. 14 Br. at 1, whether the May 6 BWC footage is admissible at trial is not the dispositive question. Instead, the Court must conduct the analyses required by the common law and the First Amendment—and in doing so, it should find the State has fallen woefully short of meeting its burden. *See e.g.*, *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1146 (9th Cir. 1983) ("there must be a substantial probability that irreparable damage to a defendant's fair-trial right will result if the documents are not sealed").

The Coalition is sympathetic to the Court's (and the parties') concerns regarding the impact of pre-trial publicity on all four defendants' trials. However, there is no *actual evidence* that broad public access to the May 6 BWC footage will actually jeopardize the Defendants' fair trial rights—there is only speculation—and it bears noting that Defendant Lane himself filed the footage publicly and presumably opposes its sealing. As the Supreme Court stated, "pre-trial

Filed in District Court
State of Minnesota
10/15/2020 9:09 AM

publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial." *Neb. Press Ass'n v. Stuart*, 427 U.S.539, 565 (1976). Moreover, as with the May 25 BWC footage, transcripts of the May 6 footage have already been reviewed and reported on by members of the press, as have the characterizations of that footage set forth in Defendant Lane's motion papers. *See, e.g.*, Rochelle Olson, *Prosecutors seek privacy order to keep details of George Floyd's 2019 arrest from public view*, The Star Tribune (Oct. 13, 2020), https://www.startribune.com/prosecutors-ask-to-keep-details-of-2019-floyd-arrest-out-of-public-view/572727311/. It is completely illogical to believe that giving members of the public just part of the story—quoting the transcripts or the piece of legal advocacy that is Lane's motion—is superior to letting them see the videos for themselves.[3]

Moreover, the notion that release of documents actually filed with the Court—as opposed to the mountain of information and disinformation about George Floyd and his death widely available on the Internet—is what will taint potential jurors and/or jeopardize a fair trial is farcical. The jurors who may someday be empaneled in this case will, in all likelihood, come to the trial with some knowledge of Floyd, the defendants, and the circumstances surrounding Floyd's death. The ways to deal with that are numerous: calling a larger pool from which to choose the actual jurors, conducting searching voir dire, providing clear instructions on what may properly be considered as evidence, sequestration, even change of venue. Depriving members of the public—who are closely watching these proceedings and who will trust the verdict only if they can watch the prosecutions unfold—is not a solution. Certainly it is not a constitutional one.

[3] Relatedly, it bears noting that although *both* Defendant and the State filed Rule 404(b) motions on October 12, only the State's is publicly available.

Filed in District Court
State of Minnesota
10/15/2020 9:09 AM

Finally, sealing the October 12 motion papers and BWC footage restricts a constitutional right, but for a futile purpose. As the Media Coalition noted in its previous filings before this Court, the video exhibits at issue are public under the Minnesota Government Data Practices Act ("MGDPA"). *See* July 13 Br. at 3 n.1. Contrary to the Court's understanding, *see* Aug. 11 Slip. Op. at 13 n.16, the Coalition did not mean to suggest that this Court is subject to the MGDPA. By the Act's plan language, it is not. *But the Attorney General's office is,* and the undersigned counsel, on behalf of the Media Coalition, separately submitted Tuesday a request to the Attorney General for copies of the BWC exhibits pursuant to Minn. Stat. § 13.82 subd. 7. That provision states in simple terms that "[a]ny investigative data presented as evidence in court shall be public." Thus, even if the Court were to make the October 12 motion papers and accompanying "evidence" inaccessible to the press and public through the judicial system, the Attorney General's office would still have an obligation under the MGDPA to disclose them. This Court has no authority to enjoin such production where such injunction would contravene the plain language and legislative intent of a statute. *See In re Access,* 517 N.W.2d 895, 897-900 (Minn. 1994) (en banc).

II. The Court should deny the State's motion for an order temporarily restricting public access to all future filings in the above-referenced matters.

Separately the State filed a motion "for an order temporarily restricting public access to all future motions and exhibits in the above-referenced matters for two business days after they are filed with this Court and served on opposing counsel." *See* State's Mot. for Order Temporarily Restricting Public Access to Mots. & Exhibits at 1 (Oct. 12, 2020) ("State Oct. 12 Br."). The State does not cite any authority to support this request, and the Coalition is not aware of any such authority. Rather, the cases cited by the State address individual pieces of information and specific court hearings. *See Minneapolis Star & Tribune v. Schumacher,* 392

Filed in District Court
State of Minnesota
10/15/2020 9:09 AM

N.W.2d 197, 200 (Minn. 1986) (addressing the "narrow question" of "restrict[ing] access to settlement documents and transcripts" in a civil proceeding); *State v. Amos*, 658 N.W.2d 201, 202 (Minn. 2003) (affirming admission of a witness's prior testimony); *Gannett Co. v. DePasquale*, 443 U.S. 368, 394 (1979) (affirming closure of a particular pretrial hearing).[4]

In contrast, the law is clear that under both the common law and the First Amendment the press and the public have a *contemporaneous* right of access to criminal proceedings. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 592 (1980) (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)). That is, once a document is filed with the court, it is presumptively public, and "no subsequent measures [after closures] can cure" the loss of contemporaneous access. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 710-11 (6th Cir. 2002). Consistent with this clear mandate, courts have repeatedly found that delays in access to court records in criminal proceedings, even when short, are denials of access that implicate the First Amendment. *See, e.g., Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983) (district court judge's sealing of "each and every document filed" in a high-profile criminal trial "impermissibly reverse[s] the presumption of openness that characterizes criminal proceedings under our system of justice," *and even a 48-hour sealing effected "a total restraint on the public's [F]irst [A]mendment right of access even though the restraint is limited in time*") (citations omitted) (emphasis added); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) (delaying access to court filings, *even for "as little as a day,"* "delays access

[4] The State also relies on Minn. R. Crim. P. 9.03 Subd. 5, which governs the Court's ability to put in place protective orders related to discovery exchanged between the parties. As discussed below, however, the Coalition takes no position in this motion on their right of access to materials exchanged between the parties before those materials are filed or otherwise submitted to the Court.

Filed in District Court
State of Minnesota
10/15/2020 9:09 AM

to news, and delay burdens the First Amendment") (emphasis added). Although the Court has discretion to manage its courtroom, it does not have the discretion to disregard long-standing law on the presumptive and contemporaneous right of access to criminal files and proceedings.

Beyond the legal problems with the State's proposal, the Media Coalition cannot imagine how it could possibly work in practice, especially during trial. Although the State characterizes any delay in access as "short and temporary," State Oct. 12 Br. at 3, two business days during a fast-moving trial is an eternity. Under the State's proposal, it is not just possible but quite probable that the Court would receive and rule upon some issue before the two-business-day window passes, leaving the media and the public it serves completely in the dark about the issue, the substantive support for the parties' arguments, the Court's ruling, and how that ruling may change the trajectory of the trial. There is thus a real likelihood that journalists covering the proceedings will end up confused and that their coverage will reflect that confusion, to the detriment of the public.

Meanwhile, consistent with their rights under state statute, members of the press will respond to any delay in access by demanding disclosure of all filings from the Attorney General's office under the MGDPA, just as they have already done with regard to the October 12 filings. As discussed above, the relief proposed by the State is thus wholly ineffective, but will require the press and public to obtain from the Attorney General's office documents that should be available from the Court, wasting their time and creating a burden for the Attorney General's office that it presumably would rather avoid while consumed by preparing these cases and ultimately trying them

At base, the State's motion is inherently arrogant in suggesting that the First and Sixth Amendments should bow to the convenience of the Attorney General's office when a perfectly

Filed in District Court
State of Minnesota
10/15/2020 9:09 AM

legitimate alternative exists: the parties first exchange draft briefs and exhibits among one another, they wait two days, and *then* the proponent of the materials publicly files them with the Court. Once a document is filed with or otherwise submitted to the Court, the First Amendment and common law presumptions of access attach. But members of the press and public admittedly have a much lesser claim to documents merely exchanged between the parties, and the parties could agree (or the Court could order) that service must occur two business days before filing—or even longer if that parties want more time. The Media Coalition takes no position on that issue.[5]

What matters to the Media Coalition—and what is required by the law—is that motions to seal get filed *before* the sealing occurs and that those motions themselves are publicly filed (along with a redacted copy of the materials at issue) so that members of the press and public can review them, and if the situation warrants, respond and request a meaningful opportunity to be heard. *See, e.g.*, *Kammeyer*, 341 N.W.2d at 557 ("We believe that the public must be afforded some opportunity to be heard *before* closure is ordered." (emphasis added)); *id.* at 558 ("[W]e think it is clear that the hearing must be held *prior to* closure." (emphasis added)); *cf.* Minn. Gen. R. Prac. 11.06(c) ("The party files a motion for leave to file under seal or as confidential *not later than at the time of submission of the document.*" (emphasis added)).

The Court should therefore deny the State's motion for a temporary protective order and require the parties to publicly file all future motions to seal in a manner that gives the press and public adequate opportunity to intervene and oppose the motion before a document is *actually*

[5] To be clear, the Media Coalition would not support any proposal requiring the parties to exchange papers not only with one another but also with the Court *before* they are formally filed. Such provision to the Court is a *de facto*, if not formal, filing, and such "shadow" files are wholly inappropriate.

Filed in District Court
State of Minnesota
10/15/2020 9:09 AM

sealed and the press and public find themselves in the situation they now face: unwinding an unconstitutional chain of events.

CONCLUSION

The Media Coalition understands and appreciates the tremendous task before this Court to manage four criminal prosecutions in the face of unprecedented public scrutiny. The law is clear, however, that the press and the public have a presumptive right of access to criminal proceedings and the documents filed therein. Accordingly, the Coalition respectfully requests that the Court immediately release for public viewing, copying, and dissemination all documents, including all video exhibits, filed by Defendant Lane regarding a May 6, 2019 incident between Floyd and police, and that the Court deny the State's motion for a 48-hour delay on release of all future motions and exhibits.

Dated: October 15, 2020

BALLARD SPAHR LLP

s/ Leita Walker

Leita Walker (MN #387095)
2000 IDS Center
80 South 8th Street
Minneapolis, MN 55402-2119
612-371-6222
walkerl@ballardspahr.com

Emmy Parsons, *pro hac vice*
1909 K Street, NW
12th Floor
Washington, DC 20006-1157
202-661-7603
parsonse@ballardspahr.com

Attorneys for Media Coalition