

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

**MEMORANDUM IN SUPPORT
OF MOTION TO LIFT
GAG ORDER FOR DEFENSE**

PLAINTIFF,

V.

TOU THAO,

DEFENDANT.

COURT FILE NO. 27-CR-20-12949

TO: THE HONORABLE PETER A. CAHILL, JUDGE OF DISTRICT COURT, AND
MR. MATTHEW G. FRANK, ASSISTANT ATTORNEY GENERAL.

MEMORANDUM IN SUPPORT OF MOTION TO LIFT GAG ORDER FOR DEFENSE

A restrictive order – also known as a gag order – is a rare tool used to protect a defendant’s constitutional right to a fair and impartial trial. *See* Minn. Judges Crim. Benchbook §1104.02. There is a constitutional presumption of access to criminal trials, although access is not an absolute right. *See Austin Daily Herald v. Mork*, 507 N.W.2d 854 (Minn. App. 1993), review denied.

Minnesota Rule of Criminal Procedure 25.03 governs when and how a district court may issue a gag order. To issue a valid gag order a court must make a factual finding that there is “a substantial likelihood of interfering with a fair and impartial administration of justice” and “all reasonable alternatives ... are inadequate”. Minn. R. Crim. P. 25.03 subd. 4. Additionally, a court must follow the requisite procedural steps to properly issue a gag order. Minn. R. Crim. P. 25.03 subd. 2, 3, and 5.

On July 9, 2020, the Court issued a restrictive order (hereinafter “Gag Order”). The Gag Order stated that the litigating parties:

[S]hall not disclose, directly, indirectly or through third parties, any information, opinions, strategies, plans or potential evidence that relate to any of the above-captioned cases, either to the media or members of the general public. This includes, but is not limited to, any discovery provided to the parties, and any exhibits in the cases.

The Gag Order was issued because “two or more attorneys” spoke to the media on July 8, 2020. Gag Order at 1. No attorneys in this particular case, *State v. Thao* (27-CR-20-12949), spoke to the media. In fact, Counsel for Mr. Thao has strictly followed the Court’s June 29, 2020 admonition that parties and their agents were not to speak to the press or public about (1) potential evidence, (2) the merits of the case, or (3) Mr. Thao’s guilt/innocence.

Since the State has yet to file a motion to join Mr. Thao with other defendants’ cases nor has the Court joined them, it is overbroad and unnecessary to issue the Gag Order for Defense in *State v. Thao*. See Minn. R. Crim. P. 25.03 subd 4 (stating that “A restrictive order must be no broader than necessary to protect against the potential interference with the fair and impartial administration of justice.”). As there is no evidence that comments in line with the June 29th made by Defense would danger the impairment of a fair trial, the Gag Order violates Defense’s First Amendment rights to free speech. See Judge’s handbook 1104.02; and *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, *Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976). Upholding said order would punish Mr. Thao for the actions of other attorneys not associated with the case of *State v. Thao*.

Additionally, the Gag Order was not issued properly on both substantive grounds and procedural grounds. The Court did not make findings of fact showing that substantive ground warranted the Gag Order nor did the Court follow the six procedural requirements outlined in

Minn. R. Crim. P. 25.03. Thus, Mr. Thao respectfully moves the Court to lift the Gag Order for *State v. Thao* as applied to Defense.

I. THERE IS NO SUBSTANTIVE GROUNDS TO ISSUE A GAG ORDER FOR STATE V. THAO UNDER MINN. R. CRIM. P. 25.03.

The Minnesota Rules of Criminal Procedure explicitly list what grounds a court may issue a gag 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. Access to public records – such as public commentary by counsel in *State v. Lane* on a filed motion – have not threatened Mr. Thao’s right to a fair and public trial. In fact, if Counsel in *State v. Thao* were to discuss the case (outside of the potential evidence, merits of the case, or innocence of Mr. Thao) it would actually *increase* the probability that Mr. Thao receive a fair trial. *See* Minn. R. Prof. Resp. 3.6 cmt. (stating that “When prejudicial statements have been publicly made by others, responsive statements may have a salutary effect of lessening any resulting adverse impact on the adjudicative proceeding.”).

The very reasons underlying the June 29th admonition to the attorneys regarding public commentary was the repeated failure of the prosecution to withhold itself, its agents, or numerous public figures from making highly prejudicial statements to the media.¹ The blatant disrespect that

¹ *Into an American Uprising: Keith Ellison on Prosecuting George Floyd’s Death*, NBC News (June 2, 2020) (where Mr. Ellison commented on the guilt of defendant(s) and potential evidence of use of force to be brought at trial);

elected public officials have shown towards Mr. Thao's Constitutional Right to a Fair Trial certainly gives defense counsel reason to rebut any misleading information they have improperly disclosed to the media. *See* Minn. R. Prof. Resp. 3.6 (stating that "a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."). Gagging both the State and Defense in this case only cements any potential jurors' preconceived notion that Mr. Thao is guilty.

The last thing Defense wishes is a trial by media, however, it would not be equitable to Mr. Thao to tie the hands of his attorney from representing him zealously by rebutting the State's incorrect statements to the public.

Even if the Court found that access to the public and news media would hurt Mr. Thao's right to a fair and impartial trial, the Court has not found that all reasonable alternatives are inadequate. Prior to the Gag Order, the only alternative used was the June 29th admonition. A change of venue is a reasonable alternative to a gag order. Minn. R. Crim. P. 25.03 cmt. Defense plans on submitting a motion for a change of venue prior to the hearing on September 11, 2020.

Attorney General Keith Ellison to Lead Prosecution of George Floyd' Death, CBS Local (May 31, 2020), <https://minnesota.cbslocal.com/2020/05/31/attorney-general-keith-ellison-to-take-over-george-floyd-case/> (where Keith Ellison repeatedly referred to the death of George Floyd as a "killing"); Meredith Deliso, Alex Perez, and Andy Fies, *Derek Chauvin was considering guilty plea but deal fell apart: Prosecutor's office*, abcNEWS (June 10, 2020), <https://abcnews.go.com/US/derek-chauvin-guilty-plea-deal-fell-prosecutors-office/story?id=71180109>; Jennifer Bjorhus, *Police chief: George Floyd's death was a 'murder,' not about lack of training*, Star Tribune (June 24, 2020), <https://www.startribune.com/police-chief-derek-chauvin-knew-what-he-was-doing/571443282/>; Joe Nelson, *DPS commissioner calls George Floyd death a murder: 'That's what it looked like to me'*, Bring Me The News (May 29, 2020), <https://bringmethenews.com/minnesota-news/dps-commissioner-calls-george-floyd-death-a-murder-thats-what-it-looked-like-to-me>; State of Minnesota Proclamation (June 8, 2020), https://mn.gov/governor/assets/Moment%20of%20Silence%20for%20George%20Floyd_tcm1055-435186.pdf; and Kare 11 Staff, *Minneapolis police officers fired after death of a man recorded saying 'I can't breathe'*, Kare11 (May 26, 2020), <https://www.kare11.com/article/news/crime/minneapolis-police-man-dies-in-police-custody/89-cfb7925a-4aa4-4f88-bf64-76d346b0e55f>.

As a reasonable alternative will be offered, the Court should lift the Gag Order until it has decided if a change of venue should be granted.

II. EVEN IF THERE WERE SUBSTANTIVE GROUNDS FOR A GAG ORDER, THE COURT DID NOT FOLLOW THE REQUISITE PROCEDURE IN ISSUING THE GAG ORDER AND AS SUCH IT MUST BE LIFTED.

There are six procedural requirements that a district court must meet before issuing a valid gag order. Here, the Court did not follow any of them.

a. There was no motion for the Gag Order.

First, a gag order “may only be issued on motion and after notice and hearing”. Minn. R. Crim. P. 25.03 subd. 2(a). Under Minn. R. Crim. P. 25.03 only a litigating party may motion for a gag order. The district court may not issue a gag order on its own accord. *See* Minn. R. Crim. P. 25.03 (*compare with* Minn. R. Crim. P. 25.02 “A continuance or change of venue may be granted on motion of any party or on the court’s initiative.”(emphasis added)). In the case of *State v. Thao* there are two litigating parties: the State and the Defense. Neither the State nor the Defense has made a motion for a gag order in the above captioned case. As such, the first element to issue a gag order was not met.

b. There was no notice for a hearing nor a hearing.

Second, a notice of the required hearing must be issued to all interested persons. Minn. R. Crim. P. 25.03 subd. 2(b). The Court did not hold a hearing before issuing the Gag Order on July 9, 2020. As there was no hearing, there was also no notice of hearing. The second element to issue a gag order was not met.

c. There was no moving party to bear the burden of establishing a factual basis.

Third, at the hearing the party moving for a gag order must meet the burden of establishing the factual basis for said order. Minn. R. Crim. P. 25.03 subd. 3(a). Since there was no moving

party nor hearing, a proper factual basis was not proven. Thus, the third element to issue a gag order was not met.

d. No interested parties were given the opportunity to observe or argue at the hearing.

Fourth, both the public and the news media have a right to attend the hearing and a record of the hearing must be made. Minn. R. Crim. P 25.03 subd.3(b) and (c). As there was no hearing, neither the Defense nor State had their opportunity to argue in opposition or support of a gag order. Additionally, the public and the news media were stripped of their right to attend the necessary hearing for a gag order. The fourth element to issue a gag order was not met.

e. There were no written findings of fact.

Fifth, “[t]he Court must make written findings of the facts and reasons supporting the conclusions on which an order granting or denying the motion is based.” Minn. R. Crim. P. 25.03 subd. 5. The Court did not make a written finding of facts in the Gag Order. Instead, the Court merely stated that two attorneys involved in the defense of other officers charged with the death of George Floyd spoke to the press. The Court did not state which attorneys spoke to the press or why speaking to the press gave grounds for issuing the Gag Order. There were no findings that counsel, Robert M. Paule, Mr. Thao, nor any other agent of the Defense spoke to the press. Even if any of said persons spoke to the public or press the Court did not give factual findings as to why that would meet the threshold for issuing a gag order. The fifth element to issue a gag order was not met.

f. There was no explanation of why reasonable alternative would be inadequate.

Finally, “[i]f a restrictive motion is granted, the order must address the possible alternatives to the restrictive order and explain why the alternatives are inadequate.” Minn. R. Crim. P. 25.03 subd. 5. Possible alternatives to a gag order include – but are not limited to:

- A continuance or a change of venue;
- Sequestration of jurors on voir dire;
- Regulation of use of the courtroom;
- Sequestration of the jury;
- Exclusion of the public from hearings or arguments made outside the presence of the jury;
- Cautioning or ordering parties, witnesses, jurors, and judicial employees; and
- Admonitions to jurors about exposure to prejudicial material.

Minn. R. Crim. P. 25.03 cmt. The only alternative to a gag order that the Court utilized was the June 29th admonition to parties to not speak to the public/press on the (1) possible evidence of the case; (2) merits of the case; and (3) the guilt/innocence of the defendants. The Defense has not spoken to the press on any of those topics. The admonition has worked and is still working in the case of *State v. Thao* as applied to the Defense.

Additionally, the Court has not used other reasonable alternatives at its disposal such as a change of venue. Until reasonable alternatives are exhausted without stopping the parties in *State v. Thao* from speaking to the press on the (1) evidence of the case; (2) the merits of the case; or (3) the guilt or innocence of Mr. Thao, the Gag Order has no proper legal basis.

CONCLUSION

The Gag Order is overbroad when applied to *State v. Thao*. Upholding the Gag Order would only punish Mr. Thao for the State's repeated and highly prejudicial conversations to media. The Court has yet to meet the required substantive grounds and procedural steps to issue a proper restrictive order under Minn. R. Crim. P. 25.03. A gag order is a final tool that should only be utilized in rare situations. This is not one of those situations.

Respectfully submitted,

Dated: This 15th day of July, 2020

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