

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA

**MEMORANDUM IN SUPPORT
OF MOTION TO FIND KEITH
ELLISON IN CONTEMPT OF
COURT**

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 FIND KEITH ELLISON IN
CONTEMPT OF COURT**

Minnesota Attorney General and lead prosecutor Keith Ellison in the case of *State v. Tou Thao* (27-CR-20-12949) has violated the June 9th, 2020 Gag Order issued by this Court. To safeguard due process rights of a defendant, the trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial and trial publicity. *See* Minn. Judges Crim. Benchbook §1103.01; *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979); and *Sheppard v. Maxwell*, 384 U.S. 333 (1966). As such, the Defense respectfully requests the Court to issue a finding that the actions of the State were in violation of the Gag Order, issue a Contempt of Court Order, and order sanctions for this blatant disregard of the Court's rule.

I. THE STATE THROUGH MR. ELLISON'S PRESS RELEASE HAS VIOLATED THE JULY 9, 2020 GAG ORDER.

On June 29, 2020 the Court admonished both State and Defense to not speak to the public or press on (1) potential evidence of the case, (2) the merits of the case, and (3) Mr. Thao's guilt/innocence. Defense counsel has followed that order precisely.

On July 9, 2020 the Court issued the Gag Order for both State and Defense. It read in part 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.

Gag Order at 1 (emphasis added). The Gag Order applied to "all parties, attorneys, their employees, agents, or independent contractors working on their behalf". Gag Order at 2. All attorneys received copies of the Gag Order as it was e-filed by the Court itself. The State was thus on notice of the Gag Order.

On July 13, 2020 Mr. Ellison issued a press statement. *See* Exhibit 1. In the press statement Mr. Ellison stated the he "put together an exceptional team with experience and expertise across many disciplines" for the case of *State v. Thao*. *Id.* The statement listed the four new Special Assistant Attorney Generals. The statement touted the various legal backgrounds (not all in criminal law) and highlights from their careers.

It is no coincidence that Mr. Ellison has put together such a high-profile team in this case. The death of George Floyd has garnered global attention in a way that no other case in Minnesota's history has. Intrinsicly tied to the publicity of Mr. Floyd's death is the Black Lives Matter movement and pressure at the local, state, and federal level to reform the criminal justice system,

as well as the resulting demonstrations, protests, civil disobedience, and riots occurring both in the Twin Cities and nationwide.

The State explicitly violated the Gag Order. The press statement was itself a direct violation of the Gag Order as it gave (1) information, (2) opinions, and (3) plans to *both* the media and public.

The State implicitly violated the Gag Order. By appointing the Special Assistant Attorney Generals, Mr. Ellison grabbed four attorneys with incredible political power in Minnesota: Neal Katyal is the former acting Solicitor General and former Principal Deputy Solicitor General under President Obama; Lola Velázquez-Aguilu was until Monday July 13, 2020 the Chairwoman of the Commission on Judicial Selection; Jerry Blackwell is the founder of the Minnesota Association of Black Lawyers and served two terms on the Commission on Judicial Selection; and Steven L. Schleicher was the former Deputy Criminal Chief of the Special Prosecution Section of the U.S. Attorney General's Office. It is without question that Mr. Ellison appointed the four attorneys to mount political pressure and to intimidate the judiciary.

II. THE STATE HAS VIOLATED THE MINNESOTA RULES OF RESPONSIBILITY BY MAKING EXTRAJUDICIAL STATEMENTS.

The Minnesota Rules of Professional Responsibility address when attorneys in a criminal trial may comment on the case outside of the courtroom:

A lawyer who is participating or has participated in the investigation or litigation of a criminal matter shall not make an extrajudicial statements about the matter that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of material prejudicing a jury trial in a pending criminal matter.

Minn. R. Prof. Resp. 3.6(a). The Minnesota Rules of Professional Responsibility understand that it may be difficult to find the line between curtailing freedom of expression with the right to a fair trial, but that without any limits of information disseminating “the result would be the practical

nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence”. Minn. R. Prof. Resp. 3.6 cmt.

Prosecuting attorneys have a heightened level of responsibility to ensure no extrajudicial statements are made in criminal cases. Prosecutors “can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused”. Minn. R. Prof. Resp. 3.8 cmt. In a criminal case a prosecutor must ensure that those associated with the prosecution and those “over whom the prosecutor has direct control over” refrain from "making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6”. Minn. R. Prof. Resp. 3.8(f). A statement is more prejudicial when it comes from a prosecutor because it creates “the additional problem of increasing public condemnation of the accused”. Minn. R. Prof. Resp. 3.8 cmt.

By issuing the press release, the State violated the Minnesota Rules of Professional Responsibility. There was no legitimate law enforcement purpose to releasing the names, backgrounds, or pro bono status of the four Special Assistant Attorney Generals. The press release sent a message to the public that the State brought in four politically connected attorneys to increase pressure on the public and the judiciary to find Mr. Thao guilty before he steps in the courtroom.

Counsel respectfully asks the Court to find Mr. Ellison in contempt of court and issue sanctions to preserve Mr. Thao’s Constitutional Right to a Fair and Impartial Jury.

Respectfully submitted,

Dated: This 15th day of July, 2020

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