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4/8/2022 11:04 AM

STATE OF MINNESOTA
HENNEPIN COUNTY

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota

Plaintiff,

The Honorable Peter A. Cahill

vs.

J. Alexander Kueng — Dist. Ct. File 27-CR-20-12953
Thomas Kiernan Lane — Dist. Ct. File 27-CR-20-12951
Tou Thao — Dist. Ct. File 27-CR-20-12949

Defendant

MEDIA COALITION'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE VIDEO AND AUDIO RECORDINGS OF PROCEEDINGS

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 KMSP-TV); Gannett Satellite Information Network, LLC (which publishes *USA Today*); 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; NBCUniversal Media, LLC; The New York Times Company; The Silha Center for the Study of Media Ethics and Law; Star Tribune Media Company LLC; TEGNA Inc. (which owns KARE-TV); and WP Company LLC (which publishes *The Washington Post*) (collectively, the "Media Coalition") by and through undersigned counsel, hereby submit this Supplemental Memorandum in Opposition to Defendants' Motion to Exclude Video and Audio Recordings of Proceedings.

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4/8/2022 11:04 AM

In the past couple of years, two high-profile trials of former police officers have been livestreamed in this judicial district: Derek Chauvin's, in March and April of 2021, and Kimberly Potter's, in December 2021. These trials were historic for many reasons, including because they were the first and only criminal trials livestreamed, in their entirety, in the history of the State of Minnesota.

By nearly all accounts, these "experiments" meaningfully enhanced the press and public's First Amendment right of access to the criminal justice system without jeopardizing the defendants' Sixth Amendment fair trial rights or in any way distracting from the solemnity of the proceedings. In fact, as set forth at pages 6-8 of the Media Coalition's initial memorandum (filed September 1, 2021), members of the prosecution team, including Attorney General Keith Ellison and Jerry Blackwell; former Hennepin County Public Defender Mary Moriarty; Hennepin County Chief Judge Toddrick Barnette, and former (now retired) Hennepin County Chief Judge Kevin Burke all made public statements following the Chauvin trial reflecting their shared views that both the public and the judicial system had benefitted enormously from the livestreaming of the trial and that the experience had disproven the many unsubstantiated concerns opponents of cameras have historically offered in support of their position. Shortly thereafter, on June 18, the Minnesota Supreme Court directed its Advisory Committee on the Rules of Criminal Procedure (the "Advisory Committee") to consider whether the current requirements for audio-video coverage of criminal proceedings in Minnesota should be modified or expanded.[1]

[1] The next meeting of the Advisory Committee is from 1:30 to 4:30 p.m. CDT on May 13. Any member of the press or public interested in attending can contact kyle.christopherson@courts.state.mn.us for location/dial-in details. (Mr. Christopherson approved inclusion of his email address in this memorandum.)

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State of Minnesota
4/8/2022 11:04 AM

Since then, this Court has submitted thoughtful comments to that Advisory Committee, stating that "as a district court judge, I have opposed the use of cameras in the courtroom in criminal cases, but my recent experience in *State v. Chauvin* has changed my opinion" and advocating for a change in the rules to create a "presumption that cameras be allowed in trials and sentencings." *See* Declaration of Emmy Parsons ("Parsons Decl.") Ex. A. Even more recently, The Honorable Judge Chu, who oversaw the Potter trial, told *Star Tribune* that both the Chauvin and Potter trials "proved to her that cameras can be present in the courtroom without being disruptive." *See* Parsons Decl. Ex. B. "I thought it was appropriate in the two cases and it went very smoothly," she said. *Id*. As she went on to say, "I forgot they were even there . . . ." *Id*.

The upcoming trial in this case promises to be equally historic, if for different reasons. Chauvin and Potter (and before them, former police officer Mohamed Noor) were convicted for actions directly attributable to them. But a guilty verdict in this case would be the first time the State has obtained "aid and abet" convictions against on-duty officers, not just for what they did, but also for *what they did not* do—*i.e.*, for failing, in their capacities as law enforcement officers, to intervene and stop the criminal conduct of a fellow officer. For that reason, many believe the prosecutions here, even before a verdict, mark a pivotal moment in American policing, portending a shift in how police are recruited, trained, and held accountable. *See, e.g.*, Parsons Decl. Ex. C. Whether that shift is good or bad is a matter of significant debate: some believe change is long overdue, while others believe the charges here, along with the social justice movement arising from George's Floyd's death, ignore the realities of policing and fail to give law enforcement officers their due. Suffice to say, the prosecution of these Defendants is controversial and closely watched, and it is paramount that the judicial system demonstrate its ability to deliver justice to both the victim and the accused. It can best do that by letting people

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State of Minnesota
4/8/2022 11:04 AM

watch the process unfold. For all these reasons, livestreaming of the trial in this case is just as important as it was for Chauvin's.

Nevertheless, the Media Coalition understands that the Court now plans to prohibit audio-video coverage, including livestreaming, of trial. Although the Court has not yet officially explained its rationale for reversing its January 11, 2022 Order, the Media Coalition assumes the decision is grounded in the Defendants' objection to such coverage, in the apparently retreating severity of the COVID-19 pandemic, and in the Court's belief that—absent the extenuating circumstances caused by the pandemic—its hands are tied by Minn. Gen. R. Prac. 4.02(d).

As this Court well knows, in one of the odd twists—perhaps silver linings—of the pandemic, the draconian requirements of Rule 4.02(d) were avoided in the Chauvin and Potter trials due to social distancing requirements: As this Court explained at page 8 of its November 4, 2020 Order, given the space limitations for the Chauvin trial, "the only way to vindicate the Defendants' constitutional right to a public trial and the media's and public's constitutional right of access to criminal trials is to allow audio and video coverage of the trial, including broadcast by the media."

Now, though, if the pandemic's current trajectory holds, it seems reasonable to believe that social distancing and masking will not be required at Defendants' June trial.[2] Thus, even

[2] That said, the medically vulnerable, immunocompromised, and those who live with them (including parents of children under age 5 who are not yet eligible for vaccines) may still feel unable to attend trial in person.

Filed in District Court
State of Minnesota
4/8/2022 11:04 AM

though it seems the prosecutor,[3] the press, the public, and even this Court[4] all want the trial livestreamed, the Media Coalition understands the position this Court is in, given Rule 4.02(d), and the fact that the Supreme Court has not acted more swiftly to address this matter so that the Court might have more guidance in time for the trial.[5]

Read alone, Rule 4.02(d) gives *carte blanche* to parties to a criminal proceeding—both prosecutors and defendants—*unchecked, unilateral power* to limit public access by keeping cameras out of the courtroom during trials of utmost public concerns and interest. In this instance, it is Defendants who are the sole obstacles to the right of the press and public to watch their trial in real time. This is true even though these Defendants, as the Court previously noted, have argued in only "vague and general terms" that witnesses are reluctant to testify, and despite the fact that the Court found that Defendants had "fail[ed] to show that audio and video coverage

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[3] On September 1, 2021, the State filed its Memorandum of Law Opposing Motions to Exclude Audio and Video Recording of Proceedings (available at https://mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12951-TKL/Memorandum209012021.pdf). The State's brief acknowledged it was mistaken in opposing audio-video coverage of the Chauvin trial (Defendants consented to such coverage at that time) and stated at pages 2-3:

> *State v. Chauvin* highlighted the enormous benefit that came with televising those proceedings to ensure robust public access in the midst of COVID-19. Because of this Court's decision to broadcast *State v. Chauvin*, anyone who wanted could witness the fair administration of the criminal justice system in one of the most significant cases in this nation's history. The fact that the public observed jury selection, counsel's statements, and witness testimony allowed them to evaluate the fairness of these proceedings for themselves and fostered enormous public confidence in the process and its outcome.

[4] *See* Parsons Decl. Ex. A.

[5] The Advisory Committee will submit its recommendations to the Supreme Court on July 1, 2022, two weeks after this trial is slated to begin. Order, *In re: Minn. Supreme Ct. Advisory Comm. on Rule of Crim. Proc.*, No. ADM10-8049 (Minn. June 18, 2021), *available at* https://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/News%20and%20Public%20Notices/Orders/ADM10-8049_Order_6-18-2021.pdf.

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of livestreaming will deprive them of a fair trial." Jan. 11 Order at 3-4. Indeed, the plain language of Rule 4.02(d) permits Defendants to object to camera coverage for any reason, or for *no reason at all*.

And yet: Even if the trial takes place in a courtroom that can seat more than the few members of the press and the public able to sit in the courtroom during the Chauvin and Potter trials, the Media Coalition expects the number of people interested in observing the trial in this case to far outstrip the number of seats in the courtroom.[6] For point of reference, more than 23 million people watched the reading of the verdict in the Chauvin case.[7] During the Potter trial, on a relatively mundane day of testimony on December 15, at least 16,000 people watched the proceedings in real time via the livestream coverage. Parsons Decl. ¶ 6. And even in the much lower-profile (and pre-pandemic) Noor trial, long lines formed for seats in the courtroom and many were turned away on the day of the verdict and Noor's first sentencing. *See* Declaration of Suki Dardarian ("Dardarian Decl.") ¶¶ 4-6 (filed Dec. 14, 2020). Stated simply, and as this Court previously recognized, "[t]here is no reason to anticipate that public interest in these cases has abated," and the trial "can be expected to receive ubiquitous media coverage given the vast public interest whether or not the joint trial is livestreamed." Jan. 11 Order at 4.[8]

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[6] The Media Coalition understands that the trial is likely to take place in a courtroom that can accommodate approximately 50 spectators (including family members of George Floyd and the Defendants, journalists, and the general public), and that the Court will make approximately 100 additional seats available in overflow rooms. Therefore, it seems fewer than 200 people will be able to "attend" Defendants' trial.

[7] "Nielsen: at least 23.2 million watched Chauvin verdict," APNews.com (Apr. 22, 2021), https://apnews.com/article/george-floyd-death-of-george-floyd-arts-and-entertainment-90295405db812108acd9c45433b2a879.

[8] Defendants may point to seats that went unfilled in the overflow rooms at their federal trial to suggest public interest in their prosecutions has waned. This is mistaken. Setting aside the sub-par experience of watching a trial from an overflow room, *see* Dardarian Decl. ¶¶ 8-10, there are many reasons a member of the public may wish to monitor a high-profile trial but be unable to

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State of Minnesota
4/8/2022 11:04 AM

Given the expected interest in the trial of these Defendants, should access to it return to the "*status quo*" of Rule 4.02(d) and should the *millions* of people who viewed the Chauvin trial suddenly be prevented from observing this one, the public will struggle to determine whether it believes justice was truly achieved in these prosecutions. At the very least, it will struggle to understand why two trials for the murder of the same man—first Chauvin's, now these Defendants'—could be held under considerably different conditions, where one is accessible to millions and the other is limited to the first 50 who can make it into the courtroom. They are likely to feel excluded, and exclusion breeds distrust. And while the Media Coalition certainly agrees Defendants should be *heard* on the issue of audio-video coverage of their cases, it is absurd that these three men (or any one party to a criminal case, for that matter) should be able to single-handedly prevent the press and public from fully monitoring the trial for one of the most notorious murders in State history—ironically, a murder fully captured on camera—just "because."

For all of these reasons—the enormous public interest in this case, its historic nature, the need for trust in the verdict, and the fact that people do not trust what they cannot see—the Media Coalition believes the Court retains and should exercise its discretion under Minn. Gen. R. Prac. 1.02 to "modify the application of [the General Rules of Practice] in any case to prevent manifest injustice" and to permit audio-video coverage, including livestreaming, of the

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do so in person, including physical disability, visual impairment, inflexible work hours, small children, and lack of transportation. The expansion of audio-video access to courts during the pandemic has thus been a boon to members of the public who wish to meaningfully exercise their constitutional right to engage with the criminal justice system but do not have the abilities or resources to physically sit in a courtroom (or for that matter an overflow room) for days on end. We should not abandon the technology that makes remote monitoring of the system possible just because the pandemic is coming to an end; rather, we should embrace it, along with its ability to build trust with *all* members of the public, not just the privileged few who can attend in person.

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upcoming trial.[9] Indeed, the First Amendment counsels in favor of this approach, *Presley v. Georgia*, 558 U.S. 209, 210 (2010) (per curiam) (stating that the First Amendment right of access is a right of meaningful access, and the Court must "take every reasonable measure to accommodate public attendance"), as this Court recognized when it first relied on its discretionary authority in a December 18, 2020 Order permitting audio-video coverage at these Defendants' trial, over the objection of the State. As the Court explained then, even if 50 seats are made available in the courtroom to members of the press and general public, that is no match for the "hundreds (if not thousands) of members of the public and the press" likely to assemble at the courthouse trying to gain access to this important trial. Dec. 18 Order at 5. Whatever the risk of infection with COVID-19 come June, the concerns the Court identified in December 2020 about large crowds, the insufficiency of overflow courtrooms to replicate in-person attendance, and the need to keep trial participants and court staff safe remain valid and relevant. The Media Coalition believes the Court would be well within its discretion under Rule 1.02 to permit audio-video coverage in an attempt to avoid "manifest injustice"[10] and respectfully requests that it do so.

Finally, the Media Coalition encourages the Court to consider whether it is necessary, or appropriate, to make a decision concerning audio-video coverage at this time, when experts fear another surge may be around the corner.[11] At a minimum, the Media Coalition urges the Court to

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[9] In making this request, the Media Coalition uses the term "livestreaming" generically and interchangeably with "broadcasting" to convey that, one way or another, members of the public should be able to access, in real-time, unedited coverage of the entire trial, as if they were sitting in the courtroom.

[10] The Media Coalition also requests that, even if audio-video coverage is not permitted, still photography be permitted.

[11] *See* Mike Strobbe, *Experts worry about how US will see next COVID surge coming*, Associated Press, StarTribune.com (Mar. 25, 2022) https://www.startribune.com/experts-worry-

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4/8/2022 11:04 AM

hold its ruling on audio-video coverage in abeyance until closer to the time of trial, given the possibility that Defendants decide to consent to audio-video coverage, that a resurgence of the COVID-19 virus changes the calculus for in-person seating, or that the Supreme Court intervenes and/or revises Rule 4 more quickly than anticipated.

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BALLARD SPAHR LLP

s/ Leita Walker

Leita Walker (MN #387095)
Isabella Salomão Nascimento (MN #0401408)
2000 IDS Center
80 South 8th Street
Minneapolis, MN 55402-2119
612-371-6222
walkerl@ballardspahr.com
salomaonascimentoi@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

about-how-us-will-see-next-covid-surge-coming/600159272/; *see also* Greta Kaul, *Coronavirus in Minnesota: 'stealth' omicron takes over*, MinnPost (Apr. 5, 2022), https://www.minnpost.com/health/2022/04/coronavirus-in-minnesota-stealth-omicron-takes-over/.