

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

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**STATE OF MINNESOTA,****SECOND ORDER REGARDING COPY  
ACCESS TO TRIAL EXHIBITS**

Plaintiff,

vs.

**MOHAMED MOHAMED NOOR,**

Court File No. 27-CR-18-6859

Defendant.

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On May 13, 2019, this Court issued its First Order Regarding Copy Access to Trial Exhibits ("First Order"). In the First Order, the Court ordered court administration to allow viewing of all of the trial exhibits in the above-referenced case in accordance with the Fourth Judicial District's bench policy relating to public requests for viewing and obtaining copies of filed exhibits ("Court Exhibit Policy"); it limited copy access to all the trial exhibits until it could issue an order that addressed the State's objection to copy access; and it invited intervention by interested parties for the limited purpose of responding to the State's objection to the copying of trial exhibits in this case. The Court received one response filing by the deadline of May 16, 2019, and it was from counsel for the Media Coalition that had previously intervened in this case for the purpose of challenging the Court's order with respect to, *inter alia*, the viewing of certain graphic evidence in the courtroom.

In its response, the Media Coalition requested that the media and the public be permitted to copy the trial exhibits in this case immediately, arguing that their right to do so was protected by the First Amendment and the common law.

I. Copy access to trial exhibits

The Court has considered the arguments of the State and of the Media Coalition with respect to the right to copy the trial exhibits in this case.

The Court acknowledges that there is a presumption in favor of copying exhibits received in the course of a criminal trial. See *also* Minn. R. Pub. Acc. 2, 3 subdiv.5. This presumption comes from a common-law right of access, however, and not the First Amendment.

The common-law right to inspect and copy trial exhibits was recognized by the United States Supreme Court in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597–99 (1978). *Nixon* articulated the standard as follows:

It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. . . . It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. . . . It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate. The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.

435 U.S. 589, 597–99 (1978). The standard places decisions with respect to copy access within the discretion of the trial court and places emphasis on the particular circumstances of the case.

*Nixon* held that there was no First Amendment right to copy trial exhibits when the trial had been open to the media and the public.<sup>1</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) or its progeny have not held otherwise. See *U.S. v. McVeigh*, 119 F.3d 806, 812 (10th Cir. 1997) (acknowledging that “*Nixon* remained the only decision of the Supreme Court directly dealing with the more narrow issue of access to court files”).

The Court acknowledges that some lower federal courts have engaged in an inquiry based on *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7-9 (1986) (“experience and logic” test), when determining whether a particular category of document is included within the First Amendment right of access. That inquiry is also particular to the proceedings and the records sought. Counsel for the Media Coalition has cited to several cases applying the “experience and logic” test that concern access to documents other than criminal trial exhibits and rights other than that of copying. Another cited case does not engage in a true constitutional inquiry, but applies a version of the common-law standard and states that it has “constitutional magnitude.” See *U.S. v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985) (“The public and the press have a longstanding common law right of access to judicial records. We have recognized that this presumption is of constitutional magnitude through the first amendment.” (internal citations omitted)).

When dealing with issues of copying criminal trial exhibits, the United States Courts of Appeals have developed various standards with respect to the limited common-law right recognized in *Nixon*.

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<sup>1</sup> The closure of pretrial and trial court proceedings and the sealing of certain documents in the court file are subject to the closure analysis set forth in *Waller v. Georgia*, 467 U.S. 39 (1984), and found in Minnesota Rules of Criminal Procedure 25.01, 25.03, 26.04 subdiv. 4(4). The question of exhibit copying does not present a question of closure. The proceedings in this case were open; the exhibits in question are not sealed and are available for public view.

Some have adopted a strong presumption of access (see, e.g., *NBC v. Myers*, 635 F.2d 945, 953-54 (2d Cir. 1980); *U.S. v. Criden*, 648 F.2d 814, 826-28 (3d Cir. 1981); *Peters*, 754 F.2d 753 (7th Cir.)); others have adopted a standard more deferential to the judgment of the trial court (*Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981); *U.S. v. Webbe*, 791 F.2d 103 (8th Cir. 1986)). The Eighth Circuit, in which this Court is located, has adopted a standard more deferential to the trial court.

At the end of the day, the common-law standard is all that is required for the Court to grant, in large part, the Media Coalition's request to copy the trial exhibits in this case. The State's position opposing the copying of any trial exhibits is overbroad. The State does not cite, nor is the Court aware of, any case where copy access to all of the trial exhibits has been denied by the trial court.

Because *Nixon* did not provide "a comprehensive definition of what is referred to as the common-law right of access or . . . identify all the factors to be weighed in determining whether access is appropriate," the lower federal courts have considered various factors to determine whether the right to inspect and copy exhibits has been outweighed by the likelihood that they "might . . . become a vehicle for improper purposes." 435 U.S. at 598-99. Of those factors often considered by federal courts, two are most relevant to the State's and this Court's concerns: the fairness of other trials in which the exhibits may be evidence and the potential misuse of the exhibits for prurient purposes.

Several jurisdictions have considered concerns with respect to the fairness of other trials in which particular distributed exhibits, usually audio or audiovisual exhibits, may be presented as evidence. These trials may be those of co-defendants, see, e.g., *Myers*, 635 F.2d at 953, or trials involving the defendant, see, e.g., *Webbe*, 791 F.2d at 106-07. The courts have typically concluded that these trials, including any possible remand of the case in question, must not be merely hypothetical or speculative.

See *Criden*, 648 F.2d at 826-28. Furthermore, a court's analysis may also consider the anticipated difficulty of jury selection in the other trial based on its experience with the case. See, e.g., *Webbe*, 791 F.2d at 107 (discussing *Criden*, 648 F.2d at 827).

Regarding the State's concern about future proceedings in this case, any post-trial motions or appellate issues will be decided by judges who will have access to the original exhibits. The possibility of a new trial on remand remains hypothetical. In the event of a remand, the Court does not anticipate significant difficulty in selecting a new jury. There was extensive press coverage prior to the trial, and it turned out that the Court did not need to draw a larger jury pool than usual to seat a panel. Moreover, the civil trial with respect to the incident in this case has resolved.

The State expresses concerns about the potential for misuse of the graphic and disturbing evidence admitted at trial, presumably portions of the body-worn camera ("BWC") videos of Officers Noor, Harrity, Fahey, Aikins, and Jindra. The Court finds that there is potential for exploitation of that material for improper purposes should it be released.<sup>2</sup> The images of the decedent's bare breasts, of her face in distress, as well as the sounds of her gasping for breath, moaning, and vomiting, are of limited value for the accurate reporting purposes for which the Media Coalition seeks to copy the trial exhibits in this case. See Media Coalition's Response at p.2. Instead, it would tend to promote sensationalism or cater to prurient interests, and it is the Court's supervisory role to avoid those uses of judicial records. See *Criden*, 648 F.2d at 831-32 ("The fact that a television station would seek to broadcast material of

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<sup>2</sup> The Court has acknowledged in its Order Regarding Media/Public Right to Observe Body-Worn Camera Video that the decedent lacks privacy rights under Minnesota law; any interests the decedent's next-of-kin may possess have not been asserted directly in this case and have only been mentioned obliquely in the State's objection. The Court's ruling is thus based on its own supervisory power over its records.

this nature is powerful justification for the principle that access to court records must be limited by judicial discretion.”) (J. Weis, concurring and dissenting); *In re KSTP Television*, 504 F. Supp. 360 (D. Minn. 1980).

The Court does not place any limitation on the remaining portions of those videos, which may have relevance to the Media Coalition’s reporting interests. In order to impose the narrowest restriction possible, the Court will permit copying of a version of the aforementioned exhibits with the face and exposed breasts of the decedent blurred and her vocalizations muted to the extent that it does not interfere with the speech of the other people depicted in the video. This will not affect the Court’s First Order permitting viewing of the exhibits in their unredacted form.

## II. Administrative process for viewing and copying of exhibits

The governing rules and policies of the Minnesota Judicial Branch permit administrative limitations on viewing the trial exhibits in a criminal case. The Media Coalition did not intervene with an objection at the time the Standing Order on Requests for Trial Exhibits During Trial (“Standing Order”) was in place; therefore, any objection it had with respect to that Order is moot.

As noted in the discussion above, the Media Coalition has not demonstrated that it has a constitutional right with respect to copying the trial exhibits in this case. The Media Coalition has been granted simultaneous access to view the trial exhibits in this case as they were offered and displayed at the trial itself, as required by the First Amendment. See Order Regarding Media/Public Right to Observe Body-Worn Camera Video.

The Fourth Judicial District’s bench policy relating to public requests for viewing and obtaining copies of filed exhibits (“Court Exhibit Policy”) provides that “[e]xhibits will be made available for viewing

within a reasonable timeframe after they have been deposited with court administration at the conclusion of a trial.” See Minn. R. Pub. Acc. 7 subdiv. 2 (“The custodian shall respond to the request as promptly as practical.”). Court administration has an important responsibility to maintain the integrity of the trial exhibits for any appellate review or other future proceedings with respect to the case. See Minn. R. Pub. Acc. 8 subdiv. 5(a) (“[e]xcept . . . where access is restricted by court order . . . documents and physical objects admitted into evidence in a proceeding that is open to the public shall be available for public inspection under such conditions as the court administrator may deem appropriate to protect the security of the evidence”). Court administration has received at least eleven requests to view the nearly three hundred exhibits that are in its custody. It is no small feat to arrange for the viewing of so many exhibits, and there would surely be complaints about fairness of access no matter what process administration selected.

The Hennepin County District Court Public Affairs Communications Specialist has posted that a public viewing is scheduled for this coming Friday, May 24, 2019. Should the public viewing prove to be demonstrably inadequate, that issue may be taken up with court administration. There is no time limit on the provisions of this Order.

The Court has ordered that the viewing and copying of the trial exhibits in the above-referenced case go forward in accordance with the provisions of its Orders and the Court Exhibit Policy. The Court defers management of the details of the process to court administration.

### III. The Minnesota Data Practices Act

The Media Coalition requests that this Court order separate government entities to turn over any copies of exhibits in their possession. It provides no authority demonstrating to suggest that this Court

has the power or obligation to do so. See Minn. Stat. §§ 13.08, 13.085. (providing civil and administrative remedies for the violation of the Minnesota Data Practices Act). Furthermore, the Court granted the Media Coalition limited permission to intervene in order to respond to the State's position with respect to copying exhibits received by the Court. The scope of that permission does not extend to requests under the Minnesota Data Practices Act.

Based upon all the files, records, and proceedings herein, and pursuant to the Court's supervisory authority over its records,

**IT IS HEREBY ORDERED:**

1. This Order pertains to the exhibits that are in the custody of court administration.
2. The Hennepin County District Court Public Affairs Communications Specialist, working in conjunction with criminal administrative staff who presently have custody of the exhibits, shall allow media representatives and the public access to and the opportunity to view and copy the exhibits in this case, with the exception of trial exhibit numbers 168, 171, 178, 194, and 234, in accordance with the Court Exhibit Policy.
3. Copying includes video taping and taking pictures of exhibits. Fourth Judicial District Court Policy D.13(5)(d) permits users of public computer terminals to take screen shots to capture the information on the computer screen. However, the policy does not allow video recording of audiovisual exhibits. Accordingly, the public or media representatives may not copy the audiovisual exhibits in this case by video taping or taking pictures of them. See Court Exhibit Policy ("A judicial order must be provided for any requests to video tape exhibits, take pictures of exhibits, or obtain copies of a recording (including video, DVD, and audio recordings.").

4. Trial exhibit numbers 168, 171, 178, 194, and 234 may be viewed by the public and the media as they were entered into evidence at the trial.

5. The Court orders the State, who submitted trial exhibit numbers 168, 171, 178, 194, and 234, to provide the Court with copies of those exhibits redacted in accordance with this Order. The redactions shall blur the face and exposed breasts of the decedent and mute her vocalizations to the extent that it does not interfere with the speech of the other people depicted in the video. The redacted versions of the exhibits shall be delivered to the Court by **June 10, 2019**.

6. When the Court has received the redacted copies of trial exhibit numbers 168, 171, 178, 194, and 234, they will be provided to court administration so that it may provide redacted copies of those exhibits upon request in accordance with the Court Exhibit Policy.

7. Because of the high level of interest in viewing and copying the exhibits in this case, all arrangements to view or obtain copies of exhibits must be referred to the Hennepin County District Court Public Affairs Communications Specialist. Contact information for the Specialist is available on the News & Public Affairs tab of the Fourth Judicial District's webpage at [mncourts.gov](http://mncourts.gov).

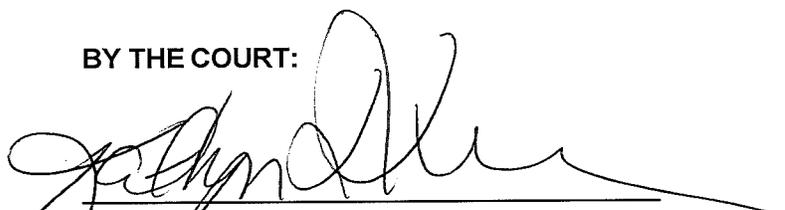
8. Duplication of exhibits, including video and audio recordings, shall be performed by court administrative staff.

9. Parties requesting copies of exhibits are responsible for the standard charges for copies of court records, to be paid or charged in advance of the exhibit's duplication.

Dated:

5/22/19

BY THE COURT:



Kathryn Quaintance  
Judge of District Court