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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

Plaintiff,

vs.

THOMAS KIERNAN LANE,

Defendant.

MEMORANDUM OPINION ON ORDER GRANTING MOTION OF MEDIA COALITION TO OBTAIN COPIES OF PUBLICLY-FILED, BODY-WORN CAMERA VIDEO EVIDENCE

Court File No. 27-CR-20-12951

On July 21, 2020, this Court held a hearing on the Media Coalition's[1] motion objecting to the Court's prior restrictions allowing media representatives and members of the public to make arrangements with Hennepin County District Court administrative personnel to view, at the Hennepin County Government Center, body-worn camera (BWC) video excerpts of former Minneapolis Police Department Officers Thomas Kiernan Lane (Lane) and J. Alexander Kueng (Kueng)[2] which record events during the detention and arrest of George Floyd in Minneapolis on May 25 ,2020 but not to obtain copies of the BWCs.

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[1] The Media Coalition includes American Public Media Group (which owns Minnesota Public Radio), The Associated Press, Cable News Network, Inc., CBS Broadcasting Inc. (on behalf of WCCO-TV), Court TV Media LLC, Dow Jones & Company (on behalf of The Wall Street Journal), Fox/UTV Holdings, LLC (on behalf of KMSP-TV), Hubbard Broadcasting, Inc. (on behalf of stations KSTP-TV, WDIO-DT, KAAL, KOB, WNYT, WHEC-TV, and WTOP-FM), the Minnesota Coalition on Government Information, The New York Times Company, The Silha Center for the Study of Media Ethics and Law, TEGNA Inc. (on behalf of KARE-TV), and the Star Tribune Media Company LLC.

[2] The Lane and Kueng BWC videos at issue are Defense exhibits 3 (Lane) and 5 (Kueng) filed by Lane on July 7, 2020 in support of his motion to dismiss for lack of probable cause.

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On August 7, 2020, this Court issued its order granting the Media Coalition motion, and allowing members of the Media Coalition, other media, and members of the public to obtain copies of the Lane and Kueng BWC videos, after payment of an appropriate fee, from Hennepin County District Court administrative personnel. This Memorandum Opinion contains the Court's factual findings and legal discussion in support of the August 7, 2020 Order.

FACTUAL BACKGROUND[3]

On May 25, 2020, George Floyd died in the wake of his detention and arrest by former MPD officers Derek Chauvin (Chauvin), Tou Thao (Thao), Lane, and Kueng who had responded to a 9-1-1 call from the Cup Foods store at 38th and Chicago Avenue in South Minneapolis alleging that a man had attempted to purchase merchandise with a counterfeit $20 bill. The Hennepin County Medical Examiner reportedly concluded in his autopsy report that the manner of Floyd's death was homicide, caused by "[c]ardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression."

All four officers are now facing criminal charges. The State has charged Chauvin[4] in the Amended Complaint with three counts:

(i) unintentional second-degree murder while committing a felony (third-degree assault), in violation of Minn. Stat. § 609.19 subd. 2(1);

(ii) third-degree murder, perpetrating an eminently dangerous act and evincing a depraved mind, in violation of Minn. Stat. § 609.195(a); and

[3] The facts summarized here are derived from the Statements of Probable Cause in the complaints in these cases. They are not intended as, and do not constitute, formal findings of fact by this Court.

[4] *State v. Derek Michael Chauvin*, 27-CR-20-12646.

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(iii) second-degree manslaughter, culpable negligence creating an unreasonable risk of causing death or great bodily harm, in violation of Minn. Stat. § 609.205 subd. 1.

Lane, Kueng,[5] and Thao[6] each faces identical charges of:

(i) aiding and abetting unintentional second-degree murder while committing a felony (third-degree assault), in violation of Minn. Stat. § 609.19 subd. 2(1); and

(ii) aiding and abetting second-degree manslaughter, culpable negligence creating an unreasonable risk of causing death or great bodily harm, in violation of Minn. Stat. § 609.205 subd. 1.

On July 7, 2020, Lane filed a motion to dismiss the State's charges for lack of probable cause. In connection with that motion, Lane filed as exhibits video excerpts from the BWCs of Lane (Defense Exh. 3) and his fellow officer and co-defendant Kueng (Defense Exh. 5). These two BWCs video exhibits are the focus of the Media Coalition's Motion. The Court had permitted media (and other interested members of the public) to make appointments with administrative personnel at the Hennepin County District Court at which they had the opportunity to view the Lane and Kueng BWC videos and take notes, but not to purchase copies of those BWC video exhibits. The Media Coalition objected to those restrictions, contending they should be allowed to obtain copies of the Lane and Kueng BWC excerpts that had been publicly-filed in support of a publicly-available motion to dismiss.

INTRODUCTION

Before moving on to analysis and discussion of the specific legal issue before the Court on the Media Coalition's motion – whether members of the public and the press may obtain copies

[5] *State v. J. Alexander Kueng*, 27-CR-20-12953.

[6] *State v. Tou Thao*, 27-CR-20-12949.

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of the Lane and Kueng BWC video excerpts publicly filed by Lane in support of his pending motion to dismiss for lack of probable cause – a few comments are in order.

Cases that generate intense public interest and media scrutiny highlight the tension between two fundamental rights: the right guaranteed under the federal and state constitutions to criminal defendants to receive a fair trial before an impartial jury, on the one hand, and the right of the public and press to attend criminal trials, on the other hand. Both the United States Supreme Court, *see Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976), and the Minnesota Supreme Court, *see Minneapolis Star and Tribune Co. v. Kammeyer*, 314 N.W.2d 550 (Minn. 1983), have acknowledged this tension. This Court is mindful of both fundamental rights, and the tension between them.

The Media Coalition, focusing on the rights of the public and press, note:

> The death of George Floyd at the hands of police on May 25, 2020 caused an international outpouring of grief and anger over law enforcement's treatment of Black men and women in America. It resulted in arguably the greatest display of civil unrest in the history of Minnesota and led to immediate calls for action and change from the highest levels of state and national leaders . . . . Without [being allowed to obtain copies of the Lane and Kueng BWC video excerpts filed in this case] the press and public cannot . . . begin to piece together a full story.

Media Coalition Brief, at 2, 6. Precisely because community reactions of outrage and public protest have been known to follow in the wake of shocking or sensationalized crimes, "the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980). As the Court observed in *Richmond Newspapers*:

> Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the

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> activities of vigilante "committees" on our frontiers. "The accusation and conviction or acquittal, . . . operat[e] to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that latent 'urge to punish.'"

Id.[7] Two years later, in another case involving the role public and press access to criminal trials "play in the functioning of the judicial process and the government as a whole," the Court continued this theme:

> Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. . . . Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government.

Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982). And, finally, two years later:

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

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[7] *See also Press-Enterprise I*, 464 U.S. at 508-09 (citations omitted):

> [The openness of criminal trials] has what is sometimes described as a "community therapeutic value." . . . Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done. . . . Whether this is viewed as retribution or otherwise is irrelevant. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.

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Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984) (*Press-Enterprise I*). *See also State v. Brown*, 815 N.W.2d 609, 612 (Minn. 2012) ("The purpose of the public trial guarantee is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.").

The Court is mindful of the multitude of societally-important, deeply-felt, and highly-contentious issues involving social and public policy, community safety, law enforcement conduct, tactics, and techniques, and civil rights – to list just a few -- George Floyd's death has unleashed. Those issues will play out in vigorous public debate. What happened – or was perceived to happen by many interested stakeholders – has led some to propose various structural reforms. That is as it should be.

Notwithstanding the intense interest and strong passions the events surrounding George Floyd's death have generated, the fact remains that Lane and his fellow former Minneapolis Police officers and co-defendants are entitled to a fair trial, before an objective and impartial jury, applying the evidence that will be presented in open court during a trial governed by the rules of evidence to the law applicable to the crimes with which they are charged. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The United States Supreme Court has made clear that trial judges have an "affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity" to safeguard a criminal defendant's due process rights. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 378 (1979) (publicity regarding pretrial suppression hearings present special risks of unfairness to defendants because the "whole purpose of such hearings is to screen out unreliable or illegally obtained evidence" which could influence public opinion against a

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defendant and also inform potential jurors of inculpatory information that is inadmissible at trial).

As the United States Supreme Court observed in another era's sensationalized and media-saturated case, the Sam Sheppard case:

> "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." . . . [N]o one [should] be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement . . . ." [Although] "freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice" . . . it must not be allowed to divert the trial from the "very purposes of a court system * * * to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom proceedings according to legal procedures." . . . Among the "legal procedures" is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. . . . Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.

Sheppard v. Maxwell, 384 U.S. 333, 350-51, 362 (1966) (citations omitted).

Lane and his three fellow co-defendants are guaranteed those rights by the same constitutions under which the Media Coalition seeks to vindicate its rights in covering the criminal proceedings. The State has an obligation to see that Lane and his fellow co-defendants' constitutional rights are vindicated, that they receive a fair trial, and that a fair and impartial jury is impaneled to render verdicts on the charges based on the evidence presented to the jury during trial. Despite the intense public interest and media focus, Lane and his co-defendants are not and will not have their criminal fates determined based on public sentiment shaped by media reporting,[8] the mass protests and demonstrations – as the Media Coalition portrays it, the

[8] Although this Court recognizes and will strive to vindicate the fundamental First Amendment rights of the press, consistent with its obligation to ensure Lane and his co-defendants receive fair

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"greatest display of civil unrest in [Minnesota] history – and public opinion influenced by the multiplicity of public and private commenters and information that may not be relevant or admissible in evidence during the eventual trial. Important, fundamental rights oft times find themselves in tension; that is unavoidable. This Court is committed to the management of pretrial proceedings and the eventual trial(s) in these cases not only to vindicate the public's and press' rights of access guaranteed by the First Amendment, the common law, and court rules but also Lane and his fellow co-defendants' Sixth Amendment rights to a fair trial, and this Court's and the parties' interests in seeing that justice be done by a fair and objective jury determining the facts based solely on evidence that will be admitted at trial.

Finally, the Court agrees with the Media Coalition that "[s]ecrecy [in connection with public aspects of criminal case proceedings] serves no useful purpose" (Media Coalition Br., at

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trials before impartial jurors, the Court is less sanguine than the Media Coalition's lawyers that the courts "necessarily rely on the efforts of journalists to produce complete, accurate accounts of what transpires in criminal proceedings for those members of the public who are not personally able . . . to attend the proceedings." Media Coalition Br., at 11. While this Court is skeptical that there ever was a time in this country's history in which journalists spoke in unified fashion in producing "complete, accurate accounts of what transpires in criminal proceedings," the Court simply observes that in the fractious, highly partisan, and segmented niches served by the modern-day media and journalists, reading accounts from such disparate sources as the *Minneapolis Star Tribune*, the *St. Paul Pioneer Press*, and *Minnesota Public Radio* in the local, "mainstream" Twin Cities media market; "national" newspapers like *The New York Times*, *The Washington Post*, and *San Francisco Chronicle*, on the one hand, and *The Wall Street Journal*, the *New York Daily News*, *The New York Post* and *The Washington Times*, on the other hand; or national news magazines or webzines such as *Harper's*, *Mother Jones*, *The Nation*, *The New Yorker*, *The Atlantic*, *Slate*, or *Salon*, on the one hand, and *The American Spectator*, *National Review*, *The Drudge Report*, or *Breitbart*, on the other hand; or tuning into stations like MSNBC or CNN, on the one hand, or Fox News or OAN, on the other hand -- all of which employ journalists -- should resoundingly dispel the notion that journalists, as a profession, can be depended on "to produce complete, accurate accounts of what transpires." Later in their Brief, the Media Coalition appear to acknowledge this reality when noting the conspiracy theories running rampant on the internet. *See* Media Coalition Br. at 22.

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22), but rejects the implication that proceedings in Lane's case and that of co-defendants Chauvin, Thao, or Kueng have inappropriately been conducted in secret.

All hearings in these cases -- each Defendant's first appearance, the first omnibus hearings on June 29, and the July 21 hearing – have been conducted in public and, given the social distancing requirements required by the COVID-19 pandemic, the Hennepin County District Court has arranged for overflow courtrooms to facilitate the presence of interested members of the public and press at the hearings.

The Hennepin County District Court has also created special websites for each of these cases in which all publicly-available documents[9] that have been filed into MN-CIS are made available to the public and press by remote access, and in which members of the public and press are able to sign up to receive case updates via email notification. This remarkable access, not ordinarily available in the tens of thousands of other criminal and civil cases filed annually in the Hennepin County District Court, is the marker of exceptional transparency, not a harbinger of secrecy. *See, e.g.*, Notice (filed June 11, 2020) [Dk #30];[10]

http://www.mncourts.gov/media/StateofMinnesotavDerekChauvin;

http://www.mncourts.gov/Media/StateofMinnesotavTouThao.aspx;

http://www.mncourts.gov/Media/StateofMinnesotavThomasLane.aspx;

http://www.mncourts.gov/Media/StateofMinnesotavJAlexanderKueng.aspx;

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[9] Documents filed confidentially or under seal under applicable authority and which therefore are not publicly available are not posted to the websites. This is not unique to these cases, as some documents routinely filed in felony criminal cases in the Hennepin County District Court, such as the Pre-Trial Evaluation, Criminal Record Summary, and Pre-Sentence Investigation reports, are filed confidentially or under seal.

[10] That notice was also filed into the Chauvin, Thao, and Kueng cases.

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This Court did issue a Gag Order, on July 9, 2020, directing the parties and counsel not to disclose certain forms of information to the public or press and providing that members of the public and press could make appointments to review the Lane and Kueng BWC video exhibits (which by their very nature are not "documents" that are or can be directly filed into MN-CIS) at the Hennepin County Government Center.[11] Those actions by this Court were not undertaken in the interests of "secrecy." Indeed, the public filing of written orders posted to public websites allowing remote access to the public and press and the issuance of an order allowing the public and press access to watch and take notes of video exhibits filed in connection with pretrial motions, which is hardly a commonplace in the Hennepin County District Court, does not manifest "secrecy"! Rather, the Court was attempting to mitigate what some colloquially characterize as efforts to "try the case in the press,"[12] to seek to avoid or at least to ameliorate

[11] Although direct, blanket gag orders on the press are not constitutionally permissible as prior restraints, *Nebraska Press Ass'n*, 427 U.S. at 561, the compelling governmental interest involved in a trial court's efforts to minimize threats that extensive and adverse publicity may present to a defendant's constitutional right to a fair trial may, in appropriate circumstances, warrant a trial court's use of gag orders to the trial participants. *Sheppard*, 384 U.S. at 359-63 ("The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."); *State v. Blom*, 682 N.W.2d 578, 609-10 (Minn. 2004) (not error for trial court to issue gag order to trial participants not to make extra-judicial statements concerning case); *Minneapolis Star and Tribune Co. v. Lee*, 353 N.W.2d 213, 215 (Minn. App. 1984). *See also* Minn. R. Crim. P. 26.03 subd. 7 (authorizing trial courts to order attorneys and parties not to make "extra-judicial statements relating to the case or the issues in the case for public dissemination during trial").

[12] The Court notes that the Media Coalition's brief appears to blur the lines between the obvious public interest in these cases and the fact that the ultimate determination whether Lane and his fellow officers are held criminally responsible for George Floyd's death under the charges

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the prospects of unduly tainting the prospective jury pool engendered by the intense media interest and reporting on these cases,[13] and to seek to vindicate the Defendants' rights and the State's interest in ensuring justice is done in these cases by a fair and impartial jury deciding whether the Defendants are guilty or not guilty of the State's charges based solely upon the evidence presented during trial, not based upon media reporting, public speculation, and extraneous information, inadmissible at trial, circulating during the months of pretrial preparation.

DISCUSSION

I. THE MEDIA COALITION HAS STANDING TO INTERVENE.

Representatives of the press and general public have a right to be heard on issues of access to or exclusion from criminal proceedings. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609, n. 25 (1982), and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), in which newspapers were allowed to intervene challenging trial court orders closing criminal trials to the press and general public. *See also Mankato Free Press Co. v.*

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the State has filed rests with an impartial jury sworn to consider only the evidence admitted a trial, rather than by public opinion polling:

> [The media's inability to obtain] and publish the [Lane and Kueng] BWC footage, which could provide additional information to viewers and readers about what the BWC footage shows and the culpability of any one of the police officers involved in Floyd's death.

Media Coalition Br., at 4.

[13] The Court is aware that The Daily Mail obtained at least excerpts from the Lane and Kueng BWC videos and posted some of that video footage online in an article posted on August 3, 2020. The reported leak of those video excerpts to the Daily Mail and the resulting article did not influence this Court's decision in its August 7, 2020 Order Granting Motion of Media Coalition to Obtain Copies of Publicly-Filed Body Worn Camera Video Evidence; the reasons for the Court's decision are explained in this Memorandum Opinion.

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Dempsey, 581 N.W.2d 311 (Minn. 1998) (granting writ of prohibition upon petition of press, requiring trial court to open remainder of posttrial *Schwartz* hearing to public and press); *Northwest Publications, Inc. v. Anderson,* 259 N.W.2d 254, 256 (Minn. 1977) (allowing media intervention to challenge trial court orders sealing complaints in two murder cases in effort to prevent public access to them, court held newspapers have standing to challenge trial court orders having "the effect of either directly or indirectly interfering with [press] functions of collecting or disseminating the news"); *Channel 10, Inc. v. Independent School District No. 709, St. Louis County*, 298 Minn. 306, 215 N.W.2d 814, 820-21 (Minn. 1974) (holding media had standing to challenge closed school board meetings under Minnesota's Open Meeting Law, based on "the right of the people to be informed in a practical way by the news media").[14]

The Minnesota Rules of Criminal Procedure expressly confer standing on the news media to challenge certain orders "restricting public access to public records relating to a criminal proceeding." *See, e.g.,* Minn. R. Crim. P. 25.03 subds. 1-3 (requiring notice of hearing be given to the news media prior to "the issuance of any court order restricting public access to public records relating to a criminal proceeding" and further providing that the "public and

[14] That rule is widely adopted in the federal courts as well. *See, e.g., In re Application of Dow Jones & Co.,* 842 F.2d 603, 608 (2d Cir. 1988); *Pansy v. Borough of Stroudsburg,* 23 F.3d 772, 777 (3d Cir. 1994); *Davis v. East Baton Rouge Parish School Board,* 78 F.3d 920, 926-27 (5th Cir. 1996); *CBS Inc. v. Young,* 522 F.2d 234, 237-38 (6th Cir. 1975); *In Re United States ex rel. Pulitzer Publishing Co.*, 635 F.3d 676 (8th Cir. 1980); *Radio & Television News Ass'n v. U.S. District Court,* 781 F.2d 1443, 1445 (9th Cir. 1986); *Journal Publishing Co. v. Mechem,* 801 F.2d 1233, 1235 (10th Cir. 1986).

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news media have a right to be represented and to present evidence and arguments in support of or in opposition to the motion, and to suggest any alternatives to the restrictive order").

A motion is the appropriate mechanism by which the media is afforded the opportunity to assert its interests.[15] The Media Coalition has standing to intervene to challenge this Court's restrictions that permitted access to the press and public to view the Lane and Kueng BWC video exhibits but did not allow members of the press or public to obtain, from the Hennepin County District Court, copies of those video exhibits.

II. UNDER THE PARTICULAR CIRCUMSTANCES HERE, THE MEDIA AND THE PUBLIC HAVE A RIGHT UNDER THE COMMON LAW AND COURT RULES TO OBTAIN COPIES OF THE LANE AND KUENG BWC VIDEO EXHIBITS FILED BY LANE IN SUPPORT OF HIS MOTION TO DISMISS FOR LACK OF PROBABLE CAUSE.

The Media Coalition contends that, under the common law right of access, "[o]nce the court receives or collects records from parties, the broad rule of [a presumption of] access attaches." Media Coalition Br. at 12[16] (citing *In re GlaxoSmithKline PLC*, 732 N.W.2d 257, 272 (Minn. 2007), and *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 202 (Minn.

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[15] Here, too, federal courts have extrapolated from the rules of civil procedure and found that "a motion to intervene to assert the public's First Amendment right of access to criminal proceedings is proper." *See United States v. Aref,* 533 F.3d 72, 81 (2d Cir. 2008); *accord United States v. Preate,* 91 F.3d 10, 12 n.1 (3d Cir. 1996); *In re Associated Press*, 172 Fed. Appx.1, 4 (4th Cir. 2006) (unpublished); *In re Associated Press,* 162 F.3d 503, 508 & n.6 (7th Cir. 1998); *In re Search Warrant for Secretarial Area Outside Office of Gunn,* 855 F.2d 569, 572-73 (8th Cir. 1988); *United States v. Valenti,* 987 F.2d 708, 711 (11th Cir. 1993).

[16] Although the Media Coalition suggests elsewhere in its brief that the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. § 13.82 subd. 7, also requires that the press and public be allowed to obtain copies of the Lane and Kueng BWC videos because they have been publicly filed as exhibits in this case, *see* Media Coalition Br. at 3 n.1, the GDPA explicitly provides that it does not apply to "records of the judiciary." Minn. Stat. § 13.01 subd. 5(b)(1); *see also* Minn. Stat. § 13.90 subd. 2 ("Access to data of the judiciary is governed by rules adopted by the supreme court.").

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1986) ("It is undisputed that a common law right to inspect and copy civil court records exists.")).

Although *Schumacher* does address the common law right to inspect and copy court records, it is has no application to the issue before this Court because *Schumacher* addressed a common law right to inspect and copy civil court records, not criminal court records, arose in the context of the Star Tribune's request to obtain copies of the settlement agreements and other files the court had ordered sealed at the parties' request after the Court had approved settlements in civil wrongful death actions, and because the Court expressly limited its decision to the particular facts in that case:

> Before turning to [analysis of the appropriate legal standard to be applied], however, we wish to emphasize the narrowness of the question presented to us and the narrowness of our decision. We are specifically considering only what standard should apply when a party seeks to restrict access to settlement documents or transcripts made part of a civil court file by statute. We do not intend this decision to apply to other civil trial records or documents.

392 N.W.2d at 204. In any event, in *Schumacher*, the Minnesota Supreme Court affirmed Judge Schumacher's decision to seal the civil court files and his denial of the media request to obtain copies of documents filed in that case.

The Media Coalition also cites to federal appellate decisions from the Second, Third, Seventh, and Ninth Circuits for the proposition that a common law right to obtain copies of judicial records requires this Court allow the copying of the Lane and Kueng BWC videos. Media Coalition Br. at 13. Because those decisions are not binding on this Court and because this Court concludes that the *Nixon* and *Kammeyer* decisions together with applicable rules in the Minnesota Rules of Criminal Procedure and Minnesota Rules of Public Access to Records of the Judicial Branch – all of which are discussed below -- provide the applicable rule of law, those other federal court decisions will not be analyzed in this Opinion. Some of those federal

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opinions are, in any event, of no utility to the circumstances here because the parenthetical information offered makes clear that they arose in the context of post-trial requests to obtain copies of trial exhibits. That context is materially different from the situation here, in which this Court has to balance concerns about inadmissible evidence being reported on and disseminated broadly by the media which might potentially taint the prospective jury pool and prejudice Lane and his co-defendants' right to a fair trial. For that reason also, Judge Quaintance's May 22, 2019 Order in *State v. Mohamed Noor*, 27-CR-18-6859, which the Media Coalition also cites and discusses, is inapposite because Judge Quaintance was also addressing post-trial requests by a Media Coalition in that case to obtain copies of trial exhibits.

This Court believes the issue here is governed by the United States Supreme Court opinion in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), and the Minnesota Supreme Court's opinion in *Minneapolis Star and Tribune Co. v. Kammeyer*, 341 N.W.2d 550 (Minn. 1983), as well as the Minnesota Rules of Criminal Procedure and Rules of Public Access to Records of the Judicial Branch.

In *Nixon*, several television networks sought to obtain copies of 22 hours of tape recordings from the White House Oval Office of conversations between President Nixon and various Administration officials and presidential advisors that had been obtained in response to a subpoena issued by the Watergate Special Prosecutor in connection with grand jury proceedings and which had been introduced into evidence during the criminal trial of Attorney General John Mitchell for conspiracy to obstruct justice in connection with the investigation into the 1972 burglary of the Democratic National Committee headquarters. Transcripts of the tape recordings given to the jury during the trial (but not received into evidence in that trial) when

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the recordings were played to the jury reportedly had been widely reprinted in the press.

In *Nixon*, the Supreme Court noted that courts in this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. 435 U.S. at 597. However, the Court noted that such a right is not absolute, and that "[e]very court has supervisory power over its own records and files, and access [to court records for inspection and copying] has been denied where court files might have become a vehicle for improper purposes." *Id*. at 598. The Court concluded that the decision regarding access to judicial records is left to the sound discretion of the trial judge, to be exercised given the relevant facts and circumstances in each particular case. *Id*. at 599, 603. The *Nixon* Court expressly declined to recognize a constitutional right of the press to obtain copies of the Nixon tapes under either the First Amendment freedom of the press guarantee or the Sixth Amendment guarantee of a public trial, *id*. at 608-10, and upheld the district court's decision not to authorize release of the tapes to the press. *Id*. at 607-08.

In *Kammeyer*, a criminal case in which the defendant was charged with criminal negligence in the wake of a road accident resulting in the death of two teenage girls, Judge Kammeyer had closed a pretrial hearing on defense motions to suppress evidence and transfer venue. 341 N.W.2d at 552. The Minnesota Supreme Court concluded that although the public and press have a First Amendment right of access to pretrial proceedings in criminal cases – presaging the United States Supreme Court decision in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) – because of the danger of prejudice to defendants, the public's right of access to pretrial proceedings is not absolute but is subject to procedural safeguards designed to preserve the fairness of the trial. 341 N.W.2d at 556. The Court concluded the trial court had

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not abused its discretion in closing that pretrial hearing to the public and press and restricting access to portions of the transcript issued after the closed hearing. *Id*. at 559. Finally, the Court held that Rules 25.01 and 25.03 of the Minnesota Rules of Criminal Procedure strike the proper balance between the First Amendment rights of the press and public to access to criminal proceedings and the Defendant's Sixth Amendment guarantee of a fair public trial. *Id*.

Consistent with the common law, the Minnesota Rules of Public Access to Records of the Judicial Branch establish a presumption that the press and public may copy court records. Those rules provide:

> Records[17] of all courts and court administrators in the state of Minnesota are presumed to be open to any member of the public for inspection or copying at all times during the regular office hours of the custodian of the records. Some records, however, are not accessible to the public, at least in the absence of a court order, and these exceptions to the general policy are set out in Rules 4, 5, 6, and 8.[18]

Access Rule 2; *see also* Access Rule 8 subd. 1 ("Upon request to a custodian, a person shall be allowed to inspect or to obtain copies of original versions of records that are accessible to the public in the place where such records are normally kept, during regular working hours."). However, Access Rule 8 subd. 5(a) explicitly recognizes that access to certain evidence, documents and physical objects admitted into evidence in a proceeding that was open to the public may be restricted by court order, and subd. 5(c) further provides that evidentiary exhibits from a hearing or trial – like the Lane and Kueng BWC video exhibits at issue in this motion –

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17 "Records" are defined as "any recorded information that is collected, created, received, maintained, or disseminated by a court or court administrator, regardless of physical form or method of storage. Access Rule 3 subd. 5. "Case Records are defined as "all records of a particular case or controversy." Access Rule 3 subd. 5(a).

18 Access Rules 5 and 6, which govern accessibility to administrative and vital statistics records, respectively, are not relevant to the Media Coalition motion.

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shall not be remotely accessible.

Access Rule 4 subd. 1(s) provides that case records that have been made inaccessible to the public under certain state statutes, other court rules (*e.g.*, Minn. R. Crim. P. 25.01 and 26.03 subd. 6), court orders, or other applicable law are not accessible to the public. Access Rule 4 subd. 2 notes that procedures for restricting access to case records are as provided in applicable court rules and explicitly cross reference Rules 25 and 26.03 of the Minnesota Rules of Criminal Procedure and *Kammeyer* for criminal cases.

Rule 25.01 of the Minnesota Rules of Criminal Procedure authorizes trial courts to issue orders excluding the public (and press) from pretrial hearings and restricting access to orders, transcripts, or evidence presented at such hearings if the trial court finds that "dissemination of evidence . . . presented at the hearing may interfere with an overriding interest, including disclosure of inadmissible evidence and the right to a fair trial, and finds, after a hearing, that a substantial likelihood exists that conducting the hearing in open court would interfere with an overriding interest. Minn. R. Crim. P. 25.01 subds. 1 and 4.

Rule 25.03 of the Minnesota Rules of Criminal Procedure provides the rules governing orders restricting public access to public records relating to criminal proceedings. Rule 25.03 subd. 4 provides that a restrictive order may issue only if the trial court concludes that: (i) access to public records will present a substantial likelihood of interfering with the fair and impartial administration of justice; (ii) all reasonable alternatives to a restrictive order are inadequate; and (iii) the restrictive order is no broader than necessary to protect against the potential interference with the fair and impartial administration of justice.

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The Media Coalition conceded, during the July 21, 2020 hearing, as it must given the law, that the Court has a duty to control prejudicial pretrial publicity. July 21, 2020 Hrg Trans. at 32. The State conceded that, in its view, the Lane and Kueng BWC videos will almost certainly be admissible at trial, and none of the parties objected to the Court permitting the media and members of the general public to obtain copies of the Lane and Kueng BWC videos (assuming payment of reasonable reproduction costs). *Id*. at 18, 37-41. Although the Court remains determined to seek to manage the pretrial proceedings in this case to minimize the risks of prejudicial publicity based on proceedings in court and conduct of the parties and counsel that could potentially taint and improperly influence the jury pool and interfere with the defendants' rights to a fair trial before an impartial jury, the Court is satisfied, based on the representations that all counsel expect the Lane and Kueng BWC video exhibits filed in this case in support of Lane's motion to dismiss will be admitted into evidence at the trial, that allowing members of the public and the press to obtain copies of those BWC videos does not, at this stage of the proceedings, present a substantial likelihood of interfering with the fair and impartial administration of justice and the defendants' rights to a fair trial. Accordingly, the Court filed its order on August 7, 2020 granting the Media Coalition's motion and permitting the copying of the Lane and Kueng BWC video exhibits.

III. THE COURT DOES NOT REACH THE MEDIA COALITION'S FIRST AMENDMENT ARGUMENT.

The Media Coalition also contends that the public and press have a First Amendment right to obtain copies of the Lane and Kueng BWC videos filed as exhibits with the Court and to distribute those videos. (Media Coalition Brief, Part II.C, pp. 17-20) The cases the Media Coalition cites in support of such a claimed right under the First Amendment are the line of cases

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in which the United States Supreme Court, various federal appellate courts, and Minnesota's appellate courts have held that the First Amendment establishes a presumptive constitutional right of the public and press to attend (i) criminal trials,[19] (ii) the voir dire of potential jurors, *see Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*), and (iii) at least some preliminary pretrial hearings (such as those in California in which the trial courts make a determination after hearing, which may be a contested evidentiary hearing, whether probable cause exists sufficient to bind the defendant over for trial). *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*). Although presumptive access by the public and press to criminal trials is now well-established as a matter of constitutional law, such access is not an absolute right, and a trial court may, in appropriate circumstances, limit access where public access would "inhibit the disclosure of sensitive information," and a limitation is necessary to serve "a compelling governmental interest, and is narrowly tailored to serve that interest."[20] Although courts have articulated these standards in varying formulations, the

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[19] *See*, *e.g.*, *Globe Newspaper*, 457 U.S. at 603, 606 ("*Richmond Newspapers* firmly established for the first time that the press and general public have a constitutional right of access to criminal trials. . . . Although the right of access to criminal trials is of constitutional stature, it is not absolute."); *Richmond Newspapers,* 448 U.S. at 573, 580 ("a presumption of openness inheres in the very nature of a criminal trial under our system of justice" such that "the right to attend criminal trials is implicit in the guarantees of the First Amendment"); *Waller v. Georgia*, 407 U.S. 39, 44 (1984) ("the press and public have a qualified First Amendment right to attend a criminal trial); *Craig v. Harney,* 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property."); *United States v. Thunder,* 438 F.3d 866, 867 (8th Cir. 2006) ("We have an open government, and secret trials are inimical to the spirit of a republic, especially when a citizen's liberty is at stake. The public, in a way, is necessarily a party to every criminal case.").

[20] *Globe Newspapers*, 457 U.S. at 606-07; *Austin Daily Herald v. Mork*, 507 N.W.2d 854, 856 (Minn. App. 1993), *rev. denied* (Minn. Dec. 14, 1993); *State v. McRae*, 494 N.W.2d 252, 258 (Minn. 1992) (trial courts may close courtrooms during trial testimony by minor victims about sex crimes committed against them); Minn. State. § 631.045 (authorizing courts to

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constitutional presumption that criminal trials are to be open to the public and the press may be overcome only under limited circumstances:

1. If failure to restrict access creates a substantial probability of prejudice to a compelling or overriding interest. *See*, *e.g.*, *Press-Enterprise. II*, 478 U.S. at 13-14; *Waller,* 467 U.S. at 45, 48; *Press-Enterprise I*, 464 U.S. at 510; *Richmond Newspapers*, 448 U.S. at 580–81; *accord Northwest Publications,* 259 N.W.2d at 257 (party seeking restrictive measures must establish, "in an adversary setting at which the public must be represented and afforded an opportunity to be heard . . . a strong factual basis" for the requested restriction).

2. No reasonable alternatives exist to adequately protect the threatened compelling or overriding interest. *E.g., Press-Enterprise II*, 478 U.S. at 13-14; *Waller v. Georgia*, 467 U.S. at 48.

3. Any restrictions on access are narrowly tailored to serve the threatened interest, *i.e.*, the restrictions must be no broader than necessary to protect the compelling or overriding interest. *E.g.*, *Press- Enterprise II*, 478 U.S. at 13-14; *Press-Enterprise I*, 464 U.S. at 510; *Waller*, 467 U.S. at 45, 48.

4. Any restrictions on access must be effective in protecting the threatened compelling or overriding interest for which the limitation is imposed—a constitutional right may not be restricted for a futile purpose. *E.g., Press-Enterprise II*, 478 U.S. at 14; *Waller*, 467 U.S. at 48.

5. The court must first provide prior notice and must also either issue written findings of fact or make detailed findings of fact on the record demonstrating that these standards have been met. *E.g.*, *Press-Enterprise II*, 478 U.S. at 13-14; *Waller*, 467 U.S. at 45, 48; *Press-Enterprise I*, 464 U.S. at 510; *Northwest Publications,* 259 N.W.2d at 257.

The public and the press will, of course, be able to attend the trial (or trials) in these cases. The right to attend a criminal trial does not, perforce, carry with it any First Amendment

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exclude public from parts of trial involving sexual misconduct against a juvenile, if deemed necessary to protect a witness); Minn. R. Crim. P. 25.01 (addressing procedures pursuant to which trial court may close portions of pretrial hearings to public if court concludes a substantial likelihood exists that conducting the hearing in open court would interfere with an overriding interest, such as the disclosure of inadmissible evidence and the defendant's right to a fair trial); Minn. R. Crim. P. 26.03 subd. 6 (governing orders restricting public and press access to portions of a trial).

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right to obtain copies of documents and exhibits that have been filed with a court in connection with a criminal proceeding, and none of the cases the Media Coalition cites in this section of its brief purport to establish any such right under the First Amendment.

Because this Court has determined to allow members of the public and press to obtain copies of the Lane and Kueng BWC video exhibits pursuant to the Minnesota Rules of Criminal Procedure, the Minnesota Rules of Public Access to Records of the Judicial Branch, and the common law, it is not necessary to decide if the media has a First Amendment right to obtain copies of these video exhibits filed in support of the Lane motion to dismiss for lack of probable cause.

BY THE COURT

Digitally signed by Cahill, Peter
Date: 2020.08.11 09:55:16 -05'00'

Peter A. Cahill

Judge of District Court