

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

MOHAMED MOHAMED NOOR,

Defendant.

) **STATE'S RESPONSE TO COURT'S**
) **ORDER TO SUBMIT SUPPLEMENTAL**
) **MATERIALS FOR REVIEW**
) **REGARDING DEFENDANT'S MOTION**
) **TO DISMISS FOR LACK OF PROBABLE**
) **CAUSE**

MNCIS No: 27-CR-18-6859

TO: THE HONORABLE KATHRYN QUAINANCE, HENNEPIN COUNTY DISTRICT COURT; COUNSEL FOR DEFENDANT; AND DEFENDANT.

RELEVANT HISTORY

On August 15, 2018, the defendant moved to dismiss the charges in this case for lack of probable cause. The State filed its memorandum in opposition to dismiss the motion on September 5, 2018. On September 12, 2018, the defendant filed a responsive memorandum. On September 14, 2018, at a scheduling conference, the court directed both parties to submit all documents and other evidence (e.g., grand jury transcripts, body worn camera, reports, etc.) that contained information referenced in the three memoranda that was not referenced in the complaint. The court requested the information by the end of the day on Monday, September 17, 2018, and stated those materials would be subject to *in camera* review. Early in the day on September 17th, the court's staff informed the State that the court wanted the parties to address the issue of public disclosure of supplemental materials. At 4:30 p.m., the court's staff sent the following message by email to the prosecutors and defense attorneys:

Any request for an order restricting public access to documents should be made pursuant to Minn. R. Crim. P. 25.03 with specific proposed findings as set forth in subdivisions 4 and 5 addressing the factors with regard to each document. *See Waller v. Georgia*, 467 U.S. 39, 40, 104 S. Ct. 2210, 2211 (1984); *Minneapolis Star and Tribune Co. v. Kammeyer*, 341 N.W.2d 550, 552 (1983).

The State's position is that Minn. R. Crim. P. 25.03 and *Kammeyer* are inapplicable at this juncture because the supplemental materials at issue have not been received into evidence, are confidential, and currently constitute investigative data protected by Minn. Stat. § 13.82. The State opposes public disclosure of any and all supplemental materials submitted by the defendant and the State. Public disclosure will violate numerous controlling statutes and rules of procedure and practice. Public disclosure will violate this court's protective order of March 27, 2018. Public disclosure will have the irreversible effect of preventing the defendant from receiving a fair trial in this case and any other collateral legal proceedings.

ARGUMENT

1. RULE 25 OF MINNESOTA RULES OF CRIMINAL PROCEDURE.

The court has requested that either party requesting an "order restricting public access" to documents do so pursuant to Minn. R. Crim. P. 25.03. The State does not request a Rule 25 restrictive order because that rule does not apply to the materials the court is reviewing. Rule 25.03 applies specifically to *public* documents:

Subd. 1. Scope. Except as provided in Rules 25.01, 26.03, subd. 6 and 33.04, this rule governs the issuance of any court order restricting public access to *public records* relating to a criminal proceeding.

Minn. R. Crim. P. 25.03, Subd. 1 (emphasis added)

The reference to Rule 25.01 returns the discussion to familiar territory: the rule permitting exclusion of the public from pretrial hearings. In this case, defendant previously moved the

court *in camera* to file a different motion, a motion to suppress the defendant's psychological records. Rule 25.01 directly applied in that situation because the defendant sought to seal *the motion itself* and litigate the matter outside the public view. This situation is very different: the motion and responses have been publicly filed. We are scheduled for a full and open hearing on September 27, 2018; the State is *not* seeking closure of that hearing.

Rule 26.03 governs trial procedure and has nineteen different subdivisions addressing how a public trial is to be conducted. The provisions of that rule are largely inapplicable at this point of the proceedings given that trial is a future event. One provision, Rule 26.03, Subd. 6, directly addresses restricting public access to portions of a trial which are conducted outside the presence of a jury, restricting public access to trial transcripts, or orders closing a portion of a trial. None of those provisions apply here.

Rule 33.04 applies to the filing and sealing of documents including search warrants, search warrant applications, search warrant inventories, statements of unsuccessful execution, criminal complaints, indictments, and arrest warrants. In this case, several search warrants were filed publicly as required by the rule and are therefore public records within the purview of Rule 25.03. The November 30, 2017 search warrant issued in this case was sealed by court order and remains sealed.

2. THE MATERIALS FOR THE COURT'S REVIEW ARE NOT PUBLIC RECORDS.

The materials supporting both parties' probable cause memoranda contain discovery in the following categories:¹

¹ The materials are not more specifically identified here in order to protect the confidential, non-public nature of the data.

1. Minneapolis Police Department (MPD) materials including body worn camera video, squad car dash camera video, incident detail report, and citation from a May 2017 traffic stop.
2. Minnesota Bureau of Criminal Apprehension (BCA) report and interview transcript related to #1 above.
3. Comprehensive MPD performance review documents.
4. MPD email regarding part-time employment.
5. 4 transcripts of witness statements including 2 civilians and 2 medical professionals.
6. Psychological records from two psychologists and one psychiatrist.
7. 2 body worn camera videos, both of which are also grand jury exhibits.
8. 7 transcripts of the testimony of 7 grand jury witnesses.
9. 1 additional grand jury exhibit.

All of the items in categories 1-7 are confidential data and therefore not public records subject to Minn. R. Crim. P. 25.03. Minn. Stat. § 13.82, Subd. 7 provides in relevant part:

Subd. 7. Criminal investigative data. Except for the data defined in subdivisions 2, 3, and 6,² investigative data collected or created by a law enforcement agency in order to prepare a case against a person, whether known or unknown, for the commission of a crime or other offense for which the agency has primary investigative responsibility are confidential or protected nonpublic while the investigation is active.

The information in categories 1-7 was, in all cases, either collected by or created by the BCA, the agency MPD designated as the primary investigative authority. That information was collected or created for the preparation of a case against a person (the defendant), for the commission of a crime (third-degree murder and second-degree manslaughter). The investigation is active and

² Subdivisions 2, 3, and 6 refer to arrest data, 911 call data and initial response data, all of which has been previously made public in this case.

will remain active until criminal proceedings against the defendant are concluded. Subdivision 7 goes on to state, importantly, “Any investigative data presented as evidence *in court* shall be public.” Minn. Stat. § 13.82, Subd. 7. If and when the parties present materials in categories 1-7 in court as evidence, obviously the information would then become public.

The process of submitting materials to a court for *in camera* review ensures that confidential data are not made public prematurely. This protects privacy interests involved and, most importantly in criminal cases, prevents prejudice that can result from public disclosure of evidence later ruled inadmissible. Minn. Gen. R. Prac., Rule 14.06 sets out the procedure for submitting confidential documents, i.e. those in categories 1-7 above, to the court for *in camera* review. This was the court’s original instruction on September 14th and the State now seeks approval to submit its confidential investigative data in this manner.

The State makes the same request for the items in categories 7-9, which are grand jury materials. Minn. R. Crim. P. 18.07 provides: “[N]o one may disclose matters occurring before the grand jury unless directed to do so by the court in connection with a judicial proceeding.” *See also* Minn. Stat. § 628.66 (providing that outside the parameters of Rule 18.07, disclosure of evidence adduced before the grand jury is a misdemeanor). Certainly the court’s request to review supplemental materials of grand jury exhibits and transcripts is not intended to result in public disclosure of any portion of grand jury proceedings. *In camera* review is the appropriate way for the court to make an informed decision on the motion while protecting the confidential investigative data and non-public grand jury proceedings.

3. SUPPLEMENTAL MATERIALS FOR REVIEW HAVE NOT BEEN RECEIVED INTO EVIDENCE.

The Minnesota Rules of Public Access to Records of the Judicial Branch recognize the important distinction between items that have been admitted into evidence and items that have

not. Rule 8 of the Rules of Public Access governs when the public is allowed remote access to exhibits entered into evidence in a trial or pretrial hearing. The 2005 comment, which clearly indicates that admission into evidence is a prerequisite to public access, is instructive:

The 2005 changes to Rule 8, subd. 5, regarding access to certain evidence, are intended to address the situation in which the provisions appear to completely cut off public access to a particular document or parts of it even when the item is formally admitted into evidence (i.e., marked as an exhibit and the record indicates that its admission was approved by the court) in a publicly accessible court proceeding. See, e.g., MINN. STAT. § 518.146 (2004) (prohibiting public access to, among other things, tax returns submitted in dissolution cases). The process for formally admitting evidence provides an opportunity to address privacy interests affected by an evidentiary item. *Formal admission into evidence has been the standard for determining when most court services records become accessible to the public under Rule 4, subd. 1(b), and this should apply across the board to documents that are admitted into evidence.*

Data Practices Act, M.S.A., Chapter 13, Appendix, Rules of Public Access to Records of the Judicial Branch Rule 8, comment (2018) (emphasis added). The rule and its comment are in line with applicable Minnesota case law. For example, in *Minneapolis Star & Tribune Co. v. Kammeyer*, the Minnesota Supreme Court held that the district court erred in having a closed hearing and sealing a court order regarding the defendant's previous DWI convictions in criminal vehicular homicide. 341 N.W.2d 550, 553 (Minn. 1983). The *Kammeyer* court did *not* state that the police reports, squad videos, or other investigative data underlying the defendant's DWI convictions should have been made available to the public. As the State previously argued when the defendant sought to seal his motion to suppress his psychological records, there is a difference between court documents (motions and orders) concerning discovery, and the discovery itself, which as demonstrated above, is confidential data protected by

Minn. Stat. § 13.82. These data may one day become public, but not until they are properly received under the rules of evidence and/or the case is ultimately complete.

4. ADDITIONAL CONSIDERATIONS.

There are several other important considerations for the court, as well as irreversible consequences, if the court were to publicly disclose these confidential, protected materials. First, the materials under consideration are, from the parties' perspective, relevant to a specific issue now before the court: whether there is probable cause to support both charges. For a probable cause determination, all reasonable inferences are to be drawn in favor of the State. The admissibility of the information in these materials *at trial* may be another issue entirely and premature disclosure of them now could unfairly prejudice the jury pool in this extremely high profile case.

Second, the supplemental materials contain not only the information relevant for the issue of probable cause, but a significant amount of other information not germane to that issue, but which cannot be redacted before submission. For example, one witness's grand jury testimony exceeds 100 transcript pages. The court is qualified to review that testimony and determine what evidence contained therein is relevant to the issue of probable cause. The public is not. The media are not. The supplemental information also contains names and addresses of civilian witnesses and names of other MPD officers who would undoubtedly be contacted by the media if this information were prematurely released without protection in place.

Third, the potential for misuse of this information cannot be overstated. The unprecedented level of publicity in this case presents an on-going risk to the fairness of the proceedings. While these supplemental material might seem like a sizeable amount of comprehensive information about this case, it is actually a tiny fraction of the investigative information that may one day be

presented in court. For example, evidence from one MPD case in May of 2017 would be disclosed while information from some 900+ other incidents would not. Testimony from seven grand jury witnesses would be disclosed while that of dozens of others would not. Two body worn camera videos would be released while dozens of others would not. One police report from the BCA would be disclosed while several hundred others would not. Piecemeal disclosure without the rules and protections of the courtroom environment would serve only to distort perception of the case for both sides and in the end, severely jeopardize the defendant's right to a fair trial and undermine justice.

Fourth, public disclosure of these materials would run afoul of the protective order the parties and the court signed March 27, 2018. One purpose of the agreement and order was to ensure that this case would be tried on the record and in open court, and not in the media. Disclosure of any confidential materials would certainly prevent that.

Fifth, other legal proceedings would be affected by the disclosure of confidential materials. As the court knows, there is a civil lawsuit pending in U.S. District Court and the magistrate judge in that case heard arguments on September 14th. Several parties, including the defendant's own civil attorney, have moved to stay the proceedings and forego discovery for the sole purpose of waiting for the proceedings in this case to conclude. In the civil case, the defendant has argued that his right to a fair trial in the criminal case would be jeopardized if the civil case and discovery proceedings were to proceed. The Hennepin County Attorney supported the request for the stay by letter (attached) and by appearance, citing specifically potential prejudice to the jury pool and the defendant's right to a fair trial. Public disclosure of these supplemental materials would be a court-ordered commencement of discovery proceedings in the civil case

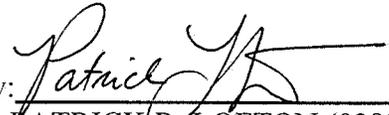
and this court would be powerless to control or oversee the manner in which the information is released or used in that separate high-profile lawsuit.

Finally, it is important not to require special or unusual treatment of this case simply because there is a high level of media and public interest in it. The rules and protections provided by Minnesota law are more than sufficient to protect and balance the right to a fair trial with the public and media's right to information. Every day in courtrooms across the state, district court judges review materials that are confidential or potentially inadmissible *in camera* to decide pretrial motions, suppression motions, motions *in limine*, motions to produce confidential data, motions to disclose confidential data, etc. Innumerable examples come to mind including a court's *in camera* review of a defendant's statement to police, a forensic interview of a child sexual assault victim, police reports related to 404(b) evidence, police reports or witness statements related to prior sexual conduct of a sexual assault victim, records related to a defendant's prior convictions or criminal history, grand jury testimony, child pornography images, autopsy photos, medical records, psychological records, and on and on. Such review is not the equivalent of closing a courtroom or limiting access; it is measure meant to guarantee a fair trial and ensure that information is disclosed in the courtroom and only in the courtroom subject to the court's rulings. An *in camera* review is authorized by the statutes and rules of the state of Minnesota. The court should review and retain the supplemental materials using that procedure thereby preventing premature, prejudicial, and catastrophic public disclosure.

Respectfully submitted,

MICHAEL O. FREEMAN
Hennepin County Attorney

By: 
AMY E. SWEASY (26104X)
Assistant County Attorney
C-2100 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-5561

By: 
PATRICK R. LOFTON (0393237)
Assistant County Attorney
C-2100 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-5561

Dated: September 18, 2018

**OFFICE OF THE HENNEPIN COUNTY ATTORNEY****MICHAEL O. FREEMAN** COUNTY ATTORNEY

September 11, 2018

VIA ECF AND U.S. MAIL

Hon. Tony N. Leung
United States District Court
342 Warren E. Burger Federal Courthouse
316 N. Robert Street
St. Paul, MN 55101

Re: *Ruszczyk v. Noor*, Case No. 18-cv-2086 (PAM/TNL)

Dear Judge Leung:

I represent the Hennepin County Attorney's Office and write with respect to the motions that are set for hearing on September 14, 2018 in the above-referenced action. The City Defendants and Defendant Mohamed Noor have each moved for a stay of all proceedings in this matter until the resolution of the related criminal proceedings against Defendant Noor, which are currently pending in state court. *See State v. Noor*, Case No. 27-CR-18-6859 (Fourth Judicial District). The Hennepin County Attorney's Office is not a party to this action, but has an interest in the motions for stay as the prosecuting agency in the state criminal proceeding.

The Hennepin County Attorney's Office agrees with the moving Defendants and respectfully submits that this civil litigation should be stayed in its entirety until the state district court criminal proceeding is resolved by dismissal, a verdict of not guilty, or sentencing after a plea of guilty or guilty verdict. There is a strong public interest in assuring the integrity and fairness of the criminal case, as detailed by Defendants in their memoranda. *See* ECF 11, City Defendants' Mem., p. 16; ECF 16, Defendant Noor's Mem., pp. 31-33. One critical component of achieving integrity and fairness is to avoid any prejudice to the jury pool, which is a special concern here, given that the criminal case has garnered an exceptional amount of publicity to date. To protect those interests, the presiding state court judge has issued a protective order that strictly restricts the dissemination of any discovery materials while the criminal case is pending. *See* Stipulation and Order (dated Mar. 27, 2018) (attached). Discovery in this case could undermine the effectiveness of the state court's protective order, particularly since the Federal Rules of Civil Procedure contemplate a much broader scope of discovery than the Minnesota Rules of Criminal Procedure, as detailed by Defendant Noor. *See* Defendant Noor's Mem., pp. 27-29. A complete stay of this civil action is the best way to give full effect to the state court's protective order and to safeguard the pending criminal proceeding.

Page 2
September 11, 2018

An omnibus hearing in the state criminal proceeding is scheduled for September 27, 2018, and it is likely that the state court will set a trial date at that time. Once the state criminal trial has been conducted, all of the evidence will have been made public either by the State of Minnesota or by Defendant Noor, and this civil litigation can proceed without jeopardizing the important criminal justice interests at stake.

If the Court has any questions about the position of the Hennepin County Attorney's Office, I plan to attend the motion hearing on September 14, 2018. Thank you for your consideration of this letter.

Sincerely,

Beth A. Stack

BETH A. STACK
Assistant Hennepin County Attorney
Beth.Stack@hennepin.us
Telephone: (612) 543-1357
FAX: (612) 348-8299

BAS
cc: Counsel of record (via ECF)
Encl.

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,)
)
 Plaintiff,)
)
 vs.)
)
 MOHAMED MOHAMED NOOR,)
)
 Defendant.)

STIPULATION AND ORDER

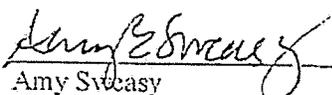
MNCIS No: 27-CR-18-6859

* * * * *

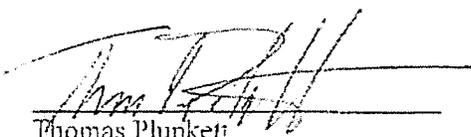
The parties to the above-referenced action stipulate to the following:

1. That a copy of the discovery in the possession of the State shall be made available to counsel for defendant and that continuing discovery will be provided by both the State and the Defendant in accordance with the Minnesota Rules of Criminal Procedure.
2. That counsel for both parties may provide copies of the discovery to members of their staff including investigators and any experts retained or experts consulted. A copy of discovery may be made for the Defendant.
3. No additional copies of any of the discovery will be provided to any other person, party, or entity or made by counsel, their representatives and staff, or the Defendant except as necessary to be reviewed by counsel and staff to prepare for legal proceedings in this matter. In addition, the parties and Defendant agree not to share the discovery with or permit its review by anyone not officially a part of the team representing either party or as necessary to conduct interviews of witnesses. But, under no circumstances will copies of discovery be provided to witnesses or left in the possession of witnesses.

4. This agreement is intended to be revised by the parties as needed with notice to the court of any changes.



Amy Swasey
Attorney for Plaintiff
Dated: 3-27-18



Thomas Plunkett
Attorney for Defendant
Dated: 27 March 2018

IT IS SO ORDERED.
Dated: 3/27/18

ORDER



Judge of District Court
Fourth Judicial District