

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

State of Minnesota,

Case Type: Criminal
Court File No. 27-CR-21-7460

Plaintiff,

vs.

**STATE'S MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR VISUAL
AND AUDIO COVERAGE OF TRIAL**

Kimberly Ann Potter,

Defendant.

TO: The Honorable Regina M. Chu, Judge of the Hennepin County District Court; the above-named defendant and defendant's counsel, Earl Gray, 1st Bank Building, 332 Minnesota Street, Ste. W1610, St. Paul, MN 55101; Paul Engh, Ste. 260, 650 South Sixth Avenue, Minneapolis, MN 55402.

INTRODUCTION

Defendant Kimberly Ann Potter, then a police officer for the Brooklyn Center Police Department, shot and killed Daunte Demetrius Wright during a traffic stop and attempted arrest on April 11, 2021. Protests and civil unrest related to Mr. Wright's killing continued for at least 11 consecutive nights after the killing of Mr. Wright.¹ Marches and vigils extended into the next month, persisting three weeks after Mr. Wright's killing.²

¹ Madeline Holcombe, *At least 100 people arrested on tense sixth night of protests as Daunte Wright's loved ones mourn for his son*, CNN (Apr. 17, 2021) <https://www.cnn.com/2021/04/17/us/daunte-wright-minnesota-shooting-saturday/index.html>; Operation Safety Net Daily Update: April 20 (April 20, 2021), <https://safetynet.mn.gov/Pages/news-release-daily-update-april-20.aspx>; Alex Chhith, *Brooklyn Center issues citywide curfew for Thursday night*, Star Tribune (Apr. 22, 2021) <https://www.startribune.com/brooklyn-center-issues-citywide-curfew-for-thursday-night/600049075/>.

² KARE Staff, *March for Daunte Wright held in Brooklyn Center*, Kare11 (May 2, 2021) <https://www.kare11.com/article/news/local/daunte-wright/march-for-daunte-wright-in-brooklyn-center/89-0f11a81c-0fff-4e9a-907a-1ee923716a37>; *Brooklyn Center Residents Near Police Station Share Views on Protests*, CCX Media (May 6, 2021)

On April 14, 2021, the State of Minnesota charged Defendant with one count of second-degree manslaughter. Shortly after the complaint was filed, “[m]ultiple media outlets . . . requested permission to record, broadcast, livestream, or screen shot the First Appearance.”³ *Order Denying Audio/Visual Recording*, April 15, 2021. Since the First Appearance, held on April 15, 2021, several local and national news agencies have filed formal notices and requests to provide video and audio coverage of these proceedings, including trial.⁴ These requestors include MPR News, Kare 11, WCCO, Fox 9, ABC News, Associated Press, KSTP, Washington Post, Ruptly News Agency, and Court TV.⁵

Meanwhile, the Minnesota Judicial Branch continued operating in a manner substantially different from normal and usual because of changes made necessary by the COVID-19 pandemic. These changes originated when the Governor declared a peacetime emergency on March 13, 2020. Until April 30, 2021, the Minnesota Supreme Court directed district courts to conduct “most criminal and civil proceedings” remotely, “with exceptions for some jury trials.” *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001, at 2-3 (Minn. filed Feb. 18, 2021). As of May 1, 2021, and effective through June 13, 2021, the Judicial Branch “continue[d] to provide limited in-person operations [and] hold limited in-person proceedings” and sought to “slowly expand in-person operations.” *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001, at 1 (Minn. filed Mar 22, 2021). Face

<https://ccxmedia.org/news/brooklyn-center-residents-near-police-station-share-views-on-protests/>; Mara Klecker and Kim Hyatt, *Hundreds follow Daunte Wright’s family in a march through Brooklyn Center*, Star Tribune (May 3, 2021) <https://www.startribune.com/hundreds-follow-daunte-wright-s-family-in-a-march-through-brooklyn-center/600052861/>.

³ These requests were denied.

⁴ *State v. Potter*, Hennepin County District Court File No. 27-CR-21-7460, Docket Nos. 11, 13, 14, 15, 17, 18, 22, 23, 24, 26.

⁵ On May 11, 2021, the Court again denied the requests for visual or audio coverage of an omnibus hearing.

coverings had been required for all persons entering court facilities. *See Order Requiring Face Coverings at Court Facilities*, No. ADM20-8001 (Minn. filed July 7, 2020). “Exposure control measures,” including social distancing, have also been in place within court facilities. *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001, at 1 (Minn. filed May 25, 2021).

It is against this backdrop that, on May 17, 2021, the State filed a Motion for Visual and Audio Coverage for Trial. Defendant, through counsel, has objected to visual and audio coverage of all pretrial hearings thus far and has indicated an ongoing objection to any visual and audio coverage of future proceedings. For the reasons listed below, this Court should grant the State’s motion for visual and audio coverage of this trial.

ARGUMENT

IN THIS UNIQUE CASE, THE COURT SHOULD ORDER LIVE AUDIO AND VIDEO COVERAGE OF THE TRIAL TO VINDICATE THE CONSTITUTIONAL PUBLIC-TRIAL RIGHTS.

A “public” trial implicates two important constitutional rights. The first is for the defendant’s benefit, afforded by the Sixth Amendment of the United States Constitution and Art. I, § 6 of the Minnesota Constitution. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 381 (1979); *State v. Lindsey*, 632 N.W.2d 652, 660 (Minn. 2001). The second, concurrent right, arises from the First Amendment, guaranteeing the general public’s and the media’s right of access to a public trial. *Waller v. Georgia*, 467 U.S. 39, 44 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-06 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573, 580 (1980).

The interests promoted by these separate but concurrent rights are similar and intertwined. The Sixth Amendment right, designed to benefit the defendant, also benefits the public in that “the public may see [the defendant] is fairly dealt with . . . and that the presence of interested spectators

may keep [her] triers keenly alive to a sense of their responsibility and the importance of their functions.” *Gannett Co.*, 443 U.S. at 380. The general public and media’s First Amendment right of access likewise benefits the defendant because “[p]ublic 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.” *Globe Newspaper*, 457 U.S. at 606. Beyond that:

[p]ublic 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.

Id. (citations omitted). “The open trial thus plays as important a role in the administration of justice today as it did for centuries before [the United States’] separation from England.” *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984). Indeed:

[t]he 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.

This openness 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 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.

Id. at 508-09. And a public trial, covered by “[a] responsible press . . . guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial process to extensive public scrutiny and criticism.” *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

To ensure the full realization of these important principles, this Court should grant the State's motion and order live audio and video coverage of the trial in this unusual case. This would increase public confidence in the criminal justice system at a critical time in a case of public interest and provide therapeutic value to the community.

Minnesota General Rule of Practice 4 covers audio and video coverage of courtroom proceedings, subject to a judge's authority to depart from the general guidelines "in any case to prevent manifest injustice." Minn. Gen. R. P. 1.02. Minnesota General Rule of Practice 4.01 presumes that "no visual or audio recordings" except for the official court record "shall be taken in any courtroom . . . during a trial or hearing of any case or special proceeding incident to trial or hearing." Parties may waive this restriction, and consent to the visual and audio recording of a trial or other proceeding, Minn. Gen. R. P. 4.02(d). Alternatively, "the trial judge [may] relax or modify [its] application . . . in situations that warrant such action," so long as the trial judge does not simply ignore the rules completely or relax them in a way that results in unjust prejudice to a party. Minn. Gen. R. P. 1.02, Author's Notes § 1.3.

Any permitted recording would then be subject to limitations imposed by the Court's order including, at minimum, those listed in the Rule. Minn. Gen. R. P. 4.02(d). The Court retains the ability to "regulate any aspect of the proceedings to ensure that the means of recording will not distract participants or impair the dignity of the proceedings," and to ensure that all constitutional rights are upheld. Minn. Gen. R. P. 4.04. The Minnesota Supreme Court likewise has acknowledged that "[t]rial court judges have a 'grave responsibility' and 'broad discretion' to 'oversee and regulate courtroom conduct and procedures during . . . criminal trials.'" *Order Promulgating Amendments to the Minnesota General Rules of Practice*, No. ADM09-8009, 2015 WL 6467107, at *9 (Minn. Aug. 12, 2015) (quoting *State v. Lindsey*, 632 N.W.2d 652, 658 (Minn.

2001)). And, in promulgating amendments to the General Rules of Practice, the Court recognized that “Minnesota should ‘gain some experience on’ media coverage in trial courts.” *Id.* at *3.

As Hennepin County District Court Judge Peter Cahill has noted, “[n]ormally” Rule 4.01 “can be applied without concern that it will impinge on the right to a public trial or the right of access held by the public and press. *Order Allowing Audio and Video Coverage of Trial*, at 6, November 4, 2020.⁶ This is because “the usual trial receives little attention except from family and friends of the victim or defendant and the Court can easily accommodate those wishing to attend the trial in person.” *Id.* at 6-7. A “usual” trial only occasionally receives media attention, if at all. *Id.* at 7. And “[a]ll spectators, whether journalists, interested parties, or casual observers, may, in normal times, come and go as they please.” *Id.*

But this is not the “usual” case.

While the State acknowledges that circumstances related to the COVID-19 pandemic have changed since Judge Cahill’s November 4, 2020 Order and even since Derek Chauvin’s March to mid-April 2021 trial, neither the pandemic nor the resulting courthouse restrictions have ended. As of June 14, 2021, and at least through September 6, 2021, district court judges and court staff are directed to continue to conduct all but a limited subset of authorized proceedings “by remote technology that permits the parties and attorneys to appear without being in the courtroom or by review of the parties’ submissions without oral argument.” *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001, at 2 (Minn. filed May 25, 2021). Though criminal jury trials are expected to occur in person, they “must adhere to the guidelines

⁶ Filed in *State v. Derek Michael Chauvin*, Hennepin County District Court File No. 27-CR-20-12646; *State v. Tou Thao*, Hennepin County District Court File No. 27-CR-20-12949; *State v. Thomas Kieran Lane*, Hennepin County District Court File No. 27-CR-20-12951; and *State v. J. Alexander Kueng*, Hennepin County District Court File No. 27-CR-20-12953.

and exposure measures in the Judicial Branch COVID-19 Preparedness Plan and the Jury Management Resource Team (JMRT) Recommendations for Jury Trials During COVID-19.” *Id.* These guidelines, until very recently, continued to require social distancing of six feet or more whenever people from two or more different households are together for less than 15 minutes total within a 24-hour period.⁷ Minnesota Judicial Branch COVID-19 Preparedness Plan at 1 (revised June 14, 2021). On June 28, 2021, the Minnesota Courts website was updated to state that effective July 6, 2021 face coverings and social distancing will no longer be required in court facilities.⁸ But, although restrictions have been dialed back, on June 15, 2021, the Center for Disease Control designated a Delta variant of the novel coronavirus a “variant of concern” – an escalation from its previous designation as a “variant of interest,” suggesting that we may not yet be wholly free of the pandemic restrictions.⁹

Independent of the COVID-19 pandemic and resulting restrictions, this case has garnered and held both the interest of the press and public on a wide-reaching scale. Developments in the case receive local and national news coverage.¹⁰ Protests demanding justice for Daunte Wright extended weeks after his killing and the issues continue to be at the forefront of the public’s mind.¹¹

⁷ <https://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/COVID-19/MJB-COVID-19-Preparedness-Plan.pdf>.

⁸ Minnesota Judicial Branch, *COVID-19 Information*, (updated June 28, 2021) <https://www.mncourts.gov/Emergency.aspx?cid=19>; see also *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001, at 6 (Minn. filed June 28, 2021).

⁹ Jen Christensen, *CDC now calls coronavirus Delta variant a ‘variant of concern,’* CNN (June 15, 2021) <https://www.cnn.com/2021/06/15/health/delta-variant-of-concern-cdc-coronavirus/index.html>.

¹⁰ Jonathan Allen, *Former Minnesota police officer to go on trial on Dec. 6 for shooting Daunte Wright*, Reuters (May 17, 2021) <https://www.reuters.com/business/legal/former-minnesota-police-officer-make-court-appearance-over-shooting-daunte-2021-05-17/>.

¹¹ After another Black man was shot and killed by law enforcement on June 3, 2021, protests and unrest again erupted and have continued. See *Protest erupts again over man killed by Minnesota*

Media interest in this case, as evidenced by the numerous requests to provide visual and audio coverage of the First Appearance received by the Court and the filings from a myriad of local and national news agencies requesting to visually and auditorily cover the proceedings and trial, is undoubtedly high. The public's substantial deep, passionate interest in this case is likewise reflected by the weeks of vigorous protests in the community. These interests will only increase as trial looms closer. Live visual and audio coverage of the trial will vindicate, at minimum, the public and media's right to access this trial of significant interest.

The inherent value in the "openness" and transparency of trials also cannot be understated. "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system," and provides a "community therapeutic value." *Press-Enterprise*, 464 U.S. at 508. Live audio and video coverage of the trial is the only way to assure this openness and transparency in unique cases, such as this, where there is a significant, demonstrable public interest. Only through this method can the public see the evidence, the witnesses, and the evidence, in such a way that will provide true transparency and confidence in the process. Mr. Wright's family supports live audio and video coverage of the trial for this exact reason.

As noted above, at least 10 media entities have already filed notices and requests to provide audio and video coverage of the trial. Given the space available within a Hennepin County courtroom, even without pandemic distancing restrictions, it is highly unlikely that it would be feasible to accommodate all 10 media entities within the courtroom throughout the entire trial, while still allowing the victim's family members and the Defendant's family members, let alone

deputies, Kare 11 (June 5, 2021) <https://www.kare11.com/article/news/nation-world/protest-erupts-man-killed-minnesota-deputies/507-4dc3bbbe-dc47-477f-af6b-95a87054e744>.

members of the general public, to be present to observe the trial.¹² Even if this Court attempted to expand access by using overflow courtrooms,¹³ the Court would still be unable to meet the demand from family members of Mr. Wright and Defendant, the public, and the press such that it could provide meaningful public access to this trial. Several media agencies have already requested permission and filed notice of a desire to provide video and audio coverage of all proceedings, and especially the trial, in this matter. Although there is no constitutional right to a televised trial, *Estes v. Texas*, 381 U.S. 532, 541-42 (1965), under the circumstances, this particular “unusual” case encourages the utilization of video and audio coverage to vindicate both Defendant’s Sixth Amendment and the public and media’s First Amendment right to a public trial and to prevent a “manifest injustice.”¹⁴ And, even with the social-distancing requirements lifted, the community protests and media requests related to this case show that public and media interest far outstrips the type of access that could be facilitated in a Hennepin County courtroom.

¹² The Court also has a statutory obligation to include ample safeguards to minimize contact between the victims and the defendant’s family, which would be even less feasible if they were required to share the limited courtroom viewing space with at least ten media entities. *See* Minn. Stat. § 611A.034.

¹³ In his *Order Denying Motion to Reconsider and Amend Order Allowing Audio and Video Coverage of Trial* at 5 (filed Dec. 18, 2020), Judge Cahill specifically noted that there are significant “deficiencies in use of overflow courtrooms, including bad video, bad audio, limited seating, jostling for position by members of the media and public, as well as the likelihood of having hundreds (if not thousands) of members of the public and press assembling at the Hennepin County Government Center” daily. The Court then concluded, based on recent experience from *State v. Mohamed Noor*, District Court File No. 27-CR-18-6859, that “it is difficult to conclude that overflow courtrooms are a reasonable measure to protect the constitutional rights of the defendants, the public, and the press,” especially when considering a case which has generated more extensive coverage and a greater degree of public interest than did *Noor*. *Id.*

¹⁴ Part of the Court’s noted concern in *Estes* was that the method of providing televised coverage, including at least 12 camera-people, cables and wires snaked across the floor, and numerous microphones throughout the courtroom “led to considerable disruption of the hearings.” 381 U.S. at 536. Technology has clearly advanced since the 1960’s, when the trial at issue in *Estes* occurred, as evidenced by the seamless and unobtrusive visual and audio coverage of *State v. Chauvin*.

Chief Justice Gildea also recently recognized that “[t]he time is right to consider whether the current requirements for audio and video coverage of criminal proceedings in courtrooms should be amended to accommodate broader access,” noting that “it would be a mistake” not to let the judicial system’s experience during the pandemic guide future action.¹⁵ The Chief Justice also acknowledged that audio and video coverage has been a “critical component of public access” that “fulfilled the public interest in the fair administration of justice,” and that expanded media coverage, even absent consent from both parties, may be warranted to vindicate the constitutional right to a public trial. *In re the Minnesota Supreme Court Advisory Committee on the Rules of Criminal Procedure*, No. ADM10-8049, at 2 (Minn. filed June 18, 2021).

This particular case, with the significant public interest accompanying it, presents unique circumstances in which expanded audio and video coverage of trial, even without consent from the Defendant, is warranted to fulfill the public interest in the fair administration of justice. The United States Supreme Court has specifically addressed the need for openness and transparency. *See Press-Enterprise Co.*, 464 U.S. at 508. “Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Id.* Without it, public concern and public outrage will continue. But, “[w]hen 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.” *Id.* at 508-09. This case presents exactly the type of unusual and unique situation where only a public trial, covered by “[a] responsible press,”

¹⁵ Steve Karnowski, *Minnesota weighs more cameras in courts after Chauvin case*, Associated Press (reprinted in Star Tribune) (June 24, 2021) <https://www.startribune.com/minnesota-weighs-more-cameras-in-courts-after-chauvin-case/600071623/>; *Minnesota Supreme Court Orders Evaluation of Audio and Video Coverage of Criminal Proceedings*, Minnesota Judicial Branch (June 24, 2021) <https://www.mncourts.gov/About-The-Courts/NewsAndAnnouncements/ItemDetail.aspx?id=2018>.

Sheppard, 384 U.S. at 350, with the assistance of visual and audio coverage will “permit[] the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government” and to public trust and respect for that process, *Globe Newspaper*, 457 U.S. at 606.

CONCLUSION

“Public interest in and access to judicial proceedings is vital to the fair, open, and impartial administration of justice; it promotes confidence in the basic fairness that is an essential component of our system of justice.”¹⁶ Earlier this year, Minnesota “gain[ed] some experience on” visual and audio media coverage in a criminal trial. Minnesota, and Hennepin County District Court, specifically, is again faced with an unusual case that has garnered local, national, and even international attention. This unique case brings with it public and media demand for access that far outstrips the Court’s ability to provide meaningful access, even without the burdens of social distancing. “[I]t would be a mistake” not to learn from the lessons learned this year and to deny expanded media coverage, including audio and video coverage of the trial, to ensure the critical component of public access and to fulfill the public’s interest in the fair and transparent administration of justice.

¹⁶ *In re the Minnesota Supreme Court Advisory Committee on the Rules of Criminal Procedure*, No. ADM10-8049, at 2 (Minn. filed June 18, 2021).

Accordingly, the State respectfully requests that the Court grant the State's motion for video and audio coverage of the trial in this unique case to vindicate both Defendant's Sixth Amendment and the public and media's First Amendment right to a public trial, to prevent "manifest injustice," and to provide the type of openness and transparency that is critical to public trust and respect for the judicial process.

Dated: June 30, 2021

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/ Matthew Frank
MATTHEW FRANK
Assistant Attorney General
Atty. Reg. No. 021940X

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1448 (Voice)
(651) 297-4348 (Fax)
matthew.frank@ag.state.mn.us

RAOUL SHAH
Assistant Hennepin County Attorney
Atty. Reg. No. 0399117

ATTORNEYS FOR PLAINTIFF