

STATE OF MINNESOTA
HENNEPIN COUNTY

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota

Plaintiff,

The Honorable Regina M. Chu

vs.

Kimberly Ann Potter

Defendant

Dist. Ct. File 27-CR-21-7460

**AFFIDAVIT OF LEITA WALKER
IN SUPPORT OF MOTION OF
MEDIA COALITION TO UNSEAL
JUROR IDENTITIES AND OTHER
JUROR MATERIALS**

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

LEITA WALKER, being first duly sworn, states:

- I am an attorney with Ballard Spahr LLP, representing intervenors American Public Media Group (which owns Minnesota Public Radio); Association of Minnesota Public Educational Radio Stations; The Associated Press; Cable News Network, Inc.; CBS Broadcasting Inc. (on behalf of WCCO-TV and CBS News); Court TV Media LLC; Fox/UTV Holdings, LLC (which owns KMSP-TV); Gannett Satellite Information Network, LLC (which publishes *USA Today*); Hubbard Broadcasting, Inc. (on behalf of its broadcast stations, KSTP-TV, WDIO-DT, KAAL, KOB, WNYT, WHEC-TV, and WTOP-FM); Minnesota Coalition on Government Information; Minnesota Spokesman-Recorder; NBCUniversal Media, LLC; Sahan Journal; Saint Paul Pioneer Press; The Silha Center for the Study of Media Ethics and Law; Star Tribune Media Company LLC;



TEGNA Inc. (which owns KARE-TV); and WP Company LLC (which publishes *The Washington Post*) (collectively, the “Media Coalition”).

2. I submit this Affidavit in support of the Motion of Media Coalition to Unseal Juror Identities and Other Juror Materials. This Affidavit is based upon my personal knowledge and my review of the files, records, and proceedings in this action.

3. Attached as the indicated exhibits are true and correct copies of the following documents:

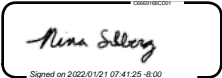
EXHIBIT A Tami Abdollah, *Minnesota judges hide jurors’ names when police go on trial in killings*, USA Today.com (Sept. 1, 2021)

EXHIBIT B Transcript of Proceedings, *State v. Chauvin, et al.*, Case No. 27-CR-20-12646 (Sept. 11, 2020).

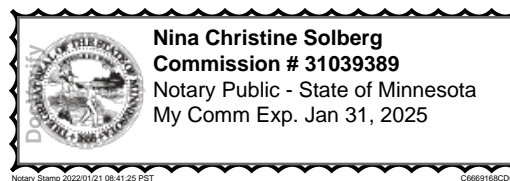
Further, Affiant sayeth naught.


SIGNED on 2022/01/21 07:41:25 -8:00
Leita Walker

This record was signed and sworn to or affirmed by use of communication technology on January 21, 2022, by Leita Walker who declared that she is located in Hennepin County, State of Minnesota.


SIGNED on 2022/01/21 07:41:25 -8:00

Notary Public – Minnesota
My Commission Expires: January 31, 2025



Notarial act performed by audio-visual communication



Exhibit A

Minnesota judges hide jurors' names when police go on trial in killings

Abdollah, Tami . USA Today (Online) ; Arlington [Arlington]. 01 Sep 2021.

[ProQuest document link](#)

FULL TEXT

Anonymous juries are supposed to be a rarity in U.S. courts, a way to protect jurors from influence, retaliation and even harm, typically in cases involving gangs and terrorists.

In Minnesota, judges hide jurors' names from the public when the cases involve a police officer who faces criminal charges for killing someone while on duty.

Since 2016, four law enforcement officers have been put on trial in Minnesota for killing someone on duty. All but one of those cases have been decided by an anonymous jury.

In April, an anonymous jury convicted former Minneapolis police officer Derek Chauvin of murder and manslaughter for George Floyd's death. Four months later, their identities are still being withheld by the judge. "Anonymous juries are supposed to be very rare, and historically, they have been very rare," said Minneapolis attorney Leita Walker, who represents a coalition of news outlets seeking to unseal the names of the Chauvin jurors.

"What we're seeing in very recent history in Minnesota is trial courts developing an exception for cases that involve police officers," she said in an interview. "And that exception is not recognized in the law."

Chauvin verdict analysis: Anonymous jury in Derek Chauvin trial part of a growing trend that has some legal experts worried

Jury makeup: Here are the jurors who will decide whether Derek Chauvin is guilty of murder in George Floyd's death

The latest Minnesota officer expected to face an anonymous jury is former Brooklyn Center officer Kimberly Potter. She is scheduled to stand trial this fall on a charge of second-degree manslaughter in the killing of Daunte Wright, 20, during a traffic stop.

Juror names are supposed to be public in the U.S. An open and transparent judicial system is meant to build confidence that the process is fair and jurors are not corrupt or tainted.

The one trial of a law enforcement officer in which jurors' names weren't hidden involved two white men. Washington County Sheriff's Deputy Brian Krook was acquitted of manslaughter in the fatal shooting in 2018 of firefighter Benjamin Evans, 23, who was suicidal.

In all the cases in which jurors' names have been hidden, the victim or the officer was Black. Mohamed Noor, the first police officer to be convicted of murder in modern Minnesota history, is Black. He was convicted of killing a

white woman.

"I don't think that it's difficult to draw a straight racial argument," said prominent civil rights lawyer John Burris, who represented Rodney King. "Racial judgments are being made here as to the publication of jurors' (names) and the anonymization of them. It should not be."

Rodney King trial, 30 years later: Trials of police who beat King compared to Chauvin, who kneeled on George Floyd's neck

Kim Potter case: Prosecutor assigned to case of ex-cop charged in Daunte Wright's death resigns over 'vitriol' and 'partisan politics'

News outlets want judge to release jurors' names in Chauvin trial

Floyd's death was captured on bystander video and spurred weeks of protests, some of which turned violent. That led defense attorneys and Hennepin County District Court Judge Peter Cahill to worry they wouldn't be able to find an impartial jury.

Cahill decided to withhold jurors' names, so they wouldn't be subject to public pressure or harassment. Because the courtroom couldn't accommodate four defendants during the pandemic, he split Chauvin's trial from the three other officers involved in Floyd's death. Chauvin's trial was livestreamed because the courtroom was closed to observers.

Jury selection process: 12 jurors must set aside what they saw in the George Floyd video. How will lawyers find an impartial jury?

During jury selection, some potential jurors expressed comfort in knowing their names would be hidden from the public for some period, said Mary Moriarty, the former chief public defender for Hennepin County.

After jurors convicted Chauvin in April, Cahill decided their names would remain hidden until at least October.

The media coalition, which includes USA TODAY, filed a motion to unseal jurors' names and other materials, including questionnaires they filled out during the selection process.

The coalition said in a court filing that "the public interest in this case and the national reckoning to which it gave rise make transparency regarding the identities, backgrounds, and predilections of the people who handed down the verdict more important, not less."

The Minnesota Attorney General's Office opposes releasing the names. It argued in a court filing that identifying jurors would "hamper efforts to assure prospective jurors in the March 2022 trial involving Mr. Chauvin's three co-defendants that their identities will be protected."

In a possible preview of arguments, they said the court shouldn't revisit its order "mere months" before that trial and potential federal proceedings.

It's unclear whether jurors in the other officers' trial will be anonymous.

The Attorney General's Office said in its court filing it doesn't know of any harassment faced by jurors, but it said

that could be because their identities remain under seal. Two jurors and an alternate in Chauvin's trial went public and have not publicly commented on any harassment.

Prosecutors reverse position on unnamed jurors

Last September, the Minnesota Attorney General's Office took the opposite position, strongly objecting to an anonymous jury, according to a filing Friday by the media coalition.

In a court hearing in September 2020, prosecutor Matthew Frank argued that the case didn't meet the standard for shielding jurors' names, which he said is an "extreme measure" that isn't taken even in some cases involving retaliatory gang murders.

Frank said shielding jurors' names is akin to closing a courtroom, where "we're conducting business to an extent secretly."

Cahill said that his primary concern was not jurors' safety but their impartiality and that the names would be released "shortly" after the trial as long as there was no civil unrest, the media coalition said in its filing.

Officials were on guard for violence after the verdict. Barricades and razor wire were set up near the courthouse, and thousands of National Guard troops were called in.

But the guilty verdict was met with "community relief rather than unrest," the coalition's filing said. "And yet the jurors' names remain secret."

One of Chauvin's co-defendants wants jury to be identified

Former officers Thomas Lane, J. Alexander Kueng and Tou Thao face charges of aiding and abetting Chauvin in committing murder and manslaughter.

Kueng's attorney, Thomas Plunkett, told the court last fall he opposes an anonymous jury because it violates his client's constitutional right to a fair and open trial.

"It reflects the general rule that judges, lawyers, witnesses and jurors will perform their respective functions more responsibly in an open court than in a secret proceeding," Plunkett told the court.

Plunkett told Cahill that shielding jurors' names "sends a message" that the jury is in danger. He declined to comment to USA TODAY.

Trial delayed: 3 former police officers accused in George Floyd's death won't stand trial until March 2022

A study in 1998 examined the impact of juror anonymity in university disciplinary hearings. It found that anonymous juries convicted at a higher rate than named juries –70% compared with 40% –when evidence against the defendant was strong.

Defense attorneys say jurors typically give police officers the benefit of the doubt when they're charged with a crime.

Anonymous juries, according to the study, imposed the harshest punishment available more often than identified

juries. The study did not find that anonymous jurors felt less accountable than named ones.

Judge in Kim Potter case shields jurors' names

Wright's death, which occurred during Chauvin's trial, also led to protests, but they calmed down after several days.

Brooklyn Center's then-police chief said Potter, a 26-year veteran of the department, accidentally fired her handgun rather than her Taser. The department released body camera footage that shows Wright struggling with police and Potter shouting, "Taser!" three times before firing.

Hennepin County District Court Judge Regina Chu issued an order last month shielding jurors' names in the Potter case. The order said their names will be hidden until Chu decides otherwise.

"The judges in both cases are balancing the safety of the jurors against the public's right to know," said Joseph Daly, emeritus professor at Mitchell Hamline School of Law.

To properly strike a balance, judges need to assess whether there are facts –not just speculation –indicating jurors are in danger, Daly said. Judges must carefully analyze their own possible implicit biases.

Under state law, a judge must have a strong reason to believe there are external threats to juror safety or impartiality to restrict access to their names and other identifying information.

According to the Minnesota Supreme Court, a trial judge must include in the record "a clear and detailed explanation" of the facts that show a jury needs protection.

Chu didn't explain her reasoning in her three-page order; she simply cited state law.

It's unclear how the issue came up in the Potter case. Chu's order was issued after an off-the-record scheduling conference, so no transcript exists, court spokesman Spenser Bickett said in an email. USA TODAY reached out to Chu and lawyers for both sides; none responded.

Minnesota Attorney General's Office spokesman Keaon Dousti said in an email that "as far as I know, this was Judge Chu's decision on her own."

Potter in court: Ex-Brooklyn Center police officer Kim Potter appears in court as Daunte Wright's family demands accountability

Though Potter's fatal shooting of Wright occurred within miles of where Floyd was murdered, Moriarty said it's a completely different case. Wright's death didn't last 9½ minutes, and video didn't spread around the world. "Transparency is very important, and it should be rare that a judge takes the extreme step of making the jury anonymous," Moriarty said. "That shouldn't be automatic in a case where a police officer is on trial."

Why are jurors' names public?

The use of anonymous juries has grown over the past several decades as technology has made it easier to track people down and harass them.

Jurors' names have been hidden for high-profile cases involving O.J. Simpson, Mafia boss John Gotti, R&B star R.

Kelly and two of the Los Angeles police officers accused of assaulting Rodney King.

Minnesota's first anonymous jury, in 1995, convicted an alleged street gang member for an assassination-style slaying of a Minneapolis police officer.

One reason their names were hidden was that a witness had been killed, allegedly because gang members thought he was talking to the police about the killing, according to a state Supreme Court opinion.

In his order sealing jurors' names for the police involved in Floyd's death, Cahill cited harassment and threats against the defendants and their lawyers, including incidents outside the courthouse and a defendant's home.

When jurors remain anonymous, "no one can question them or their decisions," a William Mitchell Law Review article noted in 1996. "Scrutiny by the public of a jury's decision will likely have no impact on the fate of the defendant. A jury which knows that others will examine its decision, however, might feel more societal pressure to render a fair verdict."

A.L. Brown, a St. Paul, Minnesota, attorney, said he "could make a very strong argument that (the names) should absolutely be made public. Maybe someone says, 'John on the jury, he drops the n-word every other day.'

"The other side of the argument," he said, "is, 'Oh my gosh, Sally on the jury lives next door, and I'm going to torment her for the next month on this trial until she convicts this guy.'"

Brown said it would be unfair for all officers charged with crimes to face unnamed juries by default, especially given their positions of power compared with other defendants. A high-profile case isn't enough of a reason to justify anonymity, he said.

In the cases of Chauvin, his co-defendants and Potter, the jury had not been selected when the judge decided their names would be hidden. "At least get a jury in the room and ask them if it's a concern," Brown said.

If security is such a concern, he said, the judge should sequester the jury, even if it is inconvenient.

"You can inconvenience the 12," Brown said, "or you can inconvenience the 5 million Minnesotans."

Tami Abdollah is a USA TODAY national correspondent covering inequities in the criminal justice system. Send tips via direct message @latams or by email tami(at)usatoday.com

This article originally appeared on USA TODAY: Minnesota judges hide jurors' names when police go on trial in killings

DETAILS

Subject: Juries; Murders & murder attempts; Manslaughter; State court decisions

Location: United States--US Minnesota

People: Potter, Kimberly Chauvin, Derek King, Rodney Glenn Wright, Daunte Floyd, George

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Exhibit B

1 STATE OF MINNESOTA DISTRICT COURT
2 COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

3 -----

4 State of Minnesota,)
5)
6 Plaintiff,) **TRANSCRIPT OF PROCEEDINGS**
7 vs.) D.C. File 27-CR-20-12646
8) D.C. File 27-CR-20-12949
9) D.C. File 27-CR-20-12951
10) D.C. File 27-CR-20-12953
11 Derek Michael Chauvin,)
12 Tou Thao,)
13 Thomas Kiernan Lane,)
14 J. Alexander Kueng,)
15)
16 Defendants.)

17 -----

18 The above-entitled matter came duly on for hearing
19 before the Honorable Peter A. Cahill, one of the judges
20 of the above-named court, Courtroom 630, in the Hennepin
21 County Family Justice Facility, Minneapolis, Minnesota,
22 on the **11th** day of **September, 2020**.

23

24 APPEARANCES:

25 **MATTHEW FRANK, ESQ.**, Assistant Attorney General,
appeared on behalf of the State of Minnesota.

NEAL KATYAL, ESQ., Special Assistant Attorney
General Neal, appeared on behalf of the State.

ERIC NELSON, ESQ., Attorney at Law, appeared on
behalf of Derek Chauvin, Defendant.

ROBERT PAULE, ESQ., Attorney at Law, appeared on
behalf of Tou Thao, Defendant.

1 **EARL GRAY, ESQ.**, Attorney at Law, appeared on
2 behalf of Thomas Lane, Defendant.

3 **THOMAS PLUNKETT, ESQ.**, Attorney at Law, appeared
4 on behalf of J. Alexander Kueng, Defendant.

5

6 **(The following proceedings were had in**
7 **open court:)**

8 THE COURT: Good morning, everybody.
9 This is State of Minnesota versus Derek Chauvin,
10 No. 27-CR-20-12646; Tou Thao, District Court File
11 No. 27-CR-20-12949; Thomas K. Lane, District
12 Court File No. 27-CV-20-12951; and J. Alexander
13 Kueng, District Court File No. 27-CR-20-12953.

14 Counsel, note your appearances beginning
15 with the State.

16 MR. FRANK: Good morning, Your Honor.
17 Matthew Frank, Assistant Attorney General on
18 behalf of the State. To my right is Special
19 Assistant Attorney General Neal Katyal. Mr.
20 Katyal will address the joinder arguments, and
21 I'll address the remaining issues.

22 THE COURT: Thank you.

23 And for Mr. Chauvin.

24 MR. NELSON: Good morning, Your Honor.

25 Eric Nelson appearing on behalf of Derek Chauvin,

1 who appears to my left.

2 THE COURT: For Mr. Thao.

3 MR. PAULE: Good morning, Your Honor.
4 Robert Paule, P-a-u-l-e, along with Natalie
5 Paule, on behalf of Mr. Thao, who's present as
6 well. Good morning, Your Honor.

7 THE COURT: Thank you.

8 For Mr. Lane.

9 MR. GRAY: Good morning, Your Honor.
10 Earl Gray representing Thomas Lane, who's present
11 and sitting next to me.

12 THE COURT: And for Mr. Kueng.

13 MR. PLUNKETT: Good morning, Your Honor.
14 Tom Plunkett on behalf of Mr. Kueng, who's
15 present in the courtroom.

16 THE COURT: All right. Good morning,
17 everyone. Just so we're aware, there are very
18 few seats available in this courtroom because of
19 social distancing, so we ask that you maintain
20 social distancing to the amount possible.

21 While you are speaking to the Court,
22 because we have overflow courtrooms, we would ask
23 that you actually approach the podium. And you
24 don't need permission to approach the podium if
25 it's your turn to speak, simply head up there and

1 make sure you use the microphone. With all the
2 Plexiglass it's sometimes hard for even the
3 court reporter to hear.

4 Also because we have the overflow
5 courtrooms, I would advise everyone in those
6 rooms that they are courtrooms and accordingly we
7 expect that the appropriate decorum will be kept
8 in those rooms as well. That is there is no loud
9 talking, there's no verbal reaction to whatever
10 is going on in court, no eating, and no drinking.

11 Counsel, you may have water, of course,
12 at counsel table.

13 Furthermore, there is no recording of
14 any of the proceedings. The only recording is
15 done by the official court reporter. And so we
16 expect that if there are any electronic devices
17 in the family overflow rooms, that's permitted.
18 As to the public overflow courtroom, any
19 electronic devices that you've been allowed to
20 keep with you are not to be out. They're to
21 remain in your pocket, backpack, purse or
22 whatever, but they are not to be out in the
23 public overflow courtroom. Again, there is no
24 recording of any type by anyone in any of the
25 overflow courtrooms.

1 There's a media overflow room, but they
2 have already been advised by the chief judge what
3 the rules of decorum of that room are as well.

4 With that, let's get to the motions.
5 I'd first of all note, it was in the footnote of
6 my scheduling order that we're not going to
7 address argument on probable cause. I think we
8 have more than enough to make that decision.
9 That decision is not going to be made today, the
10 Court is going to take it under advisement and
11 issue an order.

12 It seems that we have -- that that is
13 however a threshold motion, for example, if I
14 were to dismiss all the cases, there's no need to
15 go to the other motions, but we are going to go
16 to the other motions. I don't want everybody
17 reading into this that I've made a decision on
18 those. For efficiency's sake, and to move these
19 cases forward, we are going to discuss these
20 motions and we were going to consider them in
21 their normal course. So do not read into the
22 fact that we are continuing with our motions that
23 there's a decision made or will be made today on
24 the motions to dismiss for lack of probable
25 cause.

1 So the first one is a motion for joint
2 trial. Mr. Katyal, I think I was going to simply
3 just take it under advisement since that's the
4 only thing we've got today. Would you like to
5 address the Court on that issue?

6 MR. KATYAL: Sure.

7 THE COURT: If you would.

8 MR. KATYAL: Thank you so much, Judge
9 Cahill, and may it please the Court.

10 THE COURT: And you can remove your mask
11 when you're at the podium.

12 MR. KATYAL: Okay. Great.

13 THE COURT: I think that will help all
14 of us.

15 MR. KATYAL: The State respectfully
16 requests that the four defendants be tried
17 together. And the evidence will show that the
18 defendants were present on the scene together,
19 the defendants acted together, the defendants
20 watched the air go out of Mr. Floyd's body
21 together, and the defendants caused Mr. Floyd's
22 death together.

23 Minnesota law is clear that joinder is
24 appropriate. Rule 17.03 of the Rules of Criminal
25 Procedure provide that two or more defendants,

1 quote, may be tried separately or jointly at the
2 court's discretion, and the court must consider
3 four factors. First, the nature of the offense
4 charged. Second, the impact on the victim.
5 Third, the potential prejudice to the defendant.
6 And, fourth, the interests of justice.

7 And, of course, all four are necessary
8 for joinder; joinder is evaluated on the factors
9 as a whole. But the striking thing about this
10 case is that each of the four factors points in
11 favor of joinder. First, the evidence and
12 charges against the four defendants are similar.
13 Second, the impact on eyewitnesses and the family
14 members is dramatic as they are likely to be
15 traumatized by multiple trials, and notably some
16 of that trauma will occur on minor child
17 witnesses. Third, the defendants won't be
18 prejudiced by joinder because their defenses are
19 not antagonistic, which is a specialized term of
20 art under Minnesota law.

21 THE COURT: Let me stop you there. The
22 State issued a -- or filed a notice last night
23 regarding defendant Chauvin on like about six
24 different prior incidents. Does that change the
25 analysis on the antagonistic defenses, and if

1 not, tell me why not.

2 MR. KATYAL: Not at all, Your Honor.
3 And there's no case that suggests as much. And
4 indeed, I think the most striking thing about all
5 four briefs that my friends on the other side
6 have filed, they cited a total of 18 cases, not a
7 single one is one in which a district court
8 denied joinder. And with respect to your
9 specific question about these -- about the priors
10 and stuff like that, that's true in every case,
11 Your Honor. There will be differences in
12 defendants' prior criminal history, the levels of
13 experience, all sorts of things; that's never
14 been enough to deny joinder. And the reason for
15 that is that the Minnesota Supreme Court has been
16 very clear that the antagonistic defense is
17 defined really narrowly. It's defined in Justice
18 Anderson's opinion in *Santiago versus State* at
19 page 446. And that definition is defendants'
20 have antagonistic defenses when the defenses are
21 inconsistent and when they seek to put the blame
22 on each other and the jury is forced to choose
23 between the defense theories.

24 So it's about basically is one of the
25 defendants becoming effectively a second

1 prosecutor. And the introduction of some
2 evidence against -- about priors or something
3 like that doesn't at all render a defense
4 antagonistic. The jury can credit all of that
5 evidence that we seek to introduce, or not credit
6 it, and it won't have an impact directly on the
7 other defendants, it's not mutually exclusive.
8 And so for that reason, we don't think that the
9 antagonistic defense threshold is met. You know,
10 it's a very hard thing to show. Indeed, *Santiago*
11 is the only case cited in which you get there.
12 But that's one in which you had a shooting, one
13 shooter, two different defendants tried. And
14 when one defendant said, hey, I didn't do it, by
15 definition, according to the Minnesota Supreme
16 Court, it rendered that person a prosecutor as to
17 the other. That type definition of antagonistic
18 defense is nowhere close to being met.

19 We concede that's the best argument
20 they've got is some sort of antagonistic defense.
21 We think factors 1, 2, and 4, the interest of
22 justice as well overwhelmingly favor joiner. But
23 even there, at best what they have is something
24 hypothetical and speculative. And the Minnesota
25 Supreme Court has been clear time and again in

1 cases like *Powers* that that's not enough, that
2 kind of generalized defense concern.

3 Now, it might be that something might
4 happen. They've had a lot of different
5 speculative arguments and so on about what might
6 be an inconsistent defense. I don't think
7 anything they've identified to this point meets
8 that threshold of what an antagonistic defense
9 is. But if it does, if there is something, I
10 think the Minnesota Supreme Court in *Powers* is
11 very clear that at that point then you have
12 remedies from cautionary jury instructions to
13 possibly even granting severance. But what the
14 court has said is that the one thing you can't do
15 is try and join -- is try and deny joinder now at
16 this early stage based on some speculation or
17 some hypothetical that they've raised. And I
18 think here maybe one of the more interesting
19 things is that for all of their defenses, as you
20 mentioned, they have four different briefs
21 dismissing probable cause, there's nothing
22 antagonistic in them. Not a word that is
23 antagonistic, everything is the same. They
24 basically say, you know, two defenses. One,
25 which is the level of force used was reasonable,

1 and they all make that argument. And number two,
2 they say that Mr. Floyd overdosed. He managed to
3 miraculously take the amount of drugs necessary
4 to kill him at the very moment that he had been
5 -- had neck on his -- had his knee on his neck
6 for over eight minutes. You know, we think that
7 argument is ludicrous as we will show at
8 trial --

9 MR. GRAY: Judge, I object to that. We
10 weren't supposed to address probable cause.

11 THE COURT: Mr. Gray, he's just
12 referring to it as part of the joint trial, I'm
13 fine with him arguing that way. Your objection
14 is overruled.

15 But I do want you to move on to the
16 other factors.

17 MR. KATYAL: Sure.

18 THE COURT: And let's not get too deep
19 into the probable cause, that's under advisement.

20 MR. KATYAL: Absolutely. I don't mean
21 to argue that as all. I just mean to say that
22 the defenses so far that are offered up are not
23 antagonistic, and so that's all.

24 THE COURT: Yep.

25 MR. KATYAL: So the first factor is the

1 nature of the offense charged. The most
2 important point here is Thao's own brief at page
3 4 admits this. He says, quote, the offenses are
4 similar, that Thao is charged with similar
5 offenses to the other three. And they are,
6 they're identical for three of the defendants.
7 And with respect to the fourth defendant,
8 Mr. Chauvin, they are virtually identical. And
9 the courts time and again have said that when you
10 have circumstances like this that are overlapping
11 and have the same evidence or substantially the
12 same evidence, that that is enough.

13 Now, Mr. Chauvin says in his brief,
14 well, there will be introduction of personnel
15 records and that will be the bulk of the trial.
16 He says that at page 5. So he says the evidence
17 wouldn't be different. The problem with that is
18 twofold. Number one, at page 7 he says the bulk
19 of the charges is actually the body cameras and
20 the medical autopsy reports. And we agree with
21 that, we don't think that the personnel records
22 are what's going to be the bulk of the evidence
23 at trial, as he himself admits at that page.

24 And number two, that's never been the
25 standard. The standard is is the evidence

1 substantially the same for one defendant to
2 another. And here that is overwhelmingly this
3 case. I mean, these defendants acted together,
4 they're on the scene together, they're talking to
5 each other during the almost nine minutes that
6 take place in this and the like. And we think,
7 you know, this -- that puts this case squarely in
8 the heartland of what joinder is about, and they
9 can't cite a single case to the contrary. So
10 that's factor one if there are any other
11 questions about factor one.

12 THE COURT: No.

13 MR. KATYAL: And then factor two is the
14 trauma or the impact on the victim or other
15 witnesses. With respect to that, we think,
16 again, putting these -- putting these
17 eyewitnesss, some of whom are minor -- like the
18 woman who goes by the initial D.F. -- is
19 traumatic. The case law recognizes that that is
20 a factor. We don't want to, you know, place too
21 much emphasis on that. We think my friends on
22 the other side are right that the Minnesota
23 Supreme Court in *Blance* has cautioned that this
24 factor shouldn't swallow the others. But we
25 think forcing the family, victims and eyewitnesss

1 to go through not just one, not just two, but
2 three and four separate trials in front of four
3 separate juries and four separate time and places
4 really does force the reliving of the trauma and
5 makes this case very much, you know, far stronger
6 than cases like *Belfield* in which just the
7 expense of a bank's witnesses were considered
8 enough to tip this factor in favor of joinder.
9 Here you have something really far more dramatic.
10 And my friend's brief on the other -- one of them
11 says, well, this video and this incident is not
12 that traumatic. And I think that that, you know,
13 really is an astounding argument. I've seen a
14 lot in my life, I can barely watch these videos
15 of what happened. And the idea that it wouldn't
16 cause trauma particularly to someone who is
17 closely connected to the events, whether a family
18 member or a minor witness who saw them, I think
19 is a really, really tough argument.

20 THE COURT: Let's go to the interest of
21 justice.

22 MR. KATYAL: So the interest of justice,
23 we think there are five separate reasons why the
24 interest of justice favor joinder. The first is
25 that the length of separate trials make it the

1 case. That if you were to try, as they would
2 like, four separate trials we're talking about
3 delaying justice for months, if not years. And
4 the Minnesota Court of Appeals opinion in *Jackson*
5 I think is very strong in saying that the length
6 of separate trials can be important consideration
7 in delaying justice and things like that.

8 The second is that because the evidence
9 against the four defendants overlap so much,
10 forcing the four separate trials, to use the
11 language of the court decision in *Carlson*, places
12 undue burden on the state and the court system.
13 Here it's not just a burden on the witnesses as
14 we were talking about with respect to factor two,
15 but the burden on this court and other
16 defendants. As we know from the orchestrations
17 to just get this proceeding together today, to
18 have four of them, four separate trials as
19 opposed to a day of hearings, will really tax the
20 resources of the court, and also, ultimately, you
21 know, make it more difficult for other trials to
22 take place with other defendants and the like.
23 Again, we don't want to place too much emphasis
24 on that, but we do think that is a factor that is
25 at issue here.

1 And the third is the availability and
2 convenience of the witnesses, which I think
3 overlaps a bit with factor two. But there's also
4 a risk as these witnesses are forced to go
5 through and relive the trauma time and again,
6 they may become unavailable in the second, third,
7 or fourth trial. We could, you know, imagine a
8 circumstance like that occurring.

9 And then the last two reasons are that
10 separate trials, to use the language of *Powers*,
11 run the risk of prejudicing potential jurors
12 through the publicity related to each trial. And
13 we agree there's been pretrial publicity, of
14 course, in this case, but that is both
15 quantitatively and qualitatively different than
16 when you have a verdict. Because when you have a
17 verdict, you have the judicial seal of the
18 judicial imprimatur on whatever that verdict is,
19 which we suspect will lead to much more
20 publicity, and a different kind of publicity.
21 And that will make subsequent trials, so trial
22 two, three, and four more difficult.

23 And then the last argument for the
24 public interest is an important one, which is
25 joinder would allow the community to absorb the

1 verdicts at once instead of seriatim and
2 piecemeal. And in a case like this with so much
3 attention on it, we think the community shouldn't
4 be put through the trauma of four separate
5 verdict days.

6 THE COURT: Thank you.

7 Keeping in mind that I think the service
8 of the *Spreigl* notice might change the defense
9 analysis or argument on joint trial, I'm going to
10 give the defense a chance to file a reply, yet
11 another reply on joint trial if you wish. I'm
12 not mandating it. But if you think that the
13 *Spreigl* notice that was filed -- and just assume
14 for the sake of argument, I've just read it last
15 night when it was filed -- assume for the sake of
16 argument that it comes in, how does that affect
17 the joint trial analysis? But beyond that, for
18 today's purposes, did anyone wish to argue on
19 behalf of their client? Otherwise we can rest on
20 the briefs.

21 Mr. Paule.

22 MR. PAULE: I do, Your Honor.

23 THE COURT: Okay. If you could approach
24 the podium.

25 MR. PAULE: Thank you, Your Honor. I'd

1 like to respond. I know that I briefed the
2 issue, it's been briefed extensively by everyone
3 else. I think given the late notice of the
4 *Spreigl* notices, and I've only looked at the one
5 that I received regarding my client. Regarding
6 the others, I would like some time to submit an
7 additional brief. I think this is an important
8 area. It's important for the attorneys to make
9 the proper record so that any reviewing court, if
10 there is one, can actually look at what factors
11 the Court considered.

12 I'd like to talk about a couple of
13 things. One is just initially what Mr. Katyal is
14 saying is that the defense somehow hasn't
15 presented anything as what we're dealing with is
16 talking with hypotheticals and speculative
17 notions. I would point out that that's one of
18 the issues that the Minnesota Supreme Court took
19 the district court to task for in *Santiago*. And
20 I think also, in case the Court doesn't know it,
21 I was one of the lawyers on *Santiago*. I actually
22 gave the closing argument, and I was the one who
23 was referred to as the second prosecutor.

24 When I was assigned that case, because I
25 worked at the public defender's office at the

1 time, I actually talked to the prosecutor and I
2 said why are you doing this? And he pointed out
3 from his perspective they needed my client seated
4 in the same courtroom as Mr. Santiago to, quote,
5 convict him. And I pointed out to him that,
6 okay, he can do whatever he wants as he sees fit
7 but that he is a minister of justice whereas I'm
8 the zealous advocate, and I'm allowed to do
9 certain things that ministers of justice aren't
10 able to do. And I told him I would do that, and
11 I did.

12 Because if you look at the *Santiago*
13 case, the trial court judge, I think there were
14 seven motions for severance ultimately filed,
15 some pretrial, some mid-trial, some after closing
16 argument. But one of the things that the trial
17 court did is they applied a heightened standard
18 of review to positions the defense would put
19 forward about what potential prejudice was;
20 that's exactly what Mr. Katyal is doing.

21 If you look at the *Santiago* decision, on
22 page 442 they talk about there are two ways an
23 attorney can make an offer of proof, and they
24 cite Mauet and McCormick on Evidence. First, the
25 attorney can tell the court what the proposed

1 testimony of a witness will be. Second, the
2 attorney can present the witness for testimony.
3 And unless there's some reason to believe that an
4 attorney's offer of proof is suspect, the court
5 should accept it at face value. We're officers
6 of the court just as the prosecutors are. And
7 actually in the analysis they talk about *Spreigl*
8 evidence, so the court system doesn't require a
9 mini trial on the evidence because they view the
10 prosecutorial standards of conduct as a means to
11 weigh in and make sure that they aren't
12 misstating their case. So I think that some of
13 the --

14 THE COURT: Let me ask you though.
15 Don't -- up until the *Spreigl* notice, wouldn't
16 you agree that most of the evidence sounds like
17 it's going to be the same or very similar in all
18 four trials?

19 MR. PAULE: I think that some of it, but
20 simply volume of evidence isn't what controls.

21 THE COURT: Well, not even just volume,
22 but the major evidence. I assume we're going to
23 have the body cam, other bystander video,
24 surveillance video, medical evidence, medical
25 experts perhaps. Doesn't the bulk of the

1 majority of the evidence, isn't it similar?
2 Again, putting aside the *Spreigl* evidence that
3 was just noticed.

4 MR. PAULE: Your Honor, I think that one
5 thing that the Court has to look at is Mr. Katyal
6 kept using the term "substantially similar." If
7 you look at the *State v. Johnson* case, what it
8 requires is the overwhelming majority of
9 evidence. And I think when the Court looks at
10 it, you could look at it and say, okay, if we
11 have one trial all the evidence would be the same
12 as defendant. If my client who is charged
13 singularly has his own trial, the evidence will
14 be different in terms of what is presented.
15 Also, from my client's perspective, I'm not
16 dealing with one prosecutor, I'm dealing with
17 three other lawyers who are zealous advocates and
18 who have an ethical duty to defend their client
19 at the expense of all others.

20 And I would point out to the Court
21 that's exactly what I told the prosecutor in
22 *Santiago*. I'm putting everyone on notice, I
23 intend to do the same thing here. The duty of a
24 defense attorney demands no less.

25 THE COURT: But isn't that true in every

1 trial? So any joint trial that's going to be the
2 case.

3 MR. PAULE: It could be.

4 THE COURT: Really that doesn't
5 distinguish this case whether it should be joined
6 or not because that's always true.

7 MR. PAULE: No, it isn't, Your Honor.
8 Because it depends on what the theories of the
9 case of the defense are. And I think you can see
10 -- and another thing that I think the State has
11 misplaced in its logic is they try to take what
12 our positions are attacking probable cause as
13 defenses. Probable cause attacks are very
14 different, you're arguing about the sufficiency
15 of the charges versus putting forth a defense in
16 what your strategies are.

17 One of the things I also mentioned in
18 *Santiago*, if I was a less than ethical
19 prosecutor, any case where I had multiple
20 defendants I could file a notice of joinder and
21 try to bait the defense into displaying what
22 their defenses were ahead of time.

23 My client is presumed to be innocent.
24 We have no burden at all, including a burden to
25 establish what our defense is, and that seems to

1 be what Mr. Katyal wants us to do. But the
2 analysis in terms of our argument on probable
3 cause is an attack on the State's charge, it's
4 not the defense that it will be at trial.

5 To the Court's question though, our
6 defense may be very different at trial within
7 other ones. If I was trying this case
8 singularly, my defense might be laid out in one
9 manner. If I'm forced to stand trial, or my
10 client is with the other people involved in the
11 case, they're going to be side attacks that I'm
12 going to have to deal with that are going to
13 prejudice me on some level. The question becomes
14 is it become a manifest necessity, which is if
15 the defendants do not consent to joinder -- or
16 excuse me, to severance. But when we're
17 opposing it, we're consenting to severance, which
18 ultimately means the Court's analysis is what is
19 a fair determination of guilt and would severance
20 be necessary to do it.

21 The same analysis should be looked at in
22 terms of joinder. Because if the Court -- to the
23 argument about interest of justice and
24 expediency, if we spend multiple weeks in trial,
25 and then even at closing argument there becomes

1 an issue for severance, then all of a sudden
2 you've got other trials that come on. What the
3 prosecution is trying to get you to do is say,
4 don't worry about that, just trust us, this will
5 all go forward. Okay. And I can tell you from
6 experience that that is not how this case is
7 going to go, it's not how joint trials go.

8 I've actually tried six joint trials in
9 state court, all of them in Hennepin County. I
10 would guess I've had more joint trial than
11 anybody in this courtroom in state court.

12 THE COURT: Perhaps.

13 MR. PAULE: I speak from experience.
14 And every judge that I've had that has done one
15 of these at the end says I'm not sure I would do
16 that again for a variety of reasons. Essentially
17 you're bringing in a group of bobcats in a bag
18 and trying to deal with them letting them loose
19 in the court at once. And I think that's what
20 the Court really needs to think about.

21 With regard to just the analysis on the
22 case, the four factors.

23 THE COURT: You need to wrap it up.

24 MR. PAULE: The nature of the offense
25 charged. When you look at the nature of the

1 offense, the analysis, and it's pre *Santiago*, but
2 they looked at essentially two situations where
3 they would join. One is where there was a
4 complex, essentially white collar case, I believe
5 that's *Strimling*. And then you look at cases
6 like *Southard* where they're just heinous offenses
7 and you've got juvenile victims. That has
8 essentially been changed in the analysis to any
9 sort of a violent case.

10 With regard to the impact on the victim,
11 I know that victim can be broadly defined. But
12 when you look at the impact on the victim, it's
13 should a surviving victim, say of a robbery or
14 criminal sexual conduct, what impact would that
15 have on them. It's been blended to include
16 family. Basically the only people who are going
17 to be calling family as witnesses is the State
18 with their attempt to do the spark of life.

19 With regard to the eyewitnesss, I'm not
20 intending to call the juvenile. The one juvenile
21 witness who probably would come would be the
22 juvenile who has be identified by initials who
23 filmed this incident, and she's probably going to
24 be 18 years old and an adult when this case
25 occurs. The other two, I'm not intending to

1 call; I don't know if they're even competent
2 given the factors.

3 And then finally the interest of
4 justice. One of the things that the State is
5 arguing that if we have one verdict that it will
6 taint the jury pool. I think they'd be well
7 advised to look in the mirror about tainting the
8 jury pool because they're the ones who have been
9 talking, they're the ones who generated the
10 change of venue. It has not been me commenting
11 to the press on this case or bringing out any of
12 the evidence in this case. They're the ones who
13 have done that. And if there is a verdict,
14 whatever that verdict will be, there are means to
15 deal with that through voir dire and other things
16 that we're going to talk about when we deal with
17 change of venue issue. So I'd just like to point
18 that out.

19 Also, they sort of misstate the idea of
20 antagonistic defenses. If the Court looks at
21 *Santiago*, and it's quoted on page -- excuse me a
22 second, Your Honor. I believe it's 444, they
23 talk about Hathaway defining antagonistic or
24 inconsistent defenses exist when defendants seek
25 to blame each other. And I think the Court can

1 glean that from even some of the filings. If you
2 look at perhaps Mr. Lane and Mr. Kueng's
3 positions, at least in some of these filings,
4 they're trying to point out that they're rookie
5 officers and that Officer Chauvin was their
6 senior officer who did them, and they did certain
7 things. One of the positions we had at least
8 with regard to probable cause is that our client
9 was not involved in the physical restraint, that
10 he never touched Mr. Floyd. That he was simply
11 acting as an assisting officer to keep the
12 bystanders under control. So when you look at
13 those things, there's already the foundation
14 being laid on this case for antagonistic
15 defenses, and I don't think that's something that
16 should be sort of brushed away as the State would
17 have you do. Thank you.

18 THE COURT: Anybody else wish to -- I
19 have read the briefs, and I think I don't have
20 any questions based on that, but I will give
21 anybody a chance to speak.

22 Mr. Gray.

23 MR. GRAY: Thank you. This will be very
24 short, Judge. With respect to prejudice, in
25 prejudicing the jurors, if Mr. Chauvin is tried

1 first, which I assume the Court will do. If he's
2 tried first and acquitted, that would end this
3 case because all the other defendants are charged
4 with aiding and abetting Mr. Chauvin. And if
5 Mr. Chauvin is acquitted, I doubt very much if
6 they'd be able to proceed on the other three
7 defendants. So the prejudice to the jurors I
8 don't think is an argument at all.

9 With respect to the undue burden on the
10 State, they're the ones that charged the case,
11 Your Honor. And the availability of witnesses,
12 the State, they are the ones that have the
13 ability to have the witnesses for every trial.
14 So I'd ask the Court to deny the joinder motion.
15 Thank you.

16 THE COURT: Thank you. Anything
17 further, otherwise I'll take it under advisement.

18 Mr. Plunkett.

19 MR. PLUNKETT: Thank you, Your Honor.
20 Really I'm not going to reargue these things, but
21 just to fill up the record -- fill out the record
22 in my case, I want to make sure that it's known
23 that I'm adopting those arguments and endorsing
24 those arguments as part of my record. I'd also
25 point out that I do believe Mr. Paule has the

1 most joint trials. I have one, and it was with
2 Mr. Paule. Irony.

3 Thank you. If the Court had specific
4 questions, of course, I'd answer those.

5 THE COURT: I'm fine.

6 Mr. Nelson, do you join in all the
7 arguments?

8 MR. NELSON: Yes, Your Honor.

9 MR. KATYAL: May I have two minutes?

10 THE COURT: No.

11 All right. This matter is under
12 advisement.

13 As to the next motion on our agenda.
14 The next thing was the *Blakely* factors. I'm
15 actually going to hold off on that and put that
16 to the end, that may take a little bit of
17 discussion. I think we can move through some of
18 these others.

19 The State had a motion for expert
20 witness disclosure. First of all, does anybody
21 on the defense side have an objection to the
22 concept, not to the actual time frame but to the
23 concept of what is laid out in the proposed
24 order?

25 MR. NELSON: I do not, Your Honor.

1 THE COURT: Mr. Nelson does not, anybody
2 else?

3 Okay. As far as timeframe, Mr. Paule.

4 MR. PAULE: I'll speak loudly so
5 everyone can hear me. I do object to their
6 proposal that we submit them jointly at the same
7 time. I think if the State is going to ask for
8 expert witness disclosure, they should be the
9 ones to put their expert witnesses -- have their
10 deadline, and then we can respond. Because in
11 part our need for expert witnesses will be based
12 on what evidence and what expert witnesses they
13 are going to propose.

14 I would also point out that we're still
15 getting the discovery. We will deal with the
16 issue of the medical examiner's file, but if
17 indeed we have the entire file, it was just
18 turned over to us, I believe last week.

19 THE COURT: Several comments on that.
20 And the reason I reserved the timing is that was
21 the first thing I thought of was that the defense
22 is probably still talking to experts so I don't
23 have a problem with the staggered -- it won't be
24 too far staggered. For example, I think the
25 State I could hold to the guidelines that were

1 put in the proposed order, but as far as the
2 defense, I think I would give them more time.

3 Mr. Frank, did you want to speak to
4 that?

5 MR. FRANK: I do, Your Honor.

6 THE COURT: If you would.

7 MR. FRANK: I think one of the main
8 reasons that we proposed the same deadlines is
9 because that's contemplated by the rules,
10 simultaneous discovery. This is not one goes
11 first and then the second. They are -- both 901
12 and 902 talk about the date of omnibus hearing.
13 So the rules contemplate simultaneous discovery,
14 that's what we do. We set the dates out, the
15 proposed dates. Maybe I'm --

16 THE COURT: Have you ever experienced a
17 criminal case in Minnesota where it truly has
18 been simultaneous?

19 MR. FRANK: Truly simultaneous. I can
20 say to Your Honor, and I have been doing this for
21 quite a while.

22 THE COURT: That's why I ask.

23 MR. FRANK: We usually don't get
24 discovery from the defense. But the point is
25 it's supposed to be simultaneous.

1 THE COURT: All right.

2 MR. FRANK: Not to be anything hidden.

3 THE COURT: Ultimately it's in the
4 Court's discretion though on how to regulate
5 discovery to provide fair trial for both sides;
6 would you agree with that?

7 MR. FRANK: Our rules lack anything
8 specific about this subject, so I think it is the
9 Court's discretion.

10 THE COURT: All right. But go ahead.

11 MR. FRANK: And maybe I'm getting ahead
12 of the Court in trying to talk about dates, but
13 we thought very hard about those dates with the
14 March 8th trial date in mind. So we tried to set
15 them out enough with the understanding that,
16 yes, discovery is ongoing. But also the defense,
17 I think, has a pretty good idea what the case is
18 about. Obviously, their PC motions raise obvious
19 issues. So we think these are dates that
20 accommodate both sides very well and should be
21 simultaneous to keep the case moving.

22 THE COURT: All right. Thank you.

23 All right. I'll take that one under
24 advisement. I'll be issuing some kind of order
25 that talks about expert witness disclosure. That

1 will be on a separate date.

2 Regarding defense motions. Motion for
3 change of venue. Before anyone gets up to argue
4 that, I want to give you the Court's thoughts.
5 The record is not very complete at this point for
6 a proper motion to be decided. I know everybody
7 filed a motion for change of venue because we had
8 a motion deadline, and I appreciate you meeting
9 that; however, I'm not sure we have it. I'm
10 actually going to have Mr. Paule talk about some
11 things he raised as an alternative to pretrial
12 publicity, a standard, but we'll get to that in a
13 second.

14 The Court's intent, and what we're
15 trying to work with administration, is to do a
16 jury summons, to have a panel pulled earlier than
17 normal. The normal jury summons goes out six
18 weeks before the person has to report for trial.
19 We're trying to get a panel to be pulled long
20 before that, possibly several months. The
21 district court because of COVID has been sending
22 a general questionnaire to all summoned jurors
23 already for general background, as the
24 questionnaires that are typical in -- typical in
25 all criminal cases, although it includes

1 discussion of domestic violence and guns and
2 other things. My thought was if we are pulling a
3 separate panel, or pool actually, for this trial
4 or trials, we will talk about -- and when I say
5 "trial," again, don't take anything from that,
6 I'm going to talk about March 8th is trial,
7 whether it's one or four, but whatever that trial
8 is, I expect that we will have a jury summons
9 sent out well ahead of time with a questionnaire.
10 And there is a deadline on when counsel is
11 supposed to provide the Court with an agreed-upon
12 questionnaire, or if you can't agree, then to
13 send me your individual thoughts. The Court will
14 put together a questionnaire and it will address
15 pretrial publicity, it will ask for questions
16 regarding bias, things like that. And,
17 obviously, that's where I would welcome the input
18 of counsel on what type of questions you would
19 want in that questionnaire. Pretrial publicity
20 has got to be a part of that questionnaire so
21 that we have an idea of what is the exposure to
22 pretrial publicity. And I don't even think we're
23 going to ask have you read or seen anything about
24 this case, it's going to be what have you read or
25 seen, and has this made up your mind, and et

1 cetera. The typical things we try and do on
2 determining if pretrial publicity has been so
3 prejudicial that a person cannot be fair to all
4 sides.

5 Again, I ask counsel to assist the Court
6 in what you think would be good questions to
7 uncover the bias that may have been engendered by
8 pretrial publicity. There would be a deadline to
9 get those back, and we would -- our jury office
10 is very good about following through to make sure
11 we get those back. Then counsel would be
12 provided -- and at that point, because there is
13 no deadline on a change of venue. As I read the
14 rule it's even during trial. I don't expect that
15 we're going to wait that long, I hope we would
16 not wait that long, but in enough time for
17 everyone to look at the responses and see who our
18 pool is.

19 I notice counsel in their memoranda have
20 indicated that they're doing surveys of Hennepin
21 County, which is fine and certainly will be
22 considered by the Court if provided, and I know
23 you need time to finish those. Again, why this
24 motion isn't really ripe at this point. But this
25 is basically a survey of the actual people who

1 might be jurors. And so I think it's more
2 focused. I think it's more useful for everyone.

3 And so that's the Court's plan going
4 forward, which is why I'm not sure we need an
5 argument today on change of venue. I would allow
6 you -- and I'm not even -- would not even do a
7 briefing schedule because we'd have to find out
8 what our timing is, what can we do as far as
9 summoning jurors and getting them the
10 questionnaire ahead of time so you can look at
11 what the effect of pretrial publicity has been
12 and everything else.

13 So with that foundation, does anyone
14 feel compelled to say something today?

15 Mr. Plunkett.

16 And, Mr. Paule, we are going to talk
17 about your proposed standard.

18 Mr. Plunkett.

19 MR. PLUNKETT: Thank you again, Your
20 Honor. I don't want to argue the venue issue,
21 but I did want to note an objection to the
22 method, the process that the Court has just
23 outlined.

24 THE COURT: Okay.

25 MR. PLUNKETT: So what my objection is

1 would be that you're relying on essentially the
2 voir dire process to address the jury select --
3 the venue issue. I think that's inappropriate to
4 just rely on that solely so that's why I'm
5 objecting.

6 Also, what the Court has outlined is
7 essentially sending out a questionnaire that's,
8 you know, preapproved. I'm objecting to the
9 questionnaire being used that way right now
10 because you're sending out a questionnaire that
11 would be responded to in an unsworn manner.

12 THE COURT: Oh, no, it would be under
13 penalty of perjury.

14 MR. PLUNKETT: I want to respectfully
15 disagree that you can put somebody under the
16 penalty if they haven't been given an oath.

17 THE COURT: 358.116 says otherwise.

18 MR. PLUNKETT: And I'm respectfully
19 objecting to it.

20 THE COURT: Understood.

21 MR. PLUNKETT: I disagree that that's
22 possible.

23 Also, some of the things that would be
24 important for a jury to have before they start
25 filling out a questionnaire, in particularly a

1 bias, some sort of bias instruction.

2 THE COURT: Uh-huh.

3 MR. PLUNKETT: I would not agree to use
4 the district court or the Minnesota state court
5 jury video which does address bias. I
6 historically ask to use the state of Washington
7 Federal Court which is a -- I can certainly
8 provide the Court with a copy of it or a link to
9 it. Those are certain issues, that would just be
10 one of several issues that I would want a juror
11 to have in mind before they started answering
12 those or responding to a questionnaire.

13 Finally, I think the fact that the
14 questionnaire shows up essentially taints the
15 jury before we even get the questionnaire back
16 because the questionnaire is being received at
17 home, you know, I think that jurors listen to
18 judges in a courtroom and obey what the judges
19 say. But I don't know that that's true when they
20 get a letter in the mail and the fine print says
21 under penalty of perjury. I mean, the old
22 cliché, the big print giveth, the small print
23 taketh away. I don't know that everyone is going
24 have that.

25 Also, it's a very informal thing. It

1 does not put any process on the person who's
2 filling out the questionnaire. So much of the
3 solemnity of a court adds to the, I think the
4 veracity of people who are in it. You know, the
5 judge is talking to you, you know, it's a very
6 important thing, most people have never
7 experience that. So I think I've noted my
8 objection. If there's a specific question on the
9 objection, I of course want to answer it.

10 THE COURT: I guess that begs the
11 question, do you object to even the process that
12 we're using now during the COVID era about
13 sending out a questionnaire, a general
14 questionnaire on criminal issues before trial for
15 any jury we have, whether it's an aggravated
16 robbery or whatever?

17 MR. PLUNKETT: First I've ever heard of
18 it, Your Honor. I wasn't aware that that was the
19 practice so I --

20 THE COURT: Yeah.

21 MR. PLUNKETT: -- guess I'll object to
22 it, but I don't know what I'm objecting to.

23 THE COURT: Understood. Understood.
24 And you do make good points regarding the
25 solemnity of the proceedings and the seriousness,

1 but I think the feedback we've received is that
2 it does tend to work and it does tend to speed up
3 jury selection, which in this case -- I'm getting
4 way ahead of myself -- will probably be one by
5 one in any case.

6 MR. PLUNKETT: My objection is noted.
7 Thank you, Your Honor.

8 THE COURT: Anyone else wish to join
9 that objection or otherwise argue?

10 Mr. Paule, you want to join that
11 objection?

12 MR. PAULE: I'll join the objection with
13 regard to sending a questionnaire out ahead of
14 time.

15 THE COURT: I want to talk to you about
16 that other thing.

17 MR. PAULE: Your Honor, I, too, share
18 Mr. Plunkett's concerns. I have heard that the
19 Hennepin County Bench has been sending out a
20 questionnaire during the pandemic; I've never
21 seen the questionnaire. The same concerns he has
22 about the solemnity of court and people coming in
23 and being placed under perjury. It's different
24 to maybe not read the fine print versus being
25 told by a judge this is what they have to do.

1 I think one of the -- and I haven't
2 fully thought through the Court's thought process
3 on this, but the idea is if we somehow notify
4 jurors that they may be potential jurors before
5 they're brought into court, they may well go talk
6 to their family or their friends, hey, guess
7 what, I got a jury summons, I may be on this
8 case, I've got notice. I think that's ripe for
9 problems.

10 Ironically enough, Doonesbury right now
11 is running in the Star Tribune, they're talking
12 about the OJ Simpson jury. They're doing
13 essentially replays of the strips they ran during
14 that time. But the issue is the same, we want to
15 make sure we're getting information from people
16 that is accurate and that is free from outside
17 influence. And I think the more notice we give,
18 and I don't know what the answer is, I'll give it
19 some thought, Your Honor, but I think there's --
20 it's fraught with peril to say send out a
21 questionnaire to people saying three months from
22 now you're going to be brought in on the George
23 Floyd case. I think the chances are every one of
24 those jurors is going to talk to people no matter
25 what it says in the fine print.

1 THE COURT: Well, I don't think we would
2 be quite as obvious as that. It would be you may
3 or may not be.

4 MR. PAULE: Subtlety sometimes eludes
5 me.

6 THE COURT: Same here. But I think we
7 would be very clear to the jurors that they may
8 or may not be selected as a juror on this case
9 and go from there. But in any case, your
10 objection is noted.

11 MR. PAULE: Thank you.

12 THE COURT: You did want me to adopt a
13 new standard based on statements made by other
14 people in this case?

15 MR. PAULE: I do.

16 THE COURT: Would you like to argue
17 that?

18 MR. PAULE: Sure.

19 THE COURT: Or rest on the brief?

20 MR. PAULE: I'll rest essentially on the
21 briefs for the time being on change of venue. I
22 would point out that all of the prejudicial
23 pretrial publicity has come from either the
24 prosecutors on this case, or elected officials,
25 or other public figures. And, again, the Court

1 doesn't need the litany of people that have
2 commented on this case, but I have -- I
3 personally have never had a case where I've read
4 in the newspaper or seen on the news a prosecutor
5 announcing my client is guilty.

6 And I think the traditional analysis in
7 the change of venue, which stems from the *Shepard*
8 case, and then its acceptance in the *Thompson*
9 case, the *T. Eugene Thompson* case, is almost
10 outdated. Because the *Thompson* case involved an
11 attorney, ironically enough, who was convicted of
12 hiring somebody to murder his wife. He was
13 apparently a prominent St. Paul attorney. And
14 back in those days there were multiple papers,
15 and then multiple papers in Minneapolis. And the
16 publicity was such in the St. Paul papers that
17 they moved it to a venue theoretically that did
18 not have -- where the jury pool would not have
19 been exposed to that, so they moved it to
20 Minneapolis. I think it's an arcane, outdated
21 standard.

22 THE COURT: I agree.

23 MR. PAULE: So I think the issue becomes
24 -- because if we are going to even entertain
25 change of venue motions, we have to look at a

1 different standard because with the Internet, I
2 can read what's going on on BBC by looking at my
3 phone. And I would guess that most of our
4 jurors, once we get them in the room and start
5 questioning them, have heard about this case.
6 And the idea is, okay, if we were to move it to a
7 different county or a different jurisdiction,
8 they're still going to be exposed to the same
9 thing.

10 But getting to the Court's question, the
11 prejudicial publicity has come from prosecution
12 and their agents. We've got the chief of police,
13 we've got the head of the bureau of -- Department
14 of Public Safety, we have Mr. Ellison, making
15 comments on national news programs. We have
16 Mr. Freeman making comments.

17 THE COURT: Let's not rehash that. I'm
18 aware of all that. And, plus, there have been
19 some defense articles as well. Let's just get to
20 what is the effect in your mind with that?

21 MR. PAULE: The effect is at this point
22 we have a jury that has been -- or potential
23 jurors that have been told by people in positions
24 of power that my client is guilty and that's
25 going to have some impact on our potential jury

1 pool. That impact would be lessened, I think, if
2 we were to move it out of the area.

3 The second thing, and it's difficult to
4 find proper phrasing for this, is if I was a
5 Minneapolis resident and I was selected as a jury
6 in this case, one of the things that might be on
7 my mind is what effect would it have if, I were
8 to vote to acquit, on my community and on me
9 personally. That goes to --

10 THE COURT: Despite the Court's
11 instruction that you'll not consider the effect
12 of your -- or consequences of your verdict in any
13 way, shape or form?

14 MR. PAULE: I think despite that. If
15 you look at this case -- and I mean no disrespect
16 to the Court, but I think you've got to look at
17 this realistically. We had following the death
18 of Mr. Floyd, three or four days of just
19 out-and-out lawlessness in our community.

20 THE COURT: If I move it to Moorhead
21 they're not going to worry because it's going to
22 be Minneapolis that goes up in flames?

23 MR. PAULE: I think to some degree
24 that's accurate. It might be callous, but I
25 think that's a way of looking at it. If I lived

1 in Moorhead I wouldn't necessarily be worried
2 about the streets of Moorhead being burned as I
3 would if I lived in Minneapolis.

4 THE COURT: Understood. I'm more
5 interested in the proposed rule you have.

6 MR. PAULE: Yes.

7 THE COURT: I'm not going to entertain
8 that -- and when I said that it's an arcane rule,
9 I agreed with you on that, that's the proposition
10 that one side of the river doesn't know what's
11 going on on the other side of the river.

12 MR. PAULE: Yes.

13 THE COURT: They have their own
14 newspapers. I mean, obviously what you just
15 stated about BBC on your phone is true. I mean,
16 it's not going to be a question of have you heard
17 about this case, that's -- but that's also true
18 on a change of venue, where have they not heard
19 about it in the state of Minnesota? So if we
20 move venue, we're stuck with the same problem of
21 what have you heard, what have you not heard, and
22 how has it affected you, has it closed your mind
23 regarding a decision in this case. There really
24 isn't a -- would you agree a county or even a
25 state in this country where there has not been a

1 lot of publicity about George Floyd's death?

2 MR. PAULE: I agree with the Court, this
3 case is everywhere given digital network, news,
4 and the era we live in. However, the issue is
5 what impact is that going to have on a jury -- a
6 juror being impartial? I think, again, one of
7 the issues that you're going to have is if you
8 keep the case here is the fact that we had
9 basically cities ablaze as a result of this case.
10 And I think if I was a juror and I lived in the
11 city, I might be very concerned about that. My
12 office --

13 THE COURT: I want to take you to the
14 rule you proposed though.

15 MR. PAULE: Sure.

16 THE COURT: Basically what you're saying
17 is it doesn't matter about the pretrial publicity
18 if the prosecution or its agents have made
19 statements that are prejudicial. Is that --

20 MR. PAULE: Yes.

21 THE COURT: It's much more artfully
22 drafted in your memo. But I'm going to tell you
23 right now, I'm not even going to consider it,
24 that's for the Supreme Court. If you want to
25 have them -- have some kind of amendment to the

1 rule on change of venue, I think that's
2 appropriate, but it's not appropriate for me to
3 address it. I'm taking the rule as it's written
4 by the Supreme Court now.

5 MR. PAULE: Would the Court entertain
6 certifying the issue as important and doubtful
7 and setting it up on a pretrial?

8 THE COURT: No, because it's not
9 doubtful; the rule is very clear.

10 MR. PAULE: And I'll perfect the record,
11 but I want to make sure that I've done so, no
12 disrespect to the Court.

13 THE COURT: No.

14 All right. Anybody else need to talk
15 about change of venue at this point?

16 MR. NELSON: Your Honor, only to say
17 that I think it's premature.

18 THE COURT: All right. Anybody else?
19 Otherwise -- you wish to adopt the arguments
20 made, Mr. Gray?

21 MR. GRAY: Yes.

22 THE COURT: All right. That's noted.
23 Mr. Frank.

24 MR. FRANK: Thank you, Your Honor, just
25 a couple of points. Just to clarify that I

1 understand the Court's position is that you're
2 either going to deny the motions as premature or
3 at least defer their consideration until...

4 THE COURT: The latter.

5 MR. FRANK: Okay. Because we certainly
6 will brief the issue of change of venue. We
7 obviously would like to brief the issue of a
8 change in standard, maybe that's not necessary --

9 THE COURT: No.

10 MR. FRANK: And couple of concerns about
11 the Court's proposed process. One is that, you
12 know, in the case law when deciding on a change
13 of venue the court is to consider where it should
14 go. And so if you're sampling just a Hennepin
15 County jury pool, you're only getting part of
16 that equation, I think, and maybe a skewed part
17 of that equation, or that consideration. The
18 other --

19 THE COURT: Let me stop you. My -- the
20 implication was that other counties that were
21 proposed as receive counties would also be
22 surveyed; am I correct on that? I'm not sure
23 where I got that. Mr. Plunkett. You can just
24 speak from there, if you just answer that
25 question quickly.

1 MR. PLUNKETT: That is what the proposal
2 would be, Your Honor, is that Hennepin County
3 would of course be surveyed, but then to
4 specifically address the Court's question about
5 is there any place we can move it, we would -- if
6 properly funded, we would do a similar
7 questionnaire process in other counties, probably
8 first looking at demographics, facilities and
9 things like that to try to find a place that's
10 appropriate.

11 THE COURT: All right. Thank you.

12 Mr. Frank.

13 MR. FRANK: Well, if that's the
14 defenses' effort, that's one thing, but if it's
15 the court's, then I think we want to be heard.
16 What I'm saying -- talking about is the court
17 sending out questionnaires to jurors ahead of
18 time with the summons months ahead of time.

19 THE COURT: Right.

20 MR. FRANK: You're only going to be
21 asking Fourth District jurors what they've heard,
22 and you won't have information about other areas.
23 The defense is going to submit that that would be
24 ordinary evidence for a change of venue motion
25 would be my understanding.

1 THE COURT: Well, I think it's getting
2 the cart before the horse to talk about other
3 counties. Don't you agree that we talk to
4 Hennepin jurors first and if we have a pool -- of
5 course, there will be some people that say
6 they've made their minds up, they can't be fair
7 and impartial, if they're being honest. But
8 there may be in the questionnaires -- I think
9 sometimes we get so wrapped up within our world
10 in the criminal justice system that we think that
11 everybody knows everything we do, and has made up
12 their minds when half the time they'll read it in
13 the paper, forget about it, and they don't have
14 an opinion. Isn't the first step to actually
15 look at the Hennepin jurors and see if we have a
16 pretrial publicity problem? And if we don't, we
17 don't have to worry about St. Louis County, we
18 don't have to worry about Dakota County, Stearns
19 or wherever.

20 MR. FRANK: I mean, a good illustration
21 of that is the Noor trial. We were able to pick
22 a jury here.

23 THE COURT: Right.

24 MR. FRANK: And so I don't --

25 THE COURT: I think everyone will agree

1 this has gotten even more publicity than the Noor
2 trial, but that said --

3 MR. FRANK: Closest example I have.

4 THE COURT: -- you were able to pick a
5 jury without going through the entire pool that
6 was drawn.

7 MR. FRANK: Your Honor, I will try to
8 chose my words carefully because I know how the
9 Court feels about --

10 THE COURT: You can say that I'm not
11 being very smart on this. I --

12 MR. FRANK: No, no, no. I want to just
13 talk briefly about the pretrial publicity,
14 because it's certainly not true that it's all
15 come from us. And I think the publicity that our
16 office has been responsible for has been nothing
17 other than what a jury is going to hear anyway,
18 what the charges are, and then they will be
19 instructed that's not evidence.

20 THE COURT: And when I lifted the gag
21 order, I think I made note that much of the
22 publicity and the release of the videos were
23 things that were going to be in trial anyway. My
24 concern being more about the prejudicial things
25 that might not be evidence.

1 MR. FRANK: Prejudicial things like
2 misrepresenting what the evidence is and what the
3 law is, and interviews with the media. That did
4 not come from our office. My point is there is a
5 certain amount of pretrial publicity that's
6 unavoidable and that a jury is going to hear
7 about anyway. They're going to know we charged
8 these individuals, they're going to know a
9 complaint has been filed, and then they're going
10 to be told to set that aside. So and that's --
11 that's what the standard is. It's not whether
12 St. Paul and Minneapolis read the same newspaper.
13 But, you know, I want to -- I want to argue about
14 that arcane test but it seems like I don't need
15 to.

16 THE COURT: The test is not arcane but
17 the rationale is now, I think, pretty arcane that
18 you have to look at how much pretrial publicity
19 when the whole world has heard about this case.

20 MR. FRANK: I think the reality gained
21 from all our experience in this field is that
22 when a potential juror gets a questionnaire they
23 think, oh, what's this about, I better look it up
24 on the Internet because it's really easy for me
25 to do. We have, you know, been asking courts to

1 put in bold giant letters on the front do that,
2 and, you know, hopefully that would help. But
3 the longer we give them to do that, the more
4 likely it is they will do it and try to find ways
5 to get out of jury duty. Not that the average
6 citizen I'm suggesting tries to get out of jury
7 duty. But -- and maybe I'll have an opportunity
8 to note these concerns before the court sends out
9 its questionnaire, but these are the things that
10 I'm concerned about with the process you're
11 suggesting.

12 THE COURT: Let me throw this out to all
13 counsel. Instead of just sending out a cold
14 questionnaire, what if we actually summoned
15 people for the week but said that you also have
16 to appear on X date, and at that time we have a
17 hearing and we give them the instructions and
18 they fill out the questionnaire there but in
19 enough time -- because if we do it the normal way
20 and do the questionnaire on the first day of
21 trial, we're going to be wasting a lot of time.

22 MR. FRANK: I agree, Your Honor. And I
23 do think counsel legitimately raises a concern
24 about the solemnity of the court. I think the
25 courts -- or the potential jurors looking you in

1 the eyes, or another judge in that setting,
2 probably has a little more impact on them than
3 just getting it in the mail. It's something to
4 consider certainly. I'm not taking issue with
5 the Court's idea, just maybe some of the
6 practical aspects of it.

7 THE COURT: And I'm not wedded to all
8 the fine details. As we are here on the fly
9 talking, it may be better that we actually summon
10 people in for a day, have the solemnity of the
11 court.

12 Mr. Plunkett, is that kind of what you
13 were thinking might be an alternative? I know
14 you still object to the whole process.

15 MR. PLUNKETT: I object to everything.
16 Yeah, I mean, we're -- it's a moving target right
17 now, Your Honor. We've already changed what the
18 proposal is since it was first proposed, and, you
19 know, until I see the final product, I don't
20 know. How do I object to something that --

21 THE COURT: Well, this is where I would
22 like the parties to go for now is work on your
23 joint questionnaire. How we do it -- we are
24 going to do a questionnaire. The rules provide
25 for it and so I am going to do one. The question

1 is how we do it, and those are more
2 administrative matters. The content of the
3 questionnaire is more important at this point.
4 And so what I'd like counsel to do is work on
5 that. We can have a conference call to work on
6 the administrative part of it and perhaps kick
7 around some ideas. It would not be an on the
8 record hearing, just an administrative conference
9 on how to accomplish the use of a questionnaire
10 with the jury. And then I'd issue a jury
11 management order based on what I think is the
12 best way to manage that.

13 But other than that, Mr. Frank, I think
14 you had some other points to make.

15 MR. FRANK: I think that's a great idea,
16 Your Honor, as long as all of us understand that
17 this questionnaire is not about indoctrinating
18 jurors to your side of the case, and it's about
19 addressing that issue.

20 THE COURT: Oh, I'm going to have final
21 say of what goes in it.

22 MR. FRANK: But it's that previous
23 concern, indoctrinating jurors, that to me always
24 leads to the difficulty in agreeing on a juror
25 questionnaire with defense counsel. I mean,

1 nothing negative towards the four defense counsel
2 in this case, just my experience has been, you
3 give us free rein, defense attorneys like to
4 start indoctrinating jurors in that
5 questionnaire.

6 THE COURT: Well, let me be a little
7 more clear. I hope you can come to consensus on
8 what should be in the questionnaire as
9 appropriate questions for jury selection. And I
10 agree, and I think those who've tried cases
11 before me know that I'm fairly strict on not
12 allowing indoctrination questions, and that is to
13 get information, not to give information.

14 If -- but as an alternative, I know you
15 may not be able to come to a consensus. And if
16 that's the case, you all submit what you want and
17 I will draft it myself based on -- but I would
18 appreciate the input one way or the other,
19 whether it's a consensus questionnaire, or it's
20 something you can't agree on but you want in
21 there, I will consider anything that's brought to
22 me, but it has to go toward appropriate voir dire
23 topics. Not indoctrination, not hypotheticals,
24 not imparting facts about the case. I think you
25 just simply indicate to the jury panel that they

1 may sit on a case involving the George Floyd
2 homicide, that would be enough. Or the George
3 Floyd death is how the defense would prefer I
4 characterize it.

5 MR. FRANK: My comments have been a
6 little all over the place. I don't have anything
7 else unless the Court --

8 THE COURT: Well, it's my fault,
9 Mr. Frank. I've kind of led you around the
10 mulberry bush here.

11 MR. FRANK: Thank you.

12 THE COURT: Anything else on that?

13 MR. FRANK: No, Your Honor.

14 THE COURT: Anything else on that,
15 Mr. Paule, briefly.

16 MR. PAULE: I do want to make two
17 points. One is it seems like the prosecution is
18 creating their own narrative with regard to
19 pretrial publicity. I would point out that both
20 Mr. Ellison and Mike Freeman have spoken publicly
21 about it.

22 With regard to Mr. Frank's comment about
23 it's nothing the jury isn't going to hear. I
24 would point out specifically that Mr. Freeman
25 talked about potential negotiation. That is

1 something that never comes before a jury. And
2 not only is Mr. Freeman and Mr. Ellison both
3 lawyers, they're politicians, and the lines
4 sometimes seem to blur. I don't mean any
5 disrespect. But I will point out what history
6 tells us is they did make comments that go well
7 beyond what a jury would hear.

8 The second thing is, and I mean no
9 disrespect to Mr. Gray, but when we talk about --
10 or Mr. Frank talks about defense publicity, he's
11 not talking about State versus Thao, he's talking
12 about -- without saying it, Mr. Gray's
13 appearances on national TV, not mine.

14 THE COURT: All right. Thank you.

15 All right. Let's move on to the next
16 motion. I plan on taking a break at 10:30 just
17 so you're aware; that will be a 20-minute break.

18 Okay. Jury sequestration motion. So
19 we're talking about Rule 26.03 subdivision 5. It
20 appears with the standard that some form of
21 sequestration would be required. Again, I'm just
22 going to give everyone the Court's thoughts at
23 this moment but I'll take input. Paren 2 of
24 subdivision 5 notes that any party may move for
25 sequestration and sequestration must be ordered

1 if the case is of such notoriety or the issues
2 are of such nature that in the absence of
3 sequestration highly prejudicial matters are
4 likely to come to the jurors' attention. Also
5 when sequestration is ordered, the court in
6 advising the jury the decision, must not disclose
7 which party requested sequestration.

8 With regard to sequestration, the
9 Court's plan, I think given the nature of this
10 case, at the very least the jury will be
11 sequestered, they will be kept together, kept in
12 a hotel, all the accoutrements of sequestration
13 for deliberation. I think it would be almost
14 cruel to keep them for weeks at a time.

15 And for that, I'm going to have to ask
16 counsel start thinking, and we'll probably ask
17 you this after the break, what your estimation of
18 time for trial. How long does the State think
19 it's going to have. How much does the defense
20 think it's going to have, each of you. If it
21 were joint or if it were separate, just so that
22 we can think about that. Even then, I don't know
23 that I would order sequestration, instead would
24 allow the jurors to go home at night, but their
25 movements would be -- they would be

1 semi-sequestered, let me put it that way.
2 Talking about where they would park at an
3 undisclosed location, be escorted to the
4 courthouse by the sheriff's office, taken up to
5 the -- whatever jury room they have without
6 access to the public. Lunch would be brought in.
7 And at the end of the day, the reverse process.
8 They would be taken down through a secure
9 elevator down to where they'd be transported to
10 -- transportation to their cars by the sheriff's
11 office. So that's what the Court's current
12 thought is, but I know that others may request a
13 full sequestration for the full trial.

14 Mr. Gray, I think you mentioned that in
15 yours. Did you wish to have any comment on that
16 or --

17 MR. GRAY: I did not mention it, Your
18 Honor.

19 THE COURT: I'm thinking of something
20 else then.

21 MR. GRAY: I would object to
22 sequestration in fact.

23 THE COURT: You don't want any
24 sequestration?

25 MR. GRAY: No sequestration. Send them

1 home. Otherwise by the second week, they're all
2 so upset that as soon as the defense starts the
3 case, they're -- it's over for them. And I've
4 experienced that through the years, Judge. It's
5 much better just to send them home because
6 wherever they go -- and they're either going to
7 follow your rule or not. Thank you.

8 THE COURT: Anybody else? Mr. Plunkett,
9 how about for your client? Do you have a
10 position regarding sequestration,
11 semi-sequestered, fully sequestered, no
12 sequestration?

13 MR. PLUNKETT: Your Honor, what the
14 Court outlined of semi-sequestration, I would not
15 object to that. I would object to full
16 sequestration for all the obvious reasons. I
17 don't think you need me to state them.

18 THE COURT: I think it's only new
19 lawyers who ask for full sequestration
20 throughout. Maybe I'm wrong, maybe the State
21 wants it. But after doing it once, I think
22 lawyers realize it just leads to a very upset
23 jury, and they just want to go home. And if you
24 let them go home at the end of the day at least,
25 they don't have that -- when we're talking a

1 four- to six-week trial, that's a long time to
2 keep people away from family.

3 What is the State's position regarding
4 this proposal?

5 MR. FRANK: Your Honor, we are not
6 asking for sequestration during the trial. The
7 rule obviously contemplates sequestration during
8 deliberation, but we're not asking for it during
9 trial. The accommodations the Court is talking
10 about, I don't even see it as a sort of
11 sequestration, I think those are sensible
12 protections to put in place to avoid any
13 accidental even -- I want to say influences, but
14 information coming to the jurors. I think that
15 makes sense.

16 THE COURT: And with all due respect to
17 the media, I don't want jurors who are coming up
18 on the public elevator being chased with cameras
19 just to get a little video shot. That's -- the
20 Court wants that not to happen. Because even
21 that can be intimidating for jurors.

22 MR. FRANK: And, Your Honor, when I say
23 accidental, I mean the courthouse is a busy
24 place. It's so easy for us to -- we have to
25 remind ourselves every morning that person could

1 be a potential juror. You know, not see a juror
2 and accidentally have them hear things we talked
3 about in the courthouse, you know, nothing
4 intentional. So that's why I say I think the
5 Court's plan there is a sensible one, Your Honor.

6 THE COURT: Anybody else have any
7 thoughts? Mr. Paule.

8 MR. PAULE: I would request full
9 sequestration. There are two reasons for that.
10 One is I think -- and with all respect to
11 Mr. Gray, I think the idea of how are we going to
12 control what jurors have access to through the
13 media, what sort of coverage. I would note that
14 we have any number of reporters sitting in this
15 courtroom. I would note that we have reporters
16 sitting out front when we arrived, which will be
17 the same during trial. And we're going to have
18 protesters out there, at least during parts of
19 the trial. These are things that normally jurors
20 don't get exposed to, and I think we need to
21 shield them as much as possible. Particularly if
22 we're talking about the issue of anonymous jurors
23 as well.

24 THE COURT: Mr. Nelson, what are your
25 thoughts?

1 MR. NELSON: Your Honor, I'm undecided
2 on full sequestration versus the plan outlined by
3 the Court.

4 THE COURT: And you can send me a letter
5 brief outlining your position if you'd like after
6 you've had a chance to talk to your client about
7 it.

8 MR. NELSON: I need that opportunity.
9 But also, Your Honor, I do -- I think that the
10 safety of the jurors is a significant concern as
11 well.

12 THE COURT: All right. Thank you. All
13 right. Anonymous jury. The idea being that
14 counsel, at least this is my read on your motions
15 and the rules, counsel would have access to
16 names. You would have all the information you
17 normally would during trial but with an
18 instruction from the Court that you not reveal
19 those names, that you not refer to jurors by name
20 but instead by number. For example, Juror No. 1,
21 good morning, during jury selection, and leave it
22 at that.

23 What are people's thoughts on that? For
24 the State, do you think this is an appropriate
25 case for an anonymous jury where they are by

1 number, with the understanding at the end of the
2 trial it's -- those names are probably going to
3 be released to the media. Mr. Frank.

4 MR. FRANK: I don't want to scare you by
5 bringing up my whole binder.

6 THE COURT: You did a little bit.

7 MR. FRANK: I will only argue so far as
8 the Court wants me to. We do not agree with
9 having an anonymous jury. And I think what the
10 Court is proposing is an anonymous jury in fact,
11 or at least -- and I would worry that that would
12 look like an anonymous jury to an appellate
13 court.

14 THE COURT: Oh, it would be anonymous
15 under the rule, yes.

16 MR. FRANK: And I don't think we have
17 met the standard. You know, again I won't make a
18 lengthy argument here, unless the Court wants me
19 to go into it, but the standard from the *Bowles*
20 case was adopted into Rule 26.02 subdivision
21 2(2). And I don't think there has been any
22 showing sufficient under that rule to have an
23 anonymous jury. I think it's particularly
24 helpful to look at the *Wren* case, *W-r-e-n*, which
25 is 738 N.W.2d 378, the most recent time the

1 Supreme Court has talked about anonymous jury.
2 And the flavor from that case is clear that it's
3 disfavored, and that the standard is quite high.
4 And that *Bowles*, and the other four cases that
5 came out of the murder of Officer Hoff were very
6 unique. And so to have currently an anonymous
7 jury requires a pretty high showing --

8 THE COURT: Well, let's go to the rule.
9 The rule says that on party's motion, and there
10 has been a motion by Mr. Paule, the court may
11 restrict access to prospective and selected
12 jurors' names, addresses, and other identifying
13 information if a strong reason exists to believe
14 that the jury needs protection from external
15 threats to its members' safety or impartiality.
16 The court must hold a hearing and make detailed
17 findings supporting its decision.

18 This is that hearing, so anything you'd
19 like to make as part of the record I'll welcome.

20 MR. FRANK: Right. And so the court has
21 to have a hearing and has to make detailed
22 findings. But it's an extreme measure. And the
23 court said in *Wren* not every retaliatory murder
24 involving gang activity meets the extreme measure
25 of impaneling an anonymous jury. So what are

1 those extreme circumstances that would require it
2 when there is --

3 THE COURT: And let me stop you there.
4 I don't think there's any allegation here that a
5 jury would worry if they found a defendant guilty
6 that they would be subject to violence from any
7 of the parties. What I'm more concerned about
8 here is that there are external threats to
9 members of the jury's safety or impartiality. I
10 assume -- and has the Attorney General's Office
11 gotten any unsolicited input from the public
12 about what should happen in this case?

13 MR. FRANK: Your Honor, I can't speak
14 personally for the entire office obviously.

15 THE COURT: But...

16 MR. FRANK: I'm not aware of any
17 personally.

18 THE COURT: I get them daily. In fact,
19 luckily I was working from home yesterday and so
20 I didn't have to answer the phone. Mr. Schaefer
21 unfortunately had to whether all the calls, a
22 barrage of calls giving me advice. Many polite,
23 and I've only gotten one semi-threatening call,
24 but most were polite, but they are clearly trying
25 to influence me and my decision, and this is just

1 on a motion hearing. And I'm going to ask other
2 counsel if they received any unsolicited calls
3 from the public, because I think that should be
4 part of the record. Because just on the basis of
5 what I've received as the judge in the case, I
6 think there's a significant and strong reason to
7 believe that there would be attempts made to
8 influence the jury in an ex parte fashion if we
9 are not anonymous, and people can find out
10 through the many Internet tools where they live
11 and what their phone number is. Would you
12 disagree with that, Mr. Frank?

13 MR. FRANK: I don't think it's to that
14 level. And the reason is because we have not had
15 -- Okay. Look. In the *Bowles* case the court
16 sort of made a list of the cases where it has
17 been allowed, a lot of them are organized crime
18 cases where witnesses had been threatened, where
19 witnesses had been killed --

20 THE COURT: And I think --

21 MR. FRANK: And that's true of the four
22 Officer Hoff cases, four or five, right, where
23 one potential -- well, who they thought was a
24 witness had been murdered. And so the -- the
25 threats were directed by people who wanted to put

1 a stop to that jury, to that jury trial, and was
2 by, you know, the intention is that by the
3 defendants, and that's what intimidates the jury.

4 THE COURT: That's -- and that's not a
5 gang related, this is not those cases. I will
6 grant you that. It's more the language about
7 because this is a not just excess surplusage
8 here, it's as to their safety or impartiality.
9 If they're getting barraged by the public with
10 unsolicited comments, you better find these guys
11 or you better not find these guys guilty,
12 whatever that input is, I've gotten a little bit
13 on both sides, it's very heavily weighted to not
14 dismissing the case. And I've noted it only so
15 that it could factor into whether we have an
16 anonymous jury. It's been a lot. And if a jury
17 who isn't as much as a malcontent as I am have to
18 hear that kind of stuff, they may have their --
19 they may feel pressure and their impartiality may
20 be influenced; wouldn't you agree with that?

21 MR. FRANK: It may be, but what I'm
22 saying is we don't know right now that that is
23 happening. And the public outcry is directed at
24 the defendants. And, unfortunately, this Court
25 as a public servant is accessible and people are

1 sharing their opinions as well. But we don't
2 know right now that jurors have been threatened,
3 are going to be threatened. Because the public
4 wants the trial to proceed. And it's different
5 than those organized crime cases where there are
6 attempts made to put a stop to the trial for the
7 defendants, and that's not our case. This case
8 the public wants a trial.

9 THE COURT: What would be -- well, and
10 they know they're going to have a jury. And what
11 is the harm to the public? Because counsel is
12 going to know who the jurors are. What's going
13 to be the harm to the public if they don't get
14 their names until after the trial is done?

15 MR. FRANK: Obviously the case law talks
16 about the need for an anonymous jury stemming
17 principally from a defendant's right to a fair
18 and impartial jury and a fair trial. We
19 recognize that, but I've never understood why
20 this isn't also a question of a public trial.
21 You know, when we -- when we interview an
22 individual juror outside the presence of the
23 public for very good reasons.

24 THE COURT: Wait, I didn't say we were
25 going to close the hearing --

1 MR. FRANK: No, but when we do that,
2 it's treated as a courtroom closure, outside of
3 the public's trial right. So this is, to me,
4 somewhat analogous because you're excluding from
5 the public trial who the jurors are. And so I'm
6 not saying it can't be done but it has to be done
7 for the right reason. And then there is, of
8 course, in the case law and in the rule now, the
9 court has to take steps to minimize the prejudice
10 to the defendants. You know, so you tell them
11 don't worry about the fact that we're not letting
12 your names out there in the public, does that
13 really minimize the prejudice? And --

14 THE COURT: And let me get to your
15 public trial. The jury selection, aside from the
16 questionnaire, which might even be public itself,
17 aside from the questionnaire, they would be
18 individually questioned in open court with the
19 public able to attend to hear all about that
20 juror except for their name, address, contact
21 information. How is the public -- how is that a
22 closure of the courtroom any more than a court's
23 ruling that certain evidence will not come in?

24 MR. FRANK: I'm saying it's analogous to
25 a courtroom closure.

1 THE COURT: Okay.

2 MR. FRANK: I think there's a public
3 right -- a public trial right aspect of this.
4 The public trial right doesn't belong to the
5 defendants, really it belongs to the public.

6 THE COURT: I agree.

7 MR. FRANK: And I'm just saying it's
8 analogous to that. We're conducting business to
9 an extent secretly. In the same way that when we
10 interview individually outside the presence of
11 the public there has to be strong showings made
12 to do that. I'm just saying there's an analogy
13 here that way.

14 THE COURT: I'll take it for that.

15 MR. FRANK: Your Honor, the -- the other
16 concern that I have is the defendants have
17 brought this to you -- and one defendant has, and
18 may agree with it today, but that won't stop them
19 from raising it on appeal. You know, obviously
20 our court -- our courts are very willing to
21 review things on plain error review, and there's
22 no invited error exception to the plain error
23 doctrine. So nothing will prevent them from
24 raising this on appeal. So to have this stand up
25 on appeal, the Court is going to have to almost

1 act as if everybody is objecting to it and make
2 those detailed findings. And I just don't think
3 it's enough to say -- and I appreciate the
4 Court's concerns about the calls you're getting,
5 really it's awful, and I'm sure --

6 THE COURT: I don't care about the calls
7 for me, but it's an indication of how the public
8 is reacting to this trial and not just sitting
9 back and waiting or coming in and watching, they
10 are -- they are contacting the person making the
11 decision. And I don't care if they do that to
12 me, I am an elected official, I am a judge of the
13 district court, that's fine. But it shows me
14 that we're going to have -- the problem is
15 jurors. And I think as you know, judges are very
16 protective of jurors and try and keep them from
17 threats. I don't think it's threats here,
18 although I got one that was close to threatening,
19 but I think it's more just the input to try and
20 sway their impartiality on an ex parte basis,
21 talk about your lack of a public trial. You've
22 got people in the public talking to jurors
23 outside the courtroom that nobody is aware of.

24 MR. FRANK: And that information will be
25 out in the public regardless of their anonymity.

1 And I just -- our position is that we are not in
2 the position of having the Court able to make
3 detailed findings that this is the kind of case
4 where threats are being made that could
5 intimidate jurors.

6 THE COURT: All right. I'd like to hear
7 from defense counsel. As far as the record goes,
8 and I know we're quasi taking evidence here, but
9 I think it's just -- I need to know from counsel
10 if you received any type of input from the public
11 unsolicited.

12 MR. GRAY: Your Honor, I'd ask for an
13 anonymous juror -- jury.

14 THE COURT: Okay.

15 MR. GRAY: I would tell the Court that
16 I've experienced since I started representing
17 Mr. Lane many, many, many threats. Obscene phone
18 calls threatening my parents, thank God they're
19 dead. And a classic example is what happened at
20 Bob Kroll's house last week or two weeks ago
21 where there were threats, they did --

22 THE COURT: Beat a piñata.

23 MR. GRAY: Yes. Those are the kinds of
24 things you do not want jurors to have during the
25 jury trial and the deliberations. And I would on

1 behalf of Mr. Lane ask for an anonymous jury.

2 Thank you.

3 THE COURT: Mr. Plunkett.

4 MR. PLUNKETT: Thank you, Your Honor.

5 I'm opposed to the confidential jury or anonymous
6 jury; I'm specifically objecting to that. I do
7 think that, on behalf of Mr. Kueng, this is a
8 Sixth Amendment issue, it's been discussed, due
9 process issue, Your Honor. It's been discussed
10 in terms of a First Amendment issue, which it
11 certainly is, but I don't have a standing to
12 raise those. I'm looking at *Waller v. Georgia*,
13 467 U.S. 39. I'm looking at *Estes v. Texas*, 381
14 U.S. 532, and *State v. Lindsey*, 632 N.W.2d 652,
15 and the Sixth Amendment's bedrock right to a
16 public trial is for the benefit of the accused.
17 It reflects the general rule that judges,
18 lawyers, witnesses and jurors will perform their
19 respective functions more responsibly in an open
20 court than in a secret proceeding. And I'm
21 specifically objecting to the secret jury,
22 confidential jury, whatever term you choose to
23 assign to it.

24 THE COURT: You would characterize a
25 public voir dire with counsel having all the

1 information about the juror as a secret
2 proceeding?

3 MR. PLUNKETT: It's been called an
4 anonymous proceeding; I don't think that's a
5 secret proceeding. Whatever term you want to
6 use, I think that it's a deprivation of the right
7 to a fair and open trial.

8 THE COURT: Well, you were on the Noor
9 case, did Judge Quaintance order an anonymous
10 jury?

11 MR. PLUNKETT: She sua sponte ordered an
12 anonymous jury to the extent that -- it's kind of
13 what the Court has outlined, everyone -- all the
14 lawyers know who the jurors are and the public
15 doesn't.

16 THE COURT: Okay.

17 MR. PLUNKETT: Frankly, it wasn't
18 specifically objected to. My experience with it
19 was a -- I think it -- you also have to
20 understand that it sends a message to the jury
21 that, you know, you're in danger, that this is so
22 important that -- of course, the judge gave
23 instructions to say don't read anything into
24 this. But ultimately in that case also the
25 jurors' information was kept secret in perpetuity

1 until just recently. And at that point, all the
2 information was not released. That's a different
3 case, and I think the judge -- this Court is not
4 proposing to do something like that.

5 THE COURT: In perpetuity, no.

6 MR. PLUNKETT: Well, 6, 12 months.

7 THE COURT: Let me be very candid, my
8 intent would be -- if we have an anonymous jury,
9 and you can see which way -- yes, you can read
10 into what I am saying, you can see which way I'm
11 leaning, is to have an anonymous jury at least
12 through the trial, to release their names after
13 the trial is done -- trials are done. With the
14 only exception if there's civil unrest, I'm not
15 going to release juror names in the middle of
16 civil unrest. I hope there is no civil unrest.
17 I hope people attend the trial, watch the trial,
18 see that everyone is getting a fair shake and
19 civil unrest doesn't break out, but I'm not naive
20 either. But my intent would be to issue in an
21 appropriate timeframe shortly after trial the
22 list of names to the public.

23 MR. PLUNKETT: And I'm -- if there's --
24 I can't object to it yet because you haven't done
25 it but --

1 THE COURT: Yeah, you can note your
2 objection.

3 MR. PLUNKETT: -- you know, for secrecy
4 of that information, I'm objecting to that. But
5 right now we're talking about a secret jury I
6 think during voir dire and trial.

7 THE COURT: All right. Have you
8 received calls from the public unsolicited?

9 MR. PLUNKETT: Yes.

10 THE COURT: All right. You don't have
11 to go any further than that.

12 Mr. Paule.

13 MR. PAULE: Your Honor, to the Court's
14 question about receiving phone calls and threats,
15 yes, that's been occurring. I would also note
16 that there's been significant media attempts to
17 contact me, including media members trying to
18 seek out my client at his house.

19 I would point out that the *Bowles* case
20 dealt with an anonymous jury from a different
21 perspective. There the court's concern was that
22 the jury would be essentially sought out for
23 influence or threats by the defendants. In this
24 case, we're not talking about any of us, the
25 Court, the lawyers, or any jurors being

1 influenced by any of the defendants in this case.
2 That was a gang case involving murder of a police
3 officer. What we're talking about here is
4 members of the public who take it upon themselves
5 to try to promote their agenda and try to
6 influence other people through whatever means. I
7 would point out, I know for a fact --

8 THE COURT: As I said, the calls I'm
9 getting actually go both ways. They are
10 predominantly on one side, but I've gotten them
11 for both ways.

12 MR. PAULE: Well, I'm getting them one
13 way. And I would assume the majority of this is
14 going one way as well, too. I don't have any way
15 of knowing that except by my own experience.

16 But I would point out that what we're
17 talking about here is trying to keep a jury free
18 from outside influences. And this is not going
19 to come from the defendant's side, this is going
20 to be coming from members of the public, who I
21 would assume, based on my own experience, are
22 trying to influence them to convict. And when
23 you talk about impartiality or safety of it, you
24 also have to be worried about the safety of
25 potential jurors. Because we now had people

1 being threatened, public figures. I know by
2 experience that at least one lead prosecutor has
3 moved out of his house because of people coming
4 to his house and protesting. We had protests of
5 the Mayor, protests of the Governor. We can only
6 imagine what would happen to these jurors if they
7 were made public. And I think this is an unusual
8 case because I'm not as concerned about the jury
9 thinking that they have to be kept anonymous from
10 the defendants, it's from the public at large.

11 And to Mr. Plunkett's point, the right
12 to a public trial is the defendant's
13 constitutional right, okay. We're not talking
14 about the public's right to do that as much as
15 we're talking about a fair trial for my client.
16 And I don't want to have a jury out there that's
17 going to be having to deal with people trying to
18 influence them, threaten them, cajole them,
19 whatever, to try to influence their decision
20 against my client.

21 So I am for an anonymous jury. And just
22 so the record is clear, I'm asking for
23 sequestration from the start of the trial.

24 THE COURT: All right. Thank you.

25 Mr. Nelson.

1 MR. NELSON: Your Honor, I have no
2 objection to the anonymous jury and would, in
3 fact, join in the request for an anonymous jury.

4 To the Court's question perhaps because
5 my client is sort of the -- seen as persona non
6 grata number one in this trial, I have perhaps
7 received more of unsolicited offers to help,
8 offers to provide services for free, but more
9 importantly threats. Threats to myself, threats
10 of my professional colleagues, threats to my
11 family. Within the first week I think I logged
12 -- and I've saved every single one of these --
13 close to 1,000 unsolicited e-mails, many of them
14 threatening. It's gone so far that other lawyers
15 who share my name have had to modify their
16 business practices because they, too, have been
17 receiving calls simply by virtue of a common
18 name.

19 So this is a unique case insofar as it's
20 not a gang case where we have to worry about
21 defendants or their families retaliating against
22 these potential jurors. This case -- this
23 incident has -- I mean, this is what everyone is
24 thinking in the back of their mind, has caused
25 civil unrest, not just locally, nationally and

1 internationally. And every single person that I
2 have spoken to about this case in my professional
3 career, this is a concern that is ongoing. That
4 any verdict regardless of the verdict, if there's
5 a conviction, the sentence won't be long enough,
6 it's going to cause civil unrest.

7 So the Court is rightfully concerned
8 about the safety of the jurors; I am, too. I
9 mean, you know -- so I join in the request. I
10 join, and I think that the -- there can be
11 appropriate measures to guarantee the public
12 trial. And I just -- I'm kind of mystified by
13 the State's objection to this. Thank you.

14 THE COURT: Thank you. All right.
15 We're going to take a 20-minute break. We'll
16 reconvene at 10:50. Thank you.

17 (Court in recess.)

18 THE COURT: Motion to disqualify the
19 Hennepin County Attorney's Office. I think,
20 Mr. Paule. Mr. Plunkett, I dealt with yours
21 earlier.

22 Mr. Paule, I think this is your motion.

23 MR. PAULE: I believe it's Mr. Nelson.

24 THE COURT: Mr. Nelson, to the extent
25 that you argued the same thing as Mr. Plunkett,

1 I'm going to deny it without any further
2 argument. But you have the additional ground
3 that they are a necessary witness. Would you
4 approach the podium.

5 And I apologize to the people in the
6 overflow rooms, I fell into the bad habit of
7 letting lawyers speak from the counsel table, the
8 overflow rooms can't you hear. So we're going to
9 get more religious about getting up to the
10 podium.

11 Mr. Nelson.

12 MR. NELSON: Certainly, Your Honor. I
13 think the additional ground that we reference in
14 connection with this motion is what was
15 discovered during the course of our review of the
16 discovery in this case, specifically a memorandum
17 was prepared by Amy Sweezy of the Hennepin County
18 Attorney's Office, who was originally tasked with
19 the prosecution and, I believe, signed off on the
20 original complaint in this case. It was dated
21 May 27th, also had a reference to May 26th, about
22 a meeting that she, Mr. Lofton from the Hennepin
23 County Attorney's Office, as well as Hennepin
24 County Attorney Mike Freeman himself, had an
25 in-person -- had an in-person meeting with Dr.

1 Andrew Baker, who is the medical examiner in this
2 particular case.

3 If you look at the previous memorandums
4 that were submitted, those notes of those
5 conversations, prior conversations included
6 witnesses from the Hennepin County Attorney's
7 Office or BCA agents; however, this one
8 particular meeting where they discussed the
9 autopsy of Mr. Floyd and the findings of Mr. --
10 excuse me, Dr. Baker's autopsy were discussed at
11 length. A memorandum was produced, however there
12 was no non-attorney witness present, at least
13 listed in the memorandum that was prepared by
14 Ms. Sweezy.

15 Because in this particular case the
16 cause of Mr. Floyd's death will be one of the
17 principle defenses, I anticipate in all four --
18 or of all four defendants, Mr. Freeman has made
19 himself a potential witness should Dr. Baker
20 testify inconsistently with what Mr. Freeman
21 wrote, or Ms. Sweezy wrote regarding that
22 conversation. And that's essentially what the
23 rule -- the professional rules are specifically
24 designed to prevent.

25 I would also note, Your Honor, and just

1 to put this into context one additional ground in
2 terms of the entirety of the Hennepin County
3 Attorney's Office. I think the Court needs a
4 little understanding of the mountain of discovery
5 in this case. To date we've received
6 approximately 35,000 Bates-stamped items. Many
7 of those Bates-stamped items are not a single
8 piece of paper. For example, Bates stamp No. 4,
9 I believe, or maybe No. 8 consists of 92 recorded
10 interviews. So one Bates stamp, 92 recorded
11 interviews. We're up to 35,000 pages.

12 There is a large portion of this
13 discovery which is training materials from the
14 Minneapolis Police Department. And as I've gone
15 through all of this, I have discovered that many
16 of the trainings that were presented, and
17 potentially several of the trainings that may be
18 pertinent in this particular case were presented
19 by senior members of the Hennepin County
20 Attorney's Office. So, again, you have
21 Mr. Freeman, Ms. Sweezy, Mr. Lofton at a bare
22 minimum who should be disqualified, but you also
23 have numerous other county attorneys who are
24 training the Minneapolis Police Department
25 relevant to the law and the requirements of the

1 law, which based on the *Spreigl* notice we
2 received last night, may very well become
3 pertinent in this particular case. I know Al
4 Harris, senior prosecutor led several of those
5 trainings.

6 So on that basis, Your Honor, I think
7 that the State appears to have, at least
8 Mr. Freeman's office violated the
9 attorney/witness rule. There is legal precedent
10 suggesting that at a very minimum Mr. Freeman,
11 Ms. Sweezy, Mr. LeFevour, and Mr. Lofton should
12 be disqualified.

13 THE COURT: All right. Does the
14 Attorney General's Office have a position on
15 this? And if you could come to the podium,
16 Mr. Frank.

17 MR. FRANK: Your Honor, I certainly --
18 we certainly do oppose this. Counsel cites the
19 *Fratzke* opinion, which is very clear. Well, let
20 me back up a little bit because there's a factual
21 issue potentially here.

22 The memo relied on by counsel regarding
23 the meeting with Dr. Baker does not say it was
24 only the three of us there; we are still trying
25 to figure out if that's even true. But that

1 meeting may potentially cause a disqualification
2 of Ms. Sweezy, Mr. Lofton, or Mr. Freeman, but
3 not all three. You're only going to need to call
4 one of them as a witness if for some reason
5 there's need for impeachment of Dr. Baker's
6 testimony. So it doesn't disqualify all three of
7 them; it certainly doesn't disqualify the entire
8 office.

9 THE COURT: Isn't it an imputed
10 disqualification to the entire firm so to speak
11 if --

12 MR. FRANK: It's not. Because it's not
13 a conflict of interest, it's not a bias, it's
14 simply an inability to be sitting at that table
15 and that witness stand. That's why I'm saying
16 it's only a potential disqualifier for one of
17 those three because they can't do both, they
18 can't be in both chairs, that's the problem with
19 it.

20 And so having the three of them there
21 means that potentially only one of them would be
22 disqualified, and probably not. But even it's
23 all three of them, it's not imputed to the entire
24 office. The last paragraph of *Fratzke* points out
25 it does appear in any way that the remedy is not

1 to disqualify the entire office. So just that
2 fact that if it was just the three of them and
3 not an additional witness there would not
4 disqualify the entire office. It's not imputed,
5 it's not a conflict of interest.

6 THE COURT: Do we know the answer to was
7 somebody else -- it appears that Mr. Lofton in
8 his prior memo, or the memo that is dated, I
9 think it's the day before May 26th, he noted
10 everyone who is there including BCA, FBI by name,
11 and that is conspicuously missing from his
12 May 26th memo in which he states that Patrick
13 Lofton, Amy Sweezy, Mike Freeman and Andrew
14 LeFevour met with Hennepin County Medical
15 Examiner Dr. Andrew Baker in person in a
16 socially distanced room. He seems to be pretty
17 good at documenting who's there. Do you have any
18 information as to whether there was somebody
19 there?

20 MR. FRANK: I don't, Your Honor. I have
21 asked, I have not got an answer to that yet. I
22 don't think it actually even matters. The Court
23 knows full well that, you know, prosecutors are
24 under an obligation to prepare their witnesses.
25 For instance, defense attorneys often argue there

1 was an error made at trial because the State
2 didn't prepare its witnesses. Well, how do we
3 prepare our witness if we don't sit down with
4 them and have -- and talk to them. And so when
5 we do that, sure, we are trying to have somebody
6 else present to avoid this particular problem.
7 That's what they did. They had two or three, you
8 know, at least two other people in addition --

9 THE COURT: The problem is they're the
10 lawyers, and that's the whole point about the
11 advocate witness rule is --

12 MR. FRANK: Right.

13 THE COURT: -- you can have your victim
14 witness advocate there, you can have an
15 investigator there and they become the witness,
16 but now we're talking about attorneys as
17 witnesses.

18 MR. FRANK: But what difference does it
19 make in that sense that they are an attorney as
20 opposed to an advocate or an investigator, they
21 can still be called as a witness. So if
22 everybody to that conversation could be called as
23 a witness, there would be no way to prep
24 witnesses because we would all be potentially
25 called as a witness if we were there. That's why

1 you have an extra person there, that person gets
2 called for the limited purpose of presenting
3 impeachment of testimony.

4 THE COURT: But that gets back to the
5 standard where -- the question has the attorney
6 become a necessary witness; wouldn't you agree?
7 That's why the investigator, if they could
8 testify, they are a witness so it's not necessary
9 to call an attorney.

10 MR. FRANK: Right.

11 THE COURT: Here it may be necessary to
12 call one of the attorneys.

13 MR. FRANK: Right. And one of them
14 becomes a necessary witness and would be
15 disqualified from being the attorney asking the
16 question.

17 THE COURT: Who picks the attorney?

18 MR. FRANK: Who picks the attorney to...

19 THE COURT: Disqualify.

20 MR. FRANK: Good question.

21 THE COURT: I think it's me. But that
22 seems odd that I would essentially tell
23 Mr. Nelson who he's going to call as a witness to
24 impeach.

25 MR. FRANK: Well, maybe they pick.

1 THE COURT: Okay.

2 MR. FRANK: Because it's for the purpose
3 of impeachment. And, you know, technically it
4 should be the author, right, it should be who
5 wrote the notes. Because the only value to that
6 memo is what the author thought the witness said.
7 So if Patrick Lofton wrote those notes, you can't
8 ask Amy Sweezy about those notes because it's
9 Patrick Lofton's hearsay, right.

10 THE COURT: Let's also jump to the
11 reality of this, I don't see the County
12 Attorney's Office here today. Are you planning
13 that they be at counsel table during trial?

14 MR. FRANK: They may or may not be at
15 counsel table at trial; we haven't made that
16 determination.

17 THE COURT: Well, I have. They're
18 disqualified. I'm not going to allow those four
19 attorneys to be in this trial as potential
20 witnesses since they, I think, have violated the
21 attorney/witness rule. So because they are all
22 potential witnesses to what Dr. Andy Baker said,
23 and since cause of death is an issue, they're not
24 going to be on this case anymore.

25 But having said that, I'm not going to

1 disqualify other attorneys in the office. I'm
2 not going to disqualify victim witness certainly
3 in any case, so Ms. Boswell can still work on the
4 case, nor their support staff. Because IT staff
5 could certainly be helpful to the Attorney
6 General's Office because they're more used to
7 working in this courthouse.

8 MR. FRANK: My understanding is that
9 Mr. Freeman, Ms. Sweezy and Mr. Lofton are
10 disqualified from being at counsel table?

11 THE COURT: And Mr. LeFevour, yes.
12 Well, they're actually -- they're removed from
13 the case.

14 MR. FRANK: I'm...

15 THE COURT: It's a bit heavy-handed but
16 it's like the State is suffering no prejudice
17 from this, all I see is the Attorney General's
18 Office. Those four lawyers -- I know there are
19 other lawyers in the County Attorney's Office who
20 are probably working on this case, I'm not
21 excluding them, but those four are to be kept out
22 of this case, period.

23 I think it was sloppy not to have
24 someone present on one of the primary witnesses
25 in this case, and they made themselves attorneys

1 (sic), and I think -- I'm not going to say one,
2 Mr. Lofton because what if Mr. Nelson wants to
3 call somebody else to impeach? I'm essentially
4 -- by saying this person is off but these aren't,
5 I'm essentially directing his case, and that's
6 not supposed to be my function.

7 MR. FRANK: I don't think he can call
8 anybody but the author. But if --

9 THE COURT: Oh, I think he can call
10 anybody he wants to say isn't this what happened?
11 All right.

12 MR. FRANK: So --

13 THE COURT: They're off.

14 MR. FRANK: Those four attorneys.

15 THE COURT: Those four attorneys are
16 off.

17 MR. FRANK: Your Honor.

18 THE COURT: They're not to participate
19 in the prosecution of the case any further,
20 they're now witnesses.

21 MR. FRANK: Obviously, Mr. --

22 THE COURT: You can talk to them as
23 necessary to prepare them as witnesses if it
24 comes to that.

25 MR. FRANK: And, obviously,

1 Mr. Freeman's office is responsible for some of
2 the administrative part --

3 THE COURT: That's fine. The
4 administrative things -- and, particularly, I'm
5 not going to remove Ms. Boswell, who is the
6 victim advocate, as I understand, who's been
7 working with the Floyd family. She can still
8 participate as much as she wants, as other
9 administrative staff. But those four attorneys,
10 they're off, they're now witnesses. You can have
11 contact with them to the extent that they are
12 witnesses. In other words, prepare them or ask
13 them what their testimony would be for trial if
14 called as a witness. All right.

15 MR. FRANK: Your Honor, if I may just
16 change topics for a brief minute.

17 THE COURT: Sure.

18 MR. FRANK: There were two things I
19 wanted to revisit from earlier.

20 THE COURT: Sure.

21 MR. FRANK: One is with regard to the
22 jury anonymity issue.

23 THE COURT: Yes.

24 MR. FRANK: I raised appellate review.
25 I did that because I didn't know at the time that

1 some defense attorneys were going to oppose that,
2 and so it was sort of a caution I had for the
3 Court that even if they all want it, you still
4 have to make those findings.

5 THE COURT: Understood.

6 MR. FRANK: We certainly appreciate, we
7 don't intend to minimize the threats the Court
8 has been receiving and counsel have been
9 receiving. It's also important to remember that
10 threatening jurors is a crime. Threatening me,
11 unless it's a, you know, in nontransitory anger,
12 terroristic threat, is not such a crime, so there
13 is some difference there. And so that was the
14 reason for bringing it up. I'm not saying --

15 THE COURT: I'm fine with that.

16 MR. FRANK: One other thing I do want to
17 say, Your Honor, with your indulgence.
18 Mr. Paule, I think, was right to suggest that I
19 casted too broad a net when I talked about
20 defense publicity. And to him I apologize for
21 that. I assumed the Court knew who my comments
22 were directed at. I apologize to the rest of
23 them.

24 THE COURT: Let's just say, I'm aware of
25 most of the publicity that's been going on.

1 MR. FRANK: Thank you, Your Honor.

2 THE COURT: All right. Thank you.

3 Next on our agenda. Rule 404 evidence,
4 I'm going to put aside the *Spreigl* that the State
5 just served. I'm going to give -- actually,
6 Mr. Frank, I need to speak to you on that on the
7 404 *Spreigl* notice you just filed yesterday. I'm
8 not criticizing it was filed just before this
9 hearing because you met the deadline, which was
10 make sure that *Spreigl* notices have to be filed
11 before omnibus. So I'm not criticizing that, I'm
12 just saying it may affect how things go forward.

13 MR. FRANK: And, Your Honor, you'll see
14 the last paragraph in our notice talks about, you
15 know, we're still getting discovery, we're still
16 reviewing discovery. We felt almost a little
17 premature in filing those, but we knew that it
18 would be something to discuss today that we are
19 going to file them and that there will be
20 potential issues for the Court regarding not only
21 their notices but ours. So we didn't expect the
22 Court to, you know, address them today, I assumed
23 there would be briefing and motions *in limine*
24 regarding admission of those incidents, and they
25 probably will be supplemented over time

1 obviously.

2 THE COURT: Mr. Nelson has noted the
3 volume of discovery. So I am sympathetic to
4 that, but at the same time, the omnibus hearing
5 is supposed to be when we have *Spreigl* notices
6 and other notices. If it's just in a pile of
7 papers that have been sitting for three months,
8 and it's suddenly been discovered, you're not
9 going to find me real sympathetic to notice on
10 that. If you receive information obviously just
11 recently or in the near future, I understand that
12 you can't predict the future and you provide
13 notice as soon as possible.

14 MR. FRANK: That is true, Your Honor.

15 THE COURT: All right. That said, I
16 think your notice is deficient in that it does
17 not state the specific purpose for which the
18 evidence is being offered as required by
19 404(b)(2).

20 MR. FRANK: We did list a number of
21 purposes, Your Honor.

22 THE COURT: Yeah.

23 MR. FRANK: That was not done to --

24 THE COURT: I have that same issue with
25 the defense. Listing everything in 404(b),

1 motive, intent, opportunity, is not sufficient
2 notice. I've never thought it was no matter who
3 is putting it out there. It's just a laundry
4 list. I can read 404(b) as well as anybody,
5 you've got to tell me what the specific purpose
6 is. And I assume you'll follow up with that.

7 MR. FRANK: We will do that, Your Honor.

8 THE COURT: Thank you.

9 MR. FRANK: Actually, the list is fairly
10 descriptive of how we see it today. I understand
11 it looks like a laundry list, but certainly we
12 will flesh out those things more fully on the
13 record. Nor did we think that, you know, our
14 late -- I shouldn't say --

15 THE COURT: It's not late.

16 MR. FRANK: Disclosure of those really
17 has any impact on the joinder analysis. There
18 are going to be issues in individual trials as
19 well because you can't try, for instance,
20 Mr. Kueng without essentially trying Mr. Chauvin.
21 So that evidence, as I sit here this morning
22 thinking, well, I guess maybe we should have
23 filed those in each individual case, all of them
24 but --

25 THE COURT: Understood.

1 MR. FRANK: -- we don't think that
2 changes the joinder analysis because of it.

3 THE COURT: Well, that actually was the
4 question I had because I only had it filed in one
5 so the thought being if that's the evidence in
6 one case that does change it from the calculus
7 from the evidence is pretty much going to be the
8 same in all trials. That would be different.
9 But you're saying you're saying -- your intent is
10 to offer in all four trials.

11 MR. FRANK: In all candor, when we did
12 that yesterday, I thought, well, we're serving
13 them all in every case without really thinking
14 that there actually should be notices for every
15 case.

16 THE COURT: Understood. And I
17 understand you basically had to get it in under
18 the deadline.

19 MR. FRANK: We felt it was better to do
20 that for today's purposes.

21 THE COURT: Okay. With regard to the
22 State's *Spreigl* notice. Mr. Frank, I'd like to
23 give you two weeks from today to file
24 supplemental basically briefing, or -- and I
25 really do want to know the specific purpose under

1 404(b). I do not abide the laundry list of 404
2 possible topics.

3 So with that, and then the -- any
4 defense who wishes to respond to that,
5 particularly Mr. Nelson, since currently you're
6 the only recipient, but it sounds like everybody
7 is going to get one, is two weeks after the
8 State's brief is due so a month total, four weeks
9 from today. Okay. Any questions about that?

10 Now, as far as the defense 404(b), who
11 would like to speak to that? Mr. Plunkett, I've
12 got one from you. Mr. Nelson, I've got one from
13 you. And they appear to be identical as far as
14 what you are offering; is that correct,
15 Mr. Nelson?

16 MR. NELSON: I think they are very
17 similar, yes.

18 THE COURT: Okay.

19 Mr. Plunkett, do you want to come to the
20 podium then?

21 MR. GRAY: Your Honor, may I orally join
22 in this 404(b)?

23 THE COURT: That is Mr. Gray on behalf
24 of Mr. Lane joins the motion.

25 Mr. Plunkett.

1 MR. PLUNKETT: Thank you, Your Honor.

2 It seems like the Court's biggest concern is the
3 notice portion of the purpose?

4 THE COURT: Well, I've also got one with
5 number three.

6 MR. PLUNKETT: That's the Harris County.

7 THE COURT: Harris County, Mr. Floyd
8 engaging in an aggravated robbery.

9 MR. PLUNKETT: Case No. 1143230, which
10 is I think --

11 THE COURT: What is the possible
12 relevance of that to this case?

13 MR. PLUNKETT: Well, Your Honor, the
14 State been trying to say that Mr. Floyd
15 essentially wasn't doing anything wrong, he
16 wasn't engaging in any criminal contact, and that
17 he wasn't struggling, and that he wasn't doing
18 anything. What we have here is a situation where
19 we had -- I concede at the beginning that the
20 officers involved wouldn't have known this, but
21 he had a clear propensity for violence. It's a
22 person that not only knows how to fight but knows
23 how to exert influence.

24 When we look at what 404(b) is, absence
25 of mistake, we look at -- or accident, you know,

1 it's specifically showing that he had some
2 familiarity with what inappropriate -- illegal
3 conduct is, and I think it's relevant for 404(b)
4 purposes in that regard.

5 THE COURT: All right. With regard to
6 the May 6th, give me a little more idea there.
7 Is this something that one or more of the
8 defendants was aware of, this May 6, 2019
9 incident?

10 MR. PLUNKETT: To the best of my
11 knowledge, none of the defendants were aware of
12 that. I cannot speak, of course, for all of the
13 defendants, but I'm fairly certain that -- I'm
14 completely certain that Mr. Keung was not aware
15 of it.

16 THE COURT: Well, let me just stop you.

17 MR. PLUNKETT: Yes.

18 THE COURT: Raise your hand if your
19 client knew about this May 6, 2019 case when they
20 had contact with Mr. Floyd? Seeing none. Go
21 ahead.

22 MR. PLUNKETT: Thank you, Your Honor. I
23 think that's quite a bit more important because
24 what we show here is that Mr. Floyd is in the
25 habit of ingesting drugs when he's confronted

1 with police. What we see here is that Mr. Floyd
2 is in the -- it's his practice to engage in
3 diversionary behavior. We have requested the
4 body camera videos to find out exactly what
5 Mr. Floyd said in that situation. The written
6 reports that we have simply tell us that he was
7 crying. He went to the hospital, we know this
8 from the reports. And he at the hospital
9 disclosed that the last time that he had taken
10 drugs was when he was being arrested. I mean,
11 this is what the Government -- Mr. Katyal says,
12 oh, it's just outrageous to even suggest that
13 Mr. Floyd would take drugs when he's arrested.
14 But what we see here is a year prior that he did
15 that.

16 This Court has been around a little bit
17 more than I have, and I think that anybody that
18 has practiced criminal law would know that it is
19 actually not uncommon that people swallow drugs
20 to avoid their detection, especially if they're
21 experienced drug dealers. You know, so I think
22 this one, the May 6, 2019 event is actually quite
23 a bit more relevant, or if anything, you know,
24 stands -- jumps to the top, that would be it.

25 THE COURT: Did you get the discovery on

1 that? You said the police reports but not the
2 body cam?

3 MR. PLUNKETT: We have not received the
4 body camera. We just got a -- buried in the
5 reports we found, you know, this specific
6 incident involving Mr. Floyd. We do know that
7 there's body camera because we've read the
8 reports and it says there is. We've asked for
9 disclosure of that. I think that's another
10 motion that's in front of this Court. But, I
11 mean, the body worn camera would be certainly
12 much better than the written report.

13 THE COURT: All right. Thank you.
14 Mr. Frank.

15 MR. FRANK: Do you want me to address
16 that specific --

17 THE COURT: Yes. Well, actually --

18 MR. FRANK: I can tell the Court that I
19 looked through a batch of discovery we received
20 yesterday, or I got a chance to look through it
21 yesterday, and I believe that body worn camera
22 was in there. My motion -- my responsive motion
23 to compel, which I filed to sort of try to help
24 this along, I said we would -- we had requested
25 it. I'm pretty sure it's in the group that we

1 had that I reviewed quickly yesterday, which we
2 obviously will get out as soon as possible to
3 counsel. Do you want me to --

4 THE COURT: Well --

5 MR. FRANK: -- argue the merits or --

6 THE COURT: I think the discovery is
7 fine. You're going to provide it, you're going
8 to get it, you're going to provide it, that's
9 fine.

10 MR. FRANK: Correct.

11 THE COURT: Don't talk about the Harris
12 County case because I'm denying the request to
13 allow that in evidence. I don't think it has
14 anywhere close to a relevancy talking about
15 Mr. Floyd's actions down in Texas.

16 But with regard to the May 6th -- and
17 they're broken out separately, but it appears one
18 is medical center and one is with police, but
19 they're pretty much the same it sounds like as
20 far as incidents so I'll treat them as much.
21 Mr. Katyal did say, you know, miraculously
22 overdosed at the time he was meeting police.
23 Well, if the answer is, well, it's not miraculous
24 because he swallowed drugs. How do we know that?
25 He's done it before, you can see it on the body

1 cam of Officer Lane. So tell me why that should
2 not be -- that part, only that part that on a
3 prior occasion when he had contact with police he
4 swallowed drugs.

5 MR. FRANK: Because it's just
6 propensity. Mr. Plunkett used the word, I think
7 probably referring to the Harris County incident,
8 but it's just propensity.

9 So what are the two things that we get
10 criticized, the State, the most about 404(b)
11 evidence, the inadequacy of our notice, I
12 understand, and just arguing propensity, and
13 that's all this is. Because he did it before,
14 must be what he does. So that's all it is. I
15 think Mr. Plunkett used the word practiced. Does
16 that -- is that sufficient?

17 In my opinion, if this is being offered
18 -- not my opinion, in what I think the law
19 requires is the same standards apply to defense
20 bringing in 404(b) evidence. Articulate the
21 standard, what fact -- what fact it applies to
22 and show by clear and convincing evidence. This
23 is a Ness situation, right. If anything, it's
24 going to fall under Ness. So make that showing.
25 Make sure it's markedly similar.

1 THE COURT: Well, Ness was like an
2 incident 30 years before.

3 MR. FRANK: All I'm saying is what came
4 out of Ness, what was the -- if there was some
5 kind of change brought about by Ness, it's
6 putting restrictions on that markedly similar
7 reason for getting 404(b) in.

8 THE COURT: Well, plus, Ness dealt with
9 a criminal sexual conduct case, and that's
10 certainly the idea of propensity is much more
11 prejudicial than when this person is stopped they
12 take drugs.

13 I'll just put it this way, I agree that
14 I think it has very limited value, and so at this
15 point I deny it. But if the State does argue,
16 I'd let the defense open -- or bring in evidence
17 that he's done it before, that it was not a
18 miraculous overdose, if it was an overdose. If
19 they're saying that he did not take -- if the
20 State's position is on the date that he died,
21 Mr. Floyd did not ingest drugs when the police
22 came into contact with them, I think the defense
23 has a legitimate argument that it's relevant to
24 say, this is how he reacts when he comes into
25 contact with police. You're right. It does

1 border on propensity, so at this point I'm saying
2 no. I'm just saying we can revisit based on how
3 the trial itself goes.

4 Hold on, Mr. Gray.

5 MR. FRANK: And that's what my point is,
6 Your Honor. Even if there is that evidence --

7 THE COURT: Uh-huh.

8 MR. FRANK: -- they still have to make a
9 showing that it's markedly similar because
10 otherwise it's just plain old propensity, it's
11 just habit. I mean, it's not even habit because
12 that's a term of art, of course.

13 THE COURT: Well, let's put it this way,
14 I'm denying it at this time, but they can renew
15 it. Partly of which might be an offer of proof
16 with body worn cameras or police reports showing
17 a *modus operandi* that is similar. Because right
18 now I think it borders too close to propensity
19 and I agree with you. But if the State takes
20 advantage of that and starts saying, you know,
21 it's how could he have overdosed, the police were
22 with him. It's like, well, it's legit. I'm not
23 saying I believe that's what happened.
24 Obviously, it's a matter of does it fit a *modus*
25 *operandi* theory, which is what they're saying, I

1 assume.

2 At this point it's denied, it's too
3 close to propensity. If the defense or the State
4 -- because my understanding, if I recall, and I
5 could be wrong, I'm not trying this case, but for
6 probable cause purposes, looking at the video
7 that there was -- you could actually -- a drug or
8 a pill was visible in his mouth at one point. Or
9 am I wrong?

10 MR. FRANK: I don't agree with that,
11 Your Honor.

12 THE COURT: I could have just --

13 MR. FRANK: Certainly that was
14 Mr. Gray's argument that he made to the Court and
15 other --

16 THE COURT: Okay.

17 MR. FRANK: -- members of the public.
18 But that may be an argument that a jury has to
19 resolve, but I don't think that's as clearly
20 established as Mr. Gray wants to pitch it.

21 THE COURT: Understood.

22 Mr. Gray, I'll let you speak since I'm
23 about to deny it.

24 MR. GRAY: Yes. Your Honor, with
25 respect to markedly similar, it corroborates --

1 or circumstantial evidence, they contest the fact
2 that Mr. Floyd would not show his hands, that he
3 was cooperative, he was surprised. The May
4 incident, the year before, he did exactly the
5 same thing, he didn't show his hands, he was
6 moving around the vehicle, and drugs were
7 involved. It corroborates my client's -- because
8 you can see if you look closely, but when he
9 approaches that car, they're moving their hands.
10 He tells Mr. Floyd to put his hands on the wheel,
11 and he didn't do it right away. Well, you go to
12 that May 2019, and you'll see the same conduct,
13 which corroborates what he says, that they
14 challenge, and they're -- which I won't mention
15 their other memo, they challenge that. And
16 that's our proof, circumstantial evidence, that
17 what my client is saying is the truth. Thank
18 you.

19 MR. PAULE: May I be heard briefly?

20 THE COURT: Briefly.

21 MR. PAULE: Your Honor, I was going to
22 ask to join in the 404(b) motion, but I think
23 it's actually premature. Until we get the body
24 worn cameras, which apparently the State is going
25 to give to us, I don't have a complete picture of

1 what did happen a year earlier. So I would like
2 to reserve my motion with regard to that issue.

3 One of the issues we have is discovery
4 is ongoing, and I'm not faulting them at this
5 point for that, but I don't have everything I
6 need to make a proper motion that was required by
7 the Court's scheduling order. So I would ask
8 leave to do that and to brief that.

9 But two other things. One is the issue
10 of causation. Because what the State has been
11 saying, at least publicly, is that the cause of
12 death was essentially prone asphyxia, whereas it
13 might well be an overdose or drug intoxication.
14 We don't know that, but his actions on that date,
15 and the actions on the date in question on this
16 case may well go to the issue of causation.

17 The only other thing I would point out
18 is with regard to the Harris County incident that
19 the Court has denied. I think that -- I would
20 ask leave if the State opens the door by making
21 allegations that Mr. Floyd was peaceful or had a
22 peaceful character, that the Court should revisit
23 that particular issue. Because the allegations
24 in that Harris County incident are quite violent
25 on behalf of Mr. Floyd.

1 THE COURT: All right. State have any
2 such plans? And I don't include spark of life
3 testimony as part of that.

4 MR. FRANK: I guess I'll just say we
5 understand opening the door and what that means,
6 Your Honor.

7 THE COURT: Understood. The ruling
8 stands on that. I am going to deny the May 6,
9 2019 issue at this time. I actually think it
10 might be premature. I tend to think of 404(b)
11 issues as falling more under a motion *in limine*.
12 So I'm going to direct you all to the motion *in*
13 *limine* deadlines and make those deadlines
14 applicable to this May 6, 2019 case. But the
15 Harris County case, we're not bringing up again,
16 that's denied.

17 Okay. Discovery motions. I thought
18 this was going to be a bit of a mess, but,
19 Mr. Frank, thank you for kind of combining them
20 into one, and I'm going to use your response to
21 try to go through things to see where we are at
22 on discovery. Maybe you could approach the
23 podium because I'm going to ask you to respond to
24 the various ones that have not been met yet.

25 With regard to -- skipping through your

1 analysis, which I appreciate but don't need to
2 talk about today. Medical examiner's file, that
3 has been disclosed; is that correct?

4 MR. FRANK: That has been disclosed,
5 Your Honor, yes.

6 THE COURT: Independent medical
7 examiners Dr. Michael Baden and Allecia Wilson.
8 Is the State intending on calling those people as
9 a witness?

10 MR. FRANK: I can't say that, Your
11 Honor, right now.

12 THE COURT: Okay.

13 MR. FRANK: Because we don't have their
14 reports either.

15 THE COURT: And what is your position on
16 the request for discovery?

17 MR. FRANK: As we stated, we don't have
18 possession of those, and we don't have control
19 over them. They are not -- we didn't hire them,
20 they're not reporting to us. So under the rules,
21 we do not have any way to compel them to produce
22 it, and I don't think this Court does either,
23 being not part of our staff or being somebody
24 that regularly reports to us, nor a state agency.

25 THE COURT: But if you call them as an

1 expert witness, they're your witness.

2 MR. FRANK: Granted.

3 THE COURT: And you're not going to do
4 that cold.

5 MR. FRANK: Granted. I mean, one of the
6 reasons I can't tell you is I don't have their
7 reports either. We would like to get those
8 reports. We have asked for them, we just don't
9 have the mechanism to force it. And so I think
10 the Court has to deny it at this point. And, you
11 know, subject to the understanding that we are
12 trying, and we understand certainly that if they
13 are our witness, we have obligations then.

14 THE COURT: They're going to be subject
15 to all the expert witness disclosures we talked
16 about earlier.

17 MR. FRANK: I would assume so.

18 THE COURT: If you decide you're going
19 to call them as witnesses, expert -- they are
20 going to be as expert witnesses, they're not fact
21 witnesses. And if you are to tell me that
22 because you don't control them, you couldn't get
23 their reports, they're not going to testify;
24 that's going to be a discovery violation. But if
25 you get their reports, you provide them in a

1 timely manner, you provide CVs and -- the only
2 thing I think we're missing is Mr. Paule, I
3 think, asked for a copy of all autopsies in which
4 they have participated. I'll let him speak to
5 that one point, but otherwise I think we're at
6 the point of if anybody is going to call him as a
7 witness, you've got to get reports, you have to
8 comply with the expert witness disclosures,
9 otherwise they're going to be suppressed. And if
10 they don't want to give you their reports,
11 they're not going to testify, period. All right.

12 MR. FRANK: That's clearly understood,
13 Your Honor.

14 THE COURT: Great.

15 Next, Armed Forces medical examiner
16 file. What's the status on that?

17 MR. FRANK: Your Honor, again, not an
18 agency we have control over. Not a government
19 agency we have control over because it is a
20 federal military agency.

21 THE COURT: How did they become
22 involved?

23 MR. FRANK: I can represent to the
24 Court, I think, that I believe the U.S.
25 Attorney's Office instigated that, requested it.

1 THE COURT: I was wondering given
2 Dr. Baker's military background that he had asked
3 for it.

4 MR. FRANK: Not that I'm aware of, Your
5 Honor.

6 THE COURT: Okay. Because clearly if he
7 had asked for it, I think it would be technically
8 a part of his file and should be turned over.

9 MR. FRANK: I don't think it went in
10 that direction. I'm still trying to figure out
11 what other file there is besides the report we've
12 disclosed, or if everything that medical
13 examiner, and I should say medical examiners, had
14 has already been disclosed. Because my
15 understanding is that agency got records to
16 review, so it may be everything they have has
17 already been disclosed, but I'm still trying to
18 find that out. I think, again, the Court has to
19 technically deny it at this point for the same
20 reasons as Dr. Baden and Wilson, and for the --
21 with the same understandings that if they're
22 called as witnesses, we will have separate
23 obligations because of witnesses to disclose the
24 basis of their opinion and then that would be
25 fair.

1 THE COURT: If they're not going to
2 disclose their file, and you want to -- again, if
3 you're going to call them as a witness, they have
4 to disclose their entire file in a timely manner,
5 otherwise I'm not going to let them testify, or
6 even refer to them in cross-examination.

7 MR. FRANK: Understood, Your Honor.

8 THE COURT: Okay.

9 MR. FRANK: And assuming those expert
10 deadlines apply as well.

11 THE COURT: Yes, expert deadlines apply
12 as well.

13 Okay. We've already talked about the
14 May 6th incident, you're getting what you can and
15 you're going to provide it; is that correct?

16 MR. FRANK: Your Honor, there's a couple
17 of different aspects of this one, the body worn
18 camera we've already talked about. I agree with
19 Mr. Nelson, we are upwards of 35,000 individual
20 Bates numbers. It is ongoing in mass of the
21 discovery and so I really wanted to be able to
22 tell the Court for sure I have that and got it
23 out, I just couldn't get it done yesterday.

24 THE COURT: Understood.

25 MR. FRANK: I have on occasion

1 hand-served counsel with discovery trying to
2 speed --

3 THE COURT: I'm not worried about the
4 documentation, just whether you're going to do it
5 or not.

6 MR. FRANK: We will do it.

7 THE COURT: All right.

8 MR. FRANK: The rest -- Your Honor,
9 they're asking for the prosecution file. You
10 know, the Hennepin County Attorney's Office has
11 indicated they have had no referral of that
12 incident so there's nothing to disclose, and some
13 of that would be probably work product anyway.
14 So we are -- we believe the Court has to
15 completely deny the request for prosecution file
16 and reports.

17 THE COURT: Beyond the police reports
18 and other reports from agencies, it appears that
19 the request is for their like charging memos or
20 things like that.

21 MR. FRANK: Right.

22 THE COURT: I'll ask counsel to speak to
23 that, but generally that is going to be denied as
24 work product. So please don't argue that it is
25 not.

1 All right. Informant files.

2 MR. FRANK: Your Honor, as we argued in
3 our memo, counsel has not come forward with any
4 information to believe that Mr. Floyd was an
5 informant, nor have they come forward with any
6 threshold showing that that would somehow, even
7 if true, be relevant or material to this case.
8 There's no search warrant where information was
9 provided by an informant. There's no allegation
10 that this is related to work as an informant. No
11 allegation that these officers knew whether he
12 was an informant or how could that possibly have
13 any relevance, we don't understand. They
14 certainly have made no showing. I think this is
15 either a boiler plate motion or one just with an
16 attempt to throw informant and gang affiliation
17 out regarding Mr. Floyd.

18 THE COURT: Same thing is true for the
19 gang affiliation?

20 MR. FRANK: Correct.

21 THE COURT: Training video links.

22 MR. FRANK: Your Honor, I will admit
23 that the answer for me personally as a Luddite is
24 I don't know. It's an issue that Mr. Nelson and
25 I think I talked about early on that we do have a

1 lot of PowerPoints in the training videos and
2 some of them appear to have links to videos and
3 they don't work. And I don't know if that's
4 because that's the way we got them or it's the
5 way we disclosed them. I'm still trying to
6 figure that out. We want them equally. And I
7 know we had people trying to figure that out, and
8 we will go back to MPD if there is a format in
9 which they exist that we can disclose them. Some
10 of them, I think, have worked actually, but I
11 will commit to you that we are working on that to
12 figure that out. We would want them as well.

13 THE COURT: All right.

14 MR. FRANK: That's the best I can do
15 today.

16 THE COURT: Committing to work on it is
17 enough for me today.

18 Your state document index. To some
19 extent, this was prepared by members of your
20 staff. I assume defense is talking about
21 basically an index of the 35,000-plus pages. Is
22 that what we're talking about?

23 MR. FRANK: What we refer to as our
24 document index is, you know, a paralegal going
25 through everything and making a list of what it

1 is, that's work product. That's our work, not
2 theirs.

3 THE COURT: As a matter of professional
4 courtesy are you're willing to provide it?

5 MR. FRANK: Not that. Because --

6 THE COURT: That's a lot to throw on top
7 of a bunch of lawyers and say good luck with
8 that.

9 MR. FRANK: Your Honor, if I could
10 prepare a list of what each Bates number is
11 alone, I might be willing to do that as a
12 professional courtesy. But when they ask for a
13 document index, nope, that's our work; it
14 contains work. It's not just a simple table of
15 contents.

16 THE COURT: Okay. Well, that's what I
17 was thinking. Do you have anything like a table
18 of contents you can give them?

19 MR. FRANK: Not currently. Can we
20 produce such a thing?

21 THE COURT: Well, I'm not going to make
22 you because that's not within discovery rules,
23 but if you do, are you willing to turn over a --

24 MR. FRANK: As a matter of professional
25 courtesy, if I can have something like that -- if

1 I have something like that or can produce it, I
2 will try to do that.

3 THE COURT: All right.

4 MR. FRANK: It just can't be ordered.

5 THE COURT: Okay. Well, I agree with
6 you on that, but I would encourage any
7 professional courtesies to make this case go more
8 efficiently.

9 All right. Mr. Chauvin's personnel
10 records. I think this is pretty clear. Question
11 came up in my mind after reading your *Spreigl*
12 notice from yesterday, did those come from
13 Internal Affairs files?

14 MR. FRANK: They did not.

15 THE COURT: Okay. How were they
16 discovered?

17 MR. FRANK: Use of force reports
18 obtained from MPD.

19 THE COURT: Okay.

20 MR. FRANK: And so the specific motion
21 was for the disciplinary file, and then also the
22 pre-hire screening and psychological, that I
23 think is a separate issue. I don't know how the
24 psychological reports and pre-hire prescreening
25 process could potentially have any relevance or

1 materiality to this case. So I think that is
2 just separately...

3 THE COURT: All right. Civil case; it
4 might be relevant, you would agree?

5 MR. FRANK: I think my response mentions
6 in this criminal trial.

7 THE COURT: All right.

8 MR. FRANK: Because, yeah, that may be a
9 different issue.

10 THE COURT: Have you disclosed the final
11 disciplinary -- if discipline was imposed, I
12 believe you said there was...

13 MR. FRANK: So for Mr. Chauvin there was
14 one incident where there was discipline imposed.
15 First of all, let me back up a little bit. We
16 have each personnel file for each officer so this
17 puts us in a little different footing than
18 *Renneke* and *Demers*, I understand. So we
19 disclosed each officer's personnel file to each
20 officer and not the others. They can have their
21 own. And we talked about this early on in the
22 process, I talked to counsel about doing it that
23 way so we can figure out what can and cannot go
24 out. So each counsel has their own client's
25 personnel file that we have.

1 But because of 1343 and *Renneke*, the
2 disciplinary file is a specific -- I think as a
3 specific problem to deal with. And so what we're
4 asking the Court to do, we are willing to
5 disclose the records related to the sustained
6 discipline to opposing counsel. I will tell you
7 that there's not much there, I assume that's
8 because it's old, but that I think because it's
9 public, we can disclose to other counsel. The
10 rest of what I see as the discipline file, the
11 Internal Affairs file, I think has to go through
12 -- well, first of all, any showing that it would
13 be -- lead to relevant or --

14 THE COURT: I can cut to the chase here.
15 You're ordered to disclose anything that falls
16 under 1343(5) final disciplinary action that
17 results in -- or final action. Anything that did
18 not result in disciplinary action is not
19 disclosed under the statute and so I'm not
20 requiring you to do that. You have met the
21 obligation for each individual officer by
22 providing them their files, and I'm going to
23 consider that sufficient under the statute and
24 the rules.

25 Anything else that I've forgotten that

1 you would like to address as far as discovery?

2 MR. FRANK: No, Your Honor. Thank you.

3 THE COURT: With regard to discovery,
4 anybody wish to speak to the issues that were
5 outlined?

6 MR. PLUNKETT: I do, Your Honor.

7 THE COURT: Mr. Plunkett.

8 MR. PLUNKETT: On the ME file, I'd just
9 like to make sure that it's -- it had better be
10 the full file. That's what I'm led to believe,
11 that we have been disclosed the full medical
12 examiner's file, and there's no holdback on that.
13 And I just want to make it clear on the record
14 that's what the request was for. And I took the
15 response to be that they met that -- that they've
16 given us the full file. If we find out
17 otherwise, we'll raise that then.

18 On the two independent pathologists,
19 Forensic Pathologists Baden and Wilson, I've got
20 some concerns about that information. First of
21 all, I did not request it, I don't think it's
22 relevant to the case at all. My concern however
23 is that not having seen their reports, not
24 knowing what's in there, I don't know if they
25 came here to Minnesota and performed an

1 independent autopsy. I will tell you that from
2 what I read in the newspaper, that is what
3 happened. And I shouldn't say newspaper anymore,
4 I should say media generally. In -- is a medical
5 procedure, Your Honor. I have checked with the
6 Minnesota Board of Practices, neither of these
7 people are licensed Minnesota physicians. I
8 don't know what's in there, maybe they didn't
9 come here, but that would certainly be evidence
10 of crime. It would also be a violation of the
11 rules of practice for physicians. I just more
12 than anything, Your Honor, I think that -- I'd
13 hate to sit back and just file a complaint with
14 the Medical Practices Board against their
15 witnesses and these people without fair warning.

16 THE COURT: Well, let's go into this.
17 Doesn't sound like anybody is going to call these
18 people as a witness. If they do, they're going
19 to have to provide their reports. If they don't
20 provide their reports, I'm not going to allow
21 them to call them as witnesses. I'm not going to
22 allow them to try and impeach anybody's opinion
23 with their opinions. It's straightforward. If
24 their names are mentioned in this case, it's only
25 going to be after full disclosure of reports.

1 So I'm not mandating that the State get
2 them. If they get them, they're going to provide
3 them to you. And if they don't provide them to
4 you, obviously that's a discovery violation, but
5 it looks fairly straightforward to me. Any
6 mention of their opinions has to be accompanied
7 by full disclosure. And if it's -- it's not the
8 State's fault because they wouldn't turn it over,
9 well, the answer is they don't get to be
10 mentioned in this trial, pure and simple.

11 So let's kind of defer that.

12 MR. PLUNKETT: Yes.

13 THE COURT: That basically, I think the
14 State is kind of figuring out if they want to do
15 it. They know what my order is. That if we're
16 going to talk about that opinion in any way,
17 shape or form, even through cross-examination
18 that it has to be accompanied by full disclosure
19 beforehand. Let's leave it at that.

20 MR. PLUNKETT: Fair enough.

21 THE COURT: Others.

22 MR. PLUNKETT: Moving forward then to
23 the informant files. Mr. Frank focused on
24 relevance as the standard for disclosure. I
25 disagree with that. I think that it's not -- the

1 duty goes beyond relevant evidence, and I think
2 everybody agrees with that.

3 I do take exception with the suggestion
4 that we only requested, or maybe I only requested
5 the informant files as a boilerplate or some
6 other --

7 THE COURT: Don't worry about that.

8 MR. PLUNKETT: -- just to be mean.

9 Judge, the reason I think there might be
10 an informant file is because we have a person
11 found with a very large amount of drugs --

12 THE COURT: Let's stop you there.

13 MR. PLUNKETT: -- and they're not
14 charged.

15 THE COURT: Let's assume that we have a
16 file -- and I'm not saying he was, I'm just
17 saying for sake of argument, let's say he was a
18 gang member who was a regular informant to every
19 law enforcement agency around. Where would that
20 get us? That doesn't come into evidence on a
21 case where he's being arrested for a counterfeit
22 bill.

23 MR. PLUNKETT: But we're at the
24 discovery state, not the relevance for trial
25 stage.

1 THE COURT: But discovery has got to
2 have some showing that it would lead to
3 admissible evidence, and I'm not seeing it, Mr.
4 Plunkett, to be perfectly honest. And if you can
5 come up with something, but I'm not seeing it so.

6 So other discovery issues? May 6th, I
7 think we've already dealt with.

8 MR. PLUNKETT: I think we have, I wasn't
9 going to bring it up.

10 THE COURT: They're going to bring the
11 body worn camera. Anything else you wanted to
12 address regarding this?

13 MR. PLUNKETT: I disagree with the idea
14 that a document index is work product. I don't
15 think that it shows anything to do with what the
16 attorneys have thought or conclusions or anything
17 like that and I think it should be disclosed.

18 THE COURT: Well, I think summaries can
19 get into the realm of work product, but if they
20 have a table of contents, a pure index that say
21 this Bates stamp is this type of description,
22 they've, out of professional courtesy said they
23 will turn it over.

24 MR. PLUNKETT: Thank you, Your Honor.

25 THE COURT: So if that exists to that

1 extent that does not contain additional
2 information about it. Because that may contain
3 conclusions or theories. Thank you.

4 Mr. Gray, anything you wanted to
5 address? I think we've addressed pretty much
6 everything.

7 MR. GRAY: No, Your Honor. Thank you.

8 THE COURT: Mr. Nelson.

9 MR. NELSON: No, Your Honor.

10 THE COURT: Mr. Paule.

11 MR. PAULE: Yes, Your Honor. Your
12 Honor, if I may cite to my notice of motion and
13 motion to compel discovery filed August 28, 2020
14 at 4:16 just to give --

15 THE COURT: Not 8/24.

16 MR. PAULE: I'm sorry. 8/28/2020 at
17 4:16 p.m.

18 THE COURT: Got it.

19 MR. PAULE: With regard to number one,
20 the complete Minneapolis Police Department
21 disciplinary file on Mr. Chauvin, that may be
22 premature. But if the case is joined, then I
23 think that becomes potentially relevant and
24 material. So I would like to point that out.

25 With regard to the body camera videos,

1 Mr. Frank one afternoon indicating that they
2 provided some materials in discovery, or perhaps
3 said that I wasn't entitled to. As an officer of
4 the court, I told Mr. Frank I would not open it,
5 I would go to my office. Once I would have it, I
6 would drive it over. So I actually took the
7 file, the letter, still sealed, brought it over
8 to their office and waited while their paralegal
9 went through it to make sure whatever may have
10 been on there, that I wasn't entitled to; that's
11 professional courtesy.

12 And I think the idea that they're not
13 going to provide us a document index is very
14 disrespectful to the Court and our time. And I
15 would point out a couple of things. We've been
16 provided multiple copies of the same documents as
17 part of discovery. I'm loathe to throw stones at
18 other people, but in about the fifth copy were
19 the ten pages where there were the notes
20 interviewing the medical examiners. It's either
21 a heck of a coincidence or it's hay stacking.

22 I don't want to play games with
23 discovery this way, I would appreciate the same
24 courtesy from the State. This is going to be a
25 long case and a potentially long trial, and I

1 think the Court has the authority to persuade
2 them to provide us the discovery index. As
3 Mr. Nelson -- I'll let Mr. Nelson talk about the
4 way discovery -- because quite frankly, he's been
5 archiving it and doing it in his own manner. But
6 the idea is that we should -- if it's an open
7 file, we should all get it and we shouldn't be
8 playing games with discovery.

9 THE COURT: Well, I think I did
10 encourage them to --

11 MR. PAULE: You encouraged him, but
12 this --

13 THE COURT: I can't order them.

14 MR. PAULE: -- is not -- I would point
15 this out, I'm a citizen of the State of
16 Minnesota, this is not how I would want my
17 Attorney General's office to be behaving in a
18 case. This is the kind of case where we expect
19 the best out of our profession, and I expect no
20 less from them.

21 With regard to the medical examiner's
22 file, Your Honor. I would again take Mr. Frank
23 at his word that he's provided us everything.
24 With regard to the other autopsies, specifically
25 Mr. Baden -- excuse me, Dr. Baden and Dr. Wilson,

1 I would point out that those are discoverable
2 under subdivision -- excuse me, Minnesota Rule of
3 Criminal Procedure 9.01 subdivision 1(a), which
4 talks about the scope of the prosecutor's
5 obligation.

6 THE COURT: But it refers to people
7 under their control or regularly reporting to
8 them.

9 MR. PAULE: I will quote the rule, and I
10 don't mean to lecture the Court.

11 THE COURT: Oh, I'm fine with that.

12 MR. PAULE: The rule says: "The
13 prosecutor's obligations under this rule extend
14 to material and information in the possession or
15 control of members of the prosecution's staff and
16 any others who have participated in the
17 investigation or evaluation of the case, and who
18 either regularly report or with reference to the
19 particular case have reported to the prosecutor's
20 office."

21 I would note that I have two of three
22 pages of a letter that was sent by Bhavani
23 Raveendran, who is a senior associate with the
24 firm of Romanucci & Blandin, who is the firm that
25 is representing, I think on some level,

1 Mr. Floyd's family in the civil lawsuit. This --
2 and I can show the Court what I have here if the
3 Court would like. But it references medical
4 examiner's findings. This was turned over to us
5 in discovery, which means they've reported to
6 either the county attorney or the attorney
7 general with regard to this case.

8 Also, as Mr. Plunkett points out, both
9 Dr. Wilson and Dr. Baden apparently performed
10 autopsies, which is part of the investigation of
11 this case. For them to now say we don't have it
12 is simply not sufficient.

13 I will point out one other thing. I
14 think what -- I filed the motion requesting
15 discovery specifically of the complete medical
16 examiner's file, although that's something that
17 should have been turned over in the regular
18 course of discovery. When I called Mr. Frank to
19 inquire before I filed that motion, his response
20 was, we've requested it but we don't have it.
21 And this is approximately three months or so
22 after this incident, and they've been meeting
23 with them. The Department of Defense had no
24 problem getting a copy of that file. I think
25 it's hard pressed that the Attorney General's

1 Office couldn't get a copy of that file quicker
2 than that if they wanted to.

3 Now, again, I'm not trying to tell
4 Mr. Frank how to do his job, but the idea that we
5 don't have that, and we don't have any mechanism,
6 sure they do. They have subpoena power. They
7 have grand jury. They can do all kinds of things
8 if they wanted to. The Court is very familiar
9 with this.

10 THE COURT: Well, Mr. Paule, you have
11 subpoena power, too.

12 MR. PAULE: I do.

13 THE COURT: I guess let me just stop you
14 there. Because I know what you're saying, that
15 they come under the rubric of Rule 9.01 because
16 they're now part of the investigation because
17 they did investigatory work.

18 MR. PAULE: With the --

19 THE COURT: I understand. I disagree,
20 though, because they are independent medical
21 examiners hired like any other physician by the
22 family for a civil investigation; it is not a
23 part of the criminal investigation. To the
24 extent that it becomes a part of this case by
25 someone trying to call them as a witness, I kind

1 of made it clear that that's not going to happen
2 without full disclose in a timely manner. So I'm
3 going to leave it at that. I'm not going to --
4 I'm going to -- I'm not going to hold that 9.01
5 requires that they obtain it and disclosure it at
6 this time.

7 MR. PAULE: May I make one other point
8 at least for the record?

9 THE COURT: For the record.

10 MR. PAULE: I know, because of a
11 newspaper article -- again, whether it's
12 newspaper or media I don't know, but that both
13 Mr. Ellison and Eric MacDonald, U.S. Attorney for
14 the District of Minnesota, traveled down to
15 Houston to meet with the Floyd family accompanied
16 by representatives of his civil team. So the
17 idea that they're not regularly reporting or
18 participating in the investigation I think
19 strains credulity at least on my part.

20 THE COURT: I think traveling together
21 to a family meeting does not convert it into
22 working together on a criminal case. As a former
23 prosecutor in one of my lives, regularly you meet
24 with families, sometimes they bring a lawyer
25 along with them, and you never keep -- cross the

1 boarder and say I'm representing you as a victim,
2 I'm representing you as a family. It was always
3 represent the State of Minnesota, your lawyer is
4 here, we'll talk, it's more convenient that we
5 have one meeting. I'm not agreeing with you on
6 that, Mr. Paule, so the ruling stands as is, but
7 I acknowledge your right to make that record.

8 MR. PAULE: Thank you, Your Honor.

9 THE COURT: All right. Anything else
10 regarding discovery, otherwise I think we're
11 ready to move on. We are getting close to noon.
12 The motions we have left, there's some
13 administrative matters I'm just going to talk
14 about briefly, and then we'll get back to *Blakely*
15 and see whether we want to power through that.

16 But let me make clear what -- let me go
17 through the discovery orders that I made. With
18 regard to the Hennepin County Medical Examiner's
19 file, disclosure is complete. Any further
20 reports will be disclosed as soon as possible.

21 With regard to the independent medical
22 examiners Dr. Baden and Wilson, the State has
23 requested reports from them. They will provide
24 them, anything they receive from those doctors.
25 And unless and until they provide the reports and

1 all the necessary components of an expert
2 witness's testimony, including a CV, they will
3 not be called as witnesses by any party, nor will
4 their names or their findings be mentioned in
5 cross-examination. Unless and until the Court
6 gives permission finding that the disclosure was
7 made.

8 The Armed Forces medical file, it's my
9 understanding that it's being requested. I don't
10 find that they're under control of the State or
11 the State obtains that, they'll provide it to
12 counsel as soon as possible. They're under the
13 same restriction. If they don't provide their
14 reports, they're not testifying. Their findings
15 are not going to be brought out on
16 cross-examination.

17 Body worn camera footage. Sounds like
18 the State is willing to provide everything from
19 the May 6, 2019 incident that they can get.

20 As far as informant files and gang
21 files, the request by the defense is denied in
22 its entirety.

23 Training video links. I trust the State
24 to continue to work on getting the videos. I
25 think the State has as much of an interest in

1 seeing those videos as does the defense.

2 The document index. Again, professional
3 courtesy, I hope the State would provide an index
4 if it exists. But I understand that their
5 current index, if we can call it that, is much
6 more than that. So I'm not going to require the
7 State. I don't think that the discovery -- in
8 fact, I'm ruling that the discovery rules do not
9 require that. But certainly anything you can do
10 to assist in organizing the documents that you
11 feel would not prejudice you in any way,
12 Mr. Frank, I would appreciate the disclosure.
13 Again, I cannot order it under the rules.

14 Mr. Chauvin's personnel records. The
15 State is required to disclose anything that falls
16 under 13.43(5), disciplinary matters that
17 actually resulted in discipline including the
18 full factual basis of it.

19 I think that pretty much goes through
20 most of the discovery issues. Now, just a few
21 things to clean up before we get to *Blakely*, I've
22 not forgotten.

23 Jury selection, it's going to be
24 sequestered selection, that is one by one on the
25 witness stand. I do anticipate we will do

1 questionnaires ahead of time. Number of
2 peremptories generally in a single trial is five
3 and three. And if we have individual trials
4 that's what it will be. If there's a joint
5 trial, we will adjust accordingly. And I think
6 it's fairly discretionary with the Court on the
7 number of peremptories in a joint trial, but
8 we'll get to that -- we'll cross that bridge if
9 and when we come to it.

10 In court presence. I appreciate that
11 we've made this courtroom work. It may not be
12 our courtroom for trial, we'll have to see --
13 we'll have to essentially as a court figure out
14 did this work for the purposes of trial as well.
15 So we're going to go through that analysis. But
16 in any case, we are planning, and I would ask
17 counsel to plan with the understanding this is
18 likely still going to have COVID-19 restrictions,
19 as far as spacing on juries and everything else,
20 and all the Plexiglass that we have will probably
21 be in place. We will also have overflow rooms at
22 a minimum for family members of all parties, and
23 that includes the Floyd family obviously. They
24 will be separate family rooms. There will be a
25 media room for overflow audio and video.

1 One request I would ask you to all think
2 about, and actually this would include the media.
3 If anyone is planning on ordering overnight
4 transcripts, number one, think carefully about
5 it, but if you're going to do that we need to
6 know ahead of time because that determines how we
7 staff our court reporter. Ms. Carmichael is not
8 superwoman, she's close, but she's not
9 superwoman, and she cannot do a full day of trial
10 testimony and then overnight transcripts. So I'm
11 not asking you to give me an answer now, but you
12 better tell me by October 1st if you're planning
13 on having -- putting in requests for overnight
14 transcripts.

15 Trial length. I'd also like -- and I
16 know you're still plowing through discovery.
17 I've just, by guess more than anything else, said
18 two weeks for jury selections, four weeks for
19 trial. And if anybody thinks that that's wrong,
20 for example, if the State has kind of an idea at
21 some point closer to trial how many weeks it will
22 take for their case, and then defense can kind of
23 give me an idea of their case, and I know things
24 are still in flux so I'm not even going to ask
25 you for an estimate at this point. But just so

1 you know what I'm doing for planning purposes,
2 I'm planning six weeks. So -- but obviously that
3 can change.

4 Now, it is noon. If the parties would
5 like to break for lunch and come back, I'd prefer
6 we simply plow through and talk about *Blakely* a
7 little bit. Let's plow through.

8 Mr. Frank, if you would take the podium,
9 please. All right. We have notices in each of
10 the defendant's case, notices of intent to seek
11 an aggravated sentence pursuant to *Blakely*
12 *versus Washington*, and there are five grounds
13 that are stated. And are they identical for all
14 four defendants?

15 MR. FRANK: The grounds are; the
16 descriptions vary a little by defendant.

17 THE COURT: All right. Well, it kind of
18 is a good segue into what I'm going to start by
19 asking. Let's start with the first proposed
20 factor was that George Floyd was particularly
21 vulnerable because, and then you have your
22 factual basis. Essentially, are those the
23 questions you would want submitted to the jury?
24 For example, one, did the officers have him
25 handcuffed behind his back and he -- and then was

1 placed down on the pavement. And, two, did he
2 clearly and repeatedly tell the officers he could
3 not breathe? Are you anticipating that those are
4 the questions that would support that factor?

5 MR. FRANK: So, Your Honor, I don't know
6 that we have clear case law requiring that level
7 of special interrogatory to the verdict -- or to
8 the jury as we do with particular cruelty under
9 *Rourke*.

10 THE COURT: Well, I was going to say, I
11 think *Rourke* says otherwise because *Rourke* --
12 because the jury does not have the collegial
13 experience of the court which was when the
14 guidelines were first passed and judges made all
15 these decisions.

16 MR. FRANK: Right.

17 THE COURT: I could tell you if
18 something was significantly more serious than the
19 typical homicide because I've done a few, jurors
20 haven't. So to ask them was this particularly
21 vulnerable, or was this person particularly
22 vulnerable, that is more vulnerable than a
23 typical victim. Was it particularly cruel
24 because it involved, you know, torture or conduct
25 above and beyond a typical -- and the jurors,

1 what do they know from typical? I think you see
2 the emotional reaction to something, but that
3 doesn't give you the answer. So you're
4 anticipating my question by citing *Rourke*, so
5 what do you think?

6 MR. FRANK: If we're going to impose
7 *Rourke's* reasoning on the particularly
8 vulnerable...

9 THE COURT: And I am.

10 MR. FRANK: And if that's a decision the
11 Court has made, I don't know that I would commit
12 to saying those would be the only questions we
13 would ask. We might want to refine those.
14 Again, this is a notice and --

15 THE COURT: Well, it does require that
16 you have notice so that I can make the finding.

17 MR. FRANK: It's a finding that it's an
18 appropriate basis, aggravating factor or sentence
19 -- sentencing factor to go forward on, but when
20 it comes to writing the actual interrogatories or
21 verdict forms to the jury, I'm not sure I want to
22 be held to just how it's stated in this notice.

23 THE COURT: Well, let me just -- I'll
24 just briefly going to Rule 11. I don't have it
25 handy. Sorry for the delay.

1 MR. FRANK: So, Your Honor --

2 THE COURT: Do you have the rule? Could
3 you cite the rule for me and what the standard
4 is? Or, I'm sorry, 703, not 11. The notice --

5 MR. FRANK: I have that, too, I believe.

6 THE COURT: Okay.

7 MR. FRANK: So 703 must give written
8 notice at least seven days before the OH of an
9 intent to seek an aggravated sentence. Notice
10 must include the grounds or statutes relied upon
11 in a summary statement of the factual basis
12 supporting the aggravated sentence.

13 So our point in the notice was to
14 essentially assert enough facts for this Court to
15 say, yes, there's a basis to go forward on this.
16 I think the reason -- well, there may be several
17 reasons why this was put in the omnibus hearing
18 rule at this stage so going forward parties know
19 that there are -- these issues are out there.
20 Not to commit to the exact verdict form as how
21 it's going to look, I --

22 THE COURT: Well, the only reason I
23 bring it up is, to be perfectly honest, your
24 factual basis doesn't support particular
25 vulnerability.

1 MR. FRANK: Your Honor --

2 THE COURT: Just being honest.

3 MR. FRANK: -- I think a man who is
4 handcuffed, has been pulled out of his car at
5 gunpoint and handcuffed and despite claiming
6 various physical conditions -- I'm trying not to
7 be too descriptive, Your Honor.

8 THE COURT: No, and I get what you're
9 saying. But the problem is the factor is not
10 just particular vulnerability. It's particular
11 vulnerability due to a physical or mental
12 infirmity, and I know of no case where that
13 vulnerability is developed mid crime. If
14 anything, I think there are a few cases that say
15 otherwise. It appears at *Gardner*, for example, a
16 woman was being raped and said I thought I was --
17 I essentially became vulnerable because she
18 thought she was having an epileptic seizure.
19 Some parallels here that Mr. Floyd may have been
20 in medical distress. The Court said that's not
21 particular vulnerability because it was not a
22 substantial factor exploited by the defendant.

23 MR. FRANK: These defendants had
24 Mr. Floyd --

25 THE COURT: I'm aware of the facts.

1 Tell me why they make him vulnerable.

2 MR. FRANK: Because he can't save his
3 own life. Because he can't fight back. There's
4 three officers, police officers sitting on him,
5 handcuffed, holding his arms back.

6 THE COURT: Well, aren't we
7 conflating --

8 MR. FRANK: While another officer is
9 holding back people who are trying to help him.
10 He can't help himself.

11 THE COURT: The problem I have, I think
12 you're conflating particular cruelty, position of
13 authority, and three or more persons involved in
14 a crime. You just said, well, he was vulnerable
15 because they had three people on him. Well,
16 that's the whole reason behind three or more
17 parties participating in a crime, it makes the
18 victim more vulnerable because they have more
19 people that are -- I'm not saying you don't
20 have --

21 MR. FRANK: With all due respect.

22 THE COURT: -- *Blakely* factors here.

23 MR. FRANK: I think the Court may be
24 conflating the question of whether it's an
25 appropriate question to submit to the jury, and

1 what the Court uses to decide how much to
2 aggravate a sentence. Because that's ultimately
3 the Court's choice. If the Court feels there's
4 some overlap, then the Court takes that into
5 consideration. But what we're dealing with here
6 is whether to submit this to the jury to decide
7 under *Blakely*. Because we have to have those
8 facts in order to argue later. How you decide as
9 a judge, you know, how a judge decides how much
10 is the Court's ultimate decision. That's what I
11 think you're talking about in terms of overlap if
12 that's what you mean.

13 THE COURT: Well, what I'm talking about
14 here is I'm doing an analysis under 11.04
15 subdivision 2(a) says that it is the duty of the
16 court -- the court must determine whether the law
17 and proffered evidence support an aggravated
18 sentence. The court must also determine to
19 conduct a unitary or bifurcated trial. It
20 doesn't say anything about -- what I'm saying is
21 even accepting your proffered facts, that does
22 not support particular vulnerability. It may
23 support particular cruelty. It may support three
24 or more persons involved in a crime. It may
25 support position of trust and authority. I'm

1 just saying for this one to characterize it as
2 particular vulnerability is conflating the facts
3 with different factors.

4 And I note the *Gardner* case because I've
5 talked about someone who essentially became
6 vulnerable in the midst of a rape, and they said
7 that's not -- the whole idea of particular
8 vulnerability, at least from my experience has
9 been that it's to punish those who prey on the
10 weaker, people who are clearly weak, either due
11 to physical or mental infirmity, and they take
12 advantage and exploit that vulnerability, and it
13 becomes then, as the case law calls it, a
14 substantial factor. That's my analysis that I'd
15 like you to respond to.

16 MR. FRANK: And what happened here is
17 they took this man out of his car, you know --
18 hardly being -- well, they handcuffed him behind
19 his back. And they used three individuals, first
20 of all, try to stuff him into the car, they get
21 him out and they hold him to the ground. And all
22 three of them hold him on the ground while
23 Mr. Thao holds them away. That is vulnerability
24 because he's handcuffed and he's thrown on the
25 ground with three people on top of him. And

1 that's where the crime is. That's where they
2 caused his death. At that point he's completely
3 vulnerable, there's nothing he can do. In fact,
4 he isn't even physically trying to fight back.
5 He doesn't want to get in the squad car, but he's
6 not fighting. He's held down by three people who
7 are sitting on top of him, wrenching his arms
8 back which are handcuffed behind him. He's
9 completely vulnerable; he can't move to breathe.

10 THE COURT: But the case law does say
11 not based on position or not based on restraint
12 during the crime, it says because of a physical
13 or mental infirmity.

14 MR. FRANK: His physical infirmity is he
15 can't move.

16 THE COURT: Okay. As far as the others,
17 I don't have any questions. It appears that you
18 have made a showing on particular cruelty
19 position of trust and authority, but I'll also
20 hear from defense on that because I do have a
21 question on that.

22 Position of trust and authority is the
23 way the case law, in fact, it developed first out
24 of position of trust. Then it started to be
25 talked about in *Lee* and *Carpenter* and some other

1 cases as trust "and" authority, and now you're
2 basically saying authority.

3 MR. FRANK: Correct.

4 THE COURT: Is there any case law that
5 providers that simply authority -- because I
6 think we can all agree that based on Mr. Floyd's
7 statement when Mr. Lane came up to the window is
8 that he did not trust the police. So I don't
9 think you can say they were in possession of
10 trust vis-à-vis each other.

11 MR. FRANK: Well, I don't know that I
12 would -- well, maybe I would agree with that. We
13 don't know if George Floyd trusted the police.
14 What we do know is he followed his commands, he
15 followed the officers' commands.

16 THE COURT: Let's do this. Position of
17 authority. Let's talk about position of
18 authority.

19 MR. FRANK: He's following commands. In
20 fact --

21 THE COURT: I'm not disagreeing with you
22 that you don't have a factual basis for position
23 of authority. I'm asking you purely a legal
24 question. Is solely being in a position of
25 authority ever recognized in any case law as an

1 independent aggravating factor?

2 MR. FRANK: From trust, I can't cite
3 that to you right now, Your Honor. I'm happy to
4 look and --

5 THE COURT: Yeah, because --

6 MR. FRANK: -- I don't see why that
7 would be dispositive. It's a position of -- it's
8 a position of authority. It's the same thing,
9 it's taking advantage of your position given to
10 you as authority, as an authority figure. And
11 when they tell him to get out of the car,
12 certainly they're going to characterize all that
13 conduct differently, I understand that. But he
14 follows commands, he walks over there, he sits on
15 the sidewalk, he walks across the street. It's
16 when he starts expressing frustration or his
17 claustrophobia at being put in the back of a --
18 never been in the back of a squad car, but they
19 are tiny, you can see that -- that this whole --
20 I mean, the thing started out going bad, but he's
21 following commands.

22 THE COURT: And I guess I'm just
23 following the trajectory of the initial case law
24 which, for example, *State versus Campbell*, that's
25 367 N.W.2d 454. That was back in the mid '80s

1 when they were talking strictly about a position
2 of trust and someone you trust violates that
3 trust, allows you to get into their life, make
4 you a victim because you trusted them. It then
5 started to develop with other cases, *Lee* and
6 *Carpenter*, using the phrase trust and authority,
7 which I don't know where it came from, it seemed
8 to just kind of evolve and maybe we're just
9 getting sloppy with our terminology. So my
10 question is, and I'm not saying you don't have a
11 valid point, I'm just saying is there any case
12 law, do I have any authority for the proposition
13 that position of authority alone can be an
14 aggravating factor?

15 MR. FRANK: I can't cite that right now,
16 Your Honor.

17 THE COURT: I'm going to give you time
18 to maybe get a little more on these, so that's
19 fine.

20 MR. FRANK: And, of course, our juris
21 prudence on aggravating sentences has changed
22 considerably since the '80s, as we all grew up
23 with departures and what these reasons should be.
24 And I see no reason why position of authority
25 isn't any more legitimate than...

1 THE COURT: We have enough gray hair to
2 remember when they were called the new sentencing
3 guidelines -- and Mr. Gray before guidelines.

4 MR. GRAY: Thank you.

5 THE COURT: Anything else on aggravating
6 factors? I'd like to hear from the defense on
7 some of these as well.

8 Anybody wish to speak to the aggravating
9 factors?

10 Mr. Paule. Because I will allow you to
11 brief it as well. And I don't think we need a
12 tight time frame on this since we're talking
13 about aggravating factors, which would be at the
14 end of a trial, and much of the evidence would be
15 in a trial anyway. And if not, it would be part
16 of a bifurcated trial.

17 Mr. Paule.

18 MR. PAULE: I totally understand that,
19 I'm just talking as a threshold matter. The
20 Court issued a scheduling order ordering them to
21 make --

22 THE COURT: Correct.

23 MR. PAULE: -- notices. They're way
24 beyond that.

25 THE COURT: Okay. Well, I think they

1 said the rules require omnibus. So if my
2 scheduling order is tighter than that, it's a
3 violation of the scheduling order, not the
4 omnibus hearing rule; would you agree with that?

5 MR. PAULE: I would agree. But the
6 scheduling order specifically said shall be
7 completed. Failure to make timely disclosure
8 will presumptively develop into the preclusion of
9 any matter not disclosed. I would assume that
10 goes to notices as well.

11 THE COURT: Okay.

12 MR. PAULE: I think the Court can view
13 that any way it wants.

14 THE COURT: Well, it say "may
15 presumptively," but given the amount of discovery
16 in this case, I think I would be hard pressed to
17 hold the State to that, to be honest.

18 MR. PAULE: The only thing I will say,
19 and, again, I mean no disrespect. The rules
20 apply to both sides.

21 THE COURT: And I think I've given
22 enough leeway to both sides, so we'll go with
23 that. And if not, you need to tell me that.

24 MR. PAULE: I will.

25 THE COURT: Mr. Gray, anything you'd

1 like to say?

2 MR. GRAY: Well, Your Honor, I'd like to
3 correct the record. My client did not pull out
4 Mr. Floyd at gunpoint. As the Court has seen the
5 video --

6 THE COURT: He holstered --

7 MR. GRAY: He put the gun back in his
8 holster.

9 THE COURT: Yeah, I understood that.

10 All right. Anything else for the good
11 of the order?

12 MR. NELSON: Briefing schedule.

13 THE COURT: On *Blakely*, I would like the
14 State to take a month. And if possible, I would
15 actually encourage the State to think of
16 interrogatory questions because I think it does
17 inform. I will not give the jury -- Mr. Ellison,
18 could I talk to Mr. Frank for a little bit first.
19 Thank you.

20 I would appreciate that we have
21 questions because that could guide the decision.
22 I'm not going to give the jury, was this
23 particularly cruel. *Rourke* says that's not the
24 way we do things. And in my experience since
25 *Rourke* it is not the way we've done things. But

1 I would appreciate if as early as possible we can
2 start talking about this in case it comes to
3 that. I don't want to be doing last-minute
4 thoughts on what we submit to a jury.

5 Okay. Anything else? Otherwise, we
6 have a trial date set, we may be setting up a
7 hearing for motions *in limine* closer to the trial
8 date.

9 MR. NELSON: Our responsive time to
10 that?

11 THE COURT: One month. Like I say, I
12 don't think this requires a tight timeframe in
13 response. So a month for the State; a month in
14 response for the defendants. And if you wish,
15 you may submit a joint response. But since I
16 think -- well, you did say the facts were
17 different -- alleged, Mr. Frank, so however you
18 want to do it, you have a month.

19 MR. GRAY: How much time, Your Honor?
20 How much time after we receive the body camera on
21 the May 2019 issue do we have to submit a brief
22 on the *Spreigl*?

23 THE COURT: If the State can give you
24 notice of when that happens, I'll give you a
25 month.

1 MR. GRAY: Okay.

2 THE COURT: A month from the date of
3 receipt.

4 MR. GRAY: Thank you.

5 THE COURT: Any other motions that we
6 can resolve today, otherwise we'll stand
7 adjourned for now until March 8th.

8 (Clerk confers with the Court.)

9 THE COURT: Mr. Schaefer, who keeps
10 track of all things better than I do. With
11 regard to the *Spreigl* notice, if defense feels it
12 does have any effect on your joint trial
13 analysis, I'll give you two weeks to -- and it
14 can be letter brief if you wish. You don't have
15 to file a formal response. If you think that
16 somehow that affects the calculus on a joint
17 trial, I'll give you two weeks to submit a letter
18 brief. Nothing further.

19 And, everybody, please remember the
20 scheduling order does have how you're supposed to
21 serve the Court. Mr. Gray's office has been
22 doing it, the State's been doing it. Everybody
23 else, you're supposed to CC me and staff in the
24 CC line of the e-filing system itself. Okay.
25 We've been getting everything, but it's not easy.

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Mr. Frank.

MR. FRANK: Just one issue. The County Attorney's Office would like the Court to revisit the disqualifying of all of those individuals. I'm assuming the Court --

THE COURT: I'll entertain a motion for them, and they show up for it. They can schedule it with my office.

All right. Thank you. We're adjourned.

(Proceedings concluded at 12:17 p.m.)

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CERTIFICATE

STATE OF MINNESOTA)

COUNTY OF HENNEPIN)

I, Dana M. Carmichael, an Official Court Reporter for the District Court of Hennepin County, Fourth Judicial District of Minnesota, reported in machine shorthand the proceedings had on the hearing in the above-entitled cause and transcribed the same by Computer Aided Transcription, which I hereby certify to be a true and accurate transcript of the proceedings had before District Court Judge Peter A. Cahill.

Dated: October 9, 2020.



Dana M. Carmichael

Official Court Reporter