

State of Minnesota,
Plaintiff,

**STATE'S MEMORANDUM IN
SUPPORT OF ITS MOTION
FOR A PRETRIAL ORDER
PROHIBITING
EXTRAJUDICIAL
STATEMENTS BY TRIAL
PARTICIPANTS**

vs.

Amity Lebaube Foster,
Shannon Lee Bade,
Pamela Ann Twiss,
Jie Wronski-Riley,
Michael Anthony McDowell,
Mica Lauren Grimm,
Adja Sara Gildersleve,
Nekima Valdez Levy-Pounds,
Kandace Leanne Montgomery,
Todd Allan Dahlstrom, and
Catherine Claire Salonek,
Defendants.

District Court #: 27-CR-15-1346
District Court #: 27-CR-15-1350
District Court #: 27-CR-15-2766
District Court #: 27-CR-15-1349
District Court #: 27-CR-15-1320
District Court #: 27-CR-15-1829
District Court #: 27-CR-15-1335
District Court #: 27-CR-15-1307
District Court #: 27-CR-15-1304
District Court #: 27-CR-15-1331
District Court #: 27-CR-15-1326

INTRODUCTION

“It does not follow ... that the need to restrict publicity is lessened when the publicity is caused by the actions of the defense, rather than the prosecution.”

Levine v. U.S. D. Ct., 764 F.2d 590, 596-97 (9th Cir. 1985).

“Under the Sixth Amendment, a criminal defendant is entitled to a fair and impartial jury, not a jury whose views have been deliberately manipulated by outside influences to be biased in his or her favor.”

Eileen A. Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 20 U.S.F.L. Rev. 95, 115-16 (1995).

The State seeks a pretrial order prohibiting trial participants from making extrajudicial

statements relating to the case, otherwise commonly referred to as a “gag order.”

FACTS

Defendants, members of the organization “Black Lives Matter, Minneapolis,” are charged with up to eight misdemeanor offenses, including Trespass, Presence at an Unlawful Assembly, Disorderly Conduct, and Public Nuisance. The charges resulted from an unlawful protest at the Mall of America (MOA) on December 20, 2014. The case has generated significant media interest, undoubtedly due to the public nature of the protest.

Defense attorneys and Defendants have engaged in a substantial and ongoing media blitz. For example, on January 5, 2015, Black Lives Matter members attended a Bloomington City Council meeting and Defendant Levy-Pounds was interviewed on the news afterward.¹ On January 14, 2015, Defendant Levy-Pounds held a press conference after the charges in this case issued and requested that the local media cover it.² On January 19, 2015, Defendant Levy-Pounds wrote an article in the Star Tribune, entitled “Letter from a Bloomington Jail (Metaphorically Speaking).”³ On January 21, 2015, Defendant Levy-Pounds was interviewed by Minnesota Spokesman Recorder (MSR) about this case.⁴ On January 22, 2015, Defendant Levy-Pounds was extensively interviewed by Minnesota Lawyer about this case.⁵ On February 20, 2015, defense attorney Bruce Nestor and Defendant Grimm were interviewed on Minnesota Public Radio about the case.⁶ On March 13, 2015, Defendant Levy-Pounds was interviewed about this case on TPT’s Almanac program.⁷ On March 15, 2015, Defendant Levy-Pounds

¹ <http://minnesota.cbslocal.com/2015/01/05/black-lives-matter-group-hits-bloomington-city-council-meeting/>

² <http://nekimalevypounds.com/press-conference-scheduled-by-nekima-levy-pounds-at-7pm-to-address-the-criminal-charges-filed-by-bloomington-city-attorney-sandra-johnson/>

³ <http://www.startribune.com/local/yourvoices/288864961.html>

⁴ <http://spokesman-recorder.com/mall-protester-levy-pounds-vows-fight-charges/>

⁵ <http://minnlawyer.com/2015/01/22/for-civil-rights-attorney-kudos-and-criminal-charges/>

⁶ <http://www.mprnews.org/story/2015/02/20/bcst-black-lives-matter-mall-of-america>

⁷ <http://video.tpt.org/video/2365443005/>

spoke to a church group and talked about this case.⁸ Finally, though not an exhaustive list, on March 25, 2015, Defendant Levy-Pounds tweeted about this case.⁹

Even more troublesome than the sheer volume of the media in this case is Defendant Levy-Pounds' inaccurate statements regarding her charges and the possible penalties and her mischaracterizations of the case. For instance, during her MSR interview in January, Defendant Levy-Pounds stated that the charges against her "carry a maximum penalty of two years in prison and an \$8,000 fine."¹⁰ She went on to state that the case is "retaliatory in nature because I have been outspoken in the media about the tactics being used by Johnson and the Mall of America."¹¹ On March 25, 2015, in response to the MOA's "#It'sMy Mall" campaign, Defendant Levy-Pounds tweeted: "Well the Bloomington City Attny didn't get the memo. She charged me with w/11 misdemeanor counts for being there on Dec. 20."¹² She went on: "if #It'sMyMall, how come over 30 of my peeps were arrested for declaring #BlackLivesMatter in the Rotunda?"¹³ She again accused the City of Bloomington of retaliation in her speech at Joan of Arc church in March.¹⁴

Defendant Levy-Pounds has been charged with eight misdemeanor offenses, not 11, and the maximum penalty is up to 90 days in jail and/or a \$1,000 fine, not 2 years in prison and an \$8,000 fine. Similarly, only 22 adults (and three juveniles) were arrested at the event, not more than 30, as she claimed. The real facts are nowhere near the exaggerated numbers provided to

⁸ <http://nekimalevypounds.com/joan-of-arcs-pre-mass-speaker-nekima-levy-pounds-sunday-march-15-2015-900am-to-1000am/>

⁹ <http://www.kare11.com/story/news/2015/03/25/mall-of-america-acknowledges-confusion-on-social-channels-after-new-hashtag-backfires/70458166/>

¹⁰ <http://spokesman-recorder.com/mall-protester-levy-pounds-vows-fight-charges/>

¹¹ *Id.*

¹² <http://www.kare11.com/story/news/2015/03/25/mall-of-america-acknowledges-confusion-on-social-channels-after-new-hashtag-backfires/70458166/>

¹³ *Id.*

the media by Defendant Levy-Pounds.

In March, Defendant Levy-Pounds appeared on Almanac—at her own request. She also requested that the City Attorney appear with her to discuss the case; but due to the pending charges and the Rules of Professional Conduct, the City Attorney declined. Defendant Levy-Pounds appeared on the program regardless and during the interview called for an event permitting process at MOA. This mischaracterizes the truth, as there is a process by which groups may obtain permission to hold events at MOA. Black Lives Matter did not submit a request through that process, though, due to their longstanding policies prohibiting protests, MOA would have denied it if they had. But Defendant Levy-Pounds reported in the media that there is no mechanism by which this may be done.

Finally, Defendant Levy-Pounds constantly reports in the media two other fallacies: first, that the protest was met with “riot police” and second, that the police were the ones who closed stores and locked down the mall that day. The Bloomington Police Department unequivocally did not respond to this unlawful protest in riot gear. The officers had helmets with face masks (which turned out to be necessary when they were spit on and had water bottles thrown at them) and flexi-cuffs. Those are the only two variations from their standard patrol uniforms. Finally, the police had no say over which businesses closed during the protest and which remained open. It is the State’s understanding that MOA communicated with its tenants ahead of the protest regarding the tenants’ options, but the police did not call for stores to be closed or the mall to be locked down. Any allegations to the contrary are simply untrue.

The plethora of media interviews and articles instigated by the defense (without even reaching social media posts and comments) has resulted in extensive public comment on various

¹⁴ <http://nekimalevypounds.com/joan-of-arcs-pre-mass-speaker-nekima-levy-pounds-sunday-march-15-2015-900am->

media websites. A sampling follows:

Comments Posted on KSTP website after City Council Meeting Story:

- Not only should these racists be charged, they should have their wages garnished as well as their tax returns until all of those stores are repaid and the police overtime and MOA losses are repaid.

The racist protest was illegal and someone needs to be held responsible.

And the next time these professional/racist agitators block 35W, they should clear the road with a snow plow.

- The group 'Criminal Lives Matter' needs to find a different approach than breaking the law to get their point across.
- Apparently these people will not be satisfied until it is deemed a hate crime to enforce the law. The good news is that they are just a few idiots and the vast majority would vote to crush their efforts. They do not stand a chance. And don't give me this crap about "this is how you bring about change". When "change" was brought about historically it was the MASSES that found themselves legitimately discriminated against. These people are criminals. People who support them are criminals. Good people need to stand up against this crap.
- Stick it to 'em Bloomington! There are consequences to un-lawful actions!
- "Black Lives Matter" Protesters Were Warned In Advance.
They Were Even Given Permission To Protest On MOA Property Outside, Which The MOA Did Out Of Kindness And Safety To The Group.
But The BLM Protesters Choose To Violate The Law, Disrupt A Private Enterprise That Had Absolutely Nothing To Do With The Death Of 2 Negro Over-Sized Thugs Hundreds Of Miles Away. Americans Are Sick Of BLM.
- The logic of this group is contrary to common sense. They say they stand with... what? The citizens have been repeatedly assaulted by these people. The BLM group has shut down transportation, imposed a massive financial burden on the municipalities they demonstrate in, interfered with the commerce of honest, hard - working citizens causing them loss of income and added expenses in day care, medical transportation, emergency response delays, etc. People who were in the mall that day were detained for safety reasons causing disruption of family plans and extreme frustration. The young lady in the film clip cares not one bit for the citizens, but is selfish beyond belief. They have made heroes of violent criminals. Prosecute and jail 'em.

Comments Posted on the Star Tribune article "Letter from a Bloomington Jail":

- You need jail time to get your head right.
- Diversity is not violating the law by infringing on someone else's private property rights. Diversity is not trying to make others uncomfortable by forcing yourself into their space. I believe in equality, I believe in diversity, I believe that if there is injustice, it needs to be addressed and fixed. Acting this way is diverting from the real issues these protestors are trying to address. I'm surprised Ms. Levy-Pounds is not better at communicating than this. . . . What you did at the MOA was not effective at getting your message across.
- Let's say you owned the MOA, with the primary purpose of making money by leasing space to tenants. Groups want to use your space for demonstrations, having the potential to disrupt your tenants. Would you let this group proceed knowing others will expect the same access? Would you set that precedent? And if they did it anyway, would you let them off the hook, encouraging others to walk all over you? Highly doubtful but if your mall, do what you want.
- Yes I would let them use my mall. I would make sure people knew the ground rules like keep it peaceful, don't use profanity, etc. I would feel obligated to let the people speak because they gave me their hard earned money to build my mall for me. Then they gave me even more of their hard earned money to build me a light rail stop and freeway ramps to serve my mall. I'd feel obligated to allow my mall to serve as a town square. It's the least I can do for the people. I'm grateful to them.
- The protesters had the opportunity to come in and show the MOA they could act that way. They didn't and proved the MOA right in denying the request.
- I was there. The roving chants or "F the Police" by many in the group as they marched around the malls common area shows "your" rules of no profanity may not work. I was there, and people were offended and taken aback and scared. This is no different than if I showed up at your driveway and my friends and I did a die in about the time you had to get to work, or a loved one had to get to a hospital. Or even if we did it right on the curb line on the public street. These fools are messing with innocent people living their lives. Private property IS NOT a public square. A city park is, sidewalks are, a rented community center could be. But all this group is doing is showing their poor behaviors, and total lack of knowledge of the law. Funny this Nakemma what's her name is a law professor. Well played St Thomas.
- Who cares that there was a MOA protest? Can't you people deal with it and move on? It just looks like racial intolerance to me. Grow up, people!

- "Who cares that there was a MOA protest"? Gee, I don't know. Maybe all the store owners and patrons do? Unlike the streets which are public, the MOA is PRIVATE PROPERTY. The protesters were warned ahead of time that if they did hold there protest at the MOA they would be charged with trespassing. Heck, they even OFFERED the protesters another spot to protest so they could still have their voices heard.

So, no, not racial intolerance. Just simply following through on what they said they would do before the protest even took place. If they didn't press charges, then it's open season on protests at the MOA. ANYONE could protest there for any reason because the bar had been set by letting these protesters go.

Besides, I thought protesters wore arrests such as these as a badge of honor.

- I think they should have just accommodated the demonstration within a certain time and day. They should have let them come, sing, chant, all in a peaceful organized way. I thought it was stupid to try to bottle up free speech. The prosecutions add to the stupidity. Free speech has always been a safety valve In America. The punitive approach is raising the racial tension.
- Then does the MOA have to accomodate EVERY demonstration, or just the ones that you approve of? How about a white power protest?

My question is why did they choose the MOA? What does that represent? Why not the steps of the Capitol building or in front of City Hall?

- And that would be your right if you owned it. Do you mind if I bring 2000 people to your house for a protest this Saturday? I like your location for making an important statement. No? We are coming anyway so please don't prosecute me.
- They offered one of their parking lots on that same day.
- Lets see. A lawyer who we have to assume knows something about the law is told that unlawful demonstrations on private property won't be tolerated. She then helps organize exactly that--and in the process costs many private businesses lots of \$\$ on one of the busiest shopping days of the year. She then complains about being singled out and prosecuted? If anyone should have exercised a little legal knowledge it's this lady. Don't you know that such actions do more to radicalize your message--a message that most in MN have some sympathy with in the first place? Demonstrations should be targeted at those who you are fighting against or in disagreement with! Business owners on private property who have NO ROLE WHATSOEVER in the issues you are disputing, and innocent drivers on our freeways that you want to just stroll onto whose LIVES ARE PUT IN DANGER--don't deserve that. Don't begin to equate the marches in protest to racism in doctor kings day to this kind of utter foolishness!
- Listened to her on CCO this evening.

The woman thinks she is the reincarnation of MLK.

She more closely resembles Al Sharpton.

- Yesterday, in its print edition, the Strib had yet another "law professor" from the University of St. Thomas pardoning this behavior. Both of these professors seem to ignore the findings of the Supreme Court, which states the MOA is private property and governed by those laws, and that previous protestors have been charged.

I hope the U of ST will take a good, hard look at the people they employ to teach law. Not because of what they think, but because they are unable to recognize and deal with the law as written.

There is no oppression, Ms. Levy-Pounds. Nor is there substantive racial inequity. There is no denial of human rights.

- Or perhaps she could plead guilty (metaphorically). I think the local organizers have hijacked the true intent of the demonstration by making it about private property. If you read some of the tweets from the demonstration its clear that many thought the point was to shut down MOA. There is a lot of sadness, frustration and anger. It's unfortunate that the organizers would focus efforts in a way that shifts attention to the trivial.
- Bull Connor, who turned fire hoses on black protestors, would not have had the gall to force the protestors to pay the wages of himself and his fellow cops. When a person expects to face a misdemeanor ticket for their actions, charging them thousands and thousands seems to be all about shutting down the protest rather than about enforcing law.
- Misdemeanor yes, thousands in fines, NO
- Eqaul treatment under the law - that's what they got.
- Nobody up until this time expected to be charged for the wages of the police used to maintain order.
- Had it not been for a large group, strong-arming their way in against the will of the property owner, would the police have needed to be there? I cannot think that police presence would be unwarranted in a situation like that. The MOA had to prepare for the the worst. There could have been a breakout group rampaging through the mall. The ringleaders were warned not to do this.
- If you arrange for police presence ahead of time it's called security and there is a fee
- Actually they were warned ahead of time in written letter to the organizers that they would seek these costs

If you dont pay the dime dont do the crime.

- There is nothing about the way these people were treated that is different than what the law prescribes and they were treated the same, if not better than other protesters. I don't know why she doesn't know that.
- This lady is the female equivalent of Al Sharpton, using this to advance her own career. I am embarrassed that my alma mater, St. Thomas tolerates a person like this. Please get rid of her
- "Letter from a Bloomington Jail." Honestly, can it get any more melodramatic? The demonstrators at Mall of America didn't have fire hoses and dogs turned on them. This isn't Selma. They violated the law and have been treated with kid gloves. They city could have let it pass, and that would be OK with me. But the MOA feels it was wronged and I support the actions by the city for crimes it feels were committed.
- Levy pounds was well aware the MOA is private property. The group was offered space across the street to protest. I think this group needs to find better legal counsel- all these arrests could have been avoided.

The lawyers Professional Responsibility Board should be investigating why Levy Pounds provided such poor legal counsel to this group.

- Too bad when the MOA and city of Bloomington informed the group multiple times that they could not occupy a private property and encouraged their demonstration in public space nearby the authors legal training didn't kick in to prevent the charges of trespassing. These charges were entirely unavoidable and claims of persecution are not in keeping with the fact. Laws without enforcement are also meaningless.
- Apparently, this 'law professor' thinks she is above the law, and that 'the ends justify the means'. Frankly, she is an embarrassment to the practice of law. How much do you want to bet that she would call for vigorous prosecution of abortion protestors attempting to peacefully protest in front of and blocking an abortion clinic? The hypocrisy of radical liberals like her is stunning.
- You complain about "lack of accountability" when you aren't even accountable for your own actions. You were told that you may not protest at the MOA but you did. You were warned that arrests and criminal charges were possible, but you decided to hold your protest anyway. Now you are facing a range of charges and STILL it's someone else's fault. Time to grow up and stop making excuses. You are holding your "black boys and men" (your words, not mine) back by forcing the illusion that everything negative that happens to them is because of the color of their skin, not because of their actions or behavior. There are a huge amount of good black man, women, and children that suffer from your agenda. You disgrace Dr. Martin Luther King Jr. when you compare your actions to his.
- I can only hope that they throw the book at you....

Intentionally breaking the law and putting some shallow protest over the lives of thousands of innocent people and children visiting the MOA.

When these shallow protesters have consideration for others... they may get some consideration in return...

Comments posted on Intercept's website¹⁵:

- Who's to say what protest will remain peaceful? Can peaceful protest organizers guarantee, that all involved have peaceful intentions?
- The Mall did what it needed to do to protect itself before it was attacked by the Black-Lies-Matter crowd. As long as they didn't break any laws, then their behavior can be said to be "legal"—unlike those who trespassed and caused property damage.

It's a shame that the lawyer for these thugs has not been asked why he feels that corporations have no right to protect their property, and their customers from the kinds of people who got arrested at the Mall.

- WHY is it always someone else's fault when someone breaks the law????? Quit complaining and saying oh I am a target and don't break the law then you won't be in trouble. Really how is this hard, instead of finding reasons to think everyone's against you. The Ferguson kid robbed a store, was shot. Guess he shouldn't have robbed a store and at the very least stopped when he was told to. These guys at the mall broke the law, now they are in legal trouble. This is not profiling it's finding criminals. I for one will feel safer if I go to MOA knowing they are doing all they can to keep people safe from CRIMINALS.....Bottom line is if your black, white, purple or yellow, don't break the law and you won't be in trouble, quit trying to make trouble.

All of these comments are available for anyone to read, even if the readers did not comment themselves.

ARGUMENT

I. THE COURT SHOULD ISSUE A PRETRIAL "GAG ORDER" BECAUSE TRIAL PARTICIPANTS HAVE MADE EXTRAJUDICIAL STATEMENTS THAT HAVE A SUBSTANTIAL LIKELIHOOD OF MATERIALLY PREJUDICING A FAIR TRIAL.

The Minnesota Rules of Criminal Procedure recognize that gag orders may be appropriate in certain cases. "The court may order attorneys, parties, witnesses, jurors, and employees and

¹⁵ <https://firstlook.org/theintercept/2015/03/18/mall-americas-intelligence-analyst-catfished-black-lives-matter-activists-collect-information/>

officers of the court not to make extra-judicial statements relating to the case or the issues in the case for public dissemination during the trial.” Minn. R. Crim. P. 26.03, subd. 7 (2015). The rule does not explicitly cover pretrial gag orders and the State is unaware of any case which has directly addressed that issue; though in one highly publicized case, a district court issued a pretrial gag order. *State v. Blom*, 682 N.W.2d 578, 609 (Minn. 2004).

Regardless of whether the Rules authorize issuance of a pretrial gag order, the court may issue one under the United States Constitution. District Courts have “an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity.” *Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979). “[B]ecause of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary.” *Id.*; see also *Chandler v. Fla.*, 449 U.S. 560, 574 (1981) (stating “[t]rial courts must be especially vigilant to guard against any impairment of the defendant’s right to a verdict based solely upon the evidence and the relevant law”). In this regard, “[t]here can be no question that a criminal defendant’s right to a fair trial may not be compromised by commentary, from any lawyer or party, offered up for media consumption on the courthouse steps.” *U.S. v. Brown*, 218 F.3d 415, 424 (5th Cir. 2000). The court went on to note that “[t]he beneficiaries of this duty include not only the defendant in a given trial, but other defendants as well, such as co-defendants in the same case or defendants in related cases (as there are here), whose fair trial rights might be prejudiced by the extrajudicial statements of other trial participants.” *Id.*

The gag order sought in this case no doubt will infringe on trial participants’ First Amendment rights. But these rights are not absolute and a court may restrict them in order to ensure a fair trial. The United States Supreme Court recognized this in *Seattle Times Co. v.*

Rhinehardt, 467 U.S. 20 (1984), when it rejected a First Amendment challenge to a protective order in a civil case that prohibited pretrial dissemination of information gained through the discovery process. “On several occasions this Court has approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant.” *Id.* at 32, n. 18 (citations omitted).

The importance of minimizing the effects of prejudicial pretrial publicity is also recognized by ethical rules governing attorney conduct. The Rules of Professional Conduct prohibit lawyers from making certain extrajudicial statements concerning a criminal case:

“A lawyer who is participating or has participated in the investigation or litigation of a criminal matter shall not make an extrajudicial statement about the matter that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing a jury trial in a pending criminal matter.”

Minn. R. Prof. Conduct 3.6(a) (2015).

A. A Substantial Likelihood Exists that Further Extrajudicial Comments by the Trial Participants and Release of Trial Evidence will Materially Prejudice a Fair Trial

Although the State is not seeking an order restraining the press from disseminating information about the case, the State’s request for a gag order still exhibits some characteristics of prior restraint. While gag orders directed at the press must satisfy the clear and present danger test, *Levine*, 764 F.2d at 595, that is not the case for gag orders limited to trial participants. The Supreme Court and federal circuit courts of appeal, when considering what showing must be met before a gag order may be imposed upon attorneys, have adopted a test of whether the comments present a reasonable likelihood of prejudicing a fair trial or present a substantial likelihood of prejudicing a fair trial. *Brown*, 218 F.3d at 427; *Gentile v. State Bar of Nev.*, 501 U.S. 1030,

1075 (1991) (applying the “substantial likelihood” standard); *U.S. v. Tijerina*, 412 F.2d 661, 666-67 (10th Cir. 1969) (applying the “reasonable likelihood” standard).

The rejection of the clear and present danger standard for gag orders only against trial participants is founded upon the recognition that there is a “substantial difference between a restraining order directed against the press—a form of censorship which the First Amendment sought to abolish from these shores—and [an] order . . . solely against trial participants and challenged only by the press.” *In re Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 608 (2nd Cir. 1988). There is no controlling precedent in Minnesota or the Eighth Circuit, but the substantial likelihood of prejudicing a fair trial standard is appropriate because it is consistent with the ethical requirements contained in the Minnesota Rules of Professional Conduct.

Here, there is a substantial likelihood that permitting further extrajudicial statements by trial participants would materially prejudice the court’s ability to conduct a fair trial. The defense’s many interviews, articles, and posts have already generated a significant number of highly prejudicial comments condemning both Defendants and the prosecution. Future comments by trial participants and any release of evidence to the media will only add fuel to this already smoldering fire and further jeopardize Defendants’ right to receive a fair trial.

B. Narrowness of Proposed Order

Limitations on First Amendment freedoms must be no greater than is essential to the protection of the governmental interest. *Procunier v. Martinez*, 416 U.S. 396, 413 (1974) (overruled on other grounds). The court must issue a gag order that is sufficiently narrow to substantially eliminate only speech having a substantial likelihood of materially impairing the court’s ability to conduct a fair trial. The State is not requesting a blanket “no comment” rule, but is instead requesting that the court prohibit trial participants from releasing any evidence and

from making certain comments concerning the case that could prejudice Defendants' right to a fair trial. Without elaboration or characterization of the nature of the allegations or defenses, the attorneys may discuss: information contained in the public record, scheduling information, and any decision or order by the Court that is a matter of public record.¹⁶ This also provides adequate guidance regarding the nature of the prohibited comments, as a restraining order must give clear guidance regarding the type of speech that an individual may not utter. *Smith v. Goguen*, 415 U.S. 566 (1974).

Here, the request bars trial participants from sharing statements or information intended to influence public opinion regarding the merits of the case. The Fifth Circuit found identical language in an attorney gag order to provide clear guidance to the affected lawyers. *Brown*, 218 F.3d at 430.

C. Least Restrictive Means

The court, when considering a gag order to stem potentially prejudicial pretrial publicity, must also determine whether "other precautionary steps will suffice." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1976). In *Sheppard v. Maxwell*, the Supreme Court suggested alternatives to imposing prior restraints on the press, such as a change of venue, jury sequestration, *voir dire*, and jury instructions. 384 U.S. 333 (1966). One of the less restrictive alternatives proposed in *Sheppard* was specific restraints on the comments by the attorneys. *Id.* at 361. The State does not seek a restraint on what the press can report concerning the case; instead it seeks very limited restrictions on what trial participants can disclose or say in the media about the case. Certainly, probing *voir dire* and a change of venue are alternative means of preserving a fair trial for Defendants in the face of prejudicial pretrial publicity, and are alternatives the State may

¹⁶ To be sure, the State is not requesting the Court to prohibit trial participants from discussing current events, the

entertain in the future, but these devices are costly. *Gentile*, 501 U.S. at 1076. The Court noted:

Even if a fair trial can ultimately be ensured through *voir dire*, change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by petitioner.

Id. In *Sheppard*, the Court noted that when considering how to cure the effects of pretrial publicity, a trial court's overriding objective must be to institute "those remedial measures that will prevent the prejudice at its inception." 384 U.S. at 363 (emphasis added).

In the instant case, the State's request imposes minimal and clearly defined restrictions on comments trial participants may make and on what information they can disclose in the media. The press will continue to have otherwise unfettered access to the case and the court proceedings. At the same time, the likelihood of further publicity in this case provoking additional excoriating comments and prejudicing Defendants' right to a fair trial will be minimized.

CONCLUSION

Therefore, the State respectfully requests that the Court issue the proposed "gag order" prohibiting further extrajudicial statements by trial participants in an effort to prevent a substantial likelihood of materially prejudicing a fair trial.

Respectfully Submitted,

Dated: 4/30/15



Torrie J. Schneider
Registration Number: 0383364
Assistant City Attorney
1800 West Old Shakopee Road
Bloomington, MN 55431-3027
952/563-8753