

IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No. 22-1226

IN RE: STAR TRIBUNE MEDIA COMPANY LLC, ET AL.

Petitioners

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ON PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT  
COURT FOR THE DISTRICT OF MINNESOTA  
NO. 21-CR-00108-PAM-TNL

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UNITED STATES' RESPONSE REGARDING THE PETITION FOR A  
WRIT OF MANDAMUS

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The United States submits this response to the Court's February 7, 2022, Order directing the parties to state their respective positions on petitioners' request for a writ of mandamus directing the district court to unseal the transcript of the January 21, 2022, in-chambers proceeding in *United States v. Thao, et al.*, No. 21-cr-00108 (D. Minn.). As explained below, the United States does not object to unsealing the transcript.

## BACKGROUND

1. This matter arises from the high-profile federal civil rights prosecution of former Minneapolis Police Department officers Tou Thao, J. Alexander Kueng, and Thomas Kiernan Lane for their roles in the unlawful seizure and killing of George Floyd, an unresisting and unarmed Black man, on May 25, 2020. *See* R. Doc. 1, at 2-3. On May 7, 2021, a federal grand jury indicted the former officers, charging (1) Thao and Kueng with willfully depriving Floyd of his right to be free from unreasonable seizure, specifically for failing to intervene to stop another officer's use of force, in violation of 18 U.S.C. § 242; and (2) all three defendants with willfully depriving Floyd of his right not to be deprived of liberty without due process of law, which includes the right to be free from a police officer's deliberate indifference to his serious medical needs, also in violation of 18 U.S.C. § 242. R. Doc. 1, at 24. Defendants pleaded not guilty, and the parties proceeded to jury trial on January 20, 2022. R. Docs. 112-114; R. Doc. 223.

2. On January 20, 2022, after the jury was selected, the district court instructed the parties to be prepared at 10a.m. the following morning for a hearing on defense motions to exclude certain evidence:

(1) still images from videos taken of the events of May 25, 2020; (2) exhibits playing synchronized side-by-side videos of the same events recorded at the same time but taken from different perspectives; and (3) a dispatch call made during, and 911 calls made three minutes after, the events of May 25, 2020. R. Doc. 212, at 1; *see also* R. Doc. 205, at 1-2. Although no party had moved to seal the hearing, the district court notified the parties later that evening that the hearing would be held under seal and that no one other than the parties would be allowed in the courtroom. R. Doc. 212, at 1-2.

3. The United States immediately filed a motion objecting to the district court's order and requesting that the court hold the hearing in open court. R. Doc. 212, at 1-4; *see also* 28 C.F.R. 50.9 (requiring that government attorneys obtain express prior approval from the Deputy Attorney General before agreeing to a closed judicial proceeding). The United States explained that a hearing to exclude evidence must be open to the public absent an overriding interest in closing it and that the district court had not set forth any findings or a reasoned basis for doing so. R. Doc. 212, at 2.

To address any concerns with revealing inadmissible evidence, the United States also clarified what was and what was not in dispute. The parties had already agreed that the video evidence underlying the exhibits at issue was admissible. R. Doc. 212, at 3; *see also* R. Doc. 210, at 1-5. But defendants had moved to exclude the side-by-side display of the admissible videos, as well as still images captured from the admissible videos. R. Doc. 205, at 1-2. Thus, the defendants objected not to the admissibility of the underlying evidence but only to the government's proposal for *displaying* it. R. Doc. 212, at 3; *see also* R. Doc. 210, at 1-3. And although one of the defendants also moved to exclude certain dispatch and 911 calls, the United States proposed that the parties need not play the calls' audio at the hearing. R. Doc. 212, at 3 n.1.

4. The following day, on January 21, the district court cancelled the hearing and denied the government's motion as moot. R. Doc. 213. Instead of a courtroom hearing, the district court conducted, as specified by the docket entry, an in-chambers "trial management conference." R. Doc. 216. That same day, several media outlets separately filed a motion

also objecting to the court's order sealing any hearing on defense motions to exclude evidence. R. Doc. 217.

5. On the following Monday, January 24, the district court issued two separate orders that serve as the basis for this petition: (1) an order denying as moot the media outlets' motion objecting to the court's order closing the hearing; and (2) an order sealing the transcript of the January 21, 2022, in-chambers meeting. R. Doc. 219; R. Doc. 222. The court stated, without more, that sealing the transcript was "in the interests of justice and of a fair trial." R. Doc. 222.

6. The next day, the media outlets submitted a letter to the district court seeking permission to file a motion for reconsideration of the court's January 24 order denying their motion objecting to closure. R. Doc. 226, at 1-2. The court denied their request, explaining that the original hearing "was intended to discuss with the parties exhibits that had not been admitted and that were not appropriate for public viewing until their admission." R. Doc. 230, at 2. And, as for the subsequent in-chambers meeting, the court explained that it was "not a hearing at all," and "neither the public nor the media have a right of access to that proceeding." R. Doc. 230, at 2. Although a court reporter recorded the

meeting, the court stated that the meeting was transcribed “out of an abundance of caution, in the event that substantive matters arose” but “[n]o such discussions took place.” R. Doc. 230, at 2. The court concluded that unsealing the transcript “would serve no legitimate purpose and its release is contrary to the efficient administration of justice in this matter.” R. Doc. 230, at 2.

7. The various media outlets, joined by several others, filed a petition for a writ of mandamus seeking to vacate the two January 24, 2022, orders. This Court directed the United States and the defendants to file a response stating their respective positions on whether the January 21, 2022, transcript should be unsealed.

## DISCUSSION

Public access to trials—particularly criminal trials—is a cornerstone of our democracy. “An open trial assures that the proceedings are conducted fairly and discourages perjury, misconduct, and decisions based on partiality or bias.” *United States v. Thunder*, 438 F.3d 866, 867 (8th Cir. 2006) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980)). It “allows the public to see for itself that the accused is dealt with fairly and not unjustly condemned and

ensures that judges, prosecutors and witnesses carry out their respective duties with a keen sense of the importance of their functions.” *United States v. Farmer*, 32 F.3d 369, 371 (8th Cir. 1994). And “[e]ven though most community members do not attend trials, the knowledge that they could and that others do fortifies the public’s confidence in the trials’ results.” *Thunder*, 438 F.3d at 867 (citing *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 508 (1984)). Thus, openness “enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Press-Enterprise Co.*, 464 U.S. at 508.

These principles apply equally to pretrial proceedings, including hearings on motions to suppress or exclude evidence, *see Waller v. Georgia*, 467 U.S. 39, 46 (1984), and to transcripts of properly closed proceedings, *see United States v. Valenti*, 987 F.2d 708, 714 (11th Cir.), *cert. denied*, 510 U.S. 907 (1993). “Even where a court properly denies the public and the press access to portions of a criminal trial, the transcripts of properly closed proceedings must be released when the danger of prejudice has passed.” *Id.* (citing *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 393, 400 (1979)). A “court’s denial of the

motion to unseal a transcript must be supported with a finding that the denial of access is necessary to preserve higher values, and is narrowly tailored to serve that interest.” *Id.*

These standards were not met here. After the district court had first ordered and then canceled the evidentiary hearing, the district court held a closed in-chambers meeting and ordered that the transcript of the meeting be sealed “in the interests of justice and of a fair trial.” R. Doc. 222. The court later explained that the meeting was “not a hearing” and, because no substantive discussions took place, unsealing the transcript “would serve no legitimate purpose and its release is contrary to the efficient administration of justice in this matter.” R. Doc. 230, at 2. The United States is unaware of any interest in keeping the transcript sealed but encourages this Court to review the transcript to confirm that assessment. Because no party moved to seal the transcript, and because the court’s orders denying access to the transcript lack findings to support the asserted interests, the United States does not object to unsealing the transcript of the January 21, 2022, in-chambers meeting.



February 11, 2022

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## **CERTIFICATE OF COMPLIANCE**

I certify that the foregoing UNITED STATES' RESPONSE REGARDING THE PETITION FOR A WRIT OF MANDAMUS:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 1,511 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared using Microsoft Office Word in a proportionally spaced typeface (Century Schoolbook) in 14-point font.

(3) complies with Local Rule 28A(h)(2) because the filing has been scanned for viruses and, to the best of our ability and technology, believes it is virus-free.

Dated: February 11, 2022

CHARLES J. KOVATS, JR.  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on February 11, 2022, I filed the foregoing UNITED STATES' RESPONSE REGARDING THE PETITION FOR A WRIT OF MANDAMUS with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system, which will send notice to all counsel of record by electronic mail. All participants in this case are registered CM/ECF users.

Dated: February 11, 2022

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