

STATE OF MINNESOTA  
DISTRICT COURT, SECOND DISTRICT



TERESA R. WARNER  
JUDGE  
RAMSEY COUNTY COURTHOUSE  
SAINT PAUL, MN 55102

Friday, December 4, 2009

Jordan Kushner, Esq.  
431 South Seventh Street  
Suite 2446  
Minneapolis, MN 55415

Re: <u>State v. Monica Rachel Bicking,</u>	62-CR-08-10515
<u>State v. Robert Joseph Czernik,</u>	62-CR-08-10338
<u>State v. Garrett Scott Fitzgerald,</u>	62-CR-08-10335
<u>State v. Luce GuillenGivins,</u>	62-CR-08-10342
<u>State v. Erik Charles Oseland,</u>	62-CR-08-10345
<u>State v. Nathanael David Secor,</u>	62-CR-08-10365
<u>State v. Max Jacob Spektor,</u>	62-CR-08-10336
<u>State v. Erin Chase Trimmer,</u>	62-CR-08-10370

Dear Mr. Kushner:

Please find enclosed a copy of an Order in the above-referenced matter as a result of a hearing on October 8, 2009, before the Honorable Teresa R. Warner. Copies have been sent to all counsel of record.

Sincerely,

A handwritten signature in cursive script, appearing to read "Nathan Serr".

Nathan Serr  
Law Clerk to the  
Honorable Teresa R. Warner

Enclosure

cc: Court file

STATE OF MINNESOTA  
COUNTY OF RAMSEY

DISTRICT COURT  
SECOND JUDICIAL DISTRICT  
CRIMINAL COURT DIVISION

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State of Minnesota,

Plaintiff,

v.

**ORDER**

Monica Rachel Bicking,	62-CR-08-10515
Robert Joseph Czernik,	62-CR-08-10338
Garrett Scott Fitzgerald,	62-CR-08-10335
Luce GuillenGivins,	62-CR-08-10342
Erik Charles Oseland,	62-CR-08-10345
Nathanael David Secor,	62-CR-08-10365
Max Jacob Specktor,	62-CR-08-10336
Erin Chase Trimmer,	62-CR-08-10370

Defendants.

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The above-entitled matters came on for a hearing on October 8, 2009, before the Honorable Teresa R. Warner, District Court Judge, 1070 Ramsey County Courthouse, 15 West Kellogg Boulevard, St. Paul, Minnesota 55102.

Heidi Westby, Esq. and Derek Fitch, Esq., Assistant Ramsey County Attorneys, 50 West Kellogg Blvd., Suite 315, St. Paul, MN 55102, appeared on behalf of the State.

Bruce Nestor, Esq., 3547 Cedar Avenue South, Minneapolis, MN 55407, appeared on behalf of Defendant, Monica Bicking, who was present.

Robert Travis Snider, Esq., Snider Law Firm, 1005 W. Franklin Avenue, Suite 3, Minneapolis, MN 55405, appeared on behalf of Defendant, Robert Czernik, who was present.

James Dahlquist, Esq., 1150 Flour Exchange Building, 310 Fourth Avenue South, Minneapolis, MN 55415, appeared on behalf of Defendant, Garrett Fitzgerald, who was present.

Jordan Kushner, Esq., Suite 2446, 431 South Seventh Street, Minneapolis, MN 55415, appeared on behalf of Defendant, Luce GuillenGivins, who was present.

Peter Nickitas, Esq., 431 South Seventh Street, Suite 2446, P.O. Box 15221, Minneapolis, MN 55415, appeared on behalf of Defendant, Erik Oseland, who was present.

Robert Kolstad, Esq., 1005 W. Franklin Avenue, Suite 3, Minneapolis, MN 55405, appeared on behalf of Defendant, Nathanael Secor, who was present.

Larry Leventhal, Esq., 319 Ramsey Street, St. Paul, MN 55102, appeared on behalf of Defendant, Max Specktor, who was present.

Barbara Nimis, Esq., 350 River Road, P.O. Box 50812, Mendota, MN 55150, appeared on behalf of Defendant, Erin Trimmer, who was present.

These matters were before the Court on Defendants' Motion for Joinder, Defendants' Joint Motion to Compel, Defendants' Motion to Disclose Computer Evidence, and the State's Motion to Amend the Complaint. By agreement of the attorneys and Defendants, the motions were argued jointly.

Based upon the files, records, and proceedings herein:

**IT IS HEREBY ORDERED** that:

1. Defendants' Motion for Joinder of trial is **GRANTED**;
2. Defendants' Joint Motion to Compel Disclosure is **GRANTED in part**,


**DENIED in part**, as set forth in the attached memorandum;

3. Defendants' Motion to Disclose Computer Evidence is **DENIED**;
4. The State's Motion to Amend the Complaint is **GRANTED** as set forth in the attached memorandum;
5. The attorneys will be contacted for the purpose of setting a hearing on any outstanding motions and a trial date certain;
6. The attached memorandum is incorporated herein and made part of this Order.

**It is so ordered.**

By the Court:

Date: December 4, 2009

A handwritten signature in black ink, appearing to read "T. Warner", with a horizontal line underneath.

Teresa R. Warner  
Ramsey County District Court Judge

## **Defendants' Motion for Joinder**

On or about August 3, 2009, all Defendants joined in a Notice of Motion and Motion for Joinder of trial in their respective cases. The State of Minnesota has charged each Defendant, Monica Rachel Bicking, Robert Joseph Czernik, Garrett Scott Fitzgerald, Luce Guillen-Givins, Erik Charles Oseland, Nathanael David Secor, Max Jacob Specktor, and Erin Chase Trimmer with felony counts of conspiracy to commit criminal damage to property in the first degree and conspiracy to commit riot in the second degree. The complaint against each of the Defendants is virtually identical. The charges against each of the Defendants arise out of activities before and on the first day of the Republican National Convention ("RNC") in St. Paul, Ramsey County, Minnesota. The state alleges that the Defendants are members of a group which entitled itself the "RNC Welcoming Committee" ("RNCWC"). It is alleged that according to the RNCWC website, their main goal was to "crash the convention, shut down and disrupt the RNC." As set forth in the amended complaint against each of the Defendants, the state alleges that the Defendants conspired with one another, and others, to commit the crimes of criminal damage to property in the first degree and riot in the second degree between the dates of November 1, 2006 and September 1, 2008. In addition to other motions, the Defendants now move the Court to consolidate their trials and have one joint trial with all eight defendants rather than eight individual trials. The state opposes Defendants' motion. In accordance with Minnesota Rule of Criminal Procedure 17.03, and in the interest of justice, Defendants' Motion for Consolidated Trial is granted.

Rule 17.03, subd. 2, titled Joinder of Defendants, states:

When two or more defendants are jointly charged with a felony, they may be tried separately or jointly in the discretion of the Court. In making its determination on whether to order joinder or separate trials, the Court shall consider the nature of the offense charged, the impact on the victim, the potential prejudice to the defendant, and the interests of justice.

Application of this four-part test establishes that joinder is appropriate in these cases.

*I. The nature of the offense charged*

Joinder is appropriate when co-defendants act in close concert with one another. *State v. DeVerney*, 592 N.W.2d 837, 842 (Minn. 1999). The charges against the Defendants are identical. In addition, the majority of the state's evidence is admissible against all of the Defendants. The State alleges that each Defendant is a member of the Republican National Convention Welcoming Committee and that all Defendants acted in close concert with one another in conspiring to commit the crimes of criminal damage to property in the first degree and riot in the second degree. Each Defendant is alleged to have committed acts in furtherance of the alleged conspiracy. As the Court understands the alleged evidence against the Defendants, the state is focusing on common planning and a shared joint purpose to prove their case. In these cases, the evidence against each Defendant is likely to be nearly identical. The discovery has been exactly the same. When the great majority of evidence presented is admissible against all Defendants, joinder is favored. See generally *State v. Blanche*, 696 N.W.2d 351, 371 (Minn. 2005). The nature of the offense in these cases weighs in favor of joinder.

*II. Impact on the victim*

No specific individual or entity is enumerated as a victim in the complaint. At this point it is unclear whether the state will present the testimony of any alleged victim

of the Defendants' alleged acts. However, there will certainly be many witnesses called. In *Blanche*, the Minnesota Supreme Court elaborated on the impact to the victim factor, holding that while this factor should not "be swallowed by considerations of eyewitness convenience," district courts may consider, in some circumstances, the impact on witnesses as well. *Id.* In analyzing this factor, courts have looked at both the impact on the victim as well as trauma to eyewitnesses who would be compelled to testify at multiple trials. There has been no showing that testifying at multiple trials would be traumatizing for anyone involved. However, this Court cannot overlook the inconvenience, stress and strain on witnesses required to testify eight times about the same thing. This factor weighs in favor of joinder.

### *III. Potential prejudice to the Defendant*

Defendants are the party moving for joinder. In analyzing this factor, courts look for the existence of antagonistic or inconsistent defenses, which would weigh in favor of separate trials. Defendants are charged with conspiracy to commit criminal damage to property and conspiracy to commit riot. Defendants assert that there is no chance of antagonistic or inconsistent defenses because Defendants all take the position that there was no conspiracy to commit these crimes. None of the Defendants have asserted any different defenses or trial strategies. In fact, each of the Defendants have sought to join in the motions of other co-defendants and have worked in concert in their defense of these cases. This factor weighs in favor of joinder.

### *IV. The interests of justice*

The Defendants argue that in these cases, the interests of justice overwhelmingly support a joint trial. The state counters that in these cases, the interests of justice

overwhelmingly support separate trials for each Defendant. The Court has concluded, in balancing all the factors proffered by each party, that the interests of justice weigh in favor of a consolidated, joint trial. In addition to the factors already considered, the Court has taken into consideration that, while there can be “logistical nightmares” in eight separate trials or one joint trial, the interests of justice support a joint trial. If separate trials were held, there would be a stark difference between the trial of the first Defendant and the trial of the last Defendant. Not only would there be a significant amount of time between the two, there is a threat of the cumulative effect of publicity related to each trial. Similarly, each witness would be required to testify eight times about the same thing. Transcripts would pile up from previous testimony, and all would potentially be admissible at subsequent trials. Eight trials would be less efficient and a more significant strain on resources for all involved.

The Court is also swayed by the fact that there are no pre-trial confession issues present here. In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that a defendant’s Sixth Amendment confrontation clause rights are violated when a non-testifying co-defendant’s confession implicating the defendant is admitted into evidence. None of the Defendants in these cases have made confessions and no *Bruton* issues exist.

The State points out that there will be logistical issues that need to be addressed prior to the trial. During argument on this motion, Defendants conceded that they will need to be accommodating as it relates to preemptory challenges, objections, and cross-examination of witnesses, to name a few issues. Many of those issues have not yet been hashed out. The logistical issues are not insurmountable in this case. The Defendants have asserted their willingness to cooperate in addressing those issues. This Court

intends to address logistical issues before the trial takes place. Joint trials are more common than this Court realized, and while there are many pre-trial issues to be addressed, this Court is confident that those issues can be adequately addressed prior to trial.

Any decision this Court makes on trials, whether joint or separate, carries with it many logistical issues. But given that Defendants face identical charges, are charged in nearly identical complaints, the discovery disclosed to date has been identical for each Defendant, the evidence appears to be admissible against each Defendant, the alleged defenses are not antagonistic or inconsistent, it is the Defendants who seek joinder, and in consideration of the factors set forth in Minn.R.Crim.P. 17.03, subd. 2, the request for joinder of trial in these cases is granted.

#### **Defendants' Joint Motion to Compel**

On August 3, 2009, Defendants filed a joint motion to compel seeking the following:

- A – Impeachment evidence
- B – Documents relevant to search warrant for 627 Smith Avenue
- C – Training materials or intelligence reports provided to mobile field force units and/or St. Paul Police
- D – Undercover law enforcement officers and/or /agents/informants
- E – Correspondence between Ramsey County Sheriff and other law enforcement agencies prior to 2008 RNC
- F – Policies and procedure manuals of Ramsey County Sheriff for use of informants in investigation of activity potentially protected by first amendment to the United States Constitution
- G – Identity of all persons committing acts which the state contends resulted from the

H – Reports from all other law enforcement agencies regarding the RNCWC or any of the eight named defendants

Rule 9.01 of the Minnesota Rules of Criminal Procedure requires the prosecution to disclose, on request of defense counsel, all information related to the case that is in the prosecution's possession or control. *Minn.R.Crim.P. 9.01, subd. 1*. The prosecuting attorney's obligations under this rule extend to material and information in the possession or control of members of the prosecution staff or any others who have participated in the investigation and reported to the prosecuting attorney's office. *Minn.R.Crim.P. 9.01, subd. 1(7)*. The trial court has broad discretion in rulings on discovery and evidence. *State v. Bakken*, 604 N.W.2d 106, 110 (Minn.App.2000). In a criminal case, the trial court must recognize that the defendant has a constitutional right to be afforded a meaningful opportunity to present a complete defense. *Id.* The trial court may exercise its discretion and require the prosecution to disclose relevant material and information if the defendant shows that the information may relate to the guilt or innocence of the defendant or negate the guilt or reduce the culpability of the defendant as to the offense charged. *Minn.R.Crim.P. 9.01, subd. 2(3)*.

*A. Impeachment evidence*

Defendants seek the following impeachment evidence:

1. Any payments to witnesses the State intends to call at trial
2. Records relating to the application and hiring process of Deputy Sheriff Chris Dugger
3. Travel and expense records for the \$300,000 investigation carried out by the Special Investigation Unit of the Ramsey County Sherriff's Office
4. Personnel files maintained by the Ramsey County Sherriff's Office for Marilyn Hedstrom, Rachel Nieting, and Chris Dugger

5. Any documents relating to any contact between any law enforcement agency and any prosecution agency, law enforcement agency, or judicial official, with respect to any actual or potential criminal charge against Andrew Darst, Brandon Darby, or any other person the State intends to call as a witness at trial

1. *Payments to witnesses*

Defendants have requested information relating to payments made to FBI confidential informants Andrew Darst and Brandon Darby. Defendants want the prosecution to obtain all documents relevant to Andrew Darst, Brandon Darby, and any other confidential informant the State intends to call as a witness at trial. The State agrees that it must disclose this evidence and says it has forwarded the discovery demand to the FBI and will disclose the information as soon as it is received. The State is correct, payments to witnesses are relevant impeachment evidence and this information must be disclosed.

2. *Application and hiring records for Deputy Sheriff Chris Dugger*

Defendants have requested all records of the Ramsey County Sheriff relating to the application and hiring process of Deputy Sheriff Chris Dugger. Defendants believe the evidence will show that Chris Dugger was an undercover informant operating for the Ramsey County Sheriff's Office who was promoted and hired as a jail deputy upon completion of his undercover duties. Defendants seek this information to determine whether Dugger was hired through normal procedures or if he was hired to be an informant. Defendants offered into evidence a photograph that they assert shows Ramsey County Sheriff Robert Fletcher and Deputy Sheriff Chris Dugger at the Landmark Center on February 4, 2009. Defendants argue that this event was essentially Chris Dugger's

induction into the Ramsey County Sheriff's Department and that Defendants believe that the promise of employment was held out as an inducement to Chris Dugger in order to compel him to come up with evidence, fabricated or otherwise, against Defendants. Defendants argue that if this information shows what they contend it shows, it would be evidence of bias and relevant impeachment evidence. The State argues that this information is irrelevant and that Defendants have not made the showing necessary for disclosure of confidential information.

When a defendant requests disclosure of confidential records, Minn.Stat. §13.03, subd. 6, requires a two-step process: (1) the district court must determine whether the records are discoverable under applicable rules, including the rules of evidence and criminal procedure and (2) if the records are discoverable under the rules, the district court must conduct an *in camera* review to weigh the interests involved. *State v. Renneke*, 563 N.W.2d 335, 338 (Minn.App.1997). A district court must conduct an *in camera* review of information sought by a criminal defendant when the defendant makes a plausible showing that the information would be both material and favorable to his defense. *State v. Hummel*, 483 N.W.2d 68, 72 (Minn.1992)(quotation omitted).

Defendants have not made a plausible showing that the information sought would be material or favorable. Defendants have provided nothing but bare allegations. The only evidence submitted is a photograph that shows Sheriff Fletcher and a Sheriff's Deputy purported to be Chris Dugger. Other Sheriff's Deputies are also visible in the picture. The only identifying information on the photograph is a handwritten note that says "2/4/2009 Landmark Center." This photograph provides no support whatsoever for Defendants' allegation that Deputy Sheriff Dugger was hired improperly. Defendants

have submitted no supporting evidence for their claims and have not made the plausible showing necessary to justify disclosure of the application and hiring records for Deputy Sheriff Chris Dugger.

3. *Travel and expense records*

Defendants have requested travel and expense records for a \$300,000 investigation carried out by the Special Investigations Unit of the Ramsey County Sheriff's Office. The State does not intend to disclose the information demanded as it is vague, overbroad and irrelevant. Defendants contend that this information will show whether law enforcement officials were present at places when they say they were and whether sheriff's personnel were receiving extraordinary overtime and financial compensation by coming up with evidence.

Discovery requests must call for relevant material and must be reasonably specific. *State v. Lynch*, 443 N.W.2d 848, 852 (Minn.App.1989). Discovery rules are not meant to be used for fishing expeditions. *State v. Hunter*, 349 N.W.2d 865, 866 (Minn.App.1984). Rule 9.01, subd. 1 of the Minnesota Rules of Criminal Procedure sets forth the categories of information the prosecution is required to disclose. The travel and expense records sought by Defendants do not fall into any of these categories.

Subdivision 2, section 3, of Rule 9.01 allows this Court to order disclosure of other relevant information if Defendants show it may relate to their guilt or innocence or reduce their culpability as to the offense charged. Defendants' request is broad and nonspecific. Defendants have made no showing that travel records, expense records, overtime, or financial compensation may be related to their guilt or innocence. This

information is not relevant and Defendant's request for travel and expense information is denied.

*4. Personnel files*

Defendants have requested the Ramsey County personnel files for Marilyn Hedstrom, Rachel Nieting and Chris Dugger. The State contends that this information is irrelevant and that Defendants have not made the showing necessary for disclosure. Police officer personnel files are protected by the Minnesota Government Data Practices Act, Minnesota Statutes, Chapter 13. As described above, when a defendant requests disclosure of confidential records and makes a plausible showing that the information would be both material and favorable to his defense, a district court must conduct an *in camera* review of the information sought. Defendants have made no showing that these personnel files are relevant to their case, and have articulated no legitimate reason for their disclosure. There is nothing before this Court showing that the information in these personnel files may relate to the guilt or innocence of the defendants or negate the guilt or reduce the culpability of the defendants. Defendants have made no showing that the information might be material and Defendants' request for disclosure is denied.

*5. Documents related to criminal charges*

Defendants have requested any documents relating to any contact between any law enforcement agency and any prosecution agency, law enforcement agency, or judicial official, with respect to any actual or potential criminal charge against Andrew Darst, Brandon Darby, or any other person the State intends to call as a witness at trial. Defendants provided one example of the type of information they are seeking. Defendants submitted documentation showing that Andrew Darst had been charged with

the misdemeanor offense of trespass occurring in the city of Roseville, and that the charge was dismissed by the prosecutor. Defendants seek any records of communications between agencies regarding the dismissal of this charge. The State says it has previously disclosed all reports relating to the arrest of Andrew Darst and that it is not aware of, or in possession of, any other information related to this demand.

Defendants have requested information related to criminal charges. This information may be relevant and admissible as impeachment information. If the State has any undisclosed records in its possession or control related to criminal charges against Andrew Darst, Brandon Darby, or any other person the State intends to call as a witness, the State must disclose the records.

In addition to their discovery request for documents related to criminal charges, Defendants argued at the motion hearing that they are entitled to have the State inquire of the Roseville City Attorney and the FBI agents working with Andrew Darst as to the circumstances surrounding the dismissed charge. Under Minn.R.Crim.P. 9.01, subd. 2 (1), titled Discretionary Disclosure Upon Order of Court, this Court may order the prosecuting attorney to assist Defendants in seeking access to specified matters relating to the case which are within the possession or control of an official or employee of any governmental agency, but which are not within the control of the prosecuting attorney. This Court finds that Defendants are entitled to discovery of any documents related to the dismissed misdemeanor charge of trespass against Andrew Darst as they may be relevant impeachment evidence. The prosecuting attorneys must assist Defendants in obtaining these documents, if they exist, from the Roseville City Attorney and the FBI agents involved. However, the prosecuting attorney is not required to investigate the

circumstances surrounding the dismissed charge. Defendants are capable of conducting any follow up investigation they deem necessary.

*B. Documents relevant to search warrant for 627 Smith Avenue*

Defendants seek all documents relating to the planning and execution of the search warrant for 627 Smith Avenue, including all documents relating to the execution of the search warrant during night-time hours and all documents relating to any surveillance of 627 Smith Avenue prior to the application for the search warrant. The State says it has previously disclosed all documents relating to the search warrant for 627 Smith Avenue and is unaware of the existence of any other documents. The State is under a continuing duty to disclose evidence. If there are any documents related to the planning and execution of the search warrant that have not previously been disclosed, the State must disclose those documents.

*C. Training materials or intelligence reports*

Defendants seek all training materials or intelligence reports provided to mobile field force units and/or St. Paul Police prior to the beginning of the RNC. Specifically, Defendants seek materials relating to the nature of any threat posed to law enforcement by the Defendants in this matter, the RNCWC, anarchists, or any other individuals or protest groups. Defendants argue that if law enforcement personnel had intelligence reports indicating that people unconnected to the Defendants were planning to carry out unlawful acts, this information would be relevant exculpatory evidence. The State says it has previously disclosed all reports that relate to the Defendants and that it does not intend to disclose training materials or intelligence reports provided to mobile field force units or the St. Paul Police as this request is vague, overbroad and irrelevant.

Much of the information Defendants seek is broad and pertains to law enforcement's planning, preparation, and handling of the entire Republican National Convention. Defendants in this matter are charged with Conspiracy to Commit Criminal Damage to Property and Conspiracy to Commit Riot. Information that does not pertain specifically to the Defendants or the charged conspiracy is not relevant absent some showing of relevance. Defendants have made no showing of relevance that would entitle them to broad disclosure of RNC information not related to the Defendants or the charged conspiracy. If the State has any undisclosed training manuals or intelligence reports related to the Defendants or the charged conspiracy, the State must disclose this information.

*D. Undercover law enforcement officers*

Defendants seek names, photos, addresses, agency affiliations, and reports created by any undercover law enforcement personnel, agent, or informant acting on behalf of law enforcement with respect to any investigation or surveillance pertaining to the RNC. Defendants stated that basically they are seeking the identities of all undercover law enforcement personnel who were in the streets of St. Paul on September 1, 2008. The State says it has previously disclosed the identification and reports of all law enforcement officers and informants that provided information in connection with the investigation of the Defendants. The State does not intend to disclose the other information demanded as it is vague, overbroad and irrelevant. Much of the information sought by Defendants is not relevant. If the State has any undisclosed identity information or reports related to the Defendants or the charged conspiracy, the State must disclose this information.

*E. Correspondence between Ramsey County Sheriff and other law enforcement agencies*

Defendants seek all correspondence between the Ramsey County Sheriff and other law enforcement agencies. Defendants submitted as exhibits two samples of the type of correspondence they are seeking. Defendants obtained the correspondence from outside sources, one of which was a television news reporter. The first exhibit is a letter from Ramsey County Sheriff Bob Fletcher to St. Paul Police Department Assistant Chief Matt Bostrom discussing blockades and security during the RNC. The second exhibit is a letter to Sheriff Fletcher from St. Paul Chief of Police John Harrington discussing law enforcement staffing for the RNC. The State says it has previously disclosed any communications that specifically relate to the Defendants and does not intend to disclose the other information demanded as it is vague, overbroad and irrelevant.

Much of the information sought by Defendants is not relevant. If the State has any undisclosed correspondence related to the Defendants or the charged conspiracy, the State must disclose this information.

*F. Policies and procedure manuals for using informants*

Defendants seek policies and procedure manuals of the Ramsey County Sheriff's Department and any other State and Federal law enforcement agency involved in investigating matters set forth in the Complaint. Specifically, Defendants seek policies and manuals related to the investigation, infiltration, and surveillance of groups or individuals engaged in protected acts of political speech and the handling and operation of informants. The State says it has previously disclosed any information that specifically relates to the Defendants and does not intend to disclose the other information demanded as it is vague, overbroad and irrelevant. Much of the information

sought by Defendants is not relevant. If the State has any undisclosed policies and manuals related to the Defendants or the charged conspiracy, the State must disclose this information.

*G. Identity of all persons committing acts which the state contends resulted from the conspiracy*

Defendants seek the identity of all uncharged co-conspirators or other persons alleged to have committed acts which the State contends resulted from the conspiracy with which Defendants are charged. The State says it has previously disclosed all reports relevant to the charged conspiracy and will continue to disclose all information as it becomes known to the State. The State is under a continuing duty to disclose evidence. If the State has any undisclosed identity information pertaining to persons committing acts as a result of the charged conspiracy, the State must disclose this information.

*H. Reports from all law enforcement agencies regarding the RNCWC or any of the Defendants*

Defendants seek an order compelling the State to obtain and disclose any reports from federal, state, and local law enforcement agencies regarding any investigation related to the 2008 RNC containing information or surveillance related to the RNCWC or the Defendants. The State says it has previously disclosed all of the reports demanded and will continue to disclose all information as it becomes known to the State. The State indicated that it has conducted inquiries of every local law enforcement agency, the Ramsey County Sheriff's Department, the FBI, Secret Service, the Department of Homeland Security, and obtained and disclosed everything that specifically relates to the Defendants or the RNCWC. Much of the information sought by Defendants is not relevant. If the State has any undisclosed reports or information related to the Defendants or the charged conspiracy, the State must disclose this information.

## **Defendants' Motion to Disclose Computer Evidence**

On August 3, 2009, Defendants filed a Motion to Compel Disclosure of Contents of Seized Computers, seeking a court order requiring the State to produce complete copies of the full contents of seized computers. Defendants request that this evidence be in a form that can be viewed by using common software or else provide the software necessary for Defendants to view the evidence. The State believes it has complied with its discovery obligations by making the electronic evidence available for defense counsel to examine and by providing exact copies of the evidence.

In November of 2008, the State provided Defendants with notice of the existence of computer evidence. The State made the computer evidence available to Defendants for examination. The State also notified Defendants that the State would provide a complete copy of the computer evidence if Defendants supplied a hard drive with sufficient memory. In May of 2009, Defendants submitted a hard drive and the State placed a complete copy of all computer evidence, 1.4 terabytes of information, onto the hard drive. The hard drive was returned to counsel for Defendants on May 19, 2009. Defense counsel was unable to read the information on the hard drive. On or about May 26, 2009, defense counsel Travis Snider contacted the Ramsey County Sheriff's Office and spoke with Inspector Tony Samec who is familiar with the computer evidence. Inspector Samec informed Travis Snider that the software program ENCASE was necessary to view the information. Mr. Snider looked up the program on the internet and determined that it would cost \$3,600 to purchase. On August 3, 2009, Defendants filed the Motion to Compel Disclosure of Contents of Seized Computers presently before this Court.

Rule 9.01 of the Minnesota Rules of Criminal Procedure, titled Disclosure by Prosecution, subd. 1(3) states that the prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce tangible objects which relate to the case. This Court finds helpful the unpublished case of *State v. Simons*, 2007 WL 329137 (Minn.App.), where the Minnesota Court of Appeals discussed the application of Rule 9.01, subd. 1(3) to computer evidence. The *Simons* Court found that Rule 9.01, subd. 1(3) did not require the State to create a copy of a computer hard drive for a defendant when the State had made the computer evidence available for the defense counsel and defense expert to review at the law enforcement center. *Simons* at 5.

The State has given defense counsel the opportunity to inspect the computer evidence and defense counsel has declined. In addition to making the evidence available for inspection, the State has given defense counsel an exact copy of computer evidence in the format used by the State. In examining the computer evidence, the State used a program called ENCASE. This program prohibits altering the evidence and ensures that the evidence provided to Defendants is the same as the evidence kept by the State. The State provided a complete copy of the computer evidence to Defendants using the same software the State uses. In addition to making the computer evidence available for examination and providing a complete copy of the information, the State also disclosed a number of DVD's that contain the examination results of electronic evidence performed by or at the request of law enforcement personnel.

Defendants are not entitled to discovery disclosure in their preferred format. The State's obligation is to allow defense counsel to examine the information and reproduce the information. The State made the information available for examination and produced

a copy of the computer evidence in the same format used by the State. This is sufficient to satisfy the requirements of Minn.R.Crim.P 9.01, subd. 1(3). Defendants' request for the State to provide them with ENCASE software is denied. ENCASE is a program that is available to the public. The State gave numerous examples of internet websites where it can be obtained for free, or at a reduced rate. Just as the State is not required to purchase a computer for Defendants to view the computer evidence on, the State need not purchase publicly available software for the Defendants to view the evidence. The State has complied with its discovery obligations regarding disclosure of computer evidence. Defendants' Motion to Compel Disclosure of Contents of Seized Computers is denied.

#### **State's Motion to Amend the Complaint**

On September 3, 2008, the State filed Complaints charging each Defendant with a single count of Conspiracy to Commit Riot in the Second Degree in Furtherance of Terrorism for acts alleged to have occurred between November 1, 2006 and August 30, 2008. The same statement of probable cause was included in each complaint. The probable cause statement includes information on the State's investigation into the activities of the Republican National Convention Welcoming Committee ("RNCWC") and alleges that Defendants exercised leadership roles in the RNCWC and planned to disrupt the RNC. The probable cause statement contains a paragraph for each Defendant and describes that Defendant's alleged involvement in the RNCWC plan to disrupt the RNC. The probable cause statement concludes with a paragraph that purports to be a brief summary of critical activities that occurred on September 1, 2008, and September 2,

2008. The summary includes numerous criminal activities that took place in downtown St. Paul during the RNC.

On December 12, 2008, the State filed an Amended Complaint to add three additional charges: Conspiracy to Commit Riot in the Second Degree, Conspiracy to Commit Criminal Damage to Property in Furtherance of Terrorism, and Conspiracy to Commit Criminal Damage to Property in the First Degree. Each of the charges is alleged to have occurred between November 1, 2006 and August 30, 2008. The statement of probable cause did not contain any new information, but referred only to the statement of probable cause in the original complaint.

On April 13, 2009, the State filed the Amended Complaint that is the subject of this motion. The State seeks to remove two of the charges: Conspiracy to Commit Riot in the Second Degree in Furtherance of Terrorism and Conspiracy to Commit Criminal Damage to Property in Furtherance of Terrorism. The statement of probable cause does not contain any new information, but refers only to the statement of probable cause in the original complaint. The State also seeks to amend the end date for the two remaining charges from August 30, 2008 to September 1, 2008.

On August 3, 2009, Defendants filed a document titled Resistance to Motion to Amend Criminal Complaint to Include Date of September 1, 2008. Defendants object to allowing the State to change the end date from August 20, 2008 to September 1, 2008 because several of the Defendants were arrested on August 30, 2008 and were in custody on September 1, 2008. Defendants next objection is that the probable cause statement in the complaint does not differentiate between actions occurring on September 1 and September 2. Defendants argue that if they are to be held responsible for actions

occurring on September 1, those actions should be set out with specificity in the complaint.

Rule 17.05 of the Rules of Criminal Procedure prohibits the amending of complaints to charge additional offenses after a trial has commenced. *State v. Alexander*, 290 N.W.2d 745, 748 (Minn.1980). This is to ensure that the substantial rights of a defendant are not prejudiced. Here, there is no prejudice to the Defendants by the State's proposed amendments. Defendants have been on notice of the offenses charged since December, 2008, at the latest. Defendants have been on notice of the State's request to amend the end date for the charges since April, 2009, at the latest. Defendants have had, and will have, ample time to prepare for trial on the amended charges with the amended dates.

The fact that some of the Defendants were in jail on September 1, 2008 does not preclude the State from charging all of the Defendants with conspiracy to commit riot and conspiracy to commit criminal damage to property through September 1, 2008. Acts of a co-conspirator are relevant to prove the conspiracy and are admissible even though they may have occurred after the conspiracy ended. *Lutwak v. United States*, 344 U.S. 604, 618 (1953). Under *Lutwak*, even if the conspiracy ended with the arrest of several defendants, the September 1, 2008 acts of those not arrested are admissible.

Defendants seek an order requiring the State to identify the specific acts on September 1, 2008 for which Defendants are being held responsible. The complaint is a written signed statement of the essential facts constituting the offense charged.

*Minn.R.Crim.P. 2.01*. It is not required that all relevant facts must appear on the face of the complaint. *State v. Burch*, 170 N.W.2d 543, 549 (Minn.1969). The State seeks to

change the end dates for the offenses charged in the complaint to September 1, 2008. The State has included allegations of conduct from September 2, 2008 in the probable cause statement of the complaint. The State has not disclosed any police reports of any events from September 2, 2008 and does not intend to introduce any evidence of events taking place on September 2, 2008. Defendants seek an order requiring the State to set out with specificity each act occurring on September 1, 2008 that the State alleges is part of the charged conspiracy. *Burch* does not require the State to set forth the facts with the level of specificity sought by Defendants. However, the State must amend the statement of probable cause so it does not include allegations of conduct that occurs after the dates of offense for the charges in the complaint.

The State may amend the complaint to remove the charges of Conspiracy to Commit Riot in the Second Degree in Furtherance of Terrorism and Conspiracy to Commit Criminal Damage to Property in Furtherance of Terrorism. The State may amend the complaint to change the end date from August 30, 2008 to September 1, 2008 for the two remaining charges of Conspiracy to Commit Riot in the Second Degree and Conspiracy to Commit Criminal Damage to Property in the First Degree. The State must amend the complaint so it does not include allegations of conduct occurring after the dates of offense for the charges in the complaint.