

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Court File No.: 27-CR-20-12953

State of Minnesota,

Plaintiff,

vs.

J. Alexander Kueng,

Defendant.

**DEFENDANT'S REPLY TO THE
STATE'S MOTION TO RECONSIDER
CAMERAS IN THE COURTROOM**

TO: The Honorable Peter Cahill, Judge of Hennepin County District Court;
Mathew Frank, Assistant Attorney General; Hennepin County Attorney's Office

The defendant, by and through his attorney, requests that the Court deny the State's motion to reconsider the Court's Order from November 4, 2020 (Index # 192) (hereinafter "Order") allowing audio and video coverage for Mr. Kueng's trial. The State's Motion For Reconsideration of Order Allowing Audio and Video Coverage of Trial (Index # 217) (hereinafter "Motion") simply reargues Minnesota General Rule of Practice 4.02 and fails to consider the unique circumstances of the upcoming trial of the four codefendants. The district court's order does not open the door to have a live broadcast of every high profile trial. (Motion at 2.) The incident from Chicago and 38th from this summer sparked worldwide wide interest and protests. The trial is set to occur during a once in a century global pandemic that has required capacity limitations on places where people gather. The Court's

Order strikes a reasonable balance among the interests of the defendants, the state, and the public by allowing audio and video coverage of the complete trial.

The sky is not falling.

The Court's Order is a reasonable exercise of its authority to control decorum in the courtroom. The State's Motion analyzes the criteria laid out in the General Rule of Practice 4.02 and disagrees with its application. However, the Court acknowledged that the Order "allows for greater audio and video coverage than that contemplated by Minn. Gen. R. Prac. 4.02(b)." (Order at 9.) The Court is clearly familiar with the Rule and the Court acknowledged that it was providing greater audio and video access than contemplated by the rule. The greater access to the trial is appropriate. "[W]e emphasize the grave responsibility trial courts have in overseeing and regulating courtroom conduct and procedure during trials, including criminal trials." *State v. Lindsey*, 632 N.W.2d 652, 658 (Minn. 2001). The State's arguments about the General Rules of Practice do not need to be addressed. The Court is familiar with the Rules of General Practice and it is clear the Court is making a reasonable accommodation based on the unique facts and circumstances of the upcoming trial.

The state tries to reframe the issue as a constitutional right to a live-streamed trial. (Motion at 8.) That is not the issue here. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly

dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.” *Waller v. Georgia*, 467 U.S. 39, 46 (1984).

Limiting the members of the public who can attend the trial in overflow courtrooms, as suggested by the state, amounts to a partial closure of the courtroom. A partial closure of a courtroom must be justified by a substantial interest. *See United States v. Farmer*, 32 F.3d 369, 371 (8th Cir. 1994). “[A] partial closure does not implicate the same secrecy and fairness concerns that a total closure does.” *Id.* (internal punctuation omitted).

The Court should consider four factors to determine if a partial closure violates a defendant’s Sixth Amendment right to a public trial. “So, a partial closure does not rise to the level of a Sixth Amendment violation if: (1) there is a substantial interest likely to be prejudiced, (2) the closure is no broader than necessary to protect that interest, (3) the trial court considers reasonable alternatives to closing the proceeding, and (4) the trial court makes findings adequate to support the closure.” *United States v. Thompson*, 713 F.3d 388, 395 (8th Cir. 2013). The reasons advanced by the state are not a substantial interest that support a partial closure of the proceedings.

Partial Closure of the Trial

Limiting the number of people from who can attend the trial is a partial closure. There is a courtroom that is being prepared specifically for this trial. “Spacing requirements mean there will be little, *if any*, room for any spectators in that courtroom during the trial.” (Order at 8.) The State’s response is to suggest that there should be overflow courtrooms where the trial is lived streamed. (Motion at 8, 10, 12.) This suggestion makes no sense during this pandemic. The capacity of indoor spaces has been limited as people are required to stay six feet apart and wear masks. It is unclear how many overflow courtrooms would have to be set up to safely accommodate the public. It is unclear who would police the social distancing requirements in each courtroom. It raises public safety concerns because people from other households, cities, states or countries would gather inside together for long periods of time to observe a six week trial. That situation is in direct contrast with the order currently in place from Governor Walz prohibiting people from different households from gathering together. (See <https://www.mprnews.org/story/2020/11/18/as-covid-surges-minnesota-dials-it-back-heres-what-you-need-to-know-about-the-new-rules> Last visited on 12/13/2020) It would create a burden on the parties to monitor how many people are being turned away from an overflow. The Court would be faced with determining what an acceptable amount of the public that can be excluded from

the trial is? To be clear the defense is specifically objecting to this practice.

Importantly, the Court's decision closing the courtroom would be reviewed on appeal as structural error. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908, 198 L. Ed. 2d 420 (2017). The public should not be required to attend a COVID-19 super spreader event to view Kueng's trial. Limiting the members of the public who can attend the trial in overflow courtrooms would be a partial closure of Kueng's trial.

The state minimizes the issues surrounding the interest of the members of the public who might wish to attend, thereby demeaning Mr. Kueng's rights. The state argues "that a court does not violate the Sixth Amendment just because social distancing restrictions limit the number of spectators in overflow rooms." (Motion at 10.) For example, In *United State v. Shryock*, 342 F.3d 948 (9th Cir. 2003), cited by the state, the Court found no violation based on the size of the courtroom. The Ninth Circuit noted, "the district court always allowed Appellants' family members and the general public to use the available seating. Appellants only point to two occasions where there was insufficient seating for family members, (1) when the jury received their questionnaires, and (2) at the return of the verdict." *Shryock* at 974-75. In contrast to the situation in *Shryock*, based on prior hearings, the public desire to attend the trial in this case is so great more members of the public will be excluded from the proceeding than can be safely accommodated in overflow

courtrooms. Limiting the public's attendance is a partial closure that would violate Kueng's Constitutional right to a public trial.

No Substantial Interest to Partially Close the Trial

The four factors do not support a partial closure of Kueng's trial. The state has not advanced a substantial interest likely to be prejudiced if there is not a partial closure. The state points to general concerns about witnesses. (Motion at 6, 14-15.) This is not a substantial interest that warrants a partial closure of the entire trial. In any trial, witnesses are reluctant to testify. The notoriety surrounding the case may make witnesses more reluctant, or more willing, to testify. The state has not advanced a reason why any further coverage of witness testimony is deterrence and warrants a partial closure of the entire trial. The state argues that witnesses will be intimidated and harassed. Given that the public sentiment is significantly weighed against the defendants, based in large part on the state's extrajudicial statements, it is far more likely that witnesses will be supported and praised for testifying during the trial than harassed.¹ The state has not advanced a substantial interest that will be prejudiced that would require a partial closure of the entire trial.

The closure in this case will be broad and continue for the entire six week trial. The closure will be broader than necessary to protect whatever interest the

¹ The witness who recorded the encounter was recently recognized with a Courage Award. See <https://www.startribune.com/mps-teen-who-made-george-floyd-video-humbled-to-get-national-courage-award/572885411/>

state thinks needs to be protected. There will be a systemic partial closure of the trial because the majority of the public who want to attend the trial will be regularly excluded from the trial.

The Court has considered alternatives to the partial closure and found them to be inadequate. “Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials.” *Presley v. Georgia*, 558 U.S. 209 (2010). As the Court noted, “[t]he instant situation, however, not only is abnormal – it is in fact quite unique. The COVID-19 pandemic persists and requires social distancing, especially during jury trials².” (Order at 7.) The Court considered the prior proceedings in the case and the ongoing scrutiny of the case. (Order at 8.) The Court concluded “the only way to vindicate the Defendant’s constitutional right to public trial and the media’s and public’s constitutional right of access to criminal trials is to allow audio and video coverage of the trial.” (Order at 8.) The Court considered other alternative and found they were not appropriate.

The Court has made adequate findings that a partial closure is not warranted. The Court has reviewed the unique facts and circumstances of case along with the pandemic and determined that there should be expanded audio and video coverage of Kueng’s trial. The Order is based on practical considerations

² Since the Court issued its Order, jury trial have been significantly limited and there are no longer in person court appearances until February 1, 2021. See ADM20-8001 (<https://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/COVID-19/112020.pdf>)

and prior experiences in the trial. The Court has made adequate findings in support of its order denying a partial closure of the trial.

Finally, the Court should not amend its order to allow individual witnesses to opt out of coverage of their testimony. The Court correctly notes that if witnesses are allowed to opt out of coverage of their trial, “the public would be left with nothing but the arguments of counsel.” More importantly, it would distort the evidence presented at trial to the public. The Court has made a reasonable accommodation by allowing certain witnesses to opt out of video coverage of their testimony and allow only audio coverage. This trial, like every trial, needs to be open and transparent. The only way that can happen is if witnesses cannot opt out of the coverage of their testimony. The Court should not amend its Order and allow a partial closure of Kueng’s trial. In the unique facts and circumstances of trying a case with worldwide impact during a global pandemic, allowing full media coverage of the complete trial is appropriate and necessary.

CONCLUSION

The State Motion should be denied in its entirety. Limiting public access to the trial in this case amounts a partial closure of the trial. The state has not advanced adequate grounds to partially close the entire trial. The defendant would request that the Court affirm its Order.

Respectfully submitted,

Dated: December 14, 2020

/s/ **Thomas C. Plunkett**

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