

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

State of Minnesota,

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

Plaintiff,

Vs.

**OBJECTION TO GAG ORDER,
PARTIAL CLOSURE AND REQUEST
FOR HEARING**

J. Alexander Kueng,

Defendant.

**TO: The State of Minnesota, the Prosecuting Attorney and Other
Interested Parties in the above-entitled case.**

On July 8, 2020 this Court issued a Gag Order to all parties. This memorandum is an objection to that order, and an objection to the Court imposed limitation on access to publicly filed documents. This limitation is a partial closing which deprives Mr. Kueng of his right to a fair and open hearing. The inaccurate media reporting caused by those restrictions imperil any chance at a fair trial. Counsel requests an in-court proceeding to further outline the harm caused by the Court's Gag Order.

FACTUAL BACKGROUND

On July 7, 2020 at approximately 11:00 a.m. Counsel for Thomas Lane filed a motion and memorandum along with supporting exhibits 1 through 8 seeking dismissal for lack of probable cause. Exhibits 3 and 5 are the body

worn camera (BWC) videos from Defendant's Lane and J. Alexander Kueng. While all matters were filed publicly; none of those pleadings were made available to the public for approximately 24 hours after filing. Exhibits 3 and 5 (the videos) remain hidden from the public and media by Court's personnel who liaison with media.

Shortly after a portion of those filings were made public media outlets began vigorously reporting on their content. The reporting was incomplete and tainted because the Court denied access to the videos to the public. On July 8, 2020 Counsel was contacted by several media outlets and informed that court personnel were refusing to allow access because this Court was not available to provide guidance to staff on how to release the videos. Counsel was contacted by roughly a dozen media outlets seeking comment on the videos and motions and declined to comment. It was accurately reported that:

Kueng's attorney, Thomas Plunkett, declined to comment on the body-camera footage.

Plunkett has previously noted that Kueng, also a rookie, looked to Chauvin for guidance. After Floyd stopped breathing, Kueng tried to find his pulse and announced that he couldn't find one. Plunkett is considering filing a similar motion to dismiss the case against Kueng. See Exhibit A.

The media and public continue to be denied access to the videos. The articles are based on incomplete information due to the Court imposed limitations on publicly filed exhibits. The public narrative is being driven by

the Court's denial of access to publicly filed exhibits which has caused a piecemeal release of information that unfairly portrays the evidence. This is in addition to the denial of his right to a fair and open hearing.

Objection to Gag Order - Due Process:

The Court's *sua sponte* Gag Order is overbroad, procedurally incorrect and not calculated to achieve fairness. The Gag Order has deprived Mr. Kueng of his right to Due Process under the State and Federal Constitution.

The Court's authority for placing a gag order on participants in this case is neither clear nor stated in the Gag Order. Minnesota appellate decisions pertaining to gag orders of participants is scant. The Minnesota Court of Appeals has indirectly recognized that trial judges may impose gag orders on participants. See *Minneapolis Star & Tribune Co. v. Lee*, 353 N.W.2d 213, 215 (Minn. Ct. App. 1984).

The federal circuits have developed a split on the standard for evaluating a gag order on trial participants. The Second, Fourth, Fifth and Tenth Circuits have held that a trial court may gag participants if it determines that comments present a "reasonable likelihood" or "substantial likelihood" of prejudicing a fair trial. (*In re Dow Jones & Co., Inc.*, 842 F.2d 603 (2nd Cir. 1988); *In re Russell*, 726 F.2d 1007 (4th Cir. 1984); *U.S. v. Brown*, 218 F.3d 415 (5th Cir. 2000); *U.S. v. Tijerina*, 412 F.2d 661 (10th Cir. 1969))

However, the Third, Sixth, Seventh and Ninth Circuits have imposed a stricter standard, rejecting gag orders on trial participants unless there is a “clear and present danger” or “serious and imminent threat” of prejudicing a fair trial. (*Bailey v. Systems Innovation, Inc.*, 852 F.2d 93 (3d Cir. 1988); *U.S. v. Ford*, 830 F.2d 596 (6th Cir. 1987); *Levine v. U.S. Dist. Ct.*, 764 F.2d 590 (9th Cir. 1985). Neither the Eight Circuit or Minnesota State Courts appear to have ruled on the standard to be applied.

Counsel advances the “clear and present danger” standard because it implicates the strict scrutiny standard that should be applied to restrictions on speech.¹ “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). The First Amendment right of the press and the public has been discussed as a corollary to the Defendant’s right to a fair and open hearing lending support to this position. *See Presley v. Georgia*, 558 U.S. 209, 212 (2010). Regardless, the Court’s Gag Order does not meet either standard. Unfortunately, the fallout from the limitations on access from the Gag Order does present a “clear and present” danger of denying Mr. Kueng a fair trial. The Due Process violation flowing

¹ Minn. R. Crim. P. 25.03 Subd. 4 (a) applies a substantial likelihood test. Because this standard is untested in Minnesota, Counsel is challenging the constitutionality of the rule.

from the Court's Gag Order cannot be cured by limiting the parties. That will be addressed in the next section of this objection.

The Court's Gag Order fails for procedural due process also. The process for imposing a restrictive order is found in Minnesota Rule of Criminal Procedure 25 entitled **Special Rules Governing Exclusion of the Public from Pretrial Hearings and Prejudicial Publicity**. Rule 25 discusses, among other things, exclusion of the public from pretrial hearings and orders restricting access to public records. The rule requires notice, a hearing, and specific findings for restrictions. The rule does not discuss gag orders but should be considered as guidance to determine if procedural due process has been met in issuing this restrictive order. Since no aspect of Rule 25 was followed no further discussion is needed. The Court's Gag Order lacks any semblance of procedural due process.

The Gag Order was issued because:

The Court has been made aware that two or more attorneys representing parties in the above-captioned cases granted interviews or talked with the media yesterday, expounding on the merits of the case or commenting on other aspects of the case after a motion to dismiss was filed in *State of Minnesota v. Thomas Kiernan Lane*. See Gag Order

The Court's assertions about Counsel's actions are erroneous and therefore the Gag Order lacks a factual foundation to issue. Counsel "declined to comment on the body-camera footage." See Exhibit A. The media did make

reference to arguments Counsel made on the record at the arraignment, and the article makes that clear. *Id.* Alarming, this Court's Gag Order appears to sanction Counsel for advocating in a courtroom on his client's behalf. As reported, Counsel did acknowledge consideration of a similar motion, but that is hardly expounding on merits or commenting on aspects of the case. Compare this to the Chief of Police and the Commissioner of Public Safety declaring this is a murder and many outlandish comments from the Prosecution.

The Gag Order is an impermissible restraint on the Defendant and Counsel.² It is a sanction for advocating for fair treatment of Mr. Kueng and was issued without procedural due process.

Objection to Restrictions on Access - Closure:

The Gag Order incorrectly states that "Access to public records is not restricted by this order." *See* Gag Order at para. 3. The Gag Order restricts access in two ways. First the Gag Order delays access to public information. Second the Gag Order limits access to a review of the information controlled by court personnel. The result of these restrictions has been piecemeal release of information. The effect of these restrictions has been catastrophic, causing

² It would have been appropriate to impose a Gag Order on the Prosecution from the outset, instead they were allowed to taint the jury pool for a month without restraint.

inaccurate and out of context reporting that worked to the benefit of the prosecution. Viewing information by appointment, a week after it is publicly filed is a restriction.

The practical effect of the fallout of the Court's Gag Order, when combined with past extrajudicial statements from the prosecution, has deprived Mr. Kueng of that 'judicial serenity and calm to which (he) was entitled.' See *Sheppard v. Maxwell*, 384 U.S. 333, 355 (1966) citing *Estes v. State of Texas*, 381 U.S. 532, 536 (1965).

This case has attracted international attention and controversy. The State and its entourage of elected officials, the Commissioner of Public Safety, Chief of Police and other persons, all properly characterized as parties in this matter, were given a month to blast their trumpet thereby inflaming the public and assuring a fair trial could not be had.³ They have

³ <https://www.nbcnews.com/podcast/into-america/american-uprising-keith-ellison-george-floyd-s-death-n1222271>, accessed Jul. 12, 2020; <https://minnesota.cbslocal.com/2020/05/31/attorney-general-keith-ellison-to-take-over-george-floyd-case/>, accessed Jul. 12, 2020; <https://www.cnn.com/2020/06/24/us/minneapolis-police-chief-comment-george-floyd-trnd/index.html>, accessed July 12, 2020; <https://bringmethenews.com/minnesota-news/dps-commissioner-calls-george-floyd-death-a-murder-thats-what-it-looked-like-to-me>, accessed July 12, 2020; <https://www.nytimes.com/2020/06/03/podcasts/the-daily/jacob-frey-george-floyd-protests-minneapolis.html>, accessed July 12, 2020; <https://www.democracynow.org/2020/5/29/minneapolis>, accessed Jul. 11, 2020.

bleached the public of all objectivity toward the facts and circumstances surrounding this case and removed any hope that the Mr. Kueng might have of a fair trial. The State's misuse of public comments about the case has overwhelmed any respect for the officers' constitutional rights, spawning a Prosecution made landscape which tips mightily away from justice through the present day. The Court's Gag Order now places a butcher's thumb on the scale.

The videos and future exhibits are public data pursuant to Minn. Stat. 13.82 subd. 7. That statute states that "Any investigative data presented as evidence in court shall be public." The process for restricting public access to public records relating to a criminal proceeding is found in Minnesota Rule of Criminal Procedure 25.03 which governs the issuance of any court order restricting public access to public records relating to a criminal proceeding. The rule requires notice, a hearing, appropriate grounds and written findings. A restriction has occurred and the rule was ignored.

The Sixth Amendment's bedrock right to a public trial is "for the benefit of the accused."⁴ *See Waller v. Georgia*, 467 U.S. 39, 46 (1984) (quotation omitted). It reflects the "general rule[] that judges, lawyers,

⁴ The United States Supreme Court has recognized a related First Amendment right of the press and the public to access and observe criminal trials. *Presley v. Georgia*, 558 U.S. 209, 212 (2010).

witnesses, and jurors will perform their respective functions more responsibly in open court than in secret proceedings.” *Estate v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring). The court’s “knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is [also] an effective restraint on possible abuse of judicial power,” *In re Oliver*, 333 U.S. 257, 270 (1948), and serves to protect against even run-of-the-mill “petty arbitrariness,” *State v. Brown*, 815 N.W.2d 609, 616 (Minn. 2012) (quotation omitted). The public-trial right “applies to all phases of trial,” including pretrial proceedings. *See State v. Smith*, 876 N.W.2d 310, 328 (Minn. 2016) (quotation omitted); *see also United States v. Rivera*, 682 F.3d 1223, 1229 (9th Cir. 2012).

A closure occurs, and the values sought by a public trial are not protected, when “all or even a significant portion of the public” are excluded from a criminal proceeding. *State v. Lindsey*, 632 N.W.2d 652, 660 (Minn. 2001). This Court has restrained access to public information and media by both delay and limitation. By permitting some reporting while prohibiting other reporting, the trial court in effect parcels out news to the press and the public. This Court has done exactly what Minnesota Appellate Courts have cautioned against. *See Austin Daily Herald v. Mork*, 507 N.W.2d 854, 857 (Minn. App. 1993) *review denied*. In *Mork* a court admitted media on the

condition that they not report on a child witnesses' testimony. While the restriction was found acceptable, the decision in *Mork* warned that "parceling out news is not manageable for the courts."

Based on the above, the Defendants seek immediate rescission of the Gag Order, public release of the videos and a hearing for Counsel to review the videos and outline in detail the harm caused by the Court's Gag Order with an eye towards fashioning an appropriate remedy.

Respectfully submitted,

/s/ Thomas C. Plunkett

Date: July 13, 2020

Thomas C. Plunkett
Attorney No. 260162
Attorneys for Defendant
101 East Fifth Street
Suite 1500
St. Paul, MN 55101
Phone: (651) 222-4357