

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

State of Minnesota,Court File No.: 27-CR-20-12953
27-CR-20-12951

Plaintiff,

vs.

J. Alexander Kueng,
Thomas K. Lane,**DEFENDANT'S MOTION TO EXCLUDE
VIDEO AND AUDIO RECORDING OF
PROCEEDINGS**Defendant.

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

PLEASE TAKE NOTICE that on September 9, 2021 at 9:00 a.m. or as soon thereafter as counsel may be heard, before the Hon. Peter Cahill, Judge of District Court, the Defendant will move for an order as follows:

1. For an order prohibiting live video or audio coverage of the trial.

BACKGROUND

On November 4, 2020 this Court issued an order allowing audio and video coverage of the joint trial of the 4 co-defendants. (See Index 192). Prior to the Court issuing the order all 4 co-defendants had waived any objections to audio and video coverage of the trial, and in fact specifically requested audio and video coverage. The State had persisted in their objection to audio and video coverage.

The Court's order and memorandum examined both the 6th Amendment interests of the defense and the 1st Amendment's right to public access. The Court concluded that

both of these principles weighed in favor of forgoing the prohibitions of Minn. Gen. R. Prac. 4. Importantly the Court pointed out that “While the right of the press and public to attend criminal trials is sacrosanct, and carries with it the right to report what has occurred during the trial, the right does not include a right to ‘telecast’ the actual proceedings.” *Citing Estes v. Texas*, 381 N.W.2d 532, 541-542 (1965). Due to the unique circumstances of a raging pandemic and the space limitations imposed by social distancing, the Court explained that virtually no spectators would fit into a courtroom hosting 4 co-defendants and the States team of volunteers. In the end, co-defendant Derek Chauvin was tried on his own due to space constraints in the courtroom. It is the worldwide publicity from the televised coverage of the Chauvin trial that has impaired Mr. Kueng’s right to a fair trial.

DISCUSSION

As is often noted, “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). This Court concluded that the only way to vindicate the Defendants’ constitutional right to a 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, including broadcast by the media.

Unfortunately, this well-reasoned and thoughtful decision by this Court, while well intentioned, has resulted in a deprivation of the defendant’s right to a fair proceeding.

Due to the trial of co-defendant Chauvin being televised, Mr. Kueng's right to present a defense in his upcoming trial has been crushed. The incredible access of the public to the Chauvin proceedings has resulted in fact and expert witnesses declining to testify for the defense, one defense witness being harassed and another defense witness being subject to professional slander.

Counsel has been informed by fact witnesses that they will not cooperate or testify because the proceedings are being televised. Other witnesses have been reluctant to participate without stating a specific reason, yet intimating they are concerned about being associated with the defense due to the amount of press coverage of this matter. Multiple expert witnesses have stated they do not want the notoriety that would come from this matter. Mr. Chauvin's use of force expert, Barry Brodd, had a pig's head and blood smeared at his former residence.¹ Dr. David Fowler, "an internationally renowned forensic pathologist who served for years as Maryland's chief medical examiner — is now being subjected to harassment and defamation for having had the temerity to testify in the ex-officer's defense case."² The efforts against Dr. Fowler were led by a State's witness, Dr. Roger A. Mitchell.

As an initial matter, the defendant, by and through his attorney, formally withdraws his consent to allow video and audio coverage of the trial proceeding in this matter. Further, Mr. Kueng specifically asks this Court to prevent video and audio coverage to protect his interest in a fair trial.

¹ See <https://www.msn.com/en-us/news/crime/vandals-left-blood-pigs-head-at-former-home-of-derek-chauvin-expert-witness-police/ar-BB1fN85L>

² See <https://www.nationalreview.com/2021/04/chauvin-defense-witnesses-face-post-trial-intimidation-campaign/>

Not allowing video and audio coverage is neither a closure nor a partial closure of the Court. Should the Court believe prohibiting cameras in the court is a closure, that can be remedied with a live video feed to another courtroom or courtrooms.

Cameras in the Chauvin Courtroom brought us to the dangerous pass where people are deterred from testifying for the defense because they fear the wrath of the crowd. Cameras in the subsequent trial will deprive Mr. Kueng of a fair trial under the Sixth Amendment.

The test to determine if a closure violates a defendant's Sixth Amendment right to an open hearing has 4 factors. "[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). In this case, there is no substantial interest prejudiced based on the ease of providing reasonable access via a feed to an overflow courtroom. The breadth of the closure is not at issue because an overflow courtroom or courtrooms will allow more persons than ordinary to view the trial. As we move past COVID, an overflow courtroom is a reasonable alternative to persons being in the active courtroom.

It is Counsel's hope that eliminating the extensive worldwide coverage will allow the defense to present a reasonable defense. It cannot yet be known that removing cameras alone will be a sufficient prophylaxis to protect Mr. Kueng's right to a fair trial.

The defense is not yet moving for dismissal or a further continuance based on the television coverage of Mr. Chauvin's trial, but may need to in the future.

CONCLUSION

In order to assure a fair trial where Mr. Kueng is allowed to present a defense I respectfully ask this Court to enter an order preventing media coverage of the upcoming trial.

Respectfully submitted,

Dated: August 24, 2021

/s/ *Thomas C. Plunkett*

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