

November 18, 2009 hearing.

3. First, regarding the Court's order, a review of the transcript of the November 18, 2009 status hearing indicates that the only unambiguous order entered in this case regarding Gregory Koger's conduct was that as a condition of his bond he should not have contact with the complaining witness in the case. The defendant has not had any contact with the complaining witness in this case.

4. The additional discussion regarding no contact began when the defense complained to the Court that incorrect information about Gregory Koger's criminal history had been improperly published on the internet. In response, the State incorrectly equated the defendant's perfectly legal right to publically comment on the court proceedings with the State's complaining witness improperly publishing confidential information obtained about Gregory Koger's criminal history. In response, the Court ambiguously stated, "Both sides, leave everybody alone."

5. Based on the proceedings of November 18, 2009, it is clear that the Court did not intend to enter, nor did it enter any kind of order even remotely barring Gregory Koger or anyone else from blogging about the case on the internet. The order, if there was one, was to leave the complaining witness alone, and this order has never been violated.

6. Second, regarding Mr. Koger's conduct, the Court is directed to a copy of a printout from the defendant's website attached hereto as Exhibit A. On the website, the defendant unambiguously states that "On my attorney's advice, given the pending serious

charges I face, I am not commenting on the specific details of my arrest and I've made parts of my website private until after the legal proceedings are resolved and I can speak freely." (see Exhibit A) Therefore, even if the Court's ambiguous comment could be construed to somehow restrict Gregory Koger's First Amendment Right to publically comment on the criminal charges against him, it cannot be concluded that Gregory Koger violated any such order.

7. The State's motion is a blatant attempt to intimidate supporters of the defendant from speaking out on the defendant's behalf, either in public forums or online. Gregory Koger's supporters have formed a defense committee called the Ad Hoc Committee for Reason and Dropping the Charges whose purpose is to organize support for the defendant as he fights the charges against him. The content of the website of the Ad Hoc Committee for Reason and Dropping the Charges is not in any way controlled by defendant. Even if it were directly controlled by defendant he would not be in violation of any order of this Court because maintenance of a website does not violate the Court's Order to "Both sides, leave everybody alone." Rather, the website is a completely legitimate and protected exercise of free speech by individuals who feel strongly that Mr. Koger is innocent and that the charges against him should be dropped.

8. There is nothing about the case that is secret or confidential, or that is not rightfully in the public domain. In fact, there is public interest in the details of the case. The Chicago Reader published a news article regarding the case on January 21, 2010. Obviously, the Court has not entered any kind of order barring the Chicago Reader from

writing about the case, and the Court would not and could not hold Gregory Koger in contempt for matters published by the Reader.

9. It is clear that this Court cannot hold Gregory Koger in contempt for the actions of a third party.

10. This motion raises questions regarding the relationship between the First Amendment right to freedom of speech and the contempt power of the Court. As the United States Supreme Court stated in *Craig v. Harney*, 331 U.S. 367, 373, 91 L. ed. 1546, 1550:

The history of the power to punish for contempt and the unequivocal command of the First Amendment serve as constant reminders that freedom of speech and of the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice.

11. It has been held that the First Amendment forbids punishment by contempt, any comment on pending cases in absence of a showing that the utterances created a "clear and present danger" to the administration of justice. *Pennekamp v. Florida*, 328 U.S. 331, 90 L. ed. 1295; *Bridges v. California*, 314 U.S. 252, 260, 86 L. ed. 192. *Craig v. Harney*, 331 U.S. 367, 375.

12. In *People v. Hathaway*, 27 Ill. 2d 615, 618 (1963), the Illinois Supreme Court stated: "To be contemptuous, published criticisms of a judge relating to a pending case must constitute an imminent or serious threat to a judge of reasonable fortitude." Mr. Koger's case raises factual circumstances that *are an even weaker*

basis for contempt because the State has not even alleged criticisms of the judge in this case.

13. The clear and present danger test was recently relied on in *D'Agostino v. Lynch*, 382 Ill. App. 3d 960, 971 (1st Dist. 2008).

14. Illinois courts have a long tradition of protecting a defendant's First Amendment Right to make public comments about a pending legal matter. In *Cooper v. Rockford Newspapers, Inc.*, 50 Ill. App. 3d 250 (2nd Dist. 1977), the defendant newspaper appealed a judgment from the Circuit Court of Winnebago County, Illinois that held the newspaper in contempt for violating a restraining order that directed the newspaper not to print any editorials regarding a libel action in which it was the defendant. The Appellate Court reversed the contempt judgment, holding that the right to comment on the court system is at the core of First Amendment values. The denial of the right to comment even for a short time can result in irreparable harm. If the court may punish a violation of an invalid order restricting comment about the court system or its operation in a particular case, censorship will result. *See also, In re Summerville*, 190 Ill. App. 3d 1072 (1st Dist. 1989) (Court reverses contempt citation issued after television appearance by public guardian, which was based on order barring public guardian from making public comments on a foster placement because the order constituted an illegal prior restraint of free speech).

15. The State's complaint is not against Gregory Koger, but rather

against third parties who are exercising their First Amendment Right to support the defendant by publishing publically available information about the case, and by encouraging Gregory Koger's supporters to attend court proceedings. The State's motion is therefore an obvious attempt to chill the free speech of people who support Gregory Koger as he fights the charges brought against him. This is clearly an improper use of the judicial process.

16. In sum, not only has the Ad Hoc Committee for Reason and Dropping the Charges engaged in constitutionally protected speech, but neither has the Committee nor Mr. Koger engaged in conduct that remotely violates any order entered by this Court.

17. Finally, the State's Petition is defective because it fails to give adequate notice to the defendant whether the State is pursuing civil or criminal contempt charges, and it fails to give the defendant notice of the remedy sought. Therefore for these reasons alone the State's petition should be dismissed.

WHEREFORE, for all the foregoing reasons, the Court should dismiss and strike the State's Petition for Rule to Show Cause.

Respectfully submitted,

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