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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

J. Alexander Kueng,

Tou Thao,

Defendants.

STATE'S OPPOSITION TO A CHANGE OF VENUE OR A CONTINUANCE

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

Court File No.: 27-CR-20-12949

TO: The Honorable Peter A. Cahill, Judge of District Court; counsel for Defendants, Robert Paule, 920 Second Avenue South, Suite 975, Minneapolis, MN 55402; and Thomas Plunkett, U.S. Bank Center, 101 East Fifth Street, Suite 1500, St. Paul, MN 55101.

INTRODUCTION

This Court should deny Defendant Kueng's motion for a change of venue or a continuance. For months, this Court has been clear: Trial will commence on June 13. Now, on the eve of that trial, Defendant Kueng belatedly asks again to move this case to somewhere else in Minnesota or delay proceedings for yet another year. This newest motion—Defendant Kueng's *fourth* such request—does not offer new facts that warrant this Court revisiting its earlier decisions and changing course at this late hour. Instead, Defendant Kueng's filing is largely based on a stale declaration his co-Defendant Derek Chauvin filed on March 18, 2021 and which purports to be a study of the "extent of coverage *between May 25 and August 10 2020*." Edelman Declaration 8 (emphasis added). This Court correctly rejected arguments based on that declaration once before. It should do so again. Defendant Kueng's latest filing is nothing more than a last-ditch attempt to evade judgment. The time has come for Defendant Kueng and Defendant Thao to stand trial in Hennepin County for their respective roles in the death of George Floyd on May 25, 2020.

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ARGUMENT

I. THIS CASE SHOULD BE TRIED IN HENNEPIN COUNTY.

This Court has "wide discretion in determining whether" to grant a motion to change venue. *State v. Kinsky*, 348 N.W.2d 319, 323 (Minn. 1984). For four reasons, this Court has properly exercised its discretion when it concluded in November 2020 that this case should be tried in Hennepin County. Nothing has changed since that warrants a different result.

First, the standard for granting a new venue is high: The Court must determine that "potentially *prejudicial material* creates a *reasonable likelihood* that a fair trial cannot be had." Minn. R. Crim. P. 25.02, subd. 3 (emphasis added). Not all media is potentially prejudicial, and "[p]rospective jurors cannot be presumed partial solely on the ground of exposure to pretrial publicity." *Kinsky*, 348 N.W.2d at 323. Given the realities of modern communication, "it is unlikely that any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." *Id*. (internal quotation marks omitted). Thus, the question "is whether a prospective juror can set aside his impression or opinion and render an impartial verdict." *Id*.; *see also State v. Parker*, 901 N.W.2d 917, 924-925 (Minn. 2017); *State v. Fairbanks*, 842 N.W.2d 297, 302 (Minn. 2014); *State v. Blom*, 682 N.W.2d 578, 608 (Minn. 2004); *State v. Warren*, 592 N.W.2d 440, 447 (Minn. 1999). As the United States Supreme Court has explained, "[p]rominence does not necessarily produce prejudice, and juror *impartiality* . . . does not require *ignorance*." *Skilling v. United States*, 561 U.S. 358, 381 (2010). Thus, the mere fact that this case has incurred substantial media publicity does not mean that Defendant will likely be

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denied a fair trial. Otherwise every high-profile defendant would escape justice for his crimes. That perverse result is not the law.

Second, a change of venue is unwarranted where, as here, pretrial coverage has affected the entire state. *See, e.g.*, *Parker*, 901 N.W.2d at 922 ("[P]eople in every corner" of Minnesota "could have been exposed to" publicity.); *Blom*, 682 N.W.2d at 608 ("[N]owhere in the state would [defendant] face a jury unexposed to publicity about the case."); *Thompson v. State*, 183 N.W.2d 771, 772 (Minn. 1971) ("In a case of such notoriety, publicity extends throughout the state."). For good reason. A change in venue may be necessary where, for instance, a small community experiences intense but localized pretrial publicity. By contrast, George Floyd's death drew enormous attention, not just throughout Minnesota but across the United States and around the world. There is no reason to believe that pretrial publicity has been materially different in Hennepin County as opposed to Olmsted County or Dakota County, the two alternative locations Defendant Kueng now proposes. *See* Defendant's Fourth Motion for Change of Venue or Continuance, 1 (May 28, 2022) ("Fourth Change of Venue Motion").

Third, procedural safeguards reduce the "likelihood that a fair trial cannot be had." Minn. R. Crim. P. 25.02, subd. 3. The Minnesota Supreme Court has approved the following safeguards, all of which this Court has already implemented or can easily employ: a "jury questionnaire" to identify impartial jurors; a directive "that the State confer with the defense to identify in advance any jurors who should not be summoned to voir dire;" "individual[ized] voir dire outside the presence of the other jurors, as required in first-degree murder cases;" "additional peremptory challenges to both parties;" and "ample" leeway for defense attorneys "to question the prospective jurors about their exposure to prejudicial publicity so [the defendant] could use the additional

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challenges intelligently." 842 N.W.2d at 303; *see also Blom*, 682 N.W.2d at 609 (approving of similar measures).

Fourth, in its initial order denying a request for a venue change, the Court properly determined that it could better ensure the safety of trial participants in the Hennepin County Government Center, and the "jury can be insulated from outside influence and remain impartial." Preliminary Order Regarding Change of Venue, 5 (Nov. 4, 2020). By contrast, the Court determined that "effective security measures are more difficult to put in place in a smaller courthouse with limited entrances and exits," as would likely be the case in another county. *Id*. at 4-5; *see Fairbanks*, 842 N.W.2d at 304 (affirming district court's consideration of "[t]he technology and security features available in the nearly new Polk County Judicial Center" and the fact that "detention facilities in Mahnomen County were not adequate"). This practical consideration further supports the Court's measured decision to hold this trial in Hennepin County.

None of Defendant Kueng's counterarguments hold water. Start with the outdated declaration that is the centerpiece of Defendant Kueng's motion. The declaration summarizes media reports that, as of today, are nearly *two years old*. The passage of time is fundamentally fatal to his claim. Indeed, in recently opposing audio-visual coverage of this trial in April, Defendants argued—and this Court acknowledged from the bench—that time has lessened the intensity of the public's interest in these proceedings. To be sure, this remains an immensely important case; the State supported and continues to support audio-visual broadcasting. But the degree of publicity today is categorically different than it was in the weeks immediately following

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May 25, 2020. Moreover, Defendant Kueng's putative expert did not measure the publicity in Hennepin County relative to any other part of the state.[1]

Defendant Kueng is likewise wrong that his federal trial and Defendant Lane's guilty plea require changing venue at this late hour. *See* Fourth Change of Venue Motion at 4. The media coverage of both of those developments has been largely factual, comparatively muted, and, like the earlier coverage, not limited to Hennepin County. Defendant Kueng similarly asserts that the questionaries prove "potential jurors have a significant level of knowledge and harbor bias." *Id*. at 7. But Defendant Kueng supports that statement with a bare two quotations from questionaries. If Defendant Kueng truly believes the questionaries demonstrate he cannot receive a fair trial, he should offer more than a conclusory allegation.[2]

Nor is Defendant Kueng correct on the law. He argues that, even though this Court quoted the correct legal standard in its November 4, 2020 order, it *applied* a different standard—the one "applicable to appellate review of decisions on change of venue." *Id*. at 6. But Defendant Kueng

[1] The State does not concede that Dr. Bryan Edelman is a qualified expert, that any aspect of his declaration is accurate, or that any of his opinions are even legally relevant. To the extent Dr. Edelman argues time cannot lessen the effects of pretrial publicity, that conclusion contradicts Minnesota's Rules of Criminal Procedure, which expressly contemplate that courts may grant continuances to ameliorate the effects of publicity. *See generally* Minn. R. Crim. P. 25.02. Similarly, to the extent that Dr. Edelman believes that jurors' subconscious biases render voir dire ineffective, that too reflects little more than a disagreement with longstanding aspects of American criminal procedure. *See* Fourth Change of Venue Motion at 3-4.

[2] The affidavit from Defendant Lane's counsel is similarly conclusory. *See* Affidavit of Earl P. Gray in Support of Change of Venue and Continuance (May 4, 2022).

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does not articulate a single thing wrong with this Court's prior order denying a change of venue. Nor can he: This Court correctly applied the law and carefully articulated its reasons.[3]

Finally, there is no merit to Defendant's suggestion (at 6-7) that the pretrial publicity around this case merits a so-called "presumption" that the jury will be prejudiced. "A presumption of prejudice . . . attends only the extreme case." *Skilling*, 561 U.S. at 381; *see also Parker*, 901 N.W.2d at 925 n.5. This is not one of them, as these proceedings have so far and will continue to bear absolutely no resemblance to the cases in which a presumption of prejudice has attached. *See, e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966) (describing a "carnival atmosphere at trial"—where media extensively covered the trial of a man accused of bludgeoning his wife, press commandeered the courtroom, jurors' identities were publicized, and the judge and prosecutor were up for election shortly after the trial—that "could easily have been avoided" had the trial court exercised "control" over the courtroom). This case, despite its prominence, has always been managed by the Court in a fashion that is the opposite of the "carnival atmosphere" in cases like *Sheppard*. There is simply no comparison.

II. THIS COURT SHOULD HOLD TRIAL ON JUNE 13.

For much the same reasons, this Court should not grant yet another continuance. To determine whether a continuance is warranted, this Court similarly asks whether "potentially prejudicial material creates a reasonable likelihood that a fair trial cannot be had." Minn. R. Crim. P. 25.02 subd. 3. But Defendant Kueng will receive a fair trial, and he offers nothing but

[3] To the extent Defendant Kueng believes this Court erred because it has looked to appellate precedent for guidance, that too would be incorrect. An appellate court's deferential review of another district court's decision can—while not dictating a result—nonetheless provide insight into how this Court chooses to weigh various factors and exercise its discretion. Strangely enough, Defendant Kueng (at 6-7) actually articulates the appellate standard of review.

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speculation that—two years after George Floyd's death—this Court will now be unable to seat an impartial jury.

CONCLUSION

The State respectfully requests the Court hold this trial in Hennepin County and deny a continuance.

Dated: May 30, 2022

Respectfully submitted,

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