
STATE OF MINNESOTA,

Plaintiff,

vs.

TOU THAO

and

J. ALEXANDER KUENG,

Defendants.

**ORDER AND MEMORANDUM
OPINION CONTINUING TRIAL**

Court File No. 27-CR-20-12949

Court File No. 27-CR-20-12953

This matter came before the Court for a zoom hearing on May 31, 2022, on the:

- (1) renewed motions by defendants Tou Thao (Thao) and J. Alexander Kueng (Kueng) to change venue or to continue the trial date because of new prejudicial pretrial publicity (*see State v. Thao*, Dk 584 (filed May 30, 2022), and *State v. Kueng*, Dk 588 (filed May 28, 2022)); and
- (2) Media Coalition's motion to reconsider the Court's April 25, 2022 Order and Memorandum Opinion barring audio and video coverage of the trial. (*See State v. Thao*, Dk 578 (filed May 23, 2022), and *State v. Kueng*, Dk 581 (filed May 23, 2022).)

Matthew Frank and Steven Schleicher appeared on behalf of the State.

Robert Paule and Natalie Paule appeared on behalf of Thao, who was present.

Thomas Plunkett appeared on behalf of Kueng, who was present.

Based upon all the files, records, and proceedings, the Court makes the following:

ORDER

1. The Defense motions to change venue are **DENIED**.
2. The Defense motions to continue the trial are **GRANTED**:
 - a. Trial is continued to January 5, 2023, at 9:00 a.m.

- b. Motions *in limine* will be heard January 5-6, 2023.
 - c. Jury selection will begin January 9, 2023, at 9:00 a.m.
 - i. Each Defendant will have five peremptory strikes and the State will have six peremptory strikes.
 - ii. Jury selection will be by individual selection as required by Minn. R. Crim. P. 26.02 subd. 4(2)(b).
 - iii. Questionnaires shall be sent out to a new panel of jurors on or about September 1, 2022.
 - d. Opening statements and presentation of evidence will begin January 30, 2023.
3. Trial will be in Courtroom C-1856. At least eighteen spectator seats will be available in the courtroom: two for the media, four for members of the Floyd family, six for members of the Defendants' families, and six for members of the general public. No electronic devices will be allowed on the 18th floor or in the general public overflow courtroom, except for devices used by court staff, jurors, attorneys and staff for the parties, and defendants.
4. There will be an overflow courtroom for credentialed media and an overflow courtroom for the general public. Court administration may combine the overflow courtrooms if one courtroom can accommodate the demand for seating.
5. The Media Coalition's motion to reconsider the Court's April 25, 2022 order barring audio and video coverage of the trial is **DENIED**:
- a. The Media Coalition's motion to reconsider may be renewed closer to the trial date if there is a significant change in circumstances or a relevant change in law or court rules.

- b. The request of the American Civil Liberties Union to file an amicus letter brief (*see State v. Kueng*, Dk 582, filed May 24, 2022) is **GRANTED**.
6. The Court will not accept any negotiated plea agreements unless a change-of-plea hearing is scheduled not more than 15 days after the sentencing proceedings in the Defendants' pending federal civil rights cases, *United States v. Tou Thao (2) & J. Alexander Kueng (3)*, Case No. 21-cr-108 (2-3) (PAM/TNL).
7. All other trial management orders and scheduled deadlines consistent with this Order shall remain in effect.
8. The attached Memorandum Opinion is incorporated herein.

BY THE COURT:

Peter A. Cahill
Judge of District Court

MEMORANDUM

I. CHANGE OF VENUE

The United States Constitution guarantees criminal defendants the right to a “public trial, by an impartial jury of the State and district” in which the crime was committed. U.S. Const. Amend. VI. Minnesota’s Constitution likewise guarantees criminal defendants the right to a “public trial by an impartial jury of the county or district wherein the crime shall have been committed.” Minn. Const. Art. I, § 6; *see also* Minn. R. Crim. P. 24.01 (“case must be tried in the county where the offense was committed unless these rules direct otherwise”).

Under the Rules of Criminal Procedure, trial courts are permitted to transfer venue to another county if “potentially prejudicial material creates a reasonable likelihood that a fair trial cannot be had.” Minn. R. Crim. P. 24.03 subd. 1, 25.02 subd. 3. The decision whether to transfer venue lies in this Court’s “wide discretion.” *State v. Kinsky*, 348 N.W.2d 319, 323 (Minn. 1984); *State v. Fratzke*, 354 N.W.2d 402, 406 (Minn. 1984). If venue is changed, the case must be transferred to another county or district within the State of Minnesota. Minn. R. Crim. P. 24.03 subd. 2.

Kueng maintains:

Mr. Floyd’s death, the criminal charging of Mr. Kueng et al and the riots had more media coverage in the Minneapolis/St. Paul area than any event in its history. There was saturation news coverage in the Star Tribune and Pioneer Press and the three TV networks. Nationwide, new coverage was more extensive than any story in fifty years. (Footnote omitted.)

Kueng Fourth Motion for Change of Venue or Continuance, at 2.

Not all media publicity is potentially prejudicial and prospective jurors cannot be presumed to be partial solely due to exposure to pretrial publicity. *Kinsky*, 348 N.W.2d at 323; *see also State v. Warren*, 592 N.W.2d 440, 447 (Minn. 1999) (“The mere fact that a juror has been exposed to pretrial publicity is insufficient to show prejudice.”); *accord Skilling v. United*

States, 561 U.S. 358, 384, 399 (2010) (“pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial”; jurors “need not enter the box with empty heads in order to determine the facts impartially). As the United States Supreme Court has explained, juror exposure to news accounts of a crime does not presumptively deprive a defendant of due process because “[p]rominence does not necessarily produce prejudice, and juror *impartiality* . . . does not require *ignorance*.” *Skilling*, 561 U.S. at 381 (emphasis in original).

As noted in prior rulings, in these cases as well as in *State v. Chauvin*, 27-CR-20-12646, this Court does not find that a change of venue would ameliorate any pernicious effects of pretrial publicity that may have been prejudicial. While the Court agrees that there has been “saturation news coverage” in the Twin Cities in print and broadcast media over the past two years since the events of May 25, 2020, Defendants ignore that that these events have had saturation news coverage throughout the entire State of Minnesota – not to mention nationally¹ -- as well. Nonetheless, Defendants have not developed any factual record and presented to this Court any firm basis upon which this Court might conclude there exist other counties in this State that have been substantially less impacted by the pervasive, saturation publicity George Floyd’s death on May 25, 2020 and these cases have received. For example, searches on June 4, 2022 of the following search terms in selected Minnesota and national media entities yielded the following results:

¹ For example, Court TV reported more than 400,000 viewers tuned in to watch the jury verdicts in the *Chauvin* trial on April 20, 2021, the “most watched day” since Court TV’s “reboot” two years earlier. <https://www.nexttv.com/news/court-tv-sees-record-audience-for-chavin-verdict> Other articles reported the high levels of viewer interest in television coverage throughout the *Chauvin* trial, *see, e.g.*, <https://www.nytimes.com/live/2021/04/07/us/derek-chauvin-trial#derek-chauvin-trial-ratings>, and more than 23 million Americans reportedly watched the *Chauvin* verdicts on 11 networks other than Court TV, according to Nielsen data. *See* <https://minnesota.cbslocal.com/2021/04/22/nielsen-at-least-23-2-million-watched-verdict-in-derek-chauvin-trial/>. [Note: all referenced articles accessed June 4, 2022.]

Search Term	Selected Minnesota Media ²						Selected National Media		
	Mpls Star Tribune	Duluth News Tribune	Rochester Post Bulletin	Fargo Forum	Brainerd Dispatch	MPR	New York Times	Washington Post	NPR
“George Floyd”	3,892	19,232	45,181	22,918	17,966	3,830	22,694	841	4,560
“Derek Chauvin”	1,070	7,281	13,275	6,285	6,287	977	785	219	618
“Kueng”	288	105	107	104	102	296	105	61	880
“Tou Thao” ³	3,155	67,656	190,416	90,696	69,587	259	87	11	83

Because media coverage of these cases has been extensive throughout the entire state, a change of venue will not cure any jury pool taint created by any prejudicial pretrial publicity, whether the jury pool is from Hennepin or another county. Indeed, the Minnesota Supreme

² The searches were run in the Rochester Post Bulletin because Kueng mentions Olmsted County as a suggested venue for the trial. Kueng Fourth Motion for Change of Venue or Continuance, at 1. Although Kueng also suggests changing venue to Dakota County, Dakota County, as part of the immediate Twin Cities metropolitan area, has essentially the same local broadcast media coverage as Hennepin County and Kueng has failed to provide any information suggesting that readership rates of the Minneapolis Star Tribune or the St. Paul Pioneer Press newspapers are materially lower in Dakota County than the readership rates of those papers in Hennepin County. The searches were run in the Duluth News Tribune, Fargo [ND] Forum – the local paper serving the Fargo-Moorhead metro area – and the Brainerd Dispatch because Thao mentioned St. Louis, Clay, and Crow Wing Counties, the counties served by those newspapers, as suggested venues for the trial in his Notice of Motion and Motion for Change of Venue, filed Aug. 28, 2020 in *State v. Thao*, Dk 110.

³ The totals reported in all five of the Minnesota newspapers appear anomalous, and likely include references to many named “Tou Thao” other than the former Minneapolis police officer charged in the death of George Floyd, one of the co-defendants in this joint trial. The Twin Cities has the largest urban Hmong enclave in the United States: census data show 81,000 of the total United States Hmong population of 327,000 as of 2019 living in the Twin Cities. *See, e.g.*, <https://www.npr.org/2020/06/04/868978380/for-one-immigrant-community-george-floyds-death-isn-t-just-about-black-and-white>; <https://www.pewresearch.org/social-trends/fact-sheet/asian-americans-hmong-in-the-u-s/> (accessed June 4, 2022). A search shows about 80 people named “Tou Thao” (with a few variant spellings) living in Minnesota. *See* <https://www.spokeo.com/Tou-Thao/Minnesota> (accessed June 4, 2022).

Court has consistently affirmed district courts' denials of a change of venue when, as here, pretrial coverage has affected the entire state. *See, e.g., State v. Parker*, 901 N.W.2d 917, 922 (Minn. 2017) (affirming denial of venue change where because so much pretrial publicity had been disseminated over the internet "people in every corner" of Minnesota "could have been exposed to" pretrial publicity); *State v. Blom*, 682 N.W.2d 578, 608 (Minn. 2004) (affirming denial of venue change where "nowhere 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.").

In any event, a prospective juror's exposure to pretrial publicity does not alone create a reasonable likelihood of an unfair trial. *See Kinsky*, 348 N.W.2d at 323 ("Prospective jurors cannot be presumed partial solely on the ground of exposure to pretrial publicity."); *Fratzke*, 354 N.W.2d at 406 ("The fact that a case generates widespread publicity does not require a trial court to grant a change of venue."). Instead, the issue is whether a prospective juror can set aside his or her impressions or opinions based on pretrial publicity, be fair and impartial, and render an impartial verdict. *Kinsky*, 348 N.W.2d at 323-24; *Parker*, 901 N.W.2d at 924-25; *State v. Fairbanks*, 842 N.W.2d 297, 302 (Minn. 2014); *Blom*, 682 N.W.2d at 608; *Warren*, 592 N.W.2d at 447-448 (affirming denial of defendant's motion to change venue where 14 of the 15 jurors had read newspaper accounts or seen accounts of the charged crime on television); *Fratzke*, 354 N.W.2d at 406 ("What matters is whether the publicity is of a type that is prejudicial to the defendant and whether it affects the minds of the specific jurors involved in the case.").

The Court notes the extensive measures taken in connection with the *Chauvin* trial and which the Court is also following with respect to the joint trial of Defendants Thao and Kueng to

empanel a fair and impartial jury despite the pervasive pretrial publicity. For example, in the *Chauvin* trial:

- (1) In contrast to the panel of 30 prospective jurors who would typically comprise the panel in a second-degree murder trial in the Hennepin County District Court, the Jury Office summonsed more than 500 prospective jurors from which a panel of 326 was ultimately drawn who completed juror questionnaires.
- (2) Unlike the typical second-degree murder case in which juror questionnaires might not be employed at all and, even if used, would only be completed by members of the jury panel and provided to trial counsel at the start of trial, in *Chauvin*, the summonsed prospective jurors were sent a 14-page questionnaire containing more than 100 questions (including subparts). Those questionnaires were completed during December 2020 and January 2021 and were provided to trial counsel more than a month before the start of jury selection on March 9, 2021.
- (3) Prospective jurors were questioned individually, in the manner prescribed for voir dire in first-degree murder cases pursuant to Minn. R. Crim. P. 26.02 subd. 4(3)(d), rather than as a panel pursuant to Minn. R. Crim. P. 26.02 subd. 4(b), which ordinarily would have been the process given the charges.⁴
- (4) The Court judiciously excused prospective jurors for cause at rates far exceeding the rate in more typical cases with far less extensive publicity, with 33 of the first 131 panel members being excused for cause based on their completed

⁴ As noted in the Order, this Court also ordered individual voir dire pursuant to Minn. R. Crim. P. 26.02 subd.4(2)(b) in view of the significant possibility of exposure to prejudicial pretrial publicity.

questionnaire on the joint motion of the parties prior to questioning and 39 more being excused for cause after their individual voir dire.

- (5) The Court afforded trial counsel the opportunity for extensive voir dire of individual jurors. A total of 70 prospective jurors were questioned over the course of ten and a half days, from March 9-23, 2021.
- (6) The last juror selected was prospective juror number 131. The parties did not use all the peremptory challenges they were afforded, with the Defense having used only 14 of its 18 peremptory challenges and the State having used only 8 of its 10 peremptory challenges when the final juror was selected.⁵

The Court has adopted the same approach in the lead-up to the joint trial of Defendants Thao and Kueng. Once, again, the Jury Office summonsed more than 500 prospective jurors and sent out juror questionnaires in December 2021. These juror questionnaires were more extensive even than the questionnaires used in the *Chauvin* trial: a 17-page questionnaire with more than 125 questions (including subparts). The final panel was comprised of 265 prospective jurors and trial counsel were provided the completed questionnaires on April 25, seven weeks prior to the scheduled start of trial.

By virtue of the Court's order today, continuing the joint trial date to January 2023, by the time of trial:

- (1) more than two and one-half years will have elapsed since the events of May 25, 2020;
- (2) more than more than twenty months will have elapsed since the jury verdict in the *Chauvin* trial;

⁵ The inference that a defendant was satisfied that the jurors selected were unbiased may fairly be drawn if the Defense had unused peremptory challenges. *See Fairbanks*, 842 N.W.2d at 303; *Warren*, 592 N.W.2d at 448; *State v. Brom*, 463 N.W.2d 758, 761 (1990).

- (3) almost eleven months will have elapsed since the jury verdict in these Defendants' federal civil rights trial; and
- (4) the Court anticipates at least four and perhaps as many as six months will have elapsed since these Defendants are sentenced on their convictions in their federal civil rights cases.

Again, the Jury Office will be summoning several hundred prospective jurors for this joint trial. Written questionnaires will be sent to the summonsed jurors months in advance of the January 2023 start of jury selection. The Court anticipates, based on its experience to date in these cases, that the panel of prospective jurors for this trial, as finally constituted, will be in excess of 250. The Court anticipates trial counsel will again be provided with the completed jury questionnaires at least a month prior to the start of jury selection. By today's order, the Court once again is allocating three weeks for jury selection, during which trial counsel will be afforded extensive opportunity to voir dire prospective jurors individually to learn about their exposure to media accounts of the events of May 25, 2020, the *Chauvin* trial, these defendants' federal civil rights trial, and each prospective juror's views, attitudes, and any opinions the prospective juror may have formed about various issues upon which trial counsel will be able to make well-informed decisions about the exercise of their peremptory strikes and upon which this Court intends liberally to excuse prospective jurors for cause to ensure the impaneling of a fair and impartial jury to try these Defendants.⁶

⁶ In his renewed motion for change of venue, Kueng argues that “[r]eview of jury questionnaires reveal that a majority of the potential jurors have a significant level of knowledge and harbor bias” – although providing only two quotes from unspecified questionnaires -- and maintains that although some jurors claim to be neutral about himself and fellow former officers and Defendants Thou and Thomas Lane, they have “harsh feelings toward Mr. Chauvin and his actions.” Kueng Fourth Motion for Change of Venue (filed May 28, 2022) at 7. Mr. Chauvin, of course, will not be on trial with Defendants Kueng and Thao. In his renewed motion for change of venue, Thao cites more specifics, including 12 quotes from some of the questionnaires in the pool of prospective jurors for the June 13 trial. *Thao* NOM/M (filed May 30, 2022) at 7-8. But, it is well established that “[p]rejudice among some voir dire examinees . . . does not mean that the jury was biased.” *Kinsky*, 348 N.W.2d at 324.

In these cases as in *Chauvin*, the Court has undertaken appropriate steps to ensure the selection of an impartial jury, eliminating any likelihood that a fair trial could not be had in Hennepin County, by imposing extensive procedures to safeguard these Defendants' right to a fair trial. Minnesota appellate courts have long recognized that procedural safeguards can lessen or eliminate the "likelihood that a fair trial cannot be had." Minn. R. Crim. P. 25.02 subd. 3. In *Fairbanks*, for instance, the Minnesota Supreme Court approved the following measures: 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 challenges intelligently." 842 N.W.2d at 303; *see also Warren*, 592 N.W.2d at 448 ("[A] defendant may effectively protect himself against the possibility of any prejudicial impact by carefully questioning prospective jurors about the publicity.").

Finally, and most importantly, the Court is satisfied that a fair and impartial trial can **eventually** be had in Hennepin County, the most populous and diverse county in the state, more than 2.3 times as populous as the second most populous county (Ramsey) and home to more than 22% of Minnesota's total population (as of 2022). Minn. R. Crim. P. 24.03 subd. 1(a) (standard for change of venue). *See also Skilling*, 561 U.S. at 382 (in affirming trial court's denial of defendant's motion to transfer venue, Court observed that, given the large and diverse pool of potential jurors in the Houston area, "the suggestion that 12 impartial individuals could not be empaneled is hard to sustain."). The same is true here. If, despite all these precautions and efforts, voir dire of a panel that will surely exceed 200 prospective jurors drawn from all over

Hennepin County does not enable the Court to impanel a fair and impartial jury of 14 or 15 at the close of jury selection in this joint trial at the end of January 2023, the Court may revisit the Defendants' motion to change venue.

II. TRIAL CONTINUANCE

Continuance of a trial date has been recognized as an effective tool to diminish the effect of prejudicial pretrial publicity. *State v. Brom*, 463 N.W.2d 758, 762 (Minn. 1990) (“We have consistently held that a **substantial** interval of time between the publicity complained of and the trial date decreases the likelihood of juror prejudice owing to that publicity,” citing cases) (emphasis added).

Defendants have listed instances of recent “dissemination of potentially prejudicial material [that] creates a reasonable likelihood” of an unfair trial, based on factual developments and media publicity between February 24 and May 31, 2022. *See* Minn. R. Crim. P. 25.02 subd. 3; Thao Notice of Motion and Motion for a Change of Venue or in the Alternative a Motion for Continuance, Dk 584, pp. 2-5; Kueng Fourth Motion for Change of Venue or Continuance, Dk 588, pp. 4-5. Contrary to the State’s assertion that nothing has changed and that Defendants are not pointing to any new facts warranting this Court revisiting its earlier decisions (*see* State Opp. at 1) Defendants correctly point out that this latest spate of potentially prejudicial pretrial information has been publicized after the jury panel members in these cases filled out their questionnaires.

Some of the recent publicity the Defendants reference is relatively innocuous and hardly seems likely to create a reasonable likelihood of an unfair trial.⁷ However, media reports and the

⁷ These include the events surrounding the two-year anniversary of Mr. Floyd’s death on May 25, 2022, Neal Katyal’s hourly rate, the Amy Sweasy settlement, and Hennepin County Attorney Mike Freeman’s reported move to Ramsey County, *etc.* While perhaps not as innocuous, the

attendant publicity to two events is particularly troublesome and does create a reasonable likelihood of an unfair trial in this Court's view were the trial to be held on June 13, 2022:

- (1) the fact that co-defendant Thomas Lane, who was mentioned in the jury questionnaires as one of the three co-defendants in the joint trial, pled guilty to the aiding and abetting second-degree manslaughter charge on May 18, 2022, less than four weeks prior to the scheduled start of jury selection on June 13, 2022; and
- (2) the fact that defendants Lane, Thao, and Kueng were found guilty by a jury in their federal civil rights trial in St. Paul on February 24, 2022 of violating George Floyd's civil rights based on largely the same evidence as will be introduced in Defendants Thao's and Kueng's joint state trial.

These two recent events and the publicity surrounding them are significant in they it could make it difficult for jurors to presume Thao and Kueng innocent of the State charges. Accordingly, the trial will be continued from June 13, 2022 to January 5, 2023 – just shy of seven months -- to diminish the impact of this publicity on the Defendants' right and ability to receive a fair trial from an impartial and unbiased jury.⁸

III. AUDIO\VIDEO COVERAGE

With the reduction in the number of defendants, Courtroom C-1856 can now be configured, with the relaxed COVID protocols, to accommodate at least eighteen seats for the public. Accordingly, the Court finds that this does not amount to a courtroom closure. *State v. Schmit*, 139 N.W.2d 800, 803 (Minn. 1966) (“[I]t has been held that restrictions on attendance

documentary that aired on PBS on May 31, 2022 represents the kind of publicity more appropriately addressed to prospective jurors during voir dire (Did they watch it? Even hear about it? Did they form any opinions based on having watched it? Could they put aside whatever they saw from that documentary and decide the Defendants' guilt or innocence based solely on the evidence presented at trial? *Etc.*) than as presumptively giving rise to the reasonable likelihood of an unfair trial.

⁸ The State objects to a trial continuance but has not filed a demand for a speedy trial. Even if it had done so, the possibility of an unfair trial would be good cause to continue trial beyond sixty days from demand.

may be imposed because of the limited seating capacity of the courtroom.”). Because that is the only basis for the Media Coalition’s motion to reconsider (*see* Motion for Reconsideration, *State v. Kueng*, Dk 581, at 1), the motion is denied.⁹

The Court is, however, aware that various court committees are working diligently on possible amendments to the rules concerning cameras in the courtroom, and the Court would reconsider allowing audio and video coverage if there is a significant rule change in place by January 4, 2023.

PAC

⁹ The Media Coalition, in its condescending and overly didactic memorandum, fails to cite *State v. Schmit* as authority and fails to acknowledge that the Court will continue to have overflow courtrooms available to the public and media during the trial.