

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

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**STATE OF MINNESOTA,**

Plaintiff,

vs.

**TOU THAO,  
THOMAS KIERNAN LANE,  
J. ALEXANDER KUENG,**

Defendants.

**TRIAL SCHEDULING AND MANAGEMENT  
ORDER AND MEMORANDUM OPINION**

Court File 27-CR-20-12949  
Court File 27-CR-20-12951  
Court File 27-CR-20-12953

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This matter came before the Court on April 11, 2022 on logistical matters relating to the joint trial scheduled for June 13, 2022.

On November 4 and December 18, 2020, May 12, 2021, and January 11, 2022, the Court entered orders directing that the joint trial be livestreamed on Court TV. On November 4, 2020, the Court entered an order regarding jury anonymity and partial jury sequestration. On June 8, 2021, the Court entered a Scheduling Order in these cases. Based upon a joint motion of the parties for a continuance, trial is now scheduled to begin on June 13, 2022.

The Court scheduled the April 11, 2022 hearing *sua sponte* asking the parties to address whether:

- (1) audio and video coverage of the trial via livestreaming by Court TV, as was done in the March 8-April 20, 2021 trial of *State v. Derek Chauvin*, 27-CR-20-12646, should be allowed; and

(2) the jury should be sequestered throughout the trial.<sup>1</sup>

In addition, the State brought a motion to compel disclosure by defendants of materials introduced during the federal criminal trial involving all three defendants in January-February 2022,<sup>2</sup> and any other materials the defendants currently possess, intend to introduce at the joint trial in these cases, and have not already disclosed. Finally, the Court addressed the deadline for disclosure of Defense expert witnesses.

Keith Ellison, Matthew Frank, Nathaniel Zelinsky, Steven Schleicher, and Joshua Larson appeared on behalf of the State; Zuri Balmakund was also present on behalf of the State. The State filed a motion to compel discovery in all cases on April 1, 2022 and also filed a Memorandum Regarding Audio Visual Coverage, Sequestration, Expert Disclosure Deadlines, and Expert Testimony on April 7, 2022.

Robert Paule and Natalie Paule appeared on behalf of Defendant Tou Thao (Thao) who was also present.

Earl Gray appeared on behalf of Defendant Thomas Lane (Lane) who was also present.

Thomas Plunkett appeared on behalf of Defendant J. Alexander Kueng (Kueng) who was also present.

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<sup>1</sup> During the *Chauvin* trial, partial sequestration/security measures were in place during the trial but the jury was fully sequestered only during deliberations. See Order for Juror Anonymity and Sequestration (filed Nov. 4, 2020) in these cases as well as in *Chauvin*.

<sup>2</sup> *United States v. Tou Thao (2), J. Alexander Kueng (3), and Thomas Kiernan Lane (4)*, Case No. 21-cr-108 (2-4) (PAM/TNL).

Leita Walker and Isabella Salomao Nascimento appeared on behalf of Intervenor Media Coalition.<sup>3</sup> The Media Coalition filed a Supplemental Memorandum in Opposition to Defendant's Motion to Exclude Video and Audio Recordings of Proceedings and a Declaration of Emmy Parsons on April 8, 2022.

At the conclusion of the hearing, the Court granted on the record (1) the State's motion to compel disclosure and ordered Defendants to disclose any of the requested materials by May 1, 2022, and (2) extended the deadline for the Defendants to disclose the names and curriculum vitae of any new/additional experts and their expert reports to May 1, 2022. The Court took the issues regarding livestreaming coverage of the trial and jury sequestration during trial under advisement.

Based upon all the files, records, and proceedings, and the written and oral arguments of the parties and intervenor Media Coalition, **IT IS HEREBY ORDERED** as follows:

**TRIAL MANAGEMENT ORDER**

1. If any party intends to disclose expert witnesses other than those already disclosed, they shall serve the experts' names, *curricula vitae*, expert reports and findings, and complete written summaries of the subject matter of each expert's testimony by May 1, 2022.

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<sup>3</sup> The Media Coalition includes American Public Media Group (which owns Minnesota Public Radio); The Associated Press; Cable News Network, Inc.; CBS Broadcasting Inc. (on behalf of WCCO-TV and CBS News); Court TV Media LLC; Dow Jones & Company (which publishes *The Wall Street Journal*); Fox/UTV Holdings, LLC (which owns KMSP-TV); Gannett Satellite Information Network, LLC (which publishes *USA Today*); Hubbard Broadcasting, Inc. (on behalf of its broadcast stations, KSTP-TV, WDIO-DT, KAAL, KOB, WNYT, WHEC-TV, and WTOP-FM); Minnesota Coalition on Government Information; NBCUniversal Media, LLC; The New York Times Company; The Silha Center for the Study of Media Ethics and Law; Star Tribune Media Company LLC; TEGNA Inc. (which owns KARE-TV); and WP Company LLC (which publishes *The Washington Post*).

2. Motions *in limine* shall be filed no later than the end of the day on Friday, May 13, 2022. Supporting memoranda shall be filed by the end of the day on Friday, May 20, 2022, and any responsive memoranda shall be filed by the end of the day on Friday, June 3, 2022.
3. The parties shall exchange trial witness lists by the end of the day on Friday, May 13, 2022.
4. No later than the end of the day on Friday, June 10, 2022:
  - a. The parties shall exchange trial exhibit lists. All exhibits shall be pre-marked as “Exhibit #####” and listed on the exhibit list with a short, general description (*e.g.*, photo of scene).
    - i. The State shall use exhibit numbers 1-1000.
    - ii. Thao shall use exhibit numbers 1001-2000.
    - iii. Lane shall use exhibit numbers 2001-3000.
    - iv. Kueng shall use exhibit numbers 3001-4000.
  - b. The parties shall file proposed jury instructions.
5. Trial will commence on Monday, June 13, 2022, at 9:00 a.m. The trial will be held in Courtroom C-1856. Access to the 18<sup>th</sup> Floor of the Hennepin County Government Center Courts Tower shall be controlled by the Hennepin County Sheriff’s Office (HCSO). No one shall be permitted on the 18<sup>th</sup> Floor unless approved by the HCSO or the Chief Judge, and then only with approved credentials or identification as required by the HCSO.
6. Attorneys and Parties
  - a. The State may have four lawyers or support staff who are assisting in the trial present in Courtroom C-1856 at any time. Different personnel may rotate through those positions.

- b. Defendants shall be present at all times during the trial. Defense attorneys or their staff may occupy the three seats for each designated counsel table.
- c. Everyone at counsel tables shall remain seated unless granted permission by the Court. Communication among trial team members should occur electronically. Attorneys and support staff may use electronic devices in the courtroom.
- d. Attorneys will conduct all voir dire, arguments, and witness examination from the lectern.
- e. If a party has no objection to an exhibit being offered, the attorneys should remain silent when the Court asks if there are any objections to the exhibit.
- f. All defendants will be deemed to have joined in any objection made by an attorney for another defendant without any further record being made.
- g. Objections shall be made without argument unless invited by the Court. Sidebar conferences in the presence of jurors shall be conducted using the wireless headset devices provided by the Court. All such conferences shall be off the record unless a party makes a specific request to have the conference on the record. Parties may make a record of any off-the-record bench conferences at a later time. Defendants will be provided with a headset to listen to the sidebar conferences.

7. Spectators

- a. Two media representatives selected by the Media Coalition will be allowed in Courtroom C-1856. Different persons may rotate through the positions, but only with the appropriate credentials to be admitted to the 18<sup>th</sup> Floor. The media representatives may only use electronic devices to take notes while on the 18<sup>th</sup> Floor. Other credentialed media may use an overflow courtroom as designated by District Court, but not on the 18<sup>th</sup> Floor. Media may use electronic devices and post on social media while in the

overflow courtroom that is not on the 18<sup>th</sup> Floor.

- b. The media may not conduct or attempt to conduct interviews on the 18<sup>th</sup> Floor.
  - c. Four members of the George Floyd family may be present in Courtroom C-1856 during the trial. Two members from each of the defendants' families may be present in Courtroom C-1856 during the trial. Different family members may rotate through those positions, but only with the appropriate credentials to be admitted to the 18<sup>th</sup> Floor. Family members and members of the public may not use electronic devices anywhere on the 18<sup>th</sup> Floor. Overflow courtrooms will be available for other family members, the media, and the general public.
  - d. Spectators will sit in places assigned by the presiding judge or the HCSO.
  - e. No spectator in Courtroom C-1856 or the overflow courtrooms shall wear any mask or article of clothing that contains any image, logo, letters, or numbers that are visible.
  - f. Spectators shall not communicate verbally or non-verbally with the Court or with jurors or potential jurors. Spectators should avoid all contact with potential jurors or jurors.
  - g. Spectators may have water in a transparent bottle in the courtroom.
8. The Court will hear any motions *in limine* or administrative matters on June 13, 2022 at 9:00 a.m., continuing on subsequent days between 8:00 and 9:00 a.m., as needed.
  9. Jury selection will begin on Tuesday, June 14, 2022, at 9:00 a.m.
  10. Jurors and Potential Jurors shall be partially sequestered as follows:
    - a. Jurors and potential jurors shall be escorted to and from the 18<sup>th</sup> floor by HCSO deputies or Hennepin County Security. Jurors and potential jurors

shall follow instructions of the Court and the HCSO regarding movement while in the Government Center. Jurors will remain on the 18<sup>th</sup> Floor throughout each day that court is in session. Lunch will be provided to jurors each day by District Court.

- b. Jurors will not be otherwise sequestered except at the beginning of deliberations.
  - c. No one shall have contact or attempt to communicate with jurors except the presiding judge, court personnel, and HCSO deputies. Attorney contact with the jurors is limited to examination during the jury selection process.
  - d. Potential jurors and jurors shall not be referred to by name at any time. They shall be referred to only by the random number previously assigned by the Court.
11. Opening statements and presentation of evidence will begin Tuesday, July 5, 2022, at 9:00 a.m.
12. Witnesses
- a. Witnesses are sequestered. Parties shall instruct their witnesses not to watch any part of the proceedings prior to their testimony and not to discuss their testimony or the testimony of other witnesses until after the witnesses have testified. Parties shall also instruct their witnesses to be responsive to the questions asked and what it means to be responsive to a question, and that witnesses have a duty to avoid being non-responsive.
  - b. Upon being called to the witness stand, the witness shall be directed to stand behind the witness chair at the witness stand where the oath will be administered by the presiding judge.
  - c. During testimony, witnesses may use the witness display illustrator system if it will clarify their testimony. The witness does not need to ask for permission to use the illustrator function.

- d. At the end of each day of testimony, the attorney for the party presenting its case shall provide a list of all witnesses that will be called the following day to the opposing party, the Court, and the HCSO.
13. All other administrative orders remain in effect with the following modifications.
- a. Audio and video recording and livestreaming of the trial will no longer be allowed except as expressly permitted by Minn. R. Gen. P. 4.02(d).
  - b. At least three overflow courtrooms, set up with an audio and video feed from the court monitoring audio system currently in place, will be provided for family members of the George Floyd family and the defendants (in addition to the seats in Courtroom C-1856 that are being allocated and reserved for those family members), the media (in addition to the seats in Courtroom C-1856 that are being allocated and reserved for the media), and the general public. The Court and the HCSO reserve the right to direct seating in the overflow courtrooms among additional family members, the media, and members of the general public.
14. All other rules of decorum found in Minn. Gen. R. Prac. 2 shall be followed unless specifically modified by this order or other orders of the presiding judge. The HCSO and court staff are authorized to enforce the rules of decorum.
15. The attached Memorandum Opinion is incorporated herein.

**BY THE COURT:**

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Peter A. Cahill  
Judge of District Court

## MEMORANDUM

### **I. THE MINNESOTA RULES OF PRACTICE DO NOT CURRENTLY AUTHORIZE LIVESTREAMING OF TRIALS OVER THE OBJECTION OF A PARTY.**

The right to a public trial, guaranteed by both the Sixth Amendment of the United States Constitution and Art I, § 6 of the Minnesota Constitution, is for the benefit of the defendant, not the public. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 381 (1979); *accord Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring); *State v. Lindsey*, 632 N.W.2d 652, 660 (Minn. 2001). This right ensures that “the public may see [the defendant] 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 the importance of their functions.” *Gannett Co.*, 443 U.S. at 380; *see also Estes*, 381 U.S. at 538-39.

The press and general public do have a First Amendment right of access to public trials, recognized in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573, 580 (1980), *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 605-06 (1982), and *Waller v. Georgia*, 407 U.S. 39, 44 (1984). However, the general public’s and the media’s rights of access to criminal trials under the First Amendment are not unlimited. *Globe Newspaper*, 457 U.S. at 606; *State v. Fageroos*, 531 N.W.2d 199, 201 (Minn. 1995). 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 any right to televise the trial. *Chandler v. Florida*, 449 U.S. 560, 569 (1981); *Estes*, 381 U.S. at 541-542 & 588 (Harlan, J. concurring).<sup>4</sup>

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<sup>4</sup> The Minnesota Court of Appeals has also held that a defendant has no Sixth Amendment right to create a video recording of trial. *State v. Shimota*, 875 N.W.2d 363, 369-70 (Minn. App. 2016), *rev. denied* (Minn. April 27, 2016).

Against this historical background, the Minnesota Supreme Court promulgated the current version of Rule 4 of the Minnesota Rules of General Practice for the District Courts. In its current operative form, Rule 4.01 sets out a general rule of prohibition,<sup>5</sup> although Rule 4.02(d) does allow for the visual and/or audio recording and reproduction of trial proceedings with the consent of all parties.<sup>6</sup> The Court will employ the term “livestreaming” throughout this Memorandum Opinion as a shorthand for the “visual and/or audio recording and reproduction of trial proceedings.” For the sake of clarity and brevity, the Court will also occasionally refer to the joint trial of these three defendants, all former MPD Officers, in the trial presently scheduled to commence on June 13, 2022, as the “*Floyd II*” trial.

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<sup>5</sup> Rule 4.01 provides, in pertinent part, as follows:

Except as set forth in this rule, no visual or audio recordings [film, video, and still photography]. . . shall be taken in any courtroom . . . during a trial or hearing of any case.

<sup>6</sup> Rule 4.02(d) provides, in pertinent part, as follows (emphasis added):

In criminal proceedings occurring before a guilty plea has been accepted or a guilty verdict has been returned, a judge may authorize, ***with the consent of all parties in writing or made on the record prior to the commencement of the trial***, the visual or audio recording and reproduction of appropriate court proceedings. Coverage under this paragraph is subject to the following limitations:

- (i) There shall be no visual or audio coverage of jurors at any time . . . .
- (ii) There shall be no visual or audio coverage of any witness who objects thereto in writing or on the record before testifying.
- (iii) Visual or audio coverage of judicial proceedings shall be limited to proceedings conducted within the courtroom, . . . .
- (iv) There shall be no visual or audio coverage within the courtroom during recesses or at any other time the trial judge is not present and presiding.
- (v) Preceding or during a jury trial, there shall be no visual or audio coverage of hearings that take place outside the presence of the jury. Without limiting the generality of the foregoing sentence, such hearings would include those to determine the admissibility of evidence, and those to determine various motions, such as motions to suppress evidence, for judgment of acquittal, *in limine*, and to dismiss.

The parties have each done a 180-degree reversal in their positions on livestreaming of the *Floyd II* trial since the Fall of 2020. At that time, the State opposed livestreaming and all Defendants favored livestreaming of the trial.<sup>7</sup> Since then, after the Court ordered livestreaming of the *Chauvin* trial and that trial was livestreamed by Court TV, the State has submitted briefs, on September 1, 2021 and April 7, 2022, asking the Court to livestream the *Floyd II* trial. Defendants Kueng and Lane filed a written motion to exclude video and audio recording of the trial on Aug. 24 and Aug. 25, 2021, respectively. At the April 11, 2022 hearing, the State reiterated its request for livestreaming of the trial while counsel for all three Defendants maintained their opposition to livestreaming the trial.

Because the current version of Rule 4 does not authorize a district court to permit livestreaming of a criminal trial over the objection of a party, this Court may not order livestreaming of the trial, absent compelling justification to depart from the mandates of that operative rule.

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<sup>7</sup> See Order Allowing Audio and Video Coverage of Trial, at pp. 1-2 & 6 and nn. 1 & 5 (Nov. 4, 2020); State's Motion for Reconsideration of Order Allowing Audio and Video Coverage of Trial (filed Nov. 25, 2020); [Defendant Thao's] Objection to State's Motion for Reconsideration (filed Dec. 14, 2020); [Defendant Kueng's] Reply to State's Motion to Reconsider Cameras in the Courtroom (filed Dec. 14, 2020).

**II. THE UNUSUAL AND COMPELLING CIRCUMSTANCES OF THE COVID-19 PANDEMIC AT THE TIME OF THE *CHAUVIN* TRIAL HAVE SUBSTANTIALLY ABATED AND THE SUPREME COURT RULES IN FORCE IN THE FIRST HALF OF 2021 MANDATING SOCIAL DISTANCING, MASK WEARING, AND OTHER PRECAUTIONARY MEASURES DUE TO THE COVID-19 PANDEMIC ARE NO LONGER IN FORCE, OBVIATING RESORT TO RULE 1.02.**

**A. History and Evolution of the COVID-19 Pandemic in Minnesota and Chief Justice Gildea’s Orders for the Continuing Operations of the Judicial Branch**

On March 13, 2020, Minnesota Governor Walz issued Executive Order No. 20-01 in which he declared a peacetime state of emergency due to the worldwide spread of COVID-19. Concurrent with the Governor’s Executive Order, Chief Justice Gildea issued her first *Order for Continuing Operations of the Courts of the State of Minnesota Under a Statewide Peacetime Declaration of Emergency*, ADM20-8011 (March 13, 2020). With a few exceptions,<sup>8</sup> that order provided that no new jury trials could begin after March 16, 2020 for thirty days and also suspended all district court proceedings for thirty days. ADM20-8001, ¶¶ 4-5. That order further directed that “non-essential visits to Minnesota courthouses are discouraged” and directed court staff to “promote the use of social distancing and other mitigation strategies as recommended by the Minnesota Department of Health. *Id.* ¶ 8. Consistent with that order, the last criminal trial in the Hennepin County District Court (HCDC) before the initial COVID pandemic “shutdown” took place during the week of March 9, 2020. There were no criminal or civil jury trials in the HCDC between March 16 and June 5, 2020.

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<sup>8</sup> The enumerated exceptions included criminal court search and arrest warrants, initial appearances, temporary protective order applications in family court domestic abuse situations, mental health commitment hearings, certain proceedings in juvenile court, cases implicating constitutional rights (explicitly mentioning criminal, juvenile delinquency, and commitment cases), cases with statutory or rule time limits under thirty days, and criminal cases subject to speedy trial demands. ADM20-8001, ¶¶ 3-4 & Attached Minnesota Judicial Branch Case Priorities List (eff. March 12, 2020).

In the *Order for Continuing Operations of the Courts of the State of Minnesota Under a Statewide Peacetime Declaration of Emergency*, ADM20-8001 (March 20, 2020), Chief Justice Gildea ordered that no new jury trials could commence before April 22, 2020. Order, at ¶ 4. That order also required that with the exception of a few delineated hearings involving in-custody defendants required to be held in courtrooms – *e.g.*, bail reviews, hearings under Rules 8 and 11 of the Minnesota Rules of Criminal Procedure, plea hearings, sentencings, and probation revocation hearings -- proceedings in adult criminal courts were suspended until April 20, 2020 if they could not be conducted remotely. *Id.* ¶¶ 6, 11. That order directed court officials to ensure that proceedings required to be held in person in courtrooms be conducted in compliance with “recent guidance from public health officials, including limits on the number of people present in one location and social distancing.” *Id.* ¶ 11. Finally, that order directed that public access to courtrooms be limited to parties in the case and their attorneys, necessary court staff, and other individuals the presiding judge determines are necessary to conduct the hearing. *Id.* ¶ 13. The order permitted media representatives to attend hearings in courtrooms but, in the HCDC, media were directed to coordinate with this Court’s Information/Media Liaison Officer, and Court Administration was given discretion to limit the number of persons attending hearings, including media representatives, consistent with public health guidelines. *Id.* ¶ 14.

Governor Walz issued an Emergency Executive Order, No. 20-20, on March 25, 2020 directing that, subject to specific exceptions, everyone currently living in Minnesota stay at their place of residence from March 27, 2020 through April 10, 2020.

In the *Order Governing the Operations of the Minnesota Judicial Branch Under Emergency Executive Order Nos. 20-53, 20-56, ADM20-8001* (May 15, 2020), the Minnesota Judicial Council authorized a jury trial pilot plan that permitted pilot jury trials to proceed starting June 1, 2020 in four counties statewide, including the HCDC,<sup>9</sup> that had submitted a jury trial pilot plan that had been approved by the State Judicial Council. Order ¶ 3. That Order barred any other criminal jury trials before July 6, 2020 and any civil jury trials before September 1, 2020. *Id.* The order continued prior restrictions on persons allowed access to courtrooms for in-person hearings. *Id.* ¶¶ 11-12. Finally, that order also allowed, effective May 18, 2020, leadership to direct judges, staff, and employees to return to work, and exempted them for the “stay-at-home” directive of Executive Order No. 20-56. *Id.* ¶ 14.

On May 18, 2020, HCDC Chief Judge Ivy Bernhardson issued an *Administrative Order Pertaining to Fourth Judicial District Courtrooms During COVID-19 Emergency*. Under that Order, effective that day, HCDC implemented a social distancing protocol mandating six-foot perimeter seating for all individuals in the public galleries in HCGC courtrooms (with the sole exception that persons living in the same household were permitted to sit in adjacent seats at less than the six-foot spacing). Order ¶ 1. That order specified the priority by which seating in the public gallery would be allocated – to immediate family members, alleged victim and HCAO victim advocate, case worker/probation officer, media representatives,<sup>10</sup> and members of the

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<sup>9</sup> The other counties the Minnesota Judicial Council initially approved under the criminal jury trial pilot program were McLeod, Olmsted, and Ramsey. In mid-June 2020, the Judicial Council also approved criminal jury pilot programs in Scott and Blue Earth Counties.

<sup>10</sup> The Order instructed media representatives wishing to attend an in-person hearing to notify the Court’s Public Information Officer/Media Liaison in advance and present proper media credentials. Order ¶ 4.

general public -- given the limited courtroom seating resulting from the social distancing protocols and also authorized the HCSO to control the number of persons in courtroom public galleries and to remove individuals from the galleries if necessary to ensure compliance with the order. *Id.* ¶¶ 2-3. Judges presiding over in-person hearings were also vested with authority to make orders necessary or appropriate under specific circumstances to protect health and safety in the courtroom while allowing continuing public access to court proceedings. *Id.* ¶ 6.

On May 19, 2020, the Hennepin County Board of Commissioners approved the Hennepin County COVID-19 Preparedness Plan, which required all persons to wear face coverings while in county facilities (the HCGC is a Hennepin County facility) and outside individual workspaces, including all common spaces, elevators, hallways, entrances/exits, and “meeting spaces”/courtrooms in the HCGC.

On May 22, 2020, Chief Judge Bernhardson issued an *Administrative Order Pertaining to Pilot In-Custody Speedy Demand Jury Trials*, in effect from June 1-July 13, 2020, which limited jury trials in the HCDC pilot jury trial project to in-custody criminal trials with speedy trial demands and directed that no more than four such jury trials could be underway on any given day. Order ¶¶ 1-2, 4. The Order also authorized “livestreaming” of such jury trials to overflow courtrooms if the extant social distancing protocols resulted in “insufficient seating in the gallery for all persons interested in attending the trial.” *Id.* ¶ 6.

In the wake of the May 2020 Orders by Chief Justice Gildea, HCDC Chief Judge Bernhardson, and the Hennepin County Board of Commissioners summarized in the preceding four paragraphs, a total of 12 in-person criminal jury trials were tried to completion in HCDC between June and August 2020, an average of only four jury trials/month, a drastic decline

from the typical trial schedule in HCDC pre-COVID-19. There were no in-person civil jury trials in HCDC during the Summer of 2020.

In the *Order Governing Public Access and Services at Judicial Branch Facilities*, ADM20-8001 (May 28, 2020), Chief Justice Gildea ordered that during the Judicial Branch’s transitional phase, the court’s district administrator “shall follow the guidelines, distancing, and disinfecting measures in the Minnesota Judicial Branch COVID-19 Preparedness Plan in providing access to court public service counters.” *Id.* ¶ 2. HCDC at that time had social distancing protocols not only inside courtrooms -- with six-foot social distancing required in the courtrooms, plexiglass-dividers at counsel tables as well as between the Bench, the court reporter station, the witness box, the clerk station, and the deputy desk – but also operative in elevators and lines to enter the security clearances into both the Courts Tower and the Administration Tower at the HCGC. In addition to social distancing, disinfectants were widely distributed throughout courtrooms, surfaces in the courtrooms at counsel tables and the bench were wiped down with disinfectants at least twice a day, hand sanitizers were widely available throughout HCGC, and all persons in HCGC in all public spaces and courtrooms were required to wear masks throughout the day.

On July 7, 2020, Chief Justice Gildea issued an *Order Requiring Face Coverings at Court Facilities*, ADM20-8001 (July 7, 2020). That order required that, beginning July 13, 2020, all Judicial Branch staff personnel, judges, attorneys, parties, witnesses, persons attending in-person hearings, and all persons entering court facilities were required to wear a mask (face covering) “at all times while in public areas, hallways, or other common areas of the facility.” *Id.* ¶ 1. That order permitted the face covering to be removed in courtrooms only when the

required six-foot social distancing was maintained, plexiglass barriers were in place, and the presiding judge authorized mask removal. *Id.* ¶¶ 1-2.

With in-person civil jury trials permitted in HCDC starting in September 2020, the pace of in-person jury trials increased slightly in the Fall of 2020, compared to the Summer: a total of 15 criminal jury trials and 6 civil jury trials were tried to completion between September and November 2020, for an average of 7 jury trials during those three months, still substantially below pre-COVID-19 trial levels in the HCDC.

As the COVID pandemic continued to rage on during 2020, the Governor’s peacetime emergency declaration was extended into November, as “positive case numbers, the state’s positive percentage rate, and hospitalizations increased, and as community spread of COVID-19 widened.” See *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, ADM20-8001 (Nov. 20, 2020), p. 1. Statistics from the Minnesota Department of Health<sup>11</sup> demonstrate the substantial spike in COVID-19 infections and the impact on the public health system in November 2020:

(1) Whereas the number of new weekly positive cases in Minnesota had ranged between about 2,300 and 5,350 from mid-April to mid-September 2020, the number of new weekly positive cases first exceeded 10,000 during the week of Oct. 11-17, 2020. During the

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<sup>11</sup> These statistics are derived from the Minnesota Department of Health Weekly COVID-19 Report, the most recent for the week ending April 21, 2022, which can be found at [MDH Weekly COVID-19 Report 4/21/2022 \(state.mn.us\)](https://www.mn.gov/mdh/Weekly-COVID-19-Report-4/21/2022), as well as the weekly CDC MMWR reports for Minnesota, reporting the weekly and cumulative totals of new positive COVID-19 test cases, new hospitalizations, new intensive care unit (ICU) hospitalizations, and deaths attributed to COVID-19 since March 1, 2020. See, e.g., Downloadable data file: Weekly Testing and Case Data (CSV), under drop-down menu “Other data associated with graphs in the weekly report,” in [COVID-19 Weekly Report - Minnesota Dept. of Health \(state.mn.us\)](https://www.mn.gov/mdh/COVID-19-Weekly-Report-Minnesota-Dept.-of-Health), last accessed April 25, 2022.

five-week span from Nov. 1-Dec. 5, 2020, the number of weekly new positive cases surged dramatically to an average of about 34,500 cases during that span, peaking at just under 49,000 in the second week of November.

(2) Whereas the number of new weekly hospitalizations in Minnesota had ranged between roughly 200 and 500 from mid-April to mid-September 2020 with a median of about 290, the number of new weekly hospitalizations surged to an average of almost 1,600 cases during the five-week span from Nov. 1-Dec. 5, 2020, peaking at 1,860 in mid November.

(3) Whereas the number of new weekly ICU hospitalizations in Minnesota ranged from about 45 to 145 from mid-April to mid-September 2020 with a median of about 70, the number of new ICU hospitalizations surged to an average of about 270 during the five-week span from Nov. 1-Dec. 5, 2020, peaking at about 315 during the fourth week of November.

(4) Finally, whereas the number of weekly deaths attributed to COVID-19 in Minnesota ranged from about 30 to 170 from mid-April to mid-September 2020 with a median of about 60, the number of weekly deaths surged to an average of about 375 during the five-week span from Nov. 1-Dec. 5, 2020, peaking at about 500 during the last week of November and first week of December.

According to the CDC, COVID-19 was the third leading cause of deaths in the United States in 2020, behind only heart disease and cancer. See [FastStats - Leading Causes of Death \(cdc.gov\)](#), accessed April 25, 2022.

With exceptions spelled out in Chief Justice Gildea's Nov. 20, 2020 *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, that order required most court proceedings to be conducted using remote technology. ADM20-8001 (Nov. 20, 2020), ¶¶ 1-4.

That order also suspended jury trials from November 30, 2020 to February 1, 2021 except for criminal jury trials if the district's chief judge, after consultation with Chief Justice Gildea, granted an exception for a criminal jury trial to be held in person. *Id.* ¶ 2. That order maintained the requirements for face coverings in court facilities and restrictions on persons permitted access to courtrooms for in-person proceedings. *Id.* ¶¶ 8, 11-12. As a consequence, there were only 13 in-person criminal jury trials and no civil jury trials in HCDC in the three months from December 2020 through February 2021.

On January 21, 2021, Chief Justice Gildea issued an *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, ADM20-8001 (Jan. 21, 2021), which was effective through March 14, 2021. That order maintained the policy requiring most court proceedings to be conducted using remote technology. *Id.* ¶¶ 1-4. It barred any new in-person jury trials between February 1 and March 15, 2021 unless the district's chief judge granted an exception for a criminal or civil jury trial to be held in person. *Id.* ¶¶ 2, 15. That order maintained the requirements for face coverings in court facilities and restrictions on persons permitted access to courtrooms for in-person proceedings. *Id.* ¶¶ 8, 11-12.

On February 18, 2021, Chief Justice Gildea issued an *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, ADM20-8001 (Feb. 18, 2021), which was effective through April 30, 2021. That order maintained the policy requiring most court proceedings to be conducted using remote technology. *Id.* ¶¶ 1-4. Effective March 15, 2021, that order permitted all counties statewide to hold in-person criminal jury trials, provided that any court holding an in-person criminal jury trial adhere to the guidelines and exposure measures in approved Judicial Branch COVID-19 Preparedness Plans and Jury Management Resources Team

Recommendations for Jury Trials during COVID-19. *Id.* ¶¶ 2, 15. The order allowed in-person civil jury trials only if an exception was granted by the district’s chief justice after consultation with Chief Justice Gildea. *Id.* ¶ 4. That order maintained the requirements for face coverings in court facilities and restrictions on persons permitted access to courtrooms for in-person proceedings. *Id.* ¶¶ 8, 11-12.

Derek Chauvin was tried between March 8 and April 20, 2021. Besides the *Chauvin* trial, there were only three other trials in the HCDC during those two months: a single civil jury trial, held at the Family Justice Center in March, and one additional criminal jury trial in March and one in April.

On March 22, 2021, Chief Justice Gildea issued an *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, ADM20-8001 (March 22, 2021). In that order, effective from May 1 through June 13, 2021, the Chief Justice noted that although there had been “recent easing of restrictions on citizen’s activities and public gatherings,” the order maintained the policy requiring most court proceedings to be conducted using remote technology. *Id.* at 1 & ¶¶ 1-6. Effective May 1, 2021, that order continued the policy of the Feb. 18, 2021 Order allowing all counties statewide to hold in-person criminal jury trials, provided that any court holding an in-person criminal jury trial adhere to the guidelines and exposure measures in approved Judicial Branch COVID-19 Preparedness Plans and Jury Management Resources Team Recommendations for Jury Trials during COVID-19 and unless the district’s chief judge determined that a trial cannot proceed safely due to local conditions. *Id.* ¶ 2. The order allowed in-person civil jury trials only if an exception was granted by the district’s chief justice after consultation with Chief Justice Gildea. *Id.* ¶¶ 5-6. That order maintained the

requirement of face coverings in court facilities and the restrictions on the number of persons permitted access to courtrooms for in-person proceedings and required adherence to the guidelines and exposure measures in the approved Judicial Branch COVID-19 Preparedness Plans and, for jury trials, the Jury Management Resources Team Recommendations for Jury Trials during COVID-19. *Id.* ¶¶ 8, 12, 15-16.

In the wake of that easing on trial restrictions -- which had been in place for more than a year by then -- in-person trials increased significantly in the HCDC starting in May 2021 and continuing through March 2022 (reported totals are for trials completed to verdict or mistrial on a hung jury):

May 2021: 17 total in-person jury trials (16 criminal; 1 civil)

June 2021: 25 total in-person jury trials (17 criminal; 8 civil)

July 2021: 29 total in-person jury trials (20 criminal; 9 civil)

August 2021: 37 total in-person jury trials (28 criminal; 9 civil)

September 2021: 18 total in-person jury trials (12 criminal; 6 civil)

October 2021: 25 total in-person jury trials (21 criminal; 4 civil)

November 2021: 34 total in-person jury trials (24 criminal; 10 civil)

December 2021:<sup>12</sup> 14 total in-person jury trials (10 criminal; 4 civil)

January 2022: 29 total in-person jury trials (23 criminal; 6 civil)

February 2022: 28 total in-person jury trials (23 criminal; 5 civil)

March 2022: 25 total in-person jury trials (19 criminal; 6 civil)

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<sup>12</sup> The trial of *State v. Kim Potter*, 27-CR-21-7460, another “high profile” homicide trial in an officer-involved shooting, took place in HCDC between Nov. 30 and Dec. 23, 2021. Although the HCGC was not “locked down” during the *Potter* trial as it had been during the *Chauvin* trial for public health and safety and security reasons, that trial and the year-end holidays likely account for the significantly fewer trials during December 2020 than for most of the remaining months during this period.

Statistics from the Minnesota Department of Health again demonstrate the significant waning in COVID-19 infections by the summer of 2021. During the ten weeks from roughly Memorial Day through the first week of August 2021:

(1) The number of new weekly positive cases in Minnesota had dropped to a range between roughly 700 to 6,575, with a median of about 1,450.

(2) The number of new weekly hospitalizations in Minnesota had dropped to a range between roughly 105 and 310, with a median of about 150.

(3) The number of new weekly ICU hospitalizations in Minnesota had dropped to a range from about 15 to 85, with a median of about 25.

(4) Finally, the number of weekly deaths attributed to COVID-19 in Minnesota had dropped to a range from about 10 to a little over 30, with a median of about 20.

On June 28, 2021, Chief Justice Gildea issued an *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, ADM20-8001 (June 28, 2021), effective July 6, 2021, which lifted the requirement -- in place since May 2020 when the “stay at home” directive was lifted and judicial personnel were allowed to return to HCDC to work -- that all persons wear face coverings while in judicial branch facilities and also suspended the requirements in place since May 2020 that proceedings adhere to the Judicial Branch COVID-19 Preparedness Plan and the Jury Management Resources Team Recommendations for Jury Trials during COVID-19. Order, at 1 & ¶ 19. That order maintained the policy requiring most court proceedings to be conducted using remote technology and allowed in-person criminal jury trials to be scheduled and held in all counties statewide unless the district’s chief judge determined the trial cannot proceed due to local conditions. *Id.* ¶¶ 1-8. The order also relaxed prior

restrictions on in-person civil jury trials, allowing in-person civil jury trials if the district’s chief judge and court administrator determined that holding civil jury trials would not interfere with the scheduling of in-person criminal jury trials. *Id.* ¶ 6. That order maintained the restrictions on the number of persons permitted access to courtrooms for in-person proceedings. *Id.* ¶ 16.

On October 18, 2021, Chief Justice Gildea issued an *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, ADM20-8001 (Oct. 18, 2021), effective October 19, 2021, which noted that “[s]ince the last operations order, the COVID-10 pandemic has continued, the positivity rate and positive case numbers in Minnesota have increased significantly, and the entire State of Minnesota is currently experiencing a high level of community transmission” requiring the reinstatement of some “exposure prevention and mitigation measures” “to ensure the continued safe operation of the Minnesota Judicial Branch consistent with evolving conditions and public health guidance.” Order, at 1. That order reinstated the prior policy which had been in effect from May 2020 through June 2021 that every person entering a court facility again wear a face covering when in public areas, common areas, and in courtrooms during proceedings, subject to the discretion of the presiding judge to permit individuals to remove their face covering during in-person proceedings in a courtroom for case-specific reasons. *Id.* ¶ 1. That order also directed that proceedings be conducted in accordance with the guidance provided by the Judicial Branch COVID-19 Preparedness Plan (rev. October 18, 2021) as appropriate in particular proceedings. *Id.* ¶ 2.

Statistics from the Minnesota Department of Health demonstrate the substantial increase in COVID-19 infections and the impact on the public health system throughout the late

Summer, Fall, and early Winter of 2021. The COVID-19 reached peak pandemic numbers in Minnesota during the five week-span from Dec. 26, 2021 to Jan. 29, 2022:

(1) The number of new weekly positive cases in Minnesota during this five-week span surged precipitously, ranging between roughly 41,700 to almost 92,000, with an average of new weekly positive cases of more than 69,000.

(2) The number of new weekly hospitalizations in Minnesota during this five-week span also increased significantly from the summer to a range between 915 and 1,530, with an average of almost 1,350.

(3) Likewise, the number of new weekly ICU hospitalizations in Minnesota during this five-week span also increased significantly from the summer to a range between 118 and 155, with an average of almost 140.

(4) Finally, the number of weekly deaths attributed to COVID-19 in Minnesota during this five-week span increased almost 20-fold from the summer, with weekly deaths ranging between 180 and 230, with an average of about 210.

In comparison to the data from November 2020, *see supra* at 17-18, these statistics show that the prevailing new Omicron variants were more transmissible than the earlier (Delta) variant had been the prior winter, but less severe, with new hospitalizations, new ICU hospitalizations, and deaths below the levels reported during the spike in November 2020. According to the CDC, COVID-19 remained the third leading cause of deaths in the United States in 2021, behind only heart disease and cancer; COVID-19 was the underlying cause of death for 13.3% of all deaths in the United States in 2021, an increase from 2020 when it was the

underlying cause of death for 10.4% of all deaths in the United States. See [Provisional Mortality Data — United States, 2021 | MMWR \(cdc.gov\)](#), accessed April 25, 2022.

On March 3, 2022, Chief Justice Gildea issued an *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, ADM-20-8001 (March 3, 2022), effective March 7, 2022, in which the Chief Justice pointed to the Centers for Disease Control and Prevention’s (CDC) February 25, 2022 updated guidance regarding prevention steps appropriate based on a county’s COVID-19 community level. Order, at 1. That order observed (citations omitted):

Under the CDC’s current guidance, wearing a mask indoor in public is a recommended prevention step only for counties at a “high” COVID-19 Community Level. . . . The CDC recognizes, however, that “[p]eople may choose to mask at any time,” and that “[p]eople with symptoms, a positive test, or exposure to someone with COVID-19 should wear a mask.”

Order at 1-2. In view of evolving conditions and public health guidance as vaccination rates increased within the population, the number of positive cases declined, and the concomitant strain on the health care systems eased, the order therefore once again lifted the face covering requirement for persons in court facilities, effective March 7, 2022, but authorized the chief judge of each district to review the CDC’s COVID-19 Community Level for the counties within the judicial district and to require face coverings at court facilities in any county within that judicial district if the CDC’s COVID-19 Community Level is “high.” *Id.* ¶¶ 1-2.

**B. The Evolving Circumstances of the COVID-19 Pandemic and Recent Orders for the Continuing Operations of the Courts No Longer Necessitate Resort to Rule 1.02 to Prevent Manifest Injustice by Livestreaming the *Floyd II* Trial. Thus, Rule 4.02(d) Controls, and this Court Is Precluded by that Rule from Ordering Livestreaming of the Trial Over the Objections of the Defendants.**

In this Court’s original order regarding livestreaming (filed November 4, 2020), this Court acknowledged that it was allowing more extensive audio and video coverage than is

permitted by Minn. Gen. R. Prac. 4.02(d). The Court did not do so lightly, but out of necessity in light of the vicissitudes of the ongoing public health pandemic as described in detail in Part II.A. In this Court's Order Denying [the State's] Motion to Reconsider and Amend Order Allowing Audio and Video Coverage of Trial (filed Dec. 18, 2020), this Court also pointed to the authority granted the trial courts in Rule 1.02 of the Minnesota General Rules of Practice for the District Courts, which provides:

A judge may modify the application of these rules in any case to prevent manifest injustice.

In the Fall of 2020, this Court observed that the issue confronting the Court at that time was whether there was any reasonable alternative to livestreaming the trial that would vindicate the Defendants' Sixth Amendment rights and the First Amendment rights of the public and the press.<sup>13</sup> In this Court's view, if the answer was "yes," then the Court should adopt such a reasonable alternative and apply the strictures of Rule 4.02. On the other hand, if the answer was "no," then the flexibility of Rule 1.02 to prevent manifest injustice would support the Court's original November 4, 2020 livestreaming order. This Court concluded that livestreaming the trial was the only reasonable and meaningful method to safeguard the First and Sixth Amendment rights at play given the unique and compelling exigent circumstances facing the Court at that time due to the COVID-19 pandemic, the Executive and Administrative orders by

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<sup>13</sup> Or, as the Media Coalition framed the issue in its brief opposing the State's motion for reconsideration of the Court's November 4, 2020 order allowing livestreaming of the trial (filed Dec. 14, 2020), the problem the Court was then confronting was "[h]ow to conduct an extremely high-profile jury trial involving four criminal defendants sometime in the foreseeable future, consistent with the public-trial rights of the First and Sixth Amendments, while keeping trial participants, court staff, and the public at large safe from a highly contagious, deadly virus." Media Coalition Br. at 2.

the Governor and Chief Justice Gildea, the public's, trial participants', and court employees' health and public safety concerns given the then-extant requirements to maintain six-foot social distancing and mask wearing, the intense public interest in the *Chauvin* trial, and the limitations in seating in the trial courtroom seating because of the complete remodeling of the largest courtroom in the HCGC to accommodate what at the time had been anticipated as a joint trial of all four officer defendants,<sup>14</sup> with the complete removal of the public gallery in that courtroom to accommodate all the counsel tables required for the parties and trial counsel, while maintaining compliance with social distancing requirements.

The germane lesson to be drawn from the Court's extensive recounting of the history of the COVID-19 pandemic and the Minnesota judiciary's efforts to continue doing the public's judicial business while attempting to meet public health and safety concerns and objectives is that the circumstances the Court confronts with the *Floyd II* trial seven weeks hence are materially different from those the Court confronted from November 2020 through April 2021 with the *Chauvin* trial. The social distancing protocols and facial mask requirements in force during the *Chauvin* trial are no longer in force. Statistics from the CDC and the Minnesota Department of Health indicate that the COVID-19 pandemic is currently on the wane; as the COVID-19 virus has mutated and evolved into the current Omicron variants, the virus appears

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<sup>14</sup> The Court's November 4, 2020 order granting trial joinder contemplated that all four defendants would be tried in the March 2021 trial. That became logistically impossible given the space limitations even in the largest courtroom in the HCGC, even after remodeling to remove the public gallery entirely, and social distancing requirements once it became known in January 2021 the total number of lawyers the parties anticipated would be participating as trial counsel. It was only then, in January 2021, that the Court severed Chauvin from these three Defendants, leading to the separate *Chauvin* and *Floyd II* trials.

to be becoming more contagious or transmissible but with fewer serious long-term health consequences for those contracting the virus and in view of current vaccination rates,<sup>15</sup> the apparent seasonal decline in the transmissibility of the virus as we move into Spring – and, by the time of the *Floyd II* trial, into Summer<sup>16</sup> – it appears the COVID-19 virus presents significantly less risk to the health and safety of the trial participants in the *Floyd II* trial, the court, court staff and other court employees, witnesses who will testify at the trial, and family members, members of the general public, and media representatives who may wish to attend the trial in June-July 2022 than was the situation in March-April 2021 with the *Chauvin* trial.

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<sup>15</sup> The Pfizer/BioNTech and Moderna COVID-19 vaccines only received emergency use authorization by the U.S. Food and Drug Administration in December 2020 (see Emanuel Aff. ¶¶ 23-24) and were only starting to be administered to select groups in January 2021, and the first round(s) of vaccines only became available to many members of the judiciary and court staff in March and April 2021 when the *Chauvin* trial was underway. As of April 24, 2022, CDC statistics indicate that more than 257 million Americans, more than 82% of the total population, has now received at least one dose of a COVID-19 vaccine. See [CDC COVID Data Tracker: Home](#), last accessed April 24, 2022. Dr. Emanuel indeed predicted in his December 2020 Affidavit that as the number of vaccinated Americans increased over time, the number of new COVID-19 infections were likely to decrease “and, more importantly, severe cases of COVID-19 are likely to decrease over time.” Emanuel Aff. ¶ 35. Dr. Osterholm made the same prediction. Osterholm Aff. ¶ 21.

<sup>16</sup> In his Affidavit of December 31, 2020 (filed by the State into these cases on December 31, 2020), Dr. Ezekiel Emanuel noted that the likelihood of COVID-19 transmission is increased by four factors, three of which -- being indoors, prolonged periods of interaction, and forced exhalations, including coughing (see Aff. ¶ 19) – naturally are experienced by more Minnesotans for greater periods of time in winter than summer months. *Accord* Aff. of Dr. Michael Osterholm (filed by the State in these cases on January 19, 2021), ¶ 19. Here, too, Dr. Emanuel observed that data suggested the COVID-19 virus “seems to survive better in cold, dry air” such that risk of community spread of COVID-19 could be expected to be substantially lower in summer than winter. *Cf.* Emanuel Aff. ¶¶ 37-38.

Statistics from the Minnesota Department of Health once again bear out the significant waning in COVID-19 infections since the Jan. 2022 peak during the height of the Omicron variant:

(1) The number of new weekly positive cases in Minnesota during the two months from mid-February to mid-April 2022 declined from 8,767 at the beginning of that period to just 1,114 for the week ending April 16, 2022. That is the fewest number of new positive cases reported since July 10, 2021.

(2) The number of new weekly hospitalizations in Minnesota during the two months from mid-February to mid-April 2022 declined from 499 at the beginning of that period to just 47 for the week ending April 16, 2022. That is the first time new weekly hospitalizations have dipped below 100 since virtually the very onset of the pandemic, March 28, 2020.

(3) The number of new weekly ICU hospitalizations in Minnesota during the two months from mid-February to mid-April 2022 declined from 76 at the beginning of that period to just 9 for the week ending April 16, 2022. That is the lowest number of new weekly ICU hospitalizations seen since March 21, 2020, virtually the onset of the pandemic in Minnesota.

(4) Finally, the number of weekly deaths attributed to COVID-19 in Minnesota during the two months from mid-February to mid-April 2022 declined from 125 at the beginning of that period to just a single death for the week ending April 16, 2022. Again, that is the first time weekly recorded deaths have dipped below ten since the third week of the pandemic in Minnesota, on March 21, 2020.

The Court hastens to note that there can of course be no certainties about what will occur in the future based on analysis of historical patterns and data over the past couple years.

However, the two-year experience with the COVID-19 pandemic has shown the virus and new infections and the strain on the health care system tend to wane dramatically in the summer months before peaking in the prime winter months. There simply is no longer, in this Court’s judgment, based on the experience of the past two years and all the changed circumstances recounted in this Memorandum Opinion, the prospects for manifest injustice upon which this Court relied in ordering livestreaming of the *Chauvin* trial in the late Winter/early Spring of 2021 for the upcoming *Floyd II* trial in the Summer of 2022. The Court cannot, given these changed circumstances, continue to rely on Rule 1.02 as justification to ignore the plain strictures of Rule 4.02(d).

A few additional comments are in order.

The Media Coalition argues that “the public will struggle to understand why two trials for the murder of the same man . . . could be held under considerably different conditions, where one [trial] is accessible to millions [the *Chauvin* trial, via the Court TV livestream] and the other is limited to the first 50 who can make it into the courtroom.” Media Coalition Br. at 7 (filed April 8, 2022). Similarly, the State notes that it “is particularly concerned about the message this Court could send if it reverses course, after permitting such robust public access in the *Chauvin* trial and initially guaranteeing the public the same degree of access for [the upcoming joint trial of these defendants]” by treating the trial of these defendants “radically differently” from the *Chauvin* trial by eliminating “audio-visual coverage at this late hour, the broader public may receive the unintended message that they no longer have the right to observe proceedings,” and “[w]orse still, the public may wonder what changed to limit their access and potentially lose confidence in the process and its outcome.” State Br. at 2; *see also*

*id.* at 10 (“If this Court deviates from the procedures it employed during the *Chauvin* trial, the Court would provide the public with an apparent inconsistency: One defendant will have been tried in the public eye, but three others will have stood trial out of view, all regarding the same criminal incident.”). The short answer is that the reason the *Chauvin* trial was livestreamed while the *Floyd II* trial will not be livestreamed – assuming conditions do not change materially from where things stand as of the date of this Order – is because of the changed circumstances explained in this Opinion. It surely is not too much to ask the Media Coalition, which in a past brief touted the ability of reporters to investigate more deeply and to explain more persuasively than lawyers, that reporters can explain to the public the Court’s reasoning in their reporting. As with other orders in these cases, this Order and Memorandum Opinion is a publicly-available document; it will also be posted to the public websites this Court has established for these cases; and, in keeping with past practices by some of the media reporting on this case, some media may choose to link this Order and Opinion in their articles, also facilitating the ability of interested members of the public to read and understand the Court’s rationale for not livestreaming the *Floyd II* trial, given the materially different circumstances facing this Court now in the COVID-19 pandemic.

Moreover, the Court agrees with the State that the “*Chauvin* trial demonstrated the benefits of robust public access to this important case” and that the “commendable transparency” of the *Chauvin* trial accomplished by the livestreaming of that trial “inspired public confidence in the proceedings and helped ensure calm in Minneapolis and across the country.” State Mem. at 2 (filed April 7, 2022). In like vein, the Media Coalition also points to the January 28, 2022 letter to the Advisory Committee on the Rules of Criminal Procedure, in

which this Court<sup>17</sup> expressed views regarding the advisability of modifying and revising Rule 4.02(d) of the General Rules of Practice for the District Courts to invest district judges with discretion to order audio and video coverage of criminal trials even when not all parties consent. *See Parsons Aff.* (April 7, 2022), Exh. A. But, those views reflected only this Court’s personal views about how and the reasons why the existing rules ought to be changed. This Court of course has no unfettered mandate to ignore court rules or statutes based solely on the Court’s own personal views of the wisdom of such rules when their import is plain and their applicability clear, in the absence of compelling circumstances required to invoke other general principles and rules – like Rule 1.02 of the General Rules of Practice – that allow district courts to modify application of other applicable rules only when it is necessary to do so to prevent a manifest injustice.

For all the reasons explained herein, a manifest injustice is not visited upon the State, the public writ large, or the Media Coalition by this Court returning to the normal order of things in the courts of this State and not ordering the livestreaming of a trial – even one of whatever interest some segments of the general public, some members of the Media Coalition, and some of the family members and witnesses to the events of May 25, 2020 at the Cup Foods Store at 38<sup>th</sup> and Chicago Avenues in Minneapolis may retain after what will in effect be the third trial of the officers charged with the death of George Floyd. The *Floyd II* trial will not be “closed,” within the judicial meaning of that word for purposes of the First Amendment and public and media access; it will instead, as with every trial in Minnesota state history other than

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<sup>17</sup> The letter only expressed a personal opinion and does not constitute the position of the Hennepin County District Court.

*Chauvin* and *Potter* – including many others of immense public or media interest – be open to family members and friends of the parties, the general public, and the media consistent with the demands on the Court to ensure a fair trial to former MPD officers Thao, Kueng, and Lane, and the available resources and facilities available to the Court in which to try the case.

### III. PARTIAL JURY SEQUESTRATION IS APPROPRIATE.

The Court sought input from the parties at the April 22 hearing as to whether the jury should be sequestered from opening statements or with partial sequestration as was done in *Chauvin*. As with the issue of livestreaming, the parties again find themselves on opposite sides the issue: all three Defendants wish to have the jury sequestered throughout the trial whereas the State argues for partial sequestration as was done with the jury during the *Chauvin* trial. After considering the arguments of counsel and the effectiveness of partial sequestration in *Chauvin*, the Court concludes that partial sequestration shall be ordered.

Rule 26.02 subd. 5(2) of the Minnesota Rules of Criminal Procedure provides in part that “[s]equestration must be ordered if the case is of such notoriety or the issues are of such a nature that, in the absence of sequestration, highly prejudicial matters are likely to come to the jurors’ attention.” Although the cases of these three Defendants carry some notoriety, they are charged as aiders and abettors, thus carrying less notoriety than was the case of the primary perpetrator, Derek Chauvin. Perhaps for that reason, as well as for the fact that this will be the third trial of former MPD officers charged with George Floyd’s death, the general public interest in the case seems to have waned.<sup>18</sup> During the federal trial of these three Defendants three

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<sup>18</sup> The Court does not mean to imply that the interests of the Floyd family and friends, the Defendants’ families and friends, or members of various activist communities have lessened.

months ago, there reportedly were empty seats in the courtroom every day.<sup>19</sup> Substantially fewer media outlets have reported plans to attend the *Floyd II* trial full-time than did so during the *Chauvin* trial, when the Court set up a separate media center to which the trial was livestreamed that had working desks for more than 40 media representatives.

More importantly, it is less likely that prejudicial matters are likely to come to the jurors' attention than was true during the *Chauvin* trial. The City of Minneapolis presumably has no additional settlements to announce during the *Floyd II* trial. There are no plea offers made by Defendants that can be publicized (unlike the leaked information regarding plea discussions between the State and Mr. Chauvin dating back to late May/early June 2020 that was the subject of press reporting in the third week of February 2021, shortly before the *Chauvin* trial) and it appears that public officials have stopped sharing their thoughts about the trials in various press conferences. The juror questionnaires sent to potential jurors have already warned jurors to start avoiding media coverage of these cases. While the Court cannot fully anticipate what new prejudicial matters could arise during trial, the risk of such exposure at this point seems low.

The Court agrees with the State that the risk of prejudicial matters coming to jurors' attention must be weighed against the burden placed on jurors by sequestration. The evidence in this case is expected to last four or possibly five weeks in July and possibly into early August, a time during which many Minnesotans are taking summer vacations. That is a particularly long time for jurors to be separated from family and work and to be living in a hotel in a cloistered

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<sup>19</sup> This information was communicated to this Court indirectly by members of court administration. Mr. Frank, who attended the federal trial, did not challenge this fact when the Court stated it during the April 11, 2022 hearing.

environment. For some potential jurors, it would not only be burdensome, but impossible given other obligations in their lives. Simply stated, the high burden of long sequestration outweighs the low risk of exposure to prejudicial matters.

PAC