

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

DEFENSE OBJECTION
TO STATE'S MOTION
FOR
RECONSIDERATION

PLAINTIFF,

V.

TOU THAO,

DEFENDANT.

COURT FILE NO. 27-CR-20-12949

TO: THE HONORABLE PETER A. CAHILL, JUDGE OF DISTRICT COURT, AND
MR. MATTHEW G. FRANK, ASSISTANT ATTORNEY GENERAL

Tou Thao ("Mr. Thao" herein) opposes the State's Motion for Reconsideration of Order Allowing Audio Video Coverage of Trial filed on November 25, 2020. Mr. Thao agrees with the Court's November 4, 2020 Order Allowing Audio and Video Coverage of Trial and requests that the Order stay in place to protect his constitutional right to a fair trial.

Mr. Thao incorporates the argument of the Media Coalition's Opposition to State's Motion for Reconsideration of Order Allowing Audio and Video Coverage of Trial. Mr. Additionally, Mr. Thao joins in Defendant's Reply to State's Motion to Reconsider Cameras in the Courtroom filed today in the case of *State v. Kueng* (27-CR-20-12953).

INTRODUCTION

The Court issued an Order Allowing Audio and Video Coverage of Trial on November 4, 2020. The Order stated in part that the *State v. Thao* trial (joined together with *State v. Chauvin*, 27-CR-20-12646, *State v. Lane*, 27-CR-20-12951, and *State v. Kueng*, 27-CR-20-12953) would be available for recording, broadcasting, and livestreaming audio and video coverage. The Court limited the coverage by ordering that only on-the-record discussions would be available for recording, no video footage of any juror or potential juror be shown, no witnesses under the age of 18 be shown unless consented to by the witness and a guardian, no family member of the George Floyd family be shown, and no video or audio coverage be shown of counsel tables except for when a verdict is taken.

The Court also provided a memorandum in support of its decision. In the memorandum, the Court explained that the constitutional right to a fair trial belongs to the defendant, that this right includes a right to a public trial, and because of the highly unique situation of the COVID-19 pandemic that right can only be ensured by a public broadcasting. The Defense agrees.

The State filed its Motion for Reconsideration on November 25, 2020 in which it disagreed with the Court's Order. The State argued that there cannot be a broadcasted feed of the trial because the State did not consent to recording, that witnesses did not consent to recording, and the United States Constitution does not explicitly allow for recorded trials. The State proposed instead that the Court only allow the opening/closing arguments, testimony of defendant(s), and consenting witness(es) to be recorded. This limited scope "would allow the public to see key aspects of this trial without undermining the administration of justice." See State's Motion at 3. The Defense disagrees wholeheartedly.

ARGUMENT

The United States Constitution and the Minnesota State Constitution guarantee Mr. Thao a right to a fair trial and public trial. U.S. Const. and. VI; Minn. Const. at. I, §6. This right belongs to Mr. Thao alone and not the State. Mr. Thao does not – and will not – waive this constitutional right. Mr. Thao agrees that with the Court’s Order that his trial should be broadcasted to the public to ensure his constitutional rights in the midst of a global pandemic.

I. MR. THAO’S CONSTITUTIONAL RIGHT TO A FAIR TRIAL CAN ONLY BE PROTECTED IF THE TRIAL IS BROADCAST

Both the Sixth Amendment of the United States Constitution and the Minnesota Constitution guarantee the right to a public trial. U.S. Const. and. VI; Minn. Const. at. I, §6. There is a constitutional presumption of access to criminal trials, although such access is not an absolute right. See *Austin Daily Herald v. Mork*, 507 N.W.2d 854 (Minn. App. 1993).

Mr. Thao’s constitutional right to a fair trial cannot be protected unless the trial is broadcasted given the COVID-19 pandemic and immense public interest the case has generated. The Court explained that because the State joined all the defendants and because of social distancing requirements there is less room in the courtroom for public spectators.

The State argues that a live stream into other courtrooms would be sufficient to meet the constitutional public trial requirement. The Defense disagrees. The Court notes that family of the defendants and of the alleged victim had to sit in another room to view the close-circuit feed and “even then had trouble hearing all of the proceedings.” Order at 7. The Court has shown that a close-circuit feed to other courtrooms is not sufficient, as the State has suggested. The State has not offered any viable alternative to protecting Mr. Thao’s constitutional right to a fair trial.

Mr. Thao respectfully requests the Court to keep its original Order and have his trial broadcast to ensure he has a fair and public trial.

II. BY LIMITING THE SCOPE OF THE BROADCAST TO ONLY CONSENTING WITNESSES, THE STATE IS EFFECTIVELY DISMANTLING MR. THAO'S RIGHT TO A PUBLIC TRIAL.

“Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process.” *State v. Fageroos*, 531 N.W. 2d 199 (Min. 1995). Any closure of a portion of the trial must be no broader than necessary to protect an overriding interest. *Id.* at 201. *See* Defendant’s Reply to the State’s Motion to Reconsider Cameras in the Courtroom (27-CR-20-12953). The State has not argued any overriding interests and is requesting that the Court close off the courtroom in a way that is too broad and deprives Mr. Thao of his constitutional right to a fair trial.

The State wishes the Court to reconsider its Order to allow broadcasting of Mr. Thao’s trial. The State has repeatedly told the Court and the public that it wants a public trial. However, the State is arguing to limit the public to such a degree it would violate Mr. Thao’s constitutional right. The State wants a closed-circuit feed into other courtrooms. Those courtrooms would inevitably only fit members of the press and family of the defendants and alleged victim. Even if the Hennepin County Government Center had enough courtrooms to allow every interested member of the public a socially distanced spot to listen to the proceedings, those listening may still have a hard time hearing what was happening in the record. *See* Order at 7.

The State claims it wants a transparent process but is instead using its power to shroud the public’s view of what is happening. The State has withheld vital evidence (*See* Motion for Sanctions and Hearing Regarding Discovery Violations by the State) for months after the discovery deadline and now it is attempting to stop the public from observing witness testimony

and actual presentation of evidence. The State argues that only witnesses who consent should be broadcasted. They argue that this is because of the privacy and intimidation concerns. The Defense disagrees that these are valid reasons.

First, it is likely that no State witnesses would want to be broadcasted given the State's concern that the witnesses may be intimidated. There is always a potential concern that a witness may be intimidated by a member of the public when they testify. The State has not shown that broadcasting witnesses would subject them to more intimidation than they may receive in the same trial where their photo was printed in the newspaper and a description of their testimony printed next to it. To date, at least one potential State witnesses has spoken out publicly.¹ To the Defense, this signals that at least some of the State's witnesses are not concerned about intimidation or invasion of privacy.

Secondly, the Court has ensured that no juvenile's privacy be imposed on by protecting against broadcasting their testimony. See Order at 3.

Lastly, if the Court were to allow broadcasting only of the witnesses who consent, there would likely be no witnesses for the public to observe. Given the State's concern with witness privacy, how would the Court ensure that the State was not advising all its witnesses against consenting to broadcasting? There is no guarantee that a witness would use legitimate reasons to opt out of a public testimony.

Mr. Thao's constitutional right to a fair trial includes the right to a public trial. Mr. Thao does not and will not waive this right. The State cannot unilaterally deprive Mr. Thao of this constitutional right. By limiting – in part or in whole – the broadcasting of a trial the State would

¹ An article detailing a potential witness accepting an award for their involvement in the case of *State v. Thao* has been privately emailed to the Court and the State. The Defense does not wish to include the article in this filing as it lists the full name of a juvenile.

effectively ensure that no member of the public be guaranteed to observe the trial of Mr. Thao. Such closed proceedings are unconstitutional in criminal court, as they are violative of Mr. Thao's right to a fair and public trial. Mr. Thao respectfully asks this Court to keep its November 4, 2020 Order and broadcast his trial.

Respectfully submitted,

Dated: This 14th day of December 2020

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