

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,
Plaintiff,

**ORDER DENYING MOTION TO
RECONSIDER NOVEMBER 4, 2020
ORDER ALLOWING AUDIO AND
VIDEO COVERAGE OF TRIAL**

vs.

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

Dist. Ct. File 27-CR-20-12949
Dist. Ct. File 27-CR-20-12951
Dist. Ct. File 27-CR-20-12953

Defendants.

This matter came before the Court on the written motions of Defendants Thomas Kiernan Lane (Lane) and J. Alexander Kueng (Kueng), which motions were joined by Defendant Tou Thao (Thao) orally on the record during a September 2, 2021 hearing, for the Court to reconsider its November 4, 2020 Order Allowing Audio and Video Coverage of Trial of the joint trial to be held in this case (Trial Livestream Order).¹

Matthew Frank, Assistant Attorney General, Special Assistant Attorneys General Neal K. Katyal, Sundeep Iyer, and Nathaniel A.G. Zelinsky, and Joshua Larson, Assistant Hennepin County Attorney, appeared on behalf of the State and filed a written memorandum opposing the reconsideration of the Court's Trial Livestream Order.

Thomas C. Plunkett, Attorney at Law, appeared on behalf of Kueng and filed affidavits and a memorandum arguing against audio and video coverage of the trial.

¹ On December 18, 2020, the Court filed an Order Denying [the State's] Motion to Reconsider and Amend Order Allowing Audio and Video Coverage of Trial.

Earl P. Gray and Amanda J. Montgomery, Attorneys at Law, appeared on behalf of Lane and filed an affidavit and a memorandum arguing against audio and video coverage of the trial.

Robert M. Paule and Natalie R. Paule, Attorneys at Law, appeared on behalf of Thao.

Leita Walker and Emmy Parsons, Attorneys at Law, appeared and submitted a memorandum on behalf of the Media Coalition opposing the reconsideration of the Court's Trial Livestream Order.

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

ORDER

Defendants' motion for reconsideration of the Court's November 4, 2020 Trial Livestream Order allowing audio and video and livestream coverage of the joint trial in this matter is **DENIED**.

The attached memorandum is incorporated herein.

BY THE COURT:

Peter A. Cahill
Judge of District Court

MEMORANDUM

Simply stated, the conditions that led this Court in November 2020 to order audio and video and livestream coverage of the joint trial remain the same. The principal difference is that while COVID-19 continues to rage, it is doing so now in an even more contagious form (the Omicron mutation).² Media coverage of the cases continues and press reporters will be in the courtroom reporting on the proceedings, with or without livestream. There is no reason to anticipate that public interest in these cases has abated. There is no way witnesses can or should hide their testimony from public scrutiny.

The defendants, who actively advocated for livestreaming coverage of the trial in 2020, now state in vague and general terms that “potential defense witnesses” “will not testify because this matter is televised.”³ Even if some witnesses feel that way,⁴ the Court is willing to enforce defense subpoenas by various means, up to and including arrest of recalcitrant witnesses to force them to testify, a common practice in many other trials in Hennepin County District Court in which witnesses are unwilling to cooperate with either or both of the parties seeking their testimony at trial.

If defendants provide more specific and convincing reasons for specific witness’s reticence, that does not compel elimination of livestreaming coverage of the joint trial altogether although it may justify some limitations on the audio and video coverage of those witnesses as, for example, was done during the trial of Derek Chauvin when young witnesses testified. As this

² See <https://www.startribune.com/us-faces-a-double-coronavirus-surge-as-omicron-advances/600127370>.

³ Affidavits of Earl Gray (District Court File Number 20-12951, Dk #456) and Thomas Plunkett (District Court File Number 20-12953, Dk #481).

⁴ It was apparent to the Court that some of the fact witnesses called during the Derek Chauvin trial in March-April 2020 were not only not reticent about testifying but appeared to welcome the opportunity to testify.

is a fluid situation, any requests for such limitations will only be considered at or shortly before trial.

As to expert witnesses, defendants state that some potential expert witnesses do not wish to testify because of the notoriety of the cases.⁵ As the notoriety of these cases is neither enhanced nor diminished by livestreaming, the defense arguments fail. The joint trial of these defendants, as was the case with the trial of their co-defendant Derek Chauvin, can be expected to receive ubiquitous media coverage given the vast public interest whether or not the joint trial is livestreamed. That is simply the nature of highly publicized trials in which the public and media have an intense interest. That said, the Court condemns, in the strongest terms possible, the vandalism and harassment of expert witness Barry Brodd following his testimony in the Derek Chauvin trial. If the allegations are true, the perpetrators of that vandalism and harassment should be criminally prosecuted for their acts.⁶ Such acts are not protected speech under the First Amendment but constitute tampering with a witness⁷ and should be punished accordingly.

In conclusion, defendants fail to show that audio and video coverage and livestreaming will deprive them of a fair trial.

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⁵ *Id.*

⁶ The independent review of deaths in police custody during Dr. David Fowler's tenure as Chief Medical Examiner, ordered by the Governor of Maryland and the Maryland Attorney General, after his testimony in the Derek Chauvin trial is, unlike the harassment of Mr. Brodd, an appropriate exercise of government oversight and not "harassment and defamation" as claimed by the defense.

⁷ *See* Minn. Stat. § 609.498 subd. 1(c).