

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

State of Minnesota,

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

Plaintiff,

vs.

**THIRD SUPPLEMENTAL  
MEMORANDUM NOTICE OF  
MOTION AND MOTION TO  
CHANGE VENUE**

J. Alexander Kueng,

Defendant.

**TO: The Honorable Peter Cahill, Judge of Hennepin County District Court;  
Matthew Frank, Assistant Attorney General; Josh Larson, Asst. Hennepin  
County Attorney.**

**BACKGROUND**

On August 27, 2020 Mr. Kueng, through Counsel, filed a motion seeking a change of venue. Subsequent filings have been submitted on this issue. This Memorandum supplements the existing briefing and argument and focuses on the Court's jury questionnaire and decision to rely on the questionnaire and voir dire as a means of determining if a change of venue is necessary.

On June 30, 2020 the Court issued a scheduling order directing that the parties draft and submit proposed a jury questionnaire by November 1, 2020. On December 1, 2020 the defense and the state submitted proposed jury questionnaires. See Exhibits 1 and 2 respectively. On December 8, 2020 the parties were provided the "final form of the Juror Questionnaire" via email from chambers.

See (Exhibit 3 - Index # 238). In the same message the parties were informed that the questionnaire had already been sent to prospective jurors or would be shortly. Neither party was given an opportunity to review the questionnaire in advance or provide argument.

Counsel now notes an objection to the final questionnaire, the process of determining venue through the questionnaire and voir dire and again seeks a change of venue. This relief is necessary because reliance on the Court's questionnaire to determine the venue issue does not accurately or adequately explore juror and community bias. Further, the Court's jury questionnaire poses a barrier to meaningful voir dire as it will entrench the entire jury pool against insightful responses to important questions in the future.

### **DISCUSSION**

The process of relying on the jury questionnaire and voir dire to determine if a change of venue is necessary is objectionable and fails not provide due process to the defendants. The specific questionnaire is a barrier to exploring bias in potential jurors as the questionnaire entrenches the jury against providing accurate and insightful answers that would allow the parties to ferret out prejudice.

Due process should allow the defendants to know if the potential jurors have any preconceptions about their guilt. The defendants cannot know if the

potential jurors can be impartial if they do not know whether they possess a presumption of guilt. One way the questionnaire fails is its lack of any questions measuring bias. The jury questionnaire at question 2 merely asks:

From what you have seen, read, or heard, do you have a general impression of the defendants?

- Very negative       Somewhat negative       Neutral  
 Somewhat positive       Very positive       Other:

Why do you feel that way?<sup>1</sup>

This question by itself is inadequate to explore bias. This question needs to be connected with other questions that are calculated to elicit evidence of bias.

See Exhibit 1. By itself this question it is a blunt instrument as it in no way explores bias. The defense proposed additional questions that meaningfully examined pre-existing juror bias. A specific example is the defense proposed question asking:

Based on what you have read, seen, or heard about George Floyd's death, do you believe that "**Defendant's Name**" is:  Definitely guilty of murder  Probably guilty of murder  Probably not guilty of murder  Definitely not guilty of murder  Other:\_\_\_\_\_

The Court's choice to limit questions and rely on the questionnaire and voir dire violates *United States v. Tsarnaev*, 968 F.3d 24 (2020). The Court has embarked on a process that denies a venue change on the promise of a searching voir dire. Based on the jury questionnaire, however, that promise can no longer be fulfilled. *Tsarnaev* reversed a federal district court on this very point. See *Tsarnaev*

---

<sup>1</sup> The defense proposed this question in connection with several other questions.

at 42. *Tsarnaev* explains that a judge handling a case involving prejudicial pretrial publicity must elicit “the kind and degree” of each prospective juror's “exposure to the case or the parties,” if asked by counsel, only then can the judge reliably assess whether a potential juror can ignore that publicity, as the law requires. See *Id.* at 34 (Internal citation omitted).

The Court’s questionnaire adds to this error by using a leading question that implies that the correct answer is “yes”. (Exhibit 3 Part I Question 10):”

This question, the only question in bold face, asks:

**No matter what you have heard or seen about this case, and no matter what opinions you might have formed, can you put all of that aside and decide this case only on the evidence you receive in court, follow the law, and decide the case in a fair and impartial manner?** Emphasis in original.

This type of question is more problematic because it is calculated to get socially desirable response and will entrench all potential jurors in their response depriving the defense of meaningful in person voir dire. Being the only question in bold print, it aggravates the problem by further by putting emphasis on the need for a socially desirable answer. This questions word choice and prominence in the questionnaire prevents meaningful explorations of bias in voir dire. This Court has chosen to adopt an approach to venue that places the burden on the individual juror to self-judge their impartiality. A judge cannot delegate to potential jurors the work of judging their own impartiality. See *Tsarnaev* at 62.

Finally, Counsel notes that potential jurors are not responding to the questionnaire under oath. Historically questionnaires are filled out under oath in court. This questionnaire, however, is being mailed in advance with a caution that:

You are a potential juror in the trial of four former police officers charged in connection with the death of George Floyd. From this day forward, DO NOT read or intentionally view anything about these cases or do any investigation or research related to these cases. See *Index # 238*

There is a great risk that these prospective jurors will talk to friends and family about the case. They will also continue to see media coverage and now be prompted to review past coverage. The Court is giving prospective jurors a questionnaire several months before trial in one of the most high profile cases in history. These proceedings should be done inside the courtroom as part of voir dire at the start of trial to avoid misconduct.

### **CONCLUSION**

Based on the above arguments, Mr. Kueng asks this Court to direct a community survey be prepared in advance of jury selection to determine Hennepin

County is an appropriate venue. Further, Mr. Kueng respectfully asks this Court to disregard the existing questionnaire and seek a new pool of jurors.

Respectfully submitted,

Date: December 30, 2020

/s/ **Thomas C. Plunkett**

Thomas C. Plunkett  
Attorney No. 260162  
Attorneys for Defendant  
101 East Fifth Street  
Suite 1500  
St. Paul, MN 55101  
Phone: (651) 222-4357