

**STATE OF MINNESOTA**  
**COUNTY OF DAKOTA**

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**DISTRICT COURT**  
**FIRST JUDICIAL DISTRICT**

File No. 19HA-CR-14-2677

State of Minnesota,

Plaintiff,

vs.

Brian George Fitch,

Defendant.

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**OMNIBUS HEARING**  
**ORDER**

The above-entitled matter came before the Honorable Mary J. Theisen, Judge of District Court, on November 26, 2014, at the Dakota County Judicial Center, Hastings, Minnesota.

Phillip D. Prokopowicz, Chief Deputy Dakota County Attorney, and Richard Dusterhoft, Assistant Ramsey County Attorney, appeared as counsel for and on behalf of the State of Minnesota.

Lauri Traub and Gordon Cohoes, Attorneys at Law, appeared as counsel for and on behalf of the Defendant. The Defendant was personally present.

At this case's contested omnibus hearing, a number of issues were raised for the Court's consideration. The Court has previously ruled on the defense motion to change venue. This Order addresses the other motions heard on November 26, 2014.

Based upon the Court's review of the exhibits submitted at the hearing including the grand jury transcript, arguments and memoranda submitted by counsel, and review of the relevant law, the Court makes the following:

**FILED** DAKOTA COUNTY  
CAROLYN M. RENN, Court Administrator

**DEC 05 2014**

## FINDINGS OF FACT

1. Defendant is charged by indictment with Murder in the First Degree of a peace officer as a result of the July 30, 2014 shooting and death of Mendota Heights Police Officer Scott Patrick. He is also charged with three counts of Attempted Murder in the First Degree, as a result of an allegation that he shot at three Saint Paul Police Officers during his apprehension by police about 8 hours after the shooting of Officer Patrick. Defendant is also charged with being a felon in possession of a firearm. The acts are alleged to have occurred in Dakota and Ramsey Counties, Minnesota, on July 30, 2014.
2. In regard to this matter, First Judicial District Assistant Chief Judge Kathryn Messerich signed an Order Convening Multi-County Grand Jury on August 6, 2014. The issue for the grand jury to investigate, per the Order, was:

[MULTI-COUNTY] GRAND JURY INVESTIGATION INTO THE FACTS AND CIRCUMSTANCES SURROUNDING THE DEATH OF POLICE OFFICER SCOTT PATRICK; THE ATTEMPTED MURDER / DRIVE-BY DISCHARGE OF FIREARM / ASSAULT IN THE SECOND DEGREE OF MULTIPLE ST. PAUL POLICE OFFICERS; AND POSSESSION OF FIREARM BY INELIGIBLE PERSON IN DAKOTA AND RAMSEY COUNTIES
3. The August 6, 2014 Order designated Dakota County as the county of venue for purposes of trial.
4. The August 6, 2014 Order required that the grand jury be selected "in reasonable proportion" to the number of residents of Dakota and Ramsey Counties.
5. The multi-county grand jury commenced its investigation into this matter on September 10, 2014. 12 members of the grand jury were Ramsey County residents, and 11 were Dakota County residents. One Dakota County resident

was later excused, leaving 10 Dakota County residents and 12 Ramsey County residents who served on the grand jury.

6. This indictment was returned by the multi-county grand jury on September 12, 2014.
7. For purposes of the severance motion, it is necessary to analyze the timeline and facts of this case. As set forth in the Grand Jury transcript, the pertinent facts are as follows:
  - a. During an apparently routine traffic stop, Mendota Heights Police Officer Scott Patrick was shot three times and killed by the driver of an identified green Grand Am on July 30, 2014 at about 12:20 p.m. in West Saint Paul, Dakota County.
  - b. Witnesses who saw and heard the shooting gave inconsistent descriptions of the shooter. He was described as wearing a ball cap.
  - c. Police investigating the shooting immediately went to the Mendota Heights residence of LP; the registered owner of the identified Grand Am. LP reported that she had sold that Grand Am to Defendant within the past month. Police learned that Defendant and Defendant's girlfriend TM had stayed overnight at LP's residence the previous evening. Defendant had left the home at about 11:00 a.m. on July 30. He was driving the Grand Am and wearing a ball cap.
  - d. A massive manhunt for Defendant ensued. Hundreds of law enforcement officers assisted in this investigation and in locating and apprehending Defendant. He was ultimately apprehended at about 8:30 p.m. in Saint Paul, at a location about 5 miles from where Officer Patrick was shot.

- e. As part of the manhunt, police checked various addresses that were associated with Defendant. One such address was on Robert Street in West Saint Paul. Police went to that residence between about 4:00 and 4:30 p.m. on July 30.
- f. Police located the Grand Am parked in the back yard of the Robert Street residence. It was partially covered with a tarp. The residents of the home were acquaintances of Defendant. Residents told police that at about 12:30 p.m. that day, Defendant – who was wearing a ball cap - had shown up at the residence driving the Grand Am. He pulled it into the back yard and went in the house. He asked one of the residents, KK, if he could buy her vehicle. She was not willing, so she and Defendant discussed and agreed that Defendant could borrow her 2007 Hyundai Veracruz SUV (“SUV”) for the day in return for him making certain back payments that she owed on the SUV.
- g. Defendant did not want anyone to see the Grand Am or know that he was in the area. Therefore, two people at the residence covered the Grand Am with a tarp.
- h. Defendant left the Robert Street residence within about 45 minutes, driving the SUV.
- i. At some point thereafter, Defendant drove the SUV to KH’s residence. He had KH move a car – that he said was his – which was parked outside of his girlfriend TM’s Oakdale residence to a street off of White Bear Avenue.
- j. Defendant and KH went to a Dairy Queen, and then to a shop to have a tire changed on the SUV. They went to Jimmy John’s and got sandwiches.

- k. In the (apparently) early evening, Defendant and KH drove the SUV to a home on Sycamore in Saint Paul. Several men who were acquainted with Defendant were present in the home.
- l. Defendant had a discussion in a back bedroom of the home with one of the men about hiding out in a cabin in Wisconsin.
- m. Defendant told another one of the men present, JH, that he was going to borrow JH's truck. He told JH that JH was to return the SUV to KK.
- n. Defendant, JH, and KH got into the SUV, apparently to drive to JH's truck. Defendant was driving the SUV.
- o. Police had received tips that Defendant may be at the house on Sycamore and were in the area in unmarked squads when the SUV left the house. When police attempted to stop the SUV, it sped away. A short pursuit ensued, and ultimately the SUV ended up trapped in a parking lot a short distance from the house on Sycamore.
- p. When the SUV became trapped, JH leapt out of the front seat with his hands up and ran away from the SUV. The passenger door remained open.
- q. Saint Paul Police Officer Bohn approached the SUV. Defendant leaned over and began shooting out the passenger door. Officer Bohn returned fire as he ran around the front of the SUV. The SUV started backing up. Other officers were also shooting at the SUV.
- r. Saint Paul Police Commander Winger and Sergeant Benner were also on the scene. Defendant leaned out the driver's side window and fired at them.
- s. As police returned fire, Defendant slumped down behind the wheel of the

SUV.

- t. Commander Winger saw KH in the back seat of the SUV, and he and Sergeant Benner called for officers to cease fire. KH rolled out of the back seat of the car.
  - u. About 20 minutes later, a SWAT team came in with a Bear Cat armored vehicle. The Bear Cat bumped the SUV, pinning the driver's door. Defendant was removed from the SUV, pat-searched and arrested, and transported to the hospital. He had \$3,093.47 in cash on his person.
  - v. Two guns were recovered from the SUV. One was a 9mm with a laser sight attached to it. According to ballistics testimony, that gun fired the 2 bullets that were later recovered from Officer Patrick's body. It also ejected a spent casing found at that scene, and casings found at the scene of the shooting during Defendant's apprehension.
  - w. TM told police that Defendant had a gun with an attached laser sight. She said that she had called police on July 28, 2014 after an argument with Defendant. Defendant was very upset with her for having called police.
  - x. The evening of July 29, 2014, Defendant told TM that he was "ruined" because she had called police; saying now "they" knew who he was. He told TM, "You know, if I ever were to get pulled over, I'd shoot a cop."
8. As of July 30, 2014, there was an active warrant that had been issued by the Department of Corrections ("DOC") for Defendant's apprehension. Defendant was on supervised release from a prison sentence as a result of a burglary conviction, and he was alleged to be out of compliance with his conditions of

supervised release.

### **CONCLUSIONS OF LAW**

1. The charged offenses are sufficiently related to each other in time, place, and criminal objective so as to permit joinder for trial.
2. In this particular case, Defendant's right to trial in the county in which the offense was alleged to have occurred was not violated by joinder of the Dakota and Ramsey County offenses into one prosecution. Neither his constitutional rights nor Minn. R. Crim. P. 24.02 have been violated by placing venue in Dakota County.
3. Minn. Stat. § 628.41 is constitutional on its face and as applied to Defendant.
4. The grand jury did not improperly consider evidence unrelated to the murder charge when it considered facts related to the Ramsey County attempted murder cases.
5. The grand jury was drawn "in reasonable proportion" to the populations of Dakota and Ramsey counties.
6. The procedural defect in setting venue of the trial prior to return of indictment was harmless error in this case and did not impact Defendant's substantive rights.
7. Defendant requests an order from the Court suppressing an interview between Defendant and Investigators Muellner and Phill apparently taken at Regions Hospital on July 31, 2014. The Court is not privy to the contents or circumstances of the interview. The State has agreed, however, that the interview will not be admitted at trial. Therefore, it is appropriate that the Court order that the statement not be used at trial without prior specific court approval.

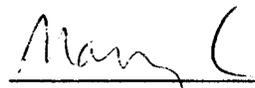
**ORDER**

1. Defendant's motion to sever the charges for trial is **DENIED**.
2. Defendant's motion to dismiss the indictment for a violation of either his constitutional or rule-created right to have trial venue set in the county in which the act occurred is **DENIED**.
3. Defendant's constitutional challenge to Minn. Stat. § 628.41 is **DENIED**.
4. Defendant's motion to dismiss the indictment because of his allegation that it was not drawn "in reasonable proportion" to the populations of Dakota and Ramsey County is **DENIED**.
5. Defendant's motion to dismiss the indictment because the Court set venue before return of the indictment is **DENIED**.
6. Per stipulation by the State, Defendant's motion to exclude from evidence an interview of Defendant taken by Investigators Muellner and Phil on July 31, 2014 at Regions Hospital is **GRANTED**. No mention of the interview shall be made at trial without prior review and approval of the Court.

**IT IS SO ORDERED.**

Dated: December 5, 2014

**BY THE COURT:**



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Mary J. Theisen  
Judge of District Court

## MEMORANDUM

### 1. Defendant's motion to sever the offenses for trial.

When a “defendant’s conduct constitutes more than one offense, each offense may be charged in the same indictment. . . .” Minn. R. Crim. P. 17.03. Joined offenses must be severed by the Court if the offenses are “not related” or if severance is “appropriate to promote a fair determination of the defendant’s guilt or innocence of each offense or charge. . . .” Minn. R. Crim. P. 17.03, subd. 3(1)(a)(b). Offenses are “related” and severance is not required if the “offenses arose from a single behavioral incident.” *State v. Kendell*, 723 N.W.2d 597, 607 (Minn. 2006). In determining whether offenses arise from a single behavioral incident, the Court must analyze the “temporal and geographic proximity of the offenses and assess whether the conduct was motivated by an effort to obtain a single criminal objective....” *Id.* at 607-8.

To analyze this issue, it is necessary to look at the facts of the case. In doing so, the Court takes the facts in the grand jury transcript as an “offer of proof” of sorts; assuming for purposes of this motion that the facts contained in the grand jury transcript will be proved up at trial. If proven, the facts do support a finding that the murder and attempted murder cases are related and motivated by a single criminal objective. It can reasonably be concluded that Defendant’s motive to shoot Officer Patrick was to avoid apprehension on the DOC warrant. Similarly, it may reasonably be concluded that his motive for shooting at the Saint Paul police officers was to avoid apprehension for Officer Patrick’s murder, and to avoid apprehension on the DOC warrant. In both instances, if proven, it can reasonably be concluded that his intent was the same – to kill police to avoid apprehension. The acts occurred within hours of each other; hours

during which the facts, if proven, suggest that Defendant was taking action to evade detection by police, and the police were conducting a massive manhunt for him. They also occurred within about 5 miles of each other. Given that the acts are closely related in location and time and the criminal objective for the murder and attempted murder offenses is the same, the acts may be considered to be a single behavioral incident.

Even if offenses are “related,” the Court must determine “whether joinder would prejudice the defendant.” *State v. Kendell*, 723 N.W.2d 597, 607 (Minn. 2006). “Joinder is not unfairly prejudicial if evidence of each offense would have been admissible at a trial of the other offenses had the offenses been tried separately.” *Id.* at 608. *See also State v. Conaway*, 319 N.W.2d 35, 42 (Minn. 1982) (improper joinder not prejudicial when evidence of one would have been admitted as *Spreigl* evidence in the other); *State v. Profit*, 591 N.W.2d 451, 460-61 (Minn. 1999) (not unduly prejudicial to combine the murders of two women, which occurred months apart, into one trial).

In this case, evidence of each offense would be admissible at trial of the other, even if tried separately. As to the murder case, evidence of Defendant’s shooting at Saint Paul officers during his apprehension would be admissible to show consciousness of guilt,<sup>1</sup> identification and motive<sup>2</sup>. Similarly, as to the attempted murder cases, evidence of Officer Patrick’s murder would be admitted to show motive and consciousness of guilt.

2. **Defendant’s motions related to venue and the grand jury indictment.**

Defendant challenges the grand jury indictment in several respects. First, he

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<sup>1</sup> Evidence showing consciousness of guilt is generally admissible. *State v. McDaniel*, 777 N.W.2d 739, 746 (Minn. 2010).

<sup>2</sup> In certain circumstances and with certain conditions, “other crime” evidence may be admitted to prove identity, plan, knowledge, and motive. *See generally, State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965).

argues that the statute permitting a multi-county grand jury violates his constitutional right to have a trial before a jury “of the county or district wherein the crime shall have been committed. . . .” Minn. Const. Article I, Sec. 6. Specifically, he argues that he has the right to have the Ramsey County case tried in Ramsey County.

The argument that a multi-county grand jury violates his constitutional right to be tried in the county where the offense was committed is without merit. The grand jury simply decides whether there is probable cause to believe that a particular defendant committed particular crimes; it does not determine guilt or innocence. Therefore, convening a multi-county grand jury to consider the Ramsey County offenses does not violate his right to have a trial before a jury “of the county or district wherein the crime shall have been committed. . . .” Minn. Const. Article I, Sec. 6.

In a similar vein, Defendant argues that the grand jury indictment is invalid because it violates Minn. R. Crim. P. 24, which sets venue in particular criminal cases. Specifically, Minn. R. Crim. P. 24.01 provides that with certain exceptions, a “case must be tried in the county where the offense was committed. . . .” Defendant essentially argues that this rule trumps Minn. Stat. § 628.41, which allows convening of a multi-county grand jury when the subject matter of the grand jury “concerns activity, events, or other matters in more than one county. . . .” (2014). He also argues that because no exception to the venue rule applies to this case, the murder case must be tried in Dakota County and the attempted murder cases must be heard in Ramsey County.

The Minnesota Supreme Court has held that special venue statutes do not violate a Defendant’s right to have a trial in the county where the offense was committed. *State v. Krejci*, 458 N.W.2d 407, 410 (Minn. 1990). “[W]here acts

constituting the crime and the nature of crime charged implicate more than one location, the [United States] constitution does not command a single exclusive venue.” *Krejci*, 458 N.W.2d at 410, *quoting United States v. Reed*, 773 F.2d 477, 480 (2<sup>nd</sup> Cir. 1985). Where, as here, the acts alleged all arise out of one course of conduct related in time, place, and criminal objective, Defendant’s right to trial in the county where the attempted murders were committed is not violated and venue may be placed in Dakota County.

Defendant also argues that the grand jury indictment should be dismissed because the grand jury improperly considered evidence unrelated to the murder case. The evidence he complains of is the evidence related to the Ramsey County attempted murder case. For the same reasons as set forth above, the argument is not persuasive.

3. **Composition of the Multi-County Grand Jury**

Minn. Stat. § 628.41, subd. 2 provides that multi-county grand juries shall be comprised in “reasonable proportion” of grand jurors from the counties. Here, Ramsey County grand jurors comprised 12 of the deliberating 22, and Dakota County grand jurors comprised 10. This is in “reasonable proportion” to the population of Dakota and Ramsey Counties.

4. **Designation of county of venue prior to return of the indictment.**

The Court issued its order convening grand jury August 6, 2014. In the Order, in part, the Court designated Dakota County as the county for trial in the event of an indictment. The state concedes that designation of county for venue pre-indictment was procedurally defective. Minn. Stat. § 628.41, subd. 3 provides that venue shall be set after return of an indictment.

Defendant has failed to show how this procedural defect has impacted his case in any way. Presumably, had the indictment been returned and the Court thereafter set venue, it would be no different than it is now. There is no right to be heard set forth in the statute, and presumably the designation of venue in Dakota County would have taken place upon return of the indictment in any event.

While error, it was harmless.

5. **Constitutionality of Minn. Stat. § 628.41.**

Defendant argues that Minn. Stat. § 628.41 (2014) is unconstitutional as it applies to him because it violates his “fundamental right that all crimes are to be tried by a jury of the county or district where the crime was committed.” Defendant’s Memorandum in Support of Defendant’s Motion to Sever, p. 13. Alternatively, he argues that the statute is unconstitutional on its face because it does not meet the “rational basis” standard of review. *Id.* at p. 14.

The power of a court “to declare a statute unconstitutional should be exercised with extreme caution.” *Assoc. Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn. 2000). This should be done only “when absolutely necessary.” *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 653–54 (Minn. 2012). A party challenging the constitutionality of a statute has the burden to demonstrate beyond a reasonable doubt that the statute is unconstitutional before it will be declared as such. *Id.* at 654. The Court’s power to declare a statute as unconstitutional “should be exercised with extreme caution and only when absolutely necessary.” *In re Haggerty*, 448 N.W. 2d. 363, 364 (Minn. 1989).

To bring a facial challenge to a statute, Defendant must show that there is no

conceivable situation where the statute could be constitutionally applied. *E.g. State v. Ness*, 834 N.W.2d 177, 182 (Minn. 2013). He has not done so. The mere fact that a multi-county grand jury can be convened when “the subject matter of the grand jury inquiry concerns activity, events, or other matters in more than one county” does not render the statute unconstitutional on due process grounds. It does not mandate trial in any particular county, and it does not violate a defendant’s right to due process of law. Defendant has failed to prove beyond a reasonable doubt that the statute is facially invalid.

Defendant has also failed to prove beyond a reasonable doubt that the statute violates his right to procedural or substantive due process. Where, as here, the Court finds that the acts alleged are related in time, location, and criminal objective, there was no arbitrary, and wrongful government action in convening the multi-county grand jury. *State v. Wiseman*, 816 N.W.2d 689, 692 (Minn. Ct. App. 2012) (explaining that a statute is presumed to be constitutional and it is defendant’s burden to demonstrate beyond a reasonable doubt that the statute violates a provision of the state or federal constitution).

In determining whether a law violates due process, the law is subject to strict scrutiny if a “fundamental right” is implicated. *Id.* at 692, *other citations omitted*. “Fundamental rights” are those that are “deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Id.*, quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S.Ct. 2258, 2268 (1997). A law subject to strict scrutiny is upheld only when narrowly drawn and when the state demonstrates that the law serves a

“compelling state interest.” *Wiseman*, 816 N.W.2d at 692-93, *citing In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999).

As noted, a grand jury decides simply whether there is probable cause to believe that a particular person committed a particular crime. It does not decide guilt or innocence. There is no fundamental right of Defendant’s which is impacted by a court ordering that a multi-county grand jury be convened when acts are alleged to have occurred in more than one county. Similarly, whereas here, the Court finds that the acts alleged are close in proximity to time, place, and criminal objective, there is no arbitrary and capricious state action in convening the multi-county grand jury. Defendant has failed to prove beyond a reasonable doubt that the statute is unconstitutional on its face or as applied to him.

MJT