

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA  
PLAINTIFF,

V.

TOU THAO,

DEFENDANT.

**NOTICE OF MOTION AND  
MOTION FOR DISMISSAL AND  
TO SANCTION KEITH  
ELLISON, MATTHEW FRANK,  
AND NEAL KATYAL**

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

**NOTICE OF MOTION**

Please take notice, that at a date and time to be scheduled before the court, Tou Thao (“Mr. Thao” herein) will move the Court for (1) a hearing in which all supervising prosecuting attorneys – specifically Mr. Keith Ellison, Mr. Matthew Frank, and Mr. Neal Katyal – will be required to attend in person, (2) an order dismissing all charges against Mr. Thao, and alternatively, (3) an order imposing other sanctions against the State for its role – directly or indirectly – in the leaking of highly prejudicial information related to potential plea agreements of codefendants.

## MOTION

Mr. Thao, by and through counsel, respectfully moves the Court for an order dismissing all charges against him – or in the alternative any and all of the below listed sanctions – due to the State’s role in leaking a codefendant’s alleged agreed-upon plea agreement.

On February 10, 2021, The New York Times published an article leaking damning information which will irreversibly taint the jury pool and will deny Mr. Thao his constitutional right to a fair trial by impartial jurors. U.S. Const. amend. VI, XIV. Minn. Const. Art. I. § 6.

The New York Times printed that “... Derek Chauvin, believed that the case against him was so devastating that he agreed to plead guilty to third-degree murder.” *See* Exhibit 1. “As part of the deal, officials now say, he was willing to go to prison for more than 10 years.” *Id.* “But at the last minute, **according to new details laid out by three law enforcement officials**, the deal fell apart after William P. Barr, the attorney general at the time, rejected the arrangement.” *Id.* (emphasis added).

On February 11, 2021, the StarTribune printed that two sources identified as “**two law enforcement officials with direct knowledge of the talks**” confirmed The New York Times reporting. *See* Exhibit 2 (emphasis added). “The officials spoke to The Associated Press on condition of anonymity because they were not authorized to discuss the talks.” *Id.*

There are a finite number of people that would have had direct knowledge of the alleged plea agreement. The newspaper articles show that Mr. Chauvin’s team was not the source, nor were the federal prosecutors.<sup>1</sup> Using deductive reasoning, the leak had to have come from the State.

---

<sup>1</sup> Mr. Kelly (Mr. Chauvin’s previous attorney) refused to discuss the case with press. *See* Exhibit 2. Mr. Nelson likewise refused comment. *See* Exhibit 1. A spokeswoman for the federal prosecution refused comment. *See* Exhibit 2.

It is impossible to overstate the magnitude of this misconduct or its prejudicial effect on the defendants' constitutional due process rights of a fair trial. If this leak would have happened during trial, the Court would be required to declare a mistrial and dismiss the charges with prejudice.

Leaking a soured plea agreement has no benefit for Mr. Thao. Nor does it benefit any other defendant. The leaked information guarantees that any potential juror who read the article or headlines now knows Mr. Chauvin was allegedly ready to plead guilty to murder and accept responsibility in the death of George Floyd. Logically, the only actor that would benefit from this leak is the State. By leaking unequivocal information about an admission of guilt, the State at a minimum, would be able to force the hand of the Court to continue the case of *State v. Chauvin*.

On December 31, 2020, the State moved the Court for a continuance of Mr. Thao and his codefendants' joint trial.<sup>2</sup> On January 11, 2021, the Court severed codefendant Mr. Chauvin's case (27-CR-20-12646) from the cases of Mr. Thao (27-CR-20-12949), Mr. Lane (27-CR-20-12951), and Mr. Kueng (27-CR-20-12953).<sup>3</sup> The Court kept Mr. Thao, Mr. Lane, and Mr. Kueng's trials joined and continued them until August of 2021.<sup>4</sup> On January 19, 2021, the State moved the Court to reconsider its continuance and severance.<sup>5</sup> The State argued that while it is apparently ready for this case to proceed<sup>6</sup>, the State believes the Court should continue the case of *State v. Chauvin*

---

<sup>2</sup> See State's Motion for Continuance of Trial.

<sup>3</sup> See Order Regarding Discovery, Expert Witness Deadlines, and Trial Continuance.

<sup>4</sup> *Id.*

<sup>5</sup> See State's Motion for Reconsideration of January 11 Order Regarding Trial Continuance and Severance.

<sup>6</sup> Mr. Thao points to the Court that the State has continued to dole out discovery as recent as February 5, 2021. The fact that the State is still providing discovery indicates the State is not ready to proceed to trial.

because of COVID-19 concerns<sup>7,8,9</sup> The Court denied the State’s motion to reconsider.<sup>10</sup> The State appealed to the Minnesota Court of Appeals.<sup>11</sup> The Minnesota Court of Appeals dismissed the State’s motion.<sup>12</sup>

The State has run out of legitimate options to continue the case of *State v. Chauvin* until their desired date. Now, the State has attempted to do indirectly what they failed to accomplish directly.

Prosecutors have the duty as ministers of justice to see that justice is done, rather than merely obtain a conviction. *See generally* Minn. R. Prof. Resp. 3.8 cmt 1.

The Minnesota Supreme Court “cannot condone the actions of those associated with the prosecution in making available for publication” various statements which “seriously threatened to have [an] effect upon prospective jurors residing in the community”. *State ex rel. Pittman v. Tahash*, 170 N.W.2d 445, 448 (Minn. 2007)(responding to “... the prosecutor, the sheriff, and other police officers ma[king] statements, extensively quoted and published by the news media” of a defendant’s admission of guilt).

The Minnesota Rules of Professional Responsibility make supervising attorneys – such as Mr. Keith Ellison, Mr. Matthew Frank, and Mr. Neal Katyal – responsible for the actions of other lawyers and also of nonlawyers they employ, retain, or associate with. *See* Minn. R. Prof. Resp.

---

<sup>7</sup> Mr. Thao reminds the Court of the extensive list of attorneys the State has brought on to try the cases surrounding the death of Mr. Floyd. The State’s attorneys are coming from multiple states including states that are hotbeds for COVID-19. When defense counsel asked the State at the January 7, 2021 off-record meeting if the State is planning on having its out-of-state attorneys quarantine for trial, the State refused defense counsel’s request.

<sup>8</sup> Defense counsel Robert M. Paule stated at the January 7, 2021 hearing that he believes the State is moving for a continuance not based on COVID-19 concerns, but because they wish to continue the case so there is no televised coverage. In short, the motion for a continuance based on COVID-19 concerns when there are no promises of safety from State’s special attorney generals/*pro hac vice* attorneys appears to be “a cloaked attempt” to get cameras out of the courtroom. *See* January 7, 2021 hearing transcript.

<sup>9</sup> *See* State’s Motion for Reconsideration of January 11 Order Regarding Trial Continuance and Severance.

<sup>10</sup> *See* Order Denying State’s Motion to Reconsider January 11, 2021 Order.

<sup>11</sup> *See* Notice of Appeal by the Prosecuting Attorney to the Court of Appeals from District Court Order Denying Continuance and Ordering Severance.

<sup>12</sup> *See* the Minnesota Court of Appeals Order filed on February 12, 2021.

5.3. This applies to both nonlawyers within a law firm (or prosecuting office) and those outside of the firm. *See* Minn. R. Prof. Resp. 5.3 cmt.

Supervising attorneys are responsible for the conduct of nonlawyers if they either order or ratify the conduct, or if they have knowledge “of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action”. *See* Minn. R. Prof. Resp. 5.3(c)(2). Since the articles have been published, the State has taken no public action to mitigate the violations of those within their supervision and control.

Here, it is known that the leaked information came from a “law enforcement official”. If the leak came from an officer, the State has direct control over them as they are agents of the State, investigating officers, and/or potential witnesses in their case against Mr. Thao.

However, a law enforcement official in broader terms, refers to a prosecuting attorney or staff member. The State has engaged in a pattern of speaking to the press on these cases. *See* Gag Order; Notice of Motion and Motion to Find Keith Ellison in Contempt of Court and Findings of Sanctions; Memorandum in Support of Motion to Find Keith Ellison in Contempt of Court; and Memorandum in Support of Motion for Change of Venue.

To safeguard the due process rights of a defendant, the trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial and trial publicity. *See Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979); *Sheppard v. Maxwell*, 384 U.S. 333 (1966). Mr. Thao asks this Court to conduct an investigation to determine the source of the leak and sanction those responsible.

Mr. Thao respectfully moves this Court for a hearing regarding this matter. Specifically, Mr. Thao asks this Court to hold an in-person hearing and require the presence of Mr. Keith Ellison, Mr. Matthew Frank, and Mr. Neal Katyal to speak on the leak, its source, and their role as

supervising attorneys on the case. Mr. Thao further requests this Court have the hearing within the next week so that the Court can act to address the prejudice and adequately sanction those responsible before any potential jurors are brought into voir dire. Lastly, as the State has been less than forthcoming to this Court (*See* Renewal of Motion for Sanctions and Hearing Regarding Discovery Violations by the State) Mr. Thao asks this Court to require all prosecuting attorneys – including all special attorney generals and *pro hac vice* attorneys – to submit affidavits under oath that they are not responsible for the leak and are not aware of who is responsible, if that is indeed the case.

If the Court finds that a prosecuting attorney, witness, law enforcement officer, or anyone else under the State’s control is responsible for the leak, Mr. Thao respectfully moves for the following:

1. An order dismissing the charges against him *with prejudice*.
2. An order barring any person(s) who leaked information of Mr. Chauvin’s plea deal to the press from participating in any of the trials stemming from the death of George Floyd. This order would also bar any person(s) who knew of the source of the leak and failed to mitigate it, ratified it, or ordered it.
  - a. If the leak came from any of the prosecuting attorneys, Mr. Thao moves this Court to make a complaint to the Minnesota Lawyers Professional Responsibility Board or to the supreme court/professional responsibility board of the state in which the attorney is licensed.<sup>13</sup> In the alternative, Mr. Thao

---

<sup>13</sup> Prosecuting attorneys have a heightened level of responsibility to ensure no extrajudicial statements are made in criminal cases. Prosecutors “can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused”. Minn. R. Prof. Resp. 3.8 cmt. In a criminal case a prosecutor must ensure that those associated with the prosecution and those “over whom the prosecutor has direct control over” refrain from “making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6”. Minn. R. Prof. Resp. 3.8(f). A statement is more prejudicial when it comes

moves this Court to require all those responsible to self-report to the appropriate governing bodies.

- b. If the leak came from a *pro hac vice* attorney, Mr. Thao respectfully moves this Court to revoke their *pro hac vice* status and bar them from appearing in the State of Minnesota under *pro hac vice* status in the future.
3. An order removing of all out-of-state/*pro hac vice* attorneys from the case of *State v. Thao*.
4. An order removing all “special attorney generals” for the case of *State v. Thao*.
5. A gag order preventing the State, prosecuting attorneys, staff, witnesses, and all other employees in its offices from speaking to the public or press until the end of trial in *State v. Thao*.
6. An order requiring the State to pay for the cost and fees associated with filing this motion.
7. An order requiring the State to pay for the cost and fees of any further delay of trial stemming from these articles or further publication on the plea deal.
8. An order preemptively removing all potential jurors from sitting on the jury if they acknowledge in voir dire they saw, read, or have knowledge of the cited articles.
9. An order increasing the amount of preemptive strikes each defense team has to counter this prejudicial effect of the misconduct.

---

from a prosecutor because it creates “the additional problem of increasing public condemnation of the accused”.  
Minn. R. Prof. Resp. 3.8 cmt.

Respectfully submitted,

Dated: This 15<sup>th</sup> day of February, 2021

/s/ Robert M. Paule  
Robert M. Paule (#203877)  
Robert M. Paule, P.A.  
920 Second Avenue South, Suite 975  
Minneapolis, MN 55402  
T: (612) 332-1733  
F: (612) 332-9951

Natalie R. Paule (#0401590)  
Paule Law P.L.L.C.  
5100 West 36<sup>th</sup> Street  
P.O. Box 16589  
Minneapolis, MN 55416  
nrp@paulelaw.com