

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

**MEMORANDUM IN SUPPORT
OF MOTION FOR CHANGE OF
VENUE**

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.

The United States Constitution (U.S. Const. amend. VI, XIV) and the Minnesota Constitution (Minn. Const. Art. I, § 6) both guarantee a defendant's right to a fair trial. The Constitutional right to a fair trial is "the most fundamental of all freedoms." *Estes v. Texas*, 381 U.S. 532, 540 (1965). One of the most important components of such right is the impartial jury.

Tou Thao ("Mr. Thao" hereinafter) cannot have a fair trial in Hennepin County because the Hennepin County Attorney, the Minnesota Attorney General, the State's agents, and local public figures have irreversibly tainted the jury pool with prejudicial publicity and repeated declarations of Mr. Thao's guilt. In the interest of justice, the Court must change the venue for Mr. Thao's trial. Mr. Thao respectfully moves the Court for an order changing venue out of Hennepin County pursuant to Minn. R. Crim. P. 24.03 (2020) and Minn. R. Crim. P. 25.02 (2020).

STATEMENT OF FACTS

On May 25, 2020, Minneapolis Police Department (a.k.a. “MPD”) Officer Tou Thao (“Mr. Thao” hereinafter) responded to a call for back up at Cup Foods located at 3759 Chicago Avenue in Minneapolis, Hennepin County, Minnesota. MPD Officers Thomas Lane and J. Alexander Kueng were attempting to arrest George Floyd (“Mr. Floyd” hereinafter) after they responded to a 911 call from Cup Foods reporting that Mr. Floyd attempting to use counterfeit bills. Mr. Thao arrived on scene with MPD Officer Derek Chauvin to assist Officers Lane and Kueng in the arrest. While Officer Chauvin joined the other two in physically restraining an uncooperative Mr. Floyd, Mr. Thao began dealing with the growing crowd of onlookers.

During the arrest, Officer Chauvin used a neck restraint per Minneapolis Police Department Policy and Procedure. Mr. Floyd at some point became unresponsive. Emergency medical personnel arrived on scene and took Mr. Floyd via ambulance first to a neighboring street, and then eventually to Hennepin County Medical Center, where Mr. Floyd was later pronounced dead.

During the arrest, multiple bystanders took video footage on their cellphones. The videos prompted a massive media and social media response. Overnight, the story of Mr. Floyd’s death became the lead news story of the state and nation. In the weeks and months following, the story of Mr. Floyd’s death and the “guilt” of the four officers involved has remained one of the most talked-about stories in both local and national news across all media platforms. Mr. Floyd’s death sparked local outrage, beginning with peaceful protests and boiling over into looting, arson, and general chaos in the City of Minneapolis for days on end.

Mr. Thao and the other four MPD Officers were fired from their jobs and all charged in Hennepin County District Court with criminal charges stemming from the death of Mr. Floyd. *See State v. Tou Thao* 27-CR-20-12949; *State v. Derek Chauvin* 27-CR-20-12646; *State v. J. Alexander*

Kueng 27-CR-20-12953; and *State v. Thomas Lane* 27-CR-20-12951. On June 3, 2020, the State charged Officer Thao with two criminal counts via complaint. Count I alleges that Officer Thao committed the crime of aiding and abetting Second Degree Murder in violation of Minn. Stat. § 609.19.2(1) with reference to Minn. Stat. § 609.05.1. Count II alleges that Officer Thao committed the crime of aiding and abetting Second Degree Manslaughter in violation of Minn. Stat. § 609.205(1) with reference to Minn. Stat. § 609.05.1.

Local politicians and both the Hennepin County Attorney and the Minnesota Attorney General repeatedly overstepped the judiciary's role by attempting to act as judge and jury themselves. They made repeated highly prejudicial statements to the media, called the officers' acts murders, and proclaimed their guilt before any of the defendants had seen the inside of a courtroom.¹

¹ *Into an American Uprising: Keith Ellison on Prosecuting George Floyd's Death*, NBC News (June 2, 2020) (where Mr. Ellison commented on the guilt of defendant(s) and potential evidence of use of force to be brought at trial); *Attorney General Keith Ellison to Lead Prosecution of George Floyd's Death*, CBS Local (May 31, 2020), <https://minnesota.cbslocal.com/2020/05/31/attorney-general-keith-ellison-to-take-over-george-floyd-case/> (where Keith Ellison repeatedly referred to the death of George Floyd as a "killing"); Meredith Deliso, Alex Perez, and Andy Fies, *Derek Chauvin was considering guilty plea but deal fell apart: Prosecutor's office*, abcNEWS (June 10, 2020), <https://abcnews.go.com/US/derek-chauvin-guilty-plea-deal-fell-prosecutors-office/story?id=71180109>; Jennifer Bjorhus, *Police chief: George Floyd's death was a 'murder,' not about lack of training*, Star Tribune (June 24, 2020), <https://www.startribune.com/police-chief-derek-chauvin-knew-what-he-was-doing/571443282/>; Joe Nelson, *DPS commissioner calls George Floyd death a murder: 'That's what it looked like to me'*, Bring Me The News (May 29, 2020), <https://bringmethenews.com/minnesota-news/dps-commissioner-calls-george-floyd-death-a-murder-thats-what-it-looked-like-to-me>; State of Minnesota Proclamation (June 8, 2020), https://mn.gov/governor/assets/Moment%20of%20Silence%20for%20George%20Floyd_tcm1055-435186.pdf; Kare 11 Staff, *Minneapolis police officers fired after death of a man recorded saying 'I can't breathe'*, Kare11 (May 26, 2020), <https://www.kare11.com/article/news/crime/minneapolis-police-man-dies-in-police-custody/89-cfb7925a-4aa4-4f88-bf64-76d346b0e55f>; and *'We Have to Do This Right': Hennepin County Attorney Mike Freeman Says George Floyd Investigation Will Take Time*, CSB Minnesota (May 28, 2020), <https://minnesota.cbslocal.com/2020/05/28/we-have-to-do-this-right-hennepin-county-attorney-mike-freeman-says-george-floyd-investigation-will-take-time/> (where Mike Freeman called the death of Mr. Floyd "senseless" and a "murder").

Defense counsel raised the issue of the State's misconduct caused by prejudicial and reckless public statements regarding Mr. Thao's Constitutional right to a fair trial in previous filings and at the June 29, 2020 hearing. Although such public comments have waned, the prejudice cause by the reckless comments is irreversible. As the Court noted in the June 29, 2020 hearing, "the internet does not forget".

ARGUMENT

It is proper and preferable "to determine the place of trial prior to the actual trial of the case rather than afterwards". *State v. Thompson*, 123 N.W.2d 378, 380 (Minn. 1963). The trial court has wide discretion in determining where to move the venue. *State v. Thompson* at 382. It is ordinarily the trial court's decision on where to move the trial if a fair and impartial jury cannot be seated in the original jurisdiction. *Id.*

If the Court grants a change of venue, Defense anticipates surveying jury pools in various counties around Minnesota, to provide the Court guidance as to where Mr. Thao can exercise his Constitutional right to a fair trial. At this time, Defense suggests that the trial in *State v. Thao* be moved to St. Louis County, Clay County, or Crow Wing County, but yields to the Court's discretion.

I. UNDER THE CURRENT STANDARD, THE COURT MUST GRANT A CHANGE OF VENUE IN *STATE V. THAO*.

The Court must grant a change of venue under the current legal standard. Under the Minnesota Constitution and the Minnesota Rules of Criminal Procedure, a defendant has the right to be tried in the county where the alleged crime occurred. *See* Minn. Const. art. I, § 6; Minn. Stat. 627.01; and Minn. R. Crim. P. 24.01 (2020). The Court may move the venue to any county of the State of Minnesota. *See* Minn. R. Crim. P. 24 cmt. (2020). Whether change of venue should be

granted is largely within discretion of the trial court. *See State v. Thompson*, 123 N.W.2d 378 (Minn. 1963).

a. The venue must be changed to another county because a fair and impartial trial cannot be had in Hennepin County, Minnesota.

Under the Minnesota Rules of Criminal procedure, a change of venue may be granted “[i]f the court is satisfied that a fair and impartial trial cannot be had in the county in which the case is pending.” Minn. R. Crim. P. 24.03 subd. 1(a) (2020). A change of venue must be granted where it appears likely that an impartial jury cannot be obtained in the county in which the crime was committed. *State v. Thompson*, 123 N.W.2d 378 (Minn. 1963). The venue may be changed upon motion by the Defense, the State, or upon the Court’s own initiative. *See* Minn. R. Crim. P. 24 cmt. (2020).

The trial court should determine venue before the jury is sworn. *See State v. Thompson*, 123 N.W.2d 378, 380 (Minn. 1963). When it appears likely that it is impossible to procure a fair trial before an impartial jury in the county in which the crime was committed, the trial court should change venue to a county where an impartial jury can be obtained:

Courts can do little to restrain news media from printing or broadcasting what they claim is news, but, when it appears that the public has been subjected to so much publicity about a case that it seems unlikely that a fair trial can be had in the locality in which the trial normally would be held, the court can and should see to it that the trial is transferred to another locality in which is more probable that a fair trial can be held.

State v. Thompson, 123 N.W.2d 378, 380-381 (Minn. 1963).²: The Minnesota Supreme Court has required a change of venue without the defendant showing actual prejudice in criminal cases with unprecedented pretrial media coverage. *See State v. Thompson*, 123 N.W.2d 378 (Minn. 1963).³

³ Where the Minnesota Supreme Court stated: “Probably no case in the memory of anyone in this locality has aroused so much interest and so much discussion as this one. Over a period of several months hardly a day has

When there is a possibility that jurors have formed preconceptions, “[g]iven the pervasiveness of modern communication and the difficulty of effacing prejudicial publicity from the minds of jurors, the trial courts must take strong measures to ensure the balance is never weighed against the accused.” *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). A change of venue is a measure the trial court has within its toolbelt. *Id.* at 363; Minn. R. Crim. P. 25 (2020).

“A motion for ... change of venue **must** be granted whenever **potentially** prejudicial material creates a reasonable likelihood that a fair trial cannot be had.” Minn. R. Crim. P. 25.02 subd. 3 (2020)(emphasis added). Here, the State and its agents have not just made *potentially* prejudicial statements, instead they have deliberately and directly called Mr. Floyd’s death a murder and claimed that Mr. Thao and the other former officers are guilty. The State made these highly prejudicial statements to the press and the public at large repeatedly. They have overstepped their role and have attempted to play out the role of judge and jury in the court of public opinion. By doing so they explicitly told the people of Hennepin County – the pool of potential jurors – that Mr. Floyd’s death was a murder (proclaiming the guilt of Mr. Chauvin and in turn all other three former police officers including Mr. Thao), and that they have no choice but to listen to the two chief prosecutors for the State of Minnesota and find Mr. Thao guilty.

Additionally, an impartial jury cannot be seated for the trial of Mr. Thao in Hennepin County because Hennepin County residents picked for the jury would shoulder the weight of their decision creating further rioting and destruction of Minneapolis and St. Paul. After the death of Mr. Floyd, peaceful protesting was overshadowed by destruction throughout the city of

elapsed when something has not been said or written in a news medium of one kind or another. It is important that the constitutional guaranty of the freedom of the press not be curtailed if we are to exist as a free people. It is equally important, however, that, when the unrestrained exercise of this right clashes with the right of an accused person to be tried by an impartial jury having no preconceived opinions as to the guilt or innocence of the accused, the rights of such accused person must be protected by transferring the case to a locality where the public may not have been influenced as much by the publicity that has been given the case.” *State v. Thompson*, 123 N.W.2d 378, 381 (Minn. 1963).

Minneapolis. Three months have passed, and the estimated \$500 million worth damage⁴ has yet to be fully repaired. The events of this past week serve as a reminder that Minneapolis is still not immune to looting and dangerous rioting. Upon the false rumors of a police-involved shooting, people took to the street in what echoed the protests following the death of Mr. Floyd; the National Guard was called in and curfew was installed. It would be unnecessary to bring to the Court's attention that an acquittal or not-guilty verdict would most likely result in further protests and rioting in the Twin Cities metropolitan area, much like the protests and rioting following the acquittal of four police officers in the trial of the assault and beating of Rodney King in Los Angeles in 1992.

Although actual prejudice need not be proven, the Defense understands that the Court may wish to wait to hear from potential jurors in Hennepin County about whether or not they have been unduly influenced by the media and the State's reckless and prejudicial comments regarding this case. *See* Minn. R. Crim. P. 25.02, subd. 3 (2020)(stating "Actual prejudice need not be shown"). Defense, along with the defense counsel from the other three officers charged with crimes stemming from the death of Mr. Floyd plan on surveying the Hennepin County jury pool to determine if actual prejudice has occurred due to the prejudicial commentary made by the State and other local figures. Such a survey has not yet been completed. Defense requests that the if this Court wishes to have the survey results before making a decision to change venue to continue the decision until after the results come in, or allow Defense to renew their motion to change venue if this Court is not persuaded to change the venue without the results.

⁴ Jeffrey Meitrodt, *For riot-damaged Twin Cities businesses, rebuilding begins with donations, pressure on government*, Star Tribune (June 6, 2020), <https://www.startribune.com/twin-cities-rebuilding-begins-with-donations-pressure-on-government/571075592/>.

b. The venue must be changed for the interest of justice.

Under the Minnesota Rules of Criminal Procedure, a change of venue may be granted “[i]n the interests of justice.” Minn. R. Crim. P. 24.03 subd. 1(c) (2020). The venue may be changed upon motion by the Defense, the State, or upon the Court’s own initiative. Minn. R. Crim. P. 24 cmt. (2020). In determining whether venue should be changed in interests of justice, the trial court has wide discretion. *State v. Thompson*, 123 N.W.2d 378, 380 (Minn. 1963). Here, Mr. Thao’s motion to change venue should be granted because trying Mr. Thao in Hennepin County would delay justice and cause unnecessary and large expenses to be borne by the court system, and ultimately the taxpayers of Minnesota.

Keeping the trial of Mr. Thao in Hennepin County would run the risk that after days of voir dire, an impartial jury could not be found. In light of the COVID-19 pandemic jurors would have to be socially distanced and most likely questioned individually. This time-intensive process would waste valuable taxpayer money. At the end of a lengthy voir dire process, the parties will ultimately not be able to impanel an impartial jury allowing the trial to move forward in Hennepin County. Thus, the case will inevitably be moved. Additionally, denying a change of venue would create an appellate issue, which could result in any potential in a potential conviction being reversed and remanded for trial. Granting the motion to change venue at this point would thus reduce costs to the court system and the State of Minnesota as well as eliminate a potential appellate issue.

II. IF THE COURT DOES NOT GRANT THE MOTION TO CHANGE VENUE UNDER THE CURRENT STANDARD, THE COURT SHOULD INSTITUTE AN UPDATED STANDARD AND GRANT THE MOTION.

The Minnesota Supreme Court has determined that a change of venue was not warranted in a case where “no evidence had been provided to indicate that any part of Minnesota had been shielded from publicity.” *State v. Blom*, 682 N.W.2d 578, 595 (Minn. 2004). Here, it would be absurd for the Defense to claim that any part of Minnesota, or the United States for that matter, had not heard of the death of Mr. Floyd. Thus we beg the question: If the current standard does not prompt a change of venue for this case, than what case would it? A standard is no longer useful when it cannot be utilized. The heart of the standard is correct – that a change of venue is required when a defendant can no longer receive a fair and impartial trial because the jury pool has been tainted in the venue in which it arose. However, the legal standard needs to be altered in light of the Digital Revolution. We assert that the following standard be utilized by the Court moving forward:

When the prosecution, or agents of the prosecution (as defined by Minn. R. Crim. P. 9.01 (2020)), make statements to the press or public that the defendant is guilty of any of the underlying elements of the alleged crime, the assumption is that the venue must be changed. The burden shifts to the prosecution to demonstrate that the statements are not prejudicial to the defendant’s Constitutional right to a fair trial. If the prosecution demonstrates to the trial court that the statements were not prejudicial, or otherwise did not interfere with the defendant’s right to a fair and impartial jury, then venue shall may remain in the original jurisdiction.

Here, the State and its agents have claimed that Mr. Floyd’s death was a “murder” despite causation yet to be proven. The burden should not rest on Mr. Thao (or any other defendant in this matter) to explain why repeated and prejudicial comments by the State calling Mr. Floyd’s death

a murder is prejudicial to him and would blatantly impair his Constitutional right to a fair and impartial trial by jury.

Respectfully submitted,

Dated: This 28th day of August, 2020

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