

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

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

NOTICE OF MOTION

Please take notice that on May 31, 2022, or as soon thereafter as counsel may be heard, Tou Thao (“Mr. Thao” herein) will move this Court for an order changing the venue of trial from Hennepin County, Minnesota, or in the alternative an order continuing the date of trial from June 13, 2022, to after the federal sentencing of all the involved officers.

MOTION

Mr. Thao joins the previously filed motions for a change of venue and continuance by codefendants Kueng and Lane and their attached exhibits. Mr. Thao asked that those motions and arguments within be made part of the record within his case.

Pursuant to Minn. R. Crim. P. 24.03 subd. 1 (2020), Mr. Thao, by and through counsel, respectfully moves this Court for an order changing venue of the above-captioned case from

Hennepin County, Minnesota to another county outside of the Twin Cities. In the alternative, Mr. Thao moves this Court for an order continuing the trial date from June 13, 2022, to after federal sentencing to dissipate pre-trial publicity in order to protect his constitutional rights to a fair trial.

Publicity Since Questionnaires Completed

On February 24, 2022, a federal jury found Mr. Thao guilty on two-counts related to the death of George Floyd. The next day the StarTribune's – the Minneapolis most populous paper – front page was taken up entirely of coverage and photographs relating to the guilty verdict.

On May 10, 2022, local news covered the Memorandum and Order filed in the related federal trial that denied Mr. Thao's motions for mistrial and acquittal. Judge Magnuson's order contained critiques of the prosecution of Mr. Thao and Mr. Kueng, including:

This Court has had the privilege of working in dozens of emerging democracies around the world to ensure that judicial independence is preserved as the fundamental building block of the rule of law. In many former totalitarian states, the rule of law suffers because of the disproportionate power of the prosecutor vis-à-vis the accused and the judiciary. The Court views the Government's conduct in this case—not the least of which was assigning no fewer than seven prosecutors to try the case—as frighteningly close to that line of overzealous prosecution.

Memorandum and Order at 9-10, *United States v. Thao*, 0:21-cr-00108-PAM-TNL, Doc. 334. Judge Magnuson specifically called into question the disregard of policies prosecuting attorneys showed by moving forward with both federal and state-level charges for the same crime. *Id.*

On May 18, 2022, co-defendant Thomas Lane plead guilty to this Court. The local news covered the plea extensively. Lead prosecuting attorney Keith Ellison released a statement which was also covered at length. 'Pleased Thomas Lane has accepted responsibility': Attorney General Ellison statement on guilty plea in death of George Floyd (May 18, 2022) https://www.ag.state.mn.us/Office/Communications/2022/05/18_ThomasLane.asp.

On May 20, 2022, a complaint went public relating to The Hennepin County Attorney Mike Freeman harassing and retaliating against prosecuting attorney Amy Sweasy – who is regarded as one of the top police use-of-force prosecuting attorneys in the country – after she disagreed for wanting to charge Mr. Thao, Mr. Lane, and Mr. Kueng for their involvement. *See* Attachment 1. Local news covered the story.¹ The complaint highlights the charging decision of Mr. Thao, Mr. Kueng, and Mr. Lane, which Ms. Sweasy told Mr. Freeman “violated professional and ethical rules” and so she withdrew from the case. *Id.* Ms. Sweasy alleged that Mr. Freeman responded by “discrimination and reprisal against me which included, but was not limited to, ostracizing me, treating me hostilely, removing job duties and refusing to assign me to the role for which I was trained” and filled her position with male prosecuting attorneys less qualified than her. *Id.* Hennepin County paid Ms. Sweasy \$190,000 in damages and instituted a no-contact agreement between her and Mr. Freeman due to his retaliation against her. The complaint states that other prosecuting attorneys disagreed with Mr. Freeman’s charging of Mr. Thao and Mr. Kueng and quit this case because of the charges. *Id.*

On May 24, 2022, Mr. Neal Katyal – a private attorney dealing with pretrial motions for this case – was reported to have a “possible new legal industry high” billable rate. The \$2,465 per hour rate (\$410.83 for every 6 minutes) was objected by a U.S. Trustee. The U.S. Trustee asked a federal judge in New Jersey to block a company from hiring Mr. Katyal “calling his hourly rate

¹ Complaint: Hennepin County Attorney Freeman made sexist remarks (May 20, 2022) <https://www.kare11.com/video/news/local/complaint-hennepin-county-attorney-freeman-made-sexist-remarks/89-45611d14-c916-4dcc-abdf-458cfa7a422c#:~:text=A%20complaint%20obtained%20by%20KARE%2011%20made%20to,kare11.com%20Published%3A%206%3A24%20PM%20CDT%20May%2020%2C%202022.>

‘significantly higher’ than that of’ other law firm partners, such as the \$1,350/hour billed by Jones Day partners.²

On May 25, 2022, it was the two-year anniversary of George Floyd’s death. The following took place:

- President Biden released a briefing titled “FACT SHEET: President Biden to Sign Historic Executive Order to Advance Effective, Accountable Policing and Strengthen Public Safety”, President Biden signed the executive order into law honoring George Floyd³;
- A bronze statute of George Floyd was erected in his honor;
- George Floyd’s family flew into George Floyd Square for the official ceremony changing the intersection to by now named “George Perry Floyd Square” – the place of this case. Mayor Frey attended and met with the Floyd family along with City Council President Andrew Jenkins. A crowd gathered and booed the Mayor who had to seek shelter in a local business. When he came back out some time later, City Council President Jenkins asked the crowd to redirect their anger⁴;
- The Annual Day of Racial Reckoning Assembly – a sanctioned city event in Minneapolis took place in the Public Services Building and was attended by city employees, Mayor Jacob Frey, and Minneapolis Fire Chief Bryan Tyner. The Black national anthem and “collections of racial justice songs echoed through the bells of City Hall”. Minneapolis Fire Chief stated “I don’t knew about you ... but I felt a great sense of pride”. *Id.*;

² Karen Sloan and Mike Scarcella, *Lawyer’s \$2,465 hourly rate draws objection in J&J talc bankruptcy case*, Reuters (May 24, 2022, 10:11 am CDT), <https://www.reuters.com/legal/litigation/jj-bankruptcy-trustee-balks-neal-katyals-2465-hourly-rate-2022-05-23/>.

³ <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/25/fact-sheet-president-biden-to-sign-historic-executive-order-to-advance-effective-accountable-policing-and-strengthen-public-safety/>

⁴ Maya Rao, Faiza Mahamud, and Susan Du, *Two years later, Minnesotans gather to remember George Floyd*, StarTribune (May 25, 2022 at 10:39 AM) <https://www.startribune.com/two-years-later-minnesotans-gather-to-remember-george-floyd/600176411/>.

- People protested the governor’s residence in Saint Paul holding signs that said “Black Lives Matter” and “Say his name” while demanding further actions by the government. The protest was called the George Floyd Angel Anniversary Rally⁵;

On May 31, 2022, PBS will air a series called *Police on Trial*, about *State v. Chauvin* and the other co-defendants’ trials. The series will feature many local persons including StarTribune reporters. *Police on Trial Watch the Trailer*, PBS, <https://www.pbs.org/wgbh/frontline/film/police-on-trial/>.

Change of Venue

The venue must be changed because “a fair and impartial trial cannot be had in the county in which the case is pending”, “in the interest of justice”, and because of overwhelming pretrial publicity that – should the trial date be kept to June 13, 2022 – would violate Mr. Thao’s state and federal constitutional rights to a jury trial with a fair and impartial jury. Minn. R. Crim. P. 24.03 subd. 3 (2020); Minn. R. Crim. P 25.02 subd. 3 (2020); U.S. Const. amend. VI; Minn. Const. art. I, § 4.

The United States Constitution (U.S. Const. amend. VI, XIV) and the Minnesota Constitution (Minn. Const. art. I, § 4 and 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.

The Court may move the venue of a trial to any county in Minnesota. Minn. R. Crim. P. 24 cmt. (2020). Whether a change of venue should be granted is largely within the discretion of the trial court. *See State v. Thompson*, 123 N.W.2d 378 (Minn. 1963). Under the Minnesota Rules of

⁵ Pam Louwagie, *Events marking the two-year anniversary of the police killing of George Floyd*, StarTribune (May 25, 2022 at 5:00 AM) <https://www.startribune.com/events-marking-the-two-year-anniversary-of-the-police-killing-of-george-floyd/600176328/>.

Criminal Procedure, a change of venue **must** 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). 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).⁶

“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

⁶ 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 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).

subd. 3 (2020)(emphasis added). Here, there is no potentially prejudicial material. There is prejudicial material. And is it highly prejudicial. There is not a potential for the jurors to be biased by it, only a question of *how much bias?* Below is a small sample of what the potential jury pool believes going into this case. The jury questionnaires went out prior to any of the prejudicial events occurring after February 24, 2022 and they already demonstrate bias against the defendants. With this jury pool in this venue, there is no possibility for Mr. Thao to have a fair trial.

- “All officers involved in this incident are absolutely in the wrong.”
- “I’ve watched the footage multiple times, and my opinion hasn’t/won’t change.”
- “With everything I’ve heard about this case I would have a difficult time being impartial.”
- “Probably not. I have very strong feelings about this case and the havoc it caused the south Minneapolis community.” (In response to the penultimate question regarding impartiality).
- “I personally could not possibly set aside what I saw with my own eyes. To be honest, I don’t believe anyone could.” (In response to whether or not the potential juror would have difficulty only judging the case on evidence in the courtroom).
- “I was nervous that if Derek [Chauvin] was not found guilty Minneapolis would not recover. Luckily he was found guilty.”
- “I known Chauvin was convicted and I strongly think the others should too.”
- “I feel strong about them being guilty.” (The explanation to the potential juror’s ‘yes’ answer to whether they would have difficulties presuming the three co-defendants innocent).
- “I think that dealing with the aftermath will be tough. I feel like people will be upset, regardless of the verdict.” (On why the potential juror does not want to be a juror in this case).

- “I watched the Derek Chauvin trial every single day, and I believe his guilty verdict is appropriate, and I believe the other officers are guilty too.”
- “The police officers should be criminally charged.”
- “My thoughts and opinions regarding the three defendants are firmly formed and developed, I do not see those changing no matter the circumstances.”

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).

It is clear that Hennepin County jurors have particular ties to this case as many have had their homes, communities, or jobs personally affected. In their response to co-defendant Kueng’s motion for change of venue and continuance, the State claims that there is “simply no comparison” to a case such as *Sheppard*. *See State’s Opposition to a Change of Venue or a Continuance*. That idea is inaccurate as SCOTUS’s purpose in hearing and ruling on *Sheppard* was to formulate a path for cases just like it, where the pre-trial publicity is overwhelming. This is such a case. No other case has garnered more attention by the public than this one, shown by the numerous books, movies, statutes, articles – and *especially* – the 18 million viewers who tuned into the *State v. Chauvin* verdict.

Continuance

Should this Court not grant a change of venue, continuing the trial date until a year after the federal sentencing would guarantee that Mr. Thao has a constitutionally fair trial with a jury who is impartial because the pre-trial publicity would disperse.

Minnesota law provides that “[a] continuance may be granted by the court . . . upon motion of either the prosecution or defense,” so long as the movant “show[s] sufficient cause for the continuance.” Minn. Stat. § 631.02. Here, Mr. Thao requests a continuance based upon two reasons: (1) to ensure that Mr. Thao has a jury of impartial peers and continuing out the date would dissipate the pre-trial publicity shown *supra*, and (2) pushing out the state trial date until after the federal sentencing would potentially save the judiciary time and expense of a trial.

Dated: This 30th day of May, 2022

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