

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Court File No. 27-CR-20-12953

State of Minnesota,

Plaintiff,

vs.

J. Alexander Kueng,

Defendant.

**MOTION AND MEMORANDUM
OF LAW IN SUPPORT OF
MOTION TO REMOVE THE
HENNEPIN COUNTY
ATTORNEY'S OFFICE FROM
FURTHER PROCEEDINGS**-----
**TO: THE HONORABLE PETER A. CAHILL, JUDGE OF HENNEPIN COUNTY
DISTRICT COURT; KEITH ELLISON, ATTORNEY GENERAL OF
MINNESOTA; AND MICHAEL FREEMAN, HENNEPIN COUNTY
ATTORNEY.**

The defendant respectfully moves this Court to issue an order removing and disqualifying the Hennepin County Attorney's Office (HCAO) from participating in the prosecution of the above captioned matter. The issue before the Court involves consideration of a prosecutor's obligation to protect the rights of the accused and a prosecutor's actions that call into question that prosecutor's ability to fulfill that obligation. Mr. Freeman, the elected Hennepin County Attorney, through his actions and statements has compromised his ethics, duty to the community and ability to impartially prosecute the case against Mr. Kueng. His actions have undermined the public's trust in how this case has been handled, so his office should be removed from the case.

ARGUMENT

The Hennepin County Attorney's Office duty to fairly and impartially prosecute Mr. Kueng's case is so badly compromised that this Court must order them removed from the prosecution of this matter. A hearing or trial in our district courts must have the appearance of fairness. "But our system of law has always endeavored to prevent even the probability of unfairness. To this end no person can be a judge in his own case and no person is permitted to try cases where they have an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered." *In re Murchison*, 349 U.S. 133, 136 (1955). Simply put, Mr. Freeman should not participate as a prosecutor in a case where he has performed unethically thereby demonstrating an interest in the outcome.

To ensure fairness in criminal proceedings, prosecutors are required to protect a defendant's rights - that is their duty to the community. "Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial...." *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). "This is so because, as we have repeatedly said, a prosecutor is a minister of justice whose obligation is to guard the rights of the accused as well as to enforce the rights of the public." *Id.* (internal punctuation omitted). Mr. Freeman has tainted himself in a way that he can no longer serve the community and provide even the appearance of propriety.

A prosecutor must balance their desire to convict against protecting the rights of the accused. A prosecutor:

[I]s the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935).

Given the role of a prosecutor in a criminal case, the HCAO should not be allowed to participate in a case when their own conduct has compromised their role as a minister of justice and undermined the public confidence in the proceedings.

A. The Close Relationship Between the MPD and the HCAO Requires Removal

The HCAO should be removed from the prosecution team to preserve public confidence in the upcoming hearings and trials. “Procedural justice refers to the subjective perception of fair procedures, not whether those procedures are objectively fair. People are willing to accept unfavorable outcomes of legal proceedings if they are delivered through procedures, they perceive to be fair. Legal authorities can therefore enhance the perceived legitimacy of their actions by employing procedures the public perceives as being fair.” Caleb J. Robertson, *Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police*, 67 Emory L.J. 853, 858 (2018). Mr. Freeman’s involvement in this prosecution assures that regardless of the outcome, the perception of the proceedings will be perceived as unreliable. His recent antics and reputation besmirch the goals of justice.

Significant problems arise when local prosecutors handle cases involving local police officers. “This problem with the appearance of justice persists even in cases in which local prosecutors successfully indict police officers and zealously prosecute them

at trial, although it takes on a different character. When police are not charged for high-profile killings, the process appears to the public and the victims to be biased in favor of the police-suspects. On the other hand, local prosecutors who zealously pursue charges against police in high-profile cases face accusations that they are over-prosecuting police for political gain. *Restoring Public Confidence in the Criminal Justice System* at 859. Mr. Freeman is unique as he fits snugly in both the white washer category and overzealous scapegoated category.

The HCAO should also be removed from the prosecution team because the office has an inherent conflict when it prosecutes police officers that work within Hennepin County. Here, Mr. Kueng was employed by the Minneapolis Police Department (MPD), and the HCAO regularly relies on the MPD as investigators and witnesses in the prosecution of their cases. The Court of Appeals has recognized that it is not appropriate for prosecutors to be involved in cases where the defendant is a current or former employee. *See Kennedy v. L.D.*, 430 N.W.2d 833, 837 (Minn. 1988). Whether Mr. Kueng was actually employed by the HCAO is not significant because of the unique relationship between police officer and prosecutors. Prosecutors have a duty to work closely with the police to gather evidence and prepare for trial. *See Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490 (1995) (“This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. “); Kate Levine, *Who Shouldn't Prosecute the Police*, 101 Iowa L. Rev. 1447, 1465 (2016) (“Prosecutors rely heavily on police cooperation for the success of their cases. Almost no

criminal case exists without the police as the first contact point. Police officers investigate and arrest suspects, often without any input from the prosecutors who will eventually try the case.”) The MPD regularly investigates and testifies at trial for cases prosecuted by the HCAO. Given the close relationship between the MPD and the HCAO’s office, the HCAO should be removed from the prosecution of Mr. Kueng’s case to make sure that is no appearance of or actual impropriety. This is especially true in Mr. Kueng’s case where unlawful command influence from the Mayor, Chief of Police, Governor, and Commissioner of Public Safety is a significant factor in this investigation and future court proceedings.

B. The HCAO Has Demonstrated Actual Bias Against Kueng

The HCAO should also be removed from the prosecution team based on the statements and acts of Mr. Freeman which show that he is not able to ethically participate in the prosecution of Mr. Kueng and protect his right to fair trial. The HCAO cannot act to protect Mr. Kueng’s right to a fair trial as they have already proclaimed his guilt in numerous public statements. Mr. Freeman has called the death of Mr. Floyd a “senseless death” and that he is sympathetic to the Floyd family.¹ He also commented that the video of the incident from a bystander “is graphic, and horrific and terrible, and no person should do that.”² In response to comments by Mayor Frey, the Hennepin County Attorney’s Office again commented on the death of Mr. Floyd. “The videotaped death of

¹ <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/>

² *Id.*

Mr. Floyd, which has outraged us and people across the county, deserves the best we can give and that is what this office will do.”³ Mr. Freeman’s comments leave no doubt that justice is not his objective in the Kueng prosecution. Mr. Freeman has fomented public anger and now seeks to taint that anger with hatred through the prosecution of Mr. Kueng. He has abdicated his duties as a prosecutor and must be removed from the case.

Additionally, the HCAO, which initially charged codefendant Derek Chauvin, unethically⁴ leaked plea negotiation information to the media, to have it reported locally, at first, and then picked up by the national news media.⁵ The HCAO not only leaked information about plea negotiations, it confirmed their leak and added “that these negotiations in high-profile cases are not unusual, nor is the fact that a deal wasn’t reached.”⁶ The leak by the HCAO of potential plea negotiations was particularly egregious and patently unethical. Information about plea negotiations and any statements related to plea negotiations are inadmissible in any proceeding. *See* Minn. R. Evid. 410. The HCAO leaked information about inadmissible evidence. The HCAO knew the leaked plea negotiations would be widely reported and have a significant impact on the local community, potential jurors, and the nation. This leak alone is enough to undermine the public’s confidence in the HCAO and their role in the prosecution team going forward.

Worse, Mr. Freeman has violated Minn. R. Prof. Conduct 3.6 (a) which prohibits a

³ <https://www.hennepinattorney.org/news/news/2020/May/response-to-mayor-frey-comments>

⁴ *See* Minn. R. Prof. Resp. 3.6 and 3.8.

⁵ <https://abcnews.go.com/US/derek-chauvin-guilty-plea-deal-fell-prosecutors-office/story?id=71180109>, accessed Jul. 12, 2020.

⁶ *Id.*

lawyer who is participating or has participated in an investigation or litigation of a criminal matter from making an extrajudicial statement about the matter that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing a jury trial in a pending criminal matter. Mr. Freeman has breached the bounds of both ethical prosecution and ethical lawyering. He must be removed from this matter.

The conflicting reports as to why the Attorney General's Office (AG) was brought in to take over the prosecution of Mr. Kueng's case also raises concerns about the HCAO's role going forward. Mr. Freeman reportedly asked for the Attorney General Office's help with the case.⁷ The official statement from his office was that "[t]here have been recent developments in the facts of the case where the help and expertise of the Attorney General would be valuable."⁸ However, other reports are that Governor Walz appointed the Attorney General's Office to take over the case based on requests from members of the House of Representatives and Mr. Floyd's family.⁹ Members of House of Representatives who represent Minneapolis wrote Governor Walz asking that the case be transferred to the AG. They noted "our constituents, especially constituents of color, have lost faith in the ability of Hennepin County Attorney Mike Freeman to fairly and impartially investigate and prosecute these cases."¹⁰ Mr. Freeman's statement about the AG's role was an attempt to protect his political standing. Mr. Freeman's lack of candor

⁷ <https://www.startribune.com/ag-keith-ellison-to-take-over-case-in-floyd-killing/570911922/>

⁸ <https://www.hennepinattorney.org/news/news/2020/May/Joint-effort-HCAO-AG-Floyd-case>

⁹ <https://www.nbcnews.com/news/us-news/minnesota-attorney-general-take-over-prosecutions-george-floyd-s-death-n1220636>

¹⁰ <https://www.house.leg.state.mn.us/members/profile/news/15468/29981>

about why the AG was brought in to take over the case raises additional concerns about the HCAO's office ability to act as a minister of justice in this matter. Mr. Kueng has demanded discovery on this matter, but it has not been forthcoming.

Mr. Freeman's public statements about the facts of the case, improper leaks, and lack of candor require the HCAO's removal from the case based on actual bias against Mr. Kueng and failure to meet his duty to the community. One cannot be charged with protecting the rights of a person accused of a crime while at the same time proclaiming their guilt and unethically leaking confidential information to the press. The HCAO has created an improper conflict of interest that undermines the public's confidence and warrants their removal from the prosecution team.

Respectfully submitted,

Dated: August 3, 2020

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