UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No.: 21-CR-108 (2) (PAM/TNL)

UNITED STATES OF AMERICA, Plaintiff, vs. TOU THAO, Defendant.	)	**MOTION FOR JUDGMENT OF ACQUITTAL**

Mr. Tou Thao ("Mr. Thao" hereinafter) respectfully moves the Court for an order for a judgement of acquittal. The Government has closed its case without proving the requisite *mens rea* required to convict Mr. Thao.

The Government has chosen to charge Mr. Thao with crimes wherein they must prove beyond a reasonable doubt that Mr. Thao acted willfully. The evidence presented is insufficient to prove that Mr. Thao acted willfully, thus there is insufficient evidence to support a guilty verdict even when looking at the evidence in the light most favorable to the Government. Defendant respectfully moves this Court for an order for a judgment of acquittal.

Background:

On May 6, 2021 the Government charged former Minneapolis Police Officer Tou Thao via indictment. (Doc. No. 1). The Indictment specifically charged Mr. Thao with two counts.

The first charge against Mr. Thao – Count 2 – alleges that Mr. Thao violated 18 U.S.C. 242. Specifically:

> On or about May 25,2020, in the State and District of Minnesota, the defendants, TOU THAO and J. ALEXANDER KUENG, while acting under color of law, willfully deprived George Floyd of the right, secured and protected by the Constitution and laws of the United States, to be free from an unreasonable seizure. Specifically, Defendants Kueng and Thao were aware that Defendant Chauvin as holding his knee across George Floyd's neck as Floyd lay handcuffed and unresisting, and that Defendant Chauvin continued to hold Floyd to the ground even after Floyd became unresponsive, and the defendants willfully failed to intervene to stop Defendant Chauvin's use of unreasonable force. This offense resulted in bodily injury to, and the death of, George Floyd. All in violation of Title 18, United States Code, Section242.

Doc. No. 1. The second charge against Mr. Thao – Count 3 – alleges that Mr. Thao violated 18 U.S.C. 242. Specifically:

> On or about May 25,2020, in the State and District of Minnesota, the defendants, DEREK MICHAEL CHAUVIN, TOU THAO, J. ALEXANDER KUENG, and THOMAS KIERNAN LANE, while acting under color of law, willfully deprived George Floyd of the right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law, which includes

> an arrestee's right to be free from a police officer's deliberate indifference to his serious medical needs. Specifically, the defendants saw George Floyd lying on the ground in clear need of medical care, and willfully failed to aid Floyd, thereby acting with deliberate indifference to a substantial risk of harm to Floyd. This offense resulted in bodily injury to, and the death of, George Floyd.

Doc. No. 1.

During their case-in-chief, the Government called witnesses who testified – amongst other things – to the following:

- Mr. Thao suggested a hobble before Mr. Floyd was placed on the ground. *See* Ex. 9A at 20:18:38 and 20:18:51.
    - Mr. Thao got the hobble (also referred to as a "MRT") out of the squad car and brought it over to the other officers to allow them to use it. *See* Tr. at 2068 (testimony of Nicole Mackenzie).
    - Nicole Mackenzie testified that Officer Chauvin rebuffed Mr. Thao's suggestion of the hobble, and that but for Officer Chauvin, Mr. Thao would have used the hobble. *Id.*
    - If a hobble had been used, Mr. Floyd would have been in the recovery position. *Id.* at 2030.
- Mr. Thao asked if EMS had already been called. *Id.* at 2068.
    - Upon finding out EMS was called at Code 2, Mr. Thao radioed in for EMS to come Code 3 – which is the fastest way for an ambulance to get to the scene. *Id.*

- It would be the expectation that if Mr. Floyd was in cardiac arrest the officers behind Mr. Thao would have been doing CPR. *Id.* at 2070.
    - Nicole Mackenzie testified that the officers behind Mr. Thao were not doing CPR, it would be the logical assumption that Mr. Floyd was not going into cardiac arrest. *Id.*
- Mr. Thao directed firefighters to the correct address of 36th and Park when dispatch asked for Squad 320 (not his own Squad 330) to give the updated location. *See id.* at 703, Ex. 9, and Ex. 9A.

ARGUMENT

A district court must enter a judgment of acquittal is the evidence presented at trial is insufficient to sustain a conviction. Fed. R. Crim. P. 29(a). "The standard for determining whether evidence is insufficient is very strict, requiring acquittal only where there is 'no interpretation of evidence that would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt.'" *U.S. Munoz,* No. 11B167, 2012 WL 2021143 (D. Minn. July 25, 2012)(citing *U.S. v. Gomez,* 165 F.3d 650, 654 (8th Cir. 1999)).

In determining whether it should issue a judgement of acquittal, the court does not "weigh the evidence or assess the credibility of the witnesses." *U.S. v. Thompson,* 285 F.3d 731, 733 (8th Cir. 2002). The evidence should be viewed "in the light most favorable to the government, resolving conflicts in the government's favor, and accepting all reasonable

inferences that support the verdict." *U.S. v. Lewis,* 895 F.3d 1004, 1008 (8th Cir. 2018) (citation and internal quotations omitted).

In the above-captioned case the Government has rested its case. The Government's witnesses have testified that Mr. Thao provided Mr. Floyd with medical care that went above what was required of him by Minneapolis Police Department Policy. Specifically, the Government's witnesses have testified that: (1) Mr. Thao stepped up the call for Emergency Medical Services (EMS) from the policy-required Code 2 to a Code 3 – the fastest way to get an ambulance to the scene; (2) Mr. Thao suggested the use of a hobble on Mr. Floyd, which would have placed Mr. Floyd in the recovery position but for Officer Chauvin's rejection; and (3) Mr. Thao answered a request of Squad 320 (not his own Squad) to tell the firefighters that they were needed at a secondary address, without that correction of address Mr. Floyd's care would have been later delayed.

I. AFTER VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT, THERE IS NO INTERPRETATION OF EVIDENCE THAT WOULD ALLOW A REASONABLE JURY TO FIND MR. THAO GUILTY OF COUNT 2.

To prevail in proving Mr. Thao committed Count 2, the Government must prove all of the following beyond a reasonable doubt:

First: That [Mr. Thao] acted under color of law;

Second: That [Mr. Thao] deprived Mr. Floyd of the right to be free from a police officer's use of unreasonable force, meaning:

2(a) That [O]fficer Chauvin used objectively unreasonable force against Mr. Floyd;

2(b) That [Mr. Thao] observed or otherwise knew that unreasonable force was being used against Mr. Floyd;

2(c) That [Mr. Thao] had the opportunity and means to intervene to stop the unreasonable force; and

2(d) That [Mr. Thao] failed to take reasonable steps to do so;

Third: *The [Mr. Thao] committed the acts or omissions willfully*; and

Fourth: That bodily injury and/or death resulted from the defense.

See Doc. No. 247 (Government's Memorandum in Clarification).

To establish a constitutional violation, it is not enough that a reasonable officer should have known the risk. Rather, the officer must have actually known of the risk and deliberately disregarded it. *Vaughn v. Greene County, Ark.*, 438 F.3d 845, 850 (8th Cir. 2006)(quoting *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 12 L.Ed.2d 811 (1994)).

Even looking at the evidence in the light most favorable to the Government, the Government has failed to show that Mr. Thao actually knew of the risk and deliberately disregarded it.

In their case in chief, the Government showed that Mr. Thao suggested that Mr. Floyd be put in an MRT (maximum restraint technique), a.k.a a hobble. The head of the training division, Inspector Katie Blackwell, testified it is physically impossible for a person in the hobble to be placed in the prone position. She also testified that it is MPD policy that persons in a hobble should be placed in the side-recovery position. Further, she testified that the side-recovery position post-hobble was taught yearly through in-service training, which Mr. Thao received.

By eliciting testimony that Mr. Thao suggested and found a hobble but was told by Chauvin that they didn't want to use it, the Government has shown that Mr. Thao did not "willfully" fail to intervene in the use of force used against Mr. Floyd. In fact, he suggested other force options – force options that would have physically required to placed Mr. Floyd out of a prone position and potentially saving him.

II. AFTER VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT, THERE IS NO INTERPRETATION OF EVIDENCE THAT WOULD ALLOW A REASONABLE JURY TO FIND MR. THAO GUILTY OF COUNT 3.

To prevail in proving Mr. Thao committed Count 2, the Government must prove all of the following beyond a reasonable doubt:

First: That [Mr. Thao] acted under color of law;

Second: That [Mr. Thao] deprived Mr. Floyd of the right to be free from a police officer's deliberate indifferent to his serious medica needs, meaning:

2(a) Mr. Floyd had an objectively serious medical need, which, when unaddressed, exposed him to a substantial risk of serious harm:

2(b) That [Mr. Thao] actually knew that Mr. Floyd had a serious medical need; and

2(c) That [Mr. Thao] disregarded that medical need by failing to take reasonable measures to address it;

Third: *That [Mr. Thao] committed the acts or omissions willfully*; and

Fourth: That bodily injury and/or death resulted from the defense.

See Doc. No. 247 (Government's Memorandum in Clarification).

"To conclude that a defendant acted 'willfully' as to Count 3, the jury must find that the defendant intentionally failed to aid Mr. Floyd, knowing that Mr. Floyd had a serious medical need and that, as an officer, he was required to take reasonable measures to render medical aid". *Id.* (citing to *United States v. Gonzalez*, 436 F.3d 560, 573 (5th Cir. 2006)). The Government must prove that Mr. Thao actually knew of the serious medical need and deliberately disregarded it. *Jones v. Minnesota Department of Corrections*, 512 F.3d 478 (8th Cir. 2008).

The way the Government charged Mr. Thao requires the Government to prove beyond a reasonable doubt that Mr. Thao acted with "deliberate indifference" by willfully failing to aid Mr. Floyd.

During their case in chief, the Government's own witnesses testified that (1) Mr. Thao stepped up the EMS call to from Code 3 – which alerted dispatch that EMS was needed as soon as possible to the scene – when he was only required by policy to call a Code 2; (2) Mr. Thao suggested a hobble restraint – which would have required Mr. Floyd to be put in the side-recovery position because of the physical impossibility to be in the prone position; and (3) Mr. Thao personally told the firefighters the correct address of the ambulance at 36th and Chicago when he was not required to.

Mr. Thao took steps above what was required by him via MPD policy. Those steps got EMS on scene faster and got fire faster to the ambulance at the safe scene. Mr. Thao took actions that went beyond what policy or training required of him. No reasonable jury could find that Mr. Thao acted with willful indifference to Mr. Floyd's medical needs when he took active steps to get Mr. Floyd medical help faster.

Respectfully submitted,

Dated: This 14th day of February, 2022

/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.

101 East Fifth Street
Suite 1500
St. Paul, MN 55101
T: (612) 440-3404
nrp@paulelaw.com

Attorneys for Tou Thao