

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

Case Type: Criminal

State of Minnesota,

Plaintiff,

vs.

**STATE'S MEMORANDUM IN  
SUPPORT OF MOTION TO AMEND  
DECEMBER 17 SCHEDULING  
ORDER ON EXPERT DISCLOSURES**

Derek Michael Chauvin,

Court File No.: 27-CR-20-12646

J. Alexander Kueng,

Court File No.: 27-CR-20-12953

Thomas Kiernan Lane,

Court File No.: 27-CR-20-12951

Tou Thao,

Court File No.: 27-CR-20-12949

Defendants.

TO: The Honorable Peter A. Cahill, Judge of District Court, and counsel for Defendants, Eric J. Nelson, Halberg Criminal Defense, 7900 Xerxes Avenue South, Suite 1700, Bloomington, MN 55431; Robert Paule, 920 Second Avenue South, Suite 975, Minneapolis, MN 55402; Earl Gray, 1st Bank Building, 332 Minnesota Street, Suite W1610, St. Paul, MN 55101; Thomas Plunkett, U.S. Bank Center, 101 East Fifth Street, Suite 1500, St. Paul, MN 55101.

## INTRODUCTION

In the Court's October 8, 2020 scheduling order regarding expert witness disclosures, the Court provided deadlines that balanced the rights and obligations of the parties with respect to expected expert witnesses. These deadlines allowed the parties an adequate opportunity to prepare for trial. On December 17, however, without hearing formally from the parties, the Court significantly altered the existing expert witness deadlines only for the Defendants, thereby depriving the State of adequate advance notice of Defendants' expert disclosures, impairing the State's ability to obtain its expert reports and prepare for trial, and giving the Defendants substantially more time than the State to obtain expert reports.

To restore the balance established in the Court's October 8 Scheduling Order, the State respectfully requests that the Court enter an amended scheduling order setting the same disclosure deadline for all parties' expert reports – ideally February 1, 2021, to allow all parties adequate time to prepare for trial. In the alternative, the State requests that this Court set February 8, 2021 as the contemporaneous deadline for all expert reports. At a minimum, regardless of whether the Court changes the deadline for all expert reports, the State requests that all parties be given the opportunity to file expert rebuttal reports by February 19, 2021, and that the deadline for motions in limine in connection with expert reports and testimony be extended to February 26, 2021.

Finally, the State requests that the Court require Defendants to provide a written waiver of their right to be present at the January 11 hearing, if they decide not to appear.

#### **STATEMENT OF FACTS**

The Court scheduled this case for trial on March 8, 2021. Litigation of the case will undoubtedly involve expert testimony on various topics involving medical causation, police training, and the use of force. To adequately prepare for trial, each party needs to have adequate notice of the general topics to be presented by the other parties' experts so that all parties can obtain complete expert reports well in advance of trial.

Accordingly, on August 28, 2020, the State filed a motion asking the Court to set deadlines for expert disclosures by all parties. The State requested two separate expert disclosure deadlines: (1) an initial expert disclosure deadline which would require the parties to provide the name, curriculum vitae, and general subject matter of its experts; and (2) a later deadline for “full expert disclosures,” including expert reports. Notice of Motion and Motion for Expert Disclosure Deadlines 2 (Aug. 20, 2020). Noting that the Rules of Criminal Procedure contemplate contemporaneous discovery obligations, the State requested the same deadlines for all parties. *Id.*

After hearing arguments on the State's requests at the September 11 hearing, the Court issued a scheduling Order on October 8, 2020. Notice of Defenses and Expert Witness Disclosure Deadlines (Oct. 8, 2020) ("October Scheduling Order"). The Court set an initial expert disclosure deadline for the State of December 1, 2020, an initial expert disclosure deadline for the Defendants of December 15, 2020, and a simultaneous deadline for expert reports of January 19, 2021. *Id.* In compliance with the Order, the State made its initial expert disclosures on December 1, 2020.

On December 11, 2020, just four days before his initial expert disclosure deadline, Defendant Thao filed a motion alleging a discovery violation and seeking, inter alia, an extension of the deadline for the Defendants' initial expert disclosures. Motion for Sanctions and Hearing Regarding Discovery Violations By The State (Dec. 11, 2020). On December 14 – one day before the disclosure deadline – Defendant Chauvin filed a motion also seeking an extension of the deadline. Defendant's Notice of Motion and Motion for Continuance 1 (Dec. 14, 2020). Although the State disagreed with the allegations of discovery violations, it advised counsel for each Defendant it would not object to a two-week extension of the Defendants' initial expert disclosure deadline. The State then advised the Court on December 15 – the day of the deadline – that although it intended to file a response to the motions alleging discovery violations, it would not object to a two-week extension of the existing initial expert discovery deadline.

Two days later, before receiving the State's response to Thao's motion alleging a discovery violation, the Court issued a second scheduling order. Expert Witness Disclosure Deadlines and Hearing on Defendants' Motions for Trial Continuance 1 (Dec. 17, 2020) ("December Scheduling Order"). The December Scheduling Order extends the Defendants' initial expert disclosure deadline by 31 days – to January 15, 2021. The Order also extends the Defendants' deadline for expert reports to February 8, 2021. The Order, however, did not correspondingly adjust the State's deadline for submitting expert reports. Thus, the State's deadline for expert reports remains

January 19, 2021, just four days – and indeed, just a *single business day* – after the deadline for the Defendants’ initial expert disclosures, and 20 days before the Defendants’ expert reports are due.<sup>1</sup>

## ARGUMENT

### **I. The Court Should Amend Its December 17, 2020 Scheduling Order To Provide All Parties With Equal Time To Obtain Expert Reports And Prepare For Trial.**

As this Court recognized in its October Scheduling Order, the deadlines for disclosure of any expert reports should be simultaneous. Simultaneous deadlines best balance the rights and obligations of the parties with respect to expert witnesses with the need to allow the parties a reasonable opportunity to prepare for trial. By requiring the State to disclose its expert reports 20 days before the Defendants, the December Scheduling Order upsets this balance, grants Defendants an unfair advantage, and unduly prejudices the State’s ability to prepare for trial. This Court should accordingly revise the deadline for full expert disclosures to February 1, 2021, to allow the parties sufficient time to prepare for trial. Alternatively, it should set February 8, 2021 as the deadline for both the State’s and Defendants’ expert reports.

The rules of criminal procedure clearly contemplate contemporaneous discovery. Both Rule 9.01, subd. 1 (prosecution disclosures) and Rule 9.02, subd. 1 (defendant’s disclosures) contain the exact same target date for discovery disclosures: the omnibus hearing. From that point on, both the prosecution and the defense have a continuing obligation to disclose matters promptly. *See* Minn. R. Crim. P. 9.03, subd. 2. These rules “are intended to provide a just determination of criminal proceedings, and ensure a simple and fair procedure that eliminates unjustified expense and delay.” Minn. R. Crim. P. 1.02.

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<sup>1</sup> Monday, January 18, 2021 is the Rev. Dr. Martin Luther King Jr. Holiday.

The disclosure deadlines established in the Court's October Scheduling Order were necessary to accommodate the contemporaneous disclosure obligations and the need for all parties to be properly prepared for trial. The initial expert-disclosure deadlines were designed to provide the parties with notice of the subject matter of expected expert testimony so that the parties could obtain reports from their experts that would address those issues. The second, simultaneous deadline for disclosure of expert reports ensured that the parties would have the experts' reports far enough in advance of trial that they could adequately prepare for trial. The simultaneous deadline for reports made sense in light of the contemporaneous disclosure obligations in the rules of criminal procedure, the need for fair proceedings to eliminate unjustified expense and delay, and the approaching trial date.

The Court's December Scheduling Order upsets the careful balance struck by the October Scheduling Order by greatly diminishing the State's notice of potential expert subject matter testimony by the defense and thereby impairing its ability to prepare for trial. This is a complex case, and all parties likely will have expert witnesses on various issues. Under the December Scheduling Order, however, the State will not even receive the Defendants' initial expert disclosures until January 15, 2021, just four days – and, indeed, just a single business day - before the State's expert reports are due. In other words, the new deadline for Defendants' initial disclosures means that the State will have just a single business day after the Defendants' initial disclosures to obtain expert reports on any and all subjects that the Defendants may identify. This leaves little to no time to assure the State's expert reports address the subject matters disclosed by the Defendants. The initial deadlines set forth in the October Scheduling Order, by contrast, allowed the State 35 days after the Defendants' initial disclosures. Moreover, under the December Scheduling Order, the State will not receive the Defendants' expert reports until February 8, 2021. Just one month before trial is set to begin. That greatly diminishes the State's ability to prepare

for trial, as compared to the seven weeks provided by the expert report disclosure deadline set forth in the October Scheduling Order.

The December Scheduling Order also provides the Defendants with numerous advantages not provided to the State. First, it gives the Defendants 69 days between the time the State made its disclosures and the time it will file its expert reports. The State, by contrast, has just *four days* between the Defendants' initial disclosures and when it files its expert reports. By that measure, then, the Defendants will have *17 times* longer than the State to complete their expert reports after receiving the other side's expert disclosures. Second, the December Scheduling Order also allows the defense to have the State's expert reports for a full 20 days before having to produce its own. This means that rather than a contemporaneous disclosure of expert reports, the Court has now provided the Defendants with a considerable opportunity to draft their reports as directed rebuttals of the State's reports, an opportunity not granted to the State. Third, the December Scheduling Order allows the defense to still have the State's expert reports for nearly seven weeks before trial, but reduces the period the State will have the defense expert reports before trial from an equal near-seven week span to just under four weeks. This puts the State at a considerable disadvantage in preparing for trial. Finally, the State will not even receive the Defendants' expert reports before the February 8, 2021 deadline for motions in limine. This means the State will not even have an opportunity to file motions in limine regarding the defense expert reports, while the Defendants will have almost two weeks to file such motions.

The December Scheduling Order did not explain the new deadlines, or justify the unfair burdens they impose. And Defendants likewise have not identified any need for these new staggered deadlines. Indeed, nothing in this case would justify these changes and unequal burdens. The only established fact that has changed between the October and December Scheduling Orders is that the State represented it would not object to a two-week extension of the Defendants' initial

expert disclosure deadline. The State also made that representation as a courtesy to the Court after Thao moved for an extension just four days before the initial disclosure deadline, so as to obviate the need for the Court to decide an extension motion within such a short timeframe. The State never conceded a discovery violation, and within a week of Thao's motion, filed a response demonstrating that the allegation of a discovery violation was without merit and opposing any further extension on that basis. Yet that courtesy offer of a two-week extension of the initial disclosure deadline somehow led to a 31-day extension of the Defendants' initial disclosure deadline, a 20-day extension of the Defendants' expert-report disclosure deadline, and the elimination of the contemporaneous deadline for expert reports.

In short, to restore the balance of the parties' rights and obligations struck in the October Scheduling Order, the State respectfully requests that this Court amend the December Scheduling Order and set February 1, 2021 as the deadline for all parties' expert reports. If the Court elects not to change the Defendants' deadline for expert reports to February 1, the State requests that the Court amend the scheduling order to extend the State's deadline for expert reports to February 8, 2021, the same as the Defendants' current deadline. These deadlines are necessary to allow the parties to adequately prepare for trial.

Finally, two other matters merit attention here. The Court's previous orders did not address potential expert rebuttal reports. Once the parties receive the other parties' expert reports, it may be necessary to provide rebuttal reports as a basis for expected trial testimony. The State requests that the Court set a deadline of February 19, 2021 for rebuttal reports. In addition, the December Scheduling Order extended the deadline for the Defendants' expert reports to the same day as the previously imposed deadline for motions in limine. *See* Scheduling Order 2 (June 30, 2020) (setting deadline for motions in limine at February 8, 2021). The State requests that the Court

amend the scheduling order to provide a separate deadline of February 26, 2021, for motions in limine regarding the expert reports and testimony.

## **II. The Court Should Require Written Waivers Of Defendants' Presence At The Hearing.**

In paragraph C of the Court's December Scheduling Order, the Court provided that the "Defendants' presence is waived" for the January 11, 2021 hearing on the Defendants' continuance motions. A criminal defendant has a right to be present at critical stages of the criminal proceedings. *See State v. Grey*, 256 N.W.2d 74, 76 (Minn. 1977). This right, like other constitutional rights, can be waived. *See State v. Finnegan*, 784 N.W.2d 243, 247 (Minn. 2010). But the defendant must personally waive his right to be present at a hearing; it cannot be done by his attorney. *State v. Rodriguez*, 889 N.W.2d 332, 337 (Minn. Ct. App. 2017). "The district court must ensure that the defendant's waiver of the right to be present was made voluntarily after consultation with counsel and a record of the waiver must be made." *State v. Charles*, 634 N.W.2d 425, 433 (Minn. Ct. App. 2001). While it is not clear that the January 11, 2021 hearing will constitute a "critical stage" at which the Defendants have a right to be present, *see State v. Booker*, 770 N.W.2d 161, 165-66 (Minn. Ct. App. 2009) (listing cases finding a hearing was a critical stage), the better practice would be to make a contemporaneous record establishing that the Defendant voluntarily decided to waive his presence after consultation with counsel. *See Charles*, 634 N.W.2d at 433 (stating that court should make a contemporaneous record of the defendant's waiver of the right to be present after consultation with counsel). This would ensure the Defendant's rights have been honored and would remove any issue on appeal as to whether the Defendants' voluntarily waived their right to be present at the January 11 hearing. The most expedient way to accomplish this is for defense counsel to obtain and file a written waiver of the right to be present, if their clients elect to waive the right.



## CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court amend its scheduling order of December 17, 2020 to establish a simultaneous deadline for all parties' expert reports of February 1, 2021, or, in the alternative, February 8, 2021. The State also respectfully requests that the Court amend the scheduling order to provide a deadline for expert rebuttal reports of February 19, 2021 and a deadline for motions in limine regarding the experts of February 26, 2021. Finally, the State respectfully requests that the Court order the Defendants to provide a written waiver of the right to be present, made after consultation with counsel, if any Defendant elects to not be present at the January 11, 2021 hearing.

Dated: December 24, 2020

Respectfully submitted,

KEITH ELLISON  
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**/s/ Matthew Frank**

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