

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Case Type: Criminal

State of Minnesota,

Plaintiff,

vs.

**STATE'S RESPONSE TO MOTIONS
BY DEFENDANTS THAO AND
KUENG REGARDING ALLEGED
DISCOVERY VIOLATIONS**

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, 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

The State submits this memorandum of law in response to the motions of Defendants Thao and Kueng regarding alleged discovery violations.¹ The thrust of these motions is an allegation that the State was “less than candid” with this Court during the January 11, 2021 hearing. Thao Motion 3; Kueng Motion 3-4. As will be explained below, the State was candid with the Court at that hearing. In further candor to this Court, the State concedes that investigation done after that hearing revealed the State had inadvertently not provided to the defense a single PowerPoint presentation from the Minneapolis Police Department (MPD) training materials. Statements made

¹ Defendant Kueng blended his discovery motion with references to another matter. This response will only address the alleged discovery matter, and will reserve a response to the other matter pending direction from the Court.

by the State at the January 11 hearing were candid because the State was working from the copy of the materials provided to the defense, which did not include that specific PowerPoint. The State did not learn of that specific PowerPoint until January 14, 2021, and disclosed it to defense counsel as soon as it could. While the State certainly regrets this human error, the motions of Defendants Thao and Kueng should be denied because their arguments are simply personal attacks on the State and do not address the legal standards for the relief they seek.

STATEMENT OF FACTS

In response to Thao's previous discovery motion, the State explained its process for producing discovery. Again, when the State obtains a flash drive with investigative materials from outside agencies, the State copies the materials onto its system and places Bates numbers on them. The State then sets the flash drive aside and works entirely from the Bates-labelled documents on the system. Affidavit of Matthew Frank, para. 2. The Bates-labelled materials are disclosed to the defense. The Bates numbers are necessary to prove exactly which documents have been served on the defense and to assure that both parties can refer to specific documents and page numbers easily and consistently.

In June of 2020, the Bureau of Criminal Apprehension (BCA) produced to the State a flash drive with a large volume of investigative materials, including training records and presentations from the MPD. *Id.*, para. 3. Those presentations included PowerPoints for various trainings, some of which included apparent videos and links to other sources. *Id.*, para. 4. Because some of the videos and links did not appear active, the State asked the BCA to request from the MPD electronic copies of the PowerPoint presentations in hopes that active videos and links would be included. *Id.*

On Thursday, January 14, 2021, the BCA provided the State with a flash drive containing the electronic copies of the PowerPoint presentation. *Id.* The undersigned began looking at the PowerPoint presentations on the flash drive to try to determine if they did include live videos and links. Upon doing so, the undersigned saw a PowerPoint titled “The New Lateral Vascular Neck Restraint System 12/3/07 – 8 hrs.” Bates 41208 (underlining in original). This PowerPoint did not look familiar from previous review of the Bates-labelled PowerPoints. Accordingly, the State Bates-labelled this PowerPoint and disclosed it to defense counsel as soon as it could. *Id.*, para. 5.

It took nearly an entire day to make four copies of the flash drive to disclose to the defense. *Id.* That Friday afternoon, the undersigned contacted Defendant Chauvin’s counsel and advised him of the PowerPoint and that the undersigned was not sure if this was a new PowerPoint provided by the MPD or if it was previously provided and we missed it in making our initial disclosures because the undersigned had not yet had the opportunity to compare it to the previously disclosed PowerPoints. *Id.*, para. 6. Subsequent to that, the undersigned found that the Lateral Vascular Neck Restraint PowerPoint had been provided by the MPD and was on the original flash drive given to this Office by the BCA, but it had not been copied onto the State’s system and Bates-labelled. *Id.*, para. 7. It appears the staff person performing those functions inadvertently did not copy that PowerPoint onto the State’s system and accordingly it did not get disclosed to defense counsel until the following week because of the length of time to make copies and the intervening state holiday.

Defendant Thao’s primary contention that the State was not candid at the January 11 hearing is wrong. Thao Motion 3. In addressing a different context, the undersigned informed the Court at that hearing that the State is working from the same PDFs as given to the defense; that was true then and is still true now. That is why the State did not know about the Lateral Vascular

Neck Restraint PowerPoint until January 14 – the State was also working from the Bates-labelled PDFs that mistakenly did not include the Lateral Vascular Neck Restraint PowerPoint. As soon as it could, the State disclosed the PowerPoint to the defense. Defendants also allege this is evidence of “haystacking” the discovery, though it is not at all clear how this basic human error in the process of copying the files over proves the State was haystacking the discovery, and they make no effort to explain this unsupported allegation. Nor have they attempted to address how this honest mistake should lead to the remedies they seek.

ARGUMENT

The Court Should Deny The Motions Because The Delayed Disclosure Was Made Promptly Upon Discovery And Defendants Have Failed To Even Address Any Prejudice.

The trial court is in the best position to determine whether any harm has resulted from an alleged discovery violation and to fashion a remedy. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). In exercising its discretion on these determinations, the court should consider: 1) the reason why disclosure was not made; 2) the extent of prejudice to the opposing party; 3) the feasibility of a continuance as a remedy, and 4) any other relevant factors. *Id.* Here, counsel for Thao, Kueng, and Lane have not even attempted to address these factors. Clearly they do not support the relief sought.

First, the disclosure was promptly made upon its discovery. The disclosure was not made at the initial time that the State received it because a staff member inadvertently did not copy it over to the State’s system. This was, in the words of Mr. Plunkett, an “honest mistake.” Defendant Kueng’s Motion 6. But as soon as it was discovered, the State disclosed it as promptly as it could.

Second, there is no prejudice to the Defendants for several reasons. Indeed, the Defendants make no effort to even argue prejudice. The PowerPoint was disclosed to counsel for Thao and Kueng seven months before their scheduled trial. The Defendants’ expert reports were not due

until February 22, 2021, meaning the Defendants had access to the PowerPoint for a month before their expert reports were due. Defendants have not established how the PowerPoint would be a significant piece of evidence to the case; it is dated December 3, 2007, long before Defendants Kueng and Lane were even police officers and Defendants Thao and Chauvin would have had considerable intervening training on restraints since then.

Moreover, the restraint described in the PowerPoint is completely different than the restraint Defendant Chauvin used on George Floyd. For example, the second slide of the PowerPoint defines “lateral” as “The horizontal compression on the neck of the inside of the forearm moving laterally against the neck and toward the stationary upper arm on the opposite side of the neck.” Bates 41209. The fourth slide of the PowerPoint explains that “Neck” refers to “The placement of the inside of the elbow to the front of the throat in order to avoid injury to the trachea, larynx and other throat structures.” Bates 41211. The PowerPoint goes on to explain the use of the officer’s arms to apply the neck restraint. Bates 41239 – 41242.

Defendant Chauvin’s restraint of George Floyd was completely different. Immediately after a fully handcuffed George Floyd was taken to the ground in the prone position by three officers, Defendant Chauvin placed his left knee on the back of Floyd’s neck and his right knee on Chauvin’s back, and used nearly all his body weight to pin Floyd down in the prone position for approximately nine-and-a-half minutes. This is not the Lateral Vascular Neck Restraint that is the subject of the PowerPoint at issue. Moreover, that PowerPoint instructs officers to place the subject on their side or in the sitting position to monitor their medical condition. Bates 41226. Defendant Chauvin kept Floyd in the prone position, with his left knee on Floyd’s neck and his right knee on Floyd’s back, for a total of more than nine minutes, approximately four minutes after

Floyd was lifeless, and in fact until the paramedics had to wave him off Floyd's lifeless body so they could load him into the ambulance.

There is no need for a continuance because Defendants Thao and Kueng received the PowerPoint approximately seven months before trial.

To be sure, the State regrets the delayed disclosure of this PowerPoint and took prompt steps to make it known to defense counsel. But Defendants have not established a basis for the forms of relief they request.

Mr. Plunkett asserts that it is surprising the Attorney General did not appear for this Court's January 11 hearing. Kueng Motion 2. This is a strange assertion given that the Attorney General was never scheduled to be at that motion hearing. Without basis in fact, he then asserts that this absence proves an intent to "cheat" the Defendants in the discovery process. Kueng Motion 2-3. As Mr. Plunkett even points out, the Attorney General had indicated that he would appear for the meeting with Chief Judge Barnette to discuss courthouse preparations for the trial. The Attorney General was never scheduled to be at the motion hearing. The meeting with Judge Barnette was a stand-alone meeting, apart from this Court's January 11 motion hearing, but as schedules allowed, the meeting with Judge Barnette got set for immediately after the motion hearing. Mr. Plunkett's assertion that the Attorney General's absence from a previous motion hearing he was never scheduled to be at is proof of some nefarious intent is not supported by fact, and appears to be nothing more than a personal attack on the Attorney General. Mr. Plunkett's baseless personal attacks and hyperbole are not a substitute for evidence and legal argument in support of this motion.

Defendants request that the Court order the State to provide a copy of the BCA's disclosures to the State, as in State v. Chauvin. The State only requests that if the Court grants this

request, the Court specifically allow the State five days to make this disclosure. The BCA disclosures contain information, such as the personnel files of each former officer, that have not been entirely disclosed to each Defendant and the State will need to redact that information.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny the motions of Defendants Thao and Kueng regarding an alleged discovery violation.

Dated: February 26, 2021

Respectfully submitted,

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