

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

PLAINTIFF,

V.

TOU THAO,

DEFENDANT.

**RENEWAL OF MOTION FOR
SANCTIONS AND HEARING
REGARDING DISCOVERY
VIOLATIONS BY THE STATE**

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 March 5, 2021, or as soon as counsel may be heard, Tou Thao (“Mr. Thao” hereinafter) will move the Court as follows.

MOTION

On December 11, 2020, Mr. Thao filed his Motion for Sanctions and Hearing Regarding Discovery Violations by the State. On January 11, 2021, this Court issued its Order Regarding Discovery, Expert Witness Deadlines, and Trial Continuance (“Order” hereinafter). In the Order, this Court ordered the State to turn over a duplicate copy of the Bureau of Criminal Apprehension’s (“BCA” hereinafter) investigative file with date stamps. *See* Order at 5.

Since Mr. Thao’s December 11, 2020 filing and this Court’s January 11, 2021 Order, it has come to the attention of defense counsel that the State has now admitted that they have violated

the Court's June 30, 2020 Scheduling Order outlining discovery disclosure deadlines and procedures. Defense counsel incorporates the Affidavit of Eric J. Nelson filed in the case of *State v. Chauvin* (Court File No. 27-CR-20-12646) on January 25, 2021. The Affidavit supports Mr. Thao's assertion through his filing on December 11, 2020 that the State has continuously and intentionally violated discovery rules and this Court's June 30, 2020 Scheduling Order.

On January 15, 2021, lead prosecutor Mr. Matthew Frank, Assistant Attorney General, and Mr. Nelson had a telephone conversation. *See* Affidavit at 2. In this conversation, Mr. Frank revealed that the BCA disk contained a Minneapolis Police Department PowerPoint presentation regarding the use of and policies surrounding Lateral Vascular Neck Restraints and other "choke holds". *Id.* This material had not yet been disclosed to Mr. Nelson, or the defense in *State v. Thao*.

At the January 7, 2021 hearing, Mr. Frank spoke on the topic of potential discovery violations. This Court gave him the benefit of the doubt stating to Mr. Frank that "[y]our response indicates that you in good faith provided everything as you got it, and you didn't engage in any malicious type of hiding the ball so to speak by shuffling the deck or making extra copies to bury the defense in, and I accept that on its face". *See* January 7, 2021 Hearing Transcript at 21. Mr. Keung's attorney, Mr. Plunkett, told this Court that "I don't believe for a moment that we're getting those in the same format that they're being received." *Id.* at 29. Mr. Frank shot back at Mr. Plunkett saying that "[Mr. Plunkett is] making allegations that we are intentionally interfering and impeding their ability to prepare their case through discovery. That's just unfounded and just inappropriate..." *Id.* at 33 – 34. Mr. Frank also told this Court that "... we are working from the same PDFs that the defendants are working from."; and "Mr. Paule's comments about timing, that we would sit on something that's in the hands of an agency we don't have control over until a certain date and then turn it over is ridiculous." *Id.* at 27 and 34, respectively. When Mr. Frank

told this Court that the State was (1) working off the same PDFs as defendants and (2) was not haystacking documents, he was less than candid with the Court.

No less than one week after the hearing – and in the days immediately after this Court ordered the BCA disk to be handed over – Mr. Frank called up Mr. Nelson to inform him that the disk would have MPD training materials that *directly* related to the issue of whether Mr. Chauvin acted within neck restraint policy (which in turn triggers a potential renewal of a reasonable use of force affirmative defense under Minn. Stat. § 609.06 subd. 1). Such MPD training materials are potentially exculpatory and should have been immediately disclosed to defense, scheduling order or not. *Brady v. Maryland*, 373 U.S. 83 (1963).

The BCA disk apparently reveals that Mr. Frank not forthcoming when he claimed the State was working off the same PDFs as defendants. *See* Affidavit.

In light of the State’s intentional mishandling of *Brady*¹ material and other pertinent evidence in the trial of *State v. Thao*, Mr. Thao moves this Court for the following:

1. A hearing on or before March 5, 2021 to discuss the discovery violations and sanctions.
2. An order directing the State to pay attorneys’ fees and costs caused by the delay of and manner in which the discovery was provided.
3. An order correcting this Court’s factual findings on the January 11, 2021 Order finding that the State “did not engage in any intentional violations of discovery rules” and that the State “did not act in bad faith”. *See* Order at 3.
4. An order requiring the State to disclose the BCA disk that was provided in *State v. Chauvin*.

¹ The Defense incorporates the facts of their Motion to Compel Disclosure on August 24, 2020 to reiterate the fact that the State did not disclose the Medical Examiner Report to Defense until after the deadline and after the Defense filed a motion to compel.

5. An in-camera review of the BCA disk to determine the complete extent to which the State intentionally violated this Court's discovery deadlines, their prosecutorial standards, the Minnesota Rules of Professional Responsibility, and the Minnesota Rules of Criminal Procedure.
6. Any further punitive sanctions the Court deems necessary once the total amount of discovery violations comes to light after an in-camera review is complete.

Respectfully submitted,

Dated: This 8th day of February, 2021

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