

STATE OF MINNESOTA

COUNTY OF HENNEPIN

State of Minnesota,

Plaintiff,
vs.

Derek Michael Chauvin,

Tou Thao,

J. Alexander Kueng,

Defendants.

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Case Type: Criminal

**STATE'S RESPONSE TO
DEFENDANTS' MOTIONS
TO COMPEL DISCLOSURE**

Court File No. 27-CR-20-12646

Court File No. 27-CR-20-12949

Court File No. 27-CR-20-12953

TO: The Honorable Peter 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; Thomas Plunkett, U.S. Bank Center, 101 East Fifth Street, Suite 1500, St. Paul, MN 55101.

INTRODUCTION

On August 24, 2020, defendant Tou Thao filed a Motion to Compel Disclosure. Specifically, defendant Thao requested production of the following materials pertaining to the death of George Floyd: (1) the complete Hennepin County Medical Examiner's file; (2) autopsy report(s) of Dr. Michael Baden; (3) autopsy report(s) of Dr. Allecia Wilson; and (4) the entire Armed Forces Medical Examiner's file.

On August 27, 2020, defendant J. Alexander Kueng filed a Motion for Disclosure. Defendant Kueng requested production of the following materials: (1) body worn camera footage of an incident involving George Floyd on May 6, 2019; (2) any files pertaining to activity of George Floyd as an informant for any law enforcement agency; (3) any files

pertaining to gang membership or gang affiliation of George Floyd for the past 5 years; (4) any prosecution file and any reports pertaining to a May 6, 2019 investigation of George Floyd; (5) the complete Hennepin County Medical Examiner's file pertaining to the death of George Floyd; (6) the entire Armed Forces Medical Examiner's file pertaining to the death of George Floyd; (7) active, imbedded links to video content within training materials previously disclosed; (8) a copy of the State's document index for disclosures made; and (9) defendant Derek Chauvin's personnel records, including pre-hire screening and disciplinary complaints.

On August 28, 2020, defendant Derek Chauvin filed a Motion for Disclosure. Defendant Chauvin requested production of the following subset of materials requested by defendant Kueng: (1) body worn camera footage of an incident involving George Floyd on May 6, 2019; (2) any files pertaining to activity of George Floyd as an informant for any law enforcement agency; (3) any files pertaining to gang membership or gang affiliation of George Floyd for the past 5 years; (4) any prosecution file and any reports pertaining to a May 6, 2019 investigation of George Floyd; (5) active, imbedded links to video content within training materials previously disclosed; and (6) a copy of the State's document index for disclosures made.

Thereafter, on August 28, 2020, defendant Thao filed an additional Motion to Compel Discovery, joining his co-defendants' motions for disclosure and requesting the following: (1) defendant Derek Chauvin's complete Minneapolis Police Department disciplinary file; (2) body worn camera footage of an incident involving George Floyd on May 6, 2019; (3) any files pertaining to activity of George Floyd as an informant for any law enforcement agency; (4) any prosecution file pertaining to a May 6, 2019 investigation of George Floyd; (5) active, imbedded links to video content within training materials previously disclosed; and (6) a copy of the State's document index for disclosures made.

The State of Minnesota hereby submits its response to defendants' motions.

ARGUMENT

Minnesota Rule of Criminal Procedure 9.01 sets forth the parameters for the prosecution's discovery disclosures in a felony case. The State addresses each of defendants' requests in turn below, in light of the relevant discovery rules.

I. Relevant Discovery Rules

A. Disclosure Without Court Order Under Rule 9.01, subdivision 1

Defendants rely, in part, on subdivision 1 of Minnesota Rule of Criminal Procedure 9.01, in support of their requests. Subdivision 1 sets forth the requirements for mandatory disclosures by the prosecution without a court order. Rule 9.01, subdivision 1 provides that “[t]he prosecutor must, at the defense's request and before the Rule 11 Omnibus Hearing, allow access at any reasonable time to all matters within the prosecutor's possession or control that relate to the case,” with the exception of certain non-discoverable information. Minn. R. Crim. P. 9.01, subd. 1.

Rule 9.01, subdivision 1a applies the prosecutor's obligations under the rule “to material and information in the possession or control of members of the prosecution staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to the prosecutor's office.” Rule 9.01, subd. 1a(1).

B. Discretionary Disclosure Under Rule 9.01, subdivision 2

Subdivision 2 of Minnesota Rule of Criminal Procedure 9.01 sets forth the circumstances under which a district court may use its discretion to order the State to provide additional discovery. The procurement of “matters possessed by other governmental agencies” outside the

control of the prosecution is governed by Minnesota Rule of Criminal Procedure 9.01, subdivision 2(1), which provides:

On the defendant's motion, the court for good cause shown must require the prosecutor, except as provided by Rule 9.01, subd. 3, to assist the defendant in seeking access to specified matters relating to the case that are within the possession or control of an official or employee of any governmental agency, but which are not within the control of the prosecuting attorney.

The prosecutor must use diligent good faith efforts to cause the official or employee to allow the defense reasonable access to inspect, photograph, copy, or have reasonable tests made.

Minn. R. Crim. P. 9.01, subd. 2(1).

Rule 9.01, subdivision 2(1) makes clear that ordering disclosure from outside governmental agencies is discretionary by the trial court and is subject to several requirements. First, the onus is on the defendant to move for disclosure of materials outside the scope of rule 9.01, subdivision 1 (disclosures to be made by prosecution without order of court). The defendant then bears the burden of showing good cause to require the prosecution to provide materials above and beyond mandatory discovery. Minn. R. Crim. P. 9.01, subd. 2(1). If the defendant makes such a showing, the trial court must order the prosecutor to assist the defendant in seeking access to specified matters, including documents and tangible objects, "relating to the case," in the possession of other governmental agencies. *Id.* The applicable discovery rules require a defendant to show good cause in order for a court to order discretionary disclosures by outside governmental agencies.

For other relevant material, not in the possession of an outside government agency, Rule 9, subdivision 2(3) applies, which provides:

On the defendant's motion, the trial court at any time before trial may, in its discretion, require the prosecutor to disclose to defense counsel and to permit the inspection, reproduction, or testing of any relevant material and information not subject to disclosure without order of court under Rule 9.01, subd. 1, provided,

however, a showing is made that the information may relate to the guilt or innocence of the defendant or negate guilt or reduce the culpability of the defendant as to the offense charged. If the motion is denied, the court upon application of the defendant must inspect and preserve any relevant material and information.

Minn. R. Crim. P. 9.01, subd. 2(3).

With respect to other relevant material, Rule 9.01, subdivision 2(3) requires a defendant to show that the requested information may relate to his guilt or innocence or negate his guilt or reduce his culpability as to the offense charged. Minn. R. Crim. P. 9.01, subd. 2(3). With respect to protected information, the Minnesota Supreme Court has required “some plausible showing that the information sought would be both material and favorable to his defense.” *State v. Underdahl*, 767 N.W.2d 677, 684 (Minn. 2009). The Minnesota Supreme Court has overturned a discovery order where the defense failed to demonstrate “that the materials could be related to the defense or were likely to contain information related to the case.” *State v. Garberg*, No. A09-914, 2010 WL 772622, at *2 (Minn. Ct. App. Mar. 9, 2010) (citing *Underdahl*, 767 N.W.2d at 685).

C. Non-Discoverable Information Under Rule 9.01, subdivision 3

Subdivision 3 of Rule 9.01 identifies material, including work product, that is not subject to disclosure by the prosecution. Rule 9.01, subd. 3 provides, in relevant part:

Subd. 3. Non-Discoverable Information. The following information is not discoverable by the defendant:

(1) Work Product.

(a) Opinions, Theories, or Conclusions. Unless otherwise provided by these rules, legal research, records, correspondence, reports, or memoranda to the extent they contain the opinions, theories, or conclusions of the prosecutor, the prosecutor’s staff or officials, or official agencies participating in the prosecution.

(b) Reports. Except as provided in Rule 9.01, subd. 1(1) to (7), reports, memoranda, or internal documents made by the prosecutor or members of the prosecutor’s staff, or by prosecution agents in connection with the investigation or prosecution of the case against the defendant. . . .

Minn. R. Crim. P. 9.01, subd. 3.

II. Defendants' Requests

A. Hennepin County Medical Examiner's File

Defendants Thao and Kueng have requested the complete Hennepin County Medical Examiner's file in this matter. This request is now moot; the State disclosed the complete file to defendants by mail on August 26, 2020, after receiving the file from the Hennepin County Medical Examiner's Office.

B. Autopsy Reports of Drs. Michael Baden & Allecia Wilson

Defendant Thao has also moved for disclosure of the reports and autopsies performed by Dr. Michael Baden and Dr. Allecia Wilson. Defendant Thao argues that Drs. Baden and Wilson are “[a]gents” in this case because they “performed medical exams and/or autopsies on the body of George Floyd or . . . have knowledge/access to the Medical Examiner File.” (Def. Thao Mot. to Compel Discl. at 4-5.) Defendant Thao therefore seeks disclosure pursuant to Rule 9.01, subdivision 1.

Following George Floyd’s death, counsel for the victim’s family enlisted the services of independent medical examiners Drs. Michael Baden and Allecia Wilson. In a summary to civil counsel, Dr. Baden opined that George Floyd “died of traumatic asphyxia due to the compression of his neck and back during restraint by police” and concluded the manner of death was homicide. (Def. Thao Mot. to Compel Discl., Ex. 2 (Bates #022937).) Dr. Wilson likewise opined, with respect to cause of death, that “[a]sphyxia due to neck and back compression led to a lack of blood flow to the brain.” (*Id.*)

Drs. Baden and Wilson did not participate in, or conduct any, investigation on behalf of the State, nor has the State retained Drs. Baden or Wilson for any services in connection with

this matter. The entirety of the information that the State obtained from counsel for the victim's family via email regarding the findings of Drs. Baden and Wilson has been disclosed to defendants. (*See, e.g. id.* (Bates #022937-38).) At the time the State obtained the information in early July 2020, Drs. Baden and Wilson had not completed final autopsy reports, according to counsel for the Floyd family. (*Id.*)

Autopsy reports by Drs. Baden and Wilson are not "within the prosecutor's possession or control." Minn. R. Crim. P. 9.01, subd. 1. Contrary to defendant Thao's assertion, Drs. Baden and Wilson do not "regularly report" to the Minnesota Attorney General's Office or the Hennepin County Attorney's Office and are not members of the prosecution team; nor have they reported to the prosecutors' offices with reference to this particular case. *See* Minn. R. Crim. P. 9.01, subd. 1a; *State v. Roan*, 532 N.W.2d 563, 571 (Minn. 1995). Accordingly, the State is under no obligation to disclose the reports of Drs. Baden and Wilson.

Nevertheless, and without conceding a legal requirement to do so, the State has contacted counsel for the victim's family in an effort to obtain the requested autopsy reports. While the State has yet to receive any such reports from counsel for the Floyd family, if the State obtains the autopsy reports, it will subsequently disclose them to defendants.

C. Armed Forces Medical Examiner's File

Defendants Thao and Kueng have further requested the complete file of the Armed Forces Medical Examiner. Defendant Thao asserts, as above, that production is required under Rule 9.01, subdivision 1 because Drs. Paul Uribe and Louis Finelli of the Office of the Armed Forces Medical Examiner are "[a]gents" in this case, having "performed medical exams and/or autopsies on the body of George Floyd or who have knowledge/access to the Medical Examiner File." (Def. Thao Mot. to Compel Discl. at 4-5.) Defendant Kueng seeks production under Rule

9.01, subdivision 2(1) & (3), asserting that the material is potentially exculpatory, but concedes that such information is “not within the prosecutor’s control.” (Def. Kueng Mot. for Discl. at 2-3.)

Files of the Armed Forces Medical Examiner’s Office are clearly not “within the prosecutor’s possession or control.” Minn. R. Crim. P. 9.01, subd. 1. The Armed Forces Medical Examiner’s Office does not report to the Minnesota Attorney General’s Office or the Hennepin County Attorney’s Office, and is not a member of the prosecution staff; nor has it reported to the prosecutors’ offices with reference to this particular case. *See* Minn. R. Crim. P. 9.01, subd. 1a. It is not even a state agency. The Office of the Armed Forces Medical Examiner is an agency of the federal military. As such, neither the State nor this Court has the authority to order it to release its records, if any other records exist. *See State v. Roan*, 532 N.W.2d 563, 571 (Minn. 1995).

Again, without conceding a legal requirement to do so, the State has made a request for the Armed Forces Medical Examiner’s file, and has thus exercised “diligent good faith efforts” to acquire a copy in order “to allow the defense reasonable access to inspect” it. Minn. R. Crim. P. 9.01, subd. 2(1). While the State has yet to receive the file, should the federal authorities provide a copy, the State will subsequently disclose it to defendants.

D. May 6, 2019 Incident

Defendants Kueng, Chauvin, and Thao also seek a number of items pertaining to prior conduct of George Floyd, including an incident on May 6, 2019.

1. Body Worn Camera Footage

Defendants Kueng, Chauvin, and Thao have requested disclosure of body worn camera video/audio from the incident on May 6, 2019.

Without conceding that information regarding the May 6, 2019 incident relates to the case or is relevant to guilt or innocence in this case, *see Minn. R. Crim. P. 9.01, subd. 2(3)*, the State has requested the body-worn camera footage from law enforcement and will produce the video, if it exists, to defendants upon receipt.

2. Prosecution File & Reports

Defendants Kueng, Chauvin, and Thao have also requested “[a]ny and all information in the possession of the Hennepin County Attorney or other state or federal prosecuting agency” regarding the May 6, 2019 incident, following the submission of the case to the Hennepin County Attorney’s Office for charging consideration. (*E.g.*, Def. Chauvin Mot. for Discl. at 2.) The Hennepin County Attorney’s Office has indicated it had no record of a referral for prosecution arising from a May 6, 2019 incident prior to discovery in this case. Moreover, any “internal documents made by” the Hennepin County Attorney’s Office pertaining to the prosecution of any case related thereto as well as any documents that “contain the opinions, theories, or conclusions” of the Hennepin County Attorney’s Office constitute protected work product and are not discoverable under Rule 9.01, subd. 3(1). And again, records in possession of other state or federal prosecuting agencies are not within the prosecutor’s possession or control. Those officers are not part of the prosecution team, nor do they regularly report to the prosecutors in this case.

E. Informant Files

Defendants Kueng, Chauvin, and Thao have also moved for “[a]ny and all files pertaining to Mr. Floyd’s cooperation as an informant (CI) for the Minneapolis Police, FBI or any other state or federal law enforcement agency either before or after May 6, 2019.” (E.g., Def. Chauvin Mot. for Discl. at 1.)

Defendants have provided no factual basis on which to believe George Floyd acted as an informant for the Minneapolis Police Department, or any other law enforcement agency. Defendants have failed to establish that such information, even if it exists, would lead to admissible evidence, or relates to guilt or innocence in this case. *See Minn. R. Crim. P. 9.01, subds. 1, 2(1) & 2(3); see also Yang v. State*, No. A10-84, 2010 WL 3632505, at *4 (Minn. Ct. App. Sept. 21, 2010) (“Whether evidence is material” on post-conviction review “requires consideration of both its admissibility and the likelihood that it would have changed the outcome at trial”). Defendants have not pointed to a single fact indicating how status as an informant would be relevant or admissible in the trial involving allegations that these former police officers killed George Floyd. Moreover, any such material would not “negate guilt” or reduce defendants’ culpability in this matter.

Besides, the State has a “common law privilege that allows it to withhold from disclosure the identity of persons who furnish information to law enforcement officers.” *State v. Dexter*, 941 N.W.2d 388, 393 (Minn. 2020). The purpose behind the privilege is “to protect the public interest in effective law enforcement” so that “these persons are encouraged to perform the duty of reporting.” *Id.* When defendants seek to discover the identity of an informant to attack a search warrant, the privilege applies, and they must “establish that such disclosure is necessary to complete an evidentiary attack on the supporting affidavit.” *Id.* In such cases, courts must

balance “the defendant’s right to prepare a defense and the public’s interest in effective law enforcement.” *Id.* While the privilege does not apply to information “that does not tend to reveal the identity of an informant,” identity information is precisely what defendants seek in this case. *Id.* Furthermore, defendants seek information regarding the identity of an informant (purportedly George Floyd) completely unrelated to, and outside the scope of, this case. Here, defendants are not challenging a search warrant in this matter in which an informant provided information. Nor do any allegations in this case come from an informant or relate to an informant. On the contrary, defendants are on a “fishing expedition” with respect to the victim, who died at the hands of defendants. *State v. Hunter*, 349 N.W.2d 865, 866 (Minn. Ct. App. 1984) (“Discovery rules are not meant to be used for ‘fishing expeditions.’”). Defendants have made no showing of how George Floyd’s status as an informant in some other matter, even if true, could possibly be relevant or discoverable here.

Insofar as defendants seek disclosures pertaining to any informant status of George Floyd, to the extent such information exists, defendants’ request should be denied.

F. Gang Affiliation

Additionally, Defendants Kueng and Chauvin have sought “[a]ny and all files documenting Mr. Floyd’s activity as a gang member or gang affiliate within the past 5 years.” (*E.g.*, Def. Chauvin Mot. for Discl. at 1.)

Again, defendants have failed to demonstrate any factual basis for believing such information exists or is relevant and material to this case. They have made no “plausible showing that the information sought would be both material and favorable” to their defense. *State v. Underdahl*, 767 N.W.2d 677, 684 (Minn. 2009).

The victim is not on trial here. Defendants have offered no reason to believe there is such information or any basis upon which to believe such information would be relevant or material to this case. Rather, it appears defendants seek only to smear George Floyd with suggestions of gang affiliation and informant status while they offer no actual evidence of it. To the extent defendants seek any additional disclosures pertaining to purported gang affiliation or informant status of George Floyd, defendants' request should be denied.

G. Training Video Links

Defendants Kueng, Chauvin, and Thao have also requested "disclosure of the training materials previously disclosed with active imbedded links to the video portions of the presentations." (*E.g.* Def. Chauvin Mot. for Discl. at 2.)

The majority of the Minneapolis Police Department training PowerPoint presentations disclosed by the State were previously produced to defendants in a PDF format that allowed the pages to be bates numbered, with video files produced separately. If possible, the State will reproduce the training PowerPoints, with any accompanying video files, in the original format in which they were received by the State.

H. State's Document Index

Defendants Kueng, Chauvin, and Thao have asked for "[a] copy of the State's documents index for all disclosures made to date" as well. (*E.g. id.*)

Any document index or other documents created by the State in connection with the State's review of discovery is an "internal document[] made by the prosecutor or members of the prosecutor's staff" pertaining to the "prosecution of the case" and thus constitutes protected work product. Rule 9.01, subd. 3(1)(b). Such a document is not discoverable pursuant to Rule 9.01, subd. 3(1). Defendants' request for the State's document index should be denied.

I. Defendant Chauvin's Personnel Records

Lastly, defendants Thao and Kueng have moved for “[t]he complete Minneapolis Police Department disciplinary files on Derek Chauvin.” (*E.g.*, Def. Thao Mot. to Compel Discovery at 1.) Defendant Kueng has requested, in particular “pre-hire screening and any subsequent disciplinary complaints. . . .” (Def. Kueng Mot. for Discl. at 2.)

The State has already disclosed to all four defendants the Minneapolis Police Department’s “Internal Affairs Public Summary” for Chauvin. (Bates 23692, disclosed on August 20, 2020.) *See* Minn. Stat. § 13.43, subd. 2(a)(4) (describing “the existence and status of any complaints or charges against the employee, regardless of whether the complaint or charge resulted in a disciplinary action” as public data). According to that summary, only one complaint resulted in disciplinary action, (Complaint IA07-39), and therefore certain records of that complaint may be public. *State v. Renneke*, 563 N.W.2d 335, 337-38 (Minn. Ct. App. 1997); Minn. Stat. § 13.43, subd. 2(a)(5). The State does not oppose the court ordering the release of any public records relating to that Complaint as provided in Minn. Stat. § 13.43, subd. 2a(5). For any other disciplinary records from Chauvin’s personnel file, the moving defendants would have to make a threshold showing of the need for in camera review of those complaint files. *See Renneke*, 563 N.W.2d at 338-39. It does not appear that they have done so.

The State opposes the release of any pre-hire screening and medical records (including any psychological evaluations and reports of injury) in any order for production. *See State v. Hummell*, 483 N.W.2d 68, 72 (Minn. 1992) (denying in camera review because defendant provided “no theories on how the [confidential medical] file could be related to the defense or why the file was reasonably likely to contain information related to the case”). Defendants have

not made any showing of how the medical records and pre-hire screening records relate to this case, are admissible, or would lead to the discovery of admissible evidence in this criminal case.

CONCLUSION

To the extent defendants Thao, Kueng and Chauvin seek non-discoverable information as set forth herein, their motions should be denied. Defendants have not demonstrated that the requested materials contain information that relates to the case as required by Rule 9.01, subdivisions 1 and 2(1), or that such material could “negate guilt” or reduce defendants’ culpability as required by Rule 9.01, subdivision 2(3). Nevertheless, the State will continue to supplement its Rule 9.01 disclosures as it receives additional discovery materials on an ongoing basis and as discussed above.¹ Notwithstanding the State’s willingness to disclose many of the records requested to the extent such records exist, the State does not concede that defendants have made the requisite showings or that they are otherwise entitled to the information sought. The State further preserves any and all objections as to relevance and admissibility with respect to the requested disclosures.

¹ The State notes that it has not yet received any Rule 9.02 disclosures from defendants to date, with the exception of a disclosure filed by defendant Thao on August 28, 2020.

Dated: September 9, 2020

Respectfully submitted,

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