

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,

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

Plaintiff,

vs.

**DEFENDANT KUENG MOTION FOR
DISMISSAL AND SANCTIONS
AGAINST KEITH ELLISON,
MATTHEW FRANK AND NEAL
KATYAL**

J. Alexander Kueng,

Defendant.

**TO: The Honorable Peter Cahill, Judge of Hennepin County District Court;
Matthew Frank, Assistant Attorney General; Josh Larson, Asst. Hennepin
County Attorney.**

BACKGROUND

On December 11, 2020 Co-Defendant Tou Thao, through counsel, filed a Motion for Sanctions and Hearing Regarding Discovery Violations by the State with accompanying affidavits. See Court File No. 27-CR-20-12949 Index 217, 218 and 219. Thao's motion asked for a continuance along with an extension of the discovery deadlines and financial sanctions. Thao's motion outlines misconduct committed by attorneys working for the State in this prosecution. The motion outlines facts which are the first brick in a wall of prosecutorial misconduct. The facts outlined in the motion document the appalling practices regarding disclosure of exculpatory information. Unfortunately the State's misconduct did not cease.

On December 14, 2020 Co-Defendant Derek Chauvin, through counsel, filed Defendant's Notice of Motion and Motion for a Continuance with accompanying affidavit of Counsel. See Court File No. 27-cr-20-12646 Index 218 and 219. Chauvin's motion asked for a modification of discovery deadlines, a copy of the BCA file in this matter, a continuance of the trial date and other relief. The accompanying affidavit of Eric Nelson is a detailed outline of misconduct by the State and accompanying hardships of the Defendants from the State's egregious misconduct. Importantly, the misconduct listed in the affidavit is largely un rebutted. Counsel for Mr. Kueng endorses the same difficulties.

On January 7, 2021 a hearing was held before this Court on all 4 cases which were, at the time, joined for trial. Mr. Katyal and Mr. Frank, attorneys for the State, participated in the hearing. Mr. Katyal's participation was limited to a regurgitation of previously filed arguments supporting the State's request for a continuance due to COVID related concerns. Mr. Frank responded to the defense concerns that the State had engaged in unethical and unprofessional discovery practices. Mr. Keith Ellison did not personally participate in the hearing. This was surprising because in an email to the Hon. Chief Judge Barnette dated December 29, 2020, it was communicated to all that Mr. Ellison would be personally present at a meeting immediately following the hearing. The email is attached as Exhibit A

and will be discussed in connection to Co-defendant Derek Chauvin's filings on January 26, 2021.

On January 26, 2021 Co-Defendant Derek Chauvin, through counsel, filed Defendant's Notice of Motion and Motion to Extend Deadline to serve Final Expert Reports with accompanying affidavit of Counsel. *See* Court File No. 27-cr-20-12646 Index 271 and 272. The Nelson affidavit directly rebuts Mr. Frank's on the record denial of prosecutorial misconduct. The email, Exhibit A, is referenced because it implicates Mr. Ellison personally in the ongoing pattern of prosecutorial misconduct. Mr. Ellison's late decision to absence himself from the hearing suggests he knew about and may have been personally involved in developing the strategy to cheat the Defendants out of their rights to due process. Mr. Ellison distanced himself and did nothing to intervene or correct the course of the State's ill-intentioned ship. The State knew very well that if this Court ordered disclosure of the BCA file they would be caught "red handed," an expression from the 15th century probably referring to people caught with blood on their hands from murder or poaching.

On February 8, 2021 Co-Defendant Tou Thao, through counsel, filed Renewal of Motion for Sanctions and Hearing Regarding Violations by the State. *See* Court file 27-cr-20-12949 at Index 318. Attached to Mr. Thao's motion is the transcript from the January 7-2021 hearing. *See* index 319. Mr. Thao's motion

outlines the factually incorrect statements of Mr. Frank to this Court on January 7, 2021. The transcript from the January 7, 2021 proceeding shows the stark contrast between the truth and the on the record statements from a law enforcement official from the Office of the Attorney General. *See* Court file 27-cr-20-12949 at Index 319. Comparing those statements to the affidavit of Eric Nelson show that the State was not “. . . working from the same PDFs that the defendants are working from.” *See* Court File No. 27-cr-20-12646 Index 272 at 21. It appears the State did in fact “shuffle the deck” and has whirled the well-ordered BCA file into discovery soup.

On February 15, 2021 Co-Defendant Tou Thao, through counsel, filed a Notice of Motion and Motion for Dismissal and to Sanction Keith Ellison, Matthew Frank and Neal Katyal along with 2 supporting exhibits in response to a New York Times article that cited three law enforcement officials as the source of leaked information about the case. *See* Court file 27-cr-20-12949 at Index 336, 337 and 338. The motion and supporting exhibits seek a hearing to take live testimony from the most likely offending attorneys with an eye toward dismissal and sanctions against the State for leaking prejudicial information regarding plea negotiations.

DISCUSSION

Mr. Kueng adopts and incorporates the above motions and supporting information/exhibits by reference. Adding to the existing record exhibit A, Mr. Ellison's, RSVP to the meeting with the Chief Judge.

It brings the defense no pleasure to bring this egregious behavior on the part of Mr. Ellison, his office and the special prosecutors to the attention of the Court. This conduct is a troubling departure from the Rules of Criminal Procedure and the Minnesota Rules of Professional Conduct. Minnesota Rule of Professional Conduct 3.8 requires prosecutors to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. Further, Rule 3.8 requires Mr. Ellison to exercise reasonable care to prevent employees or other persons assisting or associated with the prosecutor in a criminal case and over whom the prosecutor has direct control from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6. Under Rule 3.6, “[a] lawyer who is participating or has participated in the investigation or litigation of a criminal matter shall not make an extrajudicial statement about the matter that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially

prejudicing a jury trial in a pending criminal matter.” Mr. Ellison, his attorneys and his special prosecutors are implicated in violations of both of these rules.

The history of this case shows purposeful actions to thwart justice for the officers. One discovery violation is an honest mistake, this wide river of flagrant discovery violations is a purposeful act designed to prevent Mr. Kueng and the Co-Defendant’s from receiving a fair trial. Leaking prejudicial information mere days before trial is loathsome and underhanded. The State’s conduct has been pervasive, malicious and an affront to the dignity of the Office of the Attorney General. The conduct outlined herein shows a complete disrespect for this Court and the fundamental notions of due process. Mr. Kueng seeks severe and swift sanctions.

CONCLUSION

Based on the additional information provided above and the filings in court files 27-CR-20-12949 and 27-CR-20-12646 Mr. Kueng asks this court to provide to:

1. Issue a finding that there is probable cause to believe that Keith Ellison, Matthew Frank and Neal Katyal have committed prosecutorial misconduct;
2. Direct a live bodied hearing to take testimony from the attorney’s referenced in 1 above as well as all “special prosecutors” and staff working on this matter to determine the depth of the State’s breach of their duties under the Minnesota Rules of Professional Responsibility;
3. Issue a finding that there is clear and convincing evidence Keith Ellison, Attorney General for State of Minnesota has knowing and willfully violated Minn. R. Prof. C. 3.6 and 3.8;

4. Refer Mr. Ellison and Mr. Frank to the Minnesota Lawyers Professional Responsibility Board for further investigation;
5. Issue an order rescinding the privileges of all lawyers who have been brought into this matter as *Pro Hoc Vice* counsel.
6. Issue an order directing the Office of the Attorney General to compensate counsel for all Defendants and staff for the time spent sifting through and organizing discovery in this matter in the past and to pay the future costs of comparing the existing discovery to the BCA file.
7. An order requiring the Bureau of Criminal Apprehension, through the Attorney General's Office, to produce an exact duplicate copy of the BCA's investigative disclosures made to the Attorney General containing date stamps to Mr. Kueng.
8. Issue an order dismissing the criminal Charges against Mr. Kueng with prejudice in the furtherance of justice pursuant to Minn. Stat. § 631.21

Respectfully submitted,

Date: February 16, 2021

/s/ **Thomas C. Plunkett**

Thomas C. Plunkett
Attorney No. 260162
Attorneys for Defendant
101 East Fifth Street
Suite 1500
St. Paul, MN 55101
Phone: (651) 222-4357