

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF WASHINGTON

TENTH JUDICIAL DISTRICT

D. C. File No. 82-CR-19-2887

C. A. File No. 0410656

State of Minnesota,

Plaintiff,

v.

**STATE'S MOTION FOR *IN CAMERA*
INSPECTION OF DOCUMENTS CLAIMED
TO BE WORK PRODUCT**

Brian Krook,

Defendant.

TO: The above-named defendant and his attorneys, Kevin J. Short, 150 South Fifth Street #2860, Minneapolis, MN 55402 and Paul Engh, Engh Law Office, 650 South Sixth Ave., Suite 260, Minneapolis, MN 55402:

The State understands that the defense intends to move to dismiss the indictment on the grounds that the State failed to submit exculpatory evidence to the Grand Jury—namely the opinion of Steven Frazer, who is currently the Police Chief for the City of Prior Lake, Minnesota. The State did not retain Chief Frazer as an expert witness but merely consulted him to obtain the names of other people who might be able to act as an expert witness. But the defense contends that during the course of that interaction, Chief Frazer provided an opinion to Richard Dusterhoft, the Criminal Division Director for the Ramsey County Attorney's Office—that the shooting by the defendant was justified—and that the indictment should be dismissed because of the State's failure to provide that opinion to the Grand Jury. Although there are several reasons why that argument is flawed, the purpose of this motion is to obtain the non-privileged communications between Chief Frazer and defense counsel.

After the State's trial attorneys learned that there had been some interaction between Chief Frazer and Mr. Dusterhoft, Chief Frazer was invited to meet with the State's attorneys so that they could hear what Chief Frazer had to say about the nature of that interaction. Although Chief Frazer agreed to meet, and a date and time were established (September 19 at 10:00 a.m.), the day before the meeting he sent a one-sentence email to the State's attorneys which said: "I will not be attending our meeting."

To obtain information about what Chief Frazer believes happened between him and Mr. Dusterhoft, the State sent a subpoena to Chief Frazer that calls for him to appear at the hearing scheduled on December 9, 2019 at 1:30 p.m. and to produce certain documents, by November 18, 2019, listed in Exhibit A attached to the subpoena. (The subpoena is attached to this memorandum). This list includes, among other things, all documents reflecting communications between Chief Frazer and defense counsel.

On November 15, 2019, Chief Frazer responded to the subpoena for documents by sending an email with an attached document that stated that he had no documents responsive to the State's request other than his CV and the communications he had with defense counsel. (Chief Frazer's response is also attached). He also stated that on the advice of defense counsel he was not disclosing his communications with them because of a claim of "work product."

Crim. R. Pro. 9.02, subd. 3 provides that documents "to the extent they contain the opinions, theories, or conclusions of the defendant or defense counsel or persons participating in the defense, are not subject to disclosure." It is certainly possible that some of the communications between Chief Frazer and defense counsel disclose opinions, theories, or conclusions of the defendant or defense counsel, which would be appropriate to redact. But it is also likely that the

communications included information from Chief Frazer about what happened during his interaction with Mr. Dusterhoft.

Early in the week of September 18, 2019, the State's attorney spoke with defense counsel and suggested that it was unlikely that all the communications between Chief Frazer and defense counsel reflected only trial strategies, legal theories, or mental impressions of defense counsel. The defense attorney stated that he would review those communications further, but to date, the State has not received any response.

Accordingly, the State requests that Chief Frazer be ordered to provide the Court, for *in camera* review, with the documents responsive to item #2 in Exhibit A to the subpoena. This request asks for "All documents that reflect communication between [Chief Frazer] and Kevin Short, or any other person acting on behalf of Brian Krook, regarding the investigation or the prosecution relating to the death of Benjamin Evans. This includes email, notes of conversations, letters, memos and any other writing that reflects communication." The defense should also be ordered to identify those portions of the documents claimed to be protected by the work product privilege. *See City Pages v. State*, 655 N.W.2d 839 (Minn. App. 2003) (approving of the *in camera* review of documents claimed to be privileged, and requiring the party asserting the privilege to identify for the district court those portions of the documents claimed to be protected).

JOHN J. CHOI
RAMSEY COUNTY ATTORNEY

/s/ Andrew R.K. Johnson

Dated: November 25, 2019

I certify that on the above date
I sent a copy to defense counsel by:

- Courier (includes interoffice mail)
- Fax
- U.S. Mail
- Personal Service
- E-service

 /s/ Dawn Anderson

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