

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

PLAINTIFF,

V.

TOU THAO,

DEFENDANT.

**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 as soon as counsel may be heard, Tou Thao (“Mr. Thao” herein) will move the Court for sanctions due to the State’s continued discovery violations. Mr. Thao specifically will move the Court to issue the following:

1. A continuance of the trial date from March 8, 2021 to July 5, 2021;
2. An extension of the defense date for initial disclosures of expert witnesses; and
3. An order directing the State to pay attorneys fees and costs caused by the delay of and manner in which the discovery was provided.

MOTION

Mr. Thao respectfully moves the Court for sanctions due to the State's continued discovery violations. The State has repeatedly disclosed discovery months after the Court ordered them to do so and has caused harm to the Defense's preparation for trial, which in turn is endangering Mr. Thao's federal and state Constitutional guaranteed rights to a fair trial.

On June 30, 2020, the Court issued a Scheduling Order which ordered all discovery required by Minn. R. Crim. P. 9.01, 9.02, and 11.04 be disclosed by August 14, 2020. Despite this clear order, the State has intentionally persisted in a practice of providing vast amounts of discovery well beyond the Order's due date. This includes the State delaying disclosure of *Brady* material to Defendant.¹ The State's disclosure of discovery past the August 14, 2020 deadline would not be so egregious if the State disclosed evidence within 24 hours of their possession as the Order directs.² As discussed below, the State has held onto exculpatory evidence they had knowledge about for months without disclosing it to the Defense. To date, the State has untimely disclosed evidence eight times amounting to over 15,000 pages of evidence.³

Importantly, the State withheld potentially exculpatory evidence for months. The State had knowledge from at least August 7, 2020 of an interview of Dr. Andrew Baker, the Medical Examiner for Hennepin County that took place on July 8, 2020. The State withheld this information until October 28, 2020, when it disclosed a report created by the FBI documenting the interview

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.

² The Court's June 30, 2020 Scheduling Order states in ¶2(B) that "Any discovery received by a party after the discovery deadline shall be disclosed within 24 hours to the opposing party."

³ Since their August 14, 2020 deadline, the State has untimely disclosed discovery on August 20, 2020 (Bates pages 22945-23554, 23612-23692, 25233-25799, 25800- 26032, 26087-26128, 26168-28169, 5701A-5701D); August 26, 2020 (Bates pages 28170-28365); September 2, 2020 (Bates pages 28366-33314); September 16, 2020 (Bates pages 23927, 24365, 25233, 33315-33843, 33854-36272, 36275-36343); September 25, 2020 (Bates pages 3745-3747, 3132-3137, 14531-15017, 33844-33853, 36273-36274, 36344-36632); October 14, 2020 (Bates pages 36633-38450, 4549-4550); October 28, 2020 (Bates pages 38451-38845); and November 24, 2020 (Bates pages 38846-39912).

of Dr. Baker by the Minnesota BCA and the FBI. See Exhibit 1 (FBI 302 Report Dated July 9, 2020). In the interview Dr. Baker opined that George Floyd's cause of death did not include police restraint while he was on the ground.

The discovery regarding the Dr. Baker interview turned over on October 28, 2020 shows that:

- The BCA and FBI interviewed Dr. Baker on July 8, 2020 (see Exhibit 1 and Exhibit 2);
- The interview was not recorded (see Exhibit 2);
- The State exchanged correspondence with the FBI to “get the substance” of the interview “right” almost a month after the interview (see Exhibit 2 at p. 1); and
- Dr. Baker “defined the mechanism of death as Floyd’s heart and lungs stopping due to the combined effects of his health problems as well as the exertion and restraint involved in Floyd’s interaction with police **prior to being on the ground.**” (Exhibit 1 at p. 2-3)(emphasis added).

Moreover, the interview was also the subject of follow-up correspondence from the State to clarify Dr. Baker's opinion regarding the cause of death, detailed in an email from the Hennepin County Attorney's Office dated August 7, 2020 (see Exhibit 2). The State cannot argue that because only the Hennepin County Attorney's Office had such information, they were unaware of it as the Hennepin County Attorney's Office and the Office of the Minnesota Attorney General have been jointly prosecuting this case from the outset. Together, the exhibits clearly demonstrate that the State had knowledge of this interview and its importance, yet failed to timely and properly fully disclose the materials to Mr. Thao. In sum, the State knowingly withheld evidence that their

medical examiner opined that the police restraint of George Floyd on the ground did not cause his death.

Although the State knew of this information dating back to August 7, 2020, the State did not timely disclose it before the Omnibus Hearing on September 11, 2020. Not only did this disclosure violate the Court's Order, but it appears to have been done in a manner designed to handicap the Defendant's Motion to Dismiss for Lack of Probable Cause. If Mr. Thao had Dr. Baker's opinion prior to the Omnibus Hearing he would have been able to make a more persuasive argument for dismissal.

The State has failed to abide by its discovery obligations by failing to timely disclose pertinent and exculpatory evidence months after they were aware of it. This has adversely affected the Defense's ability to prepare for trial. The Defense has been unfairly disadvantaged in its ability to prepare for trial – specifically with regards to its expert witnesses. This negatively impacts the Defense's right to adequately prepare for trial and thus endangers Mr. Thao's federal and state Constitutional guaranteed rights to a fair trial.

Given the State's blatant disregard of its discovery and *Brady* obligations, Defendant respectfully requests that the Court impose the following sanctions of the State:

1. A continuance of the trial date from March 8, 2021 to July 5, 2021 (representing the four months the State has disregarded this Court's discovery deadline);
2. An extension of the defense date for initial disclosures of expert witnesses; and
3. An order directing the State to pay attorneys fees and costs caused by the delay of and manner in which the discovery was provided.

Respectfully submitted,

Dated: This 11th day of December 2020

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