

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Case Type: Criminal

State of Minnesota,

Plaintiff,

vs.

J. Alexander Kueng,

Thomas Kiernan Lane,

Tou Thao,

Defendants.

**STATE'S MOTION TO AMEND
SCHEDULING ORDER ON EXPERT
DISCLOSURES**

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

Court File No.: 27-CR-20-12951

Court File No.: 27-CR-20-12949

TO: The Honorable Peter A. Cahill, Judge of District Court, and counsel for Defendants, Earl Gray, 1st Bank Building, 332 Minnesota Street, Suite W1610, St. Paul, MN 55101; Thomas Plunkett, U.S. Bank Center, 101 East Fifth Street, Suite 1500, St. Paul, MN 55101; Robert Paule, 920 Second Avenue South, Suite 975, Minneapolis, MN 55402.

MOTION

The State moves this Court to amend its June 8, 2021 scheduling order as it pertains to expert disclosures to impose a two-step expert discovery process, with one joint deadline for the State and Defendants' supplemental initial expert disclosures, followed by a second joint deadline for the parties' supplemental full expert disclosures. Separating the initial and full disclosure deadlines would ensure that the parties' full expert reports could address any relevant issues on which the other side's experts might testify, while still permitting adequate time to prepare for trial. The State also moves this Court to reiterate its prior order that the parties not file their expert disclosures with the Court on the public docket.

STATEMENT OF FACTS

In August 2020, the State moved for a scheduling order setting two distinct deadlines for the parties' expert disclosures. First, the State requested this Court set a date for the parties' initial

expert disclosures, consisting of the names, *curricula vitae*, and general subject matter on which the experts were expected to testify. Notice of Motion and Motion for Expert Disclosure Deadlines 2 (Aug. 28, 2020). Second, the State requested this Court set a date for the parties' full expert disclosures, including their reports and written summaries of their testimony. *Id.* Because the Rules of Criminal Procedure contemplate contemporaneous discovery obligations, the State requested the same deadlines for all parties. *See id.*

In October 2020, this Court adopted the State's proposed scheduling order in large part. The Court ordered the State to provide its initial expert disclosures on December 1 and Defendants to provide their initial expert disclosures on December 15. Order re: Notice of Defenses and Expert Witness Disclosure Deadlines 1 (Oct. 8, 2020). The Court established January 19 as the deadline for both parties' full expert disclosures. *Id.*

The State provided its initial expert disclosures on December 1. But just days before their initial expert disclosure deadline, Defendants Chauvin and Thao moved for an extension. Defendant's Notice of Motion and Motion for Continuance, *State v. Chauvin* (Dec. 14, 2020); Motion for Sanctions and Hearing Regarding Discovery Violations by the State, *State v. Thao* (Dec. 11, 2020). Ultimately, this Court set the following expert disclosure deadlines: December 1 for the State's initial disclosures; January 15 for the Defendants' initial disclosures; February 1 for the State's full disclosures; and February 22 for the Defendants' full disclosures. *See* Expert Witness Disclosure Deadlines and Hearing on Defendants' Motions for Trial Continuance 1 (Dec. 17, 2020); Order Regarding Discovery, Expert Witness Deadlines, and Trial Continuance 4 (Jan. 11, 2021); Amended Order Regarding Defense Expert Report Disclosure Deadline 1 (Feb. 4, 2021). On the State's motion, this Court also prohibited the parties from filing their expert

disclosures with the Court on the public docket. Amended Order Regarding Defense Expert Report Disclosure Deadline 1 (Feb. 4, 2021).

On June 8, 2021, following the trial for Defendant Chauvin, this Court ordered that, for any additional experts not already disclosed, the parties shall provide both their initial expert disclosures and their full expert disclosures on the same date: December 15, 2021. Scheduling Order 2 (June 8, 2021) (“June 8 Scheduling Order”). The June 8 Scheduling Order also provides that motions *in limine* are due February 4, 2022, with supporting memoranda due February 11, and responsive motions due February 25. *Id.* at 1. Trial is set to begin on March 7. *Id.*

ARGUMENT

The State respectfully requests that this Court modify its June 8 Scheduling Order and set December 15, 2021 as the deadline for the parties’ contemporaneous initial supplemental expert disclosures and January 18, 2022 as the deadline for the parties’ contemporaneous full supplemental expert disclosures. The State also requests that the Court reiterate its prior order that the parties not file expert disclosures on the public docket.

I. This Court Should Amend Its June 8 Scheduling Order To Set One Deadline For All Parties’ Initial Supplemental Expert Disclosures, And A Later Deadline For All Parties’ Full Supplemental Expert Disclosures.

This Court should amend the June 8 Scheduling Order to create a two-part supplemental expert disclosure process, with December 15, 2021 as the deadline for all parties’ supplemental initial disclosures of experts’ names, *curricula vitae*, and the general subject matter of their anticipated testimony, and January 18, 2022 as the deadline for all parties’ supplemental full expert disclosures, including each expert’s reports, findings, and a complete written summary of the subject matter of their testimony.

A two-part disclosure process is likely to be particularly important in this case. As the *Chauvin* trial showed, these proceedings will likely include expert testimony on various topics

involving medical causation and the use of force. To adequately prepare, each party requires sufficient notice of the general topics to be presented by the other parties' experts so that they may obtain complete expert reports on those subjects.

Unlike in *Chauvin*, however, this trial involves three different Defendants—none of whom participated in *Chauvin*, and each of whom is represented by different counsel and entitled to retain and present his own experts. Defendants Kueng, Lane, and Thao may not retain the same experts as Defendant Chauvin did, and the experts they do retain might not present the same theories as in *Chauvin*. In fact, at the September 2 hearing, Defendants informed the Court that they will not be calling their disclosed medical experts; as a result, the State anticipates that Defendants will likely name supplemental experts on December 15. The State's experts cannot fairly predict who Defendants will choose as their experts. And the State's experts cannot possibly address as-yet unknown (and potentially new) theories on as-yet unknown (and potentially new) topics that will be addressed by as-yet unknown (and potentially new) Defense experts. This Court should accordingly modify the expert disclosure deadlines to follow the two-step process it initially implemented in *Chauvin*.

As this Court recognized in its June 8 Scheduling Order, these deadlines should be identical for the State and Defendants. Simultaneous deadlines best balance the rights and obligations of the parties with respect to expert witnesses with the need to allow the parties a reasonable opportunity to prepare for trial. Indeed, the Minnesota Rules of Criminal Procedure clearly contemplate contemporaneous discovery. *See* Minn. R. Crim P. 9.01, subd. 1 (setting omnibus hearing as target date for prosecution's discovery disclosures); Minn. R. Crim P. 9.02, subd. 1 (same, for defense); Minn. R. Crim P. 9.03, subd. 2 (imposing continuing obligation on both sides to disclose matters promptly).

Setting different disclosure deadlines for the State and the Defense would also prejudice the State's ability to prepare for trial. Defendants have had eight months to analyze the State's existing expert testimony and reports, and to prepare responsive motions and expert testimony accordingly. But based on Defendants' own representations, the State anticipates that they will likely retain new medical expert witnesses for this trial, meaning the State will have far less time to review and analyze Defendants' expert disclosures in preparation for trial. A mid-January deadline for the State's supplemental expert disclosures and a late-January or early-February deadline for Defendants' expert disclosures, as in *Chauvin*, would further compound Defendants' time advantage. By contrast, a simultaneous mid-January deadline for all parties' full expert disclosures ensures that the State has adequate time to review the Defendant's expert reports in advance of both the March 7 trial and the February 4 motions *in limine* deadline.

For these reasons, the State respectfully requests that this Court modify its June 8 Scheduling Order and set the following deadlines for supplemental expert disclosures:

- December 15, 2021—Initial Supplemental Expert Disclosures: Deadline for prosecution and defense to provide initial information about any experts not already disclosed, including the experts' names, *curricula vitae*, and the general subject matter of their anticipated testimony;
- January 18, 2022—Full Supplemental Expert Disclosures: Deadline for prosecution and defense to provide full information for any experts not already disclosed, including the experts' reports and findings, and complete written summaries of the subject matter of each expert's testimony. Disclosures must include all findings, opinions, and conclusions to which they are expected to testify, the basis for the findings, opinions and conclusions, and each expert's qualifications if not already evident from the *curriculum vitae*.

II. This Court Should Reiterate Its Prior Order That Expert Disclosures Not Be Filed In MN-CIS.

This Court should also reiterate its order stating that the parties are not to file their expert disclosures with the Court on the public docket. The Minnesota Rules of Criminal Procedure prohibit filing discovery with the Court, unless directed otherwise. *See* Minn. R. Crim. P. 9.03, subd. 9. Despite this, Defendants previously filed their initial expert disclosures on the public docket. *See* Defendant's Initial Expert Disclosure, *State v. Kueng* (Jan. 14, 2021); Expert Witness Notice, *State v. Lane* (Jan. 14, 2021); Defendant's Initial Expert Disclosure, *State v. Thao* (Jan. 15, 2021). This Court accordingly granted the State's motion last January to order Defendants to not file their expert reports with the Court. *See* State's Motion to Prohibit Defendants from Filing Expert Reports (Jan. 29, 2021); Amended Order Regarding Defense Expert Report Disclosure Deadline (Feb. 4, 2021). The Court should take the same step now, and reiterate that all expert-related disclosures be made directly to counsel, and not filed in MN-CIS.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court amend its June 8 Scheduling Order and set December 15, 2021 as the deadline for all parties' supplemental initial expert disclosures, and January 18, 2022 as the deadline for all parties' supplemental full expert disclosures. This Court should also reiterate its prior order that expert disclosures not be filed in MN-CIS.

Dated: October 6, 2021

Respectfully submitted,

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