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State of Minnesota
5/12/2021 12:30 PM

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA

V.

TOU THAO,

DEFENDANT.

MOTION FOR SANCTIONS FOR PROSECUTORIAL MISCONDUCT STEMMING FROM WITNESS COERCION

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 AND MOTION

Please take notice, that at the next available hearing, Tou Thao ("Mr. Thao" herein) will move the Court for a factual finding that the testimony of Dr. Baker was directly and indirectly coerced by the State and its agents, and for any and all appropriate sanctions resulting from the ratification of said coercion by the State.

Filed in District Court
State of Minnesota
5/12/2021 12:30 PM

Factual Background

1. Dr. Andrew Baker, the Hennepin County Medical Examiner, conducted an autopsy of George Floyd on May 26, 2020. *See* Complaint in *State v. Chauvin* (27-CR-20-12646).
2. On Tuesday May 26, 2020, Dr. Baker met with prosecuting attorneys to explain his findings from the autopsy. *See* Exhibit 6. Dr. Baker conveyed that "[t]he autopsy revealed no physical evidence suggesting that Mr. Floyd died of asphyxiation. Mr. Floyd did not exhibit signs of petechiae, damage to his airways or thyroid, brain bleeding, bone injuries, or internal bruising". *Id.*
3. On Friday May 29, 2020, the Complaint stated that the full report of the ME was pending, but that the preliminary findings "revealed no physical findings that support a diagnosis of traumatic asphyxia or strangulation". *See* Complaint in *State v. Chauvin* (27-CR-20-12646).
4. At some point prior to June 1, 2020, Dr. Roger Mitchell – former Medical Examiner of Washington D.C. – read Dr. Baker's preliminary findings. *See* Exhibit 1.
5. Dr. Mitchell spoke with Dr. Baker before Dr. Baker finalized his findings on June 1, 2020. *Id.* During the conversation between Dr. Mitchell and Dr. Baker, the following transpired:
    a. Dr. Mitchell "called Baker and said first of all Baker should fire his public information officer". *Id.*
    b. "Then Mitchell asked [Baker] what happened, because Mitchell didn't think it sounded like Baker's words." *Id.*
    c. "Baker said that he didn't think the neck compression played a part…" *Id.*

Filed in District Court
State of Minnesota
5/12/2021 12:30 PM

6. Over the weekend, Dr. Mitchell thought about Dr. Baker more. *Id.* After the phone conversation between Dr. Mitchell and Dr. Baker, Dr. Mitchell decided he was going to release an op-ed critical of Dr. Baker's findings in the Washington Post. *Id.* Dr. Mitchell first called Dr. Baker to let him know. *Id.* The following transpired:
    a. Dr. Mitchell called Dr. "Baker first to let him know that he was going to be critical of Baker's findings". *Id.* "**In this conversation, Mitchell said, you don't want to be the medical examiner who tells everyone they didn't see what they saw. You don't want to be the smartest person in the room and be wrong. Said there was a way to articulate the cause and manner of death that ensures you are telling the truth about what you are observing and via all of the investigation. Mitchell said neck compression has to be in the diagnosis."** *Id.*
7. Following the two conversations, on Monday June 1, 2020, the Hennepin County Medical Examiner issued a Press Release Report containing the final autopsy findings. *See* Exhibit 2.
    a. The final autopsy findings included neck compression. *Id.* This was contrary to Dr. Baker's conclusion before speaking with Dr. Mitchell twice.
8. On November 5, 2020 the State met with Dr. Mitchell. *See* Exhibit 1.
    a. The following prosecutors were present: Lola Velazquez-Aguilu, Joshua Larson, Matthew Frank, Erin Eldridge, and Corey Gorden. *Id.* Paralegal Dionne Dodd was also present. *Id.*
    b. If this interview was recorded, the audio has not yet been disclosed to the Defense.

Filed in District Court
State of Minnesota
5/12/2021 12:30 PM

c. Dr. Mitchell told the State that a friend of his had posted the op-ed on Facebook. *Id.* The State memorialized that Dr. Mitchell was going to send them the op-ed. *Id.*

i. The Defense has yet to receive any copy of this op-ed.

9. The November 5, 2020 memorandum was not disclosed until February 3, 2021 to the Defense. *See Supplemental Prosecution Disclosure Pursuant to Rule 9.01, Subd. 1* filed February 3, 2021.

10. During Dr. Baker's testimony in the case of *State v. Chauvin,* Dr. Baker testified to the following:

a. That he conveyed to the State on May 26, 2020 in a meeting that the autopsy of Mr. Floyd showed no anatomical evidence of asphyxiation.[1]

b. That he previous testified under oath in other proceedings regarding the death of Mr. Floyd. *See* Sealed Exhibit 3 and Sealed Exhibit 4 (noting that relevant portions of the transcript have been marked for the Court).

11. During the *State v. Chauvin* trial Dr. Fowler – the defense's chief medical expert – testified that in his opinion the death was undetermined. *See generally State v. Chauvin.*

12. Eight days after the testimony of Dr. Fowler in the *State v. Chauvin* trial, Dr. Mitchell wrote an open letter to (1) Brian Frosh, the Attorney General for the State of Maryland, (2) Allison W. Taylor, the Director of the Department of Health for the State of Maryland, (3) Merrick Garland, United States Attorney General, and (4) Rochelle

[1] The official transcript of *State v. Chauvin* trial is not yet available to the Defense. In lieu, the Defense cites to the video feed of Dr. Baker's testimony at Video of testimony. https://www.youtube.com/watch?v=oNx1UtsctVo&t=22752s (relevant testimony is from 6:05:00 to 6:19:12).

Filed in District Court
State of Minnesota
5/12/2021 12:30 PM

Walensky, Director of the CDC. *See* Exhibit 5. The letter was highly inflammatory of Dr. Fowler's medical expertise and his professional opinion. *Id.*

a. The letter called for "immediate investigation into the practices of the physician as well as the practice of the Maryland State Office of the Chief Medical Examiner (OCME) while under his leadership". *Id.*

b. The letter also stated that an opinion that Mr. Floyd's death was undetermined "is outside the standard practice and conventions…" and "[t]his stated opinion raises significant concerns for his previous practice and management". *Id.*

c. The letter demanded, among other things, that Dr. Fowler's medical license be investigated stemming from his testimony.

13. Less than 24 hours after receiving the letter, the Maryland Attorney General's Office announced that there should be a review of all in custody death reports produced by the Office of the Chief Medical Examiner during Dr. Fowler's tenue.[2]

14. There is no discovery disclosed condoning Dr. Mitchell's intimidation and coercion. This includes no documentation that the State reported Dr. Mitchell to the pertinent medical board(s) for his behavior and potential criminal activity.

Argument

The State – specifically prosecutors Lola Velazquez-Aguilu, Joshua Larson, Matthew Frank, Erin Eldridge, and Corey Gorden – knew that a potential expert witness had coerced the State's main expert witness/the only expert to perform the physical autopsy in the case of *State v.*

[2] Phillip Jackson and Justin Fenton, *In-custody death reports under former Maryland medical examiner to be reviewed after he testified Chauvin did not kill George Floyd,* The Baltimore Sun (April 23, 2021), https://www.baltimoresun.com/news/crime/bs-md-ag-office-review-20210423-l2oamj3ixnhwznd4545f7pjcau-story.html .

Filed in District Court
State of Minnesota
5/12/2021 12:30 PM

Thao. The State did nothing in response to this coercion. Instead, the State knowingly allowed Dr. Baker to take the stand in *State v. Chauvin* and testified to coerced statements.

Under Minn. Stat. § 609.27 subd. 1(3) Dr. Mitchell's conduct meets the elements to be found guilty of committing the crime of coercion. Dr. Mitchell orally made the threat to unlawfully injure Dr. Baker's trade unless Dr. Baker changed his autopsy findings. Dr. Mitchell told Dr. Baker to include neck compression in the final findings and warned Dr. Baker he was going to publish a damaging op-ed in the Washington Post. After Dr. Baker changed his findings, Dr. Mitchell did not publish the op-ed. Moreover, Dr. Mitchell unlawfully injured Dr. Fowler's trade by penning an open letter which resulted in an investigation into every death report in Maryland during Dr. Fowler's tenure.

Dr. Mitchell has set the stage that he will threaten the trade and professional reputation of any physician who suggests that Mr. Floyd's death could be labeled as "undetermined". *See* Exhibit 5 (stating that an opinion that Mr. Floyd's death was undetermined "is outside the standard practice and conventions…" and "[t]his stated opinion raises significant concerns for his previous practice and management".). Dr. Mitchell also penned that "If forensic pathologists can offer such baseless opinions without penalty, then the entire criminal justice system is at risk". *Id.* Dr. Mitchell has essentially stated that any medical expert who wants to testify that Mr. Floyd's death could be undetermined should, and will, face penalties by him. Dr. Mitchell's accusations and spurring of legal fallacies creates a chilling effect for Mr. Thao and violates his due process rights in that it has become extraordinarily difficult to find medical experts who are willing to state that Mr. Floyd's death was undetermined in fear of their professional reputation and licensure.

The State has yet to disclose relevant information it has regarding Dr. Mitchell's actions. Missing records include, but are not limited to, Dr. Mitchell's op-ed, communication on how and

Filed in District Court
State of Minnesota
5/12/2021 12:30 PM

when the State connected with Dr. Mitchell, records on when and why the State determined they would no longer use Dr. Mitchell as an expert opinion, and any audio recordings of conversations between Dr. Mitchell and prosecutors. The State is required to disclose these materials to the Defense under this Court's discovery orders. Disclosing such materials would determine whether Dr. Mitchell was a state-actor/agent when he threatened Dr. Baker and/or Dr. Fowler. This material would also determine whether the State violated Mr. Thao's due process rights under *State v. Beecroft,* 813 N.W.2d 814, 839-841 (Minn. 2012)(Finding that county attorney engaged in substantial interference arising to error when they emailed a medical examiner for the defense, stated that were disturbed by her potential testimony and would be withdrawing their support of her, and thus limited the defense's ability to call now-reluctant witnesses to testify).

The State violated this Court's discovery orders and the Minn. R. Prof. Resp. 3.8 (d) when it failed to timely disclose the November 5, 2020 memorandum and any related (to-date) undisclosed materials because they may have contained evidence of witness coercion of the primary medical experts for the State and the Defense. These materials negate the guilt of Mr. Thao because they show that the only Medical Examiner who performed Mr. Floyd's autopsy and determined his cause of death was coerced into changing his findings.

Prosecutors have the duty as ministers of justice to see that justice is done, rather than merely obtain a conviction. *See generally* Minn. R. Prof. Resp. 3.8 cmt 1. The Minnesota Rules of Professional Conduct make supervising attorneys – such as Mr. Keith Ellison, Mr. Matthew Frank, and Mr. Neal Katyal – responsible for the actions of other lawyers and also of nonlawyers they employ, retain, or associate with. *See* Minn. R. Prof. Resp. 5.3. This applies to both nonlawyers within a law firm (or prosecuting office) and those outside of the firm. *See* Minn. R. Prof. Resp. 5.3 cmt.

Filed in District Court
State of Minnesota
5/12/2021 12:30 PM

A lawyer is responsible for another lawyer's violation of the rules if the lawyer has knowledge of the specific conduct and ratifies it. *See* Minn. R. Prof. Resp. 5.1(c)(1). Supervising attorneys are responsible for the conduct of nonlawyers if they either order or ratify the conduct, or if they have knowledge "of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action". *See* Minn. R. Prof. Resp. 5.3(c)(2). Since Dr. Mitchell told the State about his coercion, the State has taken no public action to mitigate the violations of those within their supervision and control.

In response to the State's knowledge and ratification of Dr. Mitchell's coercion of Dr. Baker, the Defense moves the Court for:

1. An order dismissing the charges against Mr. Thao as the sole medical expert who performed the autopsy's findings were unlawfully coerced. Or, in the alternative, any and all of the following:
2. An order requiring the State to disclose all materials relevant to the hiring/contracting of Dr. Mitchell, any and all audio recordings of Dr. Mitchell, any and all communication with Dr. Baker on his reasoning for changing his factual findings after speaking with Dr. Mitchell.
3. A factual finding that Dr. Mitchell coerced Dr. Baker.
4. A factual finding that Dr. Mitchell coerced Dr. Fowler.
5. A factual finding that the State ratified the coercion of medical experts.
6. An order barring the following prosecutors from participating in the trial of *State v. Thao*: Keith Ellison, Neal Katyal, Lola Velazquez-Aguilu, Joshua Larson, Matthew Frank, Erin Eldridge, and Corey Gorden.

Filed in District Court
State of Minnesota
5/12/2021 12:30 PM

7. A complaint to the Minnesota Lawyers Professional Responsibility Board and/or to the supreme court/professional responsibility board of the state in which the ratifying attorney is licensed. In the alternative, Mr. Thao moves this Court to require all those responsible to self-report to the appropriate governing bodies.
8. An order requiring the State to report Dr. Mitchell to the appropriate Medical Boards for his ethical violation.
9. An order preemptively removing all potential jurors from sitting on the jury if they acknowledge in voir dire they saw, read, or have knowledge of the open-letter or op-ed penned from Dr. Mitchell.

Respectfully submitted,

Dated: This 12th day of May, 2021

/s/ Robert M. Paule
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Hennepin County
Medical Examiner

530 Chicago Avenue
Minneapolis, MN 55415

Press Release Report

Floyd, George Perry

Case No: 2020-3700

Press Release

Decedent:	Floyd, George Perry, also known as Perry, Floyd		
Age:	46 years		
Race:	Black		
Sex:	Male		
Address:	3502 Glenhurst Ave		
City:	St Louis Park	State: MN	Zip: 55416
Date & Time of Injury:	05/25/2020		
Location of Injury:	3759 Chicago Ave in front of Cup Foods Minneapolis, MN 55407		
Date of Death:	05/25/2020		
Time of Death:	9:25PM		
Location of Death:	Hennepin Healthcare - ER 701 Park Avenue (Hennepin Healthcare - ER) Minneapolis, MN 55415		

Cause of death: Cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression

Manner of death: Homicide

How injury occurred: Decedent experienced a cardiopulmonary arrest while being restrained by law enforcement officer(s)

Other significant conditions: Arteriosclerotic and hypertensive heart disease; fentanyl intoxication; recent methamphetamine use

Please direct any media inquiries to Carolyn Marinan, Hennepin County Communications at carolyn.marinan@hennepin.us.

Comments:

Manner of death classification is a statutory function of the medical examiner, as part of death certification for purposes of vital statistics and public health. Manner of death is not a legal determination of culpability or intent, and should not be used to usurp the judicial process. Such decisions are outside the scope of the Medical Examiner's role or authority.

Under Minnesota state law, the Medical Examiner is a neutral and independent office and is separate and distinct from any prosecutorial authority or law enforcement agency.

Filed in District Court
State of Minnesota
5/12/2021 12:36 PM

April 20, 2021

Brian Frosh - Attorney General
State of Maryland
Annapolis, MD

Allison W. Taylor - Director
Department of Health
State of Maryland
Baltimore, MD

Merrick Garland - Attorney General
US Department of Justice
Washington DC

Rochelle Walensky - Director
Centers for Disease Control and Prevention
Atlanta, GA

Open Letter to Political Leadership,

The purpose of this letter is to bring your attention to the recent sworn testimony provided by the former Chief Medical Examiner for the State of Maryland in Trial 27-CR-20-12646: State vs. Derek Chauvin. The testimony, proffered by David Fowler, MB, ChB.Med.Path, on April 15, 2021, revealed a highly questionable cause of death opinion. The cause of death opinion, particularly the portion that suggested open-air carbon monoxide exposure as contributory, was baseless, revealed obvious bias, and raised malpractice concerns. The cause of death statement of any individual should be an injury, disease, or combination thereof, reached to a reliable degree of medical certainty.. We believe the unsubstantiated opinion that carbon monoxide exposure may have contributed to the death of George Floyd is far outside that standard and is grounds for an immediate investigation into the practices of the physician as well as the practice of the Maryland State Office of the Chief Medical Examiner (OCME) while under his leadership. In addition, Dr. Fowler's stated opinion that George Floyd's death during active police restraint should be certified with an "undetermined" manner is outside the standard practice and conventions for investigating and certification of in-custody deaths. This stated opinion raises significant concerns for his previous practice and management.

A brief review of the medical literature for Death in Custody epidemiology occurring within the State of Maryland uncovered two significant journal articles. Both articles, *Police custody deaths in Maryland, USA: An examination of 45 cases* and *Excited Delirium Deaths in Custody: Past and Present,* provides insight into the Maryland State OCME practices regarding cause and manner of death designation for these types of cases. There is a genuine concern that there may be an inappropriate classification of deaths in custody by the Maryland OCME as either Accident or Undetermined to purposefully usurp a manner of death classification of Homicide.

Our disagreement with Dr. Fowler is not a matter of opinion. Our disagreement with Dr. Fowler is a matter of ethics. The disingenuous testimony of Dr. David Fowler exposes the frailty of the current Medical Examiner/Coroner System and illustrates the lack of existing oversight and uniformity of practice. If forensic pathologists can offer such baseless opinions without penalty, then the entire

criminal justice system is at risk. This testimony was given on camera and in view of the entire world, shining a light on what has occurred and will likely continue to occur in less visible trial testimony. Currently there is no oversight, path for formal professional reprimand, or accountability for giving expert forensic medical testimony that falls outside the reasonable standard of medical certainty. This is not an isolated incident and is in fact a longstanding issue in the US system of justice. While Dr. Fowler is not the first and is unfortunately not likely to be the last forensic pathologist to testify in such a manner, his being named in a current lawsuit for questionable certification of an in-custody death raises the concern of a pattern of bias in practice.

For these reasons, we are demanding:

- State of Maryland
    - An immediate review of ALL the deaths in custody investigated by the Maryland OCME from 2003-2020 by an appointed independent international panel of expert forensic pathologists, to specifically look at the determination of both cause and manner of death. Although the National Association of Medical Examiners (NAME) is the professional body of US medical examiners and can be approached for recommendations of US medical examiners to undertake the review, we believe that the organization is compromised to do so, in light of its now retracted statement which was issued following the performance of the second autopsy of George Floyd.
    - Investigation into the medical license of David Fowler, MB, ChB.Med.Path for possible ethical violations associated with death in custody diagnosis.
    - Immediate establishment of a state-wide multidisciplinary Death in Custody Review Board
    - Addition of a Death in Custody Check Box on the State of Maryland electronic death certificate.
    - Annual Report of Death in Custody occurring within the State of Maryland
- United States
    - An immediate investigation into ALL the deaths in custody investigated by the Maryland OCME from 2003-2020.
    - Impanel a task force tasked with implementing The National Science and Technology Council (NSTC) and Office of Science Technology and Policy (OSTP) 2016 recommendations for the complete reform of the Medical Examiner/Coroner System.
    - Immediate addition of a Death in Custody Check Box on the US Standard Death Certificate by the National Center for Health Statistics.
    - Immediate nationwide enforcement of the Death in Custody Reporting Act HR. 1447.
    - Annual Report of national data for ALL Deaths in Custody.
    - Mandatory peer-review of all deaths in custody cases by a different medical examiner's office prior to issuance of the final report, as a quality assurance measure.

On behalf of physicians across many specialties, we are requesting a swift response to this letter. Thank you for your consideration.

Sincerely,

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