STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

Derek Chauvin,

Defendant.

STATE'S NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF ORDER PROHIBITING PARTICIPATION OF MICHAEL O. FREEMAN AND OTHERS

MNCIS No: 27-CR-20-12646

TO: The Honorable Peter Cahill, Judge of Fourth District Court, and Eric Nelson, counsel for the above-named defendant.

PLEASE TAKE NOTICE, pursuant to *State v. Fratzke*, 325 N.W.2d 10 (Minn. 1982), of the State's intent to move the Court to reconsider, at its earliest possible convenience, its September 11, 2020 order prohibiting the Hennepin County Attorney Michael Freeman; his Chief Deputy Andrew LeFevour; Managing Assistant County Attorney Amy Sweasy, and Senior Assistant County Attorney Patrick Lofton from participating in the prosecution of the above-entitled case. The Court's ruling was premised exclusively on a finding that these four attorneys violated the "advocate-witness" rule during a pre-charging meeting with the Hennepin County Medical Examiner, Dr. Andrew Baker, on May 27, 2020. Specifically, the Court offered an opinion that these four attorneys subjected themselves to disqualification by speaking to Dr. Baker on May 27, 2020, *sloppily*, without a non-attorney witness present during the meeting.

The State respectfully encourages the Court, upon reassessment, to find that these attorneys did not subject themselves to disqualification under the advocate-witness rule, as it is explicated in caselaw, the Minnesota Rules of Professional Conduct, and the ABA Standards for Criminal Justice. Indeed, there is no rule which requires the inclusion of a non-attorney witness when speaking to an experienced and routine government witness, and ABA guidance specifically contemplates a prosecutor meeting with such a witness *one-on-one,* and undoubtedly four-on-one, without triggering

ethical or practical concerns. Here, there were four prosecutors speaking to the Hennepin County Medical Examiner. The State is disappointed by and disagrees with the Court's characterization of this meeting. Four experienced prosecutors met with this government witness to weigh evidence in a highly publicized, highly scrutinized homicide case under highly sensitive circumstances. Limiting the meeting to these four prosecutors was not any sort of "sloppy" act or unethical shortcutting. Rather, it was a reasoned decision made by conscientious public servants.

The State further encourages the Court to reevaluate whether the circumstances as they exist today warrant the unsupported and overbroad disqualification of these attorneys from the prosecution of this case. To be clear, the State does not plan for any of these attorneys to *be* a trial advocate in this case, and defense counsel has not actually identified a credible scenario under which any of them would be disqualified from serving as such, e.g. by becoming a "necessary witness" at trial, which is the defense's burden. With that in mind, it is unwarranted to further restrict the State still *more*: by prohibiting the State from even consulting with these experienced prosecutors (and thus preventing Mr. Freeman and Mr. LeFevour from supervising these matters). Such a broad removal of Mr. Freeman, Mr. LeFevour, Ms. Sweasy, and Mr. Lofton unduly prejudices the State and is well beyond what *Fratzke* and related caselaw would authorize. As a result, the State respectfully asks the Court to reconsider its ruling.[1]

Pertinent Facts

On the evening of May 25, 2020, Defendant was a police officer for the Minneapolis Police Department. Shortly after 8:00 PM, he responded to a South Minneapolis business, in front of which he and three other police officers (the "Codefendants") had a public encounter with the victim in this case, George Floyd. Within minutes of the encounter, the Codefendants restrained Mr. Floyd until

[1] Although the Court's disqualification motion should be reversed in its entirety, as a practical matter, the order affects only Mr. Freeman and Mr. LeFevour. Attorneys Sweasy and Lofton recused from the case in June 2020 and have had no further involvement in the case.

Mr. Floyd lost consciousness, became nonresponsive, and died. At approximately 8:27 PM, Mr. Floyd's body was taken by ambulance to the Hennepin County Medical Center. Several hours later, Mr. Floyd's body was received by the Hennepin County Medical Examiner's Office for the purposes of an autopsy.

In the early morning of May 26, 2020, video footage of Defendant's actions and Mr. Floyd's death were broadly disseminated on the Internet, and the case immediately became an unparalleled matter of public interest and unrest. The state agency investigating Mr. Floyd's death, the Minnesota BCA, issued a press release, noting that it would present its results to the Hennepin County Attorney's Office (HCAO) for the consideration of criminal charges against Defendant and his Codefendants. The HCAO assigned two very experienced, skilled, and conscientious prosecutors to review the case, Ms. Sweasy and Mr. Lofton.

It would be difficult to *overstate* that, at that point, Mr. Floyd's death became a matter of substantial local, national, and international public interest. Without exaggeration, prosecutors were well-aware that the autopsy presentation by Dr. Baker with respect to Mr. Floyd would, perhaps, be the most significant in their careers, if not the most consequential autopsy in the history of Minnesota.

On May 26, 2020, Dr. Baker conducted the autopsy of Mr. Floyd's body. Following the autopsy, Dr. Baker held a video conference with investigators from the BCA, investigators from the FBI, Ms. Sweasy, and Mr. Lofton. During this conference, Dr. Baker discussed his preliminary findings and explained that he would need to review multiple sources of additional evidence, including video evidence and toxicology results, before rendering a final opinion on Mr. Floyd's cause of death. Mr. Lofton summarized the meeting's subject matter in a one-page memorandum.

On May 27, 2020, Dr. Baker went to Hennepin County Attorney's Office for an in-person meeting with Mr. Lofton and Ms. Sweasy to discuss his preliminary findings. At this meeting, Mr. Lofton and Ms. Sweasy were joined by Mr. Freeman and Mr. LeFevour. Mr. Freeman and Mr.

LeFevour oversee the entire criminal division of the HCAO and did not attend this meeting expecting to be *trial counsel*; they attended the meeting to receive the highly sensitive preliminary autopsy findings directly from Dr. Baker and to support Ms. Sweasy and Mr. Lofton. Joining this meeting was well within the professional managerial responsibilities of Mr. Freeman and Mr. LeFevour, and, forthrightly, it would have been irresponsible and an abrogation of duty to *not* attend the meeting at that time.

Regarding the limited attendance at the meeting (specifically the lack of a "non-attorney witness"), it must be recalled that, on May 27, the prosecutors knew that Dr. Baker's findings were preliminary, private, and intricate. The prosecutors were profoundly aware that any inadvertent revelations of Dr. Baker's findings could affect public safety, and they were aware that unauthorized dissemination of any Mr. Floyd's personal and private health information would be deleterious in untold ways. As a result, while still conducting their legal obligations as ministers of justice, these prosecutors took efforts to protect the integrity of the investigation–and the privacy and dignity of Mr. Floyd–by limiting the number of attendees to *four*: the assigned attorneys, their chief managing attorney, and the county attorney himself. As stated above, limiting the meeting to these four prosecutors was not any sort of "sloppy" act or unethical shortcutting; it was a reasoned decision made by conscientious public servants.

Regarding the *subject matter* of this May 27 conference, Mr. Lofton summarized the meeting's subject matter in a one-page memorandum. Mr. Lofton's summary states that Mr. Baker "provided the *same* autopsy information" that he provided on May 26 (emphasis added). Per Mr. Lofton's summary, Dr. Baker provided several additional details, including additional information about Mr. Floyd's prior injuries/hospitalization and the cause of Mr. Floyd's death. Dr. Baker again "reiterated that his findings [were] preliminary and that he ha[d] not issued a final report" and that he "had not seen any videos [of Defendant's encounter with Mr. Floyd]."

On May 31, 2020, Dr. Baker held another video conference with Mr. Lofton and Ms. Sweasy to discuss the final toxicology results which Dr. Baker received from an outside lab. Dr. Baker essentially described the lab results and his initial interpretation of those results to Mr. Lofton and Ms. Sweasy.

On June 3, 2020, for unrelated reasons, Mr. Lofton and Ms. Sweasy withdrew from the prosecution team and ceased involvement in the case. Assistant Minnesota Attorney General Matthew Frank was assigned as lead prosecutor, and Mr. Frank has remained the lead prosecutor to date.

Discussion

I. Mr. Freeman, Mr. LeFevour, Ms. Sweasy, and Mr. Lofton did not subject themselves to disqualification during their May 27, 2020 meeting with Dr. Baker.

The Advocate-Witness Rule provides that a prosecutor cannot be a courtroom advocate for the State and a witness in the same trial. *See Fratzke*, 325 N.W.2d at 11 (stating that the rule "generally requires the removal of an attorney from a case if the attorney plans to be a witness for his client."). It stems from the longstanding rule of professional conduct which is codified in the Minnesota Rule of Professional Conduct 3.7: With certain exceptions, "[a] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness." Minn. R. Prof. Conduct 3.7.

The Court of Appeals has identified a "necessary witness" as someone whose testimony is "(1) relevant, (2) material, and (3) not available from an alternative source." *State v. Casler,* No. C7-02-1848, 2003 WL 22014550 (Minn. App. Aug. 26, 2003) (*citing World Youth Day, Inc. v. Famous Artist Merch. Exch., Inc*., 866 F. Supp. 1297, 1302 (D.Colo.1994) (providing that "a lawyer is a 'necessary' witness if his or her testimony is relevant, material and unobtainable elsewhere.")).

In *Fratzke*, a key fact witness was interviewed by three individuals: the county attorney, an assistant county attorney, and a police agent. 325 N.W.2d at 11. Defense counsel notified the district

court that they intended to call the county attorney as a witness to the witness interview and moved to disqualify the county attorney and his staff, and the district court granted the motion. *Id.* The Minnesota Supreme Court reversed the decision because the county attorney was not a necessary witness, stating:

> [W]e believe that the trial court erred in holding that defendant had established the necessity of removing the county attorney and his assistants as prosecutors. In fact, it appears that the county attorney will not likely be a necessary witness and that his testimony at best may be cumulative, there being at least two other people (one a BCA agent, the other an assistant prosecutor) who witnessed the entire interrogation of Lucking.

Fratzke elucidates that the advocate-witness rule is only pertinent when an attorney becomes a necessary witness. The rule cannot be used tactically to disqualify a prosecutor by just (or positing a premise for) calling them as a witness when doing so is unnecessary. *See Fratzke*, 325 N.W.2d at 11. *Fratzke* also does not materially distinguish the "two other people" in the room at the meeting, although one was a law enforcement witness and the other was a prosecutor. The point in *Fratzke* is that the county attorney did not become a necessary witness by virtue of participating in the meeting because there were other sources of the same information in the room with the witness.

A prosecutor undoubtedly can face a risk of *becoming* a necessary witness when interviewing a witness *alone*. Yet, the ABA's guiding standards for prosecutors provide that a prosecutor still "should seek to interview all witnesses," ABA Standards for Criminal Justice, The Prosecution Function § 3-3.4(c), and that "the prosecutor's interview of most routine or government witnesses (for example, custodians of records or law enforcement agents) *should not require a third-party observer*," *Id.* at § 3-3.4(f) (emphasis added). To emphasize the point that even 1-on-1 interviews with "routine or government witnesses" are perfectly acceptable and common in the profession, one can read the entirety of paragraph (f):

> (f) A prosecutor should avoid the prospect of having to testify personally about the content of a witness interview. The prosecutor's interview of

> most routine or government witnesses (for example, custodians of records or law enforcement agents) should not require a third-party observer. But when the need for corroboration of an interview is reasonably anticipated, the prosecutor should be accompanied by another trusted and credible person during the interview. The prosecutor should avoid being alone with any witness who the prosecutor reasonably believes has potential or actual criminal liability, or foreseeably hostile witnesses.

Id. at § 3-3.4(f). Importantly, there is simply no suggestion in this guidance that adding attorneys to a witness meeting, especially with a routine or government witness, would disqualify all attendees to a witness meeting under the advocate-witness rule.

With these considerations in mind, the Court should consider the benign, routine, and perfectly ethical format of the May 27 interview with Dr. Baker. There were four professional prosecutors at the meeting, two of which were appearing in their capacities as supervisors, and none of these witnesses will be a courtroom advocate in this case. These four attorneys did not interview a hostile or unpredictable civilian witness; instead, they spoke to an imminent professional, who is both a routine witness and government witness; who has been the Hennepin County Medical Examiner since 2004; and whose statements on Mr. Floyd's death have been consistent throughout the pendency of the case. In short, Mr. Freeman, Mr. LeFevour, Ms. Sweasy, and Mr. Lofton conducted themselves professionally and ethically; did not make themselves necessary witnesses by virtue of the format of the meeting; and did not subject themselves to disqualification under the advocate-witness rule.[2] As a result, the State respectfully asks the Court to reconsider its ruling. [3]

[2] The Court does not have to rely solely on the State's arguments in support of reconsideration. William J. Wernz, a leading expert on legal ethics issues in Minnesota for forty years, has opined that there was nothing improper about the conduct of Mr. Freeman, Mr. LeFevour, Ms. Sweasy, or Mr. Lofton and that none should be considered a necessary witness for purposes of Rule 3.7 at this point. *See attached* Affidavit of William J. Wernz (attached with exhibits).

[3] The parameters of the Court's oral ruling from the bench are not entirely clear. The State certainly understood that the Court's order prohibited the named attorneys from appearing as courtroom advocates in the case. The Court's oral ruling also suggested, however, that the named attorneys

II. The present circumstances do not warrant the disqualification of these four prosecutors because it is highly unlikely that any of them will be a necessary witness.

The State is aware that a prosecutor–just as any other trial attorney–may become subject to disqualification as a trial advocate if they become a necessary witness of *impeachment evidence*. However, such an event has not happened here, and there is no suggestion that the May 27 meeting has any impeachment value. Defense counsel has not identified any aspect of the May 27 meeting which could have impeachment value, and no showing has been attempted in earnest. Without any showing of impeachment evidence or even a meager *likelihood* of impeachment value,[4] disqualifying these four prosecutors from the case is an unsupported and overbroad act–far beyond characterizable as manifestations of prophylactic prudence.

Yet, *arguendo, even if* a statement made by Dr. Baker at the May 27 meeting acquired impeachment value at trial, there remains no sound reason to conclude that disqualification of these prosecutors would be appropriate or necessary. This is because the impeachment evidence could be introduced in multiple manners other than testimony from one of the prosecutors:

> If the evidence sought to be elicited from the attorney-witness can be produced in some other effective way, it may be that the attorney is not necessary as a witness. If the lawyer's testimony is merely cumulative,

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could not "participate" in the case beyond "administrative" duties. Mr. Freeman was elected by the people of Hennepin County and is responsible for overseeing the management of all the office's prosecutorial functions. *See* Minn. Stat. § 388.051, subd. 1. The State has assumed that the Court's oral order did not extend to managerial functions given the potential separation of powers issue this would create. *See People v. Jaquish*, 853 N.Y.S.2d 482, 488 (N.Y. App. 2007) ("A court may not lightly undertake to disqualify a district attorney, a constitutional officer chosen by the electorate and whose removal by a court implicates separation of powers considerations"); *see also United States v. Bolden*, 353 F.3d 870 (10th Cir. 2003). Accordingly, should the Court decline to reconsider its Advocate-Witness ruling, the State seeks further clarification of the scope of the Court's order.

[4] It is generally understood across jurisdictions that Rule 3.7 requires disqualification of a trial advocate only after circumstances result in it being at least "*likely*" that the lawyer will be a necessary witness. *See* Ann. Mod. Rules Prof. Cond. § 3.7, "General Test." (discussing multiple jurisdictions); *State v. Gonzalez–Villarreal*, 824 N.W.2d 161, 166 (Wis. App. 2012) (requiring the party moving for disqualification of opposing counsel to establish that opposing counsel is "likely to be a necessary witness").

> or quite peripheral, or already contained in a document admissible as an exhibit, ordinarily the lawyer is not a necessary witness and need not recuse as trial counsel.

Humphrey ex rel. State v. McLaren, 402 N.W.2d 535, 541 (Minn. 1987).

For example, Dr. Baker himself could acknowledge the impeaching statement during his trial testimony. As Mr. Lofton's memo provides, all of Dr. Baker's conclusions on May 27 were qualified by Dr. Baker as *preliminary* and not based on all the necessary evidence. Assuming Dr. Baker were confronted with a statement attributed to him by Mr. Lofton which had impeachment value, there is no reason to believe that Dr. Baker would resist or deny providing that statement. To the contrary, it is quite reasonable to assume that Dr. Baker would *agree* that he provided it (and his other preliminary conclusions) and did so prior to reviewing all the evidence. Assuming Dr. Baker acknowledged making the statement, impeachment via another witness's testimony would be cumulative and, most importantly for this analysis, unnecessary.

McLaren posits an additional possibility for introducing the impeachment evidence short of calling a witness: stipulation. *Id.* Thus, if a statement made by Dr. Baker at the May 27 meeting acquires impeachment value *vis a vis* his trial testimony and if Dr. Baker resists or denies providing that statement, the State *still* has capability to *stipulate* to that inconsistent statement, e.g. via admission of the May 27 summary. Upon admission of the impeachment document, the testimony of an impeaching witness would be obviated and rendered cumulative and, most importantly for this analysis, unnecessary. *See, e.g., Woodruff v. State*, 608 N.W.2d 881, 887 (Minn. 2000) (affirming denial of defense motion to remove prosecutor when parties afforded opportunity to read a stipulation containing the impeaching testimony sought by the deference which the prosecutor "would testify to if called"); *see also State v. Gonzalez–Villarreal*, 824 N.W.2d 161, 165-166 (Wis. App. 2012) (holding that an attorney is not a necessary witness to his client's statement when there is an audio recording of client's statement which can be played for the jury). The State's willingness to stipulate

to Mr. Lofton's May 27 summary alone makes it very unlikely that any prosecutor would become a necessary witness in this case.

Finally, one still may consider, *arguendo*, a scenario in which *one* of the four prosecutors must be called as a necessary witness to introduce an impeaching statement from May 27. If that occurred, their testimony would render the remaining three prosecutors' testimony cumulative and unnecessary. *Fratzke* makes it clear that such a scenario does not make *all four witnesses* necessary. There is no reason to believe that all four prosecutors, rather than just one, would be needed to testify. Thus, disqualifying these four prosecutors from the prosecution of this case is unwarranted. For these reasons, the State respectfully asks the Court to reconsider its ruling.

Respectfully submitted,

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Dated: September 14, 2020

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