

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

Plaintiff,

vs.

**DEREK MICHAEL CHAUVIN,
TOU THAO,
J. ALEXANDER KUENG,
THOMAS KIERNAN LANE,**

Defendants.

ORDER

Court File No. 27-CR-20-12646
Court File No. 27-CR-20-12949
Court File No. 27-CR-20-12953
Court File No. 27-CR-20-12951

This matter came before the Court on the State's written motion, filed on September 14, 2020, in *State v. Chauvin*, Court File No. 27-CR-20-12646, to reconsider the Court's oral order of September 11, 2020, removing County Attorney Michael O. Freeman, Chief Deputy County Attorney Andrew LeFevour, Managing Assistant County Attorney Amy Sweasy, and Senior Assistant County Attorney Patrick Lofton from participation in the prosecution of these four cases.

Based upon all the files, records and proceedings, and the parties' written submissions,

IT IS ORDERED

1. The Court's oral order of September 11, 2020, removing the above-named attorneys from these cases is hereby **VACATED**.
2. County Attorney Michael O. Freeman, Chief Deputy County Attorney Andrew LeFevour, Managing Assistant County Attorney Amy Sweasy, and Senior Assistant County Attorney Patrick Lofton may not appear as advocates in the trials in the

above-captioned cases and may not sign any motions or pleadings related to these cases but may otherwise participate in the prosecution of the cases.

3. The attached Memorandum is incorporated herein.

BY THE COURT:

Peter A. Cahill
Judge of District Court

MEMORANDUM

The State has moved for reconsideration of the Court’s order removing Hennepin County Attorney Michael O. Freeman and three assistant county attorneys from participation in these cases. The sole reason for the removal Order was that the four attorneys discussed the case with the Hennepin County Chief Medical Examiner, Dr. Andrew Baker, on May 27, 2020, without the presence of a non-attorney witness.¹ In doing so, the attorneys made themselves potential witnesses in the case. While it is unlikely that Dr. Baker’s testimony would be impeached, it remains a possibility that the attorneys could be called as witnesses to impeach his testimony. Accordingly, they cannot act as advocates in this case at trial. Minn. R. Prof. Conduct 3.7(a); *State v. Fratzke*, 325 N.W.2d 10, 11-12 (Minn. 1982).

The State seems particularly perturbed by the Court’s description of its conduct as “sloppy,” a word that it interprets as “unethical.”² The Court’s only regret in using the word “sloppy” is that it was imprecise. The Court intended to describe the State’s conduct as “careless” and the Court stands by that characterization.³ The failure to have a non-attorney witness present at the May 27, 2020 meeting cannot be rationalized by characterizing the meeting as “benign” or as a routine meeting with a routine government witness.⁴ This was not a routine trial preparation meeting. It was a meeting to discuss the medical examiner’s autopsy findings in a case that is receiving global attention and scrutiny. More importantly, the case was

¹ Floyd was pronounced dead at the Hennepin County Medical Center at 9:25 p.m. on May 25, 2020. Dr. Baker performed the Floyd autopsy on the morning of May 26, 2020. Dr. Baker issued his final autopsy report and conclusions on June 1, 2020. Chauvin PC Exh. 20. Chauvin’s motion is predicated upon a File Memorandum by Senior Assistant County Attorney Patrick Lofton summarizing the May 27 meeting. See Chauvin PC Exh. 6, p. 8; State’s Brief on Motion for Reconsideration, pp. 3-4.

² State’s Brief on Motion for Reconsideration, p. 4.

³ As a former prosecutor in the Hennepin County Attorney’s office, and as a District Court Judge, I have always found the attorneys in the office as a whole, and the four attorneys involved in the May 27, 2020 meeting with HCME Baker specifically, to be ethical and upholding the highest standards of professionalism in their work. But we all make mistakes, including this Court.

⁴ State’s Brief on Motion for Reconsideration, p. 7.

in its investigative phase and the witness being interviewed was the medical examiner who had performed the Floyd autopsy the prior day, who would be a primary witness at trial to establish the cause of Floyd's death, but who had not yet released his final autopsy report and conclusions. Medical examiner testimony, even when cause and manner of death is uncontested, is hardly routine.⁵ That is especially true in the instant cases where cause and manner in death is highly contested.

The claim that non-attorneys were excluded "to avoid unauthorized dissemination of any [of] Mr. Floyd's personal and private health information"⁶ is belied by the fact that a similar meeting appears to have been held with Dr. Baker on May 26, 2020, shortly after Dr. Baker had completed the autopsy, at which six non-attorney investigators were present.⁷

The State, in its motion for reconsideration, correctly notes that the Court's removal order was too broad. As is noted in *Fratzke*, 325 N.W.2d at 11-12, the remedy is not to prohibit the attorneys' participation in the case, but to preclude their participation as advocates at trial. Accordingly, the Court admits its error and issues this Order narrowing the scope of the removal.

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⁵ Truly routine witnesses, even in these cases, would include records custodians, police officers who are called to establish chain-of-custody of evidence, and witnesses of a similar ilk.

⁶ State's Brief on Motion for Reconsideration, p. 4.

⁷ See Chauvin PC Exh. 6, p. 7; see also State's Brief on Motion for Reconsideration, p. 3.