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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Court File No.: 27-CR-20-12646

State of Minnesota,

Plaintiff,

v.

Derek Michael Chauvin,

Defendant.

STATE'S MEMORANDUM OF LAW IN SUPPORT OF AMENDED MOTION IN LIMINE 2 AND MOTION TO COMPEL DISCOVERY AND A HEARING

TO: The Honorable Peter Cahill, Judge of District Court, and counsel for Defendant, Eric J. Nelson, Halberg Criminal Defense, 7900 Xerxes Avenue South, Suite 1700, Bloomington, MN 55431.

STATEMENT OF FACTS

The Court set a deadline for motions in limine of February 8, 2021. The Court then extended Defendant's deadline for service of his final expert reports to February 22, 2021. At the time of the motion in limine deadline, the State only had a general notice of Defendant's expert and so was only able to file a general motion in limine regarding his expert's potential testimony. State's Motion In Limine 2, filed February 8, 2021. On February 22, 2021, Defendant served his final expert report. Based on the content of that report, the State has filed an amended motion in limine regarding his expert's report and expected testimony.

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ARGUMENT

I. DEFENSE EXPERT DR. FOWLER CANNOT TESTIFY REGARDING THE OPINIONS, ANALYSIS OR CONCLUSIONS OF OTHER, NON-TESTIFYING EXPERTS CONTRIBUTING TO THE FORENSIC PANEL REPORT.

On February 22, 2021, Defendant Chauvin disclosed an expert report from The Forensic Panel. The "primary author" of the report is Dr. David Fowler. The report purports to be the product of a "multi-specialist, multi-disciplinary" collaboration between Dr. Fowler and 13 other doctors of varying disciplines.

As the State argued previously, a non-testifying expert's opinions are inadmissible hearsay and cannot be admitted in a criminal case during an expert's direct examination. Minn. R. Evid. 703(b); *State v. Bradford*, 618 N.W.2d 782, 793-94 (Minn. 2000) (holding it was error for medical examiner to testify on direct examination that he consulted with two other expert pathologists who agreed with his conclusions). The rule is designed to prevent a non-testifying expert's opinion from being presented to the jury without the safeguard of cross-examination. *Kelly v. Ellefson*, 712 N.W.2d 759, 770 (Minn. 2006).

The Forensic Panel's "peer reviewed" group opinion is a transparent attempt to sidestep Rule 703(b) and *Bradford*.[1] Chauvin has indicated he intends to call Dr. Fowler to testify regarding all the information in the report – with the possible exception of toxicology. This plan would allow Dr. Fowler "to launder inadmissible hearsay evidence, turning it into admissible evidence by the

[1] At least one court has criticized The Forensic Panel's characterization of its methodology. In *United States v. Shields*, the federal district court found "The Forensic Panel's use of that term [peer review] is misleading and that there was no 'peer review' performed that would be consistent with the generally accepted meaning of that term." 2009 WL 10714661 *4 n. 3 (W.D. Tenn May 11, 2009). Experts affiliated with The Forensic Panel are all paid for their "peer review" work and have an "obvious pecuniary interest in approving the work" of other experts so that each expert will continue to receive forensic consulting work." *Id.* at *6.

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simple expedient of passing it through the conduit of purportedly 'expert opinion.'" *State v. DeShay*, 669 N.W.2d 878, 886 (Minn. 2003); compare *In re Wagner*, 2007 WL 966010 *4 (E.D. Pa 2007) (the rules of evidence "do not permit experts to simply 'parrot' the ideas of other experts"); *Eberli v. Cirrus Design Corp.*, 615 F.Supp.2d 1357, 1364 (S.D. Fla 2009) ("While it is true that an expert's testimony may be formulated by the use of the facts, data and conclusions of other experts, …such expert must make some findings and not merely regurgitate another expert's opinion"). Chauvin's approach is particularly dangerous because many of the non-testifying experts have specialized knowledge outside of Dr. Fowler's area of expertise. "A scientist, however well credentialed he may be, is not permitted to be the mouthpiece for a scientist in a different specialty. That would not be responsible science." *Dura Auto. Systems of Ind, Inc. v. CTS, Corp.*, 285 F.3d 609, 614 (7th Cir. 2002). While it was permissible for Dr. Fowler to rely on information from other experts,[2] he must be prohibited from repeating the substance of the non-testifying experts' opinions and conclusions under the guise of his own expertise.

II. CHAUVIN'S EXPERT REPORT DOES NOT SATISFY THE REQUIREMENTS OF MINN. R. CRIM. P. 9.02.

The criminal discovery rules are designed to complement the rules on expert testimony by giving the prosecution sufficient information to challenge adverse opinions. Minn. R. Crim. P. 9.02, subd. 1(2)(b) requires the defense to disclose to the prosecution: (1) the findings, opinions or conclusions of the expert, (2) the bases for the expert opinion, and (3) the expert's qualifications. *Id.*[3] The level of detail in the disclosure depends on the complexity of the expert testimony. *See United States v. Jackson,* 51 F.3d 646, 651 (7th Cir. 1995). When a criminal case involves highly

[2] *See* Minn. R. Evid. 703(a).
[3] The same is true for the prosecution's expert disclosure requirements. *See* Minn. R. Crim. P. 9.01, subd. 1(4)(c).

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technical or scientific evidence, more specific expert disclosure is required. *Id.* The Forensic Panel's group report violates Rule 9.02 because it fails to clearly distinguish between Dr. Fowler's opinions and the opinions of other experts who contributed to the report (i.e. the other bases of Dr. Fowler's opinions).

Discovery rules are "based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial" and are "designed to enhance the search for truth." *State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998) (citing *State v. Lindsey,* 284 N.W.2d 368, 372 (Minn. 1979) (additional citations omitted)). The deliberate ambiguity of The Forensic Panel report puts the prosecution in an untenable situation. The State cannot adequately test the bases of Dr. Fowler's opinions without opening the door to the admission of untested hearsay opinions from non-testifying experts. Defendant Chauvin's failure to fully comply with Rule 9.02 clearly prejudices the prosecution and must be remedied.

III. THE APPROPRIATE REMEDY FOR DEFENDANT CHAUVIN'S VIOLATION IS TO COMPEL ADDITIONAL EXPERT DISCLOSURES.

The sanctions for violations of Rule 9.02 include ordering discovery, granting a continuance, holding counsel in contempt, or "enter[ing] such order as [the court] deems just in the circumstances." Minn. R. Crim. P. 9.03, subd. 8. The Minnesota Supreme Court has identified four factors that should be considered in determining appropriate sanctions for discovery violations: "(1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors." *Lindsey*, 284 N.W.2d at 373.

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Chauvin made a tactical choice to offer a "group" opinion, which is clearly inadmissible on direct examination during trial. His decision prejudiced the prosecution's ability to meaningfully cross-examine Dr. Fowler. The only way the prosecution can make knowing and meaningful choices about the scope of its cross-examination is if the expert bases of Dr. Fowler's opinion are specifically identified. Continuing the trial is not a feasible option. The remaining – and most obvious -- remedy is to compel additional disclosures.[4]

Minn. R. Evid. 705 grants the Court the discretion to compel specific pretrial disclosure of the bases of an expert opinion when necessary. The State respectfully requests that the Court compel Defendant to have Dr. Fowler specifically identify which material in his report was contributed by others. In addition, the State respectfully requests that the Court conduct a pretrial hearing outside the presence of the jury to question Dr. Fowler about the precise bases of opinions he intends to testify to during Chauvin's trial.

[4] Because the Court will not entertain a continuance of the trial, the only other adequate remedy for Chauvin's violation of Rule 9.02 would be preclusion of Dr. Fowler's testimony. The Minnesota Supreme Court has said that "[p]reclusion of evidence is a severe sanction which should not be lightly invoked." *Lindsey*, 284 N.W.2d at 373.

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CONCLUSION

For the foregoing reasons, the State's motions should be granted.

Dated: March 4, 2021

Respectfully submitted,

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