

STATE OF LOUISIANA

DOCKET NO. 99,657

VS

39TH JUDICIAL DISTRICT

RYAN D. RUSSELL, SR.

RED RIVER PARISH

MOTION TO EXCLUDE STATE'S EVIDENCE OF FORENSIC PATHOLOGY
and
RE-URGING OF PRIOR MOTION IN LIMINE ON NEW GROUNDS

NOW INTO COURT comes RYAN D. RUSSELL, SR., defendant, who respectfully moves this Court to exclude certain evidence from the trial of this matter, which trial is scheduled to begin on October 2, 2006:

1.

Defendant was charged with second degree murder by indictment on October 1, 2004. The jury trial of this matter is scheduled to begin on October 2, 2006, at 9:00 a.m. The offense allegedly occurred on August 21, 2004.

2.

The autopsy of the deceased was performed by Forensic Pathologists, Inc., an entity formerly owned and operated by George M. McCormick, M.D. Dr. McCormick's signature appears on the November 4, 2004 autopsy.

3.

Dr. McCormick died on September 20, 2005. Prior to his death, Dr. McCormick did not testify in any preliminary exam or any other similar court proceeding in this matter (the defendant was indicted by the Grand Jury; therefore, no preliminary exam was held in this matter).

4.

Evidence gathered over the past few months suggests that it is unlikely that Dr. McCormick actually performed the autopsy in this case. It appears that the November 4, 2004 autopsy was more likely performed, in whole or in part, by Dr. McCormick's long-time assistant, Ms. Lisa Hayes, who is not a medical doctor.

5.

Additional evidence suggests that the procedures employed by Forensic Pathologists, Inc. were grossly below the standard of care necessary to maintain sufficient chain of custody and scientific reliability.

FILED
STUART SHAW

SEP 13 2006

CLERK OF COURT
RED RIVER PARISH

6.

In about September 2005, the Caddo Parish District Attorney's Office initiated an investigation into the procedures employed by Forensic Pathologists, Inc., and Ms. Hayes' and Dr. McCormick's practices in performing their duties. Through that investigation, the Caddo Office has compiled the statements of nearly 20 different individuals, including Ms. Hayes, who worked for Forensic Pathologists, Inc. over the past ten years.

7.

Ms. Hayes and others have also testified on these matters in the case entitled "State v. Courtney Beaner, No. 225, 720," which is still pending in the 1st Judicial District Court in Caddo Parish. Mr. Beaner was convicted of second degree murder by a jury on October 4, 2005. He was sentenced to life in prison on October 17, 2005. In light of the new evidence regarding the practices of Forensic Pathologists, Inc., he was allowed to file a motion for new trial (post-sentencing) on December 27, 2005. Ms. Hayes and others testified during the hearing of that motion, which hearing took place on April 18-19, 2006, May 2, 2006, and May 5, 2006. The trial court has not yet ruled on Mr. Beaner's motion for new trial.

8.

Another defendant has similarly challenged the trial testimony of Dr. McCormick (and other related issues) in that matter entitled "State v. Barry Baker, No. 37,464," pending in the 2nd Judicial District Court in Bienville Parish. Mr. Baker was convicted of second degree murder by a jury on November 30, 2005. He was sentenced to life in prison on January 11, 2006. Upon information and belief, his motion for new trial (also filed post-sentencing) remains pending.

9.

The evidence adduced in these various investigations, trials, and hearings suggests the following:

1. For at least the past five years, Dr. McCormick has rarely, if ever, performed the entire autopsy of any particular patient;
2. According to Forensic Pathologists, Inc's standard autopsy procedure, Lisa Hayes (or other non-doctor assistants) would typically cut open the body, draw fluids, weigh organs, remove bullets, and track bullet trajectories without the presence or supervision of Dr. McCormick or any other qualified medical or forensic pathologist personnel present;

3. Lisa Hayes would dictate all external portions of each autopsy;
4. Dr. McCormick would routinely arrive at the clinic late in the afternoon—after most of the work had been performed—to sign off on autopsy documents;
5. Lisa Hayes would routinely remove bullets and seal them in containers herself, placing Dr. McCormick's initials on the sealed containers, without his presence;
6. Lisa Hayes would routinely sign, trace, or otherwise stamp Dr. McCormick's name on death certificates and autopsies;
7. More than one doctor apparently left the employ of Forensic Pathologists, Inc. because they were not comfortable with the protocol used by Dr. McCormick;
8. Lisa Hayes admitted to investigators that she forged the name of Dr. McCormick on a letter that purported to name her as deputy assistant coroner in the event of his death; the letter was dated the day after his death; and,
9. Numerous other deficiencies in protocol, including violations of law.

10.

This information did not fully come to light until Ms. Hayes was granted immunity from prosecution by the Caddo Parish District Attorney's Office on October 31, 2005.

11.

The Caddo Parish investigation is ongoing. The problems caused by the deficiencies described may impact hundreds of cases already decided. Upon information and belief, many of the records for the investigation have already been forwarded by the State to the inmate paralegals at the Louisiana State Penitentiary pursuant to the requirements of *Brady v. Maryland*.

12.

In Mr. Russell's case, both the State and defense have employed forensic pathologists to testify regarding the bullet wounds, bullet trajectories, and other relevant pathology in the case. The accurate understanding of these issues—to a microscopically precise level—is critical to proving or disproving the State's version of the events. Because the events occurred in August 2004, the autopsy results cannot be duplicated. The current experts must therefore rely solely on

the conclusions contained in the McCormick report, which conclusions are now highly suspect in light of the events described above. In short, the current experts can only guess as to what the true facts might be in the case. That standard is insufficient for the purposes of proving a criminal case.

13.

Although experts can clearly rely on hearsay in reaching their conclusions, their overall methodology is nonetheless limited by *State v. Foret*, 628 So.2d 1116 (La. 1993), adopting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Under the *Daubert/Foret* standard, the trial court must determine, at a minimum: (a) whether the scientific technique can be independently tested; (b) whether it has been subject to peer review; (c) what the known or potential rate of error might be; and (d) whether the methodology is generally accepted in the scientific community. It is submitted that the pathology in the current case is fatally flawed because the practices of Dr. McCormick, Ms. Hayes, and others at Forensic Pathology, Inc. fall so below the methodology accepted in the medical community that the report is useless as a basis for testimony. This is particularly true now that Dr. McCormick is deceased, and unavailable for cross-examination regarding the report and other related issues.

14.

Mr. Russell had previously moved in limine on November 12, 2005 to exclude Dr. McCormick's report on the basis of the Sixth Amendment's Confrontation Clause, as that clause was interpreted by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). This Court denied that motion on January 24, 2006, finding that the report was a standard "business record," and therefore not subject to *Crawford*. In support of its ruling, the Court cited *State v. Leonard*, 915 So.2d 829 (La. App. 1 Cir.), *rev'd other grounds*, 932 So.2d 660 (La. 6/16/06). Mr. Russell hereby renews his motion in limine on the original grounds, for the reasons provided by his November 12, 2005 memorandum in support of that motion. Mr. Russell separately argues that the autopsy does not meet the standard required to maintain a "business record" exception under the Louisiana Code of Evidence. Before the "business record" exception to the hearsay rule may be invoked, it must be shown in part that the person who made the record "had no strong motive to misrepresent, and that in all probability the evidence is trustworthy." *State v. Monroe*, 345 So.2d 1185, 1190 (La. 1977). See *State v. Romero*, 574 So.2d 330 (La. 1990)(nursing home

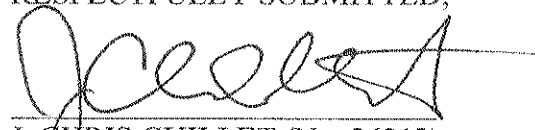
records held untrustworthy because they were routinely 'thinned out' with some information placed in other files; also, different nurses had different methods for recording information; charts were occasionally missing during shifts); compare: *State v. Prestridge*, 399 So.2d 564 (La. 1981)(medical report of coroner was admissible where it was established to be permanent record of coroner's office, *prepared by him* in ordinary course of business *based on firsthand examination of the victim*). The records of Forensic Pathologists, Inc. cannot be described as "reliable" in any sense whatsoever, and therefore do not meet the requirements of a "business record" exception to the hearsay rule under Louisiana law.

15.

For all of these reasons, the November 4, 2004 report prepared by Forensic Pathologists, Inc. should not be used for any purpose in this trial, and no trial testimony should be based even in part on the information or conclusions contained in the report. The Court should specifically prohibit all State testimony regarding issues of forensic pathology, to the extent that such testimony is based on the McCormick report.

WHEREFORE, defendant, RYAN D. RUSSEL, SR., prays that, following due proceedings: (a) the State's evidence of forensic pathology be excluded from the trial of this matter; and (b) for all other relief allowed by the law, facts, and equity.

RESPECTFULLY SUBMITTED,



J. CHRIS GUILLET (No. 26312)

507 Second Street

Natchitoches, Louisiana 71457

Phone (318) 354-1377

ATTORNEY FOR RYAN D. RUSSEL, SR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion has this date been furnished to the Honorable William R. Jones, District Attorney, by depositing it in the United States mail, postage prepaid and properly addressed, on this 11th day of September, 2006.

Honorable William R. Jones
Office of the District Attorney
39th Judicial District
Post Office Box 606
Coushatta, Louisiana 71019-0606



J. CHRIS GUILLET