



# REPORT TO THE RAMSEY COUNTY ATTORNEY

## AN INDEPENDENT REVIEW OF CASES INVOLVING DR. MICHAEL MCGEE

### PHASE 1 AND RECOMMENDATIONS FOR PHASE 2

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November 2022



**PCE**

Prosecutors' Center for Excellence



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**AN INDEPENDENT REVIEW OF CASES INVOLVING**  
**DR. MICHAEL MCGEE**  
*PHASE 1 AND RECOMMENDATIONS FOR PHASE 2*

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**OVERVIEW OF PROJECT**

In the fall of 2021 , Prosecutors’ Center for Excellence (PCE) began work with the Ramsey County Attorney’s Office (RCAO) to provide an independent review of cases involving the autopsies and testimony of Dr. Michael McGee, the Chief Medical Examiner for Ramsey County, Minnesota from 1985 to 2020.<sup>1</sup> PCE was also asked to review the propriety of Dr. McGee’s opinions based on AP tests that are used to preliminarily identify the presence of semen. This review was triggered by *US v. Alfonso Rodriguez*, Criminal No. 2:04-cr-55, slip op. (D.N.D. 09/03/2021), where judicial criticism of Dr. McGee’s testimony regarding the cause of death and his interpretation of AP tests resulted in a reversal of the death penalty in a high-profile murder case that occurred in 2003.

In consultation with the RCAO, it was decided that PCE’s independent assessment would be conducted in Phases, allowing for a systematic identification of cases that require further review. Phase 1 of the independent assessment has been completed. This report provides the findings from Phase 1 and outlines PCE’s recommendations for Phase 2 of the project.

**INDEPENDENT REVIEW TEAM**

PCE is a national non-profit that works with prosecutors in offices of all sizes to improve the criminal justice system. PCE provides consulting services to prosecutors on a wide variety of issues from office efficiency to conviction review. PCE also supports statewide prosecutor-led Best Practices Committees and national prosecutor meetings that proactively work to develop innovative solutions to the difficult criminal justice issues of the day. PCE’s Executive Director, Kristine Hamann, leads the team on this project.

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<sup>1</sup> Dr. McGee continued to work as a medical examiner in Ramsey County for some time after he was no longer Chief Medical Examiner. He is currently no longer working in Ramsey County as a Medical Examiner.



*Kristine Hamann* is the founder and Executive Director of PCE, where she has served since 2016 promoting prosecution Best Practices throughout the nation. She has written a guide for prosecutors on conviction review and has consulted on conviction review in several states. From 2013 to 2016, Kristine Hamann was a Visiting Fellow at the Department of Justice/Bureau of Justice Assistance focusing on prosecutorial best practices. She is the chair of the New York State Best Practices Committee for prosecutors, a member of the ABA Criminal Justice Council Journal Editorial Board and was Independent Counsel to the Conviction Integrity Unit of the United States Attorney's Office for the District of Columbia. She teaches a prosecutor practicum at Georgetown Law School. Ms. Hamann's previous positions include serving as the New York State Inspector General, the Executive Assistant District Attorney to D.A. Robert M. Morgenthau in the Manhattan District Attorney's Office in New York City and the Executive Assistant District Attorney for the Special Narcotics Prosecutor for the City of New York. Prior to 1998, Ms. Hamann held several other positions in the Manhattan District Attorney's Office, including Deputy Chief of the Trial Division in charge of the Criminal Court, Director of Training, and Deputy Bureau Chief of the Career Criminal Bureau. Prior to her executive roles, Ms. Hamann was an active trial attorney handling violent crime including murder.

*Patricia Riley* is a Consultant with PCE and served for 34 years as an Assistant United States Attorney in the District of Columbia, where she tried significant cases, including murder, sexual assault, and other serious cases. She held various positions in that office including Chief of the Sex Offense Section and Special Counsel to the United States Attorney, working on legislative, policy, sentencing, jury instruction, conviction integrity, ethics, and professional responsibility matters. She served as the USAO representative on the D.C. Sentencing and Criminal Code Revision Commission and on the Criminal Jury Instructions (Redbook) Committee. Ms. Riley has served on dozens of interagency working groups, task forces, and committees. She is an expert in eyewitness identification and has developed training and procedures for use by prosecutors and law enforcement officers that promote the integrity of this important evidence. Ms. Riley has previously conducted independent conviction reviews of cases involving hair and fiber evidence. She currently teaches a prosecutor practicum at Georgetown Law School.

*Sophia Roach* is a Senior Attorney with PCE and previously served as a Deputy District Attorney in the San Diego County District Attorney's Office for 23 years. Ms. Roach assisted in the management of four divisions, served as an ethics advisor, Legal Training and Advisory Committee member, liaison to the FBI Violent Crime Task Force, East County Gang Task Force, JUDGE Task Force, and the San Diego Crime Laboratories. She has handled over 600 vertical cases involving gangs, major



narcotics, and family protection. She has prosecuted 77 jury trials to verdict, including 11 murders and other serious felony cases including attempted murder, torture, kidnapping, rape, serial robbery and burglary, poisoning, witness intimidation, stalking, and criminal threats. Ms. Roach is a recognized expert in *voir dire*, trial strategy, gang prosecution, developing informants, protecting confidential information and vulnerable witnesses, complex wiretap investigations, and reduction of bias in prosecution work.

## PHASE 1

This report details the work of PCE’s independent review in Phase 1 and provides recommendations for Phase 2 of the independent review. The work in Phase 1 included:

- Preliminary review of materials.
- In-person meetings in St. Paul with RCAO and other stakeholders.
- Review of *Rodriguez* case and other appellate decisions.
- Phase 1 categorization of 214 cases in which Dr. McGee may have been involved.
- Research on AP and P30 testing.
- A recommendation regarding notification of the independent review to the defense.

## PRELIMINARY REVIEW OF MATERIALS

To create a context for the case review and meetings in St. Paul, PCE reviewed and summarized the voluminous materials related to *Rodriguez*, where the court concluded, “Ramsey County Medical Examiner Michael McGee . . . presented unsupported, misleading, and inaccurate testimony regarding the cause of [Dru] Sjodin’s death,” and entered an order reversing the sentence of death. PCE also reviewed two reports from 2010 and 2012 by attorney Jeanne Schleh on Dr. McGee cases, identified several appellate opinions pertaining to testimony by Dr. McGee, gained contextual information from RCAO staff, and did preliminary research on AP and P30 testing.

## MEETINGS IN ST. PAUL

Between May 16-18, 2022, the PCE Team met with officials from RCAO and conducted several interviews and meetings pertinent to the independent review with people both inside and outside of RCAO. These meetings provided a useful background for the case reviews that were conducted in Phase 1. The meetings included:



- **Introductory Meeting** with RCAO staff to discuss the project, needed documents, and overview of the issues. Met with Director of Victim, Witness and Postconviction Justice Division Tami McConkey, Assistant County Attorney Michelle Monteiro, and Paralegal Silvia Ares.
- **Meeting with the Ramsey County Medical Examiner** to discuss ME practices, Dr. McGee's history with the office, defense experts, and the Dru Sjodin case. Met with Dr. Kelly Mills, and Assistant County Counsel John Ristad.
- **Leadership Meeting** with Deputy County Manager Scott Williams, Ramsey County Attorney John Choi, and RCAO First Assistant Attorney John Kelly to discuss the goals of PCE's independent review.
- **Meeting Other Minnesota County Attorneys** with cases involving Dr. McGee. In attendance virtually were Stearns County Attorney Janelle Kendall, Stearns County Chief Deputy Mike Lieberg, Stearns County Criminal Division Chief Ole Tvedsen, Stearns County Juvenile Division Chief Joshua Kannegieter, and Sherburne County Lead Assistant Attorney Dawn Nyhus.
- **Meeting on Child Abuse Cases** with RCAO Director of Human Services Legal Division Kathy Eilers about child abuse cases reviewed by McGee.
- **Meeting with RCAO Supervisors** including Executive Assistant to the County Attorney Mark Haase, Prosecution Team Managers Hao Nguyen, Sarah Cory, Jill Gerber, and Maria Mitchell, Public Information Officer Dennis Gerhardstein, and Director of Strategic Initiatives and Community Relations Erica Schumacher. The meeting allowed the PCE Team to introduce themselves and outline the process for the independent review.
- **Meeting with the Attorney General's Office (AG)** with Assistant Attorney General Carrie Sperling to discuss the status of an AG case involving McGee that is under review.
- **Meeting with the Great North Innocence Project (GNIP)** with Executive Director Sara Jones and Legal Director Julie Jonas to discuss cases under review by GNIP.
- **Meeting with Minnesota Bureau of Criminal Apprehension** with Assistant Laboratory Director Staci Bennett and Biology Section Supervisor Mohamed Sedqi to discuss AP testing protocols, evidence requests, and recordkeeping.
- **Meeting at Regions Hospital** with Head SANE Nurse Ellen Johnson to discuss the SANE process, evidence transmission, and the history of AP test use by Regions SANE nurses.

## CASE REVIEWS

To start the review, RCAO created a list of cases where Dr. McGee was identified as a witness. They also received referrals on cases involving Dr. McGee from the Attorney General's Office and the Great North Innocence Project. In Phase 1 PCE reviewed electronic files received from the RCAO for 214 cases.

### Goal for Phase 1 Review

The goal of the Phase 1 review was to determine which cases involving Dr. McGee were High Priority for further review. In consultation with RCAO, PCE's standard for cases that required further review were those where Dr. McGee's testimony or reports on cause and manner of death were at issue and his opinions may have significantly contributed to the defendant's conviction. The determination was based on the facts of the case, not a review of Dr. McGee's testimony. For example, in a case involving a single gunshot wound to the head, where the only issue was the identity of the shooter, Dr. McGee's testimony about the cause of death would not have significantly contributed to the conviction of the defendant. However, where the documents received by PCE indicated that the cause or manner of death had been contested, PCE categorized the cases as High Priority. The decision to study the case further did not reflect any opinion about the validity of Dr. McGee's testimony or reports, as they were not reviewed in Phase 1.

### Phase 1 Categories

PCE divided the reviewed cases into categories, which were defined as follows:

- **High Priority Review:** The case requires a more thorough review of Dr. McGee's testimony or reports because the cause or manner of death was at issue and his opinion may have significantly contributed to the defendant's conviction.
- **Low Priority Review:** More information is required to decide if further review is needed. The type of additional information needed includes ME reports, appellate opinions, or trial transcripts.
- **No Further Review:** The documents reviewed provided no indication that there were issues with the cause or manner of death. This category was used when the reports or testimony of Dr. McGee could not have significantly affected the outcome of the case, when there was an acquittal, when the defendant was deceased, or when Dr. McGee did not render an opinion in the case.

### Protocol

The PCE Team developed a standardized review process for each case file. The goal was to identify cases that required further review of Dr. McGee's work for Phase 2 of this project. The protocol included:





- **Initial Review:** The files were randomly assigned to a PCE team member for initial review and completion of a form containing basic case information, a list of additional materials needed to assess the case, if any, and a determination regarding further review.
- **Peer Review:** After initial review, the form and case file were randomly assigned to another PCE Team member for independent peer review. The peer reviewer indicated agreement or disagreement with the initial recommendation and added items to the list of additional materials needed to assess the case.
- **Group Monitoring:** The PCE Team met at regular intervals to discuss their progress, any issues that arose during review, and to confer on cases in which the initial and peer review recommendations differed. After additional information was received, the team reached consensus.
- **Categorization:** After the Phase 1 review was completed case files were sorted by the level of review required: High Priority, Low Priority, and No Further Review.
- **PCE Project Manager:** A PCE staff member, Amanda Hester, oversaw the proper assignment and completion of the cases received.

## Documents Reviewed

In most of the 214 cases, PCE received a copy of the complaint which included a statement of probable cause written by an Assistant RCAO attorney. In some cases, PCE also received court opinions and medical examiner reports.

## Phase 1 Case Review Findings

PCE reviewed and categorized the 214 cases based on documents provided by RCAO. Categories may change if additional materials are received.

PCE Phase 1 determinations are as follows:

- **No Further Review:** 143 cases require no further review.
- **Low Priority Cases:** 43 cases require additional documents to make a final determination of classification.
- **High Priority Cases:** 18 cases appear to raise issues that require additional documents for a more in-depth review.
- **Insufficient Information:** 10 cases have insufficient information to make any decision and require additional information prior to classification for further review.



## AP TEST CASES

### Background

PCE has also been asked to provide guidance to RCAO on how to screen RCAO cases for possible problematic use of Acid Phosphatase test (AP test) results. Acid Phosphatase is a naturally occurring enzyme found in, but not exclusive to, human seminal fluid. Post-puberty, high concentrations of Acid Phosphatase are found in epithelial cells associated with the prostate. Cellular components of bone, spleen, kidney, liver, intestine, and blood also contain this enzyme. AP tests indicate the presence of the enzyme, and it is used as a presumptive test for semen. The AP test may also provide a number for the quantity of AP in the sample (referred to in this report as *quantitative AP test*).

A review of scientific literature indicates that testing for the presence of AP is a well-established practice in the forensic examination of sexual assault cases and detection of prostate cancer. However, there appears to be conflicting scientific literature on whether such testing can be used to opine about the presence of semen or the time that semen was deposited, especially in the absence of other more reliable tests, such as observed sperm, other confirming testing, or DNA. Further research on these issues may be conducted in future phases.

AP tests can be confirmed by a test for Prostate Specific Antigen (P30). This is a protein produced in the prostate gland and secreted in seminal fluid independently of sperm. P30 testing is used to identify seminal fluid, particularly in samples with little or no sperm. P30 is not restricted to seminal fluid but its presence in extremely high concentrations makes it a marker to confirm the presence of semen in samples.

After review of the available materials and relevant cases, it appears that AP and P30 testing were conducted on samples from both living and deceased victims in RCAO cases. Collection from living victims was conducted by sexual assault nurses during the examination of sexual assault victims. Collection from deceased victims appears to have been conducted by the Medical Examiner during autopsy.

**Bureau of Criminal Apprehension Laboratory Testing:** PCE learned that P30 and AP testing were conducted by lab personnel at the Bureau of Criminal Apprehension (BCA). According to interviews conducted with BCA Assistant Laboratory Director Staci Bennett and Supervisor Mohamed Sedqi, they received samples from law enforcement for P30 and AP testing, though now AP testing is no longer done. Regions SANE Nurse Ellen Johnson confirmed that law enforcement personnel collect the samples, taken during SANE exams, when a crime is reported.



BCA laboratory personnel indicated that they only used AP testing as a presumptive test and did not quantify the results, meaning AP presence was noted as present or not present, but there was no numerical value assigned to the results. A positive AP result would trigger the need for additional testing. BCA reports that records from the relevant time period are not electronic and cannot be searched using the current case management system. The only method of retrieval would be to review paper files on a case-by-case basis; however, these files may have been destroyed based on document retention policies. BCA has stopped using AP testing sometime after 2004.<sup>2</sup>

**Regions Hospital Laboratory Testing and Dr. McGee Testimony:** In a deposition that was part of the *Rodriguez* post-conviction litigation, Dr. McGee indicated that he used the Regions Hospital laboratory (formerly Ramsey County Hospital laboratory) to conduct AP testing on samples taken during autopsy. Dr. McGee was also aware that samples collected by law enforcement may have been submitted to BCA for testing by them, but when he requested testing, it was typically done at Regions Hospital.<sup>3</sup>

In the *Rodriguez* case, Dr. McGee testified that Regions conducted a study that supported the use of the *quantitative* analysis of AP testing and that it could show evidence of sexual assault, absent evidence of sperm, semen, or indicative injuries, and it could inform the timing of sexual assault. In *Rodriguez*, Dr. McGee testified that the Medical Examiner's Office's standard for the presence of seminal fluid through AP results was 25 units per liter. He indicated that the cutoff of 10 units per liter used by Regions was established by the study, while he "arbitrarily" set the higher ME levels. Dr. McGee further testified that he advised his employees to use a higher cut off to validate the presence of seminal fluid in ME samples because they were obtained from deceased victims. When Dr. McGee testified in the *Rodriguez* case about the meaning of the *quantitative* AP Test, it appears that he was initially unaware that a confirmatory P30 testing had been done in that case and was negative for semen, thus directly contradicting his testimony. The court held Dr. McGee's testimony to be flawed and reversed the sentence of death.

### PCE's Review of AP Cases

PCE reviewed documents received from RCAO that pertained to AP testing, documents regarding Dr. McGee's testimony based on *quantitative* AP tests and

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<sup>2</sup> Based on interviews with BCA, standard operating procedures from 2004 show that AP tests were still in use at that time.

<sup>3</sup> This appears to be corroborated by the presence of a Regions Hospital report with AP test results discovered in one RCAO homicide case file and numerical AP test results documented in multiple autopsy reports.

conducted independent research on the topic. To gain more information about any studies that might support Dr. McGee's testimony, at PCE's request, RCAO reached out to Regions to obtain documentation about when and how the tests were used and studied going back to the 1980s. Counsel to Regions has indicated that due to record retention policies, documentation about such studies from decades ago probably no longer exist. In addition, there may be no staff at Regions who currently have information about this topic. Thus, PCE has not been able to review Regions' laboratory files or interview relevant lab or IT personnel at Regions' lab about their AP testing.

### Case Review for Use of Quantitative AP Test Results

It should be noted that if solely used as a presumptive test and without a quantitative analysis, the AP results are unlikely to be misused in the manner suggested by the *Rodriguez* order. Thus, it is important to determine how the AP test was used in a particular case. The question remains as to whether the *quantitative* AP test results were used by Dr. McGee during testimony or in reports to indicate the presence and timing of the deposit of seminal fluid. For example, PCE found one Regions' laboratory AP report that consisted of a computer-generated report with a numerical value. However, the report does not include any information or opinion about whether this quantitative result could be used to indicate the presence of seminal fluid. Trial transcripts or other documentation will have to be reviewed to determine if the quantitative results were used.

## ADVICE REGARDING PUBLIC DISCLOSURE OF REVIEW

During the Ramsey County visit, PCE advised the RCAO regarding public disclosure of the review, including sample language for a press release intended to notify the defense bar and the public about PCE's independent review.



## RECOMMENDATIONS FOR PHASE 2

Phase 2 of the independent review requires a deeper analysis of the cases identified during Phase 1 and will narrow the issues in need of additional study and review for Phase 3.

Phase 2 of PCE's independent review involves several components:

- Further review of cases categorized as High Priority, and Low Priority categorization of cases where insufficient information was received during Phase 1, if RCAO can locate needed documents.
- Identification of issues for expert evaluation.
- Listing of experts who have either testified with or against Dr. McGee, based on documents received by PCE.
- Recommendations for possible experts to evaluate Dr. McGee's testimony and reports.
- Review of cases that involved testimony about *quantitative* AP testing.
- Further research on AP testing, if necessary or possible.

This work will be conducted mostly virtually. It is expected that a trip to St. Paul will be required to present the findings of Phase 2, conduct additional interviews, and to discuss next steps for Phase 3.

## FURTHER CASE REVIEWS

### Goal for Phase 2 Reviews

The goal of the Phase 2 independent review is to analyze cases identified in Phase 1 as High Priority or Low Priority to determine whether the cases require an in-depth review of the entire case, an analysis by an expert, or both.

### Phase 2 Assessment Standards

PCE and RCAO will confer about the assessment standards to apply during Phase 2. The following is PCE's recommendation for sorting cases in Phase 2. These categories and definitions will require review and approval by RCAO:

- **No Further Review:** The documents reviewed provided no indication that there were issues with Dr. McGee's testimony or reports. This category was used when the examination or testimony of Dr. McGee could not have significantly affected the outcome of the case, when there was an acquittal, when the defendant was deceased, or when Dr. McGee did not render an opinion in the case.



- **Raises Issues that Require Further Study:** Dr. McGee’s testimony or reports raised issues that require further study. In these cases, PCE recommends consulting with one or more independent medical experts regarding Dr. McGee’s testimony. The consultation will take place in Phase 3.

## Protocol

As with Phase 1, PCE has a protocol for conducting the reviews in Phase 2. A PCE staff member will serve as a project manager, organize documents, and track the completion of tasks. RCAO will obtain the documents needed for PCE’s review.

## Information Needed for High Priority Cases

Eighteen cases have been identified by PCE as High Priority cases and require review of additional documents, many of which will be voluminous. Additional cases may be added to the High Priority list after the Phase 2 review of Low Priority cases. The information required for the Phase 2 review of High Priority cases is as follows:

- **Trials:** Where a High Priority case was tried, PCE will need the full trial transcript. Though the focus of the transcript review will be on the medical examiner testimony and the closing arguments, other aspects of the trial testimony may also be relevant. On a case-by-case basis, PCE may need additional reports relied on by the medical examiner and other experts.
- **Pleas:** For each plea in a High Priority case, PCE will need any testimony by Dr. McGee at hearings or in the grand jury, as well as ME reports, diagrams, motions, defense reports, and other relevant materials from the original prosecution case file.

## Information Needed for Low Priority Review Cases

Forty-three cases have been identified as Low Priority Review and require additional information to determine if additional review is required. One or more of the following items will be needed for PCE’s review:

- Medical Examiner’s report and any diagrams or drawings
- Appellate decisions
- Trial transcripts

## Cases With Insufficient Information and Therefore Not Completed in Phase 1

There are 10 cases from Phase 1 that could not be studied as there was insufficient information to conduct a review. The information has been requested from RCAO and when the information is received, these cases will be completed and categorized in Phase 2.



## Interviews

The Phase 2 review may trigger the need for interviews of people with relevant information. PCE may interview the Assistant US Attorney in North Dakota who is litigating the post-conviction motions in the *Rodriguez* case and Jeanne Schleh who earlier reviewed some of Dr. McGee's cases to learn if there is additional information that can inform the review process. PCE may also speak with experts on various topics and lawyers from the Great North Innocence Project and the Attorney General's Office who are conducting their own reviews of cases involving Dr. McGee. Some of these interviews may be conducted in Phase 3 of this project.

## GATHERING ISSUES AND IDENTIFYING POSSIBLE EXPERTS

It is likely that one or more experts will be retained to assist in the evaluation of Dr. McGee's testimony and reports relevant to this review. During the Phase 2 review, PCE will assist with identifying the issues requiring expert review by gathering relevant trial transcripts and reports and compiling a list of questions. Based on documents received, PCE will collect the names of medical examiners or other experts who have rendered an expert opinion for the prosecution or defense in a case where Dr. McGee conducted an autopsy, or who may have a business conflict with Dr. McGee. These experts will be excluded from consideration as an expert on this project. PCE will identify possible qualified candidates who could serve as an independent medical examiner for this review. The RCAO will make the final decision on whether to hire an expert and who to select.

Meeting with experts and further study regarding the reliability of Dr. McGee's testimony or reports will be conducted in Phase 3 of this review.

## AP TEST CASES: CRITERIA FOR CASE SELECTION

Based on PCE's research, the focus of the review should be on cases where *quantitative* AP testing results were used by Dr. McGee to opine on the timing or incidence of ejaculation. Trial or hearing transcripts may be the only source of information about how Dr. McGee interpreted *quantitative* AP test results and how he testified about those results. The following are cases where such testimony may have been given:

- Sexual Assault cases that resulted in jury trial convictions of male defendants;  
AND
- Dr. McGee was a witness and testified at trial; AND
- *Quantitative* AP testing was conducted; AND
- There was no identifiable physical evidence of penetration such as semen, sperm, or suspect DNA; AND



- The timing or incidence of ejaculation is at issue in the case.

PCE is available to review these cases, if PCE is provided with the needed information by the RCAO.

## REPORT

PCE will prepare a final report describing the results of its work in Phase 2 and make a proposal for Phase 3.

