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NEWS

Did AG's choice 'guarantee the outcome'? Expert in Prude grand jury draws scrutiny

Justin Murphy and Gary Craig Rochester Democrat and Chronicle

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The sole medical expert cited by New York Attorney General Letitia James in her report on the death of Daniel Prude has a consistent track record of deflecting blame from police when people die in their custody — including with regard to excited delirium and restraint leading to asphyxia, two hotly debated concepts that loomed large in Prude's death.

The expert, Dr. Gary Vilke, is an emergency room doctor in southern California who in the last 20 years has provided testimony in court more than 100 times regarding deaths in police custody. Every single time it was the police who hired him to support their version of the story.

James this week announced that a grand jury declined to indict any of the Rochester Police Department officers involved in Prude's death, an outcome she called "very, very disappointing."

The news triggered a fresh round of protests on the streets of Rochester, targeted again at RPD and Mayor Lovely Warren and driven by frustration over a process that provided little closure.

"How can you (James) sit there and tell me that you presented all the evidence that you possibly could and this is the turn out?" Daniel Prude's brother, Joe Prude, said this week in an interview with WXXI News.

There is no way of knowing what James presented to the grand jury in seeking an indictment against the Rochester officers, though a judge may soon unseal the transcripts from the case.

What is clear, though, is that the decision revolved around two controversial ideas: excited delirium and positional asphyxia after restraint.

Excited delirium is the theory that the use of some drugs can make people irrational, highly aggressive, insensitive to cold or pain and uniquely susceptible to sudden death. The medical validity of the concept is hotly debated; skeptics believe it to be an inappropriate catch-all term used when people — particularly Black people — die in interactions with police.

Positional asphyxia is when a person stops breathing while lying on the stomach, especially while physically restrained or with force applied to the back. There, too, great controversy exists. Some experts say police should roll people off their backs as quickly as possible, while others believe the danger is greatly overstated.

To explain these concepts, James hired Vilke, who invariably in his appearances as an expert witness has attributed similar deaths to cardiac arrest or other causes while downplaying the possible role of restraint or other police actions.

Vilke is also a regular interview subject for journalists writing about deaths in police custody. In fact, he was quoted twice in articles related to the death of Daniel Prude in September and October 2020, both times expressing doubt about police culpability. (He declined to comment for this story).

Elliot Dolby-Shields, who has represented relatives of Daniel Prude in a civil lawsuit against Rochester and city police, expressed incredulity at James' choice of expert.

Vilke "makes a living testifying on behalf of police officers and saying what they did was justified, or what they did wasn't the cause of some unarmed Black person's death," Dolby-Shields said.

A spokesperson for James' office on Thursday said: "As evidenced by the exhaustive report that we released to the public, our office has been unwavering in our pursuit of justice in the death of Daniel Prude. Change is desperately needed to repair this broken system, and we're committed to seeing it through."

Others came to James' defense, noting that the county's medical examiner also saw evidence of excited delirium in her autopsy.

Longtime activist Rev. Lewis Stewart, president of the United Christian Leadership Ministry, said in the conversations he and other clergy had with the attorney general show that it was apparent she wanted criminal charges against the officers.

"I believe the attorney general is sincere in wanting an indictment," he said. "I think she was pretty angry herself."

After watching the police body-worn camera videos of Prude's death and reading the Attorney General's report, Julia Sherwin, a California lawyer, said this week, "I have a lot of respect for Attorney General James, but I wish she had done her homework or consulted with someone who knows how to handle these cases, instead of pushing the junk science theory of excited delirium, and hiring a well-known defense expert as her prosecution expert.

"Her choices guaranteed the outcome," said Sherwin, who has challenged the validity of excited delirium in court cases. "This is a clear case of restraint asphyxia."

The "excited delirium" debate

In her report and in her public presentation, James fully embraced the idea of excited delirium. She said officers should have recognized its symptoms and not restrained Prude in the way they did. Better training in that regard was the first of her five recommendations.

Nonetheless, Prude's name can now be counted among those of Black people whose deaths at the hands of police resulted in no indictments; a trend unaltered in New York despite a 2015 Executive Order making the state's Attorney General the special prosecutor in cases involving civilian deaths in police custody.

In her autopsy of Daniel Prude, County Medical Examiner Dr. Nadia Granger maintained that asphyxiation from restraint was central to Prude's death, but she also cited the presence of excited delirium, possibly brought on by his use of phencyclidine, or PCP. While Prude may have been in a physical state that demanded more oxygen, the "excited delirium" likely was not fatal by itself, Granger determined.

In her report on the death, Attorney General James noted the skepticism some have of excited delirium and the claims that it is junk science created to absolve law enforcement of civilian deaths, typically by restraint. She contended in the report that reliable scientific studies endorse the diagnosis, and that a panel convened by the American College of Emergency Physicians also maintained that excited delirium is real and can be identified by certain physical traits, including hypothermia, which Prude exhibited.

The Attorney General's office has also seen a string of similar deaths, the report said, and excited delirium cannot be ignored as a possible cause if lives are to be saved.

"But significantly, (excited delirium), a rare condition in and of itself, does not always portend a fatal outcome and appropriate intervention can reduce the possibility of death,"

the report said.

That conclusion, however, overlooks that in most cases excited delirium is cited as the explanation for the deaths of civilians restrained by police, critics say.

Michael Freeman, a professor of forensic medicine at Maastricht University in the Netherlands, has scrutinized every excited delirium death he could find in literature.

"Excited delirium was essentially used as an exculpatory diagnosis to move the focus away from restraint when there has been a death," said Freeman, who has often been a courtroom expert countering Vilke's claims of death by excited delirium.

"Vilke is the guy who says there is typically no such thing as restraint-related asphyxia," Freeman said.

Danger of prone position known

Scores of Americans have died in the last decade after being restrained by police and left lying on their stomachs. George Floyd, who died two months after Prude, was also face-down with an officer's knee on his neck when he expired. Drug use, obesity and prior health conditions are often contributing factors.

For this reason many police departments, including Rochester, advise against prolonged prone restraint.

"The risk of positional asphyxia can increase when a person is restrained in the prone position," the RPD wrote in a 2015 training bulletin cited in James' report. "Current training dictates that once a member believes the scene is safe, the member would remove a subject from the prone position."

Both Monroe County Medical Examiner Granger and Geoffrey Alpert, the law enforcement expert who James hired, concluded that restraint had contributed to Prude's death.

The "segmenting" technique that police used, Granger told the attorney general's office, "likely added to Mr. Prude's paranoia, agitation and stress, thereby further increasing his heart rate and need for oxygen," while also "interfer(ing) with his ability to fully expand and contract his lungs to accommodate his increased need for oxygen."

Vilke, on the other hand, said the restraint and segmenting had been more or less irrelevant. Instead, he said, Prude died from cardiac arrest.

"He noted research revealing that a significant amount of weight (400 pounds) placed squarely on the upper back (across from the lungs) for a prolonged period of time does not cause asphyxiation," the report reads, referring to Vilke. "He said that individuals suffering from Excited Delirium Syndrome have gone into cardiac arrest while in the prone position and the supine position, with and without weight being placed upon them."

As with excited delirium, the scientific facts of the debate can be difficult for a layperson to parse — particularly a police officer who must act immediately in a life or death situation.

Jack Ryan, a former police officer and current trainer, makes a simple pragmatic case against prone restraint.

"I say this all the time during training: 'What do you have to lose by (not) doing it?'" he said in a 2020 interview with KUSA-TV in Denver.

"I've said in training that we ought to have it printed on the tip of the dashboard of the police car or maybe tattooed on the backs of peoples' hands: 'Get off of them, and get them into a position that facilitates breathing.'"

Vilke's track record as expert witness

In a case like the death of Daniel Prude, then, there are two broad perspectives a medical expert might offer.

One is that Prude died as a result of being held face-down by police for several minutes while handcuffed and with significant pressure applied to his body. This restraint would be exacerbated by the drugs in Prude's body — a factor the officers were well aware of.

The other is that Prude, in the throes of excited delirium, went into cardiac arrest and died, with the police actions playing no determinative role.

More than 100 times, Vilke has been called upon in similar cases to help determine which of those two general interpretations is correct.

In every case but one (among the first of his career, in 2001), it has been the police department in question that brought Vilke into the courtroom as an expert witness. And in depositions and court testimony he invariably has concluded that officers' actions, including restraint, did not cause the death.

"He's a hired gun," a plaintiff's attorney said of Vilke in a Colorado case where a man died after being Tased and restrained while lying face down. Dolby-Shields, the Prude family attorney, said the same thing.

The statistics regarding Vilke's track record come from his own 2019 testimony in that Colorado case. The police department there ended up settling with the man's family for \$2 million.

Vilke declined to comment for this story, citing "some very negative interactions from reporters who claimed they wanted to learn, but rather appeared to have their own agendas and used the opportunity to attack my character and not to discuss the science."

He continued: "I consider myself a researcher and an educator and have been asked to review cases on behalf of both plaintiffs and defense counsel involving arrest-related deaths and have educated counsel for both sides and offered opinions."

In his 2019 testimony, Vilke clarified that plaintiffs in wrongful death cases have sought his opinion but ultimately never have relied upon his opinion because it did not support their contention that the police were at fault.

AG reliance on excited delirium

Vilke's opinion on restraint is not his only police-supportive stance. He has testified about the relative safety of Tasers; neck holds of the sort used on Eric Garner, who died in 2014 while police restrained him using a chokehold; and pepper spray.

Vilke has also maintained that spit hoods like the one placed on Prude's head "do not impact ventilation." In fact, he was quoted as an expert in a Sept. 3, 2020 story about Prude's death on the website health.com.

In another story from Oct. 18, 2020, about excited delirium in the context of Prude and other in-custody deaths, Vilke made clear where he stood.

"A lot of them have delusions of heat or hot things and devils and volcanoes and fires and stuff like that," Vilke said, referring to people experiencing excited delirium. "They're running around naked, covered in sweat, that's all that physiologic internal combustion type of thing going on."

Sherwin, the California lawyer who has challenged the premise of excited delirium in multiple cases of civilian deaths, said that there are legitimate diagnoses, such as "substance

intoxication delirium," that explain a heightened physical and mental disorientation from drugs and alcohol. Yet, the likelihood of death is proven to be minor with that diagnosis so "excited delirium" was carved out to take attention away from homicides caused by restraint, Sherwin said.

Supporters of Attorney General James said the grand jury records, if released, will demonstrate the effort her office put into the prosecution. Some elected officials and activists who spoke with her after she announced the grand jury outcome said she showed passion for police reform.

"She didn't have to move forward with the grand jury," said state Senator Jeremy Cooney, a Democrat. "I think once she made that decision she was all in."

With no indictments, however, there will continue to be some who question if the Attorney General's Office stumbled with its prosecution — especially given its choice of an expert witness.

"We presented the strongest case possible," James said at her press conference announcing the result. "I know the Prude family, the Rochester community and communities across the country will rightfully be disappointed by this outcome. ... We made every attempt to demonstrate the facts, but ultimately we have to respect the decision."

Contact staff writer Justin Murphy at jmurphy7@gannett.com.

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