

News & Views



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Events

Biennial Criminal Law Section Policy Conference “Mental Health Cases in the Criminal Justice System” June 12-14, 2009 Grand Hotel – Mackinac Island

Many believe we are spending too much on corrections. Everyone agrees we cannot afford to waste what we are spending. Yet, a growing consensus is declaring that we must handle mentally ill offenders differently. Can a new criminal justice component - Mental Health Courts - be growing fast in this era of no money? Yes! While added funds are needed everywhere for mental health treatment, new mental health court pilots are accomplishing significant results on a shoestring. In many cases, existing personnel are shifting duties with little or no additional funding.

To achieve success, judges, prosecutors, defense, police, and mental health professionals are cooperating and coordinating their work. Conferees will hear from the oldest of the nine pilots in Michigan - Genessee County - which is reporting an over 80% success rate. The Administrator of one of the most advanced programs in the nation will be a speaker. We will learn that Mental Health Court pilot projects are experimenting with wide variations in structures and managing policies.

Join us and help build what can be policy for the State Bar. Return the enclosed Grand Hotel Registration Form, or check out the many other excellent overnight facilities on Mackinac Island. **The Grand Hotel is holding rooms for this conference only until May 15.** To secure the conference rate, book by that date.

Questions? Contact either Criminal Law Section Chair Matthew Smith (616-456-8024; mattboss01@aol.com;) or Conference Committee Chair Jim Shonkwiler (517-627-9103; jlswiler@comcast.net).

Editor's Note: The Criminal Law Section has long advocated for reform of our system for appointing counsel to indigent defendants. Laura Sager, Director of the Michigan Campaign for Justice, has been asked to provide us with periodic updates on this critical issue:

Moving forward in tough times

The grim economic news shadows every attempt to address holes in Michigan's safety nets for those who are losing their jobs and homes. State government is on the chopping block and how and when we will emerge from the ongoing crisis is anyone's guess.

So how do we respond about why public defense reform should be a priority in these economic times?

First, the right to effective assistance of defense counsel for indigent individuals is a constitutional right, not a nicety to dispense with when times are tough. Louisiana reformed its system in a bipartisan accord after Hurricane Katrina, when it was literally facing issues of life and death for its citizens.

Secondly, public defense reform is one element of a smart approach to restructuring of Michigan's spending priorities. Our current public defense system is costly, inefficient and too often ineffective. Duplicative administrative costs, wrongful convictions, court costs retrying cases due to error, increased jail and prison costs and giant taxpayer funded settlements after costly lawsuits all misuse scarce taxpayer dollars. Establishing statewide standards and a more efficient system of state funding for vital and constitutionally mandated public defense services not only addresses constitutional rights, but helps curb unnecessary corrections costs. Michigan's counties are groaning under the pressure of funding a system that is a state responsibility – leading to even more pressure on a system in crisis.

Finally, it is in the best interest of public safety to ensure that the right person is doing the right time for the right crime. When the wrong person goes to prison, then the real perpetrators are free to commit more crimes, as we have seen in a series of high profile cases.

A series of reports over the last few decades have outlined the failures of Michigan's public defense system. These reports have repeatedly found that our system is both inadequate funded and fails to implement and enforce even minimum national standards for effective public defense systems. The cracks in the system grow wider in tough times, as more citizens need access to these essential services and our counties buckle under the strain of providing them.

We have a number of events coming up that are posted on our website. Key dates to circle on your calendar:

- * Bimonthly meetings of the Public Defense Task Force at the State Bar of Michigan, Lansing, third Tuesdays, 10 a.m. Check the website or call the Campaign at (517) 372-3050.
- * May 21: The Public Defense Task Force 2nd Annual Conference will take place at the Radisson Hotel in Lansing. This year's theme is "Reforming Michigan's Public Defense System: The Economic, Social and Human Benefits." Save the date!

Have questions, suggestions, or concerns? Please contact us at info@michigancampaignforjustice.org or call 517-372-3050.

The 2009 Report from the National Academies – The Wake-Up Call for Criminal Law Practitioners in Michigan

by

Brian Zobel*

On February 18, 2009, the National Research Council of the National Academies released a report entitled *Strengthening Forensic Science in the United States: A Path Forward*.¹ The substantive findings stated in the report are sobering; the committee was highly critical of a number of forensic disciplines.

The scientific validity of the basic assumptions underlying forensic firearms and toolmark examination, fingerprints, bite marks, blood spatter, hair and handwriting comparison were called into question. The committee further endorsed the need for mandatory and independent oversight, regulation and certification of forensic labs. Significantly, the criminal justice system was faulted for having been largely ineffective in excluding false and misleading forensic test results.

These findings and recommendations were not well received in the law enforcement community. The National Institute of Justice (NIJ) attempted to pre-empt publication by cutting funding for the study. Fortunately, the scientists carried the day.² Never before has such an august group leveled such a critique, at least publicly.

Michigan criminal law practitioners should find this report invaluable. While it is not a cookbook for success in the litigation of forensic science issues, it is the thinking practitioner's guide for crafting, and winning, challenges to unscientific forensic testing.

Forensic Science Fiction

Some of the committee's findings deserve special note. With respect to firearms examination, the National Academies concluded that the uniqueness of firearms markings has not been scientifically established:

Because not enough is known about the variabilities among individual tools and guns, we are not able to specify how many points of similarity are necessary for a given level of confidence in the result. Sufficient studies have not been done to understand the reliability and repeatability of the methods.³

The committee cited the conclusions of the 2008 National Research Council report entitled *Ballistic Imaging*:

The validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated.⁴

The 2008 NRC report also stressed the subjectivity of firearms examination:

Ultimately, as firearms identification is currently practiced, an examiner's assessment of the quality and quantity of resulting toolmarks and the decision of what does or does

not constitute a match comes down to *a subjective determination based on intuition and experience.*⁵

These conclusions should shock the reader. Any forensic technique that has not been sufficiently validated should not be admissible under FRE/MRE 702 and the *Daubert* standard. Any forensic technique based on intuition is not forensic science.

The Detroit Police Lab, One Year Later

The timing of the National Academies' report is ironic, considering the calamity that is forensic testing in Detroit. As the collapse of the DPD firearms lab nears its one year anniversary, the Wayne County Prosecutor's Office gave the Detroit Free Press an update on its forensic review unit. The picture was not pretty:

Wayne County Prosecutor Kym Worthy says her office has identified 147 cases of convicted and imprisoned people that will require the retesting of evidence as part of the investigation into the now-closed Detroit police crime lab -- unveiling the first of *potentially thousands of cases that are at risk of unraveling because of mishandled evidence.*

Worthy said her office has submitted a budget to [Mayor] Cockrel's office, which conservatively calls for \$871,000 per year to take on such tasks.⁶

The MSP lab has been working cooperatively with the Wayne County Prosecutor on this project. They have appeared together before the Michigan Legislature asking for increases in the MSP budget:

Last month, the state approved \$5 million for the hiring of 45 forensic scientists to add to the State Police's current staff of 36 across seven labs.

Unfortunately, these hefty price tags have not included an announcement that anyone was being released. The 147 "convicted and imprisoned" remain so while the prosecutors attempt to shore up their "unraveling" cases with retesting by the MSP.

No matter how much money is thrown at the problem, it is wrong to presume that retesting by the MSP lab is the answer to faulty work by the DPD. It ignores the clear message from the National Academies and NRC regarding the shortcomings inherent in forensic firearms examination. Whether performed by the DPD, MSP, or anyone else, *identification through firearms evidence has never been scientifically validated.*

For years, MSP lab personnel have claimed firearms identifications to the exclusion of all other firearms in the world. This is precisely what the NRC has condemned as unscientific. Far from providing some panacea solution to Detroit's problems, retesting by the MSP is just as likely to result in more false evidence.

The suggestion that the DPD lab is closed is also misleading. While the DPD lab may not be performing actual forensic testing, their personnel are reporting to work, collecting their paychecks and are still responsible for handling, packaging and shipping the evidence from ongoing criminal cases.

The DPD lab is not only open, the prosecutors are still taking DPD lab results to court. One of the faulty testing cases which first exposed the problems at the DPD lab was the matter of the *People v Jarrhod Williams*. On October 30, 2008, the Wayne County Prosecutor said, "I cannot have anybody convicted based on this kind of evidence that's inaccurate."⁷ Yet on March 5, 2009, the prosecutor's office won a ruling in the trial court admitting the original DPD lab results in Defendant Williams's upcoming trial.⁸

Beware lest a statue slay you...

While the National Academies were certainly critical of the traditional forensic disciplines, the committee also found fault with the criminal justice system:

...the adversarial process relating to the admission and exclusion of scientific evidence is not suited to the task of finding "scientific truth." The judicial system is encumbered by, among other things, judges and lawyers who generally lack the scientific expertise necessary to comprehend and evaluate forensic evidence in an informed manner; trial judges (sitting alone) who must decide evidentiary issues without the benefit of judicial colleagues and often with little time for extensive research and reflection, and the highly deferential nature of the appellate review afforded trial courts' *Daubert* rulings. Furthermore, the judicial system embodies a case-by-case adjudicatory approach that is not well suited to address the systematic problems in many of the various forensic science disciplines. Given these realities, there is a tremendous need for the forensic science community to improve. Judicial review, by itself, will not cure the infirmities of the forensic science community.⁹

The failures described by the committee have been the reality in Michigan for a generation. Since the release of the NRC report in 2008, prisoners incarcerated around the state have come forward with examples of the excesses of forensic firearms "identification." Many of these men have been incarcerated for ten or twenty years, some even longer. The transcripts from their trials stand as poignant testimonials to the inability of the lawyers and courts to spot the evidentiary issues.

In case after case, defense counsel stipulated to whatever was claimed in the examiner's report. On cross examination, one defense attorney ended up suggesting that firearms markings were like fingerprints. In another case, the trial judge took over the questioning of the firearms examiner, and "clarified" the identification of the weapon for the jury through the use of leading questions.

The March 15, 2009 Free Press article included one attorney's confession:

To a defense lawyer, the scientific evidence in court is the hardest evidence to contest... whether it's a blood test in a drunk driving case or a ballistic test in a murder case. You are at the mercy of a piece of paper.¹⁰

Michigan trial courts are tasked with acting as evidentiary gatekeepers. MRE 702 was amended effective January 1, 2004, transforming Michigan into a *Daubert* jurisdiction. MRE 703 was amended effective September 1, 2003, requiring that all facts and data underlying opinion testimony be in evidence. We are never at the mercy of a piece of paper; the law of evidence is there to exclude unreliable testimony.

¹ *Strengthening Forensic Science in the United States: A Path Forward*, National Academies Press, 2009.

² Moore, S, *Science Found Wanting in Nation's Crime Labs*, New York Times, February 5, 2009.

³ *Strengthening Forensic Science in the United States: A Path Forward*, at page 5-21.

⁴ *Id.* at page 5-20.

⁵ National Research Council, *Ballistic Imaging*, National Academies Press, 2008, at page 54-55.

⁶ Hunt, A and Schmitt, B, *147 cases in police lab mess called 'tip of iceberg'*, Detroit Free Press, March 15, 2009.

⁷ Patton, N, *Worthy: Findings about Detroit crime lab appalling*, Detroit Free Press, October 30, 2008.

⁸ Schmitt, B, *Judge: Faulty Detroit crime lab evidence ok to use*, Detroit Free Press, March 6, 2009.

⁹ *Strengthening Forensic Science in the United States: A Path Forward*, at page 3-20.

¹⁰ Hunt, A and Schmitt, B, *147 cases in police lab mess called 'tip of iceberg'*, Detroit Free Press, March 15, 2009.

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