

# The National Association of Criminal Defense Lawyers

## Comments on Reforming Forensic Science

### **Issue: Promoting Quality Forensic Science in Our Criminal Justice System.**

The conclusion of the National Research Counsel after two years of study is that most forensic science disciplines lack any scientific basis for the claims made in courtrooms across America.

To correct this failing the NRC made one overarching recommendation: The creation of a forensic science governing body with “no ties to the past,” one that’s “strong enough – and independent enough – to identify the limitations of forensic methodologies . . . .”<sup>i</sup>

It was the “strong consensus” of the report writers that the goal of “advancing *science* in the forensic science enterprise” cannot be achieved by placing this oversight body in the Department of Justice.<sup>ii</sup>

**Recommendations: Ensure Independence and Transparency.** Legislation implementing the recommendations of the NRC for an oversight body must:

1. Require that the leadership of the oversight body be made up of independent scientists with a comprehensive background in scientific research or statistics.
2. Protect the oversight body from the influence of courts, local and federal law enforcement, and professional organizations aligned with crime labs.<sup>iii</sup> This protection is essential to promoting a culture dominated by science and the scientific method at every level of the oversight organization.
3. Provide the oversight organization with the resources and the responsibility for establishing standards for each forensic discipline and for individual and lab accreditation. Implementation may be assisted by existing professional organizations (*e.g.*, ASCLD), but the standards for each discipline and for labs and for practitioners must be established by independent scientists and statisticians.
4. Require that the work of the oversight body and of forensic labs be open and transparent.

**Facts:** NACDL members are experienced litigators whose cases include forensic evidence analyzed by both local and federal crime labs. What we have observed in litigation across the country is the basis for our recommendations. Specifically:

- Federal law enforcement has long been aware of the problems identified in the NRC Report, but little reform has been undertaken<sup>iv</sup> much less the “overhaul of the forensic science community” called for by the NRC.<sup>v</sup>
- The reaction from law enforcement to the report identifying the shortcomings of forensic science has too often been defensive, dismissive, and, in some instances, disingenuous.<sup>vi</sup>
- Law enforcement necessarily requires some secrecy to pursue its mission. Science on the other hand *only* thrives in a culture of openness and transparency. Trying to conduct science within a law enforcement culture has impeded the scientific development of forensic disciplines.<sup>vii</sup>
- Accreditation by professional organizations using standards established by professional organizations has not stemmed the flow of lab scandals.<sup>viii</sup>

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<sup>i</sup> National Research Council, Committee on Identifying the Needs of the Forensic Science Community, *Strengthening Forensic Science in the United States: A Path Forward* (hereinafter “NRC Report”), at 18 and 16 (2009).

<sup>ii</sup> *Id.* at 17 & 18.

<sup>iii</sup> This is not to say that law enforcement and professional organizations should have no input in this oversight body. However, their role must be limited to advisers and consultants; persons invested in the status quo must not have a decision-making role.

<sup>iv</sup> See NIJ, *Forensic Sciences: Review of Status and Needs*, 1999; NIJ, *Status and Needs of Forensic Science Service Providers: a Report to Congress*, 2004; Kenneth E. Melson, *President’s Editorial: The Journey to Justice*, 48 J. of Forensic Sci. 705, 707 (2003); and NRC Report at 16 (discussing the inadequacies of past leadership by NIJ and the FBI).

<sup>v</sup> NRC Report at 18.

<sup>vi</sup> See H.T. Edwards, *The NAS Report on Forensic Science – What it means for the Bench and the Bar*, at 4 (May 6, 2010), available at

[http://www.cadc.uscourts.gov/internet/home.nsf/AttachmentsByTitle/NAS+Report+on+Forensic+Science/\\$FILE/Edwards,+The+NAS+Report+on+Forensic+Science.pdf](http://www.cadc.uscourts.gov/internet/home.nsf/AttachmentsByTitle/NAS+Report+on+Forensic+Science/$FILE/Edwards,+The+NAS+Report+on+Forensic+Science.pdf) (discussing briefs filed by various U.S. Attorneys’ offices mischaracterizing his view of the role of the report in admissibility hearings). See also, Government’s Opposition to Defendant’s Motion to Exclude Expert Testimony Concerning Latent Fingerprint Evidence, *United States of America v. Titus Faison*, No. 2008-CF2-16636 (D.C. Super. Ct. Feb 19, 2010) (arguing that the relevant scientific community for assessing fingerprint examination is limited to fingerprint examiners and does not include the scientists and scholars involved in the development of the NRC report) and Appellee’s Opposition to Public Defender Service’s Motion to Participate as Amicus Curiae, *Ricardo Jones v. United States of America*, No. 08-CF-716, at 4 n. 2 (D.C. Court of Appeals Aug. 30, 2010).

<sup>vii</sup> Despite repeated requests by defense counsel, federal crime labs do not allow outside experts to observe testing. Many federal and state labs refuse to disclose their protocols, standard operating procedures, audit and accreditation results, proficiency tests, and validation studies. And most law enforcement labs refuse to allow academics or independent scientists access to their population data, *i.e.* DNA, fingerprint and firearm databases. See, *e.g.*, Time for DNA Disclosure, *Science*, Vol. 326 (Dec. 18, 2009), available at [http://www.bioforensics.com/articles/Krane\\_Science\\_letter\\_2009.pdf](http://www.bioforensics.com/articles/Krane_Science_letter_2009.pdf) (scientists seeking access to the FBI DNA database for population genetics studies that could impact criminal cases; request was subsequently and cursorily denied by the FBI).

<sup>viii</sup> See NRC Report at 195 (“In the case of laboratories, accreditation does not mean that accredited laboratories do not make mistakes, nor does it mean that a laboratory utilizes best practices in every case”). See also An Independent Review of the SBI Forensic Laboratory (Aug. 8, 2010), available at <http://ncdoj.gov/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/An-Independent-Review-of-the-SBI-Forensic-Laboratory.aspx> (detailing the recent results of an independent review of the ASCLD-accredited State Bureau of Investigation in North Carolina, where it was discovered that “poorly crafted policy, inattention to reporting methods which permitted too much analyst subjectivity; and ineffective management and oversight” had led to exaggerated and false serology reports and testimony); Investigators Missed All SBI Faults (August 27, 2010), available at <http://www.newsobserver.com/2010/08/26/648075/inspectors-missed-all-sbi-faults.html>; OIG, *The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities* (May 2004) available at <http://www.justice.gov/oig/special/0405/chapter4.htm> (detailing the Jacqueline Blake drylabbing scandal at the ASCLD-accredited FBI DNA Laboratory).