

The North Carolina Crime Lab Scandal

BY PAUL C. GIANNELLI

Gregory Taylor was the first person freed by the North Carolina Innocence Inquiry Commission. North Carolina General Statutes Section 15A-1461 (2010) establishes an innocence commission as “an extraordinary procedure to investigate and determine credible claims of factual innocence.” North Carolina is the only state that has an agency specifically dedicated to reviewing innocence claims. (*See generally* David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027 (2010).)

The case against Taylor was circumstantial, and he always proclaimed his innocence. Indeed, he refused to make a deal to inculcate an acquaintance who was with him on the night of the crime. In the course of the innocence commission’s investigation, the bench notes of the serologist, Duane Deaver, who examined evidence for Taylor’s original trial, surfaced. He had prepared a lab report that was used at trial to connect the victim to Taylor’s car. The lab report noted that there were “chemical indications for the presence of blood.” However, this report revealed only the results of a preliminary test for blood. In contrast, the bench notes showed that a subsequent confirmatory test was negative, but these results were not disclosed to the prosecution or the defense at trial.

Surprisingly, during the inquiry the serologist claimed that lab procedure did not require the reporting of negative confirmatory tests. And this was corroborated by the lab director: “SBI Director Robin Pendergraft defended Deaver’s work in Taylor’s case, saying he violated no SBI policies. She explained that SBI forensic analyst report positive test results indicating a substance is blood, even if more specific tests call that result

into question.” (Mandy Locke & Anne Blythe, *SBI to Review Old Lab Cases*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 28, 2010.)

The Investigation of the Lab

As a result of this disclosure, the state attorney general commissioned an investigation into the lab’s practices. The two former FBI officials, who conducted the review, concluded:

This report raises serious issues about laboratory reporting practices from 1987–2003 and the potential that information that was material and even favorable to the defense of criminal charges filed was withheld or misrepresented. The factors that contributed to these issues range from poorly crafted policy; lack of objectivity[;] the absence of clear report writing guidance; inattention to reporting methods that left too much discretion to the individual Analyst[;] lack of transparency; and ineffective management and oversight of the Forensic Biology Section from 1987 through 2003.

(CHRIS SWECKER & MICHAEL WOLF, AN INDEPENDENT REVIEW OF THE SBI FORENSIC LABORATORY 4 (2010).)

In particular, the investigation identified four different types of improper reporting. These included reports that (1) mentioned that tests for the presence of blood were not conclusive but failed to report a confirmatory negative test; (2) failed to mention one or more negative or inconclusive confirmatory tests; (3) stated that no further tests were conducted when, in fact, one or more confirmatory tests were conducted with negative or inconclusive results; and (4) overstated laboratory test results or where lab notes contradicted the reported result. (*Id.* at 3.)

This failure of the North Carolina criminal justice system is breathtaking. The experts, the laboratory, the prosecutors, and the defense attorneys in these cases did not do their jobs.

Laboratory Misconduct

The failure to present accurate information in the lab report is inexcusable. Crime labs serve the criminal justice system. Thus, incomplete reports containing misleading information undermine this purpose. The National Academy of Sciences landmark 2009 report on forensic science addressed the issue:



PAUL C. GIANNELLI is a Distinguished University Professor and Weatherhead Professor of Law at Case Western Reserve University School of Law in Cleveland, Ohio, and the coauthor of *Scientific Evidence* (4th ed., Lexis 2007). He is also a contributing editor to *Criminal Justice* magazine.

As a general matter, laboratory reports generated as the result of a scientific analysis should be complete and thorough. They should contain, at minimum, “methods and materials,” “procedures,” “results,” “conclusions,” and, as appropriate, sources and magnitudes of uncertainty in the procedures and conclusions (e.g., levels of confidence). Some forensic science laboratory reports meet this standard of reporting, but many do not. Some reports contain only identifying and agency information, a brief description of the evidence being submitted, a brief description of the types of analysis requested, and a short statement of the results (e.g., “the greenish, brown plant material in item #1 was identified as marijuana”), and they include no mention of methods or any discussion of measurement uncertainties.

(NAT’L RESEARCH COUNCIL, NAS, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 21 (2009).)

In addition, reports “must include clear characterizations of the limitations of the analyses, including measures of uncertainty in reported results and associated estimated probabilities where possible.” (*Id.* at 21–22.)

Within months of the NAS report’s issuance, the Supreme Court provided an example in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). The court found that the laboratory report in that case “contained only the bare-bones statement that ‘[t]he substance was found to contain: Cocaine.’ At the time of trial, petitioner did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed.” (*Id.* at 2537 (citation omitted).)

This is not a new issue. The *Journal of Forensic Sciences*, the official publication of the American Academy of Forensic Sciences, published a symposium on the ethical responsibilities of forensic scientists in 1989. One article discussed a number of unacceptable laboratory reporting practices, including (1) “preparation of reports containing minimal information in order not to give the ‘other side’ ammunition for cross-examination,” (2) “reporting of findings without an interpretation on the assumption that if an interpretation is required it can be provided from the witness box,”

and (3) “[o]mitting some significant point from a report to trap an unsuspecting cross-examiner.” (Douglas M. Lucas, *The Ethical Responsibilities of the Forensic Scientist: Exploring the Limits*, 34 J. FORENSIC SCI. 719, 724 (1989).) Lucas was the director of the Centre of Forensic Sciences, Ministry of the Solicitor General, Toronto, Ontario.

Bench Notes

The North Carolina debacle once again illustrates the importance of bench notes. Bench notes are often cited in the crime lab scandals. One of the most notorious cases involved Fred Zain, the chief serologist in the West Virginia State Police Crime Laboratory, who falsified test results from 1979 to 1989. (*In re Investigation of the W. Va. State Police Crime Lab., Serology Div.*, 438 S.E.2d 501, 511 (W. Va. 1993).) A forensic scientist would later comment: “It is also clear that in case after case, defense counsel failed to review the case notes of the prosecution’s forensic serologists. Even a layperson would have seen that Fred Zain’s written reports and sworn testimony were contradicted by his case notes.” (Walter F. Rowe, *Commentary*, in EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL xviii (1996).)

Prosecutorial Bias

Moreover, the North Carolina crime lab’s reporting had a prosecutorial slant. While negative confirmatory tests were hidden or obscured, “positive presumptive and confirmatory test results were always included in final laboratory reports.” (SWECKER & WOLF, *supra*, at 25.) Here, again, the pro-prosecution bias of a crime laboratory is demonstrated. For over three decades, commentators have raised this issue:

- James E. Starrs, *The Ethical Obligations of the Forensic Scientist in the Criminal Justice System*, 54 J. ASS’N OFFICIAL ANALYTICAL CHEMISTS 906, 910 (1971) (arguing that lab personnel “inevitably become part of the effort to bring an offender to justice. And as a result, their impartiality is replaced by a viewpoint colored brightly with prosecutorial bias”);
- Andre A. Moenssens, *Novel Scientific Evidence in Criminal Cases: Some Words of Caution*, 84 J. CRIM. L. & CRIMINOLOGY 1, 6 (1993) (stating crime labs “may be so imbued with a

pro-police bias that they are willing to circumvent true scientific investigation methods for the sake of ‘making their point.’); and

- Randolph N. Jonakait, *Forensic Science: The Need for Regulation*, 4 HARV. J.L. & TECH. 109, 160 (1991) (“Another [problem] is the failure of forensic scientists to shield themselves from possible bias.”).

A British court also commented on the issue: “Forensic scientists may become partisan. The very fact that the police seek their assistance may create a relationship between the police and the forensic scientists. . . . Forensic scientists employed by the government may come to see their function as helping the police. They may lose their objectivity.” (R. v. Ward, [1993] 96 Crim. App. 1 (U.K.).)

The Defense Attorneys

If there is a lab report in a case, the attorney needs to know what tests were performed and what the limitations of the test results are. A vigilant defense counsel would have quickly discovered that the lab report was based on a preliminary test (e.g., luminol or phenolphthalein). These are screening tests, which are useful for quickly eliminating stains that are not blood. But there are false positives, and thus a confirmatory test (e.g., the Takayama test) is required. The obvious question for defense counsel is: Where are the results of the confirmatory test? Were they positive or negative?

The right to counsel includes the right to effective assistance of counsel, which in turn imposes an obligation to investigate. As the Supreme Court has noted, “a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.” (Evitts v. Lucey, 469 U.S. 387, 396 (1985).)

The Prosecutors

The deficiencies cited above apply to the prosecutors as well. Prosecutors should have known the difference between a preliminary and confirmatory test. The most basic of all professional ethical precepts is competence. Model Rule of Professional Conduct 1.1 provides: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” If prosecutors did know and failed to correct the misimpression, that conduct raises a different

ethical issue. In the *Taylor* case, “a prosecutor repeatedly told jurors the substance was blood.” (Locke & Blythe, *supra*.)

The prosecutors also had a *Brady* obligation, which included the laboratory. The Supreme Court has extended *Brady* to cover exculpatory information in the control of the police. (Kyles v. Whitley, 514 U.S. 419, 438 (1995).) Some courts have explicitly included crime labs. In one case, the California Supreme Court noted that a laboratory examiner “worked closely” with prosecutors and was part of the investigative team. The court concluded that the “prosecutor thus had the obligation to determine if the lab’s files contained any exculpatory evidence, such as the worksheet, and disclose it to petitioner.” (*In re Brown*, 952 P.2d 715, 719 (Cal. 1998).)

In another case, a court wrote that an experienced crime lab technician “must have known of his legal obligation to disclose exculpatory evidence to the prosecutors, their obligation to pass it along to the defense, and his obligation not to cover up a *Brady* violation by perjuring himself.” (Charles v. City of Boston, 365 F. Supp. 2d 82, 89 (D. Mass. 2005).)

ASCLD/LAB Accreditation

In addition, ASCLD/LAB, the principal accreditation agency in this country, also came under fire. Although the North Carolina crime lab had been accredited since 1988, a series of articles by *The News & Observer*, entitled “Agents Secrets,” raised serious questions about ASCLD/LAB’s accreditation procedures. (See Mandy Locke & Joseph Neff, *Legislators: SBI Needs a New Accrediting Agency*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 17, 2010.) A subsequent editorial highlighted the following issues:

- “Inspectors from ASCLD-LAB can be employed by crime labs that are themselves reviewed by the agency, creating a tendency among examiners to go along to get along.”
- “In reviewing analysts’ work, ASCLD-LAB allows laboratory supervisors to pick cases to be examined at their labs. That saves time—but how likely would it be that a case involving, say, the SBI lab’s failure to report a test for human blood that didn’t pan out would be volunteered for outside review?”
- “The agency seeks to have every lab accredited and works to help the labs achieve it.

That's not an attitude calculated to keep lab personnel on their toes.” (Editorial, *Overlooked*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 29, 2010. See also Joseph Neff & Mandy Locke, *Forensic Groups' Ties Raise Concerns*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 13, 2010 (“Two leaders of the accreditation agency are retired [N.C. crime lab] agents who had key management roles at the lab at the time problems persisted.”).)

ASCLD/LAB's response was less than reassuring. Its official statement pointed out that the wording in the North Carolina lab reports “was consistent with the wording commonly used by forensic laboratories in the United States during that era.” (Position Statement from Am. Soc’y of Crime Lab. Dirs: Lab. Accreditation Bd, Position on Reporting of Blood Screening Tests in the 1980’s and 1990’s (Feb. 18, 2011).)

This is not much of a justification; it means the entire field was issuing misleading reports, not just one laboratory. ASCLD/LAB's statement also noted that “it was well known to forensic serologists that the Takayama test, which was widely used as a confirmatory test for blood, often and for a variety of reasons, produced false negative results,” and, “[w]hile a positive Takayama test result confirmed the presence of blood, a negative Takayama test *did not* prove the absence of blood.” (*Id.*) But the laboratory report was not sent to other forensic scientists. It was sent to the lawyers who tried the cases. The above information could have easily been included in Greg Taylor's 1993 lab report. The lab's responsibility was to accurately report

test results, including any limitations or qualifications. If that information was complicated, it was the responsibility of the adversary system to sort it out. Omitting information is not the solution.

Conclusion

As a result of the North Carolina scandal, the state legislature enacted several reforms. First, it amended its accreditation statute, no longer designating ASCLD/LAB as the accrediting agency. The statute now provides: “A forensic analysis, to be admissible under this section, shall be performed by a laboratory that is accredited by an accrediting body that requires conformance to forensic specific requirements and which is a signatory to the International Laboratory Accreditation Cooperation (ILAC) Mutual Recognition Arrangement for Testing for the submission, identification, analysis, and storage of forensic analyses.” (N.C. Sess. Laws 2011-19 amending N.C. GEN. STAT. § 8-58.20(b) (2010).)

Second, the laboratory's “client” is now specified statutorily as the “public and the criminal justice system,” not the “prosecuting officers of the State.” (N.C. Sess. Laws 2011-19 (amending N.C. GEN. STAT. § 114-16 (2010)).)

Third, the willful omission or misrepresentation of information subject to disclosure is now a crime. (N.C. Sess. Laws 2011-19 (amending N.C. GEN. STAT. § 15A-903(d) (2010)).)

Finally, a Forensic Science Advisory Board was created. (N.C. Sess. Laws 2011-19 (codified at N.C. GEN. STAT. § 114-16.1).) ■