

Testimony of
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Committee on Judiciary, United States Senate
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Mr. Chairman and members of the Committee, I want to thank you for the honor of appearing before you, to discuss the National Academy of Sciences Report, Strengthening Forensic Sciences in the United States: A Path Forward. It is especially significant that we appear before you on a subject so vital to the future of law enforcement, prosecution and the administration of justice everywhere.

I am a career prosecutor. My name is Barry Matson. I am the Deputy Director of the Alabama District Attorneys Association and the Chief Prosecutor for the Alabama Computer Forensic Laboratories. Prior to my current position, I was the Chief Deputy District Attorney in Talladega County, Alabama for 16 years. Talladega County is not unlike the vast majority of jurisdictions in America. We were, and are, faced with every manner of drug crime, violent crime, public corruption and gut wrenching homicides. Our trial dockets are growing exponentially. We continually face these challenges with integrity, a strong work ethic, and a deep seeded passion to protect the public and to do justice. Mr. Chairman and members of this committee, we, and no one else, are the only person in the criminal justice system charged with the responsibility of seeking justice. We know, "A prosecutor is held to a higher standard than that imposed on other attorneys because of the unique function [we] perform in representing the interest, and exercising the sovereign power, of the state . . ." *People v. Hill*, 17 Cal 4th 800 (1988).

In my testimony today I will endeavor to give voice to the 'every day' prosecutor struggling with too few resources, expanding case loads as well as agenda driven criminal defense lobbies. We are also dealing with what we call the "CSI" effect, as well as well intended but inexperienced and misguided academicians. We applaud Congress for directing the National Academy of Sciences to undertake the study that led to this report. It is not in spite of the fact we are prosecutors that we welcome a serious critique of the forensic science process, it is because we are prosecutors. But like many endeavors, those with agendas have made an impact not only on this report, but now on courtrooms all over this nation.

The absence of prosecutors on the National Academy of Sciences Committee on Forensic Sciences has not been lost on those of us serving everyday in the trenches of America's courtrooms. The failure of the Committee to seek the consultation of state and local prosecutors

in its 'eight' separate meetings is glaring, and overlooks one of the criminal justice systems most vital elements.

Mr. Chairman, you well know the role of the prosecutor in the American system. As far back as 1816 Courts have said that a prosecutor . . . "is to judge between the people and the government; he [she] is to be the safeguard of the one and the advocate for the rights of the other; he [she] ought not to suffer the innocent to be oppressed or vexatiously harassed, any more than those who deserve prosecution to escape; he[she] is to pursue guilt; he[she] is to protect the innocence; he [she] is the judge of circumstances; and according to their true complexion, to combine the public welfare and the [safety] of the citizens, preserving both' and not impairing either; he [she] is to decline the use of individual passions and individual malevolence, when he [she] cannot use them for the advantage of the public; he[she] is to lay hold of them where public justice, in sound discretion, requires it." Fouts v. State, 4 Tenn. 98, 99 (1816).

Even though, as a prosecutor, I am part of the executive branch of government, I stand in the gap between the citizen and his or her government. Make no mistake about it; I am, like my colleagues, a tough prosecutor and I vigorously seek justice for the victim and the community. However, that toughness is tempered with honesty, fairness and a simple desire to do what is right.

Mr. Chairman, one thing that has been grossly overlooked in all of this process is the fact that prosecutors and forensic science professionals do more to free the innocent and safeguard the liberties of our citizens than any defense project or academician will accomplish in a career. Those entities have no burden or have taken no oath to seek the truth. Conversely, they are required to suppress the truth when it serves the best interest and needs of their client.

Have regrettable incidences occurred in the forensic setting? Yes. Is it to the level that some entities and special projects would have us believe? Absolutely not. As long as human beings are involved we will endeavor to do the very best we can, but no system will be perfect. However, the NAS report before you seems to erroneously focus upon perceived biases in the forensic and law enforcement communities. Forensic technicians and scientists are said to be rife with cognitive bias. This report says they demonstrate this bias by ignoring base rate information in seeking to please supervisors, or by basing results on suggested questions or how the data is presented. Some passages suggest that forensic scientists might simply see 'things' that do not exist, and that they skew the outcome of cases by intentionally presenting their findings in an unfair way to produce a particular result. [Page 4-9 and 4-10] If we are to follow this logic, we must ask this question Mr. Chairman. When a fingerprint examiner tells us that a suspect is excluded as the source of the latent print, should we now charge them anyway because the examiners cognitive bias may have affected the examination? Or when the drug toxicology report tells us the drugs in the possession of the defendant were not controlled, should we assume that they were actually illegal substances and incarcerate the individual? Obviously the answer is a resounding, no. These are silly questions, but they make a point that is overlooked by this report. In other words, this report suggests that the only time forensic sciences is wrong or inaccurate is when the conclusion by the scientist or technician points to the guilt of the accused. If the evidence does not, then everything is okay.

As we speak, in courtrooms in the respective states of all Senators on this Committee, a prosecutor is trying to do the right thing. As a seeker of truth, that prosecutor must be able to take every possible tool into the courtroom. If she does not have the forensic evidence juries have come to expect from a saturation of crime scene television and defense bar demands, she is bludgeoned with pleas of "where are the fingerprints", or "where is the bullet?" If that prosecutor has such evidence, and it is relevant and admissible, she must now defend that evidence from the defense lawyers' attacks using this NAS report.

Mr. Chairman, it is vital that you know the negative impact that this report has already had on prosecutors trying to find the truth. In every jurisdiction across this country, former convictions and current prosecutions are being challenged by using the words of the NAS report to attack forensic science evidence. This is true even though the report made efforts to say that no judgment is made about past convictions and no view is expressed as to whether courts should reassess cases that already have been tried. But the report went on to say [However] . . . there are serious issues regarding the capacity and quality of the current forensic science system; yet, the courts continue to rely on forensic evidence. . . The report concludes that every effort must be made to limit the risk of having the reliability of certain forensic science methodologies judicially certified before the techniques have been properly studied and their accuracy verified. We ask this committee, how could these words not be used to attack prior and current prosecutions where any forensic science discipline has been utilized?

We in the criminal justice arena know that most forensic evidence is rare. None is more rare than fingerprint evidence because they are only 'chance impressions' and the depositing of a latent fingerprint depends on many variables. When we don't have fingerprint evidence, we must constantly counter the defense attack that we have no fingerprint evidence. This defense argument of, "if only we had fingerprints" is heard every day. Now, in the rare cases where we do have fingerprint evidence, we are being faced with the NAS report as defense exhibit number (1).

Mr. Chairman, I feel compelled to address another issue raised by this report that touches on an expertise that I possess as a prosecutor, digital evidence. To give this perspective, two years ago the Alabama District Attorneys Association in conjunction with the US Department of Homeland Security, the US Secret Service, the State of Alabama and others, created the National Computer Forensics Institute, (NCFI). This is the first national institution dedicated exclusively to the training of state and local law enforcement, prosecutors and judges in all areas of digital evidence in the criminal justice system. In the very short time we have been operational, we have already trained [at no cost to the student] over 600 law enforcement officers, prosecutors and trial judges from 49 different states and Guam and Puerto Rico. In addition, with the help of Alabama's congressional delegation, we began the only state-wide system of computer forensics labs in the United States, known as the Alabama Computer Forensics Laboratories, (ACFL). I have been the Chief Prosecutor for the ACFL for the past 4 years and we have tried several hundred cases generated from these types of investigations. The NAS report before you includes the process of preserving and extracting digital evidence under the category of "sciences", when in fact, it is truly more of a methodology employing various computer software.

The report does make several observations regarding the needs of the digital forensic community. The reports says: Three holdover challenges remain: (1) the digital evidence community does not have an agreed certification program or list of qualifications for digital forensic examiners; (2)

some agencies still treat the examination of digital evidence as an investigative rather than a forensic activity; and (3) there is wide variability in and uncertainty about the education, experience, and training of those practicing this discipline.

I would first make the point that computer forensics or digital forensics is the fastest emerging and one of the most significant tools that law enforcement has in our investigative arsenal. Drug deals are now set up, via text messaging. We are finding web browser searches by murder defendants which demonstrate prior planning of the murder, and how they will kill their victim. We also routinely find emails between bank employees showing their detailed plans to defraud the institution. These are invaluable pieces of evidence to investigators and ultimately to the trier of fact. .

As for the training and certification, the NCFI, is uniquely situated to fulfill the recommendations of the NAS report. The NCFI was conceived, designed, built and functions solely as a training and education facility for digital evidence. I mention this facility to demonstrate that there are institutions available that are already meeting many of the challenges mentioned in the NAS report.

We welcome the recommendations in the NAS report. We believe that some of these will serve to strengthen forensic sciences for years to come. However, we absolutely recognize and vehemently disagree with the portions that are agenda driven attacks upon well founded investigative techniques. These same techniques or sciences are used everyday to find truth in every type of case. As an investigative tool, every discipline of forensic sciences has not simply led to a conviction, but has delivered the truth. I know this truth, and I sleep very well at night knowing that dedicated prosecutors, forensic technicians and scientists working in independent or law enforcement agencies apply their craft to see that justice is done, the innocent exonerated, and the guilty are held responsible for their crimes.

Thank you for the honor of addressing this committee.

Respectfully Submitted, the 9th day of September, 2009

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