E5 The Role of the Forensic Expert in Criminal Cases Pursuant to the Sixth Amendment of the U.S. Constitution

David M. Benjamin, PhD, 77 Florence Street, Suite 107, North, Chestnut Hill, MA 02467-1918*

After attending this presentation, attendees will learn the Confrontation Clause of the *Sixth Amendment*. Attendees will examine the role of the criminal defense expert under the *Sixth Amendment*, and identify the requirements of the Brady Doctrine.

This presentation will impact the forensic community by demonstrating the criminal defense expert's pre-trial role in "confronting" the scientific evidence against a defendant, as described in the *Sixth* and *Fourteenth Amendments* of the U.S. Constitution.

The confrontation clause of the 6th Amendment of the U.S. Constitution guarantees every criminal defendant the right "to be confronted with the witnesses against him" at trial. However, the defendant's right to a critical review of the evidence to be offered against him/her at trial begins during preparation for court, long before the trial. This is consistent with the practice of initially retaining experts as consultants and not as "testifiers." Accordingly, when retained by the defense, the expert's first role is to study the evidence and figure out what happened, and then to explain to the defense attorney how inculpatory the evidence is and how strong a case the government will be able to mount against the defendant at trial. While the right to retain a forensic expert may derive from the due process provision of the 14th Amendment, the pre-trial review of evidence which will be used against the defendant in court is an extension of the 6th Amendment of the U.S. Constitution. This right of confrontation includes reviewing, examining, and assessing the actual physical evidence or results of laboratory testing that will be the subject of expert testimony against the defendant at trial. In the field of forensic toxicology, such evidence frequently includes the results of breath ethanol tests, blood and urine drug tests, and laboratory reports describing the weight of contraband such as heroin or cocaine found in the possession of the defendant. In some cases, after a review of the evidence, the expert may form opinions that are favorable to the defendant's case, and in other instances, the expert may not have anything helpful to say. After completing a review of the evidence, only then is the expert in a position to decide if he/she will testify at trial.

In criminal cases, most defense attorneys agree that keeping potentially inculpatory evidence out of trial is a far better tactic than trying to mitigate it once it has come in. Therefore, it is incumbent on the criminal defense attorney to work closely with the forensic expert in order to prepare and present pre-trial motions to suppress unreliable evidence, or file a "*Daubert* or *Frye* Motion" to limit or suppress potentially inculpatory testimony that "misleads the jury or is unduly prejudicial" as described in FRE 403. To propound such a motion, the defense attorney needs the assistance of the forensic expert, since only the competent forensic expert is in a position to recognize "junk science" and point out its lack of reliability to the attorney.

Although it may be necessary for the defense expert to testify at a pre-trial hearing to point out the lack of reliability of certain evidence the government may want to present in its case in chief, that does not mean the defense expert will testify at trial. Testifying at the pre-trial hearing is necessary to establish the standard of care in the forensic community or the lack of reliability of the government's proffered evidence. In this capacity, the expert is concerned with helping the court recognize the lack of reliability of certain proffered evidence, test results, or incorrect opinions that the government wants to offer through its forensic expert(s). Such a review is also provided for under the Fundamental Fairness doctrine which resides within the 14th Amendment.

Recently, public attention was focused on the "Duke rape cases" where the prosecutor knew he was moving against innocent defendants and also withheld exculpatory evidence to that fact from the defense, despite a duty to comply with the Brady Doctrine. That prosecutor has lost his license to practice law in North Carolina, and will always be remembered as the part of the horse that went over the fence last! The Brady Doctrine derives from Brady v. Maryland, 373 U.S. 83, 83 s. Ct. 1194, 10 L. Ed. 2d 215 (1963), which creates a due process requirement that exculpatory evidence be disclosed to the defense without a request from the defense to do so. In a subsequent case, U.S. v. Bryant and U.S. v. Turner 142 U.S. App. D.C. 132; 439 F.2d 642 1971, the U.S. Appellate Court explained that the pre-trial disclosure of evidence gathered by the Government "would make the trial more a 'quest for truth' than a 'sporting event.'" (Id at 642). In addition to the search for truth, the Bryant/Turner court also recognized that the government's duty to disclose arises from the need to even the playing field at trial due to the "imbalance in investigative resources" between the government and the defendant because much of the relevant material "will be exclusively in the hands of the government." (Id at 648) This is because the government is supported by the resources of the state crime labs, the FBI, and the DEA, while the defendant has to rely on one or two forensic experts who frequently must be retained with court-approved funds from the government prosecuting the case.

Our founding fathers devised the 6th Amendment in order to protect the rights of defendants, rich and poor alike, and the importance of that relationship still obtains today.

***Sixth Amendment*, Confrontation Clause, Brady Doctrin**

Copyright 2009 by the AAFS. Unless stated otherwise, noncommercial *photocopying* of editorial published in this periodical is permitted by AAFS. Permission to reprint, publish, or otherwise reproduce such material in any form other than photocopying must be obtained by AAFS. ** Presenting Author*