



### **E20 Not a Single Forensic Technique Has Been Examined for Validation or Scientifically Validated During the Four Years Since the National Academy of Sciences Report Issued: Are We Losing This Rare Opportunity to Bolster Credibility in Our Justice System?**

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After attending this presentation, attendees will learn of the forensic reform efforts over the past four years and of the conflicting forces displayed in that period that will shape the outcome of those efforts.

This presentation will impact the forensic science community by implementing without further delay the forensic-practices validation studies called for by the National Academy of Sciences recommendations.

In February 2009, the American people were gobsmacked by the National Academy of Sciences Report: *Strengthening Forensic Science in the United States: A Path Forward*. Gobsmacked, because they suddenly learned that their presumptions about the forensic techniques used to convict, incarcerate, and even execute their fellow citizens were misfounded. Whereas they, along with most judges in the country, had not doubted that those techniques were solidly supported by science, a committee of the body the country had relied on for scientific advice for more than a century now said unanimously that apart from forensic DNA not a single forensic practice of the nation's crime labs had ever been validated. Though the committee said much more, none of the rest drew the reaction elicited by the no-validation assertion, coming as it did in the midst of what seemed like weekly announcements of persons being exonerated long after conviction and imprisonment for heinous crimes.

The legal community's reaction was influenced by both the continuing exonerations and *Daubert* and *Kumho Tire*. Those two decisions of the U.S. Supreme Court require that expert-testimony reliability be established before that testimony can be introduced as evidence at trial. Clearly, one cannot establish the reliability of testimony based on a forensic practice that has never been found to be valid.

In contrast to the surprise of the public, the lawyers, and the judiciary, those scientists knowledgeable in forensics were not at all surprised, a circumstance that many news stories about the Report commented on with their own surprise. The scientists had always been aware of the lack of validation of many forensic practices. They were also aware of the futility of trying to convince non-scientists of this through the adversarial system. For the forensic scientists, therefore, the February 2009 Report represented a long-sought opportunity to move outside the adversarial system to publicly examine the degree to which existing forensic practices have already been validated and, for those found by this examination *not* to have been validated, to measure scientifically the degree to which they *are* valid.

The forensic scientists' optimism in early 2009 was boosted by the swiftness with which the federal government, both the Executive and Legislative branches, reacted to the report (which had been produced in response to a request from Congress). Within months, a subcommittee on forensic science created by the White House and charged with advising the President on how to implement the report's recommendations was staffed and functioning. Concurrently, the Senate Judiciary Committee started holding hearings and meetings aimed at developing forensic reform legislation. It was at this point that conflicts emerged among the different "stakeholder" interests.

The White House subcommittee has had to keep its proceedings confidential until the President decides which of its recommendations are to be accepted. However, the Senate Judiciary Committee's work has been largely open and therefore provides a window into the struggle among those with very different concepts of what should take place, struggles that began just before the report was released and are continuing full throttle today. Those who attended the meetings called by the Judiciary Committee staff and/or attended the formal Committee hearings saw first-hand the lobbying being driven by the struggle. The outcome of the lobbying as of January 2011 can be seen in the form of the bill introduced that month by Senator Leahy, Chair of the Senate Judiciary Committee (the Forensic Reform Act of 2011), and as of July 2012 when a sharply revised version of that bill was released for comment. From the outset, one strong lobbying group has sought to have no important changes occur. A second group sees the reform movement as strictly a means of gaining more resources for crime lab directors. A third group, which may be the same as the first, is probably the strongest and has fought very hard to prevent one of the National Academy of Sciences fundamental recommendations from having any impact. Commenting on the failure of the Department of Justice (DOJ) to have corrected the long-existing failure in forensic practice, the National Academy of Sciences committee strongly expressed its recommendation that future forensic oversight be handled elsewhere than in the DOJ and indeed that the crime labs be removed from law enforcement agencies.

Given the political minefield in which they had to do their work, the Judiciary Committee staffers responsible for drafting the bill did a masterful job. The Forensic Reform Act of 2011 provided for an Office of Forensic Science housed in the office of the Deputy Attorney General (that is, within the DOJ), but for most control and staffing to reside in the National Institute of Technology and Standards (NIST), a purely scientific/technical agency of the federal government. Disappointingly, for those who wish to have scientific and not law-enforcement control of the federal oversight of forensic practice, the version of the bill released for comment 18 months later had been revised so as to effectively lodge control completely within the Department of Justice.

The same month that the revised Senate Judiciary bill was released for comment, a very different forensic-reform bill, the Forensic Science and Standards Act of 2012, was introduced concurrently in the Senate and in the House of



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Representatives. The new bill, developed by the Senate Commerce Committee, has a narrower focus than the earlier one. Whereas the bill developed by the Judiciary Committee seeks to address most of the recommendations of the National Academy of Sciences Report, the Commerce Committee bill is focused on the validity of forensic practices. In further contrast, the new bill assigns responsibility for the validation work to the National Academy of Sciences, NIST, and the National Science Foundation, with just a minor role for the Department of Justice. Reportedly, this bill was developed with little or no input from the group seeking to minimize change, the group seeking to increase resource allocation to lab directors, and the group that wished to retain in law enforcement the various responsibilities that the National Academy of Sciences Report recommended to be removed from that quarter.

As of August 1, 2012, the hope engendered by the National Academy of Sciences Report that forensic practices were on the verge of examination in non-adversarial setting has been completely unfulfilled. As indicated above, there are many intractable reasons for this failure. One not mentioned is the bundling by both the White House subcommittee and the Senate Judiciary bill of the validation studies into a myriad of other proposed fixes estimated to cost hundreds of millions of dollars and to require a large administrative structure. Both groups have lost sight of the fact that the public was upset because of the validation issue. Its demand was for *that* issue to be dealt with; all the matters that these two groups have spent most of their time dealing with pale into insignificance with that issue. What a disaster it will be if the omnibus solutions fail because of the various parties opposing one or another of their parts and, failing, drag down with them the them the validation work, the validation work which can be completed at a fraction of the cost and a fraction of the time, and would be by far the most important step in establishing the credibility of the nation's crime labs and dedicated forensic practitioners and hence of the US system of justice.

**NAS Report, Validation, Poitical Pressures**