F28 Constitutional Requirement to Litigate Scientific Evidence

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After attending this presentation, attendees will understand the United States Constitution's requirement to litigate scientific evidence.

This presentation will impact the forensic science community by analyzing constitutional standards of competency concerning the use of forensic science in the courtroom.

Criminal law is based upon constitutional law. Law enforcement agents extensively rely upon scientific principles and technology in criminal prosecutions. All cases involving criminal charges generally entail some aspect of scientific evidence and forensic science. Forensic science is used to convict the guilty and to protect and exonerate the innocent. It is the most persuasive evidence. The Due Process Clause, Confrontation Clause, and the Sixth and Fourteenth Amendments of the United States Constitution require attorneys to adequately understand scientific principles for litigation of forensic science issues. The Sixth Amendment states, "[i]n criminal prosecutions the accused a person shall . . . have the Assistance of Counsel for his defense." The Supreme Court revised the standards for admissibility of scientific evidence and expert witness testimony through the seminal cases of *Daubert*, *Joiner*, and *Kumho Tire*.[1-3] The controversial issues of reliability, peer review, error and uncertainty rates, and standardization still adversely affect competent use of forensic science.

The reliance on forensic sciences in criminal cases has increased substantially in recent years through advancing technology, thereby fostering oversight of the scientific evidence used in criminal cases. A nationwide movement has emerged advocating investigation, research, and improvement of scientific methods in forensics. This sentiment is perpetuated by the discovery of flawed forensics, high-profile crime laboratory scandals, fraud, and wrongful convictions, as well as the exposure of junk sciences and issuance of the National Academy of Sciences Report in 2009 (NAS Report) condemning problems endemic in forensic science disciplines. The NAS Report poignantly discussed the legal profession's failings concerning scientific evidence.[4]

The Sixth Amendment and Due Process Clause are emerging as sources of regulation to increase the reliability and validity of scientific evidence and competency of counsel. The courts have sought to create workable standards to assist litigators in admitting and using forensic sciences during trial. A constitutional difference exists between admitting the expert's opinion and using the expert to introduce the underlying report from a third party as a basis to form an opinion.[5-8] Furthermore, use of false evidence, debunked sciences, or repudiated expert witness opinions is a basis for challenging a conviction through a writ of habeas corpus and new trial.[9,10] Rules governing expert witness qualifications lack specificity and discernable standards despite the courts' attempt to stay current with the rapid advancements in forensic science.

Developments in forensic science have prompted the Supreme Court to issue decisions increasing counsel's duty to competently litigate forensic science evidence. The standard for effective attorney representation is whether the performance was deficient and errors existed depriving a person of fair trial (e.g., but for the attorney's conduct, there would be a different result).[11] This obligation requires a working knowledge of forensic science. Attorneys still lack a fundamental understanding of scientific issues, which impedes effective and competent representation. The inability of counsel to adequately vet scientific evidence through cross-examination has led courts to place

considerable dependence on sound laboratory techniques, careful litigation, complete disclosure of scientific procedures, scientific methodologies, and the limitations of forensic evidence. Most of these decisions are made at the trial court level on a case-by-case basis. Unfortunately, the "courts continue to rely on forensic evidence without fully understanding and addressing the limitations of different forensic science disciplines."[12]

Scientific developments, societal sophistication, and court decisions have strengthened the obligation of counsel to litigate forensic science evidence. Attorneys must improve their understanding of forensic science to competently represent their clients in accordance with constitutionally mandated principles of due process and confrontation.

Reference(s):

1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993).
2. *General Electric v. Joiner*, 522 U.S. 136 (1997).
3. *Kumho Tire Co, Ltd. v. Carmichael*, 526 U.S. 137 (1999).
4. Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council. *Strengthening Forensic Science in the United States: A Path Forward.* 110 (2009).
5. *Crawford v. Washington*, 541 U.S. 36 (2004).
6. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009).
7. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011).
8. *Williams v. Illinois*, 132 S.Ct. 2221 (2012).
9. Calif. Penal Code, Title 12, Chpt. 1, Sect. 1473 Writ of Habeas Corpus, eff. Jan. 1, 2015 (2016).
10. Texas Code of Criminal Procedure, Chpt. 11, Art. 11.073, eff. Sept. 1, 2013 (2016) Habeas - Procedures related to certain scientific evidence (The Junk Science Writ).
11. *Strickland v. Washington*, 466 U.S. 668 (1994).
12. *Strengthening Forensic Science in the United States: A Path Forward*. supra, 53.

U.S. Constitution, Litigation, Scientific Evidence