Indigent Defense

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ABA Standards on DNA

- ABA Standards for Criminal Justice, DNA Evidence (3d ed. 2007)
- Standard 6.1
  - No time limitation.
  - Guilty pleas are not preclusive.
  - Innocence, negate mandatory aggravating factor in capital cases, mandatory sentence, or mandatory sentence enhancement.

NAS Report (2009)

- "Among existing forensic methods, only nuclear DNA analysis has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between an evidentiary sample and a specific individual or source."
  - Report at 100.

Lack of Research

- "[S]ome forensic science disciplines are supported by little rigorous systematic research to validate the discipline's basic premises and techniques. There is no evident reason why such research cannot be conducted."
  - *Id.* at 22.

Justice Scalia

- "Serious deficiencies have been found in the forensic evidence used in criminal trials"

- "Forensic evidence is not uniquely immune from the risk of manipulation."

  - Commonwealth v. Melendez-Diaz, 129 S. Ct. 2527, 2537-38 (2009)

Firearms Identification

- "Sufficient studies [on firearms identification] have not been done to understand the reliability and repeatability of the methods."
  - NAS Report at 154.

Cartridge Case Ident.

- "O'Shea declared that this match could be made 'to the exclusion of every other firearm in the world.'·.·.·. That conclusion, needless to say, is extraordinary, particularly given O'Shea's data and methods."

- Admitting similarities, but not conclusion
  - U.S. v. Green, 405 F. Supp. 2d 104 (D. Mass. 2005)

Handwriting

- "The scientific basis for handwriting comparisons needs to be strengthened."
  - NAS Report at 166.

Handwriting Comparisons

- "Because the principle of uniqueness is without empirical support, we conclude that a document examiner will not be permitted to testify that the maker of a known document is the maker of the questioned document."
  - U.S. v. Hidalgo, 229 F. Supp. 2d 961, 967 (D. Ariz. 2002)

Fingerprints

- Research is needed "[t]o properly underpin the process of friction ridge [fingerprint] identification."
  - NAS Report at 144.

Fingerprints

- U.S. v. Llera Plaza, 188 F. Supp. 2d 549, 558 (E.D. Pa. 2002) (excluding and then admitting)

State v. Rose, KO6-545 Cir. Ct. Baltimore, Md. 2007) (excluded fingerprint evidence under *Frye* standard); but see

- U.S. v. Rose, 2009 WL 4691612 (D. Md. 2009)
- Markham v. State, 2009 WL 4070865(Md. Ct. Spec. App. 2009)

Hair Analysis

- "[T]estimony linking microscopic hair analysis with particular defendants is highly unreliable."
  - NAS Report at 161.

Hair Comparisons

- "This court has been unsuccessful in its attempts to locate *any* indication that expert hair comparison testimony meets any of the requirements of *Daubert*."
  - Williamson v. Reynolds, 904 F. Supp. 1529, 1558 (E.D. Okl. 1995) *rev'd on this issue*, 110 F.3d 1508, 1522-23 (10th Cir. 1997) (due process, not *Daubert*, standard applies in habeas proceedings)

Bite Mark Comparison

- "There is no science on the reproducibility of the different methods of [bitemark] analysis that lead to conclusions about the probability of a match."
  - NAS Report at 174.

Bitemark Comparison

- "Despite the continued acceptance of bitemark evidence in European, Oceanic and North American Courts, the fundamental scientific basis for bitemark analysis has never been established."

  - Pretty & Sweet, The Scientific Basis for Human Bitemark Analyses – A Critical Review, 41 Sci. & Just. 85, 86 (2001)

Bitemark (cont.)

- State v. Krone, 897 P.2d 621 (Ariz. 1995) ("The bite marks were crucial to the State's case because there was very little other evidence to suggest Krone's guilt.")

- Krone exonerated through DNA profiling
  - Hansen, The Uncertain Science of Evidence, ABA J. 49 (July 2005)

DNA Exonerations

- Mistaken eyewitnesses: 84 %
- Police misconduct: 50 %
- Prosecutorial misconduct: 42 %
- Tainted or fraudulent science: 33 %
- Ineffective defense counsel: 27 %
- False confessions: 24 %
- Jailhouse snitches: 21 %
  - Scheck et al., *Actual Innocence* 246 (2000) (62 cases)

- Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1 (2009)

- Giannelli, Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs, 86 N.C. L. Rev. 163 (2007)

NAS Report criticized

- "exaggerated" testimony (Report at 4)
- claims of perfect accuracy (*Id.* at 47),
- infallibility (*Id.* at 104), or
- zero error rate. (*Id.* at 143).

"Zerro Error Rate"

- "Testimony at the *Daubert* hearing indicated that some latent fingerprint examiners insist that there is no error rate associated with their activities . . . . This would be out-of-place under Rule 702."
  - U.S v. Mitchell, 365 F.3d 215, 245-46 (3d Cir. 2004).

“Absolute Certainty”

- “examiners testified to the effect that they could be 100 percent sure of a match. Because an examiner’s bottom line opinion as to an identification is largely a subjective one, there is no reliable statistical or scientific methodology which will currently permit the expert to testify that it is a ‘match’ to an absolute certainty, or to an arbitrary degree of statistical certainty.”
  - U.S. v. Monteiro, 407 F. Supp.2d 351(D. Mass. 2006).

"Scientific"

- Excluded use of terms such as "science" or "scientific," due to the risk that jurors may bestow the aura of the infallibility of science on the testimony.
  - U.S. v. Starzecpyzel, 880 F. Supp. 1027, 1038 (S.D.N.Y. 1995).

"reasonable scientific certainty"

- Has no scientific meaning.
- Not required under Federal Rules.
  - "There is no such requirement."
    - U.S. v. Cyphers, 553 F.2d 1064 (7th Cir. 1977) (hair samples found on items used in a robbery "could have come" from the defendants).

- Legal meaning is ambiguous at best.
  - Sometimes confidence statement
  - Hair sample probably came from the defendant and not that it possibly came from him. State v. Holt, 246 N.E.2d 365, 368 (Ohio 1969).
- Misleading under Federal Rule 403.
- Excluded due to subjective nature of opinion.
  - U.S. v. Glynn, 578 F. Supp. 2d 567 (S.D. N.Y. 2008).

- U.S. v. Willock, 2010 WL 118371 (D. Md. 2010) (“The parties have agreed that Esposito should not be permitted to express his opinions with any degree of certainty.”)
- U.S. v. Taylor, 2009 WL 3347485 (D.N.M. 2009)

Limitations on Testimony

- "Many other district courts have similarly permitted a handwriting expert to analyze a writing sample for the jury without permitting the expert to offer an opinion on the ultimate question of authorship."
  - U.S v. Oskowitz, 294 F. Supp. 2d 379, 384 (E.D.N.Y. 2003)

- Expert permitted to testify only that it was "more likely than not" that recovered bullets and cartridge cases came from a particular weapon.
  - U.S. v. Glynn, 578 F. Supp. 2d 567 (S.D.N.Y.) (firearms examination).

NRC Ballistic Imaging (2008)

- Report was concerned about testimony cast "in bold absolutes" such as that a match can be made to the exclusion of all other firearms in the world: "Such comments cloak an inherently subjective assessment of a match with an extreme probability statement that has no firm grounding and unrealistically implies an error rate of zero." Report at 82.