

Pascua Yaqui Tribe Court of Appeals

PASCUA YAQUI TRIBE,)	
Petitioner,)	
	)	ORDER ON PETITION FOR
	)	SPECIAL ACTION
v.)	
	)	Tribal Court Case No. CR-17-079
)	
MICHAEL MADRID,)	
Respondent/Real Party in Interest.)	

For the Plaintiff: Oscar J. Flores, Chief Prosecutor; Russell Boatwright and Coleen Thoene, Deputy Prosecutors.

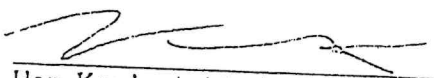
For the Defendant: Annamarie L. Valdivia, Pascua Yaqui Public Defender.

ORDER

1. We VACATE the Trial Court’s May 23rd, May 28th, and June 13th, 2019 orders governing the Petitioner’s request for consumptive DNA testing. We REMAND this case to the Trial Court to conduct proceedings pursuant to this Order.
2. In this case, we are unable to properly review the Trial Court’s decision to utilize the American Bar Association’s (“ABA”) Standards on DNA Evidence in issuing its Order for Consumptive Forensic DNA Testing, because we have an insufficient record to review. Neither Party presented the Trial Court with any legal authority, by which the Trial Court could create a legal standard for consumptive DNA testing. Without such a record, this Court cannot properly evaluate the legal issue before us.


3. ON REMAND, the Trial Court will hold a hearing so that the Parties may present the Trial Court with appropriate legal authority governing the issue of what the appropriate standard for consumptive DNA testing should be. At the hearing, the Court will consider all legal authority and argument presented to it. The Trial Court will then issue a final judgment on what legal standard the Trial Court adopts for consumptive DNA testing. This will create a full record of the legal issue for this Court to review, should either party appeal.

So ORDERED this 28th day of October, 2019.




Hon. Kendra A. Martinez

We Concur:



Interim Chief Justice Robert Miller



Justice Adam Crepelle

**IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA**

PASCUA YAQUI TRIBE,
OFFICE OF THE PROSECUTOR

Petitioner

vs.

Hon. Melvin Stoof, Judge, Pascua Yaqui
Tribal Court,

MICHAEL MADRID,
Respondent/Real Party in Interest

APPELLATE CASE NO: CA-19-007

TRIBAL COURT CASE NO: CR-17-
079

PETITIONER'S SUPPLEMENTAL REPLY EXHIBITS

Oscar J. Flores, Chief Prosecutor
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Huivisim, Bldg. A, 2nd Floor, Tucson, AZ 85757,
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Russell.Boatwright@pascuayaqui-nsn.gov

Attorneys for the Pascua Yaqui Tribe

CERTIFICATE OF SERVICE

I hereby certify that the Tribe's pleading was delivered this date to:

Benjamin Casey
Ben.Casey@pascuayaqui-nsn.gov
Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7777 S. Camino Huivisim
Tucson, AZ 85757

And that one (1) copy of the Tribe's pleading was delivered, this date to:

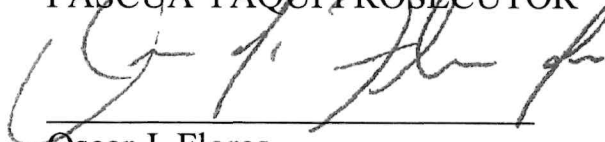
Annamarie Valdivia, Annamarie.Valdivia@pascuayaqui-nsn.gov
Melissa Acosta, Melissa.Acosta@pascuayaqui-nsn.gov
Pascua Yaqui Office of the Public Defender
7474 S. Camino de Oeste
Tucson, AZ 85757

And that one (1) copy of the Tribe's pleading was delivered this date to:

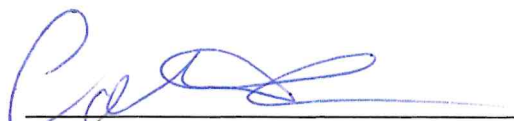
Associate Judge Melvin Stoof
Pascua Yaqui Tribal Court
7777 S. Camino Huivisim
Tucson, AZ 85757

Dated this 10 day of October, 2019.

PASCUA YAQUI PROSECUTOR



Oscar J. Flores
Chief Prosecutor




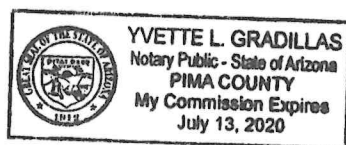
Coleen Thoene
Deputy Prosecutor



Russell Boatwright
Deputy Prosecutor

Sworn before me this 10th day of October, 2019


Notary Signature



Supplemental Reply Exhibit AA
(Copy of Order Re-Setting Pre-Trial Hearing and
Order Re-setting Jury Trial in *PYT v. Madrid*,
CR-17-079, Jan. 23, 2019)

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IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE)	
Plaintiff,	)	CASE NO. CR-17-079
Vs.	)	ORDER RE-SETTING
MADRID, MICHAEL	)	PRE-TRIAL HEARING
Defendant.	)	AND ORDER RE-SETTING JURY TRIAL
_____)

On January 23, 2019, the Tribe's Alicia Renee Robertson, the defendant, and his counsel, Melissa Acosta, appeared for a status hearing on remand from the Court of Appeals.

The defendant's request for a re-setting of a trial by jury and pre-trial should be granted for good cause shown. The court should re-schedule a Jury Trial on January 7, 2020, at 9:00 a.m., pursuant to 3 PYTC § 2-2-440, and the court should re-schedule a pre-trial conference on December 23, 2019 at 9:00 a.m., pursuant to 3 PYTC 2-290. The court should also set this matter on a priority scheduling for an earlier jury trial date, in the event a calendar space becomes available to do so.

The court should grant the Tribe's request to order the defendant to undergo a buccals swab test on January 29, 2019, at 3:00 p.m. in either Courtroom 2 or Courtroom 3, while his attorney is present.

IT IS ORDERED that the matter shall be re-set for a **JURY TRIAL** on January 7, 2020 at 9:00 a.m.. The Defendant shall be released on prior conditions of release.

IT IS FURTHER ORDERED that the court shall hold a pre-trial conference on **December 23, 2019 at 9:00 a.m.** to address all pre-trial motions, proposed questions for voir dire and all proposed jury instructions, to promote a fair and expeditious trial. Any pre-trial motions, proposed voir dire questions, and proposed jury instructions shall not be considered if not filed by the date of the pre-trial conference. **All parties must serve a written motion and any hearing notice at least 7 days before the pre-trial conference hearing date,** and **"any pre-trial motion not served on the opposing party at least seven days prior to the hearing shall not be considered."** Fed. R. Crim. Proc. 47.

The court shall place this case on a third priority for jury trial, and will set the matter for an earlier date as soon as a space becomes available.

1 **IT IS FURTHER ORDERED** that if the parties contemplate submission of a proposed
2 plea agreement, the parties shall provide notice to the court at least 30 days prior to the jury
3 trial if the parties intend to continue the case or submit a proposed plea for the court's review,
4 to promote judicial economy and obviate the need for costly and time consuming issuance of
5 jury summonses and witness subpoenas. A party's failure to provide notice of its intent not to
6 proceed to a jury trial may result in sanctions, including the payment of all reasonable and
7 necessary costs of administration for securing a jury panel, but not limited to, issuance of
8 subpoenas, summons, postage, and mailing by the Court clerk.

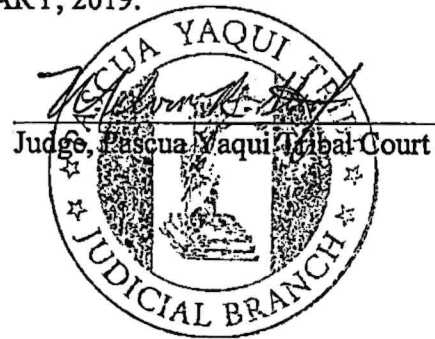
9 **THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.**

10 **IT IS FURTHER ORDERED** that the defendant shall undergo a buccals swab test on
11 January 29, 2019, at 3:00 p.m. in either Courtroom 2 or Courtroom 3. Ms. Acosta shall be
12 allowed to attend the testing.

13 **SO ORDERED THIS 23rd DAY OF JANUARY, 2019.**

14
15 Cc: Date: 01-23-19
16 Tribe Defendant _____ Counsel

17 
18 Clerk



Supplemental Reply Exhibit BB
(Copy of Second Order Re-Setting Pre-Trial
Hearing and Order Re-setting Jury Trial *PYT v.*
Madrid, CR-17-079, Mar. 6, 2019)

1 IN THE PASCUA YAQUI TRIBAL COURT

2 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

3 PASCUA YAQUI TRIBE)

4 Plaintiff,)

5 Vs.)

MADRID, MICHAEL)

6 Defendant.)

CASE NO. CR-17-079

SECOND ORDER RE-SETTING

PRE-TRIAL HEARING

AND ORDER RE-SETTING JURY TRIAL

7
8 On March 6, 2019, the court, having set this matter for the third priority for jury trial
9 settings, has located an earlier date and time for the jury trial and pre-trial settings.

10 The defendant's request for a re-setting of a trial by jury and pre-trial should be granted
11 for good cause shown. The court should re-schedule a Jury Trial on August 20, 2019, at 9:00
12 a.m., pursuant to 3 PYTC § 2-2-440, and the court should re-schedule a pre-trial conference on
13 August 5, 2019 at 9:00 a.m., pursuant to 3 PYTC 2-290.

14 **IT IS ORDERED** that the matter shall be re-set for a **JURY TRIAL** on August 20,
15 **2019 at 9:00 a.m.** The Defendant shall be released on prior conditions of release.

16 **IT IS FURTHER ORDERED** that the court shall hold a pre-trial conference on
17 **August 5, 2019 at 9:00 a.m.** to address all pre-trial motions, proposed questions for voir dire
18 and all proposed jury instructions, to promote a fair and expeditious trial. Any pre-trial motions,
19 proposed voir dire questions, and proposed jury instructions shall not be considered if not filed
20 by the date of the pre-trial conference. **All parties must serve a written motion and any**
21 **hearing notice at least 7 days before the pre-trial conference hearing date,"** and **"any pre-**
22 **trial motion not served on the opposing party at least seven days prior to the hearing shall**
23 **not be considered."** Fed. R. Crim. Proc. 47.

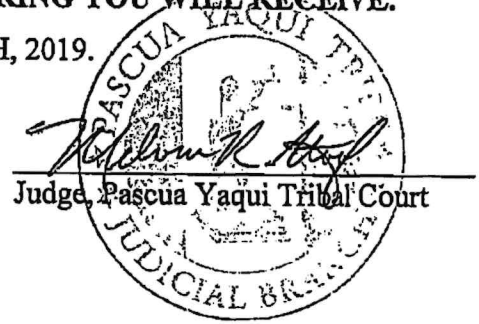
24 **IT IS FURTHER ORDERED** that if the parties contemplate submission of a proposed
25 plea agreement, the parties shall provide notice to the court at least 30 days prior to the jury
26 trial if the parties intend to continue the case or submit a proposed plea for the court's review,
27 to promote judicial economy and obviate the need for costly and time consuming issuance of
28 jury summonses and witness subpoenas. A party's failure to provide notice of its intent not to
proceed to a jury trial may result in sanctions, including the payment of all reasonable and

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necessary costs of administration for securing a jury panel, but not limited to, issuance of subpoenas, summons, postage, and mailing by the Court clerk.

THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.

SO ORDERED THIS 6th DAY OF MARCH, 2019.



Cc: Date: 3.6.19
 Tribe Defendant Counsel

[Signature]
Clerk

Supplemental Reply Exhibit CC
(Full copy of Respondent's Exhibit, *U.S. v.*
***Escalante*, CR-18-02666-001-RM (LAB))**

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 United States of America,
10 Plaintiff,

11 v.

12 Daniel Escalante,
13 Defendant.

No. CR-18-02666-001-TUC-RM (LAB)
ORDER

14
15 The defendant, Daniel Escalante, is charged in a nine (9) count indictment with
16 aggravated sexual abuse, kidnapping, brandishing a firearm in furtherance of a crime of
17 violence, assault resulting in serious bodily injury and prohibited possession of a firearm,
18 with counts 1-3 and 5-8 being committed within Indian Country. On April 16, 2019,
19 Defendant Escalante filed a motion to permit independent DNA testing on a knife the
20 government recovered a day after the incident in question. (Doc. 18). On April 26, 2019,
21 the government filed a response explaining that DPS contacted the government to explain
22 that in testing for DNA on the knife the laboratory would consume the sample. In other
23 words, the testing will destroy the evidence so only one test can be conducted. The
24 government moved the Court to deny the motion.

25 On May 20, 2019 the parties notified the Court that they had reached an agreement.
26 As such, the Court found the motion moot. (Doc. 30). Thereafter the government requested
27 a status conference due to a change in circumstances. (Doc. 31) On June 25, 2019, the
28 status conference was conducted. (Doc. 34) During the status conference the government

1 advised the Court that four additional pieces of evidence require DNA testing. Both parties
2 agreed that testing the knife for DNA is critical to the case but the defense is not interested
3 in testing the other items. Previously, defense counsel had agreed that the Federal Public
4 Defender (FPD) would pay for an independent laboratory to test the knife, however the
5 cost for testing the additional four items was cost prohibitive and the FPD refused to
6 approve that funding. The government advised that the DPS laboratory had already
7 initiated testing some of the other evidence, and it would only agree to continue the testing
8 if it tests all the evidence, including the knife. Various potential solutions were discussed
9 including allowing an independent DNA expert to observe the testing process at the DPS
10 laboratory or memorializing the testing process through photos or video. The government
11 agreed to explore those options.

12 The Court set a status conference for July 17, 2019. The defendant filed a
13 supplement to the motion to permit independent DNA testing. (Doc. 36) The pleading
14 directed the Court to *U.S. v. Gardner*, Case No. 4:14-CR-61-H, 2015 WL 1951809 (E.D.
15 N.C., April 29, 2015) In that case the court ordered the government to permit a defense
16 expert to attend the testing procedures because the DNA sample would be consumed by
17 the testing and this solution offered the best opportunity for the defendant to present a
18 complete defense. The court referenced the ABA Standards for Criminal Justice, DNA
19 Evidence Section 16-3.4, which recommends that “the court should consider ordering
20 procedures that would permit an independent evaluation of the analysis, including but not
21 limited to the presence of an expert for the moving party[,]. . . [or] videotaping or
22 photographing the preparation and testing.” *Gardner*, 2015 WL 1951809 at *3.

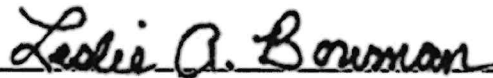
23 At the status conference the government explained that neither the DPS laboratory
24 nor the FBI laboratory would agree to an independent observer, or any video or
25 photographic memorialization, or allowing an independent lab to test the knife while the
26 government continued to test the other four items. The explanation for that position was
27 reliance on the laboratories’ policies and procedures manual. No scientific explanation was
28 offered for the refusal. The defendant made it clear that he was only interested in testing
the knife, had no interest in testing the other items and could not secure funding for the

1 additional testing in any event.

2 Based on the pleadings, the arguments and the information proffered during the
3 hearings, the Court finds that the interest of justice is served by preserving the defendant's
4 ability to present a complete defense and therefore,

5 IT IS HEREBY ORDERED that the government is to release the knife to the agreed
6 upon independent laboratory for DNA testing at the expense of the Federal Defender's
7 Office. If the government requests an independent observer be present, that request is
8 granted. The government is free to continue testing for DNA on the remaining four items
9 at any certified/licensed laboratory of its choosing.

10 SO ORDERED this 31st day of July, 2019.

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14 Honorable Leslie A. Bowman
15 United States Magistrate Judge
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**IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA**

PASCUA YAQUI TRIBE,
OFFICE OF THE PROSECUTOR

Petitioner

vs.

Hon. Melvin Stoof, Judge, Pascua Yaqui
Tribal Court,

MICHAEL MADRID,
Defendant/Real Party in Interest

APPELLATE CASE NO: CA-19-007

TRIBAL COURT CASE NO: CR-17-
079

**PETITIONER'S REPLY TO REAL PARTY IN
INTEREST'S/DEFENDANT'S RESPONSE TO PETITION FOR SPECIAL
ACTION**

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II. Defendant Fails to Acknowledge that, by Issuing an Overly Restrictive Order, the Trial Court Violated Separation of Powers and Infringed on the Executive’s Ability to Fulfill its Duties.....15

III. Defendant Mischaracterizes the Tribe’s Argument, and Focuses on the Wrong Issue in an Attempt to Distract This Court from the Problems Inherent in the Trial Court’s Overly Restrictive Order.16

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REQUEST FOR ORAL ARGUMENT

Although Defendant has not indicated whether he desires an oral argument, the Tribe renews its request based on the reasons and law outlined in its Petition. In addition, the Tribe notes that Defendant has impermissibly attempted to supplement the record on appeal. Although this is a tactic that has been pointed out in a number of recent cases, it is not something that has been addressed by any of this Court's recent rulings. Therefore, the Tribe urges this Court to hold oral argument to address this issue, as well as the issues raised in its Petition.

STATEMENT OF JURISDICTION

The parties agree that this Court has jurisdiction over this proceeding. *See Defendant's Response Brief* at p.1.

STANDARD OF REVIEW

The Parties agree that the issues presented in this case should be reviewed under an "abuse of discretion" standard.

ISSUES PRESENTED FOR REVIEW¹

The Tribe, in its Petition, listed only one issue for this Court's review. However, based on the arguments and exhibits presented in the Defendant's Brief, there is an additional issue which merits this Court's review. For the sake of clarity, the additional issue is being numbered in sequential order in relation to that which was presented in the Petition.

2. Can a party, during an appellate or special action proceeding, supplement the trial court record with evidence that was never presented to the trial court, and do so in a manner that violates established Pascua Yaqui, and Federal law?

¹ The Tribe notes that the Defendant's Brief does not conform to the formatting and typeface requirements imposed by Rule 7, Ariz. R. Spec. Act., and adopted by this Court. See *PYT v. Stoof ex rel Lopez*, CA-18-001 (PYT Ct. App. Oct. 2018); *PYT v. Stoof ex rel Gracia*, CA-19-006 (May 2019). Defendant has also failed to file a certification that his brief conforms to aforementioned rules, and any other rules incorporated therein by reference. Out of a desire to promote judicial economy, the Tribe does not object to either of these technical errors, and respectfully requests that the Defendant's brief – with the exception of certain exhibits discussed, *infra*, on pages 9-15, be accepted as filed.

STATEMENT OF THE CASE

I. Facts and Proceedings Below:

The Tribe relies upon the facts and procedural history outlined in its opening brief and supporting exhibits, because they accurately portray the case as it was presented to the trial court. As will be discussed in more detail, *infra*, Pascua Yaqui case law restricts appellate courts from considering facts and evidence not incorporated within the trial court record. No factual findings have been made regarding evidence relating to Defendant's charges.

While the Tribe rests on its previous factual summary, there are issues regarding the case's procedural history which must be clarified based upon Defendant's brief. Following denial of Defendant's first special action petition, a status conference was set for January 2, 2019. *See* Defendant's Exhibit 3. The hearing was continued until January 23, 2019,² because Defendant was unable to be served at the address he had provided to the trial court. *Id.* At the next hearing, a trial date was set for January 7, 2020, and Defendant was ordered to submit buccal swabs so that the comparative DNA analysis could be conducted. Tribe's Supplemental Reply Exhibit AA. Once that sample had been collected, it was submitted to the DPS crime lab for testing, which prioritizes testing order based on

² Upon review of its Amended Petition, the Tribe discovered that it had mistakenly indicated that the status conference had been set on July 2, 2019, instead of January 20th. The Tribe hereby corrects and apologizes for the error.

when a case has been set for trial. On March 6, 2019, the trial court granted Defendant's request to accelerate his trial date to August 20, 2019. Tribe's Supplemental Reply Exhibit BB. This, accordingly, accelerated DPS' testing priority for the case. Tribe's Exhibit F, at p.22.

Additionally, Defendant, in his brief, misstates the nature of the trial court's rulings on May 23, 2019. Although Defendant correctly asserts that the court ordered defense to find an expert who could be present in the DPS crime lab at the time of testing, he incorrectly claims that this order also allowed the defense to request that the expert be allowed to independently test the sample at a place other than the DPS lab. *See* Defendant's Brief at p.4. Such a provision was never mentioned by the court during the hearing, and was not included in the court's written ruling. Indeed, the transcript and written rulings demonstrate that Defendant is incorrect and that the court did not authorize the use of an independent facility by a defense expert. *See* Petitioner's Exhibit D, p.8-9, 14-26; Petitioner's Exhibit E.

Likewise, a detailed review of the transcripts of the May 28, 2019, and June 13, 2019, court hearings shows that the trial court's clear ruling was different than what Defendant now suggests. In both hearings, although the prosecution urged the court to allow an independent, defense-selected lab to conduct the required DNA testing, the court rejected that request. Instead, the trial court clearly ordered

that a defense expert be allowed to enter the DPS lab to observe testing procedures, and expressed amazement when informed, both times, that DPS would not allow this to happen. *See* Tribe's Exhibit F, p. 11-15, p.17; Tribe's Exhibit J, p. 12, 9-10. During both hearings, the Tribe informed the court that it had contacted the DPS crime lab and specifically asked them whether they would be able to make accommodations for a defense expert. The Tribe also informed the court that those requests for accommodations had been consistently denied.

II. Summary of the Argument

The arguments raised by Defendant are flawed for a number of reasons. First, Defendant misunderstands what constitutes an appropriate appellate record under the laws of this jurisdiction. Second, he profoundly misinterprets the core of the Tribe's argument. By focusing on the wrong issue, Defendant attempts to argue that, even though the Tribe contacted the Tucson DPS crime lab multiple times, the trial court somehow did not abuse its discretion because the Tribe failed to make an unknown number of additional attempts to persuade the lab³ to make an exception in this case and risk its very accreditation. Third, Defendant misstates

³ It should be noted, as it was in Petitioner's Opening Brief, that the Tucson DPS crime lab is an agency that is run by the State of Arizona. Accordingly, it is an agency that is run by a sovereign that the Pascua Yaqui Tribe—whether it be the judicial or executive branch-- has absolutely no jurisdictional authority over.

the record, and attempts to argue, without support, that the trial court allowed for an independent lab to have been utilized. (*See Supra.*) Fourth, and finally, Defendant claims that the plain language of the ABA guidelines should control, while ignoring the plain text of said guidelines and applicable caselaw which clearly allow for a court to craft a more appropriate and less restrictive order than what was issued in this case.

For the reasons stated in its Petition and this Reply, the Tribe respectfully asks that this Court find that the lower court abused its discretion, and reverse the trial court's order. The Tribe further requests that any inappropriate exhibits be stricken from the appellate record, and that the case be remanded so that consumptive testing may be performed at an independent, accredited lab of Defendant's choice. Such a ruling would preserve the due process rights of both parties.

LAW AND ARGUMENT

I. Defendant Seeks to Expand the Record to Include Items Never Presented to the Trial Court, Thereby Ignoring Established Law Concerning the Appellate Court's Role, and what Constitutes an Appropriate Record on Appeal.

In several recent cases filed with this Court, defense counsel has attempted to expand the Record on Appeal to include items and evidence never presented to

the trial court. The Tribe has repeatedly pointed out this impermissible practice.⁴ In this particular case, Defendant seeks to counter the Tribe's arguments by supplementing the record with a transcript of a 911 call, and with copies of news articles concerning labs other than the Tucson DPS crime lab. Allowing Defendant to continue this practice forces the Tribe to, likewise, seek to impermissibly expand the record on appeal in order to adequately address his arguments. Likewise, it forces this Court to abandon its constitutional role as a "court of review" and consider facts that Defendant, at the time of the hearings at issue, did not think were important enough to present to the trial court. For the reasons discussed below, the exhibits at issue should be stricken.

3 PYTC § 1-2-30 establishes the hierarchy of the Pascua Yaqui Judicial System and specifically establishes separate trial and appellate courts. The Pascua Yaqui Constitution defines the roles of said courts, and clearly defines the Appellate Court as a court of review. Art. VIII, §5, Pascua Yaqui Const. While this Court may order a trial *de novo* under specific, limited circumstances — none of which apply here — its primary mandate is to review lower court proceedings

⁴ This Court has not recently ruled on the question of what constitutes an appropriate appellate record, because the materials submitted were either not germane to the issues on appeal, the defense pleading has been dismissed, or because a final appellate decision is still pending.

for error. *Id.* And, as a reviewing court, its gaze is rightfully *limited* to reviewing the record presented to the trial court.

These constitutional and statutory mandates are reflected in the Pascua Yaqui Rules of Appellate Procedure, which state that the record on appeal “*shall* be the original papers, exhibits, and other objects *filed with the trial court clerk*, a reporter’s transcription of an electronic recording or narrative or agreed statement, and copies of all [court] entries.” 3 PYTC § 2-3-110(A) (*emphasis added*). “If a dispute arises as to whether the record discloses *what actually occurred in the trial court*, the difference shall be settled by the trial court, and the record made to conform to the truth.” 3 PYTC § 2-3-110(I) (*emphasis added*).

This Court has previously discussed this mandate and upheld it. For instance, it has stated that “[t]he trial court record is critical to the appellate process because the appellate court uses it to understand what occurred” before the trial court. *PYT v. Soto*, CA-06-010, p.5 (PYT Ct. App. Mar. 2007) (*citing Lamone v. Navajo Nation*, 3 Nav. R. 87 (1982)). It went on to state that “an appellate court can only rule on issues in the record.” *Id.* at 6. Additionally, this Court has previously refused to consider evidence “that has not been submitted to and considered by the” trial court. *PYT v. Coleman*, CA-15-003, p.5 (PYT Ct. App. 2015) (*citing United States v. Elias*, 921 F.2s 870, 874 (9th Cir. 1990); *see c.f. PYT v. Campoy*, CA-07-009, p.3 (PYT Ct. App. Jun. 2011) (indicating that the

prosecution did not make a complete record at trial, but also indicating that the sole appellate judge involved in review of the case checked unrelated criminal cases from previous years).

Here, rather than basing his arguments on materials contained in the trial court record, Defendant relies on materials that were never presented to the trial court, that are not contained in the official Record on Appeal, and which are factually irrelevant to the issues raised in the Petition. For example, Defendant has submitted a transcript of a 911 call made by a third party that was not prepared until September 30, 2019, the day Defendant's brief was filed. *See* Defendant's Ex. 1, p.5. Based on the Tribe's review of the record, the 911 call was never submitted to the trial court for consideration, either in an audio or written format. The 911 transcript, while potentially relevant for impeachment at trial, is not relevant to the issue of whether the trial court abused its discretion in denying the Tribe's request to have DNA evidence tested by an independent, defense-selected lab.

Additionally, Defendant has attached a number of news articles that discuss perceived issues with forensic DNA testing conducted by state run crime labs. *See* Defendant's Exhibits 9, 10, & 12.⁵ None of these articles discuss the policies,

⁵ Defendant additionally cites to a 2007 law review article. *See* Defendant's Exhibit 11. Although this exhibit was never presented to the trial court, it, unlike

procedures, or even issues alleged to have occurred at the Tucson DPS crime lab. Instead, they concern cases from New York (Defendant's Exhibit. 9), Phoenix, Arizona (Defendant's Exhibit 10), and La Paz County, Arizona (Defendant's Exhibit 12). One of the articles does not even address the issue of DNA testing but, rather, blood alcohol analysis in DUI cases. *Id.* Defendant appears to cite them for the general principle that any government run crime lab is prone to significant amounts of error. Yet Defendant ignores the fact that none of the articles discuss the Tucson DPS crime lab at issue *in this particular case*. The facts contained in these news articles — in addition to being entirely irrelevant to the policies and procedures of the local DPS crime lab — were never presented to the trial court. Thus, the trial court was denied an ability to consider the articles when rendering its opinion. Attaching them as supplemental exhibits in this proceeding is nothing more than a belated attempt by Defendant to expand the factual record to include facts and information he failed to introduce despite being given multiple opportunities to do so.

the news articles discussed above, is considered potentially persuasive secondary legal authority, and is readily available on recognized legal research websites. It is also important to note that the authors of this article indicated a preference for having forensic testing conducted by “truly *independent* forensic laboratories.” *Id.* at p. 777-78 (*emphasis added*). In this case, the Tribe specifically proposed that the evidence be tested by an independent lab.

Finally, Defendant attached an email sent by the assigned prosecutor to defense counsel. *See* Defendant's Exhibit 4. The email was submitted on May 1, 2019. *Id.* In doing so, Defendant insinuates that the Tribe impermissibly delayed DNA testing or, at the very least, delayed notifying defense counsel that consumptive testing was necessary. *See* Defendant's Brief, at p.3. The aforementioned email was, once again, never presented to the trial court. Because Defendant failed to introduce the email as part of the trial court record or develop this insinuation, there was no need for the Tribe to introduce copies of any other emails relevant the timeliness concerns he now alluded to in his brief. While this might not present an issue in most cases, it creates a true problem in this one. Defendant suggests that the Tribe impermissibly delayed DNA testing, and delayed notifying his attorney that testing would consume the evidentiary sample at issue until May 1, 2019. However, because Defendant failed to preserve this email as part of the trial court record, the only way that the Tribe can address his insinuations is to, likewise, impermissibly supplement the appellate record. Were the Tribe to violate precedent as Defendant has, the Tribe could supplement the record with other emails occurring between the prosecution and DPS lab between April 26th, a Friday, and May 1st, the following Wednesday, demonstrating that the prosecution promptly followed up with the lab regarding testing timelines and issues. These documents would also demonstrate that the prosecution contacted

defense counsel on May 1st to notify them that consumption of the testing sample was required. However, such an expansion would be improper under Pascua Yaqui law.⁶

As discussed above, the Pascua Yaqui Tribal Code and appellate precedent make it clear that attempts to expand the record on appeal are improper. Expansion is improper because it robs the trial court of a chance to consider all of the evidence and make detailed and relevant factual findings. Asking this Court to make those factual findings demonstrates a lack of understanding of the Constitutional role of the Court of Appeals as a court of review. Accordingly, the Tribe asks that the exhibits discussed above be stricken, and that this Court not give them any weight in its analysis.

II. Defendant Fails to Acknowledge that, by Issuing an Overly Restrictive Order, the Trial Court Violated Separation of Powers and Infringed on the Executive's Ability to Fulfill its Duties.

Defendant fails to address the separation of powers arguments raised in Petitioner's brief. *See* Petition, at p. 26-29. Nor does he attempt to distinguish the legal authority cited by the Tribe regarding this issue. Accordingly, the Tribe respectfully requests this Court view Defendant's failure as agreement that the

⁶ Due to the impropriety of expanding the trial court, factual record in an appellate proceeding, the Tribe will not submit copies of emails or communications relating to this particular sub-issue. In the event that this Court elects to overturn established precedent in this area, the Tribe would respectfully ask for leave to supplement the record as Defendant has.

arguments raised in the Petition on this issue are legally valid. The Tribe also notes, as it did in its Petition, that the Tucson DPS crime lab is an agency run by the State of Arizona. As such, Tribal Courts have no jurisdiction over them and cannot order them to violate their policies and procedures.

III. Defendant Mischaracterizes the Tribe's Argument, and Focuses on the Wrong Issue in an Attempt to Distract This Court from the Problems Inherent in the Trial Court's Overly Restrictive Order.

Defendant, in an attempt to focus this Court's review on the wrong issue, mischaracterizes the Tribe's core argument. In its Petition, as it did before the lower court, the Tribe has agreed that Defendant has a due process and ICRA right to participate — in some fashion — in the consumptive DNA testing procedure called for by this case. The Tribe's argument on appeal is that the trial court proverbially tied the prosecution and executive branches hands by issuing an overly restrictive order despite being presented with reasonable, less restrictive alternatives that would allow forensic testing to occur while still protecting Defendant's due process rights. Instead of acknowledging this fact, Defendant attempts to claim that the Tribe seeks “a blanket ruling... [that] consumption of DNA evidence by [the] prosecution is permissible as long as DPS experts submit their complete bench notes and are made available for interview.” Defendant's Brief, p.12. This claim is inaccurate.

Although this jurisdiction has yet to address whether one-sided, consumptive testing is appropriate, other jurisdictions that have dealt with the issue have indicated that said procedure does not automatically create due process concerns. *See* Petition at p. 19-20.⁷ That being said, the Tribe takes the prosecutorial mandate announced in *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935) seriously. This resulted in the Tribe contacting defense counsel to inform them that consumptive testing was necessary, and asking for their input regarding testing procedures. While the Tribe argued at trial that it could perform consumptive testing over defense objection, it suggested at two of three hearings on this issue that there was an alternative that would address Defendant's objections. The suggested alternative would also preserve the integrity of the testing process and Defendant's due process rights. Given the unique circumstances of this case, the most appropriate, and least restrictive alternative was to ask that the evidence be tested at an independent, defense-selected lab.⁸

⁷ The Tribe further notes that this Court need not, as part of this case, whether the prosecution may conduct consumptive testing on its own, and, essentially, *ex parte*. The only issue before this Court is whether the trial court abused its discretion in refusing to order that testing be conducted by an independent, defense-selected lab.

⁸ It should be noted that, in selecting an independent, accredited laboratory, defense would, at the same time, be selecting its own expert to conduct the testing. In the event that a prosecution expert could not be present due to the accreditation policies of that laboratory, the prosecution would simply ask for copies of the expert's notes, and an opportunity to interview them before trial. However, the

Although Defendant argues that this alternative method would have violated his Due Process and ICRA rights, he fails to articulate how his ability to select an independent lab to conduct consumptive testing in a case against him would violate either. The Tribe Argues that Defendant's ability to choose his own independent crime lab to conduct consumptive testing alleviates any of his unsubstantiated concern of bias or incompetence on the part of the Tucson DPS crime lab.

In this case, the Tribe made multiple requests of the Tucson DPS crime lab to see if it would be willing to accommodate the narrow and restrictive ruling issued by the trial court. Those requests were denied. Each time they were denied, the information was presented to the trial court, and the Tribe asked that the court consider another, specific alternative, and suggested that Defendant could select an accredited lab of their choice and that he would trust to perform the necessary consumptive testing. The trial court—received information at two of three hearings that the Tucson DPS crime lab would not allow *any* outside law enforcement, defense attorneys, prosecutors, or their experts to be present within the lab to observe the testing procedure despite requests— and, yet, refused to order the suggested, less restrictive, and more reasonable alternative. This refusal amounted to an abuse of discretion.

trial court's narrow ruling prevented defense from being able to select an independent accredited laboratory.

Defendant also attempts to argue that the Tribe had an obligation to ask the Tucson DPS crime lab again after the June 13, 2019, hearing whether it would change its mind and allow a defense expert to be present within their testing area to observe their process. As noted above, the DPS crime lab is run by a separate, sister sovereign, namely, the State of Arizona. This argument ignores the fact that the Tribe had already made multiple requests over the course of weeks asking whether the lab would be willing to accommodate the trial court's order. Defendant's argument also ignores the fact that Tribal courts have no jurisdictional authority over State agencies. Likewise, it ignores the very case law that Defendant has cited in his brief.

Defendant has cited to *U.S. v. Escalante*, CR-18-02666-001-TUC-RM (LAB) (Jul. 2019), and, specifically, a pretrial ruling issued by a Tucson District Magistrate issued on July 31, 2019. While Defendant has submitted a copy of this ruling as an exhibit, it is missing the second page.⁹ While this case is unpublished and, therefore, carries only persuasive authority, it is important to note that the district court indicated the following:

At the status conference the government explained that neither the DPS laboratory nor the FBI laboratory would agree to an independent observer, or any video or photographic memorialization.... The

⁹ The Tribe does not believe that this omission was intentional, given the sheer number of exhibits submitted by both sides.

explanation for that position was reliance on the laboratories' policies and procedure manual." *Id.* at 2.

The district court went on to order that independent testing was appropriate given the circumstances in that case. *Id.* at 3. It is equally important to note that the same policies and procedures raised in *Escalante* involve the same information that was presented to the trial court in this case. Therefore, based on Defendant's own authority, that requiring the Tribe to make additional attempts beyond what it had already done would not have changed the situation. The DPS crime lab would not, and could not, allow outside law enforcement officers, attorneys, or their experts to be present in its testing area.¹⁰ Thus, while Defendant argues that remand is appropriate to give the Tribe additional time to make attempts to persuade the DPS crime lab to abandon their accreditation policies, it is abundantly clear that such attempts would be, at best, completely fruitless.


CONCLUSION AND REMEDY SOUGHT

For the reasons discussed above, the Tribe respectfully requests that this Court find that the trial court abused its discretion. It crafted an overly restrictive order regarding the method and manner in which the prosecution could fulfill its mandate to investigate cases set for trial. Said order, despite the manner in which

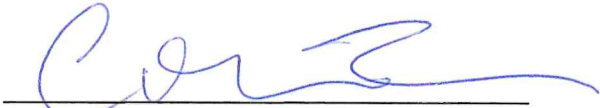
¹⁰ The Tribe further notes that another case Defendant relies upon, *U.S. v. Gardner*, 2015 WL 1951809 (E.D. N.C., 2015) is, according to Westlaw.com and its telephonic support service unpublished. Because it is unpublished, it carries little, if any, persuasive authority, and it is inappropriate to cite it as precedent.

Defendant now attempts to characterize it, forced the Tribe to make a Damocles choice. Specifically, it forced the Tribe to choose between testing evidence at the only lab that the court authorized—the Tucson DPS crime lab— which would violate the very terms of the court’s order, or to forgo testing, abandon its duties, and hope that Defendant would be precluded using the failure to test as evidence against the prosecution at trial. The Tribe, therefore, requests that this Court find that the trial court’s overly narrow ruling regarding the method and manner of consumptive DNA testing be vacated as it amounted to an abuse of discretion.

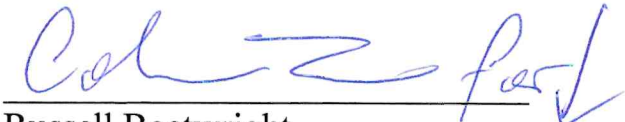
RESPECTFULLY submitted this October 10, 2019.



Oscar J. Flores
Chief Prosecutor



Coleen Thoene
Deputy Prosecutor



Russell Boatwright
Deputy Prosecutor

CERTIFICATE OF SERVICE

I hereby certify that the Tribe's pleading was delivered this date to:

Benjamin Casey
Ben.Casey@pascuayaqui-nsn.gov
Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7777 S. Camino Huivisim
Tucson, AZ 85757

And that one (1) copy of the Tribe's pleading was delivered, this date to:

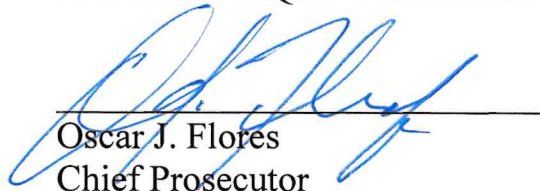
Annamarie Valdivia, Annamarie.Valdivia@pascuayaqui-nsn.gov
Melissa Acosta, Melissa.Acosta@pascuayaqui-nsn.gov
Pascua Yaqui Office of the Public Defender
7474 S. Camino de Oeste
Tucson, AZ 85757

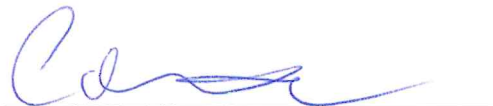
And that one (1) copy of the Tribe's pleading was delivered this date to:

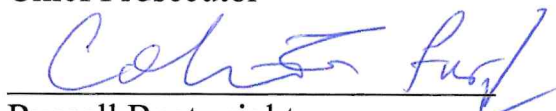
Associate Judge Melvin Stoof
Pascua Yaqui Tribal Court
7777 S. Camino Huivisim
Tucson, AZ 85757

Dated this 10 day of October, 2019.

PASCUA YAQUI PROSECUTOR

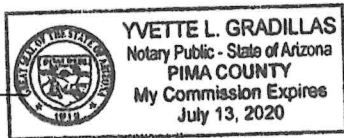

Oscar J. Flores
Chief Prosecutor


Coleen Thoene
Deputy Prosecutor


Russell Boatwright
Deputy Prosecutor

Sworn before me this 10th day of October, 2019


Notary Signature

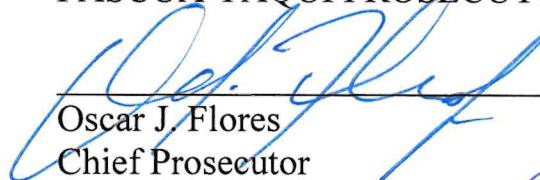


CERTIFICATE OF COMPLIANCE


1. This certificate of compliance concerns an reply to a response for a Petition for Special Action submitted under 3 PYTC § 2-3-90, and Rule 7, Ariz. R. P. Spec. Act.
2. The undersigned certifies that the Petition for Special Action to which this Certificate is attached uses a proportionally-spaced typeface of at least 14 points, is double-spaced, and contains **4208** words counted pursuant to the governing rules.
3. The document to which this Certificate is attached does not exceed the word limit set by Rule 7, Ariz. R. P. Spec. Act, and Rule 4, Ariz. R. Civ. App. P., as made applicable by this court in *PYT v. Lopez*, CA-18-001, p.1-2 (Oct. 2018).

Dated this 10 day of October, 2019.


PASCUA YAQUI PROSECUTOR



Oscar J. Flores
Chief Prosecutor




Coleen Thoene
Deputy Prosecutor

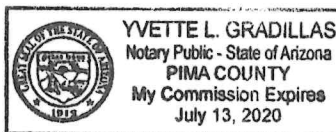


Russell Boatwright
Deputy Prosecutor

Sworn before me this 10th day of October, 2019



Notary Signature



IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,	)	APPELLATE CASE NO. CA-19-007
Petitioner,)	
vs.	)	PASCUA YAQUI TRIBAL COURT NO.
	)	CR 17-079
Honorable Melvin Stoof, Judge, Pascua)	
Yaqui Tribal Court,)	
)	
MICHAEL MADRID)	
Respondent/Real Party in)	
Interest.)	

RESPONDENT'S RESPONSE BRIEF: EXHIBITS

PASCUA YAQUI PUBLIC DEFENDER
 Annamarie L. Valdivia
 Senior Staff Attorney
 PYT Bar #10267
 4725 W. Calle Tetakusim, Building B
 Tucson, AZ 85757
 (520) 883-5013

Attorney for Respondent

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1. Transcripts from October 31, 2017 Call to PYT 911 dispatch
2. December 19, 2018: Trial Court's Order Setting Status Conference
3. January 2, 2019: Order for Continuance
4. May 1, 2019: Email from Russell Boatwright to Melissa Acosta
5. May 28, 2019: Motion to Reconsider Court's Order for Independent Expert for DNA testing
6. May 28, 2019: Order for Consumptive Forensic DNA Testing, etc.
7. *USA v. Gardner*, No. 4:14-CR-61-H, 2015 WL 1951809 (E.D. N.C. April 29, 2015)
8. June 31, 2019: Order in *USA v. Daniel Escalante*, No. R18-2666-(TUC)-RM(LAB)
9. Lauren Kirchner, *Traces of Crime: How New York's DNA Techniques Became Tainted*, N.Y. Times, Sept. 4, 2017.
10. Wendy Halloran and Elizabeth Wiley, *DPS: Forensic Scientist Hid Backlog of 40 Cases, Delayed DNA Testing for Years*, NBC News Channel 12 (Phoenix, Arizona), May 23, 2017.
11. Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 Calif. L. Rev. 721, 773 (2007).
12. Megan Cassidy: *Former Forensic Scientist Sues Arizona Department of Public Safety, Alleges Retaliation*, The Republic, (April 4, 2018).

RESPECTFULLY SUBMITTED: September 30, 2019



ANNAMARIE L. VALDIVIA
Senior Staff Attorney
PYT Bar #
4725 W. Calle Tetakusim, Building B
Tucson, AZ 85757
(520) 883-5013

Attorney for Respondent Michael Madrid

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2019, I filed an original and submitted a copy of the Respondent's Response Brief: Exhibits to the following:

Ben Casey
PYT Court of Appeals
7777 S. Camino Huvisim
Tucson, AZ 85757

Honorable Melvin Stoof
PYT Court of Appeals
7777 S. Camino Huvisim
Tucson, AZ 85757

Oscar Flores
Chief Prosecutor
Colleen Thoene
Deputy Prosecutor
PYT Prosecutor's Office
PYT Court of Appeals
7777 S. Camino Huvisim
Tucson, AZ 85757

Michael Madrid, Respondent



ANNAMARIE L. VALDIVIA
Senior Staff Attorney
PYT Bar # 10267
4725 W. Calle Tetakusim, Building B
Tucson, AZ 85757
(520) 883-5013

Attorney for Respondent Michael Madrid

EXHIBIT 1:

Transcripts from October 31, 2017 Call to PYT 911 dispatch

1 THE PASCUA YAQUI TRIBAL COURT
2 IN AND FOR THE PASCUA YAQUI INDIAN NATION

3 PASCUA YAQUI TRIBE,) Case No.: CR-17-079
4 Plaintiff,)
5 vs.)
6)
7 MICHAEL MADRID) Pascua Yaqui Nation
8 Defendant.) Tucson, Arizona
9) October 31, 2016 p.m.
10) 8:30 p.m.
11)
12)

13 TRANSCRIPT OF: 911 Call- October 31, 2017
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Transcripts prepared by: Lilian Contreras, Lay Advocate and certified paralegal for the Pascua Yaqui Tribe's Office of the Public Defender.

1 **911 Dispatch:** Pascua Yaqui 911 what's your emergency?
2 **911 Caller:** On Torim and Teta..Tetakusim. Hurry we need cops over(?) here.
3 [inaudible]... "bald", there is a black Ford F150 with rims, there's two guys against one,
4 we need now.
5 **911 Dispatch:** Ok um? You said um um Torim and Tetakusim correct?
6 **911 Caller:** Ah yes. Torim and Tetaksuim
7 **911 Dispatch:** Don't hang up ok, don't hang up. Stay on the line.
8 **Angelica:** Hurry up there's kids here send them. [Sounds] [inaudible]... Mikey stay over
9 there. They have knives Michael. They have knives. [inaudible]... Them.
10 **911 Dispatch:** Ok you know who it is by any chance?
11 **911 Caller:** It's ahh Michael Madrid Jr. and I don't know these other guys, they're from
12 outside of Pascua.
13 **911 Dispatch:** Ok and what happened? I have cops going, but just talk to me let me
14 what's going on, ok.
15 **911 Caller:** I don't know there was a confrontation, we're driving here down Torim, and
16 um we're going to my brothers and then I don't know they just started talking crap to
17 each other and then some guy got off the black Ford F150 it's a older model with rims.
18 And then um one of them took out a knife and then the other one took out a knife.
19 So...and then I was telling Mikey just to leave and he was leaving and the the truck the
20 guys got in the truck and started following him. Now they're chasing each other.
21 **911 Dispatch:** Where are they going?
22 **911 Caller:** Towards Torim. They're going east. Down Torim going east. They're going
23 towards the cops that are parked right there by the fire department. Sounds.... It's a older
24 model Ford. It's a older model Ford.
25 **911 Dispatch:** And what's the other vehicle?

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911 Caller: With rims. Huh?

911 Dispatch: Is there another vehicle involved or no?

911 Caller: No. Its just that one vehicle. And there's [inaudible]...

911 Dispatch: Chasing someone on foot?

911 Caller: [inaudible]...all black with red a red top.

911 Dispatch: Ok.

911 Caller: And then the other one [sounds]...

911 Dispatch: Okay and are they chasing him in the car?

911 Caller: They just stopped him. I think they got him. Well that, he, Mikey..was going he was walking away, cause I told him just go, I told him just go. So he was walking um..west. He was walking west on Torim. He was leaving and that truck was following after him. The trucks right here.

911 Dispatch: Okay, they abandoned the truck and they're chasing him?

911 Caller: No. They're..somebodys driving the truck and....

911 Dispatch: Okay.

911 Caller: Right here and the cops. They [inaudible]...coming down Camino Potam, towards the park.

911 Dispatch: You said its um going down a Potam now?

911 Caller: Yeah..or its stopping right there with the bike cop.

911 Dispatch: Its stopping with the bike cop. Okay.

911 Caller: Yeah.

911 Dispatch: Okay um.

911 Caller: They were in the...they were in truck and they ended up they were talking smack to Mikey and Mikey ended up hitting the truck and the guys got off and then they

1 and that's when they were wanting to fight in front of all these kids that were walking on
2 the sidewalk.

3 **911 Dispatch:** Ok. And then um can I get your name?

4 **911 Caller:** Angelica.¹

5 **911 Dispatch:** And what's a good ah phone number for you Angelica?

6 **Angelica:** 901-0078

7 **911 Dispatch:** Did the cops, do you see an officer out with the vehicle right now?

8 **Angelica:** Yeah. Well the the driver got off and and from and he's there, they're standing
9 right there with bike cop.

10 **911 Dispatch:** Okay then I am going to go ahead and let you go, okay?

11 **Angelica:** Okay.

12 **911 Dispatch:** Thank You.

13 **Angelica:** Bye-

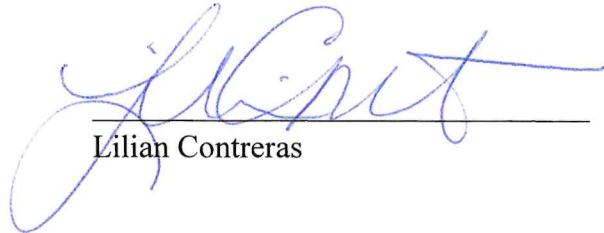
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¹ Caller later identified as Angelica Alvarez

CERTIFICATE

I, Lilian Contreras, do hereby certify that this transcript of the proceedings was prepared by me, to the best of my skill and ability, and that the same was transcribed by me via computer-aided transcription, and that the forgoing pages of typewritten matter are a true, correct, and complete transcript of all the proceedings had, as set forth in the title page hereto.

Signed in Tucson, Arizona, on the 30th of September, 2019



Lilian Contreras

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EXHIBIT 2:

December 19, 2018: Trial Court's Order Setting Status Conference

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IN THE PASCUA YAQUI TRIBAL COURT
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE)
Plaintiff,)
VS.)
MADRID, MICHAEL)
Defendant.)

CASE NO. CR-17-079
ORDER SETTING STATUS
HEARING ON COURT OF APPEALS'
OPINION AND REMAND

On December 19, 2018, the court reviewed the Court of Appeals' Opinion in CA-17-002, which remands the matter back to the trial court, and the court should set the matter for a status hearing to determine what, if any, actions the parties will take in the matter.

IT IS ORDERED that this matter shall be set a status hearing on January 2, 2019 at 11:00 a.m..

**THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.
SO ORDERED THIS 19th DAY OF DECEMBER, 2018.**

Melvin R. Hoop
Associate Judge, Pascua Yaqui Tribal Court

cc: Date: 12/19/18
 Tribe Defendant/Counsel Pretrial

Clerk *[Signature]*

EXHIBIT 3:

January 2, 2019: Order for Continuance

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IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE)
Plaintiff,)
Vs.)
MADRID, MICHAEL)
Defendant.)

CASE NO. CR-17-079

ORDER FOR CONTINUANCE

On January 2, 2019, the defendant's counsel, Melissa Acosta, appeared, and the defendant was not served, due to a bad address. The Tribe's Kendrick Wilson made an unopposed request to continue the status hearing set for today, because the defendant's counsel confirmed her client may be served at his old address. Time limits are deemed waived, and the court should grant the continuance, for good cause shown.

IT IS ORDERED that the court shall continue the status hearing, for good cause shown, and the hearing shall be re-set on January 23, 2019 at 11:00 a.m.. Time limits shall be waived. The defendant shall be released under all prior conditions.

THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.


The defendant shall be served at 7324 S. Camino Cocoin, Tucson Az. 85757.

SO ORDERED THIS 2nd DAY OF JANUARY, 2019.



JUDGE, PASCUA YAQUI TRIBAL COURT

Cc: Date 01.03.19
 Tribe Defendant/Counsel



Clerk

EXHIBIT 4:

May 1, 2019: Email from Russell Boatwright to Melissa Acosta

Melissa Acosta

From: Russell Boatwright
Sent: Wednesday, May 1, 2019 10:55 AM
To: Melissa Acosta
Subject: Michael Madrid CR-17-079

Good morning Melissa,

We submitted a DNA sample taken from a tail light in this matter for testing. DPS' lab just emailed me and said that the sample will be consumed as a result of the testing, so there will be no sample left for independent testing if you wanted. Would you stipulate to us going forward with test? If so, I'll prepare one and send it to you to review before I file it.

Best,

Russell Boatwright

Deputy Prosecutor
Pascua Yaqui Office of the Prosecutor
7777 S. Camino Huivisim
Building A, 2nd Floor
Tucson, AZ 85757
Tel: (520) 879-6253
Fax: (520) 879-6260
E-mail: Russell.Boatwright@pascuayaqui-nsn.gov

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PLEASE CONSIDER THE ENVIRONMENT BEFORE PRINTING THIS EMAIL.



EXHIBIT 5:

**May 28, 2019: Motion to Reconsider Court's Order for Independent
Expert for DNA testing**

2019 MAY 28 AM 11:20

DOCKET NO. _____

CLERK

1 PASCUA YAQUI TRIBE
7474 S. Camino de Oeste
2 Tucson, Arizona 85757
(520) 879-6251

3
4 Russell Boatwright
Deputy Prosecutor

5
6 **IN THE PASCUA YAQUI TRIBAL COURT**
7 **IN AND FOR THE PASCUA YAQUI RESERVATION, ARIZONA**

8
9 PASCUA YAQUI TRIBE,
Plaintiff,

10 Vs.

11
12 **MADRID, MICHAEL RAYMOND**

13 Defendant
14
15

NO. CR-17-079

**MOTION TO RECONSIDER COURT'S
ORDER FOR INDEPENDENT EXPERT
FOR DNA TESTING**

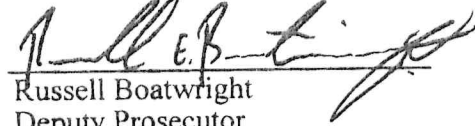
16 COMES NOW The Pascua Yaqui Tribe, by and through counsel undersigned, and hereby
17 requests this Honorable Court to reconsider its order allowing for an independent expert to be present
18 for testing of the DNA sample. The DPS laboratory does not allow for independent persons to enter
19 testing areas of the lab due to the vulnerability of contamination. Therefore, this is not an option.

20 The Tribe requests that the Court order that Tribe be allowed to consume the sample. The
21 defense has maintained that the blood is a non-issue, and is even willing to stipulate to such.
22 Therefore, there are no grounds under which the defendant is prejudiced by the consumption of the
23 DNA sample.

24 The Tribe objects to stipulating that it is Michael Madrid's blood. It is the Tribe's burden, to
25 prove beyond a reasonable doubt, all the elements of every count, and that Michael Madrid was, in
26 fact, the person who committed those crimes. Since jury's are free to accept, or reject, any
27 stipulation, the Tribe wants the scientific testing done.
28

Respectfully submitted this 28th day of May, 2019.

OFFICE OF THE PROSECUTOR
PASCUA YAQUI TRIBE


Russell Boatwright
Deputy Prosecutor

Original of the foregoing delivered/mailed
This date to:

Clerk of the Court, Pascua Yaqui Tribal Court

A copy delivered to:

Melissa Acosta
Office of Public Defender

By:

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EXHIBIT 6:

May 28, 2019: Order for Consumptive Forensic DNA Testing, etc.

1 IN THE PASCUA YAQUI TRIBAL COURT

2 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

3 PASCUA YAQUI TRIBE,)
4 Plaintiff,) Case No. CR-17-079
5 Vs.) ORDER FOR CONSUMPTIVE FORENSIC
6 MADRID, MICHAEL R.) DNA TESTING AND ORDER
7 Defendant.) DENYING TRIBE'S MOTION TO
8) RECONSIDER COURT'S ORDER FOR
9) INDEPENDENT EXPERT FOR
10) DNA TESTING
11)
12)

13 On May 28, 2019, the court reviewed the Tribe's Motion to Reconsider Court's Order
14 for Independent Expert for DNA testing. Appearing were Melissa Acosta and Stu Dehaan, for
15 the defendant, whose presence was waived, and Russell Boatwright and O.J. Flores, for the
16 Tribe.

17 The Tribe reports that the Arizona State Crime lab would not be able to accommodate
18 allowing the defendant's forensic DNA expert to be present for consumptive testing, because
19 "[t]he DPS laboratory does not allow for independent expert to be present for testing of the
20 DNA sample. On May 23, 2019, the court adopted the ABA Standards on DNA Evidence
21 and should follow Standard 3.4(e) Consumptive testing and it granted the defendant's request
22 to permit an independent evaluation of the analysis, including but not limited to, the presence
23 of an expert representing the defendant during the evidence preparation and testing, and
24 videotaping or photographing the preparation and testing.

25 Because the ABA Standard on Consumptive Testing is one standard that addresses
26 both the interests of the Tribe to prove its DNA evidence and it but also protects the
27 defendant's right of due process in ensuring its expert can observe the DNA consumptive
28 testing to ensure protocols and standard operating procedures are followed, the court should
maintain its prior court orders, and it denies the Tribe's motion to reconsider, for lack of good
cause shown.

**IT IS ORDERED that for good cause shown, the court grants the defendant's
motion for consumptive Forensic DNA testing. The court shall set a review hearing on
the defendant's Motion on June 13, 2019 at 9:00 a.m..**


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THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.

IT IS FURTHER ORDERED that the Tribe's motion to reconsider shall be denied, for lack of good cause shown.


IT IS FURTHER ORDERED that the defendant's counsel shall file an ex parte motion for appointment of its DNA Forensic expert, as soon as possible, for court review. The motion and order shall be sealed in the court file, for appellate review and not opened except upon order of this court.

SO ORDERED THIS 28th DAY OF MAY, 2019.



Judge, Pascua Yaqui Tribal Court

CC: Date 05-28-17
 Tribe Defendant/Counsel



Clerk

EXHIBIT 7:

***USA v. Gardner*, No. 4:14-CR-61-H, 2015 WL 1951809
(E.D. N.C. April 29, 2015)**

No. 4:14-CR-61-11

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA EASTERN DIVISION

United States v. Gardner

Decided Apr 29, 2015

MALCOLM J. HOWARD Senior United States District Judge

ORDER

This matter is before the court on the government's motion for an order authorizing consumptive DNA testing. [D.E. #72]. The defendant has responded [D.E. #78], and this matter is ripe for adjudication.

BACKGROUND

A federal grand jury indicted the defendant on September 23, 2014, on seven counts of conspiracy, robbery, and discharge and brandishing of a firearm during and in relation to a crime of violence. The indictment alleges that on three occasions in late 2013, defendant, along with his codefendant, Mr. Linwood Hagans, robbed convenience stores at gunpoint. During one robbery, defendant allegedly discharged a firearm. Although each robbery was recorded on surveillance video, the suspects wore both masks and gloves which prevented indisputable identification. At least three other unindicted but known, identified, and named suspects were investigated by law enforcement officials. Further, at least one purported victim represented with a high degree of certainty that the robber was an individual other than defendant.

During the investigation, Lenoir County Sheriff Chris Hill observed a vehicle he believed to be driven by defendant leave the defendant's residence. Sheriff Hill followed the vehicle and allegedly observed the vehicle come to rest on the shoulder of the road beneath an overpass. After a few minutes, the vehicle moved back onto the road and continued its travel. Sheriff Hill and other law enforcement officials searched the area

where the vehicle had stopped. They found a coffee can containing a .22 caliber revolver, a ski mask, digital scales, suspected cocaine, and a pack of cigarettes of the same brand stolen during some of the robberies. No person, however, would testify to seeing defendant place the firearm into the coffee can in which it was found. Further, no person would testify to seeing defendant put the coffee can at the location where it was recovered by law enforcement officials.

An analyst compared test fires from the .22 caliber revolver found in the coffee can to the bullet recovered from the convenience store where a gun was discharged. The analyst reported that the bullet found at the robbery scene was the same caliber as the revolver found in the coffee can, but the bullet was too damaged to determine whether it was fired from the same gun.

The government now requests the court for permission to test the gun to determine whether any touch DNA can be found. If DNA is found, the government requests the court for permission to perform testing which may entirely consume any DNA found on the gun. Proposed testing would compare any DNA found on the gun to DNA samples obtained from the defendant.

COURT'S DISCUSSION

The principles set forth in California v. Trombetta, 467 U.S. 479 (1984), and Arizona v. Youngblood, 488 U.S. 51 (1988), regarding the Due Process Clause and the government's destruction or loss of evidence prior to a criminal trial assist the court in its analysis. See United States v. Bohl, 25 F.3d 904, 909 (10th Cir. 1994). Courts have long held that criminal defendants are afforded significant procedural safeguards which protect the

defendant's opportunity to present a complete defense. Trombetta, 476 U.S. at 485; see also United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). Less clear, however, is the requirement imposed by the Due Process Clause upon the prosecutor regarding any duty the government has to take affirmative steps to preserve evidence on behalf of criminal defendants. Trombetta, 476 U.S. at 486. The key question when determining the duty owed to a criminal defendant *4 by the government is whether the evidence possesses an exculpatory value that is apparent before its destruction. See generally Trombetta, 476 U.S. at 488-89; Youngblood, 488 U.S. at 57-58.

Under Trombetta, the government has a duty under the Due Process Clause to preserve evidence when it both: (1) possesses "an exculpatory value that was apparent before [it] was destroyed;" and (2) is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Trombetta, 476 U.S. at 488-89. Under Youngblood, however, "unless a criminal defendant can show bad faith" by the government or its agents, "failure to preserve *potentially useful evidence* does not constitute a denial of due process of law. Youngblood, 488 U.S. at 58. Therefore, a key distinction is made between evidence which possesses exculpatory value and evidence which only possesses potentially exculpatory value. See generally Trombetta, 476 U.S. at 488-89; Youngblood, 488 U.S. at 57-58.

The court must first analyze the nature of the evidence to determine whether the standard set forth in Trombetta or Youngblood applies. In contrast to the questions presented before the Supreme Court of the United States in Trombetta and Youngblood, the question presented before the court in the instant case is prospective instead of retrospective. The *5 government urges that the DNA, if any sample even remains on the firearm, has no apparent exculpatory value as required by Trombetta to invoke the government's duty of preservation. The court agrees with the government's conclusion inasmuch as DNA

evidence, regardless of the result of testing, cannot prove the defendant was or was not involved in the alleged offenses. The court, however, finds that such evidence, if any, can fairly be considered to be potentially exculpatory under Youngblood.

If the question presented before the court was retrospective, the defendant would be required to show the government consumed the DNA evidence in bad faith. When determining bad faith, the court considers what the government or its agents knew regarding the exculpatory value of the evidence at the time it was lost or destroyed. Youngblood, 488 U.S. at 56, n.*; United States v. Caldwell, 201 F.3d 437, *4 (4th Cir. 1999) (unpublished). The following factors have also been considered by some courts in determining bad faith:

(1) whether the government had explicit notice that [defendant] believed the [evidence] was exculpatory; (2) whether the claim that the evidence is potentially exculpatory is conclusory, or instead "backed up with objective, independent evidence giving the government reason to believe that further tests of the [destroyed evidence] might lead to exculpatory evidence;" (3) whether the government could control the disposition of the evidence once [defendant] indicated that it might be exculpatory; (4) whether the evidence was central to the case; and

*6

(5) whether the government offers any innocent explanation for its disposal of the evidence.

United States v. Rogers, No. 10-10140-01-JTM, 2010 WL 5015329, at *4 (D. Kan. Dec. 3, 2010) (citing United States v. Smith, 534 F. 3d 1211, 1224-25 (10th Cir. 2008)). Because the government submitted its motion prospectively, the court can establish procedural safeguards to permit the testing requested by the government while preserving the defendant's opportunity to present a complete defense. The court finds that


factors (1), (2), and (3) set forth in Rogers and Smith would militate against the government's requested course of action to perform consumptive DNA testing without the presence of an independent expert on behalf of the defendant in the event it did not request prior authorization from the court, while factors (4) and (5) support the government's request. In any event, the government's request for prior authorization convincingly demonstrates good faith regarding its intent to perform a consumptive DNA test on any sample that may be found on the firearm.

Although this court is unwilling to state that the Due Process Clause requires it to prevent destruction of the potential DNA evidence or permit the defendant to hire an expert to be present at any tests conducted on a DNA sample that may be found, this court believes the prospective imposition of prophylactic safeguards in accordance with the ABA Standards on DNA Evidence best preserves the defendant's opportunity to present a complete defense while allowing the government's request to perform testing. ABA Standard 16-3.4 sets forth the following:

(a) When possible, a portion of the DNA evidence tested and, when possible, a portion of any extract from the DNA evidence should be preserved for further testing. ...

... (e) If a motion objecting to consumptive testing is filed, the court should consider ordering procedures that would permit an independent evaluation of the analysis, including but not limited to the presence of an expert representing the moving party during evidence preparation and testing, and videotaping or photographing the preparation and testing.

ABA Standards for Criminal Justice, DNA Evidence § 16-3.4 (3d ed. 2007).

 casetext

CONCLUSION

For the foregoing reasons, the court hereby orders:

(1) The government be allowed to perform DNA testing on any remaining sample found on the firearm recovered from the can under the overpass;

(2) If the government can develop a usable DNA profile without consuming all of the DNA, it shall preserve the rest of the sample for testing by the defendant's expert if defendant so requests;

*8 (3) If the government cannot develop a usable DNA profile without consuming all of the DNA, it shall be allowed to perform a consumptive DNA test;

(4) At any DNA test, including the recovery of a sample from the firearm and whether or not such test is consumptive, defendant's expert shall be afforded the opportunity to attend and be apprised of the test and procedures performed by the government and its agents; and

(5) The government shall comply with discovery requests by the defendant insofar as they comport with the government's disclosure requirements set forth under applicable constitutional, statutory, and case law.

(6) The defendant shall prepare and file in this court a proposed request for prior authorization of funds within fourteen (14) days of entry of this order if he wishes to seek approval for funds to hire an expert for purposes related to this order.

The court, therefore, GRANTS IN PART and DENIES IN PART the government's motion for authorization to conduct consumptive DNA testing. [D.E. #72].

This 29th of April 2015.

/s/ _____

MALCOLM J. HOWARD

#34

Senior United States District Judge
At Greenville, NC


 casetext

EXHIBIT 8:

June 31, 2019: Order in *USA v. Daniel Escalante*, No. R18-2666-(TUC)-RM(LAB)

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America,
Plaintiff,
v.
Daniel Escalante,
Defendant.

No. CR-18-02666-001-TUC-RM (LAB)
ORDER

The defendant, Daniel Escalante, is charged in a nine (9) count indictment with aggravated sexual abuse, kidnapping, brandishing a firearm in furtherance of a crime of violence, assault resulting in serious bodily injury and prohibited possession of a firearm, with counts 1-3 and 5-8 being committed within Indian Country. On April 16, 2019, Defendant Escalante filed a motion to permit independent DNA testing on a knife the government recovered a day after the incident in question. (Doc. 18). On April 26, 2019, the government filed a response explaining that DPS contacted the government to explain that in testing for DNA on the knife the laboratory would consume the sample. In other words, the testing will destroy the evidence so only one test can be conducted. The government moved the Court to deny the motion.

On May 20, 2019 the parties notified the Court that they had reached an agreement. As such, the Court found the motion moot. (Doc. 30). Thereafter the government requested a status conference due to a change in circumstances. (Doc. 31) On June 25, 2019, the status conference was conducted. (Doc. 34) During the status conference the government

1 additional testing in any event.

2 Based on the pleadings, the arguments and the information proffered during the
3 hearings, the Court finds that the interest of justice is served by preserving the defendant's
4 ability to present a complete defense and therefore,

5 IT IS HEREBY ORDERED that the government is to release the knife to the agreed
6 upon independent laboratory for DNA testing at the expense of the Federal Defender's
7 Office. If the government requests an independent observer be present, that request is
8 granted. The government is free to continue testing for DNA on the remaining four items
9 at any certified/licensed laboratory of its choosing.

10 SO ORDERED this 31st day of July, 2019.

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14 Honorable Leslie A. Bowman
15 United States Magistrate Judge
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EXHIBIT 9:

Lauren Kirchner, *Traces of Crime: How New York's DNA Techniques Became Tainted*, N.Y. Times, Sept. 4, 2017.



Traces of Crime: How New York's DNA Techniques Became Tainted

The city's medical examiner has been a pioneer in analyzing complex DNA samples. But two methods were recently discontinued, raising questions about thousands of cases.

By Lauren Kirchner

Sept. 4, 2017

Over the past decade, the DNA laboratory in the office of New York City's chief medical examiner emerged as a pioneer in analyzing the most complicated evidence from crime scenes. It developed two techniques, which went beyond standard practice at the F.B.I. and other public labs, for making identifications from DNA samples that were tiny or that contained a mix of more than one person's genetic material.

As its reputation spread, the lab processed DNA evidence supplied not only by the New York police, but also by about 50 jurisdictions as far away as Bozeman, Mont., and Floresville, Tex., which paid the lab \$1,100 per sample.

Traces of Crime

This article was produced in collaboration with [ProPublica](#), an independent, nonprofit newsroom that produces investigative journalism in the public interest.

Now these DNA analysis methods are under the microscope, with scientists questioning their validity. In court testimony, a former lab official said she was fired

Criticizing one method, and a former member of the New York State Commission on Forensic Science said he had been wrong when he approved their use. The first expert witness allowed by a judge to examine the software source code behind one technique recently concluded that its accuracy “should be seriously questioned.”

Earlier this year, the lab shelved the two methods and replaced them with newer, more broadly used technology.

A coalition of defense lawyers is asking the New York State inspector general’s office — the designated watchdog for the state’s crime labs — to launch an inquiry into the use of the disputed analysis methods in thousands of criminal cases. While the inspector general has no jurisdiction over the court system, any finding of flaws with the DNA analysis could prompt an avalanche of litigation. Previous convictions could be revisited if the flawed evidence can be shown to have made a difference in the outcome.

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The medical examiner’s office “has engaged in negligent conduct that undermines the integrity of its forensic DNA testing and analysis,” the Legal Aid Society and the Federal Defenders of New York wrote the inspector general on Friday. Because the lab has kept problems with its “unreliable” testing and “unsound statistical evidence” secret from the public and the courts, they continued, “innocent people may be wrongly convicted, and people guilty of serious crimes may go free.”

In addition to those convicted using the disputed methods, many defendants may have chosen to plead guilty when they learned prosecutors had DNA evidence against them. Their cases face significant barriers to reconsideration.

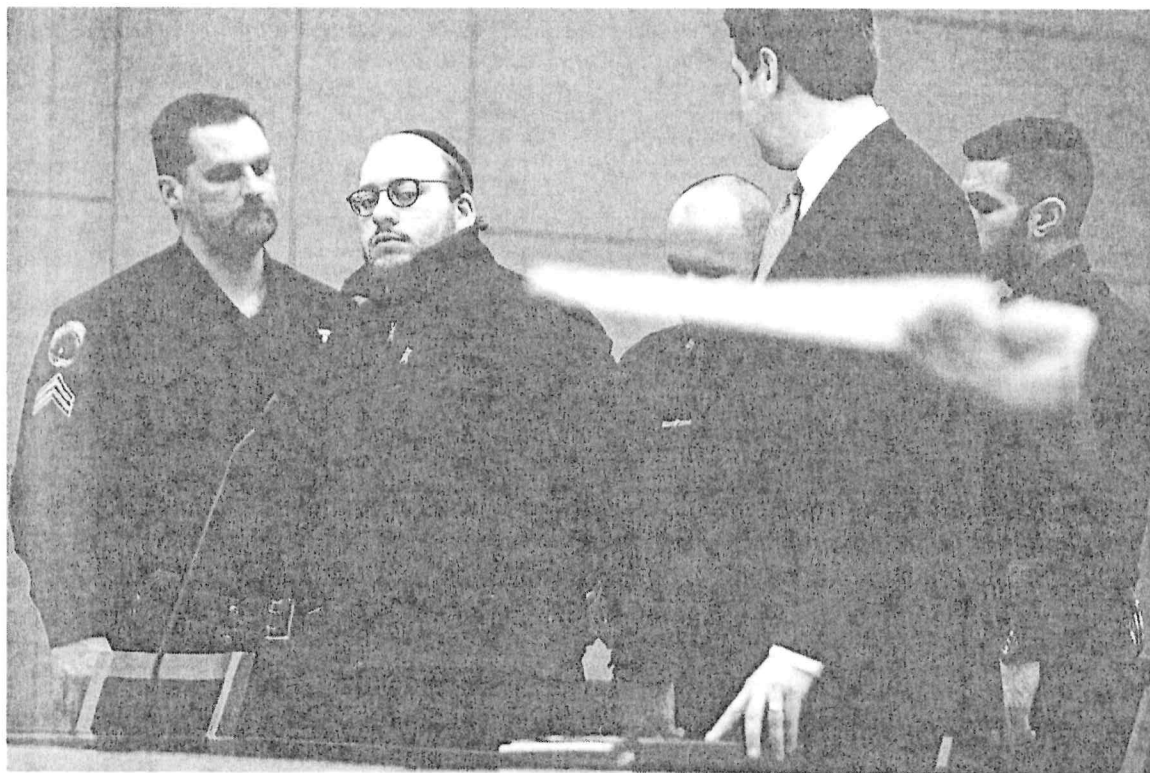
The medical examiner’s office stands by its science. Its chief of laboratories, Timothy Kupferschmid, said that the discarded techniques were well-tested and valid, and that the lab was adopting newer methods to align with changing F.B.I. standards. He compared it to a vehicle upgrade.

“So just because we’re switching to the new model, I mean, our old pickup truck worked great, but my new pickup truck is so much better,” he said.

One case that hinges on the disputed DNA techniques stemmed from the beating of Taj Patterson in December 2013. A group of Hasidic men attacked Mr. Patterson, a black student, in the Williamsburg section of Brooklyn. Prosecutors blamed the attack on the Shomrim, a Hasidic group that patrols Williamsburg, a neighborhood where tensions between orthodox Jews and blacks have long simmered.

Six days after the attack, the police found one of Mr. Patterson’s black Air Jordan sneakers on a nearby roof.

The police sent the sneaker to the DNA lab, where a technician swabbed a 3-inch by 6-inch area of its heel — and recovered 97.9 picograms of DNA from at least two people. A picogram is one trillionth of a gram.



Mayer Herskovic was the only person to stand trial and be sentenced to prison for the 2013 gang attack on Taj Patterson in Brooklyn. The DNA found on Mr. Patterson’s sneaker was pivotal in the case against Mr. Herskovic. “I don’t believe that this is DNA,” Mr. Herskovic said of the evidence. Victor J. Blue for The New York Times

The sample bore Mr. Patterson's DNA. Using software developed in-house, the lab calculated that it was 133 times more likely than not that the remainder belonged to Mayer Herskovic, a young father who lived and worked in Williamsburg and had no criminal record.

"I don't believe that this is DNA," Mr. Herskovic said. "A mixture, like you take milk, orange juice and water and you mix it, what is it? Is it still milk? Is it still orange juice? I don't know."

"DNA is the magic word," he added. "If you throw it into a trial, they eat it up. For me, it's not magic at all."

No other physical evidence linked Mr. Herskovic to the attack on Mr. Patterson, who was blinded in his right eye. Neither the victim nor those who witnessed the crime identified Mr. Herskovic at trial, nor was he seen on surveillance video. Mr. Herskovic said he has never been part of the Shomrim, and deplored the assault on Mr. Patterson.

Nevertheless, he was convicted by a judge of gang assault, and sentenced this past March to four years in prison. He is appealing.

Three years ago, Barry Scheck, a co-founder of the Innocence Project, a nonprofit that uses DNA evidence to exonerate wrongly convicted prisoners, yelled at his colleagues on the state forensic commission about the potential perils of the DNA work at the city's lab.

"The day of reckoning is going to come," Mr. Scheck told his fellow commissioners, some of whom rolled their eyes, a video of the meeting showed. "Someday people are going to review this," he continued. "It's an Ebola. It is a cancer here that could be spreading. We are all on notice."

•••

For three decades, forensic DNA evidence has been a valuable tool in criminal investigations, incriminating or exonerating suspects. Matching a defendant's

NEW YORK — Genetic material with a sample found on a weapon or at a crime scene has proved extremely persuasive with judges and juries.

But not all DNA evidence is equal. Sometimes it's clear: blood or semen identifies a single person. If it's just a few skin cells left on an object, or if it contains more than one person's genetic material, it can be more ambiguous. In such situations, labs used to report that the results were inconclusive, or the defendant could not be excluded from the mix.

New types of DNA analysis have been introduced in recent years to interpret trace amounts or complex mixtures, spawning an industry of testing tools, chemical kits and software. As analysis has become more complex, the techniques and results are coming under fire nationwide.

In the past three years, flaws in DNA methods have temporarily shut down testing in public crime labs in Austin, Tex., and Washington. Lab analysts "make it seem like it's a completely objective process," said Bicka Barlow, a lawyer in California with a master's degree in genetics and molecular biology. "But I'm 100 percent convinced that there are many people who are incarcerated who were convicted with DNA evidence who are innocent."

The two techniques that New York's lab introduced were the "high-sensitivity testing" of trace DNA amounts, and the Forensic Statistical Tool, or FST, in which software calculates the likelihood that a suspect's genetic material is present in a complicated mixture of several people's DNA. By its own estimate, the lab has used high-sensitivity DNA testing to analyze evidence samples in 3,450 cases over the past 11 years, and the FST in 1,350 cases over the past six. Cases in which both methods were used may be counted in both totals.



From left, Andrew Feiter and Kamedra McNeil, forensic scientists, at a crime lab in Washington. Flaws in DNA methods temporarily shut down testing in some public crime labs, like this one. Bill O'Leary/The Washington Post, via Getty Images



In February 2012, responding to a 911 call about gunshots near East Tremont Avenue, police officers from the 45th Precinct in the Bronx saw a passer-by make a motion as if he was dropping an object under a parked car.

His was a familiar face: Johnny Morgan, who had been arrested 75 times. The police found a .40-caliber Glock 23 beneath the car. Mr. Morgan was charged with gun possession, based both on DNA evidence and witness testimony. But the amount of DNA recovered from the gun was extremely small; the lab initially said it was unsuitable for testing.

After the prosecutor and the police requested a high-sensitivity test, analysts said Mr. Morgan's DNA was a match. He was convicted.

Public crime labs assessing DNA evidence, including the F.B.I.'s lab, "amplify," or copy, the material 28 times to conduct their analysis. Under the high-sensitivity testing method developed by Dr. Theresa A. Caragine, a forensic scientist, and implemented in 2006, New York's lab began to push very small amounts through

three more cycles, bringing the total to 31. This approach provided more material to look at — as much as eight times the standard approach. But, like turning up the volume on a radio, those additional cycles amplified small imperfections from missing or contaminated DNA.

To reduce potential problems, the lab decided not to amplify samples smaller than 20 picograms, or about three cells' worth of DNA, its then-director, Dr. Mechthild Prinz, said in 2005 during the state's approval process for the test. She declined to comment for this article.

“The scientific community has been asked to test more and more evidence with less and less amounts of DNA,” Dr. Prinz explained in 2009 to the DNA Subcommittee of the state forensic science commission, which approves all forensic methods used in New York State.

“A couple of years ago, DNA testing was limited to body fluids — semen, blood, and saliva. Now every laboratory in the country routinely receives swabs from guns,” other weapons, burglary tools, and cash registers, she said.

After several years of high-sensitivity testing of small amounts of DNA, the lab developed a second method: a piece of software to interpret complex mixtures.

Invented by Dr. Caragine and Dr. Adele A. Mitchell, a geneticist with a specialty in statistics who joined the lab in 2008, the Forensic Statistical Tool, or FST, considers the overall amount of DNA in the mixture, how many people are in it, how much information is probably missing or contaminated, and the frequency with which each piece of DNA appears in different racial or ethnic groups. Then it compares the defendant's DNA profile to the mixture, and calculates a likelihood ratio, which it expresses as a single number.

The bigger that number — and it's sometimes in the millions or even trillions — the more likely that the defendant's DNA is present. Dr. Caragine and Dr. Mitchell testified in 2012 that about a third of all test results were favorable to defendants, by indicating that their DNA was probably absent.

NEW YORK Times
Only a small proportion of cases using the Forensic Statistical Tool went to trial. Most defendants faced with unfavorable FST results pleaded guilty, defense lawyers say. “Just the prospect of those numbers going in front of the jury could really warp the plea bargaining process,” said Brad Maurer, a lawyer and DNA specialist at New York County Defender Services.

Eric Rosenbaum, an assistant district attorney and head of the DNA Prosecutions Unit in Queens, described the FST as an “extremely powerful tool because it is devastating in court.”

Dr. Theresa A. Caragine, a forensic scientist, left, and Dr. Adele A. Mitchell, a geneticist with a specialty in statistics, invented FST. Nicole Bengiveno/The New York Times

• • •

In December 2012, The New York Times profiled Dr. Mitchell and Dr. Caragine in the

article “Helping Decide Guilt or Innocence,” which described their fruitful collaboration, but also hinted at a brewing controversy. The Legal Aid Society was gearing up for an extensive fight against admission of FST results in court.

One interested reader was Dr. Eli Shapiro, the former mitochondrial DNA technical leader in the DNA lab. One reason for his early retirement, he later testified, was the stress over having to sign off on lab reports generated by the software. Even in the lab, few people knew the science behind it.

Dr. Shapiro later said in court that he found the FST process described in the article “very disturbing.” He reached out to his former boss and colleagues to express his alarm. “They were not concerned,” he testified.

So, in early 2013, Dr. Shapiro offered his help to Legal Aid, which had just formed a unit specializing in DNA evidence. Under a judge’s order, the lab had given Legal Aid the results of its validation studies — internal tests of the FST’s accuracy. Dr. Shapiro helped decipher the data.

“He knows the math,” said Clinton Hughes, a Legal Aid lawyer. “For relaxation, he does long division on the beach with a pencil.”

From 2012 to 2014, a hearing in Brooklyn before Judge Mark Dwyer focused on DNA evidence in two cases: it had been recovered from the handlebars of a bicycle after a shooting, and from the clothing of a sexual assault victim. With the help of testimony from Dr. Shapiro and some of the world’s most renowned DNA experts, Legal Aid hoped to persuade the judge to throw out the evidence.

The defense experts were denied access to the FST’s software code, which would later come under scrutiny. Instead, they criticized the way that Dr. Caragine and Dr. Mitchell designed and tested the FST.

Dr. Bruce Budowle, an architect of the F.B.I.’s national DNA database, testified that New York’s statistical methods were “not defensible.”



Clinton Hughes, a lawyer at the Legal Aid Society, is part of a team that has challenged the admissibility of DNA results from the two disputed techniques.

Demetrius Freeman for The New York Times

He said that the FST was designed with the incorrect assumption that every DNA mixture of the same size was missing information or had been contaminated in just the same way. He also criticized the lab's overreliance on "pristine" saliva and samples to test its methods, which do not mirror the ways real crime-scene evidence is degraded by time and weather. The lab underestimated the challenges, he testified.

"Five-person mixtures can look like three-person," he said, "four contributors can look like two-person mixtures. It's almost impossible to actually be accurate."

The software's inventors acknowledged a margin of error of 30 percent in their method of quantifying the amount of DNA in a sample, a key input into the FST calculation. They acknowledged that the FST didn't consider that different people in a mixture, especially family members, might share DNA.

In April 2013, weeks after testifying, Dr. Caragine was forced to resign from the lab

NEW YORK Times
after New York's inspector general found that she had violated protocol by changing her colleagues' FST results in two cases. Her defense was that she was correcting their mistakes. Dr. Mitchell left in 2014. Dr. Caragine declined to comment for this article, and Dr. Mitchell did not respond to repeated requests for comment.

Perhaps the most dramatic testimony in the hearing came from Dr. Ranajit Chakraborty, who had developed the F.B.I.'s policy on DNA in the 1990s and, as a member of New York's DNA Subcommittee, voted to approve both high-sensitivity testing in 2005 and the FST in 2010. What he had since learned about the FST bothered him.

"What would your vote be today?" Jessica Goldthwaite, a lawyer for Legal Aid, asked Dr. Chakraborty on the stand.

"My answer would be no," he said. In November 2014, Judge Dwyer sided with the defense, excluding evidence produced by both high-sensitivity testing and the FST. He was the first state judge to do so, and so far the only one.

• • •

Appointed to the state forensic science commission when it formed in 1994, Mr. Scheck didn't vote for either of the lab's methods. His misgivings grew when he learned that the DNA sample used to convict Mr. Morgan in the Bronx gun case was only 14.15 picograms. That was below the 20-picogram minimum for high-sensitivity testing the lab had promised to set during its approval process back in 2005.



Dr. Marina Stajic, the former director of the toxicology lab at the medical examiner's office, testified that the city's DNA lab should be transparent with its data.

Ramsay de Give for The New York Times

At the October 2014 commission meeting, Mr. Scheck pounded the table as he proposed to compel the lab to turn over any validation studies it had conducted for high-sensitivity testing of especially small samples. He accused lab officials of not having performed the necessary studies, despite their assurances otherwise. While Mr. Scheck's motion failed, it drew a vote from an unexpected supporter: Dr. Marina Stajic, who then worked for the medical examiner's office as the director of the toxicology lab. She supported the motion, she later testified, because she believed that the DNA lab should be transparent with its data.

Her boss, Dr. Barbara Sampson, the chief medical examiner, heard about Dr. Stajic's vote the next morning. She expressed her anger in an email to a colleague, "Hold me down."

Mimi Mairs, then a lawyer for the DNA lab, emailed, "She sucks."

A spokeswoman for the medical examiner's office declined to comment on the correspondence, as did the Manhattan district attorney's office, where Ms. Mairs is now a prosecutor.

In April 2015, Dr. Sampson and Mr. Kupferschmid fired Dr. Stajic, who had worked at the lab for 29 years. Mr. Kupferschmid then called a commission member to inquire whether Dr. Stajic would also be removed from the oversight group, according to

court documents.

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In February 2016, Dr. Stajic sued Dr. Sampson, Mr. Kupferschmid, and the city for allegedly violating her First Amendment rights. The defendants' lawyer contends Dr. Stajic can't prove why she was fired, and that her vote wasn't constitutionally protected speech. Her case is pending.

•••

The case that finally revealed the FST's source code began with a few drops of cooking oil.

Kevin Johnson and his ex-girlfriend Octaviea Martin shared custody of two sons, and he sometimes stayed over in her Bronx apartment. One night in April 2015, he was cooking cheeseburgers when some oil spilled. He and Ms. Martin argued about cleaning it up.

Her daughter got upset and called 911, telling the dispatcher that Mr. Johnson was pointing a gun at Ms. Martin. A police search of the apartment turned up two socks wedged between the refrigerator and the wall. In one sock was a black pistol; in the other, a silver revolver.

Mr. Johnson, who had been convicted on a previous weapons charge, was arrested.

The lab found that one gun contained two people's DNA; by the FST's calculation, it was 156 times more likely than not to contain Mr. Johnson's DNA. The second gun had three people's DNA and a formidable likelihood of 66 million.

Hoping to cast doubt on the DNA results, his lawyers, Christopher Flood and Sylvie Levine, asked for the FST source code, which other lawyers had sought in vain.

Again, the government refused to hand it over on the grounds that it was a "proprietary and copyrighted" statistical tool owned by the City of New York.

The federal judge granted the defense access to the FST code in June 2016 under an order that bars wider disclosure. (The medical examiner's office denied ProPublica's

public records request for the code, citing its “sensitive nature”)

Nathaniel Adams, a computer scientist and an engineer at a private forensics consulting firm in Ohio, reviewed the code for the defense. He found that the program dropped valuable data from its calculations, in ways that users wouldn't necessarily be aware of, but that could unpredictably affect the likelihood assigned to the defendant's DNA being in the mixture.

“I did not leave with the impression that FST was developed by an experienced software development team,” Mr. Adams wrote in an affidavit. Pending more rigorous testing, “the correctness of the behavior of the FST software should be seriously questioned.” Characterizing Mr. Adams' criticisms as merely stylistic rather than substantive, the lab told ProPublica that the FST provided reliable calculations.

Technology consultants wrote the software code for the FST, according to a spokeswoman at the medical examiner's office. Few, if anyone, at the lab or on the state's DNA Subcommittee had the expertise to double-check the software, said a scientist in the lab who worked on the techniques who asked to remain anonymous for fear of career repercussions. “We don't know what's going on in that black box, and that is a legitimate question,” the scientist said, adding that evidence in older cases should “absolutely” be retested in light of growing questions about the FST. “As a scientist, I can't say no.”

The U.S. attorney's office withdrew the DNA evidence against Mr. Johnson days before the hearing about its admissibility was scheduled to begin.

Nevertheless, Mr. Johnson pleaded guilty this past May. On Aug. 28, he was sentenced to 28 months in prison, almost all of which he has already served. His lawyers declined to make him available for an interview.

As Mr. Johnson's case proceeded, the lab circulated a memo to clients in September 2016, notifying them that it would replace both high-sensitivity testing and the FST on Jan. 1. A new chemical kit would make the additional amplification cycles of the high-sensitivity method unnecessary. The lab would retire the FST in favor of STRmix, a commercially available and F.B.I.-endorsed software program for DNA

mixtures that dozens of public labs use.

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The medical examiner's office "is fully committed to staying on the cutting edge of new technology to best serve the City of New York," Mr. Kupferschmid wrote in the memo. He added that the lab would raise the minimum sample size for sensitivity testing to 37.5 picograms — almost twice the initial floor of 20 picograms.



Mr. Herskovic, at home in Brooklyn, is appealing his conviction. He said he agreed to give a DNA sample to the police because he expected it to show he was innocent. "I said, 'Go ahead, take it!'"
Demetrius Freeman for ProPublica



The change in policy is scant consolation to those who were convicted based on the discarded DNA techniques, like Mr. Herskovic. After the gang attack on Mr. Patterson, two confidential informants gave Mr. Herskovic's name to a police detective. Mr. Herskovic was then arrested and swabbed for DNA. Neither informant testified against him at trial.

Sitting at a table in his apartment in Williamsburg, Mr. Herskovic discussed the DNA evidence, first calmly and then indignantly. The white walls were bare except for a small mirror, a clock and a portrait of his children, who were scribbling in coloring books on the kitchen floor. He recalled how, when the police asked him to give a DNA sample, his lawyer cautioned him not to, but Mr. Herskovic went ahead and did so.

"I was the first one to give DNA," Herskovic said. "He told me they needed it, I said, 'Go ahead, take it! It will be better.'"

The DNA on Mr. Patterson's sneaker was pivotal to the case against Mr. Herskovic. Mr. Patterson testified that whoever pulled off his shoe had punched and kicked him. Although four other suspects were arrested, and several other men were identified by witnesses, seen on surveillance video, or had their license plates photographed at the scene, only Mr. Herskovic has been tried or sentenced to prison. Two people pleaded guilty to misdemeanors and were given probation; charges were dropped against the other two.

Mr. Herskovic's four-year sentence was stayed pending appeal. He's working at an hourly job for a heating, ventilating and air-conditioning company to support his wife and two young children. His appeals lawyer, Donna Aldea, plans to argue that the FST was never tested on a population as insulated as the Hasidic Jews of

Williamsburg, who very likely share many of the same ancestors, and therefore much of the same DNA.

“This case is a poster-child for how ‘DNA evidence’ can literally be fabricated out of thin air, and how statistics can be manipulated to create a false impression of ‘scientific evidence’ of guilt,” Ms. Aldea said. “This must be exposed.”

Lauren Kirchner is a senior reporting fellow for ProPublica, an independent, nonprofit newsroom that produces investigative journalism in the public interest.

A version of this article appears in print on Sept. 4, 2017, on Page A1 of the New York edition with the headline: Doubts and DNA Evidence

[READ 42 COMMENTS](#)

EXHIBIT 10:

Wendy Halloran and Elizabeth Wiley, *DPS: Forensic Scientist Hid Backlog of 40 Cases, Delayed DNA Testing for Years*, NBC News Channel 12; (Phoenix, Arizona), May 23, 2017.

Forensic scientist hid backlog of 40 cases, delayed DNA testing for years

A forensic scientist at the state crime lab intentionally hid her backlog of cases for years, failed to test DNA submitted in 40 cases, and kept evidence from those cases in her possession, according to a DPS audit uncovered by a six-month 12 News Investigation.

A forensic scientist at the state crime lab intentionally hid her backlog of cases for years, failed to test DNA submitted in 40 cases, and kept evidence from those cases in her possession, according to a DPS audit uncovered by a six-month 12 News Investigation.

In at least one of those cases, justice may have been denied.

Tempe police investigate alleged sex assault

On October 18, 2009, 19-year-old Melissa Rukstelis called Tempe police to report she was sexually assaulted by a man she said she dated in high school.

Rukstelis had been at a party hosted by a friend in the area of McClintock and Hermosa Drive, the police report said. She told the investigating officer, Det. Sue Schoville, she had recently re-connected with [redacted] Baldry, 21.

Rukstelis told the officer she invited Baldry to the party to "catch up" and that they hadn't been in a romantic relationship since she was in high school. Rukstelis admitted to drinking heavily during the party and, according to the police report, vomiting several times.

The police report said that at 4 a.m., Baldry offered to give Rukstelis a ride home because the person who was supposed to give her a ride was asleep.

A person at the party told police that he helped Baldry escort Rukstelis to Baldry's car and put her in the back seat as this was "easiest" for them. The witness told the investigator Rukstelis was lying in the car wearing a seat belt and she was close to "passed out" when she and Baldry left, records show.

The police report showed that Rukstelis laid in the back of Baldry's Ford Taurus and gave him directions to her house.

Baldry later told police he stopped two houses down from the party so she could throw up, as well as a second time on a residential side street along Baseline Road.

While Rukstelis admitted to police that she was "extremely intoxicated," she said she remained awake and noticed Baldry kept driving around instead of taking her home, according to the report.

Rukstelis told police that when they finally reached her apartment complex she fell asleep in the back of the car.



Melissa Rukstelis. (Photo: 12 News file)

When she woke up, she said her jeans were pulled down "completely off her right leg and down by her knee on her left leg," according to the police report. Rukstelis also told the officer Baldry digitally penetrated her against her will. She said she thought she was "dreaming" but woke up and told him to "stop." "I crossed my legs" and "pushed his hand away."

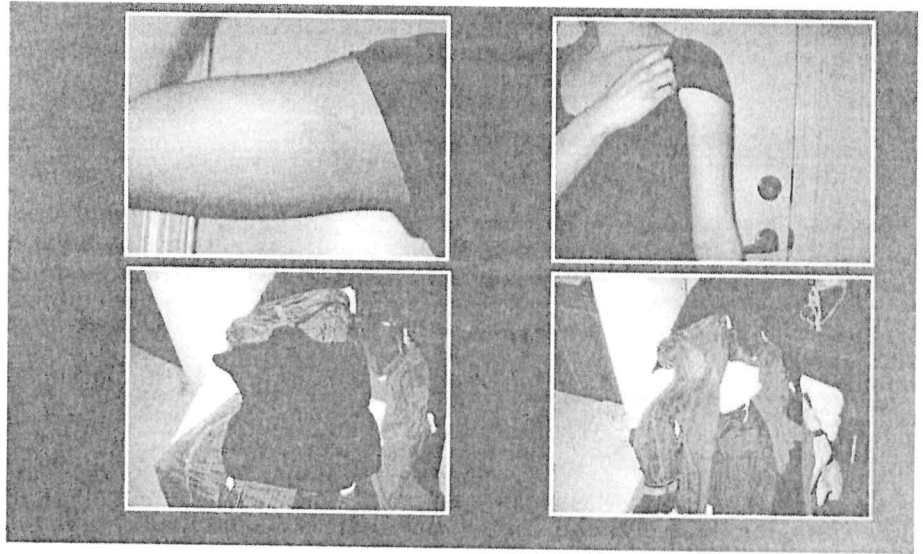
Rukstelis said she then fell back asleep and Baldry performed oral sex on her, according to the report. At that point the police report shows she pushed Baldry toward the door and told him to get off of her.

She told the officer Baldry became upset with her, pushed her and held her down. The officer took photographs that showed Rukstelis had multiple scrapes, scratches and bruises on her arms, including a three-inch scratch she says was from Baldry holding her down. In addition, she had multiple purple and red contusions on her back, according to the police report.

Rukstelis got out of the car, realized she'd left her purse and returned to get it, the police report said. She told the investigator that at that point Baldry got out of the car and approached her, but she couldn't remember if she "slapped" or "punched" him in the face. In the report, she said Baldry uttered a profanity at her and pushed her against the car, then she ran into her house.

Rukstelis told police she laid down in the tub as she continued to be sick and did not immediately contact police because she was "too intoxicated."

The Tempe Police Officer seized the clothes Rukstelis wore to the party as evidence and a sexual assault examination was performed on her, records show.



Baldry also denied removing her pants, putting his fingers in her vagina and performing oral sex. The report and audio recording reveals Baldry only said he knew Rukstelis from attending Mountain Pointe High School. In the recording, he claimed he had no prior sexual history with Rukstelis, "no high school relationship with Rukstelis or even a romantic relationship."

Baldry was adamant on the recording that they had no history together other than that of mutual friends.

"We didn't even date in high school, we were just friends," Baldry said on the recording.

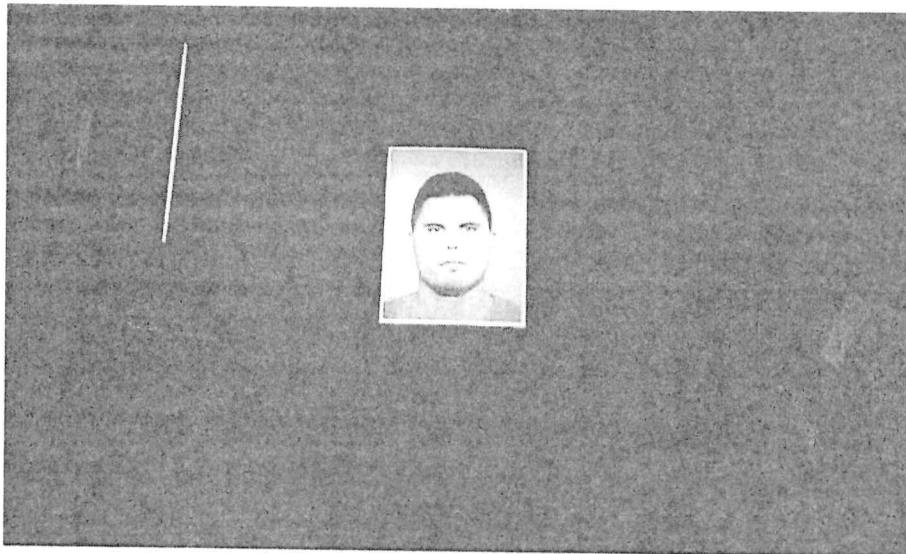
However, one of Rukstelis' friends who lived at the home where the party was held confirmed to the detective that Rukstelis and Baldry were involved intimately in high school, records show.

During the recorded conversation, Baldry also denied removing her pants, putting his fingers in her vagina and performing oral sex.

Baldry said he offered to let Rukstelis sit in the front seat but that she wanted to lie down in the back seat and told the detective she passed out in the back seat when he got to her apartment complex. He said he remained outside the car while trying to wake her up, according to the recording. He told the investigator that when Rukstelis woke up she started yelling at him, calling him names and then slapped him in the face.

According to police records, Baldry said that at no time were Rukstelis' pants down. He said he never touched her private parts or performed oral sex on her. According to the report and the audio recording, Baldry said there would be no reason to find his DNA on Rukstelis' body.

Baldry told police he'd done nothing wrong and was just trying to be a "good friend," the report said. He told the officer that he did not touch Rukstelis other than by shaking her shoulder and grabbing her arm when her knees buckled under her. Baldry denied any physical contact with her and denied all her accusations.



his DNA to avoid being falsely accused, the report said, saying "this is making me extremely uncomfortable" and "I'm getting wrongly accused for things."

the conversation, according to the police report and t

After the alleged assault, Rukstelis was interviewed a second time at Tempe Police Headquarters. She obtained an Order of Protection against Baldry from the Chandler Municipal Court on October 30, 2010, records show.

Police reports show that on August 11, 2010, the DPS Crime Lab notified Tempe PD that no semen was detected in the sex assault test kit. However, the lab said further testing – called Y-STR – could be done to try to locate male DNA on the collected evidence.

To conduct Y-STR testing, Schoville would need to submit DNA from the suspect for the scientific analysis. On September 2, 2010, she obtained a court order from Maricopa County Superior Court Judge White to obtain Baldry's DNA. The order allowed Schoville to swab the inside of Baldry's mouth, which she collected as evidence at the Tempe Police Department.

The swabs were sent to the DPS Crime Lab so that the Y-STR testing could be completed and a possible suspect identified.

But there wouldn't be immediate answers. This case would sit at the DPS Crime Lab for years.

Audit uncovers crime lab misconduct

Kathy Press, the supervising forensic scientist tasked with examining this evidence, was hiding cases from her supervisors to cover up her backlog of cases, DPS records show. She even kept evidence "in her possession", according to the state audit.

Supervising Forensic Scientist Jennifer Kochanski discovered the misconduct when she began an audit of the DNA unit's backlog in October 2015. Kochanski identified 29 cases Press was assigned that were not completed in a timely manner, DPS records show.

"In January 2016, you reported 11 additional cases were on your backlog. These additional cases were your possession. You had the evidence in your possession and the case files were at your desk. Many of the cases identified were cases from several years prior," Kochanski wrote.

On January 19, 2016, Kochanski wrote that the Scientific Analysis Bureau (SAB) identified a total of 40 cases assigned to Press in which she failed to complete the scientific analysis process. Reports show that many of these cases were several years old.

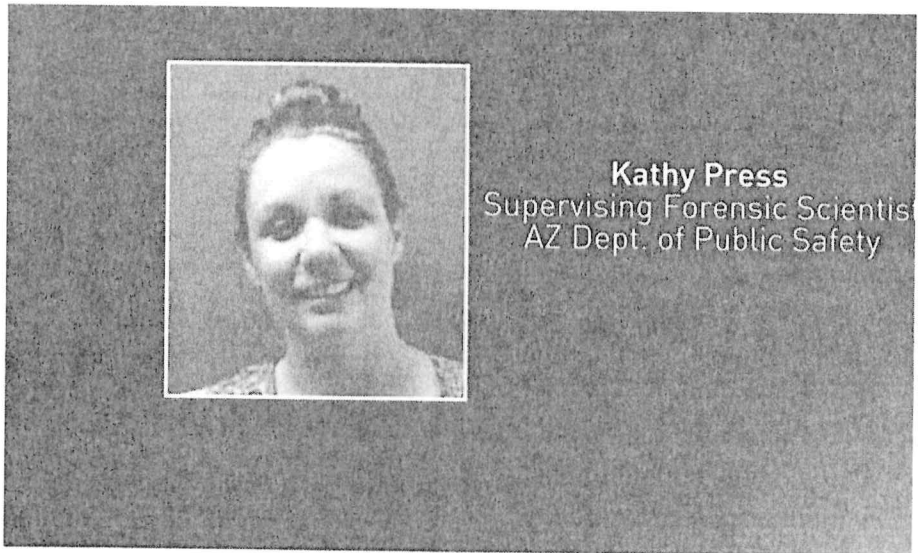
cases because Press had taken possession of the evidence. Kochanski wrote that she had to check the "audit trails" to determine Press' involvement.

Many of the cases identified appeared to be "an intentional act

as an "old case": the Tempe Police Department's sexual assault case involving Rukstelis.

SAB determined that Press did not complete the de-convolution work even though the original profile entered received a CODIS hit for a suspect in December 2014. The investigation also concluded that Press failed to notify Tempe Police about this hit and, at the time of the investigation, had not completed the report she was required to issue to Tempe PD, according to state records.

Press was put under internal affairs investigation. Records show Kochanski asked Press why she had not completed her cases. Kochanski asked if Press was "too busy...or overwhelmed." DPS records show Press said, "No, I just haven't gotten to them yet." Press agreed that these cases should have been completed long time ago."



Kathy Press (Photo: DPS)

Kochanski also noted that when police departments inquired about the status of testing, emails reveal that Press either didn't respond to their emails or said she would get them information but didn't follow up.

According to DPS records, when asked, Press agreed with the allegation that she was "inefficient" "because there's cases that are on my backlog that should have gone out."

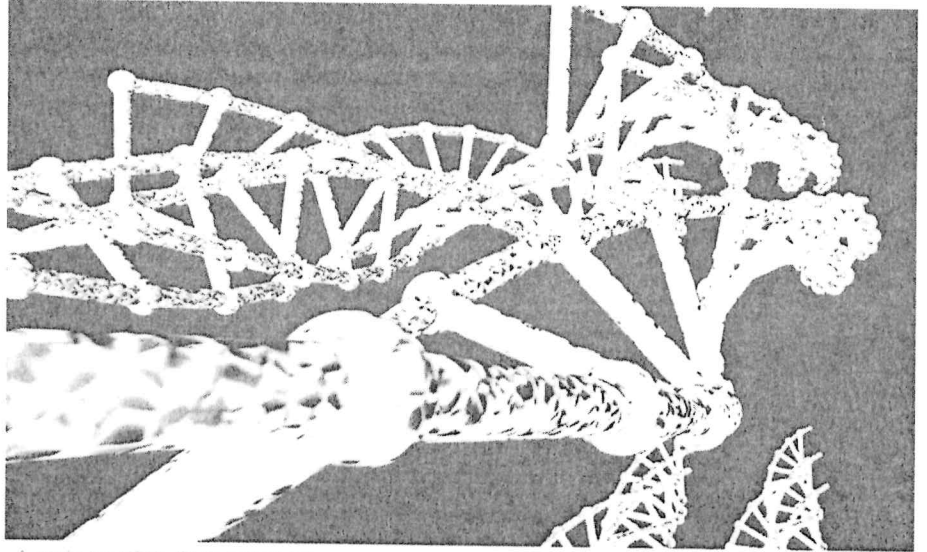
This audit wasn't the only time there was an issue with Press' backlog of cases. Internal documents from Press' personnel file show in January 2015, Central Regional Crime Lab Manager Scott Rex identified a backlog of cases.

Press' cases that were four to five years old. At that time, Press was put on a performance improvement plan and relieved of some of her responsibilities.

As a result of the policy violations and misconduct discovered during the internal investigation, Press was demoted from supervising forensic scientist to forensic scientist IV effective May 21, 2016. The order was signed by Deputy Director Lieutenant Colonel Heston Silbert.

On May 11, 2016, prior to the demotion taking effect, Press tendered her resignation effective May 24. She wrote that personal and family circumstances have made it difficult for her to continue a career at

The same day, she notified the Tempe Police Department that she had finished the scientific analysis of their 2009 sexual assault case and David Baldry's DNA was a match.



A visualization of DNA. (Photo: 12 News file)



Too little, too late

On September 14, 2016, Tempe police arrested Baldry on suspicion of sexual assault. Det. Greg Bacor questioned him for three hours.

2009



Initially, Baldry again denied allegations that he touched Rukstelis' vagina or performed oral sex on her, according to police records.

"I did not sexually assault her," Baldry said, according to a video recording of the police interview.

2016



After reminding Baldry of his statements in 2009, Bacon tells him, "you lied."

"That's pretty clear-cut. You lied. There's no other way to say it. You lied. There's no other way to say it lied. Your DNA was found inside of her vagina," Bacon told Baldry, according to the recording.

2016



Baldry finally cracks.

"It was like foreplay, it was just like, you know touching and all of that," he said.

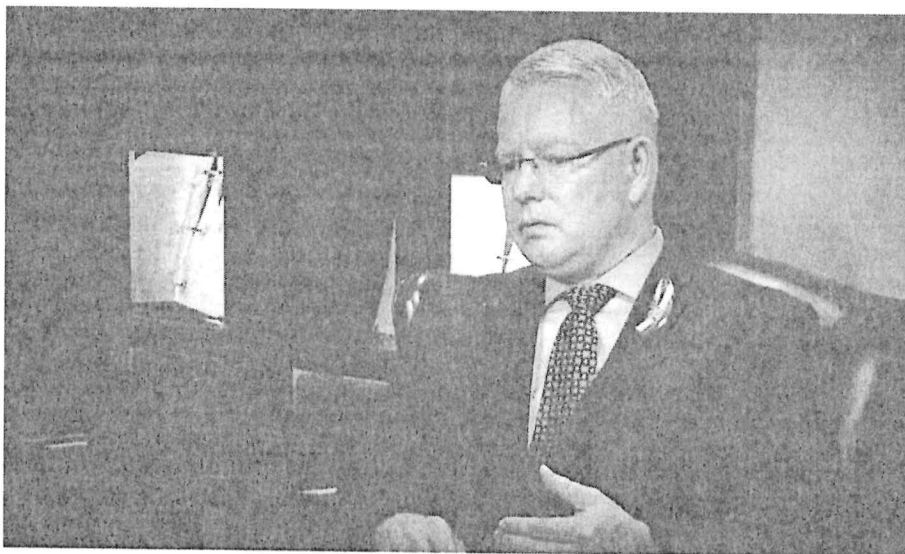
"He wouldn't until they had him pinned. It was like he was putting up that surrender flag: 'I'm done. I'm done. You've caught me,'" said Rukstelis.

During the interview, Baldry told Bacon that he "did not think Rukstelis was too intoxicated to provide consent." He also told the detective that when he realized she had passed out or fallen asleep, he stopped according to police records.

There would be no victory for the alleged victim.

The Maricopa County Attorney declined to prosecute Baldry and said the six years it took to receive the DNA results was a factor.

"And that six to seven years minimum what it would take before we would get in front of a trial, yeah it has an effect," said County Attorney Bill Montgomery.



...it of time" to complete testing.

...were a consent issue and a lack of witnesses.

"It's not an instance in which she did anything wrong, the case is not gonna come together for us like we need it to, as we know we need it to in order to get a jury to convict," he said.

Montgomery said Rukstelis did everything right – in reporting, in having an exam done, and in cooperating with law enforcement.

"Even if everybody is telling the truth, we would have a hard time because of that consent issue," said Montgomery.

The county attorney said he is required to prove the victim did not consent and the suspect knew she wasn't consenting.

"No one is saying that they disbelieve the victim," Montgomery said. "The question becomes, 'do we have the evidence to present to a jury where we can get them to convict?'"

"One of the things we look at as prosecutors is the amount of time since an incident occurred for several reasons. Number one, the jury's going to know the date that a crime occurred and they're also in their minds going to try to figure out, 'well, why are we here today after so much time has elapsed?'"

"And there's practical concerns too, about the ability for people to remember what they said back when the crime originally was investigated.

"Where you have differences between what somebody may have said, particularly if their recollection of the time could have been impacted by substance use, whether legal or not, and then what they're able to recollect when they get on the witness stand in front of a jury – all that factors in too."

Ultimately, Montgomery said they decided there was not a reasonable likelihood of a conviction.

Rukstelis said she feels victimized by the system designed to seek justice for her.

"Someone does it once, they can do it again. And I want people to know who he is," she said.

12 News was unable to reach David Baldry after several attempts but did leave a message with someone who knows him to ask him to call.

Over the course of our investigation DPS respectfully declined to speak on camera but issued two statements:

Tempe PD case 2009172852 (DPS DR 2009744972) was submitted to the DPS Crime Laboratory in November 2009, with a request to perform DNA analysis on a sexual assault kit. A Scientific Examination Report was returned to Tempe PD in January 2010, stating that no semen or spermatozoa were detected in the sexual assault kit. In September 2010, Tempe PD requested that the Laboratory attempt further analysis. In early 2016, it was discovered that the ADDITIONAL DNA analysis had NOT been completed.

this case. The analyst assigned to the case did not complete the analysis or report the results in a timely fashion, ultimately reporting the DNA results in May 2016. When this was discovered, the analyst was disciplined and demoted. Subsequently, the analyst resigned from the Department. The excessive time to complete the analysis is regrettable. ALTHOUGH the Laboratory has procedures in place to ensure that this does not OCCUR, THE INVOLVED EMPLOYEE DID NOT FOLLOW THESE PROCEDURES, PREVENTING MANAGEMENT FROM DISCOVERING THE ISSUE EARLIER.

The second statement from DPS identified the former employee as Kathleen Press:

Through an internal investigation it was discovered a former employee had gone to lengths to hide their work files and mask their incompetence. The case for which you inquire was assigned to this employee who as a result of our internal investigation was demoted and subsequently resigned. Under Col. Milstead's administration, beginning in 2015, a department-wide, work-performance accounting and auditing system was implemented. As a part of this system, greater scrutiny and accountability is provided to each employee's work. As a result of a supervisor's diligence, the aforementioned misconduct by a former employee was discovered. The employee's lack of professionalism is beyond regrettable, it is reprehensible. In the last two years we have increased the speed and accounting of cases assigned to Crime Lab and specifically the Forensics Unit.

All of the major laboratory disciplines have improved their processes and have lower backlogs than in 2013. The backlogs for the disciplines have improved as follows:

10

spokesperson:

I joined the Arizona Department of Public Safety, rising through the ranks through multiple promotions into a supervisory role. I did so despite an overwhelming caseload, little support and a leadership structure that refused to solve or take responsibility for a well documented backlog in DNA testing.

I resigned from DPS by my own choice in 2016. I did so because I could no longer work for an organization that continued to allow issues to fester nor work in a position that was negatively impacting my health and my family life.

The case in question represents a true tragedy – one caused by DPS leadership's refusal to help fix a backlog they knew existed. Rather than attempt to solve this backlog crisis, they chose to ignore it and sweep it under the rug. This blame deflection apparently continues to this day, as their untrue statements about my performance indicate. DPS leadership's false assertion that I let this case languish for six years flies in the face of the truth reflected by the case files.

I never allowed this case or any other case to sit idle for undue periods of time to hide incompetence or misconduct. At a time when I was taking on multiple leadership roles – positions that today are handled by multiple full-time employees – I was also required to maintain a caseload that was in no way a one-person job. As emails and case files document, DPS leadership was well aware of this caseload and the department's backlog, as were others involved in the cases. They were also well aware of my assumption of additional roles and responsibilities, and my attempts to re-assign cases so they could be completed.

While it may be convenient for DPS to "throw me under the bus," that's simply a deflection of what really happened here. To make excuses is simply to fail the victims of these crimes again. That failure is beyond unfortunate.

The majority of Press' 40 cases are from Tempe police. It's not clear if DPS notified any of the agencies about what happened. However, when we reached out to Tempe, they were not aware of the situation.

Here is the list of her 40 cases:

2009703286 [Coolidge PD, PC]

2009708038 [Glendale PD, PC]

2011708490 [Glendale PD, PC]

2012708795 [Tempe PD, SA]

2010729903 [Glendale PD, SA]

1978021106 [Tempe PD, VC]

2007740874 [Tempe PD, SA]

EXHIBIT 11:

Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 Calif. L. Rev. 721, 773 (2007).

95 Calif. L. Rev. 721

California Law Review
June 2007

Article
Erin Murphy⁴¹

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THE NEW FORENSICS: CRIMINAL JUSTICE, FALSE CERTAINTY, AND THE SECOND GENERATION OF SCIENTIFIC EVIDENCE

Accounts of powerful new forensic technologies such as DNA typing, data mining, biometric scanning, and electronic location tracking fill the daily news. Proponents praise these techniques for helping to exonerate those wrongly accused, and for exposing the failings of a criminal justice system that previously relied too readily upon faulty forensic evidence like handwriting, ballistics, and hair and fiber analysis. Advocates applaud the introduction of a “new paradigm” for forensic evidence, and proclaim that these new techniques will revolutionize how the government investigates and tries criminal cases.

While the new forensic sciences undoubtedly offer an unprecedented degree of certainty and reliability, these characteristics alone do not necessarily render them less susceptible to misuse. In fact, as this Article argues, the most lauded attributes of these new forms of forensic evidence may actually exacerbate the *722 conditions that first caused traditional forensic sciences to fall into disrepute.

This Article challenges the new orthodoxy of forensic science. In so doing, it reframes the debate about the role of forensic evidence in the criminal justice system in three respects. First, this Article sets forth a new taxonomy of forensic evidence that distinguishes first from second generation forensic sciences. Second, using this framework, this Article illustrates how the particular characteristics of the second generation aggravate, rather than relieve, the pathologies that ultimately afflicted the first generation. Lastly, this Article criticizes current suggestions for improving the use of forensic evidence in the criminal justice system that fail to account for the peculiar characteristics of the second generation, and advocates alternative remedies tailored to these specific concerns.

Introduction

Forensic science has long captured the public’s imagination of criminal justice.¹ From Sherlock Holmes’s trademark magnifying glass to the shaky handwriting on the ransom note for the Lindbergh baby to the swirling double helix of DNA, images of the mystical power of forensic science pervade popular culture. Currently, one of the most-watched television dramas in the country is “CSI: Crime Scene Investigation,” and viewers not satisfied with just this offering can also tune in to “CSI: NY,” “CSI: Miami,” or any number of other programs showcasing forensic science technologies.² As one scholar presciently observed ten years ago, “[t]o consider the future . . . is largely to talk about the creeping scientization of factual inquiry.”³ Today, that “creep” pours forth in a flood as legal scholars across a variety of disciplines wrestle with questions related to science in the judicial system.⁴

*723 Of course, traditional forensic evidence, such as handwriting, firearms, bullet, bite, toolmark and fingerprint

identification, has long played a role in the criminal justice system. But currently on the horizon are a new generation of forensic sciences capable of uncovering and inculcating criminal offenders at an order of magnitude greater than that afforded by traditional forensic techniques. This array of exciting new methods--such as DNA typing,⁵ data mining,⁶ location tracking,⁷ and biometric technologies⁸--represents a marked advance over the rudimentary techniques of old, and will surely stake a central and indispensable role in the future administration of criminal justice.

*724 Many of these new, more reliable methods have already acquired a measure of fame by exposing both the unreliability of traditional techniques as well as with the attendant failure of the criminal justice system to keep out such illegitimate evidence. Accordingly, it is easy to assume that the qualities that make the new methods so trustworthy and desirable will likewise render them less susceptible to, if not wholly immune from, the problems that plague traditional sciences. Some critics of traditional sciences have even touted certain new methodologies as emblematic of a "new scientific paradigm" for forensic evidence, one in which "untested assumptions and semi-informed guesswork [is] replaced by a sound scientific foundation and justifiable protocols."⁹

Yet the experiences of traditional forensic sciences in the criminal justice system caution against embracing these new techniques without any hesitation. In recent years, empirical studies and select trial courts have called into question the legitimacy of evidentiary stalwarts like handwriting,¹⁰ voice exemplars,¹¹ hair and fiber,¹² bite and tool marks,¹³ and even fingerprints.¹⁴ Exoneration studies have demonstrated the shocking degree to which the criminal justice system has historically failed to prevent the government from deploying spurious sciences and faulty or fraudulent evidence to aid in the conviction of innocent defendants. For example, one study found that defective scientific evidence contributed to over one-half of wrongfully obtained convictions.¹⁵

It stands to reason that a system that failed to stem the abuse of untested or faulty forms of forensic evidence might also be ill-equipped to safeguard the *725 use of more robust, complicated forms of such evidence, both in terms of assuring its integrity and fostering healthy scientific development. In fact, as this Article argues, the very traits that make this new generation of forensic evidence so promising serve to raise concerns about the use of such evidence in the future. The series of scandals that have already besieged DNA typing, arguably the most sophisticated technique of the second generation, underscore the urgency of this claim.¹⁶

Accordingly, this Article sets forth three challenges to customary forensic evidence in the criminal justice system. First, in contrast to the notion that all forensic sciences share the same essential traits but simply range on a continuum from less to more reliable, this Article draws clear categorical lines between first-generation and second-generation forensic techniques.

Second, this Article looks to the historical experiences of first-generation forensic sciences in the criminal justice system to anticipate the future of second-generation evidence. Contrary to conventional wisdom, which roundly endorses second-generation techniques as superior to their much-discredited predecessors, this Article argues that the very characteristics that instill such confidence in the second generation--their technical complexity, reliance on databasing, and breadth of application--in fact aggravate the conditions that ultimately caused widespread failures in the first generation. Thus, the second generation will face the same concerns about integrity and quality control that permeate the first generation.

Third, this Article examines the proposals typically advanced to improve the use of forensic evidence in the criminal justice system, and asserts that these approaches fail to account for the particular demands of the second generation. This Article contends that our current models of criminal justice, even operating at optimal and idyllic levels, cannot adequately safeguard the widespread use of technically sophisticated, highly probative evidence. Thus, in this age of powerful and pervasive new forensic technologies, the criminal justice system must reckon anew with how it accommodates scientific evidence. This Article therefore proposes measures specifically responsive to the concerns raised by second-generation evidence.

Part I defines the two generations of forensic evidence, and illustrates the particular characteristics of second-generation sciences using the most developed technique: DNA typing. Part II identifies the two "fronts" on which the battle for quality assurance is waged and lost with respect to all forensic evidence: the government laboratory and the courtroom. This Part then demonstrates why the stakes are particularly high and the challenges particularly acute for the methods of the second generation. Part III acknowledges conventional proposals to improve the criminal justice system's *726 processing of forensic evidence and notes how they fail to address the distinct characteristics of the second generation. This Part then sketches solutions tailored to those concerns.

I A New Taxonomy of Forensic Evidence

A. Defining the First and Second Generations

The list of traditional forensic sciences is long and familiar: it includes analysis of bite and tool marks, hair and fiber, ballistics, handwriting, voice exemplars, and fingerprints. But although these techniques have long appeared in criminal cases, they have arisen only in an occasional and sporadic fashion, and usually in a supporting role to other forms of evidence like eyewitness testimony or the defendant's own confession.¹⁷ For a myriad of reasons, none of these first-generation methods ever occupied the full field of criminal adjudication.

First, traditional forensic techniques have limited application. They typically fit discrete categories of offenses. For example, handwriting analysis can only aid those types of cases in which a writing is at issue, and ballistics only those cases involving the discharge of a firearm. And then, even within those narrow categories of case type, only a fraction of cases will actually produce forensic evidence. Ballistic evidence requires that bullets actually be recovered; hair or fiber evidence, even if present, may be easily lost or overlooked.¹⁸ In short, the range of potential cases amenable to first-generation evidence, both in theory and in practice, remains quite limited.

Second, first-generation techniques are experiential and observational, rather than technical or experimental.¹⁹ They are neither conceptually complicated nor scientifically rigorous. Indeed, most of those who analyze such evidence have no advanced degree of any kind.²⁰ And because first-generation *727 techniques are intuitive, laypeople can readily comprehend most of their results: most people can quickly grasp the notion of matching fingerprint ridges, handwriting slants, or bullet grooves.²¹

Third, and relatedly, first-generation techniques are mechanically unsophisticated. They do not employ complex interpretive machinery or instrumentation,²² and rarely raise questions concerning the protection of proprietary information. In fact, most techniques never endured any rigorous validation testing or study, and so there exists little "science" worth protecting.²³ For instance, hair and fiber analysis needs little more than a microscope and basic chemicals, and handwriting analysis requires virtually no equipment. First generation techniques are also more amenable to defense-side testing and the cultivation of local expertise, given that critical analysis of the technique requires little instrumentation and minimal training.

Fourth, first-generation techniques are reactive and self-contained in their investigative scope. The analysis of hair, handwriting, fiber, bullets, firearms, voiceprints and so on all require that the police identify a "suspect" for comparison--whether in the form of an individual person or inanimate object. For instance, ballistics and firearm identification calls for the recovery of a bullet and the identification of a suspected weapon. Likewise, handwriting or hair analysis works only after isolating a potential suspect or match. First-generation forensic sciences lack the capacity to identify a suspect in the first instance; they instead operate mainly to confirm the defendant's connection to a crime after other evidence has already identified him as the perpetrator.²⁴

*728 Fifth, and finally, because first-generation techniques are capable of supplying only a narrow slice of information, they typically do not implicate greater questions of personal privacy. That is, to the extent that these techniques reveal any information, it tends to be limited to the facts and circumstances of the case or suspect at hand. Although efforts were once made to draw conclusions about race, ethnicity, or mental state from studies of fingerprints or handwriting, these endeavors have now been largely discredited.²⁵ Generally speaking, first-generation forensic sciences such as handwriting, fingerprinting, ballistics, bite or tool mark, and fiber analysis do not reveal information about mental or physical health, biological or demographic characteristics, family relationships, or other intimate information.

In contrast, second-generation techniques, like DNA typing, data mining, location tracking (such as cell site, GPS or RFID tracking), and biometric scanning (such as iris or facial recognition), share characteristics that starkly differentiate them from the first generation.

First, second-generation techniques apply to a wide variety of offense types as well as to a large number of cases within those types. For example, DNA typing not only can generate evidence relevant to crimes ranging from the pettiest theft to the most gruesome murder, but it also can do so in a greater percentage of such cases than could its first-generation counterpart, fingerprinting.²⁶ As other second-generation technologies like location tracking, data mining, or biometric scanning become

more sophisticated, then it is likely that they will also become more prevalent. It is easy to imagine a *729 future in which evidence culled from cell phones, computers, "EZ Pass" cards, and smart identification cards becomes more ubiquitous,²⁷ or in which images from a security camera linked to a database facial recognition system are used to convict a host of offenders across a broad spectrum of crimes.²⁸

Second, the second-generation techniques differ from their first-generation counterparts in their scientific robustness. Building and applying the methodologies of DNA typing, biometric scanning, or location monitoring requires highly specialized knowledge and expertise. As a result, second-generation techniques are intuitively inaccessible to laypersons, even while the results of such methods are typically viewed as highly reliable. The underlying rigor of second-generation sciences also supports stronger claims of their probative value than that offered by first-generation techniques; some second-generation methods purport even to provide proof to a degree of scientific certainty. In short, unlike first-generation methods that largely rely upon intuitive methods that lead to findings of general inclusion, second-generation sciences use technically sophisticated methods that provide individuated findings related with the highest levels of confidence.

Third, this methodological sophistication of second-generation techniques is mirrored by a complementary mechanical sophistication. Whereas first-generation sciences relied on tools no more complicated than a magnifying glass or microscope, the tools of the second generation are far more costly, elaborate, and incapable of ready reproduction. For example, DNA typing requires complex machinery, chemical kits, and computer software; location tracking depends upon satellites and cell-towers; biometrics use software and image scanners. Conducting an independent analysis, then, requires a significant capital expenditure.

This mechanical sophistication highlights a related characteristic of the second generation. Namely, because such techniques rest on such a complicated architecture, the disclosure or deployment of the technologies underpinning second-generation techniques may raise concern about proprietary interests. DNA typing has already weathered a series of challenges related to the reluctance of private companies to divulge claimed proprietary secrets, such as the chemical sequences used to conduct the analysis.²⁹ *730 Similarly, location tracking or biometric devices rely on technologies developed and protected as intellectual property.

Lastly, and perhaps most importantly, second-generation sciences--unlike their first-generation counterparts--rely upon computerized databases to store large quantities of information. Second-generation techniques are therefore not just reactive, or limited to confirming a known suspect's guilt. Rather, second-generation methods are proactive, and can identify a suspect *ab initio*-- and even serve to supply the only evidence of guilt. "Cold hits" in the national DNA database have both identified suspects in cases with corroborating evidence, as well as been used to secure conviction on the basis of the genetic information alone.³⁰ Similarly, location tracking, data mining, or biometric technology may potentially either identify a suspect about whom may be developed additional evidence, or support prosecution on the basis of the scientific evidence alone.

This database-dependency raises a related characteristic that differentiates first from second-generation techniques. Namely, second-generation methods can gravely impact the privacy interests of both suspects and innocent third parties, whereas first-generation techniques typically reveal no information other than that pertaining to the evidentiary question at hand. A handwriting sample or fingerprint reveals little more than that someone might match it. To the contrary, the DNA samples collected by the government contain the individual's entire genetic code--a veritable blueprint of her existence--and even a typed profile has the power to reveal familial associations. Other technologies likewise threaten to compromise privacy interests, such as the government collection and compilation of images for a biometric database, or the investigation of cell site data to reveal either the users of a certain cell tower or the communications undertaken by a particular user. And of course, even assuming the government manages to collect or investigate such material without undermining individual privacy, the adversarial process itself creates a second wave of concern. Once presented with DNA or cell-site or biometric data, the first logical step for any defense investigator would be to seek access to the DNA, cellular, or biometric database to determine whether the conclusion reached is reliable, and whether it contains any other plausible perpetrators, thereby enhancing the threat to individual privacy.

To illustrate these characteristics of the second generation, and to convey how they will affect the future administration of criminal justice, the next section explores the archetypal second-generation science: DNA typing. This *731 Article uses DNA typing as an illustrative example largely because it is the most developed of second-generation sciences, and thus offers the most fertile ground to explore the issues that such evidence may raise.

B. The Archetypal Second-Generation Science: DNA Typing

DNA typing debuted as a forensic tool in 1985, when Sir Alec Jeffreys recognized its potential to answer questions of identity central to the resolution of criminal cases.³¹ After its birth in the United Kingdom, the technique quickly jumped the pond, and by 1988 it appeared in the United States in the first reported appellate case.³² Since then, the power of DNA science has dazzled every faction of the criminal justice community, even defense attorneys.³³

Consider the following investigation, which took place in the United Kingdom: a brick thrown off an overpass hit a truck passing below, killing the driver. Investigators had no leads other than a small quantity of blood found on the brick, which in turn yielded a DNA profile. A search of the nationwide database containing over two million profiles revealed no direct matches. However, a "familial" search of the same database, which looks for profiles that correlate highly to the evidentiary profile, yielded a lead. Investigators followed the lead to a relative of the suspect, and then found the suspect, who later confessed and was convicted.³⁴ Although the perpetrator's profile was not in the database, his relative's profile, which would approximate his profile at a *732 much higher frequency than would the profile of an unrelated individual, directed officers to the right person.³⁵

As this anecdote illustrates, DNA typing has the potential to transform how law enforcement officers apprehend suspects, how governments bring prosecutions, and how prosecutors secure convictions. And as one of the most developed second-generation sciences, DNA typing provides excellent clues into how the second generation will change criminal justice, and what potential concerns such evidence will raise.

I. A High Volume of Cases with a Forensic Evidence Component

Study of DNA typing reveals how second-generation evidence transforms the nature of proof within the criminal system. Because second-generation techniques are methodologically robust and are broadly applicable, cases with a forensic evidence component are likely to displace cases without such evidence, ultimately resulting in a criminal docket with a large volume of cases involving forensic evidence.

For instance, although DNA typing techniques were both cumbersome and expensive when first conceived, recent scientific advances now allow rapid processing and turnaround at a rate conducive to wide-scale use of DNA evidence.³⁶ Whereas processing used to take weeks, if not months, with robotics and automation it is expected that analysts will soon be able to process up to 800 samples a day.³⁷ In the United States, the average turnaround time for a DNA request today is still twenty-three weeks in state laboratories and thirty *733 weeks in local laboratories.³⁸ By comparison, the national crime laboratory in the United Kingdom, the Forensic Science Service ("FSS"), tolerates only a twenty-four day turnaround time between submission and return of forensic samples.³⁹ Offender samples--those drawn in ideal conditions from a known single source--typically take the FSS five days.⁴⁰ Miniaturization processes will soon enable on-scene analysis of DNA that takes only seconds.⁴¹

Moreover, advances in collection techniques allow technicians to gather samples less intrusively and from a greater variety of sources than in the past. Nuclear DNA, which is obtained from the nucleus of cells, is found not only in blood but also in hair follicles, skin scrapings, and saliva containing skin cells. Buccal swab kits, which demand no more than a painless scrape of the inside of a suspect's cheek, are increasingly sensitive and render clear, typeable results. Furthermore, whereas in the past forensic scientists often required a significant amount of biological material, scientists can now generate profiles from as few as six cells, a quantity not even visible to the naked eye.⁴² Modern techniques allow analysts to take the smallest bit of biological material and duplicate it to create a testable quantity;⁴³ analysts then examine multiple places, or loci, on a genetic strand at the same time.⁴⁴ And harnessing sophisticated processing techniques, analysts increasingly are able to "pull-apart" forensic samples containing mixtures of more than one person's DNA, and ascribe particular genetic profiles to specific individuals.⁴⁵ Finally, if nuclear DNA testing cannot be performed because a forensic sample contains degraded or dead cells, *734 mitochondrial DNA typing can often recover genetic information stored in the cell long after the nuclear DNA has decomposed.⁴⁶

Given the ease with which DNA evidence is recovered, and the advances in cost-effective, efficient processing of large quantities of evidentiary samples, it is not hard to envision a future in which DNA testing plays a central role in criminal

investigation and adjudication. Today, the public imagination holds that DNA most commonly applies to the prosecution of serious offenses such as rape and murder. However, perhaps counterintuitively, DNA evidence may carry the least potential for these types of offenses. After all, rape and homicide cases tend to be amenable to defenses, including self-defense and consent, that render DNA evidence either irrelevant or less dispositive.⁴⁷ Instead, DNA evidence may hold the greatest promise in solving low-level crimes like property and possession offenses.⁴⁸

For instance, property offenses presently constitute an enormous volume of criminal complaints and cost billions of dollars annually, but carry very low rates of arrest or "clearance."⁴⁹ According to the Department of Justice's Uniform Crime Reporting statistics, there were roughly 10.4 million reports of burglary, general theft, and automobile theft in 2003.⁵⁰ Of the estimated 1.2 million motor vehicle thefts, only 13.1% of motor vehicle crimes were cleared;⁵¹ of the roughly 7 million larcenies or thefts, only 18.1% were cleared;⁵² and of the 2.2 million burglaries, only 13.1% of burglaries were cleared.⁵³ In contrast, a much higher percentage of violent offenses are cleared by arrest. In 2003, there were only 1.38 million reported violent crimes--murder, rape, robbery, and aggravated assault⁵⁴--and 46.5% of them were cleared.⁵⁵ Thus, although property offenses exact a costly penalty on *735 communities, they are rarely closed by arrest or conviction.

However, early data suggest that the availability of DNA evidence can radically transform these numbers. In a typical month, the United Kingdom's FSS makes an association or "hit" between forensic and known samples in their databases in roughly fifteen murder cases, thirty one rape cases, and a whopping 770 motor vehicle, property, and drug offenses.⁵⁶ As one study observed, "[f]rom April 1995 to the end of January 2002, the majority of matches were not made in rape, other sexual offenses, or murder. Instead, the largest numbers of matched crimes were commercial and residential burglaries."⁵⁷ Local experience bears this out: in Virginia, of the first 2000 hits in no-suspect cases, only 12% were for murder or rape, whereas 59% helped solve property crimes such as burglary or robbery.⁵⁸ Moreover, data indicate some correlation between those who commit property offenses and those who commit violent offenses.⁵⁹ This correlation will likely serve to increase support for allocating resources to apprehend property offenders.

Beyond property offenses, DNA evidence can also have a significant impact on narcotics- or weapons-based possession offenses, whether simple possession or with intent. Such cases constitute a major volume of crimes charged in the United States. For example, a Department of Justice study from 2000 reports that 40% of state-charged felonies across large urban counties were weapon or drug possession related offenses.⁶⁰ The viability of such prosecutions, however, often turns on whether the suspect is apprehended in immediate or visible possession of the contraband;⁶¹ the suspect not in actual *736 possession of the contraband can elude effective prosecution. DNA typing, however, can conclusively link suspects to contraband.⁶² There is even a strong indication that suspects possess no "reasonable expectation of privacy" in shed DNA cells,⁶³ and thus law enforcement can easily gather such probative evidence without worrying about the individual's Fourth Amendment rights.

Consequently, as the costs of deploying DNA decrease, and law enforcement officers' and prosecutors' awareness of such technology increases,⁶⁴ greater and greater numbers of such cases are likely to enter the criminal justice system. Indeed, if submitting an evidentiary sample for DNA analysis becomes as easy as it already is to submit a sample for narcotics analysis, then law enforcement officers might be expected to regularly conduct such tests, even in cases involving low-level offenses. The state of New York has plans to open a state-of-the-art DNA testing laboratory intended solely for processing property and other low-level crimes.⁶⁵ And already in the United *737 Kingdom, roughly 50% of DNA evidence sample submissions between 2001 and 2002 were for property or theft crimes,⁶⁶ and roughly 17% were for drug offenses.⁶⁷

Of course, more cases submitted for DNA testing may simply mean that a greater number of total cases. But given the scarcity of resources in the criminal justice system, it is more likely that DNA-based cases will displace non-DNA based cases than it is that the raw number of cases will dramatically increase. Given that prosecutors inevitably must choose only a fraction of cases to pursue from the greater number available, they may develop a bias toward DNA-based evidence in allocating resources.⁶⁸ Some have complained that the community demands such evidence, the result of the so-called "CSI effect" evident in jurors exposed to unrealistic crime scene television shows.⁶⁹ Thus, prosecutors faced with limited resources will logically prefer those cases in which proof of scientific certainty is readily available to those that rely only on civilian witnesses or law enforcement officers on overtime pay.⁷⁰ If so, then the typical prosecutor's docket will likely contain a percentage of DNA-based cases disproportionate to the percentage of such cases in the pool at large.⁷¹ All of *738 this leads us to the first lesson about second-generation sciences that can be gleaned from the current experience of DNA typing: their ease of use, breadth of application, and persuasiveness of proof render them likely to appear in a disproportionately high volume and wide spectrum of criminal cases.

2. An Entirely New Kind of Case: The 'Cold Hit'

Advances in second-generation sciences do not just encourage the substitution of cases with a forensic evidence component for those without such a component. They also allow for the identification of perpetrators even in the absence of any other evidence. That is, second-generation sciences introduce into the criminal justice system an entirely new kind of case: one in which the only evidence is scientific.

In the case of DNA typing, law enforcement increasingly has at its disposal large databases of genetic information. Specifically, as law enforcement officials collect and process DNA samples, they load "profiles," or results of the genetic testing, into computer databases. These databases contain two types of files: "forensic" samples that contain genetic material collected from crime scenes, and "offender" or "known," single-source samples that contain genetic profiles of offenders or known persons who submitted biological material voluntarily⁷³ or pursuant to one of many offender-collection statutes.⁷³

*739 In the United States, the DNA database is nicknamed CODIS, or the "Combined DNA Index System," and it exists at three levels: local (LDIS), state (SDIS), and national (NDIS).⁷⁴ While statutes and regulations governing NDIS circumscribe the information that may be uploaded and require laboratories that load profiles to meet certain proficiency standards,⁷⁵ the local and state counterparts often include material obtained under less stringent standards.⁷⁶ As of March 2007, the national database, which is maintained by the Federal Bureau of Investigation (FBI) and to which every state contributes, contained over 4.5 million profiles.⁷⁷ Of these, 179,763 were forensic samples, and 4.3 million were known or offender profiles.⁷⁸ The states are not far behind: Virginia, which is widely recognized as one of the most advanced *740 jurisdictions in dealing with DNA issues,⁷⁹ has loaded over 253,986 offender samples⁸⁰ and 7,044 forensic samples.⁸¹ As of 2004, California had loaded 274,000 known profiles and 9,300 forensic samples.⁸²

The accessibility and expansion of DNA databases have given rise to the "cold hit" case in which the major or only evidence is biological material linking the defendant to the offense. In these cases, the government has no investigatory leads, but develops a genetic profile based upon some material left at the crime scene. The government then runs that forensic profile in a database and uncovers a "match"—a stored sample associated with a known person or offender. As of December 2006, federal investigators had used the national database to make roughly 47,000 "cold hits."⁸³ And as the databases have grown, the match capacity has skyrocketed: whereas it took Virginia nearly eight years, from 1993 to 2001, to reach its first 1,000 "cold hits," the state reached its second 1,000 in a matter of eighteen months.⁸⁴ Since 2001, the laboratory has averaged at least one "cold hit" a day, and as of July 2002, that figure had doubled to two and one half hits a day.⁸⁵

From a cold hit, the government either develops further facts to implicate the suspect, or else brings the case on the basis of this evidence alone. To be sure, in the majority of cases, the government will endeavor to collect additional evidence beyond the forensic proof. For instance, in one case, the government established a "cold hit" and, after identifying a suspect, found two *741 witnesses who claimed to recall the suspect having a cut on his finger the day of the murder that corresponded to a wound inflicted by the victim.⁸⁶ But, in some cases, the government may proceed on the sole basis of genetic evidence or marginally probative additional evidence, such as the suspect's proximity to the scene of the offense.⁸⁷ In some cases, the offense occurred long before genetic typing was available—sometimes as far back as twenty or thirty years.⁸⁸

Some jurisdictions have even responded to the influx of "cold hit" cases by authorizing "John Doe" warrants intended to circumvent statute of limitations restrictions.⁸⁹ Typically, investigators seeking an arrest warrant must specifically identify by name the person that the warrant authorizes law enforcement to arrest. However, where a name is not available, but a genetic profile has been developed, some states permit the issuance of an arrest warrant for a "John Doe" identified only by a particular genetic profile. In such cases, should "Doe" ever be identified (for instance, if Doe's genetic sample is later entered into a database) then the arrest warrant may be executed even though the statute of limitations would have otherwise passed. In Wisconsin, the legislature dispensed entirely with the statute of limitations where the state bases an arrest warrant in a sexual assault case on DNA evidence.⁹⁰

*742 For several reasons, including the lack of central record keeping, it is difficult to determine the frequency with which the government presently brings cases in which the only evidence is genetic material.⁹¹ First, although laboratories increasingly record their "cold hit" matches, most fail to follow up on the number of cases that actually proceed to prosecution and disposition. Second, of those jurisdictions that have tracked prosecution rates,⁹² none appears to track whether or not additional evidence was subsequently adduced in the case. Third, the "cold hit" is still a relatively recent

phenomenon, and thus the cases may not have yet wended their way through the courts.⁹³ Finally, it seems likely that in a great number of DNA cases, the existence of damaging genetic evidence results in a guilty plea, as is the case for the vast majority of criminal cases overall, which precludes appellate challenges and thereby decreases the likelihood of a readily visible judicial trial. In Virginia, for example, an inmate identified on the basis of only a "cold hit" pleaded guilty and accepted the death penalty.⁹⁴

"Cold hit" cases are, however, clearly going forward.⁹⁵ The first apparent case, which occurred in the United Kingdom, was a rape case in which the prosecution introduced no evidence other than the genetic information and the fact that the defendant had access to the area of the offense.⁹⁶ In Louisiana, a DNA dragnet resulted in the arrest of Derrick Lee Todd in May 2003.⁹⁷ In August and October 2004, he was convicted of two separate murders and *743 sentenced to death.⁹⁸ In Virginia, a murder that occurred in 1992 remained unsolved for years, and investigators had no leads. Four years later, the state required offender Mack Reaves to submit a DNA sample, but backlogs prevented it from being processed until 2001. Once analyzed, the sample was matched to a sample collected in the 1992 case, and Reaves pleaded guilty in 2001 to avoid the death penalty.⁹⁹ Clearly, the "cold hit" case has staked a place in the criminal justice system, and it will likely only expand as courts and prosecutors grow increasingly reliant upon, and comfortable with, DNA databases.¹⁰⁰

Thus, DNA typing offers a lesson about the future of second-generation sciences: unlike its predecessors of the first-generation, this evidence may in many cases be the sole proof of guilt that exists. Yet the present legal framework for handling forensic evidence hews to notions better suited to the first, rather than the second, generation. The law has simply not kept pace with advances in forensic science. The Supreme Court last addressed the constitutional requirements for expert assistance to indigents in 1985, in *Ake v. Oklahoma*, in which the Court recognized only the barest entitlement to expert advice.¹⁰¹ And the last articulation of the importance of preserving physical evidence in a criminal case came almost twenty years ago in *Arizona v. Youngblood*,¹⁰² in which the Court held that government destruction of physical evidence did not violate the Due Process Clause so long as it was not done in bad faith.¹⁰³

In short, contemporary perspectives on scientific evidence reflect a conception of the role of forensic science in criminal adjudication founded on the characteristics of the first generation. The current view is that forensic evidence is auxiliary, occasional, and nondeterminative. But these antiquated ideas of forensic evidence ignore the emerging reality that second-generation forensic evidence is increasingly central, pervasive, and determinative in *744 criminal adjudications. Given the role that second-generation technologies are apt to play in the adjudication of criminal cases, a close examination of how the criminal justice system handles forensic evidence is in order.

II The Sins of the Father: Two Fronts, Two Failures

Can conventional models of criminal process ensure the integrity of second-generation forensic evidence, especially given that such evidence may be the only proof in some cases? The answer rests on whether current models of criminal process in fact vouchsafe the production, and subsequent adversarial testing, of second-generation forensic evidence.

This Part examines the two primary sites for evaluating and safeguarding each of these aspects of evidentiary integrity: the scientific process and the judicial process or, in shorthand, the laboratory and the courtroom. To ensure the production of reliable forensic evidence, each site must guarantee that the technique used to interpret the evidence is generally reliable as a method, and that the technique was executed reliably in a particular case.¹⁰⁴ This Part first diagnoses the structural problems impeding accurate appraisal of both of these aspects of reliability as they arose with regard to the first-generation sciences, and then considers whether the characteristics peculiar to the second generation will aggravate or alleviate those concerns.

*745 A. The Laboratory

The established method for distinguishing good from bad science is to consider its resilience when challenged. The scientific method, the cornerstone of reliability,¹⁰⁵ asks whether a method is testable and falsifiable.¹⁰⁶ Good science thrives, and evolves, in an open environment.¹⁰⁷ Open debate spurs the development of sound new principles and thwarts the propagation of the bad.¹⁰⁸ Competition inspires scientists to challenge orthodoxy and engage in experimentation. Diversity further subjects theories to rigorous peer review and testing, which in turn ensures that they survive close scrutiny under various conditions. But while all of this may be true of science generally, it has unfortunately never described the field of forensic science.

1. A Diagnosis of the First Generation

The list of first-generation forensic analysts and laboratories caught up in scandals of one variety or another is both well-documented and long. The worst stories are of methodologies seemingly concocted from thin air, such as the “Cinderella” expert who purported to match foot and shoe impressions based on a method developed by and known only to her.¹⁰⁹ On the other end of the spectrum are techniques such as fingerprinting, which have long been embraced in the absence of any scientific validation even though such validation seems at least possible to attain.¹¹⁰ But even setting aside the validity of a particularly methodology, the ignominious past of the first generation includes tales of fabrication and improper handling of evidence, falsification of results and reports, rogue or incompetent analyses, and corrupt or misleading testimony.¹¹¹

Why does faulty forensic science occur in laboratories across the country? The most likely answer is that forensic science has never been ordinary science. The techniques of forensic science rarely find analogues in academic or *746 commercial settings. As commentators have observed, “[t]here is virtually no other ‘market’ for identification tests,”¹¹² and there “are no industrial uses of what forensic identification scientists do.”¹¹³ Thus, the government not only creates forensic science, but also almost exclusively executes forensic procedures.¹¹⁴ Unlike scientific techniques that emerge from collaborative or competitive environments spanning both public and private realms, almost all forensic science, and almost all forensic scientists, claim common ancestry in the government. “Peer review” in forensic science approximates self-congratulation,¹¹⁵ and the scientists who “validate” a particular theory or methodology are those who often stand to benefit from its approval.¹¹⁶

Thus, rather than finding motivation and regulation in a robust community of peers, the forensic scientist is beholden to the internal demands of police investigators and government attorneys.¹¹⁷ So long as these clients remain satisfied, the laboratories need not engage in any new development or self-criticism.¹¹⁸ Rather, crime laboratories primarily engage in applied science, limiting their responsibilities to the mechanical processing of government evidence.¹¹⁹ Indeed, technicians who hold no more than an undergraduate degree staff many police crime laboratories,¹²⁰ and these personnel are often *747 ill-trained to conduct independent research or analysis, even if encouraged by adequate resources or incentives. As a result, forensic science that “grew up in the criminal law” suffers from a case of “arrested development.”¹²¹

The lack of meaningful peer review not only stunts the methodological growth of forensic science, but also enables forensic science to evade the stringent quality control standards imposed on most scientific endeavors. Many forensic laboratories fail to adhere to even basic monitoring standards: they do not engage in validation studies or undertake routine proficiency testing,¹²² and those that do tend to shroud their results in secrecy rather than publish them publicly as in other scientific disciplines.¹²³ In the oft-quoted words of one renowned scientist, “clinical laboratories must meet higher standards to be allowed to diagnose strep throat than forensic labs must meet to put a defendant on death row.”¹²⁴ Thus, forensic laboratories rarely catch their own errors, and they face few external incentives, such as rigorous accreditation or monitoring standards, to adopt more exacting practices. Indeed, in a recent study aimed at ascertaining the feasibility of implementing blind proficiency testing in forensic laboratories, researchers’ efforts were compromised by “clandestine revelation of the test to the lab by the cooperating law enforcement personnel”—in other words, even when efforts were made to conduct blind testing, the police compromised the test by deliberately revealing to the lab that the sample was a test.¹²⁵

At the same time, structural barriers impede the development of robust “defense-oriented” forensic research and practices. Although defense testing does and can occur, there is generally no centralized market to drive the development of institutional “defense-side” forensic testing or research facilities.¹²⁶ Without such institutions, defense attorneys must rely either on the *748 benevolence of government laboratory analysts,¹²⁷ or find independent analysts, who are often simply retired government technicians.

Moreover, to the extent that defense attorneys endeavor to obtain an independent examination, their inquiries or requests for raw data are often met with the hostility and reluctance of an adversary rather than the candor and neutrality of a scientist.¹²⁸ In the words of one commentator, “[w]here science advances by open discussion and debate, forensic science has been infected by the litigator’s preference for secrecy.”¹²⁹ Forensic scientists often feel the pressure to produce results that will please their central and even sole client, the government, and to shield their processes from the defense or even the public domain.¹³⁰ Thus, defense research is almost nonexistent, and defense testing is piecemeal and sporadic.

2. The Pathologies of the Second Generation

At first blush, it might seem that the second generation of forensic sciences would avoid, rather than suffer from, the

pathologies outlined above. After all, many second-generation techniques derive from technologies pertinent to the world outside the police precinct, and scientists with expertise in these areas populate not just crime laboratories but also research institutions and private industry. Advances in DNA research fill the news every day, and biometrics, data mining, and location tracking rely upon technologies generated by and used in private industries, which presumably are equally responsive to any legitimate bidder.

But closer examination reveals that the characteristics of second-generation techniques in fact aggravate the problems already extant in first-generation forensic sciences. In fact, an attorney confronted with a second-generation science report--whether claiming that the crime scene sample matched the profile of the client in a database, or that a biometric scan matched the client to the image on the security camera, or that cell phone triangulation *749 placed the client's cell phone at the crime scene--will be even more ill-equipped to assess the accuracy of such evidence than an attorney confronted with an ordinary handwriting or ballistics report. Why? Three reasons. First, the forensic application of second-generation sciences lack commercial or research analogs, despite the market robustness of the technology generally; second, they rely on databases and research in the control of the government or industry, which both frustrates independent or adversarial inquiry and heightens legitimate concerns about safeguarding privacy and proprietary information; and third, they demand a degree of technical expertise, financial investment, and mechanical sophistication that inhibits the development of informal and independent advisors. The following Parts will examine each of these three problems in turn.

a. The Gap between Forensic and Nonforensic Research

Despite the aura of commercial application that looms around second-generation techniques, the forensic use of such techniques can be readily differentiated from its nonforensic counterpart. First, the forensic application of a general technology varies markedly from its commercial use. For instance, with respect to DNA typing, many research scientists, pharmaceutical companies, and other groups take great interest in genomics-based work, but the geneticist's overall objective typically differs significantly from that of the forensic scientist. Whereas a geneticist generally looks for areas of the genetic strand that regulate human attributes, diseases, or characteristics, the forensic scientist most commonly studies those places at which genetic material has no demonstrable function or purpose (typically, the thirteen established loci).¹³¹ To suggest that the geneticist's broader interest in genomics validates DNA typing for forensic purposes is like suggesting that the widespread market for electricity somehow ensures the proper functioning of an electric chair. Similarly, a biometric technique may be used by private industry to identify known employees in a secured workplace, but that does not mean it is validated for use identifying unknown persons in the first instance.

Second, the mere fact that private industry developed a particular technology, rather than the government alone, does not ensure a greater degree of openness or methodological soundness. Any company that develops a technology for forensic purposes inevitably allies closely with its primary customer, the government.¹³² The reason is clear: once a company develops *750 and markets a revenue-generating forensic product, it strives to protect the product and ensure that it is universally embraced and adopted. Thus an adversary of the government--for example, a defense attorney--is also an adversary of the company.

Moreover, even apart from government allegiance, private companies may have proprietary interests in protecting new technologies, which further discourage permitting open access. For example, forensic scientists typically conduct DNA typing using "kits" and machines developed and sold by private companies.¹³³ However, these companies vigorously guard the methods and validation studies underlying their technologies as intellectual property,¹³⁴ and have successfully resisted disclosing the scientific theories that underpin their techniques.¹³⁵

Similarly, private cell phone companies, email providers, and search engines might be reluctant to reveal how they collect and store data for fear of granting competitors access to such information.¹³⁶ Think of the recent controversy surrounding Google's refusal to disclose the search terms users entered into its search engine: the company's primary claim was not privacy, but rather the need to protect its proprietary information.¹³⁷ Although Google *751 resisted the government's request, the government eventually managed to obtain the same data from three other private search engines without any opposition. However, one can imagine that, if even the government occasionally has difficulty obtaining such information, then defense counsel would be hard-pressed to convince a court to honor a subpoena for similar access in a criminal case.

b. Access to Databases

The database dependency of second-generation sciences further renders it unlikely that a complete appraisal of the evidence will be frequently, if ever, undertaken. That is, even assuming that the government or private industry permitted open access to the technologies underpinning a second-generation technology like biometric scanning or DNA typing, the government is apt to retain a tight hold on the databases containing the images or genetic material used for comparison.

For example, DNA typing requires the compilation, storage, and search of large quantities of genetic information. These databases are critical to determining the likelihood of a profile appearing in the population at large and to making “matches” between samples. But nongovernmental scientists infrequently, if ever, can access this data.¹³⁸ Statutory protections and rules of discovery protect the government’s source materials and raw data in specific cases,¹³⁹ and judges rarely require disclosure beyond the materials relevant to the instant dispute.¹⁴⁰ This inevitably inhibits or outright prevents defense attorneys and independent researchers from challenging the validity of the government’s conclusions.

The same holds true for other forms of second-generation science, although in some cases a private party, rather than the government, may hold the relevant information. For instance, facial recognition or iris scan techniques depend on government-compiled databases of recorded biometric information, and radio frequency tracking of cell site information or vehicle movements relies on data collected and stored by private companies from particular towers or stations.¹⁴¹ But here too, independent researchers are unlikely to gain broad access to such data to examine it for unusual patterns, inaccurate record-keeping, or errors in data processing.

Of course, the courts and government have sound privacy reasons to tightly regulate such materials. While a defendant confronted with location tracking data might request access to a database to determine what other persons were in the same area at the same time, the disclosure of such information obviously implicates the privacy interests of such persons. DNA databases can likewise reveal “familial” connections, thereby exposing information about persons not even included within the immediate scope of authorized intrusion.¹⁴² Raw DNA samples have the power to divulge the very essence of personhood: a person’s phenotypic characteristics, gender, age, health, and genealogy.¹⁴³ Thus, even apart from any statutory laws limiting access,¹⁴⁴ the government is understandably reluctant to open up databanks to any researcher who comes along. If most people shudder to think that their social security number would be known to the world, imagine trying to justify the broadcast of their thirteen-loci genetic profile and cell phone movements.

c. Technical Complexity, Mechanical Sophistication, and the Dearth of Independent Analysts

Finally, the technical complexity and mechanical sophistication of second-generation sciences means that broad-based independent research along with case-based verification of government conclusions are unlikely to occur widely. Even assuming open access to all the underlying material, defense lawyers would encounter difficulty in finding an expert qualified to conduct research or review. Whereas the fingerprint or ballistics analyst at the local sheriff’s office might retire and start taking defense-side consulting jobs at home, the local second-generation analyst cannot readily do the same. For example, just buying the software necessary to examine the data generated by a DNA lab, without conducting any independent tests of the raw biological sample, requires an expert to make a substantial capital investment. Actually conducting independent research projects or experiments requires access to data and funding far in excess of that typically available to indigent defendants.¹⁴⁵ Similarly, it is difficult to imagine a robust community of experts specializing in checking the accuracy of location data or biometric scanning. It is far easier to imagine that once the government puts the evidence forward, it will be accepted without question as true.

Further examination of the most developed second-generation science, DNA typing, illustrates this dynamic. Independent methodological research is all but nonexistent, and there is only a small community of nongovernment experts.¹⁴⁶ Yet numerous and significant questions remain to be answered with regard to DNA analysis--concerning, for example, how to disentangle mixtures of genetic samples from more than one person, how commonly or easily genetic material is transferred, or to what extent population substructure affects match probabilities. Yet few nongovernment researchers have the time, resources, interest, or capacity to conduct such inquiries. Similarly, independent testing of evidence in individual cases is not terribly common,¹⁴⁷ and when such tests are performed, it is often by laboratories primarily beholden to government contracts and hostile to defense interests.¹⁴⁸

This lack of testing does not reflect a justified confidence in DNA evidence. After all, scandals have revealed systemic problems in a number of “flagship” DNA laboratories and horrific tales of false-positive DNA matches.¹⁴⁹ Errors as small and unintentional as an analyst accidentally squeezing a pipette into the wrong tube,¹⁵⁰ or forgetting to change gloves after

an extraction, can compromise critical evidence.¹⁵¹ In Texas, a scandal currently rages over the Houston crime laboratory. News accounts revealed the laboratory's deplorable physical condition and shoddy practices, which in part resulted in the misplacement of 280 boxes of evidence covering approximately 8,000 criminal cases.¹⁵² In other laboratories, improper handling of evidence has turned up "matches" that appear to result from contamination, rather than actual guilt.¹⁵³ Similar problems have emerged in laboratories across the country,¹⁵⁴ including the elite Federal Bureau of Investigation DNA lab,¹⁵⁵ and *756 around the world.¹⁵⁶ As this catalog of scandal and malfeasance reveals, second-generation sciences have not been spared the ignominies of first-generation sciences, and given their technical complexity, mechanical sophistication, database-dependency, and privacy and proprietary concerns, it is unlikely that will change.

B. The Courtroom

Even assuming, however, that forensic evidence lives primarily in the gated community of government science, this lack of scientific scrutiny need not imply a lack of legal scrutiny. Yet as this Part explains, several distinctive characteristics of the criminal justice system cause legal scrutiny of forensic evidence to falter.

In the landmark case of *Daubert v. Merrill Dow Pharmaceuticals*,¹⁵⁷ the Supreme Court announced its regime for assessing scientific evidence, expressing its confidence in "the capabilities of the jury and of the adversary system generally," and in "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof," to protect against the introduction of faulty or fraudulent scientific evidence.¹⁵⁸ *Daubert* outlined a four-factor test to determine admissibility: whether a scientific technique successfully withstands testing; whether it has been subjected to peer review and publication; whether it has a known error rate and standards to control its operation; and whether it is generally accepted in a scientific community.¹⁵⁹

Yet while *Daubert* addressed the legal standards for admissibility of scientific evidence, it did not specify how those standards should operate in *757 practice. How should courts treat multiple requests to admit scientific evidence, within a single case or across cases, especially if urged by the same party? Must each courtroom entertain challenges to the admissibility of a technique each time it is used, or may a judge properly take judicial notice of findings made in other cases, courtrooms, counties, states, or nations?¹⁶⁰ When should courts consider an admitted technique "scientific law" and thus the proper object of judicial notice,¹⁶¹ and, conversely, when might new developments justify subjecting existing "scientific law" to renewed scrutiny? Who should bear the burden of putting forth evidence that calls into question the continued reliability of an established methodology? What should be the relevance of a laboratory's error rate, as opposed to a methodology's error rate, in determining a technique's admissibility?

This Part identifies the ways in which the distinctive characteristics of criminal process undermine the proper functioning of this model in the criminal justice system, first by describing the legal structures that surround the admission of first-generation forensic evidence, and then by asking how second-generation evidence will fare within those structures. Specifically, the first Part examines the experience of first-generation techniques and concludes that structural features impede the judicial system's monitoring function with regard to the first generation. Namely, the structural asymmetry of parties to a criminal case, along with the scarcity of resources, weak discovery practices, and high rate of plea bargaining, renders adversarial processes an inadequate safeguard of the integrity of forensic science. Building on this description, the next Part then explains how these shortcomings are especially acute when considered in light of the characteristics peculiar to the second generation.

1. A Diagnosis of the First Generation

Under the current evidentiary regime governing criminal cases, judges approach methodological questions as questions of law and case-specific applications of these methods as questions of fact.¹⁶² Accordingly, when faced *758 with forensic methodologies, trial courts "rely in part upon legal memoranda, scientific documents, and precedent--rather than factual hearings with live witnesses--to determine their admissibility."¹⁶³ Indeed, trial courts routinely find scientific methodologies reliable solely on the basis of judicial notice,¹⁶⁴ and appellate courts have endorsed particular methodologies and techniques based solely upon approval in other jurisdictions or appraisal of relevant literature in the field.¹⁶⁵

*759 At the same time, and in contrast to this "law-like" status of methodologies, trial courts typically refuse to look at evidence of a laboratory's reliability, or lack thereof, when resolving case-specific questions of admissibility or

methodological soundness.¹⁶⁶ Rather, courts treat such attacks in a fact-like manner; the fact-finder considers them through a case-specific lens as relevant only to the “weight” of the evidence. Indeed, some courts refuse even to allow counsel any access to, or argument about, a laboratory’s or analyst’s errors in other cases, finding such evidence irrelevant to the specific reliability question at hand.¹⁶⁷

Upon initial analysis, this rubric carries great appeal. Permitting a trial court to adopt previous findings can save on costly and repetitious hearings and promote uniformity among different courts and judges. Moreover, because much robust debate in the scientific community appears in written format in journals or papers, live witnesses are not necessarily essential to communicate a range of perspectives to a court. And allowing a court to determine an admissibility question by looking outside of a factual record adduced by the parties, as a judge might look outside the record to sources of legal authority, diminishes the likelihood that a technique roundly criticized as illegitimate will somehow penetrate a courtroom due to (even strategic) lack of vigorous opposition. After all, it hardly behooves the justice system if, for example, a judge rules astrology reliable and admissible simply because she was bound by *760 the record and no party presented evidence to the contrary.

Conversely, it seems fitting that courts should treat questions about the proper application of an established technique in a fact-like manner—left to adversarial challenge and determination by the fact-finder. After all, error is an inevitable part of scientific testing, and a particular error need not undermine the legitimacy of the method as a whole. The execution of a particular scientific test is arguably well determined by looking only within a record, and only to the evidence judged relevant to the question at hand. Moreover, assigning weight to the evidence in a particular case—taking into account all its flaws, contradictions, or weaknesses—is the fact-finder’s very purpose.

But despite the initial appeal of this bifurcated regime, the history of forensic science suggests that it falters when placed in action in the criminal justice context. Rather than streamline the introduction of forensic evidence, the system effectively railroads it. In this respect, it is perhaps significant that the Supreme Court expressed its confidence in judicial process in a civil, rather than criminal, case.¹⁶⁸ The problem may rest in the very structure and nature of criminal process.

The prosecutorial function in every jurisdiction is consolidated into a central figurehead. For the federal criminal courts, the office of the Attorney General coordinates the actions of all prosecutors throughout the nation.¹⁶⁹ In cities and states, offices are coordinated on a local or statewide level. The prosecutor in turn is a repeat institutional player in the system, handling a wide variety of cases in which an issue may arise.¹⁷⁰ Across the nation, then, a forensic technique’s proponent in a particular jurisdiction is essentially a single litigant: the prosecutor.¹⁷¹ Indeed, given that forensic science is a government-dominated field, even the government’s chief proponents of the technology, the *761 scientific witnesses, can become institutional figures.¹⁷²

From this centralized, institutional role, the government is well-positioned to ensure that the courts accept new methodologies.¹⁷³ The prosecutor can consolidate resources to present the strongest case possible for admission. She can assign specialized or multiple counsel, work collaboratively with scientists to develop arguments and theories in support of the technique’s admission, or decide not to seek admission until conditions are optimal. The prosecutor can actively “forum shop” a new forensic technique by choosing those cases and those courtrooms—indeed, those judges—most likely to be receptive to the proposed technology. A prosecutor eager to see a technology accepted might even choose test cases with reference to which defense lawyers seem least likely to pose a formidable adversary.¹⁷⁴

At the same time, the very structural dynamics that well equip the prosecutor to argue in support of novel scientific evidence in turn undermine the defense’s ability to fight meaningfully against it. Unlike the prosecutorial function, the defense function is typically diffused among paid private practitioners, or localized central offices. In many jurisdictions, defense attorneys are not even repeat players within the criminal justice system, but rather take criminal cases only when required by the courts.¹⁷⁵ This decentralization of the defense function impedes concerted and comprehensive efforts to respond to new forensic techniques at the critical moment when they gain momentum. Coordination of the initial defense response to a new *762 government technique therefore occurs, if at all, with much less frequency.¹⁷⁶

This may be particularly true in the early stages of a technique, when the government has its tightest grip and the only literature about the development or validation of the method is that generated by the government.¹⁷⁷ As a result, the defense attorney may acquire a distorted perspective of a methodology’s legitimacy, and even the skeptical defense attorney may encounter a dearth of extrinsic critical analyses.¹⁷⁸ Unarmed with legitimate contrary voices, and often confronted with judicial misperception that the staff of forensic laboratories are neutral “scientists” rather than partisan advocates, the defense

is ill-positioned to mount an effective challenge.¹⁷⁹

In addition, even where coordination among defense attorneys is possible or desirable, the nature of the defense role may preclude it. The defense attorney, unlike the prosecutor, meets forensic evidence reactively: she cannot pick or choose the perfect case or the perfect forum in which to mount an opposition. Furthermore, pragmatic and ethical limitations thwart effective pooling of data. For instance, an attorney would be hard-pressed to advocate a third party's retention and storage of the ballistic evidence in a client's case for the purpose of conducting systematic studies. Nor could an attorney use the findings made in one case to either support or attack the findings in another, without risking a breach of client confidentiality or a conflict of interest.

Moreover, ethical rules bind defense attorneys to the zealous representation of each individual client,¹⁸⁰ which further constrains the defense attorney's choice of whether to challenge admissibility. Consider a defense attorney presented with a novel scientific technique in a homicide case. That attorney, knowing that ultimately the trial will turn on self-defense rather than identity, might choose to mount a lackluster challenge or no challenge at all when the government tenders the evidence. In such a case, the defense attorney with limited resources would be remiss, both practically and ethically, in wasting precious time and effort carefully opposing the admission of the scientific evidence, even if she knows that her failure to do so will make it harder in a future case to convince the same judge that the very same kind of evidence admitted earlier should now be considered unreliable.¹⁸¹ It is not hard to conjecture that a defense attorney might accede to fifty cases in which the defendant agrees under oath during a plea colloquy that certain forensic evidence corresponded to him before attempting to argue in a single case going to trial that the same forensic method is entirely untrustworthy and unreliable.

In addition, the efforts the government expends at the early stages of a technique's acceptance reap prolonged rewards, because the decisions in these initial hearings often serve as the foundation for widespread acceptance of the technique. Once a technique takes root, both practical and legal obstacles preclude its easy extirpation. For precisely the reasons Monahan and Walker cite,¹⁸² trial courts typically choose not to undertake lengthy or complicated admissibility hearings, but instead simply adopt the findings of earlier courts and rule the technique admissible. Moreover, a court confronting an admissibility question previously decided understandably feels less compelled to require the prosecutor, perhaps the same prosecutor who previously held a complex hearing in another courtroom or even that same courtroom, to re-enact the earlier hearings. This practice arguably even pays heed to the principles of consistency and equal treatment under the law: when a court deems a technique admissible in one court likewise admissible in another, it treats like litigants alike and avoids the awkwardness of disparate results.¹⁸³

*764 Thus, the law-like treatment of scientific methodologies, in effect, reverses the burden of evidentiary admissibility set forth in Daubert: rather than ask whether a proponent of scientific evidence has proven the technique's reliability by a preponderance of the evidence, criminal courts presume a technique admissible unless a party demonstrates by some unascertainable standard that other courts erred in admitting it, or that the science has undergone a significant change that warrants revisiting a prior court's findings.¹⁸⁴ Given this shift in the dynamics of admissibility, and combined with the custom of determining admissibility by judicial notice, a technique need only gain a threshold level of approval before the law's impulse toward efficiency and consistency takes hold and a science admissible in enough jurisdictions becomes presumptively admissible in all others.¹⁸⁵

While considerations of consistency and equal treatment drive courts to support the current regime, prosecutors also have little reason to challenge this prevailing wisdom. Able to rely on the findings in other proceedings, and act only responsively upon challenge, the government has an interest in preserving the status quo. After all, since the law tends to view uncertainty as evidence of falsehood, new theories only call into question the legitimacy of those previously accepted and proven. Questioning an established theory becomes counterproductive; it serves only to provide opposing counsel, or the courts, *765 with the ammunition necessary to defeat the continued admissibility of the technique.¹⁸⁶ As every grandmother knows, "if it ain't broke, don't fix it." Thus, the law-like treatment of forensic methodologies actually discourages government scientists from engaging in further research and development of forensic technique, and subverts the innovation and experimentation that typically characterize scientific development.¹⁸⁷

Strong incentives discourage lawyers even on the defense side from raising challenges to scientific evidence, both with respect to a technique's methodological legitimacy and to its reliability in a particular case.¹⁸⁸ The very "scientific" nature of forensic evidence bestows an air of reliability that defense attorneys may be loathe to confront.¹⁸⁹ Counsel may simply be unwilling to spend time adducing sufficient arguments that the forensic technique, and the precedential cases endorsing it, a re

in fact illegitimate.

And, just as it has been argued that elaborate legal regimes encourage defense attorneys to disregard factual inquiries in favor of legal arguments,¹⁹⁰ *766 so too might it be observed that the entrenchment of law-like scientific methodologies steer defense attorneys away from scrutinizing the fact-based results of forensic testing carefully. Rather than challenge the evidence, an "overworked, underpaid," court-appointed counsel—who may also lack the time, knowledge, or energy even to screen the case for the reliability of its scientific conclusions¹⁹¹--may simply try to incorporate the findings into the theory of the case or,¹⁹² more likely, negotiate a plea bargain.¹⁹³ In fact, the more meritorious a prospective defense attack on the evidence's methodology or application may seem, the more likely it is that the government will obviate the attack by offering a plea that cannot be refused.

In this respect, although the adversary model conceives the system as "a dispute between two sides in a position of theoretical equality before a court which must decide on the outcome of the contest,"¹⁹⁴ the reality flatly contradicts this ideal. The adversary in the criminal justice system tends to perform simply a screening function, winnowing out those few cases that will actually make it before a fact-finder for resolution.¹⁹⁵ And even if defense counsel might be able to mount a fruitful attack, resource and role constraints inhibit defense counsel from undertaking it. This administrative, rather than adversarial, character renders the Daubert Court's primary safeguard--the advocate and the adversarial process¹⁹⁶--truly vigilant in only a small fraction of cases.

*767 2. The Pathologies of the Second Generation

It might be argued that second-generation scientific techniques alleviate many of the concerns raised in the preceding section. Advocates of DNA typing, for instance, have argued that it provides a new standard by which to judge all forensic science.¹⁹⁷ They suggest that the rigors of DNA science will spare it from the embarrassments that plagued traditional forensic sciences, and even advocate the "DNA paradigm" as a tool for reassessing first-generation techniques.¹⁹⁸

But even within the short lifetime of the most advanced second-generation science, DNA typing, examples of both questionable methodological assertions and erroneous technical application abound.¹⁹⁹ For instance, in the early 1990s, one expert testified that "in the experience of the entire forensic laboratory community, he did not know of a single instance 'where different individuals that are unrelated have been shown to have matching DNA profiles for three or four probes.'"²⁰⁰ Today, such a statement would be highly dubious: in 2004, the founder and pioneer of forensic DNA testing, Sir Alec Jeffreys, declared that a ten-loci probe was "no longer foolproof," and recommended that fifteen or sixteen markers be used to safeguard against false inclusions.²⁰¹ Both Virginia and Texas wrongly jailed individuals for years on the basis of falsely inculcating DNA evidence.²⁰² For nearly every laboratory mistake or malfeasant act, there were lawyers and judges who failed to catch it.²⁰³

In short, it may seem that the characteristics that define the second generation--their technical complexity, scientific certainty, recurrent presence *768 in a wide range of cases, and database-based comparisons-- would justify confidence in their wide-scale use in the criminal justice system. But, closer examination of the historical experience of first-generation forensic evidence reveals such optimism to be misplaced. As is already apparent from the short history of DNA typing, many of the characteristics that make second-generation sciences so appealing in fact places them at equal, if not greater, risk for error in the current regime.

First, with regard to admissibility determinations, the technical complexity of second-generation techniques make close and continuous judicial scrutiny of their methodological soundness less likely. Judges confronting sophisticated scientific evidence must invest greater intellectual and material resources to conduct a comprehensive examination of second-generation techniques. Even well-meaning judges may struggle to comprehend complicated scientific or mathematical principles,²⁰⁴ and the heightened likelihood of error may discourage a court from delving too deeply into such complicated scientific knowledge.

Judicial reluctance, however, only renders the initial hearings on a new technique more decisive, since few later judges will retread the treacherous path--especially if it is only to risk arriving at a result suspiciously contrary to that reached earlier.²⁰⁵ Yet at the initial stages, second-generation *769 methodologies, with their requirements of mechanical sophistication and specialized technical knowledge, are even less likely to have withstood the scrutiny of an independent community of auditors. Indeed, the general rigor of second-generation sciences may also lend them an air of "mystic infallibility" that discourages

critical inspection, and the existence of “real world” analogues, notwithstanding that the nonforensic applications in fact deploy meaningfully different methodologies, may bolster this sense.²⁰⁶ A judge who thinks that cell phones or GPS satellites or iris scans or DNA tests generally work in the world may be less inclined to question whether, when put to forensic purposes, the methodological underpinnings remain sound.

The high volume of second-generation cases only exacerbates this impulse. Resource constraints may ultimately persuade the “amateur scientists”²⁰⁷ of the bench, particularly those inclined to intellectual timidity with regard to sophisticated scientific techniques, to lean heavily upon the “law-like” status of other courts’ rulings rather than spend precious time deciphering a seemingly legitimate methodology. Of course, the more that *770 forensic evidence is approved in cases in which the defendant admits guilt and the evidence goes unexamined, the more it affirms the belief that this kind of evidence is typically trustworthy and reliable.

But even an intellectually entrepreneurial judge willing to fully exercise her gatekeeper role under Daubert might not find much help from the adversarial parties. The characteristics of second-generation sciences render scrutiny of either general methodological legitimacy or specific case application unlikely in the vast majority of cases.

Given the rigor of second-generation techniques, defense attorneys, like judges, may find themselves susceptible to the temptation simply to trust the integrity of the evidence, thus making the case seem insurmountable or “open-and-shut.”²⁰⁸ Many lawyers will reasonably conclude that it requires too great an effort, and reaps too little a reward, to study such evidence in the hopes of uncovering a flawed methodological approach.²⁰⁹ And the more technically complex the evidentiary form, the more likely it becomes that even a well-meaning attorney may be incapable of comprehending the science regardless of the effort she expends.²¹⁰ After all, not every attorney can be expected to *771 master the methodological details of facial recognition software or DNA amplification and testing.

Similarly, the seeming (or actual) impenetrability of the technique may discourage the attorney from conducting a thorough inspection for errors in its application. Faced with the choice between spending time searching for possible errors explicable and meaningful enough to sway a jury and simply accepting a plea bargain or crafting a defense compatible with the scientific evidence, the attorney may quite reasonably choose the latter course.

Of course, an attorney may always request expert assistance to help interpret scientific evidence. But, due to the high volume of second-generation evidence, and its likely appearance in a range of both low- and high-level cases, such assistance is likely to be less, not more, availing than with respect to first-generation sciences. A defense attorney handling one hundred cases, a majority of which are misdemeanors, cannot feasibly petition for assistance in the forty cases that contain second-generation scientific evidence. Courts jealously guard limited budgets,²¹¹ and most jurisdictions require counsel to demonstrate that their request is “reasonable”²¹² and that the issue is “likely to be a significant factor in [the] defense.”²¹³ Absent expert eyes, the sophisticated technologies of the second generation may prevent counsel from even articulating the need for assistance even if she tried:²¹⁴ a judge in one case denied an untrained request as “no more than a plea that DNA evidence is simply too ‘complicated.’”²¹⁵

But even if counsel were able to demonstrate a need in every case, the sheer volume of second-generation techniques prevents courts from appointing *772 independent experts in all, or even most, cases. Not only would such appointments be inefficient, but they would also be extraordinarily costly. The same forces that generate demand for technical expertise in turn work to decrease supply. The mechanical sophistication and technical expertise associated with second-generation techniques like DNA typing or facial recognition technologies all but preclude the development of plentiful independent expert shops. Simply reading raw data in a DNA case requires software that can cost thousands to tens of thousands of dollars,²¹⁶ and the rapid evolution of the technology can render a large capital investment obsolete within a short number of years. Judicial parsimony in granting requests further shrinks the available expert pool.²¹⁷ Those experts actually assigned are also likely to be more expensive for second-generation sciences: the time commitment is greater because both interpreting the data and conveying technical results to counsel takes longer. In short, second-generation experts are likely to be more scarce than their first-generation counterparts, and even when available, they are likely to be stretched thin and demand costly fees.

Lastly, even assuming a judge receptive to such a challenge, a defense attorney capable and well-resourced enough to pursue one, and an expert available for appointment, it remains unlikely that the expert could undertake the examination necessary to truly safeguard the integrity of the evidence. That is because the mechanical sophistication and technical complexity of this evidence all but forecloses independent research. The infrastructure necessary for true methodological testing is simply

lacking. At the same time, the database-dependency of second-generation sciences, and the privacy and proprietary secrets concerns they raise, effectively prohibit access to the material necessary for independent research. Manufacturers of DNA typing kits, cell phone or search engine technologies, or biometric scanning software may bristle at disclosing broadly the technology underlying their particular techniques, even under a court "gag" order. Similarly, the relinquishment of data stored indiscriminately in databanks for exploratory purposes--whether iris patterns, DNA profiles, or cell records--understandably raises legitimate concerns about personal privacy.

The database dependency of second-generation technologies also means that scrutiny of these techniques for case-specific errors in application itself requires access to large volumes of data, which may not be feasibly disclosed, or feasibly reviewed, in every case.²¹⁸ For instance, verifying that a cell-site report accurately identified the location of a phone at a particular time requires *773 verifying all the precursor data, including the accuracy of the tower location, clarity of signal, lack of interference with signal reception, and correspondence to actual physical terrain; this is obviously difficult to scrutinize closely in every case.²¹⁹

Or consider, for example, the FBI DNA-lab scandal concerning analyst Jacqueline Blake, who pled guilty to falsifying reports of "negative controls"--the data used to demonstrate that no contamination has taken place during testing.²²⁰ Her actions only came to light when a coworker working late noticed a problem with the files on Blake's computer.²²¹ Similarly, an analyst fired from a private laboratory for substituting clean control files in problematic samples was discovered only when a reviewer noticed that her negative blank files were strangely identical in every case.²²² More recently, an audit of a Massachusetts crime lab revealed "instances in which laboratory officials entered the same genetic profile under two different ID numbers in the database," and in which an analyst reported "DNA results in four cases matched the genetic material from old rape kits when they had not."²²³ Independent review of the documents related to a single case simply could not have captured these errors.²²⁴ Review of the analyst's entire body of work might have caught the suspicious data, but of course no court would have mandated such broad disclosure *ex ante*, simply on the chance that the analyst's work was not up to snuff.

*774 Yet disclosure of the materials necessary to find such flaws in every case in which second-generation technologies are used is all but impracticable. Not only would requiring such sweeping document disclosure in every case effectively bankrupt a jurisdiction,²²⁵ but it would also demand disclosure of an unsustainably, and perhaps even impossibly, large quantity of paperwork.²²⁶ And no expert or attorney could, as a matter of practice, undertake such a review in every case.

From this perspective, the courts' demonstrated reluctance to approve the means necessary to effectively inspect second-generation evidence is not in the end pathological; it may in some respects be quite reasonable. But this reasonableness invites danger: the very qualities that make second-generation technologies so desirable make it all the more likely they will never encounter adversarial scrutiny of any kind. And while this lack of scrutiny is troubling on its face, it becomes all the more troubling when considered in light of the very real possibility that, given the investigative power of these technologies, in many cases they may be the only actual evidence of the defendant's guilt.²²⁷

III Where Do We Go From Here?

When it comes to second-generation evidence, some may argue that the effective lack of scrutiny is, statistically speaking, tolerable. As noted above, in *775 the vast majority of cases, it is likely that no error took place, and second-generation sciences are at base far more credible sources of evidence than the traditional forensic sciences.²²⁸ But the criminal justice system has never been satisfied with being a random game of chance; as the familiar edict goes: "[b]etter that ten guilty persons escape than that one innocent suffer."²²⁹ It is reasonable to expect that, as the use of scientific evidence increases, so too will increase the number of errors attributed to its use. More importantly, two aspects of second-generation evidence make meaningful scrutiny all the more indispensable. First, the scale of error that can occur among second-generation techniques is an order of magnitude larger than that which occurred among the first-generation. Whereas a faulty hair comparison may wrongly inculpate someone in one case, a wrongly calibrated machine can chum out large volumes of erroneous information and tarnish multiple cases. Or consider some of the errors that may occur in DNA typing: a manufacturer may contaminate a kit,²³⁰ an analyst may fail to run positive or negative controls, or a technician may erroneously input data into a database.²³¹ Such mistakes can compromise not just a single case, but multiple related or unrelated cases as well.

Second, even if second-generation evidence is apt to be faulty in fewer overall cases, when it does fail the stakes will be at their highest. That is not just because second-generation technologies appear so irrefutably probative, but also because they

allow criminal cases to be built on little more than forensic proof: for instance, charges are routinely brought based upon only a "cold hit" DNA match.²³² Moreover, in some cases the crime might have occurred years before, making an effective defense all the more difficult to muster.²³³ At the very least, in cases involving no evidence but forensic *776 evidence, justice dictates implementation of the most exacting safeguards. If the only evidence in a thousand theft cases across the country is the testimony of a forensic analyst that the defendant matched the evidence when the likelihood of a random match was one in 240 billion, then surely everything should be done to ensure that such testimony is in fact accurate.

However, existing recommendations for improving the quality of forensic science in court tend to stay within the conventional framework, asking only to shore it up by granting more money for experts,²³⁴ providing better training for lawyers,²³⁵ requiring more elaborate hearings and discovery,²³⁶ selecting more competent juries,²³⁷ and allowing for greater independent testing.²³⁸ Each of these recommendations has its own merits, and if implemented could dramatically improve the quality of scientific evidence in the criminal justice system.²³⁹ Yet they do not address, much less rectify, the particular economy of the criminal justice system, which perpetuates the introduction of faulty forensic evidence. Instead, the conventional fixes rely upon an outdated view of the nature of forensic evidence, where case-specific review plausibly suffices to ensure the quality of evidence. They assume: that an attorney is willing and able (or even obligated) to engage in extensive pretrial investigation and maneuvering to winnow contestable from uncontestable cases; that judges will conduct an adversarial proceeding of some kind (whether a motions hearing or trial) in those contestable cases; and that it is efficient, much less possible or *777 desirable, to assign experts to review the outcomes of all scientific testing.

Moreover, such proposals fail to acknowledge that, even if resource constraints entirely disappeared, the monitoring of second-generation sciences requires a scope of inquiry broader than that accorded to each defendant in a single criminal case, and a recalibration of the balance of power between the centralized government and decentralized defense.

Against this backdrop, this Part attempts to set forth a nonexhaustive catalog of recommendations keyed to these particular concerns. Although none of these recommendations alone offers a complete safeguard, if implemented together, they have the potential to improve dramatically the use of forensic evidence in the criminal justice system.

A. Loosening the Government's Grip on the Technology

As argued above, forensic sciences generally, and second-generation technologies in particular, require reviews of greater depth and breadth to uncover flaws in either the underlying methodological technique or the execution of that technique in a particular case. Comparing a recovered writing to the suspect's writing exemplar may be the sole basis of a first-generation finding. By contrast, the reliability of conclusions drawn in DNA typing may depend upon match probabilities derived from databases of genetic material or upon comparative examination of the work an analyst has done across cases. Thus, effective monitoring of second-generation evidence demands close scrutiny not just at the individual case level in court, but also across the entire range of operations. But given the appearance of these technologies in a high volume of cases and the privacy and proprietary concerns that broad disclosure may raise, how might such reviews take place?

Scholars and advocates have urged perhaps the single most important change: wide-scale reform of the forensic laboratory system, to ensure better quality control and recast the culture to that of a neutral scientific lab rather than an arm of the government.²⁴⁰ Truly independent forensic laboratories are *778 essential in part because they form the first line of defense against shoddy forensic science.²⁴¹ Such labs might readily find homes in large public universities, or in not-for-profit organizations.

But the creation of an independent laboratory system, even assuming that such a feat could in fact be accomplished, is not alone enough for two reasons. First, to foster the maturation and critical examination of complex second-generation techniques, no single institution ought to be allowed to operate as the sole custodian of the tools necessary to develop and challenge scientific orthodoxies. Second, supervision over the proper implementation of those technologies requires constant and ongoing scrutiny at the wholesale, not just retail, level. The criminal justice system therefore needs institutions capable of and empowered to undertake each kind of oversight.

1. Centralized Oversight Agencies

Methodological development and quality control monitoring requires that a neutral and bipartisan entity have the power to

pursue, and encourage others to pursue, research and auditing functions. Such an entity, or Board, should have members drawn from all relevant communities: the government, the defense bar, and private industry, academia, or forensic laboratories. Armed with a research budget, the Board would oversee the equitable dissemination of research funds for studies.²⁴² The Board would also have access to all private or proprietary data related to a particular technique, and could award circumscribed access to researchers consonant with the needs for confidentiality or the protection of trade secrets. New techniques would first be submitted to the Board, which could then disseminate proposed methodological approaches for the purpose of close scrutiny and peer review. The Board could also issue periodic "state-of-the-technology" reports that clarify the ongoing areas of uncertainty in a technology's use or development, and outline the *779 various approaches currently deemed acceptable or unacceptable. It could also expound standards and protocols of model practices for the execution of particular forensic techniques.

This model in many respects mirrors that first proposed by Professors Monahan and Walker, who extended their social authority model to the hard sciences and outlined a "National Science Panel" that could resolve questions pertaining to causation in breast implant litigation.²⁴³ In Walker's and Monahan's model, courts could give the findings of such panels law-like deference: the findings would be capable of being "overturned," but presumptively correct. In the civil arena, these kinds of panels aim to produce a coherent response to the scientific questions that occur throughout the nation, so that litigation is conducted more efficiently and consistently. But in the criminal arena, such panels have the potential to produce more than just efficiency: they might also function as a counterweight to the government domination of forensic science, whether de jure (as the operator of crime labs) or de facto (as the primary consumer of forensic services).

Second-generation techniques already have something of a model for such a panel. The debut of DNA analysis catalyzed two convocations of experts who produced manuals for the forensic use of DNA evidence that became the "how to" guides for courts.²⁴⁴ After distinguished scientist Eric Lander exposed numerous flaws in the forensic evidence in *People v. Castro*, resulting in an unprecedented joint statement from the government and defense experts concluding that the evidence was unreliable and eventually resulting in its exclusion,²⁴⁵ the National Academy of Sciences responded to his call for a committee to investigate forensic DNA typing.²⁴⁶

Accordingly, in 1992, the FBI, along with a consortium of government agencies, issued a report that it had commissioned from a committee charged with summarizing and analyzing the state of scientific knowledge in the field of DNA evidence.²⁴⁷ After controversy erupted over the first report's conclusions, another report issued in 1996.²⁴⁸ Scholarly discussion regarding the merits of the panels, and of the conclusions that each reached, abound.²⁴⁹ What is clear, however, is that the reports of the panels served to inform and educate judges and litigators about the legitimate areas of dispute in the field, and provided a *780 useful summary and reference for best practices.²⁵⁰ Even the debate between the disparate conclusions reached by the first and second panels has contributed a richness to the conversation that criminal justice has otherwise sorely lacked with regard to forensic science. In this regard, the beneficial educative role played by neutral expert panels, particularly with respect to resolving the complicated disputes likely to characterize the second-generation sciences, is illustrative and instructive.²⁵¹

But an isolated or sporadic convocation of experts is not enough. Second-generation technologies require constant monitoring and development. New technologies may arrive on the scene, and old technologies can still present novel or innovative questions.²⁵² For instance, while the foundations of DNA *781 typing are now fairly firmly entrenched, new controversies emerge constantly.²⁵³ By means of illustration, consider the following concrete example from a controversy currently unfolding in the DNA research community. The DNA-typing technique most commonly used in the United States today examines genetic information at thirteen different places, or loci, on the genetic strand.²⁵⁴ Regardless of the number of loci developed, DNA analysts typically calculate the significance of a "match" between the forensic and known samples using a method known as the "product rule."²⁵⁵ The product rule, in turn, relies upon data FBI scientists developed to determine the frequency of particular alleles, or numerical expressions of genetic information, in the population. The validity of this method depends upon two critical assumptions: first, that the frequency tables derive from a sufficiently large and random sample to allow for general conclusions,²⁵⁶ and second, that there is no link or correlation between each piece of information.²⁵⁷ At present, courts across the nation have accepted the results of DNA typing into evidence and ruled the product rule, and the frequency tables underlying it, an acceptable way to represent the significance of a match.

Yet, recent evidence calls into question the accuracy of using the product rule to convey match probabilities.²⁵⁸ How that evidence was uncovered, and *782 what has happened since the discovery illustrate the specific problems second-generation sciences raise. Notably, questions were first raised when an alert analyst happened to observe, and then to pursue out of

laudable intellectual curiosity, the fact that the DNA samples of two unrelated individuals (one Caucasian, one Black) matched at nine loci. Under the statistical models then in place, a person picked at random would match that nine loci profile at a rate of 1 in 754 million in Caucasians, 1 in 561 billion in African Americans, and 1 in 113 trillion in Southwest Hispanics.²⁵⁹ Simply because she was curious, that analyst checked the rest of the 60,000 person database for such matches, and uncovered ninety pairs of individuals who matched at nine loci, and several pairs at ten and even eleven loci.²⁶⁰ But although such matches prompted serious questions about the accuracy of the population statistics used in criminal cases, the analyst could take no further action, because she had “no time or the funding to look into it anymore.”²⁶¹ Hence, the research stalled.

Upon learning of these findings, a defense attorney, representing a man charged with a “cold hit” crime on the basis of a nine loci match,²⁶² attempted to gain access to the data to conduct further investigation. Predictably, however, the government vehemently opposed the request and cited to the arguments elaborated above: privacy concerns,²⁶³ the burden that it would place on the government “to require the State to do a search to satisfy a single Defendant,”²⁶⁴ and the fact that such research was outside the scope of the analyst’s duties.²⁶⁵ In another hearing, the government response revealed the intimacy and degree of state and federal coordination: the manager of California’s databank testified that the federal authorities had warned that if a court ordered disclosure of the database for research purposes, the state “could lose our authority to use the software,” since “if the FBI pulled our *783 authorization, it is just like Microsoft who said we can’t use Word anymore. We are shut down.”²⁶⁶ Of course, the federal government’s interpretation flies in the face of the federal statute enabling the CODIS, which specifically provides that the databases be made available “if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes.”²⁶⁷ Nevertheless, the trial court ruled in favor of the government, and against further inquiry.²⁶⁸

Litigation on the same issue has occurred in various jurisdictions around the nation, to varying success.²⁶⁹ But under the current legal regime, it is left to individual defense attorneys, and to individual state trial judges, to press for an answer to the question, “how many multiloci matches are in the state and national databases, and why?” But although individual case litigation is the only place to seek the answer to that question, it is hardly the best place. A single trial court is understandably reluctant to grant a defense motion to pursue such broad research simply for the benefit of a single defendant in a single case. Moreover, judges might understandably be wary about issuing orders to open the databases without undertaking a comprehensive examination of the privacy interests involved, the caliber of the research proposal, or the estimated scope of the project: all questions that a busy trial court is typically ill-equipped to consider. At the same time, the government, which controls the data, lacks the money, time, expertise and perhaps most critically, the interest, to conduct essential inquiries. As a consequence, critically important scientific inquiry is effectively thwarted.

Imagine, however, that such a question could be asked of a neutral entity, which then had the power to grant appropriate access to independent researchers capable of answering it.²⁷⁰ This body could efficiently negotiate the *784 privacy, proprietary information, and confidentiality concerns raised by such research. The research could be made available on a broad basis, to the benefit of defendants as a class. Rather than have a single judge shoulder the burden of ordering what is essentially a large, long-term research project for the benefit of one defendant, the judge could instead ask whether the government has enabled scientific development and study through broader-scale efforts mediated by a neutral scientific panel. More generally, such a panel could also periodically survey the field and identify desirable areas for continued study.²⁷¹ If properly funded, the panel could even award grants for research, the results of which could then be made available to the entire criminal justice community.

Another key component of such a panel would be the periodic publication of guidance documents intended to assist judges, lawyers, and technicians with critical and emerging questions related to a technology. Where varying legitimate theories exist, these documents would highlight the conflict and summarize the arguments in favor and against each position. In this respect, a neutral national panel would embrace, rather than gloss over, conflicts in the scientific community with regard to the desirability of various methods or techniques. Similarly, a centralized monitoring institution would be a natural repository for the collection and analysis of data about the efficacy of forensic methodologies. Woefully absent from the public debate about the use of various technologies in the criminal justice system are any data on the degree to which forensic evidence is actually used in investigations, to what effect, and whether those investigations result in conviction. A centralized oversight agency could not only ensure that forensic evidence is used properly; it could also compile the data necessary to ensure that it is used intelligently.

The panel could also serve as a promoter of best practices by promulgating protocols and standards. It could oversee the

auditing and proficiency testing necessary to ensure that methodologically sound techniques are implemented properly on a lab-by-lab and case-by-case basis.²⁷² Even *785 though most states require licenses for everything from nail salons to fishing, no national or statewide licensing standard or board exists for forensic crime laboratories.²⁷³ A national panel could set out standards for regular auditing of laboratories, and for blind proficiency testing and baseline qualification of analysts,²⁷⁴ rather than simply relying upon voluntary or ad hoc national accreditation processes run by professional organizations comprised of the very technicians under review.²⁷⁵ In this respect, comprehensive monitoring likely militates in favor of a tiered structure for such oversight agencies, with complements to the national panel in the form of statewide oversight structures aimed at ensuring quality control within each laboratory. And even if the federal government failed to act nationally, the existence of an assortment of state or regional panels might stir "competition" in both standard-setting and research.

As scandals have erupted across the nation, several states have reacted by convening just such entities. For instance, in response to scandals at its premier laboratory, Virginia quickly enacted legislation creating a Department of Forensic Science, headed by a director appointed by the governor, and separate from the Department of Criminal Justice services.²⁷⁶ The legislation also provided for a state Forensic Science Board (FSB) in the wake of scandals at Virginia's premiere laboratory.²⁷⁷ The FSB is responsible for adopting regulations for the administration of various forensic disciplines, including DNA, drug, and breathalyzer testing, and for setting forth goals and standards for the department. At the same time, Virginia convened a Scientific Advisory *786 Committee (SAC), composed of thirteen members who serve for four years.²⁷⁸ The SAC reviews laboratory operations of the Department of Forensic Science, and makes recommendations on protocols, testing, qualifications, and quality control.²⁷⁹

Virginia's efforts are a step in the right direction toward comprehensive oversight.²⁸⁰ A centralized state body can execute regular auditing procedures, as well as commission spontaneous open-file, big-picture reviews of laboratories' materials, including comparisons across cases. In many instances, such reviews will be the only means of uncovering red flags that pinpoint certain labs, or analysts, for closer scrutiny.²⁸¹ Such an entity can also skillfully navigate confidentiality concerns to prevent inappropriate disclosure. At the same time, the entity could make publicly available the results of quality control and assurance measures.²⁸²

As a practical matter, how might such an entity come into being?²⁸³ The easiest response would be through legislative enactment.²⁸⁴ Just as Congress *787 created CODIS, and so followed the states, so too could legislatures create CODIS's chaperone.²⁸⁵ Alternatively, the National Research Council, the operating arm of the National Academy of Sciences, could pick up where it left off and regularly convene an expert panel, which might in turn pressure the executive and legislative branches for access to the required resources.

Courts could also effectively force the creation of such panels by refusing to find admissible any forensic evidence proffered without proof that the underlying data necessary to test its methodological soundness has been subject to nongovernment-related scrutiny. After all, Daubert itself specifically instructed that "submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected."²⁸⁶ It further acknowledged that the "scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses."²⁸⁷ Precisely to enable such wide-ranging consideration, the government must require open access to databases--perhaps not to every individual litigant, but certainly to a qualified and limited community of researchers. The litigation surrounding the multilocus matches provides just such an opportunity: just as the decision in the Castro case catalyzed the first NAS panel, so too could an adverse decision in several trial court cases--either ordering the disclosure of the databases or precluding the admission of the evidence drawn from their matches--prompt either executive or legislative response.²⁸⁸ Such issue forcing by courts might also prompt private companies concerned about proprietary information to cooperate more fully with defense-side or independent analysts. For instance, although the private companies that developed the primer sequences for forensic DNA typing initially refused to release what they deemed proprietary information, some companies realized a competitive advantage in publishing such information, because law enforcement would elect their technologies over those not open for inspection.²⁸⁹

*788 2. Granting Access to Basic Information

At the local level, each forensic agency should be held responsible for providing easy access to certain universal and critical documents. In the words of one scholar, discussing the increasing presence of science in public debate, "[i]t is important to ensure that good scientific information not only is available in the abstract, but also is made available to the right people, at the right times, and in ways that promote accountability in the production, transmission, and use of knowledge."²⁹⁰ With the

advent of the Internet, little justification exists for withholding general documents on the grounds that routine production of such information would unduly burden the laboratory. Forensic agencies should store key operating materials such as protocols, analysts' resumes, and the results of validation studies and proficiency tests in an electronic format that could be downloaded at any time. Agencies could likewise make the reports issued by independent entities available in an electronic format that even indigent defendants could access. Agencies could even make proficiency test and audit results and corrective action logs available online. At present, such information is nearly impossible for defense investigators to obtain.²⁹¹ To the extent that such information might include sensitive material, the government could easily protect it through passwords that can be provided to counsel in an individual case by court order. Alternatively, a laboratory could simply hold "visiting hours" during which such items are available for inspection.

B. Loosening the Courtroom's Grip on the Law

Changes, like those above, to the oversight and availability of forensic evidence will unquestionably improve the overall quality of evidence presented in criminal cases. But simply tightening the laboratory oversight structure is not enough. In the coming years, second-generation techniques will likely enter the court in a high number and wide range of cases. And as scientific techniques evolve, understandings about legitimate scientific practice will change as well. Yet the current legal structure fails to embrace, much less address, either of these realities. The defense function will still suffer from the structural features that discourage robust testing of scientific evidence, and the prosecutorial function will still benefit from its dominance of the market in forensic services. But several small shifts in legal obligations, aimed at evening the playing field between the government and the defense, could shore up the adversary process *789 as a safeguard not only against faulty forensic evidence, but also against accurate forensic evidence used in a faulty fashion.

I. Greater Centralization of Defense Functions

Questions have long lingered concerning the desirability of consolidating indigent defense services within a particular jurisdiction.²⁹² Advocates of such consolidation, typically in the form of public defender offices or agencies, argue that effective representation requires the pooling of resources and experience available only in formal, centralized agencies.²⁹³ Other proponents point to the institutional power realized by the centralization of defense services, particularly when such offices control their own internal allocation of resources.²⁹⁴

The rise of second-generation forensic evidence lends further credence to arguments favoring official centralization. However, even stopping short of formal reorganization of the provision of such services, some informal changes in how defense attorneys approach their responsibilities can be implemented more immediately. Specifically, second-generation forensic evidence requires that defense attorneys coordinate their efforts broadly, not just across cases, but across county and state borders.

Fortunately, the very technologies that define the second generation of forensic evidence also enable a second-generation response: technology aids in state and national cohesion among an otherwise diffuse practice of criminal defense. For instance, in response to the complexity and pervasiveness of DNA typing, two practicing attorneys joined with a renowned academic expert in *790 DNA in sounding a call to defense attorneys to collaborate nationally on issues of DNA evidence.²⁹⁵ They identified the "most fundamental need" as an "ongoing, comprehensive, national repository of defense-oriented forensic science information."²⁹⁶ Accordingly, in conjunction with the National Association of Criminal Defense Lawyers and the National Legal Aid and Defender Service, the attorneys formed an online Forensic Library to provide a forum for defense attorneys to share materials related to forensic evidence.

Such collaboration serves as a model for the kind of pooling of resources necessary to ensure that the defense bar responds effectively to complicated, challenging, and changing forms of second-generation forensic evidence. But defense counsel need greater resources to foster and encourage collaboration. Legislatures could aid in such efforts by specifically funding activities aimed at national collaboration, and nonprofit organizations could designate individuals responsible for coordinating such efforts on a broad scale. Finally, some adjustments in the understandings of confidentiality and work-product privileges are also essential, so that communications and information-sharing among defense attorneys might be appropriately protected the same way in which communications between lawyers in different offices of the Department of Justice are protected.

2. Defense Entitlements to Access

Secondly, because second-generation evidence depends so largely upon data outside the scope of the individual case, access to this data is essential to safeguard the integrity of the evidence. If the government may use a database to make conclusions about the defendant, then the defendant should have access to that database, within reason, to confront those conclusions. Thus, within the bounds of an individual case or investigation, defense attorneys should be permitted to petition the court for equal access to the relevant databases. Courts should not accept the excuse that third parties hold these databases: if the government obtained information, then the defense should have equal opportunity to do the same or else the evidence should be deemed inadmissible. Similarly, and especially in the absence of neutral entities like the Board described above, courts should reject claims that disclosure of database materials is unduly cumbersome or invasive, and should instead simply cabin the scope of disclosure appropriately.

Again, the experience of DNA evidence proves illustrative. Presently, Illinois is one of the few states in the nation to provide a statutory framework ²⁹⁷ for defense access to genetic databases in individual cases. Thus the defendant, upon a particular showing, can exercise a parallel capacity to investigate an offense through a search of the database. Such a search may aim to show, for instance, that an evidentiary item suggests a genetic profile other than the defendant's, or that a mixture of profiles points to a different possible perpetrator. The defendant's rights to due process and the assistance of counsel clearly contemplate such searches, and they are essential to the equitable administration of justice.²⁹⁸ For example, one lawyer in Missouri reported that she represented a man with no prior violent convictions who was "matched" through a "cold hit" in a database to a case in which the government intended to seek the death penalty.²⁹⁹ Noticing that the government had failed to check the database with regard to an intimate sample taken from the victim, the attorney persuaded the laboratory, over the objections of the prosecutor, to run the second profile through the database.³⁰⁰ When the second profile turned up a match to a convicted sex offender, the government dismissed the case against her client.³⁰¹ In the absence of explicit statutory frameworks for granting defense access, however, attorneys should not have to depend on the kindness of government technicians.

3. Greater Government Duties

Given the degree to which the government dominance of the market for forensic science inevitably advantages the government in terms of knowledge and resources about such techniques, the government should assume several duties consistent with the prosecutorial duty to see that "justice be done" rather ³⁰² than to simply win every case.

First, the law should impose upon the government an affirmative duty to disclose any departures from protocol that government analysts undertake in reaching the results at issue in the case.³⁰³ Such an affirmative duty, like the duty of the government to disclose exculpatory evidence to the defense,³⁰⁴ places the obligation to observe and report any deviations from standard practice upon the party best positioned to bring these deviations to the attention of the court. In many cases, the government will be able to justify such departures on the basis of sound scientific practice or evolving standards; nevertheless, the government should identify and report them, rather than leaving to the defense—who is often least well-positioned to notice—the responsibility of uncovering them. Once disclosed, the defense has several options: it may elect to challenge the legitimacy of the technique in light of the modification; argue to the jury that the modification was ill-advised or invalidated the results; or forego use of the information altogether.

This obligation of disclosure is also in keeping with the law-like deference evidentiary rules accord to the findings of validity of a particular methodology.³⁰⁵ Presumably, the court initially admitted results of a particular technique on the premise that the approved technique was executed in a particular case in conformance with general standards. If, however, some "tweaking" or modification was required, then the government has a duty to disclose the deviation—much as an advocate of one position has an obligation to disclose binding contrary authority, or as the government has an obligation to disclose information in its possession that contradicts the statements of its witnesses. In short, the government, rather than the defense's careful review or good luck, should call to attention any deviations from the protocols that garnered acceptance of the method in the first place.

Second, to encourage scientific progress, courts should place upon the government affirmative obligations consistent with the obligations of good science. Although the law's interest in finality, certainty, and consistency tends to value precedent over innovation, these principles ill-serve the enterprise of science, which thrives instead on novelty and experimentation. Rather than entrench methodologies and penalize the government for experimentation, the law should create incentives for the

government to engage in research and *793 development, and bring forward new evidence in support of its techniques.

Accordingly, the government should carry a burden of placing before the court continued evidence of a technique's legitimacy. Rather than render admission of a methodology a one-time question that, once answered, is rarely asked again, the law should affirmatively require the government to provide evidence verifying the technique's continued viability. This is not to say that the government should be expected to reinvent the wheel by conducting full-scale admissibility hearings in every case. Instead, rather than start from an assumption that "no news is good news," this approach would regularly ask "what have you done for me lately?" While the disclosure of new validation studies might not be essential to the continued admission of the methodology, the failure to supply a court with evidence of continued development within the field would, after a substantial amount of time, cause courts to view such evidence with increasing skepticism. Likewise, the absence of evidence demonstrating the methodology's continued validity could alone constitute evidence of its obsolescence, and justify exclusion. In short, whereas courts venerate an ancient legal principle for having stood the test of time, they should greet a similarly antiquated scientific technique skeptically absent evidence of ongoing viability.

Third, rather than simply selecting and advocating for the theory that suits it best, the government should bear a burden of presenting evidence and disclosing results derived from all legitimate, competing theories. Law imposes upon science an unrealistic degree of certainty, and then imparts one result over another without due regard for legitimate conflict.³⁰⁶ Evidentiary rules settle for the "general acceptance" of one method when, in fact, authentic conflict exists,³⁰⁷ and more than one method may have attained a threshold of reliability. In science, it is not unusual that two opposing positions may find equal support in legitimate argument and proof. In such cases, law-like deference to one position at the expense of the other thwarts and distorts the actual state of the science.

Such conflicting, but equally legitimate, methodological approaches merit equal play before a jury. However, the defense is ill-poised, particularly with respect to second-generation techniques, to identify areas of conflict or seek out and retain experts in support of its position. Placing the burden on the *794 government properly acknowledges both the government's domination of forensic science, and the impossibility of bestowing expert assistance upon every defendant in every case. Failure to produce such evidence, like failure to disclose exculpatory information in its possession, could constitute grounds for precluding the evidence altogether.³⁰⁸

By means of illustration, take a question regarding the proper means of calculating the random match probability in a "trawl" case, where the government matched the defendant after making a "cold hit" in a database. At present, there exists reasonable debate regarding the preferred method for calculating the match probability in such cases. As the DNA Advisory Board has explained:

There are alternate methods for assessing the probative value of DNA evidence. Rarely is there only one statistical approach to interpret and explain the evidence. The philosophy and experience of the user, the legal system, the practicality of the approach, the question[s] posed, available data, and/or assumptions all affect the choice of approach.³⁰⁹ For example, some scholars argue for a likelihood ratio that takes into account the size of the database.³¹⁰ Some suggest that the results of a "trawl" are more reliable than in a simple confirmation case, because the analyst has compared the genetic profile to a database and excluded a large number of persons.³¹¹ Some think that a simple "counting method" is most appropriate,³¹² and some contend that the likelihood of a "false positive" increases as the analyst looks in a database for a match, and thus the statistical probability should be accordingly discounted by this risk.³¹³

*795 In the current procedural environment, government lawyers may pick which of these methods they prefer, demonstrate its reliability, and effectively ignore any contrary voices unless specifically raised by an opposing party. In a select few cases, opposing counsel might be knowledgeable or well-resourced enough itself to offer the method favorable to the defense, but in the vast majority of cases, counsel will not undertake to argue or perhaps even know to argue any contrary view. Yet allowing the government to pick its preferred methodology from among legitimate competitors, and leaving to the defense the obligation to uncover alternative theories, saddles the party with the least resources and least access with the burden of introducing an equally valid approach. While such a burden might rightly operate with regard to other forms of evidence, history suggests that, in the lopsided world of forensic science, the defense can rarely bear it well. Rather, bestowing on the government a legal obligation to present all statistical calculations that have any legitimate basis--not just to the fact-finder but also directly to defense counsel--diminishes the risk that institutional inequities or the administrative nature of criminal

process will result in the presentation of misleading scientific evidence.

4. Error and Admissibility

Finally, in every case, courts should consider whether the laboratory generally operates at a sufficient level of competence first as a legal and then as a factual question.³¹⁴ At present, courts typically view the error rates of either the methodology itself or the executing laboratory as factual questions of “weight” to be determined by a jury,³¹⁵ rather than as legal questions of *796 admissibility. As a result, laboratories have little incentive to document their rate of error and courts have still less incentive to require their provision and disclosure.³¹⁶ But as a threshold matter, judges should not admit evidence processed at laboratories that fall below a reasonable standard of operational efficiency. A restaurant that served up roaches in its spaghetti on five earlier occasions is not, after all, a place you would go to eat, no matter how much it assures you that it prepared your meal in a sanitary manner. In the same vein, when a person’s freedom, and not just good digestion, is on the line, a similar standard should apply.

A facility with a demonstrated history of improper storage or handling of evidence, or an inexcusable rate of failure on proficiency tests, simply cannot generate results reliable enough to discount the risk of error, regardless of how meticulously its personnel have performed the tests in an individual case. Moreover, staking admissibility of evidence on a laboratory’s general reliability not only creates incentives on the part of the laboratory to comply with published standards of operation, but it also gives the prosecution a vested interest in competently managing the laboratory, thereby encouraging an oversight role in place of unquestioned allegiance. Finally, if reliability were treated as a threshold question of admissibility, on which the proponent of the evidence carried the burden, then the government would have to submit evidence of the laboratory’s error rate. This requirement would thereby foster the implementation of testing and oversight procedures necessary to quantify such a rate. And, if the question of a laboratory’s threshold competence level is a quintessentially legal one--does this laboratory generally operate at a threshold level of reliability?--then courts would have to set appropriate standards of operational legitimacy. This would have the salutary effect of both articulating such standards, and giving laboratories an incentive to hew to them. Moreover, while earlier decisions finding a particular lab competent may warrant a degree of deference, counsel should always retain the capacity to prove an approved lab unreliable. Similarly, a tainted laboratory might redeem itself by demonstrating that it has instigated changes to remedy a systemic problem.

Regardless, once a laboratory meets the appropriate threshold standard, the courts should nonetheless admit evidence of error as factual evidence for *797 the jury to weight as it deems appropriate. This principle carries particular weight with regard to “cold hit” cases, given that the existence of extrinsic evidence is less likely to compensate for any mistake or error on the part of the testing authorities. Of course, the government, in turn, could introduce mitigating evidence--that any problems or errors in the laboratory are routinely dealt with in a professional and efficient manner, or that the laboratory’s cited errors did not affect the particular case.

Conclusion

Although this Article uses DNA typing to illustrate the problems presented by second-generation technologies and recommend possible means of mitigating them, it also intends to begin a more general conversation about how the criminal justice system will accommodate evidence from the next generation of forensic science--whether the evidence in question is that a cell phone was used at a particular time and place or that data mining uncovers evidence that the defendant perpetrated the crime. The distinct characteristics of second-generation forensic sciences--including their methodological complexity and sophistication, breadth of application, scientific certainty, implications for privacy and proprietary interests, and reliance on databases--elicit a host of concerns that courts, lawyers, and scholars must consider as such evidence continues to infiltrate criminal cases. Moreover, the fact that these technologies have the power to provide strong evidence of an individual’s guilt, even in the absence of any other evidence, makes the task of monitoring the accuracy of such evidence all the more important. The recommendations in this Article attempt to strike an efficient balance among the various competing concerns. In adjusting evidentiary and legal rules to better accommodate the second generation of forensic evidence, this Article aims to fashion a justice system worthy of the innovative forms of evidence that enter into it.

Footnotes

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⁴¹ Assistant Professor of Law, University of California, Berkeley, School of Law (Boalt Hall). J.D., Harvard Law School, 1999. I owe a tremendous debt of gratitude to David Sklansky for his infinite wisdom, patience, and insight, as well as to Frank Zimring, Eleanor Swift, Jan Vetter, Jonathan Simon, and Chuck Weisselberg. Dr. Montgomery Slatkin, Dr. Michael Eisen, and attorney Bicka Barlow also provided generous assistance. Special thanks to Andrea Roth, Todd Edelman, Tim O'toole, and Eliza Platts-Mills for their invaluable contributions throughout the process. This work also benefited from the thoughtful comments of Jennifer Mnookin, Rick Lempert, Sam Gross, Rich Friedman, Brandon Garrett, John Monahan, Laurens Walker, Paul Giannelli, Bill Rubenstein, Ed Cheng, Michael Saks, Bill Stuntz, and especially Carol Steiker. Finally, Ben Wolff, Debbie Won, and Lisa Cisneros provided wonderful research support.

¹ Black's Law Dictionary defines "forensic evidence" as "[e]vidence used in court; esp., evidence arrived at by scientific or technical means, such as ballistic or medical evidence." Black's Law Dictionary 597 (8th ed. 2004). This Article uses "forensic evidence," "scientific evidence," and "forensic science" interchangeably to refer to evidence derived from the application of scientific or technical knowledge.

² See, e.g., Jennifer Frey, *On Crime-Scene Shows, the Science is Arresting*, Wash. Post, Sept. 19, 2004, at N01 ("[S]cience is hip. Science is popular. Science grabs ratings.").

³ Mirjan R. Damaska, *Evidence Law Adrift* 143 (1997).

⁴ In particular, much attention has focused upon the increasing use of empirical evidence to help formulate legal policy. See, e.g., Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 *J. Crim. L. & Criminology* 733, 735 (2000) ("We are calling for a mode of judicial decision-making and academic debate that treats social scientific and empirical assessment as a crucial element in constitutional decision-making, thereby making criminal procedure decisions more transparent."); David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 *Emory L.J.* 1005 (1989). On efforts to mollify the "battle of experts" so often waged in civil court, see, e.g., Samuel R. Gross, *Expert Evidence*, 1991 *Wis. L. Rev.* 1113, 1208 (1991) (proposing reforms designed to improve quality of expert evidence).

⁵ By the phrase "DNA typing" I mean to include both nuclear DNA analysis, which typically examines thirteen locations on the genomic strand for repeating sequences of DNA, as well as mitochondrial DNA typing, which typically sequences two specific regions of the mtDNA strand. See, e.g., *Holmes v. South Carolina*, 126 S. Ct. 1727 (2006) (vacating conviction where state held inadmissible evidence of a third party perpetrator because DNA evidence suggested defendant's guilt).

⁶ "Data mining" typically refers to pattern analysis of large quantities of data, and is perhaps better described as a technique or technology rather than a "science." By way of example, the government may check phone records to isolate individuals who frequently call certain foreign countries, and then cross-check those names against flight registry lists. I also use this term to include more generally the analysis of computer database-generated records.

⁷ A range of location tracking devices are currently in use, including satellite-based Global Positioning System monitoring (through cell phones or electronic bracelets), radio-frequency identification (RFID) tags, or cell-site triangulation (using cell phone signals to approximate location). See, e.g., *United States v. Forest*, 355 F.3d 942, 948 (6th Cir. 2004) (approving cell phone site tracking); *People v. Ricafort*, No. A101531, 2004 Cal. App. Unpub. LEXIS 2500 at *9-10 (Cal. Ct. App. Mar. 18, 2004) (using FasTrak records to document defendant's travel to site of arson on morning of offense); David A. Lieb, *States Seeking to Track Cell Phones for Traffic Conditions*, Associated Press, Oct. 8, 2005 (detailing pilot programs to track drivers through their cell phones).

⁸ "Biometric technologies" here refers to techniques that rely upon computer-generated matches between observed biological characteristics, either between two samples or between a sample and a stored image in a database. Fingerprinting is, in this respect,

a venerated “biometric technology” that, with the advent of databases, has now gone online. Newer forms include facial recognition or iris pattern analyses that compare digitized images to determine the likelihood of identity. See, e.g., *Chambers v. Commonwealth*, No. 2005-CA-000815-MR, 2006 WL 1451566 (Ky. Ct. App. May 26, 2006) (unpublished opinion) (noting that the defendant, who gave a false name on arrest, was identified through an iris scan at the jail); *Facial ID Technology Makes Gains in Florida*, *Organized Crime Dig.*, May 4, 2005 (reporting that use of technology has led to forty-five arrests since implementation nine months earlier); Arthur Kane, *Facial Scanning Targets ID Theft*, *Denv. Post*, Jan. 2, 2005 (describing use of biometrics, including facial recognition as a means of detecting fraudulent identity card applications); Spencer S. Hsu, *D.C. Forms Network of Surveillance*, *Wash. Post*, Feb. 17, 2002, at C1 (describing use of such software during demonstrations, football games, and other large public events); Stephen Thompson, *Facing Security*, *Tampa Trib.*, Feb. 9, 2002, at 1 (describing implementation of facial recognition software at Tampa area airport). I would also include under this heading the use of cameras to record images that are then matched to stored biometric profiles--for instance, a camera in a government building that does not simply record events, but also aims to compare recorded images against images of suspicious persons that are contained in a database.

⁹ Michael J. Saks & Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 *Science* 892, Aug. 5, 2005.

¹⁰ See, e.g., Michael J. Saks, *Merlin and Solomon: Lessons from the Law’s Formative Encounters with Forensic Identification Science*, 49 *Hastings L.J.* 1069, 1097 (1998) [hereinafter *Saks, Merlin and Solomon*] (“After standing unquestioned for most of this century, a re-evaluation of handwriting identification expertise has resulted from the Supreme Court’s decision in *Daubert*.”).

¹¹ See, e.g., Erica Beecher-Monas, *Blinded By Science: How Judges Avoid the Science in Scientific Evidence*, 71 *Temp. L. Rev.* 55, 97 (1998) (“Voice identification also has failed the scientifically valid prong of *Daubert*.”).

¹² See, e.g., *id.* at 86-87 (describing trial court’s rejection of hair evidence for failure to meet standards of validation, despite recognition of “long history of admissibility”).

¹³ *Annotated Scientific Evidence Reference Manual* § 1-3.5.1[2] (Michael J. Saks et al. eds., 2004) [hereinafter *Annotated Scientific*] (identifying “scores of forensic techniques,” including bite mark testing that “might not survive empirical test”).

¹⁴ See, e.g., Jennifer L. Mnookin, *Fingerprint Evidence in an Age of DNA Profiling*, 67 *Brook. L. Rev.* 13, 39-43 (2001) (detailing the uncritical acceptance of fingerprint evidence and chronicling subsequent challenges to the underlying validity of the technique).

¹⁵ Michael J. Saks, *Scientific Evidence and the Ethical Obligations of Attorneys*, 49 *Clev. St. L. Rev.* 421, 424 (2001) (citing statistics from the Innocence Project indicating that unintentional, as opposed to fraudulent, forensic science errors play a factor in 63% of wrongful conviction cases); see also *id.* at 424 (observing that one-fourth of the cases involved fraudulent forensic science errors).

¹⁶ See *infra* notes 149-156.

¹⁷ Terrence F. Kiely, *Forensic Evidence: Science and the Criminal Law* 56 (2006) (reporting that forensic science “along with other evidence, is used circumstantially” to reconstruct the events surrounding the crime).

¹⁸ See *id.* at 136 (noting difficulty of “[e]fficient and correct fiber recovery”).

¹⁹ *Id.* at 180 (acknowledging that “most of the forensic sciences are observational disciplines supported by modern microscopy,” and that “a majority of the forensic sciences do not rest upon any core scientific or mathematical principles”).

²⁰ Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 *Stan. L. & Pol’y Rev.* 381, 425-26 & n.271 (2004) (noting lack of doctoral programs in criminalistics or forensic science in the United States, and only two in

the world); Brendan Koerner, *Under the Microscope*, *Legal Affairs*, July/Aug. 2002 ("An increasing number of forensic scientists hold graduate degrees in chemistry or molecular biology, and rigorous interdisciplinary programs are cropping up at colleges; the University of West Virginia recently offered the nation's first-ever four-year degree in biometrics, the science of identifying humans by unique physical traits like iris patterns and hand geometry. These students, however, typically specialize in newer techniques like DNA testing. Traditional forensics is still dominated by ex-cops and examiners 'educated at the school of hard knocks.'").

²¹ See, e.g., David L. Faigman, *The Tipping Point in the Law's Use of Science: The Epidemic of Scientific Sophistication that Began with DNA Profiling and Toxic Torts*, 67 *Brook. L. Rev.* 111, 117 (2001) (noting ballistics and fingerprinting analysis both result in matching characteristics that are visible); Mnookin, *supra* note 14, at 32-33 (identifying the "cultural plausibility" of fingerprinting science as a contributing factor to its uncritical acceptance); *Developments in the Law --Confronting the New Challenges of Scientific Evidence*, 108 *Harv. L. Rev.* 1481, 1503 (1995) (chiding judges for applying a "show-and-tell" principle of admissibility, whereby a court admits scientific evidence that is intuitively visually comprehensible, such as fingerprint or handwriting, but excludes that which requires interpretation, such as polygraph).

²² Kiely, *supra* note 17, at 6 (noting that "the great number of the traditionally employed forensic sciences are, in effect, based on and centered in close observation, aided by modern microscopy...."); *id.* at 180 (remarking that "a majority of the forensic sciences do not rest upon any core scientific or mathematical principles").

²³ See, e.g., Paul C. Giannelli, *Forensic Science*, 34 *J. L. Med. & Ethics* 310, 311 (2006) (noting "lack of empirical support" for traditional techniques).

²⁴ In this respect, some technologies, both new and old, bridge the first- and second- generation sciences. Old standards like voiceprints or neutron activation analysis, and new techniques such as fMRI imaging or digital cameras, embody some of the characteristics of first-generation sciences and some of the second generation. Fingerprinting might be viewed, in some respects, as an illustrative bridge technology between the first and second generation. Fingerprinting has historically shared the characteristics of the first generation: it was available in a limited number of cases, had little investigative capacity, and was based on very little scientific validation. However, increased attention on validating the methodological underpinnings of fingerprinting techniques has pushed it toward the second-generation category. More importantly, fingerprinting formally entered the second generation with the advent of the Automated Fingerprint Identification System (AFIS), which computerized the record keeping and thus allowed for greater use of printing as an investigative tool. Simon A. Cole, *Fingerprint Identification and the Criminal Justice System*, in *DNA and the Criminal Justice System* 74 (David Lazer ed., 2004) (describing AFIS).

²⁵ Early developers of fingerprinting believed that fingerprints could reveal race, ethnicity, heredity, and other biographical data, including potential criminality. Simon A. Cole, *Suspect Identities* 103-09 (2002) (reporting, for instance, on claims by one French researcher that prisoners showed certain print characteristics more frequently than the general population). Some handwriting analysts also claim the ability to discern facts about individual personality or emotion by studying handwriting. Andre A. Moenssens, *Handwriting Identification in the Post-Daubert World*, 66 *UMKC L. Rev.* 251, 259 (1997) (referring to "graphology," or the study of handwriting to reveal personality traits).

²⁶ Lawrence Kobilinsky, Thomas F. Liotti & Jamel Oeser-Sweat, *DNA: Forensic & Legal Applications* 6 (2005). Compare also, e.g., John M. Butler, *Forensic DNA Typing* 34 (2d ed. 2005) (listing various sources of DNA), with Cole, *Fingerprint Identification and the Criminal Justice System*, in *DNA and the Criminal Justice System*, *supra* note 24, at 73 (outlining limitations of fingerprinting as a forensic technique). In some respects, second-generation techniques can render first-generation methods irrelevant: for instance, where there is a fingerprint or hair evidence or a handwriting sample, there is often sufficient genetic material to conduct DNA typing.⁰

²⁷ See, e.g., Andrew Glazer, *Police Nationwide Train In Analyzing Gang Websites*, Associated Press, July 10, 2006 (describing use of websites by gang members to communicate information about illegal activities).⁰


²⁸ Of course, counternarratives surrounding such evidence may always be constructed. Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 *Yale J. L. & Hum.* 1, 4, 17-22 (1998) (noting that initial enthusiasm for photography as a tool of perfect truth succumbed to reality that photography can be "a potentially misleading form of proof" that is

a “human representation,” rather than simply a “direct transcription” of reality).

²⁹ See, e.g., *People v. Bokin*, No. 168461, slip op. at 15 (Cal. Super. Ct. May 5, 1999) (addressing litigation by defense to obtain data regarding DNA studies against company’s claim that data constituted proprietary information that should not be disclosed). Google recently made the news by contesting a government subpoena aimed at data-mining information from their popular website, claiming that disclosure of such information would “jeopardize its trade secrets.” Katie Hafner & Matt Richtel, *Google Resists U.S. Subpoena of Search Data*, N.Y. Times, Jan. 20, 2006, at A1.

³⁰ See *infra* note 86.

³¹ *Mnookin*, *supra* note 14, at 40. DNA typing has also found application in family court cases, where paternity is at issue, and even in civil matters. See, e.g., *Alabama Tombigbee Rivers Coalition v. Norton*, No. CIV.A.CV-01-S-0194-S, 2002 WL 227032 (N.D. Ala. 2002) (discussing challenge to listing of species on Endangered Species Act that involved DNA testing of contested fish).

³²  *Andrews v. State*, 533 So. 2d 841 (Fla. Dist. Ct. App. 1988).

³³ Law enforcement officers approve the ease with which DNA evidence can be collected, processed, stored, and searched. Prosecutors appreciate its appeal to the public at large and the degree to which it is essentially unassailable in court. Judges welcome the scientific rigor with which it was developed and is usually applied. Even defense lawyers have largely embraced DNA technology and sought wider use of DNA testing as a means of exculpating those wrongly suspected or convicted of offenses. See, e.g., Kiely, *supra* note 17, at 6 (reporting “considerable enthusiasm for the power and potential of twenty-first century scientific advances ... such as DNA research”). Bruce Budowle, director of the FBI lab, has observed wryly that “[o]ne attorney ... had [the] position that thousands of innocent people are in jail because of DNA typing” and “[t]hat same attorney” thinks that “thousands of innocent people are in jail because of no DNA typing.” David Lazer, Introduction: DNA and the Criminal Justice System, in Lazer, *supra* note 24, at 3-4. While Budowle’s observations nicely illustrate both sides of the DNA coin, they fail to acknowledge the significant differences between exculpatory DNA typing and inculpatory DNA typing. The power of DNA evidence to exclude a suspect has never been in serious dispute--by analogy, it is easy to determine that a type AB blood sample did not come from an O+ suspect. But it raises far more contestable issues to conclude that a particular O+ suspect is the precise, or even a probable, source of the sample.

³⁴ Matthew Falloon, *DNA Traps Brick Thrower Who Killed Lorry Driver*, *The Guardian* (London), Apr. 20, 2004.

³⁵ The FBI has recently changed its own information-sharing policies to permit such familial searches in the United States’ national database. See Mark Hansen, *Match Point: How a Denver Rape Probe Got the FBI to Change Policy and Release Kinship DNA*, 92 *A.B.A.J.* 48, Dec. 20, 2006.

³⁶ Automation not only reduces the time associated with processing DNA; it also reduces the costs. Although it is difficult to calculate the precise expense of processing DNA results, some estimates exist. For instance, one report labeled the cost of analyzing a simple, typical rape kit as roughly \$1,100. Nicholas P. Lovrich, Michael J. Gaffney, Travis C. Pratt & Charles L. Johnson, *National Forensic DNA Study Report*, U.S. Dep’t of Justice Grant 2002-LT-BX-K 003 (2003), at 34, <http://www.ncjrs.gov/pdffiles1/nij/grants/203970.pdf> [hereinafter *National Report*]. This estimate includes the costly chemicals or reagents necessary to do the tests, as well as salaries of analysts, but not overhead or equipment. *Id.* Another report listed the cost of an in-house DNA test in a criminal case as \$568.96, while in-house testing of a known offender sample was only \$7.58. Office of State Budget & Management, North Carolina Department of Justice, *Cost Study of DNA Testing and Analysis 7*, Table 4 (2006).

³⁷ Shaila K. Dewan, *As Police Extend Use of DNA, A Smudge Could Catch a Thief*, N.Y. Times, May 26, 2004, at A1. DNA testing in the United States is largely conducted in state or local laboratories. *National Report*, *supra* note 36, at 15 (reporting that 80.1% of law enforcement agencies use a state laboratory to process DNA evidence, 11.7% use a local agency laboratory, and only 2.9% use private laboratories). Currently, state laboratories process an average of 1,284 samples a year, whereas the local laboratories process an average of only 771. *Id.* at 28-29.

³⁸ National Report, *supra* note 36, at 28-29.

³⁹ *Id.*

⁴⁰ Christopher H. Asplen, *The Application of DNA Technology in England and Wales*, U.S. Dep't of Justice (2003), at 15, <http://www.ncjrs.gov/pdffiles1/nij/grants/203971.pdf> [hereinafter *DNA in England*]. FSS processes roughly 30,000 offender samples a month. *Id.*

⁴¹ Alec J. Jeffreys, *Genetic Fingerprinting*, 11 *Nature Med.* No. 10, Oct. 2005, at 1039.

⁴² In a pilot program conducted in the United Kingdom in 2000-2001, experienced LCN technicians responded to all stolen vehicle scenes and swabbed for biological evidence. *DNA in England*, *supra* note 40, at 26. The study showed that experienced technicians were able to recover LCN samples from 51% of the scenes they attended. *Id.* at 27. At present, however, LCN is not typically considered generally accepted for inclusion purposes, because it raises a number of serious sensitivity concerns, although it still has value as a method of exclusion. Kobilinsky, Liotti & Oeser-Sweat, *supra* note 26, at 112-13.

⁴³ The technique of Polymerase Chain Reaction (PCR) allows scientists to amplify genetic material to produce a more readily measurable amount.

⁴⁴ Multiplexing systems now allow DNA analysts to express the genetic information stored at several loci in one simultaneous process, rather than run separate tests for each locus.

⁴⁵ For example, Y-STR typing capitalizes upon the chromosomal differences between men and women to amplify only the male fragment of the forensic sample. Such a technique aids investigators in rape cases, which often involve mixed samples from both a female victim and a male perpetrator. See Kobilinsky, Liotti & Oeser-Sweat, *supra* note 26, at 113-17. Forensic experts are also seeking ways to deconvolve mixtures of profiles from persons regardless of sex. See, e.g., Butler, *supra* note 26, at 525.

⁴⁶ See, e.g., Kobilinsky, Liotti & Oeser-Sweat, *supra* note 26, at 120-21 (noting that mtDNA is useful in examining hair or "items such as teeth and bone, which are often found to contain degraded nuclear DNA" but "can still produce good results because of the high copy number of mitochondrial sequences within").

⁴⁷ Although, one exception may be with respect to child sexual abuses cases. Because there are no consent-based defenses to child sexual abuse, the presence of a defendant's genetic material in the body cavity of a child can more or less conclusively prove a case, even without subjecting a child to the trauma of testifying in court.

⁴⁸ See, e.g., Richard Willing, *DNA Database Used to Help Solve Thefts*, *USA Today*, Oct. 19, 2006, at A1 (describing how in ten states, the "total number of DNA matches in property-crime cases has exceeded the number of matches in violent crime[] [cases]").

⁴⁹ In 2003, the United States lost seventeen billion dollars from nonarson-related property crimes. Press Release, Federal Bureau of Investigation, *FBI Releases Crime Statistics for 2003* (Oct. 25, 2004) (on file with author).

⁵⁰ Bureau of Justice Statistics, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics 130* (2003).

⁵¹ *Id.* at 57.

⁵² *Id.* at 49, 53.

53 Id. at 45, 47.

54 Id. at 11.

55 Id. at 13.

56 Press Release, Forensic Science Service (UK), Forensic Evidence Proves Crucial to Conviction of Serial Rapist, (Mar. 4, 2004), available at http://213.52.171.242/forensic_t/inside/news/list_press_release.php?case=22&y=2004; see also Press Release, Forensic Science Service (UK), National DNA Database Hits 2 Million Mark (July 15, 2003), available at http://213.52.171.242/forensic_t/inside/news/list_press_release.php?case=20&y=2003. (describing a typical month as yielding results in 15 murders, 31 rapes, and 770 car crimes).

57 DNA in England, *supra* note 40, at 13.

58 Virginia Lab Records its 2,000th DNA Cold Hit, Park News, June 11, 2004 [hereinafter Virginia Lab]; see also Virginia Department of Criminal Justice Services, DNA Databank Statistics, available at <http://www.dfs.virginia.gov/statistics/index.cfm> (last visited May 14, 2007) [hereinafter VA DNA Statistics] (reporting that 2,284 of 3,614 investigations aided by database hits were in breaking and entering, burglary, grand larceny, or robbery offenses, whereas only 992 were for rape, murder, and rape/murder combined).

59 The state of Virginia reports that 39% of the violent crimes linked through “cold hits” were linked to offenders who had only previous convictions for property offenses. VA DNA Statistics, *supra* note 58. But see Amitai Etzioni, DNA Tests and Databases in Criminal Justice: Individual Rights and the Common Good, in Lazer, *supra* note 24, at 206 (commenting on the Virginia data and similar data from Florida and England, while noting one journalist’s wry observation that “[i]f a large percentage of rapists receive speeding tickets, would that justify expanding the DNA database to include those with moving violations?”).

60 U.S. Dep’t of Justice, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties* iii (2000).

61 See, e.g., *Maryland v. Pringle*, 540 U.S. 366, 372 (2003) (upholding arrest on probable cause of driver of vehicle in which money and drugs were found secreted in back armrest, noting it a reasonable inference that all three occupants had dominion and control over contraband).

62 See, e.g., *United States v. Winston*, 456 F.3d 861 (8th Cir. 2006) (describing DNA testing of items including gun found in toilet tank, drugs and clothing found in backpack); *Commonwealth v. Squires*, 835 N.E.2d 323 (Mass. App. Ct. 2005) (table) (referencing DNA testing of drug bag); see also *People v. Elder*, No. 248287, 2005 WL 562638, at *5 (Mich. Ct. App. Mar. 10, 2005) (unreported decision) (remarking with regard to ineffectiveness claim that counsel’s belief was not unreasonable that evidence against defendant, which included drugs in a jacket with defendant’s DNA on it, “was strong and that conviction was likely”).

63 See, e.g., *People v. Padilla*, No. B153331, 2002 WL 31518865 (Cal. Ct. App. Nov. 13, 2002) (finding no violation of defendant’s Fourth Amendment rights because defendant had no legitimate expectation of privacy in ejaculated semen provided by girlfriend); Molly McDonough, *Cops Played Lawyer to Get DNA*, A.B.A. J. & Rep., Jan. 27, 2006 (describing court proceedings in *State v. Athan*, No. 75312-1, in which trial court upheld ruse by police, posing as lawyers in fictitious firm, to get defendant’s DNA by mailing him a false letter inviting him to join a class action, and then testing the saliva on the envelope upon its return); see also Richard Willing, *Police Dupe Suspects into Giving up DNA*, USA Today, Sept. 11, 2003, at 3A (describing a range of trickery to obtain DNA samples including posing as “a phony dating service ... [a] public health worker ... a rape counselor ... a Taco Bell worker ... and a diner”); Elizabeth Joh, *Reclaiming “Abandoned” DNA: The Fourth Amendment and Genetic Privacy*, 100 Nw. L. Rev. 857 (2006) (reviewing issue of abandoned DNA and related constitutional issues).

⁶⁴ One study revealed that a major factor in the under-utilization of DNA typing and databasing technology is simple lack of education and awareness. When surveyed about reasons for failing to submit evidentiary samples, 31.4% of laboratories reported that they did not conduct testing because a suspect had not yet been identified. National Report, supra note 36, at 22. Yet, in the words of the study, “[c]learly these ‘no suspect’ cases are exactly the types of crime scene evidence that need to be submitted in order for the DNA database to be effective.” Id. at 18. In the written comments portion of the survey, laboratory remarks demonstrated a lamentable lack of awareness of available resources, with multiple observations that a national DNA database is needed. Id. at 19. In short, the survey revealed that, far more than concerns about funding or backlogs, the major impediment to the investigatory use of databases is simple lack of information about their availability. Id. at 22.

⁶⁵ Dewan, supra note 37, at A1; see, e.g., Nat’l Institute of Justice, Office of Justice Programs, U.S. Dep’t of Justice, DNA in ‘Minor’ Crimes Yield Major Benefits in Public Safety, available at <http://www.ncjrs.gov/pdffiles1/nij/207203.pdf> (Nov. 2004) (reporting that, “[i]n New York, biological evidence from 201 burglaries yielded 86 CODIS-acceptable DNA profiles” and noting success in retrieving evidence from “the sweatband inside a cap, from the inside of a mask, on a cigarette butt, in chewing gum, on a drinking glass, or from a half-eaten sandwich”); see also Richard Willing, DNA Database Used to Help Solve Thefts, USA Today, Oct. 19, 2006 (reporting that the national DNA database “increasingly is being used to identify suspects in unsolved burglaries and other property crimes” according to a USA Today review of state crime labs).

⁶⁶ Virginia likewise reports that, as more officers use and appreciate DNA services, the “amount of evidence submitted by law enforcement for DNA analysis grows by 30 percent every year.” National Report, supra note 36, at 22.

⁶⁷ DNA in England, supra note 40, at 18.

⁶⁸ Thus, for example, whereas in the past the government might not have charged a passenger found in a car with a gun in the trunk, because of lack of evidence linking the two, today the government would charge that passenger if the gun had the passenger’s DNA on it. To make room for that case, the government might not charge the driver found with a gun under his seat—even though in the past that would be the kind of case upon which it would proceed-- due to concern that the lack of DNA evidence renders the case less likely to be successful.

⁶⁹ See, e.g., Richard Willing, “CSI Effect” Has Juries Wanting More Evidence, USA Today, Aug. 5, 2004, at 1A.

⁷⁰ It may also be that “[o]ne consequence of mathematical proof ... may be to shift the focus away from such elements as volition, knowledge, and intent, and toward such elements as identity and occurrence” Laurence H. Tribe, Trial By Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev. 1329, 1366 (1971). Thus, for example, in the case of widespread availability of DNA evidence, the government might elect to bring cases in which the sole question is one of identity--readily established by the DNA evidence--and dispense with those cases that involve questions of intent. Imagine that a prosecutor can only bring thirty cases due to resource constraints. One hundred cases come in, only forty of which have DNA evidence. The prosecutor may choose to bring a handful of non-DNA cases because of pressing concerns raised by the offense or the victim, but the vast majority of the thirty slots are likely to be allocated to the DNA-based cases, even though DNA cases were a minority of the total possible cases brought. The percentage of cases brought with a DNA element (say, 80%) therefore will not mirror the objective percentage of cases with DNA evidence in the world at large (40%).

⁷¹ Of course, the availability of DNA evidence may eventually cause criminals to either take measures to hide their identity or shift to types of crimes in which DNA evidence is less readily obtained. However, while possible, such a result seems implausible, at least on a broad scale. First, many crimes are committed in a manner suggesting little foresight, and by those whose thought is clouded from intoxication. Consider, for instance, the ease with which a robber can hide his identity by putting on a mask, yet hardly every robber is masked. Second, unlike fingerprints or facial features, it is hard to avoid leaving a DNA trail, even when steps are taken to do just that. Butler, supra note 26, at 1-2 (describing a rape case in which defendant had the victim shower to eliminate evidence, but in which investigators recovered saliva cells from a beer can and an amount of semen undetectable to the naked eye from the bed). Finally, because DNA technology applies across a wide variety of cases, it may be less a menable to displacement caused by deterrence, because it would require abstaining from criminality altogether, rather than from a particular crime.

⁷² In fact, recent concerns have arisen over law enforcement’s increasing use of DNA “sweeps” or “dragnets” to collect genetic information. In a “dragnet,” law enforcement officers investigating an offense descend on a community and request voluntary

submission of DNA samples from the entire eligible population. See, e.g., Pam Belluck, To Try to Net A Killer, Police Ask a Small Town's Men for DNA, N.Y. Times, Jan. 10, 2005, at A1. Voluntary contributors to such efforts have later balked at the government's continued retention of the genetic sample after the case is closed. Tim Potter & Stan Finger, Motion Asks: What Happens to DNA?, Wichita Eagle, Mar. 9, 2005 (describing motion to return DNA sample filed by man who submitted DNA in a "dragnet" related to search for BTK killer); Richard Willing, Privacy Issues is the Catch for Police DNA Dragnets, USA Today, Sept. 16, 1998; Keith O'Brien, Men Seek Return of DNA From Serial Killer Search: Some Claim Police Bullied Them for Swabs, New Orleans Times-Picayune, Dec. 28, 2003.

⁷³ For a comprehensive listing of such statutes, see David Lazer & Michelle N. Meyer, DNA and the Criminal Justice System: Consensus and Debate, in Lazer, supra note 24, at 372-73. Unfortunately, the constitutional and statutory limitations on the collection of genetic material, and the proper use of such material, exceed the scope of this article, although scholars and courts have struggled with this very question. See, e.g., United States v. Kincade, 379 F.3d 813 (9th Cir. 2004) (en banc) (upholding statute requiring convicted felons to submit material to DNA database); Nicholas v. Goord, 430 F.3d 652 (2d Cir. 2005) (same); In the Matter of the Welfare of C.T.L., 722 N.W.2d 484 (Minn. Ct. App. 2006) (holding unconstitutional state statute authorizing blanket DNA sampling of charged defendants); Vermont v. Watkins, (Vt. Dist. Ct. App. 24, 2006) (No. 6805-2-04) (invalidating on state constitutional grounds the "suspicionless collection and banking" of DNA samples from all convicted nonviolent felons); see also D.H. Kaye & Michael E. Smith, DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage, 2003 Wisc. L. Rev. 413, 415 (advocating for a population-wide database as the most effective means of preserving privacy and social justice interests). Suffice it to say that many interesting questions, ranging from privacy concerns to the scope of the Fourth Amendment and beyond, arise from the collection, storage, and search of an individual's genetic information.

⁷⁴ See 42 U.S.C. §§ 14131 et seq. (2006). "CODIS" actually refers to the software used to search for information, but it has emerged as a nickname for the database.

⁷⁵ For instance, rules govern what constitutes an appropriate "crime scene" or "forensic unknown" sample, and laboratories cannot load into NDIS any profile of fewer than thirteen loci for convicted offender samples and ten loci for forensic unknowns, National DNA Index System (NDIS), NDIS Standards for Acceptance of DNA Data, at 7, 9 (Jan. 1, 2000) (outlining protocol for DNA typing and setting forth criteria of acceptance). Laboratories must also comply with quality assurance standards issued by a technical working group affiliated with the FBI. Butler, supra note 26, at 441 & App. IV (reproducing DNA Advisory Board Quality Assurance Standards).

⁷⁶ For example, individual states may elect to include profiles extracted in laboratories not qualified to submit material nationally, see, e.g., 502 Ky. Admin. Regs. 32:010(6), available at <http://www.lrc.ky.gov/kar/502/032/010.htm> (last visited May 14, 2007) (permitting submission of samples from laboratories pursuant to state standards); or to store profiles insufficiently complete to qualify for inclusion in the national database. See, e.g., 515 Mass. Code Regs. 2.04 (1987) (permitting loading of six loci profiles into state database, and searches based on four loci); N.Y. Comp. Codes R. & Regs. tit. 9, § 6192.3, available at <http://www.criminaljustice.state.ny.us/legalservices/section6192.htm#3> (last visited May 14, 2007) (setting laboratory testing standards at national level, but allowing profiles to be loaded with only six loci).

⁷⁷ CODIS Statistics Clickable Map - NDIS Statistics, FBI, available at <http://www.fbi.gov/hq/lab/codis/clickmap.htm> (last visited May 14, 2007). In the United Kingdom, the FSS claims it has effectively loaded the profiles of the entire "criminally active population." Home Office (UK), Forensic Science and Pathology Unit, DNA Expansion Programme 2000-05: Reporting Achievement 3 (2005-2006) (reporting achievement in 2004 of goal of obtaining DNA of "criminally active population," estimated at roughly 2.5 million).

⁷⁸ Id.

⁷⁹ See Tracey Maclin, Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?, 33 J.L. Med. & Ethics 102, 104 (2005) (detailing history of Virginia collection statutes, which have "led the nation in DNA database expansion").

⁸⁰ Virginia Department of Criminal Justice Services, DNA Databank Statistics, available at <http://www.dfs.virginia.gov/statistics/index.cfm> (last visited May 14, 2007).

⁸¹ CODIS Statistics Clickable Map - Virginia Statistics, FBI, available at <http://www.fbi.gov/hq/lab/codis/va.htm> (last visited May 14, 2007). Notably, these numbers do not include databases kept at the state level, which are often more expansive because they need not comply with federal laws in processing or reporting information.

⁸² Press Release, Attorney General Lockyer Announces More than 1000 Hits Obtained Through Cal-DNA Database (Oct. 27, 2004) (on file with author).

⁸³ CODIS Measuring Success, FBI, available at <http://www.fbi.gov/hq/lab/codis/success.htm> (last visited May 14, 2007). "Cold hits" can be either an offender-to-scene match, meaning a known offender fits an unknown profile recovered at a crime scene, or a scene-to-scene match, meaning that the profile derived from an unknown sample from one crime scene matches an unknown, but identical, sample found at another crime scene.

⁸⁴ Virginia Lab, *supra* note 58; Karin Brulliard, Va. Gets U.S. Funds for DNA Backlog, Wash. Post, Sept. 22, 2004, at B01 (reporting that as of July 31, law enforcement in Virginia had found suspects in over 2,000 cases in which there was no evidence--including 1,200 burglaries and robberies--through their DNA database).

⁸⁵ Brulliard, *supra* note 84; see also Amitai Etzioni, DNA Tests and Databases in Criminal Justice, in *DNA and the Criminal Justice System*, *supra* note 24, at 200. California likewise reports one cold hit a day. Bureau of Forensic Serv., California Dep't of Attorney Gen'l, available at <http://caag.state.ca.us/bfs/> (last visited May 14, 2007).

⁸⁶ New York State Division of Criminal Justice Services, DNA Case Highlights, available at <http://criminaljustice.state.ny.us/forensic/dnacasehighlights.htm> (describing case of Bryan R. Hawkins in Monroe County).

⁸⁷ Courts have not reached consensus on the question whether genetic evidence, without more, suffices to support a conviction. See, e.g., *Roberson v. State*, 16 S.W.3d 156, 170 (Tex. Crim. App. 2000) (observing that "the perils of eyewitness identification testimony far exceed those presented by DNA expert testimony" and affirming that verdict can be based on DNA alone); *People v. Rush*, 672 N.Y.S.2d 362, 363 (App. Div. 1998) (upholding conviction based only on DNA evidence, even given that complainant misidentified defendant at trial, and rejecting argument that DNA is not "infallible" and thus cannot stand alone because "[v]irtually no evidence is absolutely conclusive"). In the United Kingdom, the Court of Appeal quashed the conviction of a man found guilty by a jury solely on the basis of genetic evidence indicating that the random match probability of his genetic profile to the evidentiary sample was about one in four million; based on those statistics, the court concluded that he was one in seven to ten males in the United Kingdom with such a profile. Mike Redmayne, *Rationality, Naturalism, and Evidence Law*, 2003 Mich. St. L. Rev. 849, 879-80 (2003) (citing *R v. Lashley*, an unreported case discussed in Mike Redmayne, *Appeals to Reason*, 65 Mod. L. Rev. 19 (2002)). Professor Redmayne noted that the accused also had no connection to the area. *Id.* The Supreme Court has previously held that an uncorroborated confession, without more, cannot support a conviction. *Smith v. United States*, 348 U.S. 147, 152 (1954).

⁸⁸ See, e.g., David Snyder, DNA Links Ga. Man to Md. Rapes, Wash. Post, Apr. 27, 2005, at B5 (describing how a profile entered into the national database by a New York lab turned up "matches" to a string of rapes in the late 1980s in Maryland, as well as two rapes in the New York area in the earlier 1970s).

⁸⁹ See, e.g., Edward J. Imwinkelreid, *The Relative Priority that Should Be Assigned to Trial Stage DNA Issues*, in *DNA and the Criminal Justice System*, *supra* note 24, at 94-95 (listing states where legislators have proposed John Doe legislation, along with those in which prosecutors have sought such warrants even without express legislative authorization).

⁹⁰ Butler, *supra* note 26, at 446; see also Veronica Valdivieso, *DNA Warrants: A Panacea for Old, Cold Rape Cases*, 90 Geo. L.J. 1009 (2002) (discussing John Doe warrants).

⁹¹ See David Lazer & Michelle N. Meyer, DNA and the Criminal Justice System: Consensus and Debate, Lazer, *supra* note 24, at 379. Others have observed that “[t]racking database hits and prioritizing case management must become a high priority,” as there exists “inadequate data on which to judge the overall effectiveness of DNA data banking programs.” Frederick R. Bieber, Turning Base Hits into Earned Runs: Improving the Effectiveness of Forensic DNA Databank Programs, 34 J. L. Med. & Ethics 222, 222 (2006).

⁹² See, e.g., VA DNA Statistics, *supra* note 58.

⁹³ In Virginia, for example, a survey conducted in 2003 of the outcome of the first 1000 cold hits revealed that 100 resulted in convictions through plea or trial, 7 yielded not guilty verdicts, and 53 were never prosecuted; 752 were pending at the time of the survey. VA DNA Statistics, *supra* note 58.

⁹⁴ Frank Green, Patterson is Executed, DNA Comparison Led to Conviction in Slaying, Richmond Times Dispatch (VA), Mar. 15, 2002, at B1 (reporting on execution of James Earl Patterson).

⁹⁵ See, e.g., State v. Scarborough, 201 S.W.3d 607, 624-25 (Tenn. 2006); Hartsfield v. State, 200 S.W.2d 813 (Tx. Ct. App. 2006); State v. Hunter, 2006 WL 2790248 (Ohio Ct. App. Sept. 29, 2006); People v. Harrison, 2005 WL 2429974 (N.Y. App. Div. Oct. 4, 2005), appeal denied, 843 N.E. 2d 1162 (2005); see also David Lazer & Michelle N. Meyer, DNA and the Criminal Justice System: Consensus and Debate, Lazer, *supra* note 24, at 379 (reporting that a 2001 study of New York’s first 102 cold hits found that four had resulted in convictions and that charges were pending in fourteen others, but there was no data about the remaining cases).

⁹⁶ Regina v. Adams, [1997] 1 Crim. App. 377 (A.C.).

⁹⁷ Melinda DeSlatte, Jury Hears Testimony of DNA Evidence in Derrick Lee Todd Case, Sun Herald (So. Miss.), Oct. 5, 2004.

⁹⁸ *Id.*

⁹⁹ Tom Jackman, Va. Man Receives Life Sentence for ‘92 Slaying: Va. DNA Database Led Police to Suspect Eight Years After Shopkeeper’s Death, Wash. Post, at B02. In another Virginia case, a man was arrested and charged for a rape that occurred twenty-two years earlier. David Stegon, DNA Cold Hit Leads to Rape Charge, Manassas Journal Messenger, Jan. 11, 2005.

¹⁰⁰ Notably, there are presently over 500,000 backlogged evidentiary samples believed to be amenable to testing, in homicide, rape, and property crime offenses. National Report, *supra* note 36, at 14.

¹⁰¹ Ake v. Oklahoma, 470 U.S. 68 (1985); see also Caldwell v. Mississippi, 472 U.S. 320 (1985).

¹⁰² 488 U.S. 51 (1988).

¹⁰³ *Id.* at 57-58. The Supreme Court recently granted a stay of execution, only to then deny certiorari, in a capital case petition filed by Kenneth Starr, the former Solicitor General of the United States, regarding the destruction of DNA evidence. Lovitt v. True, 545 U.S. 1152 (2005) (granting stay), cert. denied Lovitt v. True, 126 S. Ct. 400 (2005) (Mem.). The death sentence was later commuted to life without parole by the governor. David Stout, Clemency Stops an Execution in Virginia, N.Y. Times, Nov. 30, 2005, at A19.

¹⁰⁴ Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 Calif. L. Rev. 877, 885-87 (1998) [hereinafter Walker & Monahan, *Social Facts*]. Daubert subscribes to the same basic structure, finding "conclusions and methodology" to implicate distinct interests. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 595 (1993) (placing "the focus, of course ... solely on principles and methodology, not on the conclusions that they generate"). But see *GE v. Joiner*, 522 U.S. 136, 146 (1997) (breaking down distinction and observing that "conclusions and methodology are not entirely distinct from one another"). Professor Michael Saks, examining the criminal law, finds maintenance of the distinction between conclusions and methodology beneficial, and subdivides the inquiry one degree further:

At the highest level of abstraction are scientific theories, the basic concepts underlying and explaining a field's empirical knowledge. One step down are general applications of the theory, that is, broad applications to the real world of procedures, techniques, relationships, or measures that follow from the theory. At the most concrete level are specific applications of the field's knowledge, tools, and procedures to the case at bar.

Michael J. Saks, *The Aftermath of Daubert: An Evolving Jurisprudence of Expert Evidence*, 40 *Jurimetrics J.* 229, 233-347 (2000) [hereinafter Saks, *Aftermath*]; see also David L. Faigman, Elise Porter & Michael J. Saks, *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying About the Future of Scientific Evidence*, 15 *Cardozo L. Rev.* 1799, 1822, 1827 (1994). By illustration, with regard to DNA typing: the "scientific theory" underlying DNA typing is that the cells of human beings contain genetic material that is unique to each individual and capable of evaluation. The "general application" of the theory is that, for example, polymerase chain reaction or capillary electrophoreses effectively express the results of genetic typing. Finally, the "specific application" refers to the effectiveness of executing the technique in a specific case.

¹⁰⁵ See *Daubert*, 509 U.S. at 593 ("[S]ubmission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected."). Indeed, the Daubert Court specifically defined good science as that which is subject to "falsifiability, or refutability, or testability." *Id.* at 593 (quoting K. Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* 37 (5th ed. 1989)).

¹⁰⁶ *Daubert*, 509 U.S. at 593.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 596.

¹⁰⁹ Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 *Va. J. Soc. Pol'y & L.* 439, 458-62 (1997).

¹¹⁰ *Cole*, *supra* note 24, at 268-74.

¹¹¹ See, e.g., Giannelli, *supra* note 109, at 442-468 (analyzing a range of "sciences" and associated scandals); *Cole*, *supra* note 24, at 281 (noting that "the first external proficiency tests on American police fingerprint laboratories" resulted in only 44% of examiners scoring perfectly, while 22% reported false positives; in later tests, the false positive rate ranged from 3% to 15%).

¹¹² Beecher-Monas, *supra* note 11, at 73; see also Saks, Merlin and Solomon, *supra* note 10, at 1132 (commenting on "the lack of other institutions (such as academia or industry) where competition or critical evaluation might create incentives for improved knowledge as well as improved technique").

¹¹³ Saks, Merlin and Solomon, *supra* note 10, at 1092.

¹¹⁴ See Giannelli, *supra* note 109, at 470 & n.182 (reporting that 79% of crime laboratories are governed by law enforcement).

- ¹¹⁵ Annotated Scientific, *supra* note 13, § 1-3.5.1[2] (observing that the conceptions of “peer review” and “publication” as centerpieces of scientific validity, as expressed in Daubert, are not very rigorous in the forensic disciplines); cf. John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. Pa. L. Rev. 477, 500 (1986) (characterizing scientific findings made in-house and unpublished as “highly suspect”).
- ¹¹⁶ Faigman, Porter & Saks, *supra* note 104, at 1829; Paul C. Giannelli, *The Supreme Court’s “Criminal” Daubert Cases*, 33 Seton Hall L. Rev. 1071, 1101 & nn.173-74 (2003) (referring to case rejecting toolmark testimony because it lacked true peer review in that “law enforcement technicians” wrote the relevant validating studies).
- ¹¹⁷ Saks & Koehler, *supra* note 9, at 893 (observing the “cultural difference between normal science and forensic science” and cautioning that “[w]hen individuals who are not steeped in the culture of science work in an adversarial, crime-fighting culture, there is a substantial risk that different set of norms will prevail”); see also Saks, Merlin and Solomon, *supra* note 10, at 1093 & n.109.
- ¹¹⁸ One commentator succinctly identifies the eight problems of forensic laboratories as: government monopoly, government budgetary dependence, poor quality control, inappropriate information sharing between the government and technicians, insufficient distinction between the analytical and interpretive function, lack of an adequate number of defense experts, lack of a competitive custom among those experts that exist, and public ownership of laboratories. See Roger Koppl, *How to Improve Forensic Science*, 20 Eur. J. L. & Econ. 255, 257 (2005).
- ¹¹⁹ See Saks, Merlin and Solomon, *supra* note 10, at 1092. Of course, lack of resources also contributes to this phenomenon.
- ¹²⁰ Kenneth G. Furton, Ya-Li Hsu, and Michael D. Cole, *What Educational Background Do Crime Laboratory Directors Require From Applicants?*, 44 J. Foren. Sci. 128, 129-31 (1999) (reporting findings of survey of crime lab directors that, for all positions combined, 63% required a B.S. and 27% a B.A., and for firearms, document, or fingerprint examiners, 17% of directors required no college-level degree of any kind); see also Joseph L. Peterson, Steven Mihajlovic & Joanne L. Bedrosian, *The Capabilities, Uses, and Effects of the Nation’s Criminalistics Laboratories*, 30 J. Forensic Sci. 10, 18 (1985) (reporting that in 1982, 48% of laboratory personnel held a bachelor’s degree, and 17% had not finished college).
- ¹²¹ See Saks, Merlin and Solomon, *supra* note 10, at 1091-92; see Mnookin, *supra* note 14, at 40-43. For example, many commentators have observed that forensic sciences such as fingerprinting readily lend themselves to both validity and proficiency testing, and yet the discipline has wholly failed to conduct full-scale studies in either respect.
- ¹²² Saks & Koehler, *supra* note 9, at 894 (noting that “blind tests are practically nonexistent”); see also Beecher-Monas, *supra* note 11, at 84.
- ¹²³ Saks, Merlin and Solomon, *supra* note 10, at 1093-94.
- ¹²⁴ Eric Lander, *DNA Fingerprinting on Trial*, 339 Nature 501, 505 (1989).
- ¹²⁵ Joseph L. Peterson, et al., *The Feasibility of External Blind DNA Proficiency Testing. II. Experience with Actual Blind Tests*, 48 J. Forensic Sci. 32, 38 (Jan. 2003) (reporting that, in one of five labs tested, “police contact person revealed the plans for the blind test to laboratory management”).
- ¹²⁶ For example, a “defense” testing and research center might do everything from independently checking and verifying government analysis, to conducting its own analysis of evidence, to undertaking studies aimed at challenging government orthodoxies.
- ¹²⁷ However, few government labs will accept testing requests from defendants. One study of 300 crime laboratories concluded that “fifty-seven percent ... would only examine evidence submitted by law enforcement officials.” Giannelli, *supra* note 148, at 1331

(quoting Joseph L. Peterson, Steven Mihajlovic & Joanne L. Bedrosian, *The Capabilities, Uses, and Effects of the Nation's Criminalistics Laboratories*, 30 *J. Forensic Sci.* 10, 13 (1985)).

¹²⁸ Giannelli, *supra* note 109, at 470, 473; see also Giannelli, *supra* note 162, at 117-18.

¹²⁹ Saks, Merlin and Solomon, *supra* note 10, at 1092-93.

¹³⁰ Saks & Koehler, *supra* note 9, at 893 (“All [forensic science] experts are tempted, many times in their careers, to report positive results when their inquiries come up inconclusive, or indeed to report a negative report as positive.”) (quoting A.A. Moenssens, 84 *J. Crim. L. & Crimol.* 1, 17 (1993)); Michael Risinger, Michael J. Saks, William Thompson & Robert Rosenthal, *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 *Calif. L. Rev.* 1, 27-41 (2002) (describing susceptibility of forensic analysts to bias from government influence).

¹³¹ Kobilinsky, Liotti, & Oeser-Sweat, *supra* note 26, at 104. But see Barry Steinhardt, *Privacy and Forensic DNA Data Banks, in DNA and the Criminal Justice System*, *supra* note 24, at 173 (rejecting the term “junk DNA” because it may turn out that these loci in fact code for some useful purpose).

¹³² For instance, Applied BioSystems, which develops technology for DNA typing, and Orchid Cellmark, a leading private DNA lab, employ the law firm of Smith Alling Lane to promote its interests in government. Chris Asplen, a vice president at the firm, in turn has played a major role in advancing the prevalence of DNA typing. According to the company’s website, Mr. Asplen “worked closely with both Attorney Generals [sic] Reno and Ashcroft to develop DNA policy for the Department of Justice,” has “testified before numerous state and city legislative bodies,” and “testified before Congress to help appropriate over \$160 million for forensic DNA testing.” See Gordon, Thomas, Honeywell, Staff, <http://www.sai.gov.com/Staff.html#4> (last visited May 14, 2007). With regard to another company, one independent scientist described how, although he purchased DNA-typing analysis software from a private company, the company twice refused to allow him to enroll in their software training course, because he was not government-affiliated. Dr. Simon Ford, Lexigen Science and Law Consultants, *Lecture at the Public Defender Service for the District of Columbia* (2002).

¹³³ See, e.g., Butler, *supra* note 26, at 97 (describing “[t]wo primary vendors for STR kits used by the forensic DNA community” as “Promega Corporation ... and Applied Biosystems”); *id.* at 359-63 (describing various instruments used to perform capillary electrophoreses and their manufacturers, along with software used to interpret data).

¹³⁴ See Butler, *supra* note 26, at 100-01 (comparing Promega corporation, which published its primer sequences, with Applied Biosystems, which “has repeatedly refused to release the primer sequences ... claiming that this information is proprietary”). Applied Biosystems claimed that “they would lose revenue if generic brand products were produced by other entities using the revealed primer information.” *Id.* Jennifer N. Mellon, *Notes, Manufacturing Convictions: Why Defendants are Entitled to the Data Underlying Forensic DNA Kits*, 51 *Duke L.J.* 1097, 1099 (2001) (reviewing the resistance to discovery exhibited by private DNA kit manufacturing companies and arguing for greater disclosure).

¹³⁵ See, e.g., *State v. Traylor*, 656 N.W.2d 885, 900 (Minn. 2003) (“[W]e hold that disclosure of the primer sequences and unlimited access to Perkin-Elmer’s validation studies are not necessary for the scientific community to validate the Profiler Plus and Cofiler kits and, therefore, that [the defendant’s] due process right to a fair trial has not been violated.”).

¹³⁶ See, e.g., Lynda Hurst, *Bio-security Still a Fantasy*, *Toronto Star*, Jan. 24, 2004, at A1 (noting missteps in development of biotechnology, and reporting that the “proprietary right on the algorithm used in iris scanning is held exclusively” by a New Jersey company that is considering a request to open up the technology).

¹³⁷ Katie Hafner & Matt Richtel, *Google Refuses to Hand Over Search Data to US*, *Int’l Herald Trib.*, Jan. 20, 2006.

¹³⁸ For instance, population geneticists might very well have great interest in research using such data, but at present are foreclosed

access. Interview with Dr. Montgomery Slatkin, Professor of Integrative Biology, University of California, Berkeley (Mar. 3, 2006).

¹³⁹ The rules of discovery often limit the scope of mandatory disclosure to that which is used in the particular case. For example, Federal Criminal Procedure Rule 16 requires the government to provide only a description of “the witness’s opinions, the bases and reasons for those opinions, and the witness’s qualifications.” Fed. R. Crim. P. 16(a)(1)(G). Thus, counsel’s requests can fall on deaf ears. See Beecher-Monas, *supra* note 11, at 78; Paul C. Giannelli, Criminal Discovery, Scientific Evidence, and DNA, 44 Vand. L. Rev. 793, 816 (1991) (discussing need for greater discovery of “predicate materials” underlying DNA evidence and concluding that “the rules do not require adequate discovery”); Pat Smith, Hearings Begin in DNA Discovery Spat, The Recorder (San Francisco), Feb. 2, 2005 (describing hearing in which public defenders sought jurisdiction-wide order allowing broader than case-only discovery). Indeed, the defendant in one case received “greater discovery under the FOIA [Freedom of Information Act] after his trial than he could have received under Rule 16 prior to trial.” Giannelli, *supra*, at 816 (referring to *United States v. Stifel*, 594 F. Supp. 1525, 1528, 1531-38 (N.D. Ohio 1984)).

¹⁴⁰ See, e.g., William C. Thompson & Simon Ford, DNA Typing: Acceptance and Weight of the New Genetic Identification Tests, 75 Va. L. Rev. 45, 105 (1989) (citing *People v. Wesley*, 140 Misc.2d 306, 239-30 (Albany County Ct. 1988), and describing defense challenge countered by government’s introduction of previously unpublished and undisclosed studies); see also Saks, Merlin and Solomon, *supra* note 10, at 1092-93 (noting that the defendant has little access to those few studies generated by government scientists).

¹⁴¹ See, e.g., Jim Bronskill, Passports to Get ‘Biometric’ Scan, Toronto Star, July 24, 2006, at A4 (reporting complaints with regard to Canada’s adoption of biometric technologies for passport security, including that “We don’t really know much about how these databases get made and who is programming them”).

¹⁴² See, e.g., Henry T. Greely, Daniel P. Riordan, Nanibaa’ A. Garrison, & Joanna L. Mountain, Family Ties: The Use of DNA Offender Databases to Catch Offenders’ Kin, 34 J. L. Med. & Ethics 248 (2006); Frederick H. Bieber, Charles H. Brenner & David Lazer, Finding Criminals Through DNA of Their Relatives, 312 Science 1315-16 (June 2006).

¹⁴³ Pilar N. Ossorio, About Face: Forensic Genetic Testing for Race and Visible Traits, 34 J. L. Med. & Ethics 277, 278, 283 (2006) (adding that it may also predict an individual’s surname).

¹⁴⁴ Many states have inadequately defined privacy laws, which seem to leave the door open for some measure of use or study by third parties, or for non-law-enforcement purposes. See Steinhardt, *supra* note 131, at 175-80. Yet the breadth of most of these statutes allows law enforcement, or other public officials, to use the database for non-law-enforcement purposes. To the extent that they authorize non-law-enforcement usages, it tends to be limited to “humanitarian purposes” or missing persons identification. Most states lack an organized regime through which defense-oriented research entities (non-law-enforcement and non-public officials) can gain access to government databases. The wide range of vague and confusing statutory requirements leaves unclear the parameters for a private researcher. See Seth Axelrad, Survey of DNA Database Statutes, American Society of Law, Society & Ethics, available at http://www.aslme.org/dna_04/grid/statute_grid.html (last visited May 14, 2007).

¹⁴⁵ Given that roughly 80% of defendants in the criminal justice system are indigent, see William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 28 (1997), there simply does not exist a robust, paying consumer base for consistent and widescale defense work. For instance, one expert reported that he was able to conduct useful, albeit informal, studies regarding DNA transfer only because a wealthy defendant for whom the study might prove beneficial subsidized his work. See William C. Thompson, Simon Ford, Travis E. Doom, Michael L. Raymer & Dan E. Krane, Evaluating Forensic DNA Evidence: Essential Elements of a Competent Defense, The Champion, Apr. 2003, at 26.

¹⁴⁶ There do exist a handful of individual academics and scientists willing to entertain defense-side consulting work and review government reports with an objective eye, but of course they are still restricted to the data disclosed by the government. Perhaps the most successful such entity is one established in 2002, which consists of an automated analysis service, available at a reasonable price to defense advocates, that provides an independent review of a CD-ROM of the government’s raw data. See Forensic Bioinformatics, <http://bioforensics.com> (last visited May 14, 2007). This service provides defense counsel with a

thorough report of all of the genetic information recorded during testing, rather than just the government's gloss on the "relevant" information, and highlights possible problem areas. Because this service reviews cases from a wide variety of labs, and a broad array of cases within a lab, it also has produced a data set from which research conclusions may be analyzed, and has a limited potential, if used consistently, to spot recurrent or systemic errors, at least as regards the raw data.

¹⁴⁷ In fact, in many jurisdictions, a defendant had no right to obtain physical evidence in control of the state for purposes of independent testing. In specific response to the availability of DNA testing, many legislatures have granted to defendants a legal entitlement to testing both pre-trial and post-conviction. See, e.g., D.C. Code § 22-4133 (2006); Helen Dewar & Dan Morgan, Senate Approves Bill on Victims' Rights: Both Chambers Tackle Busy Agendas, *Wash. Post*, Oct. 10, 2004, at A05 (reporting on passage of federal law appropriating funds for defense DNA testing). However, this right to test is second to the government's right: if the government elects to test, and such testing consumes the sample, the defendant typically cannot claim violation of that right. Nevertheless, some courts grant the defendant's request to have a defense expert present during testing that is likely to consume the entire sample.

¹⁴⁸ See, e.g., *People v. Bokin*, No. 168461, slip op. at 15 (Cal. Super. Ct. May 5, 1999) (holding DNA inadmissible because laboratory analyst's bias in favor of prosecution went "beyond advocacy" to indicate outright hostility to defense function); Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert*, *Post-DNA World*, 89 *Cornell L. Rev.* 1305, 1396 (2004) (describing, in the context of DNA analysis, that "[w]hen faced with an ambiguous situation, where the call could go either way, crime lab analysts frequently slant their interpretations in ways that support prosecution theories") [hereinafter Giannelli, *Ake v. Oklahoma*]; see also Janet C. Hoefel, Note, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 *Stan. L. Rev.* 465, 499-500 (1990) (describing how "[a]nalyzing biological evidence and testifying about it in court has become an extremely lucrative business" in which the chief aim is to "sell ... to crime laboratories in the U.S.>").

¹⁴⁹ William C. Thompson, *Tarnish on the 'Gold Standard': Understanding Recent Problems in Forensic DNA Testing*, *The Champion*, Jan./Feb. 2006, at 10-12 (listing scandals); Mnookin, *supra* note 14, at 49-50 (describing case of Raymond Easton, who was arrested and charged after officers linked him through a "cold hit" that matched his DNA at six loci, but released based on testing of additional loci conducted after it was revealed that illness prevented him from having committed the crime); see also Maryann Spoto, *Murder, Rape Charges Dropped Due to Botched DNA Evidence*, *Star-Ledger* (Newark), Feb. 7, 2006, at 28 (reporting that cold hit case must be dropped because the analyst who made the match had examined evidence from the old case, along with a new case involving the defendant, on the same day, raising the possibility of cross-contamination); Annie Sweeney & Frank Main, *Botched DNA Report Falsely Implicates Woman; Case Compels State to Change How It Reports Lab Findings*, *Chi. Sun-Times*, Nov. 8, 2004, at 18 (noting that a laboratory forensic profile "matched" woman, based on what ultimately turned out to be only partial match, was revealed erroneous when woman, after arrest on warrant, was shown to be incarcerated at time of offense).

¹⁵⁰ Paula McMahon, *Crime Lab Botches Murder Inquiry: Prosecutors Must Drop Charges after DNA Evidence is Contaminated*, *Sun-Sentinel* (Ft. Lauderdale, FL), June 24, 2003, at 1A (announcing dropping of murder and robbery charges due to "someone squeezing the eye-dropper into the wrong vial" and noting disagreement regarding whether government or defense attorney caught error); Keith Paul, *Audit Calls for Changes in Police DNA Lab*, *Las Vegas Sun*, May, 23, 2002, at 1 (reporting results of audit conducted after independently hired defense expert caught forensic lab in mistakenly labeling DNA typing results with name of innocent man).

¹⁵¹ Consider a case that recently arose in Michigan. There, the DNA of a grown man turned up in the testing of evidence related to a thirty-six-year-old murder case. On its face, the evidence appeared reasonable and reliable. But because the man, who was four at the time of the murder, lived one hundred miles away from the scene and would have somehow had to drop blood on the deceased victim for the profile to appear, the evidence raised suspicions. And, in fact, a broader review of the laboratory records revealed that the man's DNA was being tested by the very same laboratory around the same time as the evidence was processed in the old case. Although the analysts insisted that no contamination had occurred, and the age of the man at the time of the offense precluded any argument that he murdered the woman, it is easy to imagine a different outcome had the evidence been from a contemporaneous crime. See, e.g., Teresa Mask, *How Jurors See DNA Evidence May Decide Unsolved Killing: 1969 Slaying Trial Continues Today*, *Detroit Free Press*, July 19, 2005.

¹⁵² Ralph Blumenthal, *In Texas, Oversight for Crime Labs is Urged*, *N.Y. Times*, Jan. 5, 2005, at A18.

¹⁵³ Steven Hepker, *DNA Test Results Still a Mystery*, *Jackson Citizen Patriot*, Jan. 19, 2005 (describing thirty-six-year-old murder

case in which DNA testing revealed profile of apparent culprit, as well as an utterly unrelated, then four-year-old boy); see also *infra* note 156 (describing the famous Leskie case in Australia, in which genetic testing matched a profile on a murdered child's bib to a clearly unrelated rape victim whose sample had been tested by the same analyst in the preceding weeks).

¹⁵⁴ Vic Ryckaert, Judge Asked to Halt DNA Retests: Crime Lab Less Than Candid About Cases Under Review, Attorney Says, *The Indianapolis Star*, Aug. 13, 2003, at 1B (describing fall-out from publication of prosecutor's request that crime lab retest DNA evidence in sixty-four cases believed compromised by analyst); Keith Matheny, Supervisor Accused of Passing Off DNA Test, *Traverse City Record-Eagle*, Dec. 19, 2004 (detailing internal investigation of supervisor in Michigan State Police Crime Lab DNA unit that had a subordinate take a proficiency test for him); Glenn Puit, Police Forensics: DNA Mix-up Prompts Audit at Lab, *Las Vegas Review-J.*, Apr. 19, 2002, at 1B (discussing audit at Las Vegas laboratory after switched names on DNA profiles led to year-long imprisonment of "suspect"); DNA Testing Mistakes at the State Patrol Crime Labs, *Seattle Post-Intelligencer*, July 22, 2004 (cataloguing a series of errors ranging from cross-contaminations samples across and within cases, including a vaginal sample with semen of positive control, along with other errors). Not even the private laboratories have proven exempt from such corruption. See, e.g., Rick Orlov, Lab Used by LAPD Falsified DNA Data, *L.A. Daily News*, Nov. 19, 2004, at N1 (describing dismissal of Sarah Blair from Orchid Cellmark, after allegations that she manipulated DNA data); Jeff Coen & Carlos Sadovi, Crime Lab Botched DNA Tests, *State Says*, *Chi. Trib.*, Aug. 19, 2005, at C1 (noting that Illinois state police found numerous errors in results reported from Bode Technology, an independent lab based in Virginia).

¹⁵⁵ Richard Willing, Mueller Defends Crime Lab After Questionable DNA Tests, *USA Today*, May 1, 2003, at 3A (noting that purported quality control guidelines did not catch technician's failure to run negative controls in 100 DNA cases, caught only when coworker revealed the problem). Questions have also arisen about work done by the Virginia state crime lab, one of the leading laboratories in the country in the DNA field. See, e.g., Maurice Possley, Steve Mills & Flynn McRoberts, Scandal Touches Even Elite Labs: Flawed Work, Resistance to Scrutiny Seen Across U.S., *Chi. Trib.*, Oct. 21, 2004, at C1.

¹⁵⁶ See Leskie Bib Puts Science in the Dock, *The Age*, Nov. 22, 2004, available at <http://www.theage.com.au/articles/2003/11/21/1069027328463.html?from=storyrhs>.

¹⁵⁷ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993).

¹⁵⁸ *Daubert*, 509 U.S. at 596. *Daubert* replaced the longstanding standard of admissibility in federal courts enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Daubert*, 509 U.S. at 585-89. In the wake of *Daubert*, which applied only to federal courts, many states, some of which have evidentiary rules modeled on the federal rules of evidence, adopted its standards. See David E. Bernstein & Jeffrey D. Jackson, *The Daubert Trilogy in the States*, 44 *Jurimetrics J.* 351, 355-56 (2004) (observing that by mid-2003, roughly twenty-seven states had adopted a test consistent with *Daubert*); cf. *Minor v. State*, 914 So.2d 372, 400 (Ala. Crim. App. 2004) (noting state's continued adherence to *Frye* doctrine, except as regards DNA evidence, which state law requires to be evaluated pursuant to *Daubert*).

¹⁵⁹ *Daubert*, 509 U.S. at 593-94. Some scholars note that *Daubert* actually enumerated five criteria, because the question of error rate is analytically distinct from that of elucidated standards or protocols.

¹⁶⁰ Indeed, the *Daubert* Court seemed expressly to duck the question, noting that "[a]lthough the *Frye* decision itself focused exclusively on 'novel' scientific techniques, we do not read the [Federal Rules of Evidence] requirements ... to apply specially or exclusively to unconventional evidence." *Id.* at 592 n.11. The Court went on to assume that "well-established propositions are less likely to be challenged than those that are novel, and they are more handily defended," and observed that "theories that are so firmly established as to have attained the status of scientific law ... properly are subject to judicial notice." *Id.*

¹⁶¹ *Id.*

¹⁶² See, e.g., Saks, *Aftermath*, *supra* note 104, at 232 (noting the "long practice, especially among state supreme courts, which have had considerable experience with expert evidence over the past century, of treating decisions about the admissibility of scientific

evidence as a matter of law"); Annotated Scientific, *supra* note 13, § 1-3.8 (same). While this is the established system in the criminal law context, it has only recently been extended to the civil law context. Seeking evidentiary rules that balance fluidity (the individual treatment of a case) with stability (consistency and efficiency), Professors John Monahan and Laurens Walker put forth a functional and textual analysis to argue that methodological questions are more "law-like," whereas questions involving the application of methodologies are more "fact-like." See Laurens Walker & John Monahan, *Scientific Authority: The Breast Implant Litigation and Beyond*, 86 Va. L. Rev. 801, 802, 819-21 (2000) [hereinafter Walker & Monahan, *Breast Implant Litigation*]; Walker & Monahan, *Social Facts*, *supra* note 104, at 877, 888-90; Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 Va. L. Rev. 559, 559-60 (1987) [hereinafter Walker & Monahan, *Social Frameworks*]; Monahan & Walker, *supra* note 115, at 479. Professors Monahan and Walker initially limited their proposals to the use of social scientific evidence in the civil arena, although they briefly nodded to the use of empirical evidence to establish, for example, community standards of decency in criminal obscenity trials. Walker & Monahan, *Social Facts*, *supra* note 104, at 880-81. Recently, however, they have advocated the extension of their argument to the hard sciences, as well. Walker & Monahan, *Breast Implant Litigation*, *supra*, at 803 (proposing to "extend our earlier work" by applying their scientific authority model, "which was limited to social science research," to hard science questions resolved by science panels).

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See, e.g., *Hayes v. State*, 660 So.2d 257, 262-64 (Fla. 1995) (vacating death sentence founded on unreliable DNA evidence after taking "judicial notice" of the National Research Council's 1992 forensic science report and citing cases in other jurisdictions); *Commonwealth v. Crews*, 640 A.2d 395, 400 (Pa. 1994) (rejecting defendant's complaint regarding trial court's "reliance on judicial decision from other jurisdictions to establish the scientific community's general acceptance of DNA testing");

United States v. Porter, 618 A.2d 629, 635 (D.C. 1992) (conducting appellate review of admission of DNA evidence and noting that "[i]n doing so, we may consider not only expert evidence of record, but also judicial opinions in other jurisdictions, as well as pertinent legal and scientific commentaries"). Professor Saks likewise observes that law-like treatment of forensic evidence includes applying *de novo* review to admissibility decisions, judicial approval of opinions based upon on extrinsic sources, and categorical deference to binding precedent finding a particular methodology admissible. Saks, *Aftersmath*, *supra* note 104, at 232.

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See, e.g., *United States v. Havvard*, 117 F. Supp. 2d 848, 854 (S.D. Ind. 2000), *aff'd* 260 F.3d 597 (7th Cir. 2001) (accepting fingerprint evidence despite lack of scientific testing because they "have been tested for roughly 100 years" by "adversarial proceedings"); *People v. Palmer*, 145 Cal. Rptr. 466, 472 (Cal. Ct. App. 1978) (approving gunshot residue evidence based upon a scan of literature in field).

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See, e.g., *Porter*, 618 A.2d at 635 (D.C. 1992); *United States v. Beasley*, 102 F.3d 1440, 1448 (8th Cir. 1996) ("[W]e believe that the reliability of the PCR method of DNA analysis is sufficiently well established to permit the courts of this circuit to take judicial notice of it in future cases"); *People v. Chandler*, 536 N.W. 2d 799, 803 (Mich. Ct. App. 1995) ("Courts of this state may continue to take judicial notice of the admissibility of the RFLP method of DNA testing, including the statistical analysis"); see also *People v. Richie*, No. B158254, 2005 WL 1340382, *8 (Cal. Ct. App. 2005) (granting appellant's request to take judicial notice on appeal of four more recent scientific studies in support of position, because "we can consider scientific literature outside the record to determine whether a scientific technique is generally accepted"); cf. *United States v. Iron Cloud*, 171 F.3d 587, 591, 593 (8th Cir. 1999) (reversing and remanding for evidentiary hearing on admissibility of scientific methodology, based upon appellate judicial notice of cases calling the methodology into question).

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See, e.g., *United States v. Morrow*, 374 F. Supp. 2d 51, 67 (D.D.C. 2005) ("A laboratory's error rate is a measure of its past proficiency and is of little value in determining whether a test has methodological flaws.... What the defendant has sought to do here is challenge the proficiency of the tester rather than the reliability of the test. Such challenges go to the weight of the evidence, not its admissibility.") (internal quotation omitted); *State v. Adams*, 817 N.E.2d 29, 48 (Ohio 2004), cert. denied, 544 U.S. 1040 (2005) (noting "reliability inquiry relates to the validity of the underlying scientific principles, not the correctness of the expert's conclusions"). The Court in *Morrow* identified three possible types of error: "(1) a laboratory's past error rate; (2) the error rate that results if an analyst follows the ... protocol and uses properly calibrated instruments in the specific case at hand; and (3) the possibilities of human error in the specific case at hand." *Morrow*, 374 F. Supp. 2d at 66-67. Regarding the first type of error--what might be considered the "generally sloppy lab" argument--the Court noted that the past error rate might not be admissible at all because it might be propensity evidence, and if admissible, would be relevant only to the weight of the evidence at hand. The last type of error, the "lab was sloppy in this case" error, would be admissible only as to weight, unless the sloppiness in

the case was so grave that it undermined the reliability of the methodology altogether. Id. at 68.

¹⁶⁷ See, e.g., *People v. Funston*, No. C032472, 2002 WL 313198, *4 (Cal. Ct. App. 2002) (unpublished opinion) (finding no error in trial court's exclusion on prejudicial/probative grounds the exclusion of evidence that lab had twice in 277 case reviews made reports that turned out to be "false positives," where trial court reasoned that "the question is one of relevance" and "the fact [that the lab] made errors in the past is not probative" of the issue whether it erred in the instant case); cf. Dale A. Nance & Scott B. Morris, *Juror Understanding of DNA Evidence: An Empirical Assessment of Presentation Formats for Trace Evidence With a Relatively Small Random-Match Probability*, 34 *J. Legal Studies* 395, 435 n.61 (2005) (noting question whether error rates constitute impermissible character evidence, without taking a position, and citing Edward J. Imwinkelried & D. H. Kaye, *DNA Typing: Emerging or Neglected Issues*, 76 *Wash. L. Rev.* 413, 461-63 (2001)).

¹⁶⁸ In fact, the Court had previously denied certiorari in a criminal case that would have raised the same issue. Paul C. Giannelli, "Junk Science": The Criminal Cases, 84 *J. Crim. L. & Criminology* 105, 110 & n.33 (1993) (observing that the Supreme Court denied certiorari in a criminal case in which DNA evidence was admitted, *United States v. Jakobetz*, 955 F.2d 786 (2d Cir.), cert. denied, 506 U.S. 834 (1992)). In the remand of *Daubert*, Judge Kozinski ruefully observed that the Court's newly announced criteria would pose unconsidered problems for forensic evidence. *Daubert*, 43 F.3d at 1317 n.5; Giannelli, *supra*, at 109 ("Despite the highly visible efforts to reform the rules governing experts in the civil arena, the 'junk science' debate has all but ignored criminal prosecutions."). Perhaps wary of this prediction, a bill circulated unsuccessfully in Congress that exempted criminal evidence from the proposed codification of the *Daubert* test. H.R. 988, 104th Cong., 1st Sess. (1995). Nevertheless, empirical evidence suggests that "whereas civil defendants prevail in the *Daubert* challenges, most of the time criminal defendants ... lose." Peter J. Neufeld, *The (Near) Irrelevance of Daubert to Criminal Justice: And Some Suggestions for Reform*, 95 *Am. J. Pub. Health*, S107, S109 (2005).

¹⁶⁹ 28 U.S.C. § 519 (2006).

¹⁷⁰ Cf. Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Social Change*, 9 *Law & Soc'y Rev.* 95 (1974).

¹⁷¹ See *Daubert*, 509 U.S. at 592 n.10 (citing *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987)). The rules do not specifically place the burden upon the proponent, but that is who it falls to naturally.

¹⁷² By contrast, in civil cases the perceived problem is the opposite: there is an abundance of experts able and willing to testify to "any" opinion. See, e.g., Gross, *supra* note 4, at 1129-30 ("[E]xpert witnesses are too readily available"); *id.* at 1130 ("Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount.") (quoting *Winans v. New York & Erie R.R.*, 62 U.S. (21 How.) 88, 101 (1858)).

¹⁷³ Prosecutors retain wide discretion in almost every aspect of their work, from charging to resource allocation to tactical decisions. See generally Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 *J. Crim. L. & Criminology* 717, 736-37 (1996) (demonstrating that "unreviewed discretion is the norm" for prosecutors).

¹⁷⁴ Indeed, one need not subscribe to a dark view of prosecutors to think they might make such choices; the prosecutor who believes in the integrity of the scientific technique, as such a proponent should, would logically choose a less formidable adversary or atmosphere if for no other reason than to prevent unnecessary expenditure of time and effort.

¹⁷⁵ See Steven K. Smith & Carol J. DeFrances, *Indigent Defense*, at 2, Bureau of Justice Statistics, Feb. 1996 (describing "ad hoc" appointment system); see also Carol J. DeFrances, *State-Funded Indigent Defense Services*, 1999, at 2-3, Bureau of Justice Statistics (Sept. 2001) (commenting that "[t]he decentralized and diverse ways of delivering indigent defense services make collecting information nationwide difficult." and identifying the three primary mechanisms as public defender systems, assigned counsel, and contract appointments). In one study of the twenty-one states that funded 90% or more of their public defense services (as opposed to relying upon federal or local funding), only sixteen states had a state-centralized public defense program; the

remaining three states had devolved control to local branches. *Id.* Even within states with centralized programs, at either the local or national level, the central public defender office may not handle all cases. *Id.* at 3 (reporting that nineteen of the twenty-one states also used ad hoc assigned counsel programs, and eleven of the twenty-one states also used contract programs).

¹⁷⁶ Indeed, at least preliminary data bears this out. In his study of federal and state court challenges to expert evidence, Professor Risinger observed that “[t]he most striking contrast between the state and federal numbers is the prosecution’s higher loss rate in state courts.” D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 *Alb. L. Rev.* 99, 111-12 (2000) (citing the expert win rates of the government in criminal cases as 90% in the federal system, and 75% in state courts). Professor Risinger attributes this difference in part to the difference in the types of cases brought in state versus federal court. *Id.* However, the greater resources and geographic dispersion of federal prosecutors versus state prosecutors can perhaps also explain the disparity. With more resources and options at their disposal when putting forth scientific evidence, federal prosecutors naturally succeed at a higher rate. To the contrary, at a local or state level, prosecutors have fewer resources and options. Similarly, the defense response is perhaps strongest and best coordinated at the local level.

¹⁷⁷ See *supra* Part II.A.

¹⁷⁸ See *Giannelli, Ake v. Oklahoma*, *supra* note 148, at 1386 (“There is a special need for outside experts when novel scientific evidence is introduced. Paradoxically, there is often a lack of defense experts in these cases precisely because the procedure is new.”).

¹⁷⁹ Judges further view the lack of controversy in the field as proof that the principle is sound and well-accepted, rather than as possible evidence of “absence of vigorous inquiry, an impoverished research tradition, lack of resources, or stagnation.” Saks, Merlin and Solomon, *supra* note 10, at 1135 (“In many of the cases we have reviewed, the courts were presented with only one-sided questions regarding the adequacy of a given kind of asserted scientific evidence. Prosecutors typically offered the novel forensic science and defendants typically offered no reply of substance. The courts in these cases often said they were impressed at the ‘uncontradicted’ expert testimony.”).

¹⁸⁰ Model Code of Prof’l Responsibility Canon 7 (1969).

¹⁸¹ The defense cannot subvert the zealous pursuit of a single client’s defense even to the greater good of all defendants generally.

¹⁸² See Walker & Monahan, *Social Frameworks*, *supra* note 162, at 583-84 (noting that factual treatment of social science evidence, requiring “[t]he same testimony about the same research studies ... in case after case” is “an inefficient use of court time”); see also Saks, *Aftermath*, *supra* note 104, at 233 (criticizing the Supreme Court’s decision in *Joiner* in part because “it is inefficient to allow parties to relitigate the same general question over and over”); cf. Annotated Scientific, *supra* note 13, § 1-3.8 (“Once a higher court determines, on the scientific merits, that a ... forensic identification technique can do what it purports to do (unless there is a change in the state of scientific knowledge), there is not much sense in allowing the same question to be revisited by the trial courts in case after case.”).

¹⁸³ In contrast, the Supreme Court in *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), announced that the abuse of discretion standard governed appellate review of trial courts’ admissibility decisions. *Id.* at 141-43. In applying this standard, the Court bestowed upon lower courts the deference traditionally reserved for partly factual determinations, even while recognizing the potential for them to reach different decisions with regard to the same evidentiary admissibility issues. *Id.* at 142.; see, e.g., Beecher-Monas, *supra* note 11, at 78 & n.153; Saks, *Aftermath*, *supra* note 104, at 233. In this regard, Professor Saks has observed that the abuse of discretion standard of review announced in *Joiner* technically permits one court to uphold the legitimacy of a majority-endorsed technique, while another court finds the minority-endorsed technique legitimate, thereby leaving the public baffled. Saks, *Aftermath*, *supra* note 104, at 234; see also Janet C. Hoefel, *The Sixth Amendment’s Lost Clause: Unearthing Compulsory Process*, 2002 *Wis. L. Rev.* 1275, 1324 (2002) (“The second effect of the *Daubert* trilogy is that lower courts are deciding the same issues differently. A particular expertise or scientific method may be admitted in one court and denied in another.”).

¹⁸⁴ See, e.g., Annotated Scientific, supra note 13, § 1-3.8 (agreeing that a higher court revisiting admissibility determinations makes no sense “unless there is a change in the state of scientific knowledge”). Cf. United States v. Leon, 468 U.S. 897, 927 (1984) (Blackmun, J., concurring) (agreeing with majority’s view of social science evidence introduced in support of outcome, but describing the court’s decision as “a provisional one” subject to reconsideration should experience call into question the empirical assumptions upon which the decision rested). Of course, where evidence is excluded, incentives remain high to improve upon the science and try again. See, e.g., Walker & Monahan, Breast Implant Litigation, supra note 162, at 823 (relating trial court’s rejection of plaintiff’s scientific evidence, in which court discouraged blind “precedential effect” but rather encouraged revisiting the question “in the event that new and conclusive studies emerge”). Finally, it should be noted that some forensic science admissibility questions are decided by statute, thus obviating this concern altogether. See Paul C. Giannelli, Admissibility of Forensic Science Evidence, 28 Okla. City U. L. Rev. 1, 5 (2003) (describing various forensic techniques, including hypnosis, battered-wife syndrome, DNA, and polygraph evidence that received legislative validation).

¹⁸⁵ Unfortunately, “reducing the variability and dynamism across cases severely limits the opportunities for adversarial testing of diverse scientific evidence and experts across cases and over time.” David S. Caudill & Richard E. Redding, Junk Philosophy of Science? The Paradox of Expertise and Interdisciplinarity in Federal Courts, 57 Wash. & Lee L. Rev. 685, 750 (2000).

¹⁸⁶ See Saks, Merlin and Solomon, supra note 10, at 1131-32 (“Fundamental new discoveries risk raising judicial doubts about all that had gone before, and what the future may reveal about the present. No advances means raising fewer doubts. We have seen examples of forensic identification sciences ... that have been largely frozen in time, with little if any fundamental progress since their foundational appearances in court.”). Similarly, “the law’s desire for finality not only impedes the disclosure of available science, but also militates against the open communication and exchange that lead to the production of new scientific knowledge.” Sheila Jasanoff, Transparency in Public Science: Purposes, Reasons, Limits, 69 J. L. & Contemp. Probs. 21, 40 (2006).

¹⁸⁷ Of course, there are some situations in which the government may desire progress or change. For instance, the government might prod scientific inquiry in response to a persuasive attack made by defense lawyers on the basis of a technique’s shortcoming, or a court’s adverse ruling on admissibility, or the prospect of increasing a technique’s forensic capacity.

¹⁸⁸ Again, the history of scientific evidence in the criminal justice system, even of the low-tech variety, suggests that the vast majority of counsel do just that. Giannelli, supra note 168, at 114-15 (describing “junk science” testimony on future dangerousness and observing that one expert testified up to 127 times without meeting meaningful opposition); Saks, supra note 15, at 431 (citing study indicating that “out of 90 state court opinions in which handwriting identification evidence was proffered there was not a single challenge to the admissibility of the forensic handwriting examiners”); see also Saks, Merlin and Solomon, supra note 10, at 1132-33 & n.347 (describing freedom with which forensic scientists usually testify, even to baseless propositions, because there is no academic or commercial community to hold them accountable and lawyers fail to attack). Indeed, studies have shown that the defense calls an expert in only a small percentage of cases. In a survey of appellate court cases decided after Daubert over a span of six years, one scholar found only 213 state court challenges to the prosecution’s scientific evidence, and eighty such challenges in federal court. Risinger, supra note 176, at 125; see also Stuntz, supra note 145, at 42 (citing study of appointed counsel in New York City, which revealed that the defense used experts in only 17% of homicide cases, and in only 2% of other felony cases).

¹⁸⁹ Annotated Scientific, supra note 13, § 1-3.5.1[2] (“It appears that historically [defense] lawyers brought few challenges to the basic validity of a wide range of techniques routinely relied on by prosecutors.... [T]he lawyers mainly assumed that these experts could do what they claimed they did.”).

¹⁹⁰ Stuntz, supra note 145, at 15, 21.

¹⁹¹ One scholar remarks that under-litigation in the criminal field “could be the result of a couple of factors,” including that “criminal defense lawyers ... have seen little profit” from such challenges, due to the lack of judicial receptivity. David L. Faigman, The Law’s Scientific Revolution: Reflections and Ruminations on the Law’s Use of Experts in Year Seven of the Revolution, 57 Wash. & Lee L. Rev. 661, 661 n.2 (2000). Moreover, “most criminal defense work is conducted by over-worked, underpaid, and under-resourced public defenders,” whereas “[c]hallenging forensic science expert testimony is a time-intensive and expensive proposition.” Id. Thus, “[p]ublic defenders simply might not have the time and money to do it effectively.” Id.

¹⁹² For instance, rather than challenge the DNA recovered in a rape case, counsel might point to the location of recovery (for instance, a stain on the bed versus in the living room) as evidence that the sex was consensual. In the highly publicized O.J. Simpson trial, the defense argued that certain aspects of a blood stain on the socks of the defendant suggested police tampering, rather than exclusively relying upon an argument questioning the DNA typing results. See Richard Lempert, *After the DNA Wars: Skirmishing with NRC II*, 37 *Jurimetrics J.* 439, 444-46 (1997).

¹⁹³ See, e.g., Gerald Lynch, *Our Administrative System of Criminal Justice*, 66 *Fordham L. Rev.* 2117, 2121 (1998) (noting that “[m]eaningful statistics are elusive” with regard to the rate of plea bargaining, but that “there is no real dispute that ... the vast majority of cases are disposed of without a formal trial”).

¹⁹⁴ Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 *U. Pa. L. Rev.* 506, 563 (1973).

¹⁹⁵ Lynch, *supra* note 193.

¹⁹⁶ *Daubert*, 509 U.S. at 596.

¹⁹⁷ Saks & Koehler, *supra* note 9, at 893.

¹⁹⁸ *Id.*

¹⁹⁹ See *supra* text accompanying notes 149-156.

²⁰⁰ *Commonwealth v. Crews*, 640 A.2d 395, 402 (Pa. 1994); see also Giannelli, *Ake v. Oklahoma*, *supra* note 148 (describing testimony of analyst in the first DNA execution case, *Spencer v. Commonwealth*, who claimed, without contradiction, that there was “no disagreement in the scientific community about the reliability of DNA print testing” even though two National Academy of Science reports indicated several large areas of disagreement).

²⁰¹ Alok Jha, *DNA Fingerprinting ‘No Longer Foolproof’: Pioneer of Process Calls for Upgrade*, *The Guardian* (London), Sept. 9, 2004, at 5. Even though different DNA-typing methods such as VNTR versus STR typing have different degrees of discriminatory power, greater than three loci are necessary to determine uniqueness. Committee on DNA Forensic Science, National Research Council, *The Evaluation Of Forensic Dna Evidence* 161, 34 (1996) [hereinafter *NRC II*].

²⁰² See, e.g., Steve McVicker, *More DPS Labs Flawed: DNA Testing Woes Across State Threaten Thousands of Cases*, *Houston Chron.*, Mar. 27, 2004, at A1 (describing audits revealing widespread failures at forensic laboratories across Texas, initiated after DNA retesting of biological evidence revealed that an analyst at the Houston laboratory falsely inculpated a convicted man); Adam Liptak, *You Think DNA Evidence is Foolproof? Try Again*, *N.Y. Times*, Mar. 16, 2003, § 4, at 5 (discussing exoneration of Josiah Sutton, whom an analyst at the Houston crime lab wrongfully inculpated); Thompson, *supra* note 149; Butler, *supra* note 26, at 390 (discussing Sutton case and Houston scandal).

²⁰³ Thompson, *supra* note 149.

²⁰⁴ For example, early DNA cases allowed testimony regarding the testing and sampling, as well as testimony that the two samples “matched,” but refused to admit statistical evidence due to lack of general consensus in the community. See, e.g., *Commonwealth v. Crews*, 640 A.2d 395, 401-02 (Pa. 1994); *State v. Bible*, 858 P.2d 1152, 1193 (Ariz. 1993). The reasoning in such cases often mirrors that expressed by the Crews majority, which likened “match” testimony to testimony saying “I saw a blue Chevrolet run over this dog.” *Crews*, 640 A.2d at 402-03. According to the Crews court, even though the testimony cannot establish that it was the defendant’s blue car, it remains “useful, admissible identification evidence.” *Id.* The

difference, of course, is that jurors sitting in the dog homicide trial can rely upon their intuitive or experiential knowledge about the frequency of blue Chevrolets in the area to assign weight to the evidence; for instance, jurors in Detroit might assign different probative value to such evidence than jurors in San Francisco. To the contrary, a juror who first hears testimony that every person's DNA is unique, and then hears evidence from a DNA analyst who reports that the DNA in the suspect's sample "matched" the forensic sample, can infer only that in fact the forensic sample came from the defendant. In this sense, such testimony may in fact be more damaging than the evidence warrants. Absent personal knowledge concerning the frequency of certain genetic profiles in the population, the juror simply has no other independent or experiential knowledge upon which to rely in determining the significance of the "match" statement.

205 Consider, for instance, the enormous backlash that attended the trial court's decision in *United States v. Plaza*, which held aspects of fingerprinting evidence insufficiently reliable after application of the Daubert test. 188 F. Supp. 2d 549 (E.D. Pa. 2002), withdrawn from bound volume but available at 2002 WL 27305, at *19 (noting that the government may introduce evidence attesting to uniqueness of fingerprints and to similarities between the latent print and that of the suspect, but precluding "testimony expressing an opinion of an expert witness that a particular latent print matches, or does not match, the rolled print of a particular person and hence is, or is not, the fingerprint of that person"). Ostracized as obtuse and unsophisticated, and lambasted for breaking with one hundred years of precedent, the trial court eventually determined to save face and reverse course despite the wealth of scholarship supporting the court's initial conclusion. *United States v. Plaza*, 188 F. Supp. 2d 549, 576 (E.D. Pa. 2002) (vacating earlier opinion). As an aside, the second *Plaza* opinion illustrates nicely the import the government places upon admissibility rulings in a regime that accords them law-like precedence, and the pressures that prosecutorial watchfulness in turn imposes upon courts. In its motion for reconsideration in *Plaza*, the government argued not only with regard to its "prosecutorial effectiveness" in the case at bar, but also pleaded that "other cases in which fingerprint identification could be expected to play a significant role ... would be seriously compromised by the preclusion of [the requested] opinion testimony." *Id.* at 552-53. Thus, in effect, the government premised its argument for admission not only on the facts of the case at bar, but on its fear of the widespread repercussions of an opinion precluding the introduction of such testimony. Incidentally, the *Plaza* opinion also illustrates well the difficulty in fixing with specificity the preferred form of proof-taking in admissibility decisions. In its reconsideration opinion, the trial court claimed benefit from materials outside the record; however, the judge felt constrained to earmark them as such. *Id.* at 554 (interposing a "Historical Note (not drawn from testimony)"). Moreover, the court highlighted the particular importance of live testimony as one of the decisive factors in its decision to reconsider. *Id.* at 575 (observing that one of the witnesses at the reconsideration hearing, FBI print unit chief "Stephen Meagher, heretofore a name in a transcript, became a real person, and through his live testimony I was able to get a substantially more rounded picture of the procedure").

206 *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974). In the words of one scholar, "disputing the technology is like disputing the law of gravity." Hoeffel, *supra* note 148, at 466. As stated by a defense lawyer confronting DNA typing evidence, "[w]hen an expert comes in and says there's a one in 700 million chance that your man is not the one ... it just kills you." *Id.* at 466 n.10. Thus, in the aftermath of the trial of the first man in New York state to be convicted in part based upon DNA-typing evidence, one juror observed, "The DNA was kind of a sealer on the thing. You can't really argue with science." *Id.* at 515 & n.297.

207 *Daubert*, 509 U.S. at 601 (Rehnquist, J., concurring). Justice Rehnquist, of course, coined this phrase as an expression of skepticism at the propriety of having federal court judges resolve complicated scientific disputes, many of which remain unresolved by experts in the field. That debate, regarding the capacity of judges to render decisions with regard to highly technical evidence, continues to rage. See, e.g., Faigman, *supra* note 191, at 684 (looking with optimism into "the next twenty years or so," in which "lawyers and judges will become increasingly sophisticated consumers of science").

208 Of course, that would violate the ethical rules. See, e.g., William H. Simon, *The Ethics of Criminal Defense*, 91 Mich. L. Rev. 1703, 1703 (1993) (recognizing the ethical obligation of criminal defense counsel zealously to pursue defense even of guilty client, while doubting ethical propriety of "aggressive defense" tactics); David Luban, *Are Criminal Defenders Different?*, 91 Mich. L. Rev. 1729, 1729 (1993) (arguing that institutional considerations require criminal, but not civil, defense lawyers to pursue aggressive tactics). But see Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument From Institutional Design*, 104 Colum. L. Rev. 801, 801 (2004) (arguing that scarce defense resources should be allocated upon express, rather than covert, bases such as "factual innocence").

209 Anecdotal evidence suggests that just this is happening. The methodologies underlying DNA-testing techniques have been robustly challenged in only a handful of cases; in the first appellate criminal case challenging the admissibility of DNA evidence, the

defense called no experts. ²⁰⁹ *Andrews v. State*, 533 So. 2d 841, 847 (Fla. Dist. Ct. App. 1988); Hoeffel, *supra* note 148, at 499 & n.193 (describing how, after the introduction of DNA evidence in 1987, “there were no expert witnesses for the defense” in “many” cases involving DNA typing, up until the landmark hearing in *People v. Castro*, No. 1508/87 (N.Y. Sup. Ct. 1989)). Challenges to the application of these technologies may receive even less scrutiny. See also Risinger, *supra* note 176, at 125 (noting that only two of 213 federal court cases studied posed direct, rather than derivative, challenges to the DNA evidence, and in only 44% of the state court cases and 18% of the federal court cases were there any challenges to DNA evidence at all). Data regarding the challenges mounted by defense attorneys to the execution of the testing--which would be reflected in cross-examination rather than by an admissibility hearing--are harder to come by.

²¹⁰ In the words of one court:
DNA printing is a highly complex process which only a trained expert fully understands. Without this understanding, defense counsel cannot properly prepare for trial, or understand appropriate avenues to question results or cross-examine experts testifying for the prosecution. Without special training, the defense would be at the mercy of the prosecutor’s expert, unable to discern weaknesses in the procedures used or in the interpretation of results.
Jay A. Zollinger, Comment, Defense Access to State-Funded DNA Experts: Considerations of Due Process, 85 Calif. L. Rev. 1803, 1812 (1997) (quoting *Tennessee v. Edwards*, 868 S.W.2d 682, 697-98 (Tenn. Crim. App. 1993)) (internal quotation marks omitted)). It is worth noting that the lack of outside assistance is often not readily compensated for by the availability of government experts, because many government scientists refuse to accommodate defense requests for assistance. See *supra* note 140.

²¹¹ Giannelli, *supra* note 148, at 1312 (citing numerous studies demonstrating that “[j]udges routinely deny lawyers’ requests for expert/investigative fees” even in capital cases (internal quotation omitted)).

²¹² See, e.g., *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985); see also Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, *Criminal Procedure*, § 11.2 & nn. 180-84 (2d ed. 1999).

²¹³ *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985). Many states, along with the federal government, implement the constitutional right to expert assistance statutorily. For example, the Criminal Justice Act provides for expert assistance to indigent federal defendants when “necessary for an adequate representation.” See, e.g., 18 U.S.C. § 3006A(e)(1) (2006). As many commentators have noted, expert assistance is frequently difficult for an indigent to obtain. See, e.g., John F. Decker, *Expert Services in the Defense of Criminal Cases: the Constitutional and Statutory Rights of Indigents*, 51 U. Cin. L. Rev. 574 (1982); Giannelli, *supra* note 148, at 1365.

²¹⁴ See, e.g., *Little v. Armontrout*, 835 F.2d 1240, 1244 (8th Cir. 1987); see also Thompson & Ford, *supra* note 140, at 52 (describing DNA evidence as “unusually complex, requiring a complicated series of procedures, drawn from molecular biology” which may require “lawyers ... to consult experts in a variety of fields, including population genetics, chemistry, and microbiology”).

²¹⁵ Zollinger, *supra* note 210, at 1812-13 (citing *Cade v. Florida*, 658 So.2d 550, 555 (Fla. Dist. Ct. App. 1995); *North Carolina v. Mills*, 420 S.E.2d 114, 118 (N.C. 1992); *Taylor v. Texas*, 939 S.W.2d 148, 151 (Tex. Crim. App. 1996)).

²¹⁶ See *supra* note 36.

²¹⁷ Saks, Merlin and Solomon, *supra* note 10, at 1092 & n.112.

²¹⁸ At a minimum, a skilled reviewer must have broad access to the laboratory’s contamination logs and corrective action files, laboratory protocols, maintenance logs, proficiency testing results, caseworker files, and so on. See, e.g., Giannelli, *supra* note 139, at 815-16 & n.152 (explaining need for more extensive discovery in DNA cases).

- ²¹⁹ See, e.g., David A. Lieb, *States Seeking to Track Cell Phones for Traffic Conditions*, Associated Press, Oct. 8, 2005 (detailing pilot programs to track drivers through their cell phones and explaining tracking technology).
- ²²⁰ See Press Release, Department of Justice, *Former FBI Biologist Pleads Guilty to Filing False DNA Laboratory Reports* (May 18, 2004). Specifically, negative controls are blank injections designed to safeguard against and expose any contamination that might have occurred in the testing process. If a blank comes back with stray material, then the analyst knows that the results of a test, especially of an "unknown," may be the result of contamination. Rather than run blank injections, however, Ms. Blake apparently substituted a completed file in 103 cases, and misrepresented that copied file as a blank run in the case. See Maurice Possley, Steve Mills & Flynn McRoberts, *Scandal Touches Even Elite Labs*, Chi. Trib., Oct. 21, 2004; Richard Willing, *Mueller Defends Crime Lab after Questionable DNA Tests*, USA Today, May 1, 2003, at 3A. Notably, ordinary sample contamination occurs so frequently that most labs require their analysts to keep their own DNA profiles on file, so that they can be compared against findings. See, e.g., Kobilinsky, Liotti, & Oeser-Sweat, *supra* note 26, at 99 (advocating this practice).
- ²²¹ U.S. Dep't of Justice, Office of the Inspector General, *The FBI DNA Laboratory: Review of Protocol and Practice Vulnerabilities ii* (May 2004), available at <http://www.usdoj.gov/oig/special/0405/final.pdf>.
- ²²² See *Aff. of Dr. Robin W. Cotton, Ph.D, Maryland v. Kenneth Ernest Abend*, Nos. K-02-506 and K-0401903 (Nov. 2, 2004), at 3 & attachment B (on file with author).
- ²²³ Jonathan Saltzman, *US Audit Found More Problems at Crime Lab*, Boston Globe, Feb. 1, 2007, at A1.
- ²²⁴ See, e.g., Phoebe Zerwick, *DNA Mislabeled in Murder Case*, Journal Reporter (Greenville), Aug. 28, 2005 (describing case of woman implicated in sister's death when sample tubes were erroneously mislabeled); Tom Jackman, *Paternity Suit Raises Doubts About DNA Tests*, Wash. Post, Aug. 21, 2005, at C1 (cataloging a list of faulty DNA tests).
- ²²⁵ John Devlin, *Comment, Genetics and Justice: An Indigent Defendant's Right to DNA Expert Assistance*, 1998 U. Chi. Legal F. 395, 396 n.111 (1998) (citing the typical cost of a DNA expert as ranging from \$1,000 to \$10,000); Giannelli, *Ake v. Oklahoma*, *supra* note 148, at 1398 (reporting expert costs as high as \$28,000); see also *id.* at 1363 ("If the standard [for appointing an expert] is too demanding, the right is gutted. If the standard is too lax, the costs skyrocket."). Nevertheless, the first National Academy of Sciences recommended just that: they suggested that defense DNA experts be appointed in all cases involving DNA, because few attorneys can deal with this type of science. National Research Council Committee on DNA Technology in Forensic Science, *DNA Technology in Forensic Science* 147-49 (1992) [hereinafter NRC I]. The subsequent report recommended appointment of experts, either to the court or to the parties, and noted that the complexity of DNA evidence might require the appointment of multiple experts. NRC II, *supra* note 201, at 169-70.
- ²²⁶ Early challenges to the sufficiency of discovery in DNA cases reveal courts' struggles to strike the right balance between the defense's interest in obtaining comprehensive material to challenge the validity of the government's assertions, and the government's interest in controlling the burden of amassing documents. See, e.g., *United States v. Yee*, 129 F.R.D. 629, 630 (N.D. Ohio 1990), *aff'd sub nom United States v. Bonds*, 12 F.3d 540 (6th Cir. 1993) (commenting with regard to broad discovery request that "the defendants appeared to accept ... the government's contention that the materials that they are seeking are not encompassed within Fed. R. Crim. P. 16"). In *Yee*, the magistrate judge ultimately granted the defendants' request, mainly because the case posed one of the initial challenges to the admissibility of DNA evidence. Moreover, he specifically cited as support the lack of "extensive independent scientific assessment and replication of the reliability of the procedures that have been developed by the F.B.I.," as well as the "fact that the defendants have developed bona fide questions about each of the categories in which they are seeking discovery." *Id.* at 631.
- ²²⁷ See text accompanying *supra* note 95.
- ²²⁸ Some might even argue that the error rate of DNA typing is more favorable, and thus preferable, to that of eyewitnesses. But see Giannelli, *Ake v. Oklahoma*, *supra* note 148, at 1396 ("A British study (albeit small) found that '38 per cent of defence [sic] lawyers who had obtained an independent analysis' of DNA evidence received reports that 'differed from those of the prosecutions' expert.").

229 William Blackstone, 4 Commentaries *358; In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (“[I]t is far worse to convict an innocent man than to let a guilty man go free.”).

230 Contamination at the manufacturing level has occurred in the United Kingdom, and another incident recently arose in the United States. See, e.g., Becky Pallack & Kim Smith, Contaminated DNA Strikes Three Cases, *Az Daily Star*, Dec. 13, 2005 (describing how same unknown sample turned up in testing at Tucson crime lab and then in two Florida crime labs, causing officials to conclude that the tubes used for testing were contaminated at a factory). Interestingly, prosecutors in the Tucson case moved the court to preclude the defense from even mentioning the contamination to the jurors, arguing that it unduly prejudiced the jury with regard to the reliability of testing in that case; their request was denied. *Id.*

231 For example, a Las Vegas lab inadvertently switched two DNA profiles as it entered them into the database; as a result, an innocent man spent a year in jail awaiting prosecution for sexual assault. Glenn Puit, *Police Forensics: DNA Mix-up Prompts Audit at Lab*, *Las Vegas Review-J.*, Apr. 19, 2002, at 1B.

232 See *supra* Part I.B.2.

233 What innocent person could recall why they frequented a certain location or made a certain purchase or undertook other such activities on a random day many years earlier, or even locate the witnesses to verify their assertions?

234 Giannelli, *supra* note 109, at 475-76; Paul S. Milich, *Controversial Science in the Courtroom: Daubert and the Law’s Hubris*, 43 *Emory L.J.* 913, 925 (1994).

235 Giannelli, *supra* note 109, at 475-76.

236 William C. Thompson, *Evaluating the Admissibility of New Genetic Tests: Lessons from the “DNA War”*, 84 *J. Crim. L. & Criminology* 22, 99-100 (1993); Christopher G. Shank, *Note, DNA Evidence in Criminal Trials: Modifying the Law’s Approach to Protect the Accused from Prejudicial Genetic Evidence*, 34 *Ariz. L. Rev.* 829, 870 (1992).

237 Graham C. Lilly, *The Decline of the American Jury*, 72 *U. Colo. L. Rev.* 53, 85 (2001). Of course, debates rage concerning whether scientific evidence exceeds fair expectations of jurors’ abilities, or whether juries are up to the task of resolving scientific disputes often unresolved among the experts in the field. Compare, e.g., Joseph Sanders, *Scientifically Complex Cases, Trial By Jury, and the Erosion of Adversarial Process*, 48 *DePaul L. Rev.* 355, 360, 363 (1998) and Lilly, *supra*, at 67 (arguing that “long-term trends in the nature of litigation ... poses serious questions about the potential of American juries to adequately perform their traditional roles”), with David W. Shuman, et al., *Assessing the Believability of Expert Witnesses: Science in the Jurybox*, 37 *Jurimetrics J.* 23 (1999); Edward J. Imwinkelried, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology*, 28 *Vill. L. Rev.* 554, 570-71 (1982-83).

238 Giannelli, *supra* note 139, at 816-17.

239 Of course, some of these recommendations are specifically designed for a civil justice system and cannot reasonably be transplanted into the criminal justice system. For instance, some suggestions impinge upon other rights of criminal defendants: qualifying specialized juries or removing certain questions from jury determination could impermissibly prejudice the defendant’s Sixth Amendment right to a jury of peers.

240 Scholars have recommended creating independent laboratories with higher quality technicians, Giannelli, *supra* note 109, at 469; strengthening accreditation, protocol, and proficiency review of labs, *id.* at 474-75 & n.202; Beecher-Monas, *supra* note 11, at 100-01; and encouraging ongoing validation studies, Saks, *Aftermath*, *supra* note 104, at 239 & n.41. One recent innovative approach to this argument is to introduce a system of “competitive self regulation” to create “rivalrous redundancy” in labs, such

that technicians would know that evidence is periodically sent to multiple laboratories for testing and quality control. Koppl, *supra* note 118, at 256, 267. Some also recommend the institution of a legal entitlement to independent or corroborative testing of scientific evidence. Beecher-Monas, *supra* note 11, at 90 n.250. The right to independent or duplicative testing, however, cannot alone ensure the integrity of all forensic evidence. First, in many cases, the DNA sample is exhausted by government testing, and no evidence remains for independent submission. Second, a costly and time-consuming procedure such as duplicative testing cannot serve as the ordinary means of verifying the integrity of the government's results. Third, there are many strategic reasons why defense counsel might elect not to conduct routine independent testing. For instance, to the extent that a jurisdiction bestows a right to retest evidence, that right loses meaning unless it also includes a proscription on the government's comment on the exercise, or failure to exercise, such a right. Until courts resolve the questions of confidentiality and evidentiary use surrounding independent testing, defense lawyers will be reluctant to submit all evidentiary items--particularly those already shown to "match" the defendant--to confirmatory testing.

241 They also help insulate municipalities from civil liability incurred from substandard or fraudulent work. See, e.g., Brandon L. Garrett, *Innocence, Harmless Error, and the Federal Wrongful Conviction Law*, 2005 *Wisc. L. Rev.* 35, 98-99 (2005) (reporting on a Cleveland civil suit lodged after an analyst falsified hair and blood evidence, and in which the settlement included provision of a "permanent, independent scientific monitor").

242 The National Institute of Justice, a branch of the U.S. Department of Justice, currently solicits a limited amount of such research, but this entity is clearly inadequate. First, because the government solicits the work, the government also defines what projects are interesting or worthy of being undertaken, rather than allowing a vibrant and diverse research community to make such determinations. Second, because the government selects the recipients of such grants, it is able to skew the awards toward researchers sympathetic to its interests.

243 Walker & Monahan, *Social Facts*, *supra* note 104, at 823-24 (describing operation of national science panels).

244 The American Bar Association also recently endorsed national standards for the use of forensic DNA evidence.

245 Jennifer Mnookin, *People v. Castro*, in *Evidence Stories* 226-27 (Richard Lempert ed., 2006).

246 *Id.* at 227.

247 NRC I, *supra* note 225.

248 NRC II, *supra* note 201.

249 See, e.g., Lempert, *supra* note 192, at 465-68.

250 See, e.g., *United States v. Ewell*, 252 F. Supp. 2d 104, 109 n.8 (D. N.J. 2003), *aff'd* by *United States v. Adams*, Nos. 03-2108, 03-2152, 2006 WL 1888737 (3d. Cir. N.J. 2006) (referring to standards set by NRC); *People v. Watson*, 789 N.E. 2d 375 (Ill. App. Ct. 2003) (same); *aff'd* by *People v. Watson*, 214 Ill. 2d. 271 (Ill. 2005); *United States v. Trala*, 162 F. Supp. 2d 336, 348 (D. Del. 2001) (same), *aff'd* by *United States v. Trala*, 386 F. 3d. 536 (3d. Cir. 2004); vacated by *Trala v. United States*, 126 S. Ct. 1078 (2006).

251 Neither of the prior two committees was convened by a neutral party, and so while the members of each committee may have strived to complete a fair and balanced report, and may have achieved that goal, it cannot be said that their origins were neutral. Of course, the conclusions of such panels would garner additional legitimacy if they were deliberately composed by a neutral and disinterested body. Compare, for example, the "two-step process" used by the judge in the civil case studied by Professors Walker and Monahan. See Walker & Monahan, *Breast Implant Litigation*, *supra* note 162, at 808-809. In that case, the judge first designated a "Selection Panel" to provide "names of neutral, impartial persons who have indicated expertise" and would be able to

communicate well and serve, and then chose the four-person panel from that list of names. *Id.* Ideally, to preserve both the appearance and actuality of fairness, such panels would be appointed and monitored by a neutral party, such as a member of the judicial or even legislative branch.

252 There remains some question whether the population samples used to draw conclusions were insufficiently large and not demonstrably randomized. The government researcher who published the study upon which the frequency tables are based looked at sample group sizes in the low hundreds. See, e.g., NRC I, *supra* note 225, at 91 (1992); P.J. Bickel, Discussion of The Evaluation of Forensic Evidence, 94 *Proc. Nat'l Acad. Sci.* 5497 (May 1997) (observing that "many scientists would not agree [with] the modeling assumptions" that assume that the data is drawn from a "random sample[]" of the relevant population and that no linkage is present). For instance, many charge that such a small sample size is insufficiently random, and thus inferences about the composition of the population at large are inappropriate: the frequency table for genetic characteristics in the African American population was developed from only 210 profiles; from 203 for Caucasians, and from 209 for Hispanics. See Bruce Budowle, et al., Population Data on the Thirteen CODIS Core Short Tandem Repeat Loci in African Americans, U.S. Caucasians, Hispanics, Bahamians, Jamaicans, and Trinidadians, 44 *J. Forensic Sci.* 1277, 1278 (2001). A subsequent study attempted to address these concerns, and drew upon data from roughly 1749 African-Americans, 1511 U.S. Caucasians, and 1421 Hispanics; that study concluded that these populations were in Hardy-Weinberg equilibrium. See Bruce Budowle, B. Shea, S. Niezgodna & R. Chakraborty, CODIS STR Loci Data from 41 Sample Populations, 46 *J. Forensic Sci.* 453, 453-89 (2001). That study was later criticized. See Dan E. Krane, Travis E. Doom, Laurence Mueller, Michael L. Raymer, William M. Shields, & William C. Thompson, Commentary, 49 *J. Forensic Sci.* 453 (2004). At present, laboratories use a "theta correction" to account for the possibility of substructure among certain populations. Kobilinsky, Liotti & Oeser-Sweat, *supra* note 26, at 156. Finally, it is worth noting that the same questions have dogged the use of mitochondrial DNA evidence. Critics have charged that the mtDNA database similarly contains too few samples to adequately capture the true population frequencies. See Frederika A. Kaestle, Ricky A. Kittles, Andrea L. Roth & Edward J. Ungvarsky, Database Limitations on the Evidentiary Value of Forensic Mitochondrial DNA Evidence, 43 *Am. Crim. L. Rev.* 53 (2006).

253 See *supra* Part I.B (referencing developments in miniaturization, YSTR typing, familial searching, mixture deconvolution, and so on).

254 Butler, *supra* note 26, at 111.

255 Butler, *supra* note 26, at 501; Frederick Bieber, Science and Technology of Forensic DNA Profiling, in *DNA and The Criminal Justice System*, *supra* note 24, at 35; see Kobilinsky, Liotti & Oeser-Sweat, *supra* note 26, at 167-69. For an excellent primer on principles and techniques of forensic DNA, see Kobilinsky, Liotti & Oeser-Sweat, *supra* note 26, at 1-196.

256 Following the analogy used above, if the frequency tables were conducted by sampling two hundred people at a large-sized shoe store, then naturally the purported frequency of large-footedness would fail to reflect the actual frequency of large-sized feet in the population. Or if, for some reason, it should turn out that all people in the general population with crossed eyes also have large feet, then the assumption that each variable was independent would prove incorrect.

257 See, e.g., Butler, *supra* note 26, at 501 (describing product rule); see also Kobilinsky, Liotti & Oeser-Sweat, *supra* note 26, at 135, 341 (defining "linkage" and assumption of "linkage equilibrium"). For example, when analysts look at only the male fraction of DNA, the product rule cannot be used, because the various pieces of genetic information are known to be linked. Kobilinsky, Liotti & Oeser-Sweat, *supra* note 26, at 116.

258 Emerging independent research also indicates that the second assumption--that of independence at the various loci--may not hold true for all populations. After three years of battling government refusal to disclose the data upon which it based its frequency tables, defense experts obtained a fraction of the data and conducted independent analysis. As a result, these experts uncovered that in certain Native American populations, it appeared that correlations were evident between several of the loci that had been glossed over by government researchers. Dan E. Krane, Travis E. Doom, Laurence Mueller, Michael L. Raymer, William M. Shields, & William C. Thompson, Commentary, 49 *J. Forensic Sci.* 453 (2004) (noting that "examination of data reported ... for two Native American populations ... shows significant departures from HWE [Hardy-Weinberg Equilibrium] at three loci for each population" and arguing that "these loci should not be used when the product rule is employed to compute the frequency of multi-locus genotypes in these populations").

259 See Transcript of Proceedings at 21-22, In the Matter of the Application of the State of California for An Order, (Oct. 17, 2005) (No. MISC-001) [hereinafter Transcript] (on file with author); see also Kathryn Troyer, Theresa Gilboy, and Brian Koeneman, Arizona DPS Crime Laboratory, Poster Presentation at Promega 12th International Symposium: A Nine STR Locus Match Between Two Apparently Unrelated Individuals, Phoenix, AZ (2001).

260 Transcript, *supra* note 259, at 23, 26-30.

261 *Id.* at 25.

262 As a means of saving time and money, some states routinely do only the “Profiler Plus” test, which looks to nine loci, rather than also do the “Cofiler” test to reach the full thirteen.

263 Transcript, *supra* note 259, at 70.

264 *Id.* at 6. Ironically, the analyst testified that one requested search would take a less than an hour, and the other only a couple of months. *Id.* at 57-58, 71.

265 Transcript, *supra* note 259, at 58, 70.

266 Transcript of Proceedings at 31-32, *People v. Davis*, (Jan. 18, 2006) (No. SCN 190226) (testimony of Kenneth Konzak).

267 42 U. S. C. § 14132(b)(3)(D) (2006).

268 Laura Ernede, *Defender Cites Mistakes in DNA Database*, Daily J. (S.F.), Jan. 11, 2007. The attorney, Bicka Barlow of the San Francisco Public Defender’s Office, appealed to the Court of Appeals, which subsequently denied a writ of appeal. *Davis v. Super. Ct. San Francisco*, No. A116603 (Cal. Ct. App. Mar. 8, 2007).

269 Ultimately, the court ordered the government to disclose only the barest of information: a summary of the report of the analyst’s findings. See Minute Entry, In the Matter of the Application of the State of California for an Order Requiring Custodian of Records as DPS Product Documents/DNA Database Unit, *Arizona v. Lopez* (No. CR-20051252) (Super. Ct. Az. Oct. 26, 2005) (ordering Arizona lab to conduct a specific search of state database, and report results to defense attorney) (on file with the author).

270 The request could logically come from a range of places, including public defender organizations, individual offices in a particular jurisdiction, professional associations such as the National Association of Criminal Defense Lawyers, or even non-profits erected precisely to conduct these types of reviews. Data generated by a researcher commissioned by either a specific defense office or professional organization would necessarily be protected by attorney-client privilege, such that access to the information contained in such a study or report might not be disclosed broadly.

271 Cf. Saks, Merlin and Solomon, *supra* note 10, at 1132-33 (questioning whether “admissibility decisions of courts are instruments too blunt to guide the development of scientific fields”); Thompson & Ford, *supra* note 140, at 100-07 (identifying problems in reliance upon databases and suggesting areas of necessary development and study).

272 The Office of the Inspector General, which investigated the FBI DNA scandal, noted the general lax enforcement mechanisms for quality control in DNA typing labs. U.S. Dep’t of Justice, *The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities 17-21* (May 2004) (noting that labs initially could “self-certify” their compliance with quality assurance standards required for participation in the national database, and that even those who relied on external audits often did not follow the recommendations presented); *id.* at 21 (noting that stricter enforcement measures did not prevent the “weaknesses in ... procedures and protocols” that led to the FBI lab scandal, even though the lab had received clean reports from both internal and external

auditors, and was accredited at the time). Effective forensic analysis requires quality assurances of numerous kinds, including: that the methodology is valid (including tailored to a particular purpose); that the laboratory's protocols for executing the methodology are valid (including training, oversight, and error prevention); that the laboratory's actual execution of that protocol is generally reliable (including blind testing, quality assurance methods, and regular review of corrective action files); and that the execution of a methodology in a particular case is reliable.

273 A recent study of forensic laboratories that conduct DNA testing revealed that only 63% were accredited, and 87% of those had been accredited by ASCLD, the professional association. Greg W. Steadman, Survey of DNA Crime Laboratories, 2001, at 2-3, Bureau of Justice Statistics, Jan. 2002. A comprehensive list of current state quality assurance regulations for DNA typing can be found at Seth Axelrad, State Regulations on Quality Assurance for Forensic DNA Laboratories, Am. Soc'y L., Med. & Ethics, available at http://www.aslme.org/dna_04/reports/axelrad2.pdf.

274 A recent study explored the feasibility of external blind proficiency tests of forensic laboratories. Peterson, *supra* note 125, at 32. Despite encountering several obstacles, the researchers concluded that "external blind proficiency testing in forensic DNA laboratories is possible," even though they did not recommend it. *Id.* at 39.

275 Presently, the professional association, the American Society of Crime Laboratory Directors or ASCLD, accredits laboratories through its Laboratory Accreditation Board. Butler, *supra* note 26, at 395. Their accreditation process does not require any regular blind proficiency testing, nor does it appear even to require that laboratories maintain centralized error logs to record (and presumably analyze and correct) errors made in and across cases.

276 Va Code Ann. § 9.1-1100 (2005). The DFS is not entirely independent, in that it is responsible for providing forensic laboratory services to government agencies only. *Id.* § 9.1-1101. The defense may petition the court for laboratory services. *Id.* § 9.1-1104.

277 See Va. Code Ann. § 9.1-1109 et seq. (2005).

278 *Id.* § 9.1-1111 et seq.

279 *Id.* § 9.1-1113.

280 The passage of the Justice for All Act of 2004 rendered states eligible for grants if they certified that they used "generally accepted laboratory practices and procedures, established by accrediting organizations or appropriate certifying bodies." 42 U.S.C. § 3797k et seq. And indeed, several states have undertaken gestures of reform, both before and after the 2004 federal legislation. See, e.g., 20 Ill. Comp. Stat. 3981/5 (2005) (creating laboratory advisory committee); Mass. Gen. L. Ann. 6 § 184A (creating a board composed of government representatives to collect data and report on operation of forensic services in state); N.Y. Exec. § 995-a & -b (2006) (creating diversely composed Commission on forensic science); Tex. Crim. Proc. Code Ann. § 38.01 (2005) (same); Wash. Rev. Code § 43.103.010 et seq. (creating government-constituted state forensic investigations council). Other efforts were unsuccessful in enacting the proposed reforms. See, e.g., S.F. 3273, 84th Leg., 2nd Reg. Sess. (Minn. 2005) (proposing a forensic laboratory oversight commission); S.B. 768, 93rd Gen. Ass., 2nd Reg. Sess. (Mo. 2006) (setting forth system of crime lab oversight, including a diversely composed oversight committee); H.B. 1380, 2d year of 159th Sess. (N.H. 2005) (establishing forensic science oversight commission).

281 See, e.g., Ruth Teichroeb, They Sit in Prison --But Crime Lab Tests are Flawed, Seattle Post-Intelligencer, Mar. 13, 2004, at A1 (describing internal audit of one analyst, which revealed flaws in 30 of 100 cases); Jonathan Saltzman, US Audit Found More Problems at Crime Lab, Boston Globe, Feb. 1, 2007, at A1 (reporting audit of state crime lab that revealed systemic problems visible only across cases).

282 As one commentator has observed, a "[s]tatistical review" is essential to determine abnormalities in a laboratory by looking across cases, not just within a case. Labs with anomalously "high or low number[s]" on relevant criteria can then be targeted for closer examination. Koppl, *supra* note 118, at 270-71.

283 Professors Walker and Monahan also discuss the potential sources of authority for convening such panels, as well as for the treatment of the panel's results by both district and appellate courts. Walker & Monahan, *Breast Implant Litigation*, supra note 162, at 825-830.

284 Congress mandated the constitution of a DNA Advisory Board (DAB), under the DNA Identification Act of 1994, which convened for five years and addressed standards for forensic testing. At the close of that five year period, the DAB's duties effectively transferred to the Scientific Working Group on DNA Analysis Methods (SWGDM), an FBI-led committee that could not fairly be characterized as independent. Butler, supra note 26, at 394-95.

285 In fact, various states have considered legislation that tightens scrutiny over forensic laboratories. See, e.g., 2005 Vt. S.B. 249 (introduced by Senator Illuzzi) (creating a Forensic Laboratory Oversight Commission); Ill. H.B. 5241 (Durkin); Mo. H.B. 1330; N.H. H.B. 1380 (Hammond). However, authorization for access to the federal database requires federal, not just state, action. Indeed, just before this article went to press, the National Academy of Sciences convened one such general committee as a result of congressional action. See *Identifying the Needs of the Forensic Science Community*, The National Academies, available at <http://www8.nationalacademies.org/cp/projectview.aspx?key=48741> (last visited May 14, 2007).

286 Daubert, 509 U.S. at 593.

287 *Id.* at 597.

288 Of course, to be effective, a decision likely would have to be rendered in numerous cases. The government can always simply choose not to use the forensic evidence, or to forego the case entirely, if it wishes to avoid enforcement of such an order.

289 Butler, supra note 26, at 101 (describing how, after courts in California, Colorado and Vermont excluded DNA evidence absent disclosure of primer sequences, the Promega Corporation "made the decision to publish their STR kit primer sequences ... and have done so since").

290 Jasanoff, supra note 186, at 133-34.

291 Ruth Teichroeb, *They Sit in Prison --But Crime Lab Tests are Flawed*, supra note 281, at A1 (recounting series of audits that uncovered flaws in numerous cases, while also revealing that defense counsel and the defendants in those cases had not been notified of findings). But see Ill. Sup. Ct. R. 417(b)(iii-vi) (2004) (expressly providing for defense discovery of such materials in DNA cases).

292 Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 L. & Contemp. Probs. 31 (1995) (outlining various ways in which indigent defense services are performed). My recommendation for greater deliberate collaboration holds true across the defense bar, although well-resourced defendants tend to confront fewer of the structural impediments to mounting effective challenges of evidence.

293 See, e.g., Kim Taylor-Thomas, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 Geo. L.J. 2419, 2432 (1996) (relating successful collaboration between Washington, D.C. and Cook County, Illinois public defender offices); Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 Yale L.J. 1835, 1849-57 (1994) (detailing problems raised by lack of centralized defense programs and adequate funding).

294 See, e.g., Taylor-Thomas, supra note 293, at 2449-57 (describing how centralized offices can better wield political power particularly with regard to funding issues). Opposition to centralizing the defense function tends to center around the perception that to do so would be both costly and contrary to the ultimate goal of justice, because defense lawyers would litigate--and even

win--more cases. Note, Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense, 113 Harv. L. Rev. 2062, 2067 (2000) (recounting political opposition to bills to mount statewide defense services). One might also argue that consolidation heightens the possibility of conflicts of interest among defense lawyers, both in ethical terms as well as in their own apportionment of time and effort to particular cases. See, e.g., Darryl K. Brown, Defense Attorney Discretion to Ration Services and Shortchange Some Clients, 42 Brandeis L.J. 207 (Winter 2003/2004).

295 See, e.g., Richard S. Schmechel, William C. Thompson & Edward J. Ungvarsky, Defending With (And Against) Forensic Evidence: A Call to Share Resources, *The Champion*, Aug. 2005, at 39.

296 *Id.*

297 The Illinois statute permits the defendant in any case where DNA may be relevant to the defense investigation or at trial to move the court for an order requiring the state police to conduct certain genetic tests, or to make certain comparisons or searches within the database. 725 Ill. Comp. Stat. § 5/116-5 (2005); see also Ga. Code Ann. § 24-4-63Ga. Code Ann. § 24-4-63 (2005) (providing similar rights to Georgia defendants upon a showing that "access to the DNA data bank is material to the investigation, preparation, or presentation of a defense at trial or in a motion for a new trial"). The American Bar Association recently endorsed this approach in its articulation of general standards for DNA evidence. ABA Criminal Justice Standards on DNA Evidence (Standard 8.3, approved by ABA House of Delegates, Aug. 2006). Some states provide oblique entitlements in that they specifically curtail database access generally, but then provide an exception for defense counsel pursuant to court order. See, e.g., Haw. Rev. Stat. § 844D-82 (2006); N.C. Gen. Stat. § 15A-266.8 (2005); Cal. Penal Code § 299.5(g)-(h) (West 2005); N.J. Stat. Ann. § 53:1-20.21 (2006). The permissible scope of such access, however, is far from clear, especially where the statute specifically states that only the material "related to the case" may be disclosed. See, e.g., Iowa Code § 81.8 (2005).

298 By comparison, just as the government cannot instruct a witness to refuse to talk to the defense, so too should the government not be allowed to "sequester" biological "witnesses," particularly potentially exculpatory ones.

299 Email from Cynthia Dryden, Public Defender in St. Louis, MO, to Erin Murphy, Assistant Professor of Law, University of California, Berkeley-- School of Law (Boalt Hall), March 1, 2006 (on file with author).

300 *Id.*

301 *Id.*

302 *Berger v. United States*, 295 U.S. 78, 88 (1935).

303 For example, in a DNA case, the protocol may require that the analyst disregard as spurious any peaks lower than a certain cut-off level, or in particular position to another peak, or at a particular height-ratio to another peak. Yet, in a particular case, the government may attempt to incorporate those peaks because some other information justifies, in the government's eyes, the peak's inclusion. In the present legal framework, the government is under no obligation to disclose to the defense its decision to override standard practices; in the proposed regime, the government would be required to bring that discretionary decision to light.

304 *Brady v. Maryland*, 373 U.S. 83 (1963).

305 See *supra* Part II.B.1.

306 Law, like science, must remain receptive to new information, allowing it to adapt over time. Walker & Monahan, *Breast Implant Litigation*, *supra* note 162, at 822 (arguing for the contingent "law-like" treatment of certain scientific results, while noting that "[i]nvariably, science changes over time just as law changes over time"); *id.* at 822 n.119 (quoting Heidi Li Feldman, *Science and*

Uncertainty in Mass Exposure Litigation, 74 Tex. L. Rev. 1, 16 (1995) (“As scientists acquire new data and change their collective judgments about which background assumptions to hold constant, they revise and replace even well-established scientific theories. Scientific theory does not achieve absolute finality.”)) (footnote omitted).

307 Frye v. United States, 293 F. 1013 (1923); Daubert v. Merrell Dow Pharms., 509 U.S. 579, 593-94 (1993).

308 Where competing theories exist, however, the government can argue in favor of a particular approach, leaving the fact-finder to decide which it finds most persuasive. Of course, some commentators find it appalling that juries should be allowed to resolve methodological disputes that even expert scientists cannot resolve. See *supra* note 237. However, if presented with the equal legitimacy of both positions, then jurors are in many respects in the best position to adopt whichever approach best fits the circumstances of the case. For instance, jurors might be more conservative in a “cold hit” case than in a case with corroborating evidence, and for good cause. Thus, drawing on Professors Monahan’s and Walker’s model, for instance, whereas law-like treatment of scientific methodologies might entitle a judge to instruct a jury that one particular technique is sound, a revised instruction might instead inform jurors that several separate and competing scientific approaches or techniques are sound.

309 Butler, *supra* note 26, at 614.

310 See, e.g., NRC II, *supra* note 201, at 40.

311 See, e.g., Butler, *supra* note 26, at 618 (citing Evett, Foreman & Weir, *Biometrics* 56(4), at 247-76 (2000)); Peter Donnelly & Richard D. Friedman, DNA Database Searches and the Legal Consumption of Scientific Evidence, 97 Mich. L. Rev. 931, 933 (1999).

312 NRC I, *supra* note 225; Butler, *supra* note 26, at 515.

313 See, e.g., William C. Thompson, Franco Taroni & Colin G. Aitken, How the Probability of a False Positive Affects the Value of DNA Evidence, 48 J. Forensic Sci. 47, 52-53 (Jan. 2003). With regard to the use of likelihood ratios to express match probabilities, one scholar has similarly argued persuasively that such ratios should incorporate error rate data. See Jonathan J. Koehler, Why DNA Likelihood Ratios Should Account for Error (Even When a National Research Council Report Says They Should Not), 37 *Jurimetrics J.* 425, 429 (1997) (arguing that error rates should be calculated into probability determinations).

314 At present, this question is often treated either as irrelevant when the defense cannot make a showing of malfeasance expected to affect the results in the case at bar, or else as a matter for the jury to decide in weighing the evidence. See, e.g., *United States v. Morrow*, 374 F. Supp. 2d 51, 67-68 (D. D.C. 2005) (finding such evidence relevant for “weight ... not exclusion”); *United States v. Ewell*, 252 F. Supp. 2d 104, 113-14 (D. N.J. 2003) (“What the defendant has sought to do here is challenge the proficiency of the tester rather than the reliability of the test. Such challenges go to the weight of the evidence, not to its admissibility.”); *People v. Reeves*, 109 Cal. Rptr. 2d 728, 750-53 (Ct. App. 2001). The second National Research Council report refused to even recommend consideration of laboratory error at trial, whether as a qualifier on the statistical calculations or as independent evidence regarding reliability. NRC II, *supra* note 201, at 185. Alternatively, some courts have found that there exists some level at which the general practices of a laboratory fall so far below the acceptable standards that they cease to be “reliable,” and thus should be excluded. See, e.g., *Murray v. Florida*, 838 So.2d 1073, 1081 (Fla. 2002) (reversing death conviction based in part on DNA evidence because errors and contamination in testing procedures meant “the State did not meet its burden in demonstrating the general acceptance of the testing procedures” used in the case); *People v. Castro*, 973 N.Y.S.2d 985, 986 (N.Y. Sup. Ct. 1989) (holding that admissibility should turn in part on whether the technique was properly executed).

315 See Dale A. Nance & Scott B. Morris, Juror Understanding of DNA Evidence: An Empirical Assessment of Presentation Formats for Trace Evidence With a Relatively Small Random-Match Probability, 34 J. Legal Stud. 395, 398 (2005) (citing cases).

316 See *United States v. Morrow*, 374 F. Supp. 2d 42, 46 (D.D.C. 2005) (noting that “the great weight of legal precedent indicates that

possible contamination issues go towards the weight--rather than the admissibility--of DNA evidence"). U.S. v. Lowe, 954 F. Supp. 401 (D. Mass. 1996) (noting that the "FBI does not compute a systemic laboratory rate" yet nonetheless finding evidence admissible, observing that "no federal cases ... have excluded DNA evidence on account of a theoretical error rate alone"). Simon Cole compiled existing data on the rate of false positives for fingerprinting, and determined that, assuming the resultant .8% false positive rate, U.S. laboratories "reported 1,905 false positives in 2002 alone." Simon Cole, More Than Zero: Accounting for Error in Latent Fingerprint Identification, 95 J. Crim. L. & Crimin. 985, 1034 (2005).

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EXHIBIT 12:

Megan Cassidy: *Former Forensic Scientist Sues Arizona Department of Public Safety, Alleges Retaliation, The Republic, (April 4, 2018).*

Former forensic scientist sues Arizona Department of Public Safety, alleges retaliation

Megan Cassidy, The Republic | azcentral.com Published 2:04 p.m. MT April 4, 2018 | Updated 2:56 p.m. MT April 4, 2018



(Photo. AFP/Getty Images)

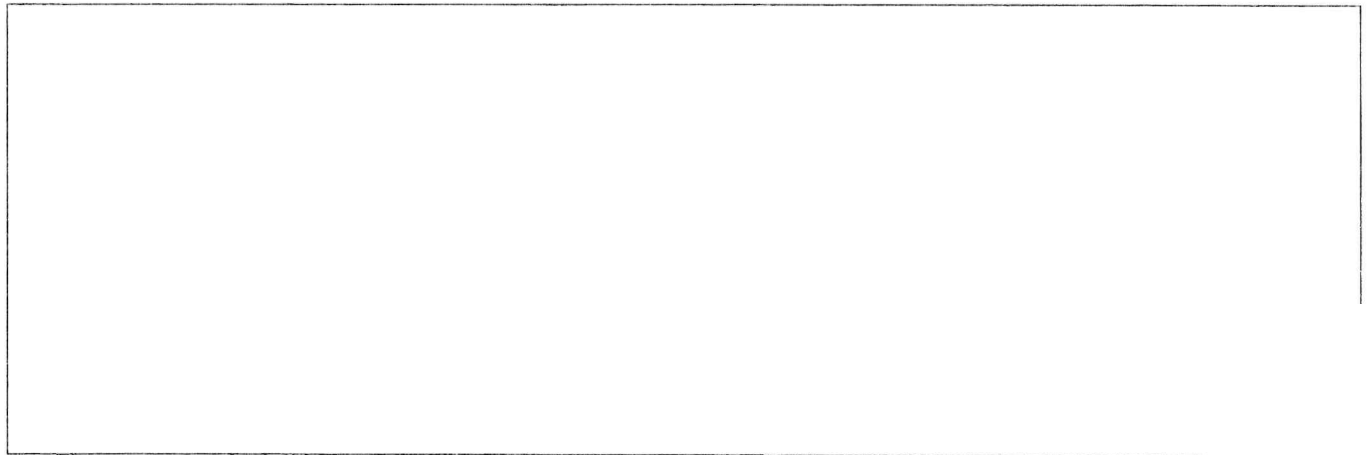
A former forensic scientist at Arizona's state-run crime lab has sued his former employers, claiming he was pushed out after refusing to give false testimony about the lab's blood-testing equipment.

The lawsuit, filed Monday in the U.S. District Court of Arizona, claims that retaliation by Arizona Department of Public Safety employees violated Greg Ohlson's First Amendment right to free speech. He is seeking an undisclosed amount in damages, for "loss of income and benefits; humiliation, emotional distress and damage to reputation."

Ohlson worked for the DPS from 2004 until last year, in the Scientific Analysis Bureau's Toxicology Department. His work involved testing blood samples for DUI cases, and he was occasionally asked to testify about his findings.

Although some larger Arizona police agencies run their own testing equipment, many departments use the state's lab to test blood for alcohol levels. The results can be used as evidence in a criminal prosecution.

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The lawsuit states that the break with Ohlson's employers began in 2016 and was rooted in a disagreement over what lab results to provide to defense attorneys.

Blood tests are run in "batches," which can analyze up to 90 duplicate blood samples from 45 different people. In at least two separate cases, defense attorneys had requested results from the entire batch as a way to fact-check the results.

The DPS initially refused to release the batch-run results. Ohlson's attorney said, arguing that it would take too much time. Defense attorneys asked a judge called Ohlson to testify about his research on the matter.



Although some larger Arizona police agencies run their own testing equipment, many departments use the state's lab to test blood for alcohol levels. (Photo: Nick Oza/The Republic)

According to the lawsuit, Ohlson's testimony undercut DPS' officials.

"(Ohlson) testified to his opinion that release of the entire batch would be in the public interest and, except in rare instances, support the validity of the individual result," the lawsuit stated.

The judge ordered the DPS to release the entire batch following Ohlson's testimony. Later, a jury found the defendant not guilty of his DUI charge.

Ohlson's lawsuit claims his superiors confronted him a month after his testimony and ordered him to alter his statements. Also, he was removed from testing blood samples and ordered to delete batch results he had been recording on DPS-issued computers, his attorneys said.

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An employee performance report provided in the lawsuit details the "oral instruction" Ohlson was given by his employers following his testimony.

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"It was pointed out to you that your opinion ... is contrary to the opinion of the other analysts in the bureau and contrary to the position of the laboratory," the DPS employee performance report stated. "You were advised that testifying about what other agencies in the state do with regards to disclosure or storage of their data is outside of your current qualifications. You are not currently employed by these agencies and are not aware of their current procedures, protocols or policies."

Ohlson again testified days after the June 2016 report was issued, and was put on administrative leave. After an internal investigation, his superiors found him guilty of insubordination and "conduct adverse to the agency." His pay was docked, and he was removed from laboratory work.

Ohlson's attorneys said he "got the message" and retired in early 2017.

In a media statement, Ohlson's attorneys included a quote from a judge in one of the cases in which Ohlson testified.

"Based on the totality of the evidence presented at the recent hearing, this Court is of the opinion that a reasonable person could conclude that DPS's policies and the application of those policies by DPS's lab supervisors have created a culture of intimidation," La Paz County Superior Court Judge Pro Tempore Gary Donahoe said.

The lawsuit names Beth Brady-Morris, Joseph Tripoli, Timothy Chung and Vincent Figarelli as defendants. All are employees of the department's Scientific Analysis Bureau.

"Greg Ohlson's actions honored the highest aspirations of public service," his attorney, Michael Garth Moccia said in a statement. "Greg believed the disclosure of all the evidence would lead to greater public confidence in the outcome of all DUI prosecutions in the state. His only goal was to bring that about. His superiors painted him as a disruptive, argumentative employee. Simply not true."

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IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,	)	APPELLATE CASE NO. CA-19-007
Petitioner,)	
vs.	)	PASCUA YAQUI TRIBAL COURT NO.
	)	CR 17-079
Honorable Melvin Stoof, Judge, Pascua)	
Yaqui Tribal Court,)	
)	
MICHAEL MADRID)	
Respondent/Real Party in)	
Interest.)	

RESPONDENT'S RESPONSE BRIEF

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I. JURISDICTIONAL STATEMENT

The Appellate Court has jurisdiction to review interlocutory appeals pursuant to Pascua Yaqui Tribal Code 3 PYT § 2-3-90 and *PYT v. Lopez*, CA-18-001 (October 2018). However, Respondent Michael Madrid disagrees that the Trial judge abused discretion by either exceeding his authority or by creating an unreasonable restriction on the Tribe's duty to investigate.

II. STATEMENT OF THE CASE

A. Summary of Incident and Arrest

The following information was obtained from Petitioner's Supplemental Exhibits, police reports and media disclosure provided to defense by the Tribe. Respondent, Michael Madrid ("Mr. Madrid") makes no admissions as to any elements of the charges in the underlying matter. Mr. Madrid denies the facts of the incident as alleged by the Petitioner in its petition.

The trial court has made no findings of fact. Mr. Madrid maintains his innocence in the trial matter. The charges and probable cause statement exclude exculpatory information provided by the 911-caller, Angelica Alvarez, who is expected to testify at trial to confirm that two men with knives were threatening Mr. Madrid - consistent with statements she made to dispatch officers the night of the alleged incident. Respondents Exhibits ("Resp.Ex."), Exhibit 1: Transcripts from October 31, 2017 - 911 call to PYT dispatch.

On October 31, 2016 Mr. Madrid was arrested on eleven separate counts stemming from the above referenced incident. Petitioner's Supplemental Exhibits ("Pet.Supp.Ex."),

Exhibit A: Complaint. Angelica Alvarez called 911 after she witnessed two men wielding knives approach and threaten Mr. Madrid. When police arrived at the scene, officers never questioned the alleged victims about weapons in their possession. Victims told officers Mr. Madrid broke a headlight and threatened them with a knife. No other independent witnesses were interviewed or disclosed by officers despite the fact that the parties were all at a community Halloween event and other attendees were present.

The alleged victims claimed that they approached Mr. Madrid in an attempt to assist Mr. Madrid's girlfriend, Jessica Williams. They claimed Mr. Madrid was beating her and her face was bloody. However, officer reports from Christopher Tapia indicate that Ms. Williams was interviewed after the incident and that there was no indication that Ms. Williams had suffered any injuries whatsoever. Furthermore, the officer's report indicates that Ms. Williams's versions of events were consistent with voluntary statements made by Mr. Madrid at that time of his arrest and incarceration. Pet.Supp.Ex.A: Probable Cause Statement, pp. 3-4.

Ms. Williams told officers that she learned of her cousin's death the night of the incident and "became so emotional that she couldn't bare anyone and she wanted to go to her mother[s] house []. She stated that Michael tried to console her but she pushed him off and asked a female that she recognize[d] to give her a ride to her mother's house." Ms. Williams denies ever being assaulted by Mr. Madrid. *Id.* at 4. Her statements to police were consistent with the statements made by Mr. Madrid.

Mr. Madrid was taken into custody and provided statements to the police, his statements were consistent with Ms. Alvarez's versions of events. Mr. Madrid admitted to

acting in self-defense when the men approached him. He denied hurting his girlfriend. He was taken into custody and a sample of blood was taken from a headlight. *Id.* at 3.

B. Summary of Relevant Trial Court Proceedings

Mr. Madrid incorporates and supplements below the facts as argued in his opening brief in *PYT v. Madrid*, CA-17-002 submitted on September 21, 2017:

On December 18, 2018, this Court issued an order denying Mr. Madrid relief against DNA collection in *PYT v. Madrid* (CA-17-002). The case was then remanded to the trial court for further proceedings consistent with the appellate court's order. On December 19, 2018, the trial court issued an order setting a status conference in this matter for January 2, 2019. Resp.Ex.2. Upon motion by the Tribe, the status conference was reset to January 23, 2019 as Mr. Madrid had not been served. Mr. Madrid was present at the January 23, 2019 hearing and submitted to DNA testing on January 29, 2019 as ordered by the trial court. Resp.Ex.3

Despite all the litigation over DNA collection and testing, it was not until May 1, 2019, that trial counsel, Chief Public Defender Melissa Acosta was notified by email that the entire DNA sample collected from the night of the alleged incident would be consumed by Arizona State Department of Public Safety ("DPS"). Resp.Ex.4. Defense counsel, Melissa Acosta objected to consumption of the DNA sample collected at the scene and the case was set for a hearing on May 23, 2019.

On May 23, 2019, Defense Attorney Annamarie Valdivia appeared on behalf of Ms. Acosta and argued that pursuant to the American Bar Association's ("ABA") Standards on DNA Evidence, Standard 3.4, Consumptive Testing ("ABA Standards on DNA") that the

Court could either allow the presence of an independent expert during the consumption of the DNA at DPS or allow for the videotaping of testing. Pet.Supp.Ex.D; and Pet.Supp.Ex.I: ABA Standards for Criminal Justice: DNA Evidence, 3d ed. (2007). At no time during this hearing did either party request that an independent testing agency perform the examination.

Based on the arguments presented by both parties at that time, the trial court ordered that the defense obtain an independent evaluator that could either: 1) complete the consumptive testing; or 2) who could be present at the time of DPS consumptive testing. The court capped the costs of such an expert at \$450, in accordance with the current rates prescribed under the Criminal Justice Act (“CJA”) and that any cost exceeding that amount would need approval from the Chief Judge.¹ Pet.Supp.Ex.D, pp.15-26. (“And so again, I’ll just issue the order tracking the language of the, uh, the guideline, uh, with, with the independent evaluator of the Defendant to do the analysis or that expert can also, uh, videotape or photograph the preparation and testing.” *Id.* at p.26.

Prosecution’s main concern at the time appeared to be who was going to foot the bill for this expense. The Court made it clear that the Court would ultimately pay for the expert and that was an issue to be handled *ex-parte* and would not concern prosecution. Trial Court’s written order issued on May 23, 2019, likewise permitted testing to be conducted by an independent evaluator outside of DPS:

¹ Transcripts of the May 23, 2019 erroneously referred to this as “EJA.” P. 16 of transcripts. Page 41 of Tribe’s Supplemental Exhibits.

The court should adopt the ABA Standards on DNA Evidence and should follow Standard 3.4(e) Consumptive testing; the court should grant the defendant's request to permit an independent evaluation of the analysis, including but not limited to, the presence of an expert representing the defendant during the evidence preparation and testing, and videotaping or photographing the preparation and testing.

Pet.Supp.Ex.E, p.1.

The prosecution then filed a motion to reconsider the trial court's May 23, 2019 order, arguing that "[t]he DPS laboratory does not allow for persons to enter testing areas of the lab due to vulnerability of contamination." Resp.Ex.5. Nowhere in the motion did the Tribe address the possibility of the DNA being consumed in an independent laboratory even though this was an option provided by the trial Court. The Tribe instead focused on the argument that stipulating that the blood was Mr. Madrid's, was not an option. In response to the Tribe's Motion to Reconsider its May 23, 2019 order, the trial court specifically reiterated the following:

On May 23, 2019, the court adopted the ABA Standards on DNA Evidence and should follow Standard 3.4(e) Consumptive testing and it granted the defendant's request to permit an independent evaluation of the analysis, *including but not limited to*, the presence of an expert representing the defendant during the evidence preparation and testing, and videotaping or photographing the preparation and testing.

Because the ABA Standard on Consumptive Testing is one standard that addresses both the interests of the Tribe to prove its DNA evidence and it but also protects the defendant's right of due process in ensuring its expert can observe the DNA consumptive testing to ensure protocols and standard operating procedures are followed, the court should maintain its prior court orders, and it denies the Tribe's motion to reconsider, for lack of good cause shown.

Resp.Ex.6.

A second motion to reconsider was filed by prosecution on June 10, 2019. Pet.Supp.Ex.L. That motion did request that the trial court permit consumption of the DNA evidence by DPS or in the alternative, an independent expert to be allowed to conduct the consumptive testing. *Id.* The oral arguments made by the parties at that hearing did not address an independent tester but rather focused on having an independent expert be present at DPS during consumptive testing. At that hearing, the trial court did then deny the prosecution's request for an independent tester (despite previously including this as an option), and instructed prosecution to inquire about possible accommodations. Prosecution failed to follow the trial court's instructions for further inquiry of DPS practices and procedures. It is unclear whether or not the trial court would have ultimately denied a second request for independent testing as prosecution failed to provide the trial court with the requested information.

At the hearing on June 13, 2019, the trial court also addressed prosecutions concerns that if DNA testing was not possible, defense would be able to argue that prosecution failed to do their job. The trial court wanted more information before making any final determinations, but said that precluding defense from commenting could be a remedy. "Just determine[] based on what these folks are going to do, if they're going to accommodate my end, so hopefully they will. Pet.Supp.Ex.J, pp. 14-15. *See also*, Pet.Supp.Ex.K, p. 2: Minute Order Re: Tribe's Second Motion to Reconsider Court's Ruling on Consumption of DNA Sample, dated June 10, 2019. "The court agreed with the defendant's counsel, and it should order that the Tribe attempt to determine whether the lab has allowed any accommodations in the past, and to notify the court as to what

specific order may be necessary to effectuate such observation by defendant's experts.”

Id.

Prosecution had the ability to resolve the issue regarding an independent tester as early as May 1, 2019 when the parties became aware that consumption of the DNA was required for testing. Because of the delay, the trial court was attempting to save time and money. The Tribe was ordered to follow-up with DPS and report back to the trial court on possible accommodations. According to its own policies and procedures, DPS did allow certified technical assessors to witness analysis of evidence pursuant to Section 4.6.4, Arizona Department of Public Safety Scientific Analysis Bureau, SAB General Procedures Manual at p. 25. *Id.*

III. SUMMARY OF ARGUMENT

The Pascua Yaqui Tribal Code requires all attorneys in criminal court to follow the standards of the ABA Guidelines. *See* 3 PYTC § 1-4-30 (Appearance of Attorneys), 2 PYTC § 2-15-70 (General Duties of Director: Public Defender); and 2 PYTC § 2-17-80 (General Duties of Director: Chief Prosecutor). The trial court did not abuse its discretion when it ultimately denied the use of an independent tester as the Tribe failed to inquire further into accommodations that could be made by DPS to allow an expert to witness consumptive testing of DNA.

IV. ARGUMENT

A. Standard of Review

Respondent, Michael Madrid, agrees that the standard of review in this matter is abuse of discretion as argued and supported by the Petitioner in its Amended Petition for Special Action (“Petition”) at pages 7-8. In *PYT v. Coleman*, CA-15-003 (PYT Ct. App. 2015), this Court, citing to *Michaelson v. Garr*, 234 Ariz. 542, 544, (Ariz. App. 2014), held that “[t]he court abuses its discretion when it makes an error of law in reaching a discretionary conclusion or “when the record’ viewed in the light most favorable to upholding the trial court’s decision, is devoid of competent evidence to support the decision.” Mr. Madrid disagrees with the argument that the trial court abused its discretion. The trial court relied on competent evidence presented by the defense and prosecution and ultimately requested the Tribe to conduct additional inquiry before it would entertain other remedies.

B. Issue for Review

Whether the trial court abused its discretion when it denied independent testing of DNA because prosecution failed make further inquiry on possible accomodations for the defense expert to view consumption of DNA in accordance with the ABA Stanadrds for DNA Testing?

- 1. The Trial Court did not abuse its discretion when it ultimately denied prosecution’s request for independent testing as it relied on the arguments and facts presented by the parties and requested the Tribe to do further inquiring on conducting consumptive testing at DPS as it appeared from DPS policies that an exception and accommodations could be made.**

Where the code provides a clear rule, the Court need not look to state or federal law for guidance. 1 PYT § 2-39 (A) and (H). In this case, the code is clear, pursuant to 3 PYTC § 1-4-30, “all attorneys appearing before this Court shall conform to the usual standards of conduct of the American Bar Association in the performance of their duties as an “attorney. Furthermore, prosecutors and defense attorneys are mandated by code to “provide legal services to clients in a manner consistent² with State Bar of Arizona and American Bar Association Standards.” 2 PYTC § 2-15-70 and 2 PYTC § 2-17-80. As a sovereign nation, the Pascua Yaqui Tribe, through its code enacted by council, has elected to abide by the ABA Standards in criminal matters. The Petitioner briefly argues in footnote 13 in their petition that the code does not require adherence to the ABA Standards pursuant to Pascua Yaqui Tribe criminal law or criminal rules of procedure. Petition p. 18, footnote 13. However, if this Court were to adopt this line of reasoning, it would render the requirements of the code, i.e. to follow ABA Standards, without merit or weight. One cannot conform to the ABA Standards and simply ignore the standards.

Neither *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) nor *Bobby v. Van Hook*, 558 U.S. 4, 4, 130 S. Ct. 13, 15, 175 L. Ed. 2d 255 (2009) apply to this case as those cases discuss the application of the ABA Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases in ineffective assistance of counsel claims. More importantly, those involve jurisdictions that have not adopted those

² Consistent is defined as the following: “1. an order done logically with a pattern. 2. anything that doesn’t change. 3. following the rules of standards.” Black’s Law Dictionary Online Legal Dictionary, 2nd ed.; available at <https://thelawdictionary.org/consistent/>.

specific ABA guidelines. This Court previously found that we need not look further than the rules contained in our codes for guidance when the rules are clear. *See PYT v. Lopez*, CA-18-001.

Other courts have in fact applied the ABA Standards for DNA testing. For example, in *USA v. Gardner*, No. 4:14-CR-61-H, 2015 WL 1951809 (E.D. N.C. April 29, 2015), the court ordered the government to permit a defense expert to attend the testing of DNA where the DNA would be consumed. Resp.Ex.7. That court held that “imposition of prophylactic safeguards in accordance with the ABA Standards on DNA Evidence best preserves the defendant’s opportunity to present a complete defense while the government’s request to perform testing.” *Id.* at 3 (citing to ABA Standards for Criminal Justice, DNA Evidence § 16-3.4 (3ed. 2007)). The United States District Court for the District of Arizona followed the decision above in *USA v. Daniel Escalante*, No. R18-2666-(TUC)-RM(LAB) ultimately permitting parties to conduct independent testing. Resp.Ex.8. Nevertheless, these cases only serve as examples where other jurisdictions have voluntarily followed the ABA Standards for DNA. Here, attorneys are ordered to do so by code. The code clearly states that attorneys shall conform to the ABA Standards, and not that they “should be guided.” “Words shall be given their plain meaning...” 1 PYTC § 2-30. In comparison, Arizona State directs lawyers to be “guided” by certain ABA guidelines. *See* 16A A.R.S. Rules Crim.Proc., Rule 6.8 (a)(5):

To be eligible for appointment in a capital case, an attorney must...be familiar with and *guided* by the performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, and the 2008

Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.

Emphasis added.

The Petitioner argues that providing defense counsel with the DPS examiner's complete bench notes and submitting him/her to an interview could cure any concerns the defendant may have regarding contamination or misidentification of a DNA sample. However, uncovered fraud and mistakes in DNA testing and analysis in government laboratories demonstrates the importance of adhering to the ABA Standards for DNA. See Lauren Kirchner, *Traces of Crime: How New York's DNA Techniques Became Tainted*, N.Y. Times, Sept. 4, 2017. Resp.Ex.9. Serious irregularities and misconduct also came to light at the Arizona DPS Crime Lab, the agency which the prosecution hopes to utilize in the present case. See Wendy Halloran and Elizabeth Wiley, *DPS: Forensic Scientist Hid Backlog of 40 Cases, Delayed DNA Testing for Years*, NBC News Channel 12 (Phoenix, Arizona), May 23, 2017. Resp.Ex.10.³ The ABA Standards were created for good reason and as a measure to all parties, including the defendant have access to equal justice.

[C]onsider, for example, the FBI DNA-lab scandal concerning analyst Jacqueline Blake, who pled guilty to falsifying reports of “negative controls”--the data used to demonstrate that no contamination has taken place during testing.²²⁰ Her actions only came to light when a coworker working late noticed a problem with the files on Blake's computer.²²¹ Similarly, an analyst fired from a private laboratory for substituting clean control files in problematic samples was discovered only when a reviewer noticed that her negative blank files were strangely

³ Also available at: <https://www.12news.com/article/news/investigative/dps-forensic-scientist-hidbacklog-of-40-cases-delayed-dna-testing-for-years/440611276>. Undersigned counsel had difficulties printing this article to page.

identical in every case.²²² More recently, an audit of a Massachusetts crime lab revealed “instances in which laboratory officials entered the same genetic profile under two different ID numbers in the database,” and in which an analyst reported “DNA results in four cases matched the genetic material from old rape kits when they had not.”²²³ Independent review of the documents related to a single case simply could not have captured these errors.²²⁴ Review of the analyst's entire body of work might have caught the suspicious data, but of course no court would have mandated such broad disclosure ex ante, simply on the chance that the analyst's work was not up to snuff.

Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 Calif. L. Rev. 721, 773 (2007). Resp.Ex.11. See also, Megan Cassidy: *Former Forensic Scientist Sues Arizona Department of Public Safety, Alleges Retaliation*, The Republic, (April 4, 2018). Resp.Ex.12.

Thus, it would be dangerous for this Court to make a blanket ruling supporting the argument that in every criminal case, consumption of DNA evidence by prosecution is permissible as long as DPS experts submit their complete bench notes and are made available for interview. Moreover, such a finding would be contrary to the intent of the code, which is for attorneys of this jurisdiction to follow ABA Standards in general. Moreover, it would also be a violation of the Indian Civil Rights Act as it would deny Mr. Madrid and other defendants from both equal protection under the law as well as deprive him of liberty without due process of law. 25 U.S.C. § 1302 (a)(D)(8).

Nevertheless, this Court need not address the application of the ABA Standards, generally, if it finds that the appropriate remedy is to remand to permit prosecution to complete the further inquiry as instructed by the trial court. After such inquiry is

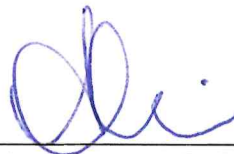
conducted and the finding relayed to the trial court, the trial court may permit independent testing as requested by the Tribe.

There is an alternative remedy in this matter as the trial Court initially permitted the parties to conduct presumptive DNA testing by an independent expert, but ultimately denied this request until prosecution complied with the order for further inquiry into the practices and procedures of DPS. The trial court also permitted leave for prosecution to file *motions in limine* to preclude the defendant from commenting on the absence of DNA testing should the parties ultimately forgo testing. For these reasons, the Petitioner's Petition is not ripe and the requested relief should be denied.

V. CONCLUSION

The trial court did not abuse its discretion when requiring prosecution to make further inquiry regarding expert observations at DPS in accordance with their manual on general policies. Had prosecution made further inquiry pursuant to the court's order, the trial court could have issued other remedies in accordance with the ABA Standards for DNA testing. Furthermore, the trial court opined additional remedies that the Tribe could rely on if for some reason the parties could not complete DNA testing. For these reasons, Mr. Madrid is requesting denial of the Petitioner's request for relief in this matter.

RESPECTFULLY SUBMITTED: September 30, 2019



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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2019, I filed an original and submitted a copy of the Respondent's Response Brief to the following:

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9 **THE PASCUA YAQUI TRIBE COURT OF APPEALS**
10 **IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION**

11 PASCUA YAQUI TRIBE)
12 OFFICE OF THE PROSECUTOR,)
13 Appellant,)
14 vs.)
15 Hon. Melvin Stoof, Judge, Pascua Yaqui Tribal)
16 Court,)
17 MICHAEL MADRID,)
18 Respondent/Real Party in Interest)
19 Defendant.)

Case No.: CA-19-007

**MOTION TO EXTEND
TIME TO FILE RESPONSE BRIEF**

UNOPPOSED

20 Respondent/Defendant, Michael Madrid, through undersigned counsel, Annamarie Valdivia of the
21 Office of the Public Defender, respectfully requests for an extension of time to file its response brief in this
22 matter pursuant to 3 PYTC § 2-3-70 (B). (“The time for doing any act provided by these rules, ... may be
23 shortened or extended upon ... written motion for good cause shown...”). This motion is based on the
24 following:

25 Undersigned counsel is only one of two attorneys currently working full-time for the Office of the
26 Public Defender in addition to one staff member. There are typically five attorneys working full-time at the
27 Office of the Public Defender. However, recent changes have created a larger case load requiring immediate
28 attention in court, with motion’s practice and with managing clients. A larger case load has also required

1 undersigned counsel to prepare and defend clients in more bench trials, revocation proceedings and she is
2 currently preparing for a bench trial on September 24, 2019 as well as a jury trial on October 8, 2019.

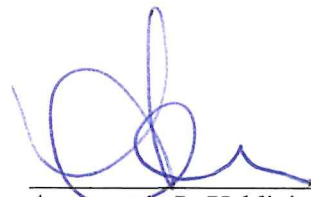
3 Because of this, undersigned counsel was unable to turn her attention to the response brief in the above-
4 referenced matter until this afternoon. Because undersigned counsel will be out of the office September 18
5 for tribal recognition and 19 for an all day visit to Arizona Department of Corrections – Perryville to visit a
6 Yaqui inmate, she is requesting a continuance until September 30, 2019 to finish the response brief.

7
8 Undersigned counsel has had limited exposure to this case, and while she does acknowledge
9 presenting oral argument regarding the American Bar Association’s guidelines on the consumption of DNA
10 evidence, additional time is needed to familiarize herself with the procedural history of this case and to
11 conduct the necessary research to effectively represent Mr. Madrid in this special action.
12

13 Out of an abundance of caution, Appellant respectfully requests for an extension of time to file the
14 response brief. This motion is being made in good faith and not for the purpose of delay.

15 Undersigned counsel contacted Deputy Prosecutor Coleen Thoene and she does not oppose this
16 motion.
17

18
19 RESPECTFULLY SUBMITTED this 13th day of September 2019.
20

21
22
23 

24 _____
25 Annamarie L. Valdivia
26 Senior Staff Attorney
27 Attorney for Mr. Valenzuela
28

CERTIFICATE OF SERVICE

I hereby certify that the original and five copies of the Motion to Extend Time to File Response Brief were delivered this date to:

Ben Casey
Pascua Yaqui Court of Appeals

Coleen Thoene
Deputy Prosecutor
Pascua Yaqui Office of the Prosecutor
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Tucson, AZ 85757

Conforming copy to Michael Madrid, Respondent/Defendant

DATED this 13th day of September 2019.



Annamarie L. Valdivia
Senior Staff Attorney
Attorney for Mr. Valenzuela

**IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA**

PASCUA YAQUI TRIBE,
OFFICE OF THE PROSECUTOR

Petitioner

vs.

Hon. Melvin Stoof, Judge, Pascua Yaqui
Tribal Court,

MICHAEL MADRID,
Respondent/Real Party in Interest¹

APPELLATE CASE NO: CA-19-007

TRIBAL COURT CASE NO: CR-17-
079

PETITIONER’S PETITION FOR SPECIAL ACTION (AMENDED)²

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¹ In Special Actions, the complaint names the body, officer, or person against whom relief is sought. However, “[i]f any public body, tribunal, or officer is named as a defendant, the real party or parties in interest shall be joined as defendants.” Rule 2(a)(1), Ariz. R. P. Spec. Act. In such circumstances, the practice is to direct the writ in form to the court as a matter of courtesy, but in fact leave its handling to the Real Party in Interest. *See* Rule 2, Ariz. R. P. Spec. Act., Arizona State Bar Committee Notes, section (a).

² A copy of this petition was originally filed on August 15, 2019. This amended copy is being filed to comport with the font and formatting requirements of Rule 7, Ariz. R. P. Spec. Act.

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REQUEST FOR SUBMISSION OF COMPLETE TRIAL COURT RECORD

Given the nature of the rules and procedures governing special actions within this jurisdiction, as adopted, *in toto* by *PYT v. Lopez*, CA-18-001 (Oct. 2018), the Tribe respectfully requests that appropriate clerk be ordered to submit the entire trial court record, pursuant to 3 PYTC § 2-3-110. Any attachments or supplemental exhibits attached to the Tribe's Petition will not encompass the complete trial court record.

REQUEST FOR STAY OF LOWER COURT PROCEEDINGS

Trial in this matter is currently scheduled for August 20, 2019. The offenses for which Defendant/Real Party in Interest has been charged were alleged to have occurred nearly three years ago. One of the elements that the Tribe will be required to prove beyond a reasonable doubt at the time of trial is the identity of Defendant as the perpetrator. Given the age of the case, and the fact that the memories of even the best witness can fade over time, DNA comparative testing is necessary. *See* Order to Obtain DNA Via Saliva Swab, *PYT v. Madrid*, CR-17-079 (Jun. 20, 2017) (Tribe's Supplemental Exhibit B).³

In May and June of this year, the trial court issued a ruling effectively barring the prosecution from conducting forensic DNA testing in this case although it had previously ordered Defendant to provide a buccal swab for comparison. *Id.* The court's ruling prohibited the Tribe from being able to use the Arizona

³ In this ruling, the trial court noted that there was "a legitimate governmental interest in matching" Defendant's DNA sample to samples collected at the crime scene. The court specifically and correctly noted that such evidence could serve to bolster eyewitness identification testimony, and also potentially connected Defendant to the very item he was alleged to have damaged.

Department of Public Safety (DPS) crime lab⁴ to conduct comparative testing in this case unless Defendant's expert was present in the lab because such testing would result in the complete consumption of the initial evidentiary sample. The trial court's decision was based on the trial court's interpretation of ABA standards regarding DNA testing, which is not binding law, and the fact that Defendant desired to have his own expert witness the testing procedure at the DPS lab. DPS accreditation requirements and related policies prohibit outside individuals from being present in the lab during testing procedures. Thus, it is impossible for the Tribe to comply with the trial court's order. Additionally, although a reasonable alternative was suggested — namely, using an independent lab chosen by the defense to test the evidence — that alternative was rejected by the court.

As will be discussed more fully below, the trial court's order placed an unreasonable and unduly burdensome restriction on the executive branch's ability to investigate its case and prepare for trial. This restriction has resulted in the Tribe being absolutely unable to conduct forensic DNA analysis. Without this testing, the Tribe will have a much more difficult time proving its case at trial. The trial court's ruling also has implications for other criminal cases filed in the Pascua Yaqui Tribal Courts, regardless of whether they involve DNA analysis. At its core, the trial court's ruling stands for the proposition that any time consumptive testing is required — whether it be for DNA, narcotic, fingerprint, fluid, or other samples — a defense expert, if requested, must be allowed to enter the DPS crime

⁴ The DPS crime lab is accredited by the American Society of Crime Lab Directors-Laboratory Accreditation Board (ASCLD-LAB). Because the Pascua Yaqui Tribal Council has authorized an intergovernmental agreement with Arizona DPS that allows the Tribe to utilize the services of the DPS crime lab for forensic testing.

lab to witness the test or the test cannot happen. In the event that such testing occurs anyway, the Tribe risks receiving a spoliation instruction at trial, which the trial court insinuated that it would give such a proposed instruction. If such testing doesn't occur, the Tribe risks giving the defense a powerfully persuasive line of argument regarding the investigative efforts made by law enforcement. This is an issue of jurisdiction-wide importance that will be seen repeatedly in the future.

Because trial in this case is set for August 20, 2019, the Tribe respectfully requests that this Court stay the lower court proceedings pending resolution of this Petition for Special Action. A stay is necessary in order to ensure that the Tribe and the victims in this case do not suffer irrevocable harm.⁵

REQUEST FOR ORAL ARGUMENT AND TIME FOR ADEQUATE BRIEFING

This Petition raises issues of first impression in this jurisdiction, and involve questions that will arise in future cases. It will require this Court to decide if the ABA Standards constitute binding legal precedent, carrying the same legislative and authoritative weight as existing Pascua Yaqui law, or if they merely constitute useful guidelines and reference material, as other courts have held. This

⁵ The Tribe further notes that it does not have the option to dismiss and refile this case in order to pursue DNA testing for two reasons. First, the trial court's incorrect rulings are considered "law of the case" and would survive even if the case were to be dismissed and refiled. Second, the Pascua Yaqui Tribal Code establishes a one-year statute of limitations for the filing of criminal cases. 4 PYTC § 1-40. Unlike other jurisdictions, such as Arizona, the Pascua Yaqui Tribal Code does not include a "savings clause" for refileing. *See e.g.* A.R.S. § 13-107(G) (allowing for a six-month extension to the statute of limitation to refile a case following a dismissal, even if the statute of limitations has already run).

Court will also have to determine to what extent the judicial branch may dictate the manner and mode of forensic testing in criminal cases, when the executive branch is the governmental body responsible for investigating criminal matters and seeing that laws are enforced. Specifically, it will have to determine whether the judiciary — in response to a defense objection — may place unworkable restrictions on when and how forensic testing may be conducted, thereby prohibiting the prosecution from conducting any sort of forensic analysis.

Resolution of these complex issues will turn upon this Court's interpretation of relevant Tribal, Federal, and State law. Accordingly, the Tribe requests that the matter be set for oral argument as such would be in the interests of justice. *See* 3 PYTC § 2-3-180; 3 PYTC § 2-3-260(C)(6) and (D). The Tribe further requests, given the nature of the issues presented, that Defendant/Real Party in Interest be given adequate time in which to file a written response to the petition, and that the Tribe be given adequate time in which to file a written reply.

STATEMENT OF JURISDICTION⁶

The Pascua Yaqui Tribal Rules of Appellate Procedure grant parties the right to appeal in most, but not all, circumstances. *See generally* 3 PYTC § 2-3-30, *et seq.* The Tribe may not, for instance, appeal a judgment acquitting a defendant in a criminal case. 3 PYTC § 2-3-90(G); Art. I, § 1(c), Pascua Yaqui Const.; *PYT v. Montana*, CA-12-001 (PYT Ct. App. July 23, 2013). The Tribe may, however, request interlocutory or “special action” review. *PYT v. Lopez*, CA-18-001 (Oct.

⁶ The Arizona Rules of Procedure for Special Actions “provide no limits on the time within which a special action may be filed.” *State ex rel. McDougall v. Tvedt*, 163 Ariz. 281, 283, 787 P.2d 1077, 1079 (Ct. App. 1989). Whether a petition is timely filed depends on the unique circumstances of a case. *Id.*; *State v. Mahoney*, 25 Ariz. App. 217, 219, 542 P.2d 410, 412 (1975) (finding untimely the state’s special action petition filed 57 days *after the date of dismissal of a criminal case* where the prosecution provided no reasons justifying the delay); *Cicoria v. Cole*, 222 Ariz. 428, 430, 215 P.3d 402, 404 (Ct. App. 2009) (indicating a four month delay was not a bar to special action jurisdiction given the unique circumstances of the case, and the fact that the issues raised in the petition were ones of statewide importance that would affect numerous cases); *Star Pub. Co. v. Bernini*, 228 Ariz. 490, 492, 268 P.3d 1147, 1149 (Ct. App. 2012) (accepting special action jurisdiction that was technically moot given the state of trial court proceedings).

The Tribe’s Petition is timely. The hearings that form the basis of the trial court’s rulings occurred on May 23rd, May 28th, and June 13, 2019. Although the Tribe promptly requested copies of the recordings of the hearings and submitted them for rush transcription, the final transcript was not received until July 20th, 2019. Part of this delay was due to the fact that the transcriptionist had received a partial recording for one of the hearings, and had to submit a revised transcript once the issue was discovered. This petition was filed less than 30 days from the date that the Tribe received the required transcripts. Under the unique circumstances of this case, the Tribe’s Petition is timely.

2018). While the Pascua Yaqui Tribal Code and Rules of Appellate Procedure do not include rules for special actions, this Court has recently adopted, *in toto*, the Arizona Rules of Special Action. *Id.* Special action review is appropriate in situations “where no ‘equally plain, speedy, and adequate remedy is available by appeal.’” *Id.* at 1-2 (*quoting* Rule 1(a), Ariz. R. P. Spec. Act.). Special action relief is also only appropriate in situations where: “1) the trial judge has failed to exercise discretion which he/she has a duty to exercise, or to perform a duty required by law as to which he/she has no discretion; and 2) the trial judge has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority, and 3) the trial judge’s determination was arbitrary or capricious or an abuse of discretion.” *Id.*; *see also* Rule 3, Ariz. R. P. Spec. Act.; *PYT v. Gracia*, CA-19-006 (May 2019) (indicating that matters should be raised pursuant to Rule 7(e), Ariz. R. P. Spec. Act.). As will be discussed in greater detail in the body of this petition, exercise of special action jurisdiction in this matter is proper.

Special action review is appropriate in this case because the Tribe is seeking review of a pretrial ruling in a criminal matter. The “Tribe has no plain, adequate, or speedy remedy available by appeal because 3 PYTC § 2-3-90(D) prohibits governmental appeals after acquittal.” *Id.* at 2. The trial court’s decision amounted to an abuse of discretion because it exceeded the authority granted to the judicial branch by the Pascua Yaqui Constitution. It created an unreasonable

restriction on the Tribe's duty to investigate its case in preparation for trial. Additionally, and as will be discussed more fully below, the trial court abused its discretion in a manner that will cause similar issues and repeated litigation in a multitude of criminal cases involving the consumptive forensic testing. Accordingly, this Court has jurisdiction over this Petition for Special Action.

STANDARD OF REVIEW

Although the Tribe has been unable to locate published Tribal, State, or Federal cases that is directly on point with the issues presented here, it is well settled that decisions regarding disclosure and the admittance of evidence at trial rest within a trial court's discretion. *See c.f., United States v. Ornelas*, 906 F.3d 1138, 1150–51 (9th Cir. 2018), *cert. denied sub nom. Moreno Ornelas v. United States*, 139 S. Ct. 2638 (2019) (discussing, generally, a court's ability to set disclosure deadlines and to enforce its disclosure orders); *United States v. Doe*, 778 F.3d 814, 822 (9th Cir. 2015) (discussing whether the trial court's narrow, reasonable interpretation of a defendant's disclosure request was an abuse of discretion); *Cooper v. Brown*, 510 F.3d 870, 876 (9th Cir. 2007) (stating that a trial court has discretion to determine the admissibility of forensic DNA testing at trial.). Accordingly, the Tribe submits that the appropriate standard of review to be applied in this case is an "abuse of discretion" standard. This Court has stated that a court "abuses its discretion when it makes an error of law in reaching a

discretionary conclusion, or when the record, viewed in the light most favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision." *PYT v. Coleman*, CA-15-003, p.2 (PYT Ct. App. 2015).

ISSUES PRESENTED FOR REVIEW

1. May a trial court — relying on ABA suggested standards — effectively prohibit the parties from pursuing necessary forensic testing at an independent, defense-selected lab and, instead, order that any testing conducted must be done at the DPS crime lab, and in a manner that would require the lab to violate its policies?

STATEMENT OF THE CASE

I. Facts⁷ and Proceedings Below:

Defendant was charged with three counts of aggravated assault, committed in violation of 4 PYTC § 1-130, one count of injury to public property, committed in violation of 4 PYTC § 1-630, one count of disorderly conduct committed in violation of 4 PYTC § 1-300(D), three counts of threatening or intimidating, committed in violation of 4 PYTC § 1-255(A), and two counts of endangerment, committed in violation of 4 PYTC § 1-180. Complaint and Affidavit of Probable Cause, *PYT v. Madrid*, CR-17-079 (Jan. 4, 2017) (Tribe's Supplemental Exhibit A). The charges are based on the following relevant facts.

On October 31, 2016, the victims drove to the Pascua Yaqui Reservation for Halloween related festivities. *See generally, Id.* Defendant was present at the same event. *Id.* The victims witnessed Defendant strike an adult female and attempted to assist her, even as the adult female subject got into a separate car to drive away. *Id.* According to the reports provided to law enforcement by the victims, Defendant drew a knife, brandished it at them and nearly struck at least one of the victims and threatened to "cut" or "kill" all of the victims present. *Id.*

⁷ The parties contest some of the facts and circumstances relating to the offenses charged in this case, and no factual findings have been made by the trial court or a jury. However, it is the Tribe's belief that the parties will agree as to the case's procedural history.

According to the victims, Defendant also punched one of the tail lights of their vehicle, breaking the taillight cover and leaving behind a smear of blood.

By the time law enforcement arrived, Defendant had fled the scene. *Id.* Officers were able to locate Defendant relatively nearby. *Id.* When he was found, he was carrying a Halloween bag that appeared to have blood stains on it, and he was bleeding from injuries on his knuckles. Defendant spoke to officers and initially denied possessing a weapon. *Id.* However, when confronted by the fact that independent witnesses had seen him throw away a weapon while running, he admitted to having had a knife during the altercation, but claimed that he had only drawn the knife for the purposes of self-defense. *Id.* Officers collected an evidentiary sample of the small blood smear that was left on the remnants of the victims' vehicle's taillight. That sample was placed into evidence and ultimately transported to the DPS crime lab for DNA testing.

On February 23, 2017, the Tribe filed a motion requesting that Defendant provide a buccal swab for comparative DNA analysis with the sample collected from the taillight. The Tribe's Motion was granted over Defendant's objection.⁸

⁸ Defendant's primary contention was that there was no need for DNA testing because he was willing to stipulate that he was present at the scene, and that the blood left at the scene was his. However, based on a review of court records, no written stipulation was ever submitted. Additionally, jurors are free to ignore stipulations, or to only give them limited amount of evidentiary weight. *See* Model Criminal Jury Instruction, Ninth Circuit, #2.3 (concerning stipulated testimony);

See Supplemental Exhibit B. Defendant then filed a Petition for Special Action with the Pascua Yaqui Court of Appeals that was ultimately denied.⁹ Following receipt of the appellate mandate, the trial court set a July 2, 2019, status conference. Opinion and Order, *PYT v. Madrid*, CA-17-002 (undated). The Defendant submitted a buccal swab on January 29th, 2019. After another status conference, trial was set for July 7th, 2020. Later, at the request of Defendant, the trial date was accelerated to August 20, 2019.

On April 26, 2019, the crime lab contacted the Tribe and advised it that testing of the evidentiary samples collected at the scene would result in consumption of those samples. The Tribe requested that testing be deferred until it had an opportunity to contact defense counsel about the issue. Defense counsel objected to consummative testing without providing any articulations for said objection, or any grounds for how consumptive testing would prejudice Defendant. The Tribe promptly filed a motion with the trial court requesting guidance on whether, and in what manner, DNA testing could proceed. The trial court set the matter for expedited hearing on May 23, 2019, attaching a copy of the American Bar Association's (ABA) guidelines regarding consumptive testing as part of its

also Model Criminal Jury Instruction, Ninth Circuit, #2.4 and commentary (concerning stipulated facts, and the manner in which a stipulating becomes binding).

⁹ Defendant's Special Action Appeal was denied because he had a viable appellate remedy if convicted.

order. Order Setting Hearing on DNA Evidence Testing, *PYT-Lopez*, CR-17-079 (May 14, 2019) (Tribe's supplemental Exhibit I).

At the hearing, Defendant requested that he be allowed to have an independent expert present at the DPS lab to personally witness or videotape the testing process. Transcript, May 23, 2019, at 3-5 (Tribe's Supplemental Exhibit D). The Tribe, at the time, did not object to the request. The trial court ultimately ordered that a defense counsel expert be allowed to attend testing at the DPS lab. As part of its oral ruling, the Court indicated "I'm going to just track the language of the ABA standard which would include but is not limited to... the presence of an expert representing the moving party during evidence preparation and testing, videotaping, or photographing the preparation and testing. *Id.* at 14-15. A part of its written ruling, the trial court indicated that it would allow the defense to submit an *ex parte* motion for funds to pay for an independent expert. *See* Order for Consumptive Forensic DNA Testing and Order Setting Hearing on Reivew, *PYT v. Madrid*, CR-17-079 (June 23, 2019) (Tribe's Supplemental Exhibit E).

Shortly after the hearing, however, the Tribe learned from DPS that their internal accreditation policies and standards prohibit non-DPS lab personnel from being present in laboratory areas. This accreditation protocol bars prosecutors, law enforcement, defense attorneys, and independent experts from entering the lab. Immediately upon receiving this information, the Tribe moved the trial court to

reconsider its earlier ruling, and a hearing was set for May 28, 2019. At the hearing, the Tribe detailed the information it had received from DPS, and indicated that independent parties were not allowed into the lab while case samples were being tested due to the “sensitive nature of the entire lab and DNA testing.” Transcript, May 28, 2019, at p.3-4 (Tribe’s Supplemental Exhibit F). The Tribe proposed as an alternative that testing could be conducted at a defense-selected, independent lab as outlined as an option in the ABA guidelines. *Id.* at 4.¹⁰

In its oral ruling, the trial court indicated that it would follow the ABA standards, and that those standards were also used to help govern both lawyer and judicial ethical obligations. *Id.* at 11. It then discussed its previous experience with unrelated out-of-state labs that were equipped with sheltered observation areas. *Id.* at 11-12. Although the court noted that the ABA standards allowed for defense counsel to select an independent lab, the court indicated that it felt that option to be too costly. *Id.* at 12-13. The court further noted that, if the Tribe pursued forensic testing through DPS and an independent defense expert was not allowed to enter the lab to observe the testing, that it would consider it to be a due process issue relating to the “spoliation of evidence.” *Id.* at 13, 18. Finally, the

¹⁰ The Tribe further noted that, while Defendant appeared at one time to be willing to stipulate to his presence at the scene, the jury had the right to disregard the stipulation. Given that the offense in this case occurred approximately three years ago, and witnesses’ memories often fade with time, DNA testing was necessary to prove the element of identity at trial. *Id.* at 4-5.

court indicated that it would issue jury instructions regarding spoliation, evidence destruction, and *State v. Willits*, 96 Ariz. 184 (1964) in the event that DPS tested the evidence without allowing a defense expert to be present. *Id.* at 17-18.¹¹ The trial court's written ruling comported with the oral transcript. *See* May 28, 2019 Order, *PYT v. Lopez*, CR-17-079 (Tribe's Supplemental Exhibit G).

After the hearing, the Tribe, out of an abundance of caution again asked DPS if an exception could be made to allow a defense expert to be physically present during any DNA analysis procedure conducted in this case. DPS indicated that they could not because such an exception would place them in direct danger of losing their accreditation. The Tribe then filed a second motion to reconsider, to which it attached a copy of the relevant DPS laboratory guidelines. A hearing was held on June 13, 2019. At said hearing, the trial court acknowledged the DPS guidelines, but indicated that, in his previous experience practicing in New Mexico and Texas, the labs in those states had sheltered areas from which attorneys and outside experts were able to observe testing procedures. Transcript, 6-13-19, at p.4-5 (Tribe's Supplemental Exhibit J). The court then stated the following:

“Well, notwithstanding their policy of not permitting outsiders into their labs or even to observe... the testing, the Court, uh, follows the standards of the ABA because it does look at the interests of both parties and weighs the

¹¹ There was no defense motion before the court requesting such an instruction, nor had the Tribe indicated in its motion that it would purposefully disregard the Court's order.

interest of both parties and certainly the Court found last time that the, uh, Defendant also has an opportunity to review and observe if there's going to be a total consumption of the sample since that's going to prevent them from doing testing at a later date. So that's the whole purpose of the consumptive testing and observation, uh, so you can, uh, just determine that it's properly, the procedure at least was followed and then the expert can argue about the results if they wish."

Id. at 9.

The trial court then denied the motion to reconsider, as well as the request that testing be conducted at an independent, accredited lab of Defendant's choosing. *Id.* at 9-10. Likewise, the trial court rejected the proposition that, in the event that DPS conducted the requisite testing, the criminalist bench notes would be disclosed for an independent expert to review, and the criminalist himself could be interviewed by defense. The Tribe has made additional inquiries with the DPS lab, which had reaffirmed its stance that it will not allow third parties into the lab to witness testing procedures.

Trial in this matter is currently scheduled for August 20, 2019. As of the date of this Petition's filing, the Tribe has been unable to conduct DNA testing in this case because of the trial court's order.

II. Summary of the Argument

The trial court inappropriately applied ABA standards, which do not constituted binding legal precedent, as precedential authority in this case. The court then interpreted those guidelines in an unduly restrictive manner. As a result,

the Tribe has been forced to forgo DNA forensic analysis despite the fact that reasonable testing alternatives were, and are, available. Accordingly, the trial court's decision amounted to an abuse of discretion and should be overturned.

LAW AND ARGUMENT

I. Do the ABA “Standards on DNA Evidence” Relied Upon by the Trial Court Constitute Binding Legal Precedent, or Do They Simply Constitute Useful Reference Material?

In this case, and largely because the parties were unable to provide any authority to the contrary, the trial court relied on the ABA “Standards on DNA Evidence,” *see* Tribe’s Supplemental Exhibit I, to determine whether consumptive testing should be conducted and, if so, under what circumstances. The Tribe will discuss the legality of consumptive in greater detail below. However, it is important to understand the nature of the American Bar Association, their publications, and the fact that their publications do not constitute binding legal precedent.

The American Bar Association is a professional organization that was founded in 1878.¹² While its central purpose is to advance the development of the legal profession, it is not an organization that attorneys are required to join. Licensing matters and ethical rules are, instead, typically handled by the bar associations established by individual States and Tribes. That being said, the ABA has promulgated the “Model Rules of Professional Conduct,” which has been adopted, in whole or in part, by various sovereigns. Additionally, the ABA promulgates suggested standards regarding various legal areas, including the

¹² https://www.americanbar.org/about_the_aba/

preferred practice standards for client representation, and regarding DNA and other types of forensic testing.

Courts are often asked to rely on ABA standards and publications as precedent in criminal cases. However, the United States Supreme Court—in at least one context—has indicated that ABA standards are not precedential or binding authority, but rather, useful reference material that a court may take into consideration when making a decision. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (stating that ABA standards “are guides to determining what is reasonable” in the context of defense attorney representation and performance, but that “they are only guides” as they cannot take into account the unique circumstances presented in individual cases); *also Bobby v. Van Hook*, 558 U.S. 4, 8–9, 130 S. Ct. 13, 17 (2009) (“Prevailing norms of practice as reflected in [ABA] standards and the like... are guides to determining what is reasonable, but they are only guides.”).

Although these cases involve use of the ABA guidelines in the context of “ineffective assistance of counsel claims,” the reasoning and principles employed in these decisions apply equally to the issues presented in this case, and in Indian country. Every case presents a unique factual situation in which a court is required to look at all factors when making a decision. In the context of consumptive forensic testing, there is no “one size fits all” rule as to what procedure should be followed. The ABA standards are not statutes, nor do they carry the same precedential weight as caselaw. Additionally, it is important to note that there is no provision of the Pascua Yaqui Tribal Code which grants precedential or

legislative force to the ABA standards.¹³ For all of these reasons, the ABA standards used in this case are not binding legal precedent, but only guidelines. And, as will be discussed more fully below, the trial court both treated these guidelines as binding precedent and employed a narrow interpretation that resulted in an unreasonable and unjust result.

II. The Trial Court Abused its Discretion when it relied upon ABA “Standards on DNA Evidence,” § 3.4(c) as Binding Legal Authority and Narrowly Interpreted it so as to Limit the Ability of the Prosecution to Investigate and Ultimately Prove its Case.

As discussed above, ABA standards, while useful and potentially persuasive reference material, does not constitute binding legal authority. The trial court, however, relied upon the ABA “Standards on DNA Evidence, § 3.4” as such. Additionally, the trial court interpreted the text of this standard in an overly narrow manner that lead to an unreasonable result. The trial court’s rulings in this case placed the Tribe in an untenable position. The rulings forced the Tribe to choose investigating and preparing its case and accepting the risk of a spoliation instruction or dismissal at trial, or of not fulfilling its investigative duties and allowing Defendant to argue that the investigation was lacking as a defense at trial. And it did so even though § 3.4 specifically contemplates the use of alternative methods of consumptive testing. In short, the court’s ruling constituted an abuse of discretion.

¹³ In the ABA “Standards on DNA Evidence,” the Committee indicates that the standards constitute only “ABA policy.” It is equally important to note that, while the Pascua Yaqui Tribal Code makes reference to the ABA standards in provisions relating to the certification of local attorneys and advocates, nothing in the code suggests that ABA policies dictate criminal law or criminal rules of procedure within the Pascua Yaqui Tribe.

Prosecutors have a duty to investigate in preparation for trial, and to disclose exculpatory evidence to defendants and their attorneys. *See generally Brady*, 373 U.S. 83, 83 S. Ct. 1194 (1963). The Tribe also has a duty to prove the existence of every element of every charged criminal offense beyond a reasonable doubt at trial. 3 PYTC § 2-2-430(D). Proving identity, or whether the defendant currently on trial is the individual who committed the charged offenses, is also an element that must be proven beyond a reasonable doubt at trial. In order to meet its evidentiary burden, the prosecution and law enforcement are typically required to perform forensic testing of items of evidence collected at a crime scene. Such testing is not limited to the areas of DNA comparative analysis, but can also include areas involving fingerprint analysis, testing a sample for the presence of semen or DNA, blood alcohol analysis, and testing items for the presence of illegal drugs.

Unfortunately, in many cases, officers are only able to obtain a small evidentiary sample for testing. For instance, an almost infinitesimal amount of semen may be recovered from a rape victim's clothing, or a small amount of drugs may be recovered from a suspect's pocket, or — as was the situation in this case — a very small sample of blood may be located on a physical surface and collected via swab for testing. In these situations, the evidentiary sample is often not large enough to be split, or to be tested more than once, and any testing conducted will result in the complete consumption of the sample.

Regardless of how small an evidentiary sample is, however, federal courts have long afforded criminal defendants significant procedural safeguards designed to protect a defendant's opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528 (2532) (1984). Additionally, the prosecution typically has a duty to preserve, within reason, evidence that possesses

apparent exculpatory value, and which is “of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *Id.* at 488-89, 2533-34.¹⁴ Nevertheless, Courts have indicated that consumptive testing is allowable, and does not automatically result in due process concerns. *See e.g. United States v. Anderson*, 169 F. Supp. 3d 60 (D.D.C. 2016) (allowing prosecution to pursue consumptive DNA testing in spite of evidentiary samples being consumed, in part, because there was a reasonable likelihood that DNA evidence would be left over as a result of the extraction and magnification process); *Kowalak v. Scutt*, 712 F. Supp. 2d 657, 695 (E.D. Mich. 2010) (relying, in part, on *Carlson v. Minnesota*, 945 F.2d 1026, 1029 (8th Cir.1991), *United States v. Stevens*, 935 F.2d 1380, 1387 (3d Cir.1991), and *Garrett v. Lynaugh*, 842 F.2d 113, 116 (5th Cir.1988) for the proposition that the Due Process Clause places no constraints on the good faith consumptive or destructive testing of evidence by the prosecution).

Out of an abundance of caution, it has been the practice of the Tribe — as it is with a number of prosecuting agencies throughout Arizona and the United States — to notify defense counsel whenever forensic testing will result in the consumption of an evidentiary sample. This is done to give defendants the opportunity to evaluate their options to seek independent testing. *See c.f. Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935) (stating that prosecutors are “in a peculiar and very definite sense the servant of the law” with an obligation

¹⁴ However, while the prosecution has a duty to preserve potentially useful evidence, the United States Supreme Court has determined that, “[u]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” *Arizona v. Youngblood*, 488 U.S. 51, 51, 109 S.Ct. 333, 334 (1988).

to ensure that cases are prosecuted vigorously but fairly). This practice is also detailed in the ABA “Standards on DNA Evidence,” § 3.4(c) (suggesting that prosecutors endeavor to advise opposing counsel when testing is likely to be consumptive). This is done to allow the defense an opportunity to make arrangements to observe the testing process or, as what happens more commonly in Arizona, to allow defense an opportunity to have the evidence tested by an independent, accredited lab that is not affiliated with a law enforcement agency.

In this case, the trial court relied exclusively on ABA “Standards on DNA Evidence, § 3.4(e).” That section states the following:

“If a motion objecting to consumptive testing is filed, the court should consider ordering procedures that would permit an independent evaluation of the analysis, including *but not limited to* the presence of an expert representing the moving party during evidence preparation and testing, and videotaping or photographing the preparation and testing.”

Id. (emphasis added).

Although § 3.4 is not binding legal authority, its plain language clearly indicates that each case, and each circumstance involving potentially consumptive testing is to be treated on an individual basis. The ABA, in drafting this guideline, could have suggested that the only option available for consumptive testing was to allow a defense to have an independent expert present within the lab where the testing occurs, or to allow a third party to photograph or record the testing process. The ABA did not take such a narrow approach. Instead, the ABA indicated that options for testing in this arena were “not limited to” the examples included within

the limited text of the guideline. Thus, other options are available and should be employed when called for by the particular facts of a case.

Here, the DPS crime lab is an ASCLD-LAB accredited lab. As part of its accreditation, the lab is required to employ certain standards and policies regarding contamination, disruption, or interference caused by outside forces. The DPS lab has, therefore, implemented a policy that prohibits any third party from coming into the lab to witness forensic testing procedures unless that individual is there specifically and solely for accreditation purposes. This is a policy that applies to all individuals. For instance, prosecutors, law enforcement officers, defense attorneys, defense experts, and civilians are all equally restricted from having access to the lab itself. While the DPS lab has an observation area, that area is not set up in a manner that would allow individuals to observe testing procedures within the lab.

The constraints that the DPS lab has to follow do not, in any manner, limit Defendant's ability to seek an independent test of the sample in this case. Defendant was able to secure funding for an independent expert from the court with a cap of \$2400. *See* Tribe's Supplemental Exhibit H.¹⁵ Said funding could

¹⁵ The trial court also indicated that, while it expected the public defender, who represents Defendant, to pay for expert services, it would order the Tribe to pay any remaining cost for expert fees, up to the \$2400 cap, that the defense agency would be unable to cover. Such an order and cost break down could easily have

have just as easily been applied to a defense-selected, independent lab capable of conducting the testing necessary in this case, and one that would not have the same restraints and restrictions that the DPS lab does. Indeed, in jurisdictions in Arizona, and across the country, this is the preferred method.

Instead, the trial court narrowly interpreted § 3.4 as having a preference for allowing defense-hired, independent experts to be present within crime labs to observe and/or record testing procedures. The court, in issuing its ruling, indicated that DNA testing must be conducted at the DPS lab, but in a manner that would present a very real and immediate risk to the lab's accredited status. Such a threat would not just impact cases filed before the Pascua Yaqui Tribal Court, but would cases pending in Federal and Arizona State courts, sister sovereigns, which rely on the DPS lab for forensic testing.

The trial court then went a step further in its oral ruling, and indicated that it would entertain the issuance of a spoliation or *Willits* style instruction.¹⁶ This ruling placed the Tribe in an untenable position. On the one hand, it could abide by the court's order, in which case, no DNA testing could be performed. This

been used to pay for an independent, defense-selected lab that said expert has access to.

¹⁶ Pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), allows a trial court to issue a jury instruction which allows a jury — if they find that the prosecution caused material evidence to be destroyed, either directly or through inaction — to infer that the destroyed evidence would have benefitted a defendant at trial in terms of proving his innocence.

would potentially allow Defendant a particularly powerful line of argument at trial; specifically, that law enforcement and the prosecution had failed to test any and all evidence it had, and failed to conduct a full and complete investigation. On the other hand, the Tribe could push forward with testing at the DPS lab, obtain a result—whether it was inculpatory or potentially exculpatory—and attempt to admit it at trial. However, under this scenario, the Tribe would run the risk of the evidence being determined to be inadmissible. Even if it was admitted, the Tribe would run the very real risk of an adverse jury instruction that would allow the jury to consider admission of any DNA evidence ultimately worthless. In short, the Tribe was left with two untenable options, both of which would result in its inability to investigate its case, prepare for trial, or prove the necessary element of identification at trial.

The ABA guidelines regarding DNA testing are designed to be suggestions for prophylactic safeguards. They are not binding precedent. Nor do they encompass all options available to parties or to the court in situations where consumptive testing is required. Although Defendant asked to have an expert present in the DPS lab for the testing procedure as a witness, there was another readily, and easily, available alternative that the trial court rejected. This alternative would allow the defense to witness the required forensic testing conducted by an expert of its choosing, or to have the testing conducted by an

expert and lab of his choosing. It would also obviate the concerns of accreditation and loss thereof currently at issue with the DPS crime lab. While this option would have required the expenditure of funds, the trial court ultimately authorized up to \$2400 in funding to Defendant to pay for an independent expert. The fact that the trial court has had experiences with different crime labs in different jurisdictions that may have had different policies or the resources with which to set up a dedicated and useful observation area is inapposite, as those labs are not the labs available to the Pascua Yaqui Tribe. Another option would have involved allowing the DPS lab to test the evidence, submit their complete bench notes to defense counsel and/or a defense expert for review, and submit to a defense pretrial interview themselves.

Given all of the circumstances presented in this case, the trial court abused its discretion, first, by applying the ABA guidelines as precedential authority, and then by interpreting the guidelines in an unreasonably narrow manner. As a result, the trial court issued an order regarding DNA forensic testing that the Tribe was unable to comply with, and placed the Tribe in a position where it may not be able to prove its case at trial. For these reasons, the trial court's decision amounted to an abuse of discretion.

III. The Trial Court's Ruling Amounted to an Abuse of Discretion Because it Amounted to an Impermissible Infringement by the Judiciary into the Realms that Reside Within the Realm of the Executive.

An equally troubling result of the trial court's ruling in this case is the fact that it involves an exercise of judicial power to impermissibly limit and infringe upon matters that are normally entrusted to the executive branch of government. This infringement is direct result of the trial court's holding being so narrowly tailored as to prevent the Tribe from conducting necessary testing in this case.

The Pascua Yaqui Constitution establishes three separate branches of government, "the Legislative, the Executive and the Judicial." Art. 4, Pascua Yaqui Const. It further states that "no person or group of persons charged with the exercise of powers properly belonging to one of these branches, shall exercise any powers properly belonging to the others." *Id.* The legislative branch has the power to enact laws, and "[t]o negotiate and to execute contracts and agreements with federal, state and local governments," Art. VI, §1, Pascua Yaqui Const., and to "appropriate available tribal funds for ...purposes serving the general welfare." The judicial branch is tasked with presiding over legal matters arising out of the Tribal code, Art. VIII, Pascua Yaqui Const. The police department is considered a member of the Executive branch of government and is tasked with enforcing the laws created by the legislature. 2 PYTC § 2-8-10; Art. VII, §1, Pascua Yaqui Const. "Because our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence, the

commingling of functions among branches has concerned the Court only when commingling poses the danger of “encroachment” (that is, when it threatens to undermine the authority and independence of one or another coordinate branch,) or aggrandizement (as occurs when one branch seeks “powers more appropriately diffused among separate Branches).” *United States v. Ray*, 375 F.3d 980, 995 (9th Cir. 2004) (*internal citations and quotations omitted*).

Courts in other jurisdictions have held that the judiciary may not infringe on the realms of the legislature or executive outside of normal “checks and balances” principles. *See e.g. United States v. Neyens*, 831 F.2d 156, 162 (7th Cir. 1987) (noting courts cannot dictate parole release dates as that is a function of the executive); *also United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016) (determining that USDOJ could not use funds that had not been appropriated by the legislature as that would violated separation of powers); *also cf. United States v. Alfonso*, 143 F.3d 772, 776 (2nd. Cir. 1998) (inappropriate for a court to dismiss an indictment by looking beyond the scope of the indictment and drawing inferences to what proof prosecution/executive would be able to introduce at trial); *United States v. Farrar*, 338 F. Supp. 3d 1186, 1191 (D. Haw. 2018) (inappropriate for court to review prosecutions charging decision absent a prima facie showing that the decisions rested on an impermissible basis); *Ray*, 375 F.3d at 995 (stating that compliance of the prosecution with a standing order of the judiciary did not

violate separation of powers doctrine when there was no evidence that complying with the standing order would impair the executive branch's ability to fulfill its duties).

The Pascua Yaqui Tribal Council, to this end, has entered into an intergovernmental agreement with the Arizona Department of Public Safety, specifically to be able to use the services of its crime lab to conduct forensic testing in criminal cases. Whether the scope of accommodations the DPS crime lab is able to provide within the limits of its policy and accreditation standards differs from what labs in other states might be able to provide is not the issue, and should not have been a basis for the trial court's ruling in this case.

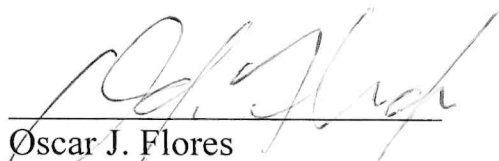
Here, the executive branch of the Pascua Yaqui government, of which the prosecution is a designated subagency, is tasked with enforcing the law. It is also tasked with filing criminal charges against offenders when the law has been violated, and ensuring that criminal cases are investigated, prepared, and fully presented at trial. Had the trial court's ruling in this case been broader and allowed for other, reasonable alternatives, no infringement would have occurred. Instead, the trial court issued a ruling that placed the prosecution in the position of abiding by the ruling and being unable to present evidence at trial while placing the defense in a stronger position in terms of argument, which would work together to make it more difficult — if not impossible — for the prosecution to prove its case.

If the prosecution chose to violate the court's order and conduct the testing it was lawfully required to do, it ran the very real risk of a *Willits* or spoliation instruction. This was an impermissible infringement on the executive's investigatory duties and, therefore, amounted to an abuse of discretion.

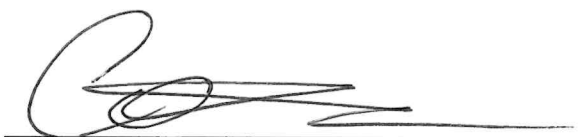
CONCLUSION AND REMEDY SOUGHT

For the reasons discussed above, the Tribe respectfully requests that this Court stay the trial court proceedings based on the issues presented in this Petition. The Tribe further requests that the Court set a reasonable briefing schedule, followed by oral argument. Finally, the Tribe requests that this Court find that the trial court's overly narrow ruling regarding the method and manner of consumptive DNA testing be vacated as it amounted to an abuse of discretion.

RESPECTFULLY submitted this 15th day of August, 2018.



Oscar J. Flores
Chief Prosecutor



Coleen Thoene
Deputy Prosecutor



Russell Boatwright
Deputy Prosecutor

CERTIFICATE OF SERVICE

I hereby certify that the Tribe's pleading was delivered this date to:

Benjamin Casey
Ben.Casey@pascuayaqui-nsn.gov
Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7777 S. Camino Huivisim
Tucson, AZ 85757

And that one (1) copy of the Tribe's pleading was delivered, this date to:

Annamarie Valdivia, Annamarie.Valdivia@pascuayaqui-nsn.gov
Melissa Acosta, Melissa.Acosta@pascuayaqui-nsn.gov
Pascua Yaqui Office of the Public Defender
7474 S. Camino de Oeste
Tucson, AZ 85757

And that one (1) copy of the Tribe's pleading was delivered this date to:

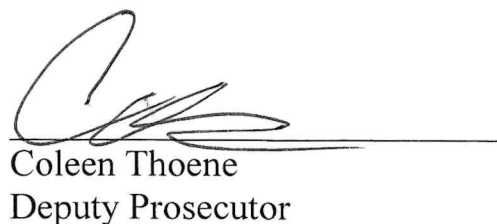
Associate Judge Melvin Stoof
Pascua Yaqui Tribal Court
7777 S. Camino Huivisim
Tucson, AZ 85757

Dated this 20 day of August, 2019.

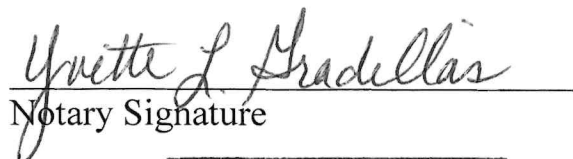
PASCUA YAQUI PROSECUTOR

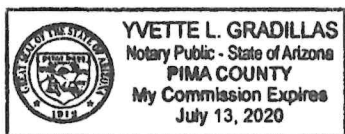

Oscar J. Flores
Chief Prosecutor


Russell Boatwright
Deputy Prosecutor


Coleen Thoene
Deputy Prosecutor

Sworn before me this 20th day of August, 2019


Notary Signature




CERTIFICATE OF COMPLIANCE

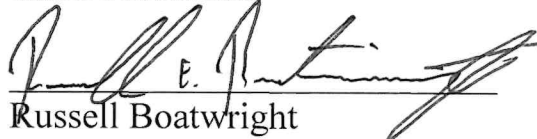
1. This certificate of compliance concerns an amended Petition for Special Action submitted under 3 PYTC § 2-3-90, and Rule 7, Ariz. R. P. Spec. Act., and supplemental exhibits previously filed on August 15, 2019.
2. The undersigned certifies that the Petition for Special Action to which this Certificate is attached uses a proportionally-spaced typeface of at least 14 points, is double-spaced, and contains 7749 words.
3. The document to which this Certificate is attached does not exceed the word limit set by Rule 7, Ariz. R. P. Spec. Act, and Rule 4, Ariz. R. Civ. App. P., as made applicable by this court in *PYT v. Lopez*, CA-18-001, p.1-2 (Oct. 2018).

Dated this 20 day of August, 2019.


PASCUA YAQUI PROSECUTOR



Oscar J. Flores
Chief Prosecutor

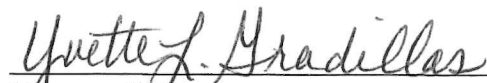


Russell Boatwright
Deputy Prosecutor

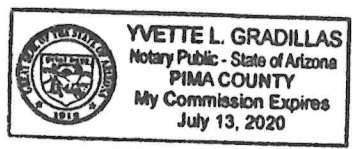


Coleen Thoene
Deputy Prosecutor

Sworn before me this 20th day of August, 2019



Notary Signature



**IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA**

PASCUA YAQUI TRIBE,
OFFICE OF THE PROSECUTOR

Petitioner

vs.

Hon. Melvin Stoof, Judge, Pascua Yaqui Tribal
Court,

MICHAEL MADRID,
Respondent/Real Party in Interest¹

APPELLATE CASE NO: CA-_____

TRIBAL COURT CASE NO: CR-17-079

PETITIONER’S SUPPLEMENTAL EXHIBITS

Oscar J. Flores, Chief Prosecutor
Russell Boatwright, Coleen Thoene,
Deputy Prosecutors
Pascua Yaqui Office of the Prosecutor
7777 S. Camino Huivisim, Bldg. A, 2nd
Floor, Tucson, AZ 85757
Telephone: (520) 876-6251
Oscar.J.Flores@pascuayaqui-nsn.gov
Coleen.Thoene@pascuayaqui-nsn.gov
Russell.Boatwright@pascuayaqui-
nsn.gov

Attorneys for the Pascua Yaqui Tribe

¹ In Special Actions, the complaint names the body, officer, or person against whom relief is sought. However, “[i]f any public body, tribunal, or officer is named as a defendant, the real party or parties in interest shall be joined as defendants.” Rule 2(a)(1), Ariz. R. P. Spec. Act. In such circumstances, the practice is to direct the writ in form to the court as a matter of courtesy, but in fact leave its handling to the Real Party in Interest. See Rule 2, Ariz. R. P. Spec. Act., Arizona State Bar Committee Notes, section (a).

CERTIFICATE OF SERVICE

I hereby certify that the Tribe's pleading was delivered this date to:

Benjamin Casey
Ben.Casey@pascuayaqui-nsn.gov
Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7777 S. Camino Huivisim
Tucson, AZ 85757

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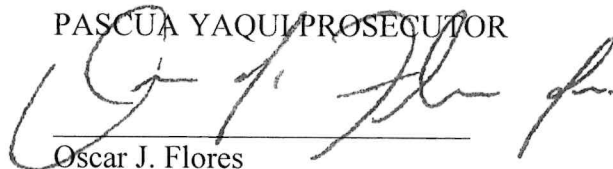
Annamarie Valdivia, Annamarie.Valdivia@pascuayaqui-nsn.gov
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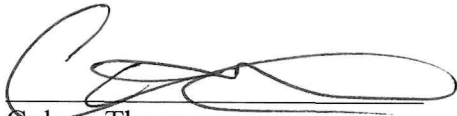
Associate Judge Melvin Stoof
Pascua Yaqui Tribal Court
7777 S. Camino Huivisim
Tucson, AZ 85757

Dated this 15 day of August, 2019.

PASCUA YAQUI PROSECUTOR



Oscar J. Flores
Chief Prosecutor




Coleen Thoene
Deputy Prosecutor



Russell Boatwright
Deputy Prosecutor

Sworn before me this 15th day of August, 2019


Notary Signature

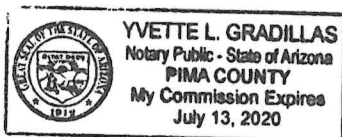


Exhibit A
(Copy of Criminal Complaint and Affidavit filed
in *PYT v. Madrid* CR-17-079)

1 **IN THE PASCUA YAQUI TRIBAL COURT**
2 **IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION** PM 1:57

3 **Pascua Yaqui Tribe,**
4 Plaintiff,
5 vs.
6 **MADRID, Michael Raymond**
7 Defendant.

DOCKET NO. CR-17-079
Case No. _____
CLERK JM

CRIMINAL COMPLAINT

8 The PASCUA YAQUI TRIBE, hereby complains and alleges, upon information and
9 belief, that the above named defendant, an Indian, while on the Pascua Yaqui
10 Reservation, did commit the following offense(s):

11 **COUNT 1: 4 PYTC § 1-130(A)(2)(B)(2) ~ Aggravated Assault**

12 On or about October 31, 2016 at approximately 8:30 p.m., at or near 5010 W. Calle
13 Torim, committed aggravated assault by committing assault and using a deadly weapon
14 or dangerous instrument, to wit: placed Tony Orosco in reasonable apprehension of
15 immediate physical injury by swinging a knife and attempting to stab Tony Orosco.

16 **COUNT 2: 4 PYTC § 1-130(B)(2) ~ Aggravated Assault**

17 On or about October 31, 2016 at approximately 8:30 p.m., at or near 5010 W. Calle
18 Torim, committed aggravated assault by committing assault and using a deadly weapon
19 or dangerous instrument, to wit: placed M.O. (a minor/DOB 3/1999) in reasonable
20 apprehension of immediate physical injury by swinging a knife and attempting to stab
21 M.O..

22 **COUNT 3: 4 PYTC § 1-130(B)(2) ~ Aggravated Assault**

23 On or about October 31, 2016 at approximately 8:30 p.m., at or near 5010 W. Calle
24 Torim, committed aggravated assault by committing assault and using a deadly weapon
25 or dangerous instrument, to wit: placed Stephanie Herrera in reasonable apprehension of
26 immediate physical injury by swinging a knife at Stephanie Herrera.

27 **COUNT 4: 4 PYTC § 1-630 ~ Injury to Public Property**

28 On or about October 31, 2016 at approximately 8:30 p.m., at or near 5010 W. Calle
Torim, without proper authority, used, injured, or misused any public, Tribal, government
or private property, to wit: punched the rear tail light of Tony Orosco's truck, breaking it.

1 **COUNT 5: 4 PYTC § 1-300(D) ~ Disorderly Conduct**

2 On or about October 31, 2016 at approximately 8:30 p.m., at or near 5010 W. Calle
3 Torim, with the intent to disturb the peace or quiet of a neighborhood, family or person,
4 or with knowledge of doing so, recklessly handled, displayed, or discharged a deadly
5 weapon or dangerous instrument, to wit: disturbed A.O.(a minor DOB: 7/2003) by
6 swinging a knife near his brother, M.O. (a minor/DOB 03/1999).

6 **COUNT 6: 4 PYTC § 1-255(A) ~ Threatening or Intimidating**

7 On or about October 31, 2016 at approximately 8:30 p.m., at or near 5010 W. Calle
8 Torim, with the intent to scare or terrify, threatened or intimidated another person by
9 word or conduct so as to cause physical injury to another person or serious damage to
10 property of another person, or caused another person to reasonably believe that he/she
11 was in danger of receiving physical injury or damage to property, to wit: threatened to cut
12 and/or kill Tony Orosco.

12 **COUNT 7: 4 PYTC § 1-255(A) ~ Threatening or Intimidating**

13 On or about October 31, 2016 at approximately 8:30 p.m., at or near 5010 W. Calle
14 Torim, with the intent to scare or terrify, threatened or intimidated another person by
15 word or conduct so as to cause physical injury to another person or serious damage to
16 property of another person, or caused another person to reasonably believe that he/she
17 was in danger of receiving physical injury or damage to property, to wit: threatened to cut
18 and/or kill M.O. (a minor/DOB 03/1999).

18 **COUNT 8: 4 PYTC § 1-255(A) ~ Threatening or Intimidating**

19 On or about October 31, 2016 at approximately 8:30 p.m., at or near 5010 W. Calle
20 Torim, with the intent to scare or terrify, threatened or intimidated another person by
21 word or conduct so as to cause physical injury to another person or serious damage to
22 property of another person, or caused another person to reasonably believe that he/she
23 was in danger of receiving physical injury or damage to property, to wit: threatened to cut
24 and/or kill Stephanie Herrera.

23 **COUNT 9: 4 PYTC § 1-180(A) ~ Endangerment**

24 On or about October 31, 2016 at approximately 8:30 p.m., at or near 5010 W. Calle
25 Torim, recklessly endangered another person with a substantial risk of imminent death or
26 physical injury, to wit: endangered Tony Orosco by swinging a knife near Tony Orosco.
27
28

1 **COUNT 10: 4 PYTC § 1-180(A) ~ Endangerment**

2 On or about October 31, 2016 at approximately 8:30 p.m., at or near 5010 W. Calle
3 Torim, recklessly endangered another person with a substantial risk of imminent death or
4 physical injury, to wit: endangered Stephanie Herrera by swinging a knife near Stephanie
5 Herrera.

6 **COUNT 11: 4 PYTC § 1-180(A) ~ Endangerment**

7 On or about October 31, 2016 at approximately 8:30 p.m., at or near 5010 W. Calle
8 Torim, recklessly endangered another person with a substantial risk of imminent death or
9 physical injury, to wit: endangered M.O. (a minor/DOB 03/1999) by swinging a knife
10 near M.O. (a minor/DOB 03/1999).

11 And such violations, upon conviction, are punishable under the Pascua Yaqui Tribal
12 Codes. The undersigned hereby swears or affirms that this complaint is based upon
13 information and belief, and the attached Affidavit and Verification, or signed statement.

14 **DATED this 4th day of January, 2017.**

15 
16 _____
17 Complainant/Attorney

18 *Pursuant to Article I, § 1(g) of the Pascua Yaqui Constitution, 4 PYTC § 4-20, and 25 U.S.C. §*
19 *1302(a)(b), If found guilty at sentencing or plea agreement, the Pascua Yaqui Tribe may seek*
20 *punishment that includes imprisonment.*

21 DEFENDANT: Michael Raymond Madrid
22 ADDRESS: 7681 S. Vatgue Tucson, AZ 85757
23 DOB: 01/07/1993 SSN: ORIGIN: Pascua Yaqui Tribe #2694U08049
24 SEX: Male HT: 5'4" WT: 129 EYES: Brown HAIR: Black

25 *Note: Accused persons may obtain disclosure information about their case ten days after arraignment by contacting*
26 *the Prosecutor's Office at 7777 S. Camino Huivisim, Tucson AZ 85757. [3 PYT R.Crim.P. Rule 38]*
27
28

IN THE PASCUA YAQUI TRIBAL COURT IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION	
<p>_____</p> <p>PASCUA YAQUI TRIBE, Plaintiff</p> <p>Vs.</p> <p>Michael Madrid , Defendant</p>	<p style="text-align: center;">CLERK</p> <hr/> <p style="text-align: center;">COURT USE ONLY</p> <p style="text-align: center;">Case Number P16103121</p>
PROBABLE CAUSE STATEMENT	

TRIBAL COURT
MANDATE

PMPI: 1:57

CR-17-020
CR-17-079
mu

AFFIRMATION

1. *C. Tapra 358*
I, being a duly authorized law enforcement officer of the Pascua Yaqui Indian Tribe and for the Pascua Yaqui Indian Reservation, declare under penalty of perjury, the following is true and correct:
 - A. I am the arresting officer in this case; OR
 I am a law enforcement officer and make this statement on information and belief derived from Officer .

2. SUSPECTED PARTY (Defendant)

Name: **Michael Madrid**

Driver's license number:

Tribal enrollment number: **2694U08049**

Date of birth: **1/7/1993**

Michael Madrid is an enrolled member of the **Pascua Yaqui** Tribe.
 is an Indian subject to the jurisdiction of the Pascua Yaqui Tribe.

3. The defendant was Arrested on 10/31/2016 at 8:52:00 PM

NOV 3 2016 4:34 PM

4. I have probable cause to believe that the defendant committed the following offense(s) at or near **5010 W. Calle Torim** which is within the exterior boundaries of the Pascua Yaqui Indian Reservation.

PYTC 4-1-130B - aggravated assault

PYTC 4-1-130 - assault

PYTC 4-1-150 -battery

PYTC 4-1-300/3.10F - D.C. / D.V.

5. Statement of Probable Cause:

Probable Cause Narrative

On October 31, 2016 at approximately 2030 hours there was emergency tones reference to a fight in progress with weapons involved in the area of 5010 W. Calle Torim. As I was en route to the incident location I was waved down by several individuals that were pointing (northeast from Potam and Calle Torim) saying "he ran that way" "he is wearing a red hat black shirt".

I drove thru the alley way (potam and Rahum) and reached Calle Rahum. I saw another male point north on Rahum. I was unable to locate a male with that description and return south on Rahum. I then noticed a male that seemed out of breath wearing the same description (red hat black shirt).

I approached the male in my fully marked patrol vehicle and asked him to stop. He complied. The male identified himself as Michael Madrid (DOB 01/07/1993 PYT enrollment # 2694U08049). He stated he was trying to get away from people that wanted to jump him but he did not hurt anyone. I noticed Michael had a white and orange Halloween bag that had blood on it. Michael also had blood coming from his fingers (fists) and I observed several lacerations. I asked Michael if he had any weapons and he said no. Michael smelled of alcoholic intoxicants and he stated he had had been drinking before going out for Halloween.

Ofc. Machado interviewed the other parties involved -refer to supplement for further-

A male subject later approached me as I was speaking to Michael and he identified himself as Pena from PYPD Probation. Pena advised me that Michael threw something underneath the van which was located at 7621 S. Camino Rahum.

Michael then did say he had a knife and threw it under the van. Per Michael he took out his knife to defend himself because the other individuals that wanted to jump him took a knife out.

PYFD was summoned and they evaluated.

PROBABLE CAUSE STATEMENT

Michael Madrid

Incident# P16103121

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I spoke with Pena and his wife which was identified as Andrea Pena (DOB 07/22/1987). Andrea stated that she saw police cutting across the alleys way and her daughter pointed out that a guy was running. She then saw the police car drive north on Rahum and a man was walking south on Rahum threw something in her direction. Andrea stated that she felt something go over her foot and heard something scraps the concrete. She stated she then discovered that it was a knife. Andrea described Michael was wearing a red hat and a black shirt. Andrea stepped out and saw Michael getting treated by PYFD and confirmed that's the man she saw waking south on Rahum and threw the knife under the van.

Vince stated he saw the Michaels face when he was running and noticed Michael had hid from police when the police officer passed by in the car. He then saw Michael run into the street and began to walk casually. Michael then ducked behind the van and that's when he threw something underneath it.

I took photographs of Michael's person, his injuries, the location of the knife and knife.

I spoke with Michael's girlfriend Jessica, on the telephone and she agreed to meet with me at her mother's house where she was currently at. 7440 S Camino Caballo. There's was negative contact with Jessica. I spoke to a female that stated Jessica was fine and she did not see any injuries on her. She stayed her grandmother, Patricia Cariño, took Jessica home along with her three children.

Michael was transported to PYPD where I read him his Miranda rights and he stated yes he understood and yes he would answer my questions. Michael stated it all started near the boys and girls club bus stop when his girlfriend, Jessica Williams (DOB 01/30/1987), (relationship for approximately 5 months and live together) got a phone call and received news of her cousin passing away. She became so emotional and wanted to leave the area but Michael said he was telling her she must wait for her kids (3 kids (Ariana 12yooa, Juanito 8yooa and Alexis 5yooa) that were on their way to their location. He said that he was trying to control her from freaking out when he saw people getting out of a car and telling him to leave her alone. Michaels said there was an older male and a younger male that got off a black truck. He described it to be a black Dodge Ram truck. At that time the younger male took out a knife which he described it to be approximately 5-6 inches in length. As the male kept approaching him with the knife he also took his out to defend himself. At that time he saw Jessica jump into a car and knew she would end up going home so Michael said that he began to walk east. Per Michael the older male jump out of the truck and he reacted and punched his vehicle telling him to get back. Michael said that the younger male pulled a knife out again for the second time and he began to run. Michael did say the younger male did swing the knife at him at one point but he doesn't think he made contact with him. Michael did say he heard police sirens after he stopped running and he threw his knife on the floor because he was scared of police. Michael described the younger male as 18-19 years of age, tall, long hair and wearing all black. The older male was described as a shorter male, in his 30's, with short hair. Michael stated that he did not put his hands on Jessica to harm her and he would never do that.

PROBABLE CAUSE STATEMENT

Michael Madrid

Incident# P16103121

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Michael was transported to northwest hospital for further medical treatment on his hand which had two lacerations on his Posterior ring finger and middle finger.

I arrived at Campbell terrace apartments 4750 S. Campbell Ave and spoke with Jessica. I did not notice any marking, bumps, bruises, swelling or deformities on Jessica that was consistent to her being assaulted. I asked Jessica what had happened and she stated that she was had become emotional to her hearing that her close cousin (Ernesto Castillo) had recently passed away. She stated she became so emotional that she couldn't bare anyone and she wanted to go to her mother house (on Caballo). She stated that Michael tried to console her but she pushed him off and asked a female that she recognize to give her a ride to her mother's house. She jumped into the car and left the area. Jessica stated she was not assaulted by Michael.

Officer Machado Involvement in this case:

On 10/31/2016 at approximately 20:15 hours, I responded as a backup officer regarding a fight with weapons. The call was toned as an emergency call and firstly reported at Torim and Tetakusim.

As the call was being dispatched, I was listening when a vehicle drove up behind me while I was at the fire station. As I received the information from dispatch, I began to drive away by turning around the vehicle that drove up. I could see it was a white four door vehicle and a woman driver called to me. I stopped my motorcycle and the woman driver asked if I was going to the call over there. The woman then pointed to the west. The woman said that there was a fight. One guy has a knife and the other people are in a black truck. I stated to the woman that that was the same call I was going to.

I responded by driving west on Torim as I thought initially the incident may be on Torim and Tectiviecti as Torim and Tetakusim run parallel to each other. As I was driving westbound on Torim passing Potam, I noticed a male jumping up and down waving his hands in the air. I slowed and the male shouted "He's running that way." The male pointed eastbound on Torim and Potam area.

Dispatch reported that the person with a knife was named possibly Michael Madrid and was wearing a red hat and black shirt and was running on Torim.

I turned my motorcycle around and as I traveled northbound on Potam from Torim, I noticed another male running. I called to the male and he stopped. He stated to me that he was chasing the guy with the knife. He pointed in a northwest direction into the alleyway east of Potam and said that he was running that way.

Officer C. Tapia called out that he was with Michael Madrid on Rahum. I remained at the scene with the other male and a black Ford F150 Bearing Arizona license plate BET1211 arrived.

The male I was speaking to identified himself as Tony Orosco (07/28/1980-Tohono O'odham enrolled). Tony stated to me that he was driving the black

Ford F150 with his family as he was taking his kids Trick-or-Treating and at the time was in a line of traffic at the Boys and Girls club on Torim which is about the 5010 block of Torim. Tony said that he observed a couple yelling and then saw a male wearing a red baseball hat with a letter "D" on it and black shirt grab and bear hug a black woman wearing a red shirt and jeans. Tony then said the male punched the woman in the face with his fist. Tony said he yelled out of his window to leave the girl alone. Tony then said that the girl began screaming for help and running in and out of traffic. Tony said that he heard the woman yell, "Somebody help me, get him away from me."

Tony then said his wife Stephanie Herrera (02/17/1973-Tohono O'odham Enrolled) said that maybe they should help her. Tony said that Stephanie and his son Manchello Orosco (03/14/1999-Tohono O'odham Enrolled) exited the vehicle and called to the woman to get in the truck and they would give her a ride. Tony said that he made a U-turn and saw the male swinging the knife at his wife and son.

Tony said that he exited the vehicle and began yelling at the male. Tony said the male yelled, "I will cut you all. I will kill all three of you." Tony said that the male approached him and began swinging the knife at him attempting to stab him. Tony said that he had to jump backwards so that the male would not stab him in the throat.

Tony then said the male punched the right rear tail light of his truck with his fist and began to walk away. Tony followed him and they began to run eastbound on Torim. Tony said that as he began to run after the male, another black male put his hands out and stopped Tony and said something to the effect of, "Hey leave that guy alone he's with me." Tony then told the man that he tried to stab him, his wife, and his son. Tony then said that the small group began yelling, "Run Mikey, just go home, Run."

Tony continued saying that he resumed chasing the male until he saw my police motorcycle and called at him to stop.

I looked at the truck and observed that the right rear tail lamp was broken. I could also see a small blood smear at the broken area of the lens. I looked at the rest of the truck and took pictures all around the vehicle. I did not note any other damage and Tony stated that the male only punched the rear light as he began to drive. Tony added that the male also punched a sign at the Boys and Girls club at the bus stop and there should be blood there as well.

Sergeant M. Corleone arrived and stated that the blood smear needs to be collected for evidence. Sgt. Corleone then provided me with a cotton tipped swab in a sealed package, a white evidence box, and a newly unopened bottle of water. I placed on a set of gloves and Sgt. Corleone then poured a small amount of the water into the cap and asked me to wet the cotton swab that I had just opened. I then used that swab to collect the blood smear off of the broken tail lamp of the truck. I then secured the swab in the evidence box and placed it into my luggage box of the police motorcycle where I later placed it into the evidence department of the Pascua Yaqui Police Department.

I then made contact with Stephanie Herrera who said that she was in the

truck as a passenger and were driving on Torim when she saw a male punch a female in the face. Stephanie continued that the woman began running into traffic on Torim and was screaming for help when she said to her husband Tony that they should help her. Stephanie said she could hear the woman screaming, "Help, get him away from me." Stephanie said that she and her son Manchello exited the vehicle and began to call to the woman so that they could give her a ride home. Stephanie said that the woman jumped into a dark blue colored Jeep Liberty. Stephanie said that she could see the woman sitting in the rear passenger seat and she was crying and her face was covered with blood.

Stephanie said that the male in black came up to them as her husband was driving the truck making a U-turn and pulled out a knife. Stephanie said that she saw the blade of the knife as it had a silver color. Stephanie also said that she heard it make a "Click" sound as the male unfolded it using both hands. Stephanie said that this is how she knew the knife to be a real knife and not a Halloween prop.

Stephanie said that the male swung the knife at her son Manchello and her son had to jump backwards so that he did not get stabbed. Stephanie said that she then stood in-between her son and the male and yelled at him to stop and not hurt her son. Stephanie then said that her husband Tony then drove up and exited the vehicle and yelled at the male to stop. Stephanie said that the male yelled, "I will cut you all, I will kill all three of you." Stephanie also said that male was yelling that this was Barrio Nuevo Libre Blood set.

Stephanie said that her husband then chased the male eastbound on Torim and she drove the truck with her kids in to Potam and Torim where she saw police lights and me speaking with her husband.

Stephanie described the male as wearing a hat with the letter "D" on it and a white shirt who appeared to be young like in his early 20s. Stephanie said the woman appeared to be a black lady who was also in her early 20s and was wearing a red shirt and blue jeans.

I then spoke to Manchello Oroasco (03/14/1999-Tohono O'odham enrolled) who stated that he was in the truck with his family when he saw a couple arguing. Manchello said that the male then grabbed the woman and then punched her in the face. Manchello said that his father Tony yelled from the vehicle to leave the girl alone. Manchello said that his mother Stephanie said to his father that they should help the woman and give her a ride. Manchello then exited the vehicle with his mother and began to call at the woman as she was running through the street yelling for help.

Manchello said that the woman jumped into a dark green Jeep Liberty and drove off. Manchello said he could see that the woman was bleeding from the nose and the mouth.

Manchello said that the male then walked up to him and asked him what he thought he was going to do getting out of the truck like that. Manchello said that he said he was just trying to help. Manchello said that the male pulled out a knife and unfolded it and began swinging it at him trying to stab him and yelled that this was Barrio Nuevo Libre.

Manchello said that he was trying to stab me here, and pointed to his neck/throat area. Manchello said that he had to jump backwards to avoid getting stabbed. Manchello said that if he had not jumped backwards that he would have been stabbed by the knife. Manchello said that the knife had a silver blade and he heard it click when he used two hands to open the knife.

Manchello said that his mother Stephanie then came up and began to yell at him and he continued to swing his knife. Manchello said that his father Tony finished turning around and exited the vehicle and began yelling at him too. Manchello said that the male tried to stab his father Tony as well and then punched the truck and began to run off. Manchello said that he also began to run after his father who was chasing the male with the knife until he saw me on my police motorcycle and waived me down.

Manchello described the woman as wearing a red shirt and blue jeans and had a busted face. Manchello clarified and said that the black woman had blood covering her face. Manchello said that she was also a black woman who appeared younger and approximated early 20s. Manchello said the male was wearing a red baseball hat with a white letter "D" on it, black shorts, and a black shirt and stood about 5'5" and had a thin build. Manchello said he also appeared to be in his early 20s.

I then made contact with Alanzo Orosco (07/26/2003-Tohono O'odham Enrolled) who said that he was inside the truck with his family when he saw a guy punch a woman in the face and the woman began to run around and yell for help. Alanzo said his mother Stephanie and Brother Manchello exited the vehicle and the woman got into another car and drove off.

Alanzo said that while he was inside the vehicle he could see that the male pulled out a knife and yelled at his brother and mother, "I'm going to stab all of you."

Alanzo said that the male was wearing a red hat with what looked like a letter or design on it and a black shirt. Alanzo said the woman was wearing a red shirt.

Alanzo said that his mother then got into the vehicle and drove off to where his father was talking with the cops.

The last passenger in the vehicle was a 4 year old Anthony Orosco who was reported as remained inside the vehicle during the occurrence.

Tony, Stephanie, Manchello, Alanzo, and Anthony did not require any medical attention and were uninjured.

I advised Tony that a detective would be contacting him and he stated that he would speak to them as the case was forwarded to Detectives and Victim Services. Tony stated that he lives with his family on the Tohono O'odham reservation.

I then drove to the Boys and Girls club at 5010 W. Torim. I stopped and photographed the scene and was unable to locate the actual location of the incident. I did notice that a substance of some kind appeared to be on an electrical box. I took photos of that as well to be entered into evidence. I

PROBABLE CAUSE STATEMENT

Michael Madrid

Incident# P16103121

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was not able to locate damage or blood on any of the signs at or around the bus stop.
NFI

Michael was transported and booked into PYPD detention center per the following PYT codes:

*4-1-130B- aggravated assault

*4-1-130- assault

*4-1-150-battery

*4-1-300/3.10F- D.C. / D.V.

The information contained herein is true and accurate to the best of my knowledge and belief.

- I request that the Court make a probable cause determination and, if the defendant is in custody, that he be continued in custody, pending further proceedings.

C. Lopez 758
Signature of Officer

EXECUTED ON: 11/01/16
Date

Exhibit B
(Copy of Order to Obtain DNA Via Saliva Swab,
***PYT v. Madrid* CR-17-079 (June 20, 2017))**

1 IN THE PASCUA YAQUI TRIBAL COURT

2 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

3
4 PASCUA YAQUI TRIBE,)
5 Plaintiff,) Case No. CR-17-079
6 Vs.)
7 MADRID, MICHAEL)
8 Defendant.) ORDER TO OBTAIN DNA
9 VIA SALIVA SWAB
10
11

12 On June 20, 2017, on remand from the Court of Appeals, the court held a re-hearing
13 on the Tribe's request for an order to perform DNA saliva swab testing on the defendant, and
14 his counsel, Sara Dent, should be present when the tests are conducted. Ms. Dent waived the
15 presence of her client, and Alicia Renee Robertson argued for the Tribe.

16 The Tribe argues that the court has authority to issue an order for buccal swab tests for
17 DNA, pursuant to 3 PYTC § 2-2-390(a)(6)&(F) which permits the court to order that
18 defendant provide the prosecutor with samples of "hair, blood, saliva, urine, or other specified
19 materials which involve no unreasonable intrusion of his or her body."

20 The Tribe argues that the DNA testing will establish whether blood samples collected
21 by the investigating officer from a tail lamp can be matched against the DNA sample of the
22 defendant to prove an element of the crime of injury to public property, and also to other
23 crimes, for example if the Tribe's witnesses testify they saw the defendant commit an
24 aggravated assault in addition to punching the tail lamp, such evidence may support the
25 credibility of the testifying witnesses' account and therefore goes to the totality of the
26 circumstances.

27 The defendant objects because the alleged crime is not a felony, as in *Maryland v.*
28 *King*, that it is not a reasonable search because the alleged crime is a misdemeanor, a de
29 minimis issue. Additionally, the defendant argues that there must be a nexus of the testing to
30 the crime alleged.

31 Citing to *State v. Wedding* and *Maryland v. King*, the Tribe asserts that the buccal
32 swab test for DNA is a minimally intrusive tests, much less intrusive that the blood tests
33 allowed in *Schmerber v. California*, and would be a reasonable search related to proving a
34 particular crime took place and that there is a sample against which it may be tested, now in

21 JUN 2017 AM 9:02

1 police custody. The Tribe argues that in the *Wedding* case, the Arizona court found that upon
2 an arrest supported by probable cause, the state could obtain saliva, blood, fingerprints, and
3 pubic hair, all of which were much more intrusive than a minimally intrusive buccal swab.
4 The Tribe also argues it will only be using the DNA for the sole purpose of comparing the
5 DNA sample with the blood sample collected from the tail light in this case.

6 In *Maryland v. King*, the U.S. Supreme court noted the when officers make an arrest
7 supported by probable cause to hold for a serious offense and bring the suspect to the station
8 to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like
9 fingerprinting and photographing, a legitimate police booking procedure. The Supreme Court
10 held that the "expectation of privacy were not offended by the minor intrusion of a brief swab
11 of the cheek." 133 S.Ct. 1958, 1980 (2013). The *King* court found that using a buccal swab
12 test inside a person's cheek to obtain a DNA sample is a search under the fourth amendment,
13 but is a negligible intrusion and therefore a reasonable search "the unlitimate measure of the
14 constitutionality of a governmental search." (Citing affirmatively to *Vernonia Sch, Dist 47J v.*
15 *Acton*, 515 U.S. 646, 652). The test of reasonable applied by the King court is determined by
16 weighing "the promotion of legitimate governmental interests" against :the degree to which
17 [the search] intrudes upon an individual's privacy," *Wyoming v. Houghton* 526 U.S. 295, 300.
18 The King court found that a buccal swab involved a brief and minimal intrusion with
19 "virtually no risk, trauma, or pain," *Schmerber v. California*, 384 U.S. 757, 771.


20 The court finds that because the officer took a swab sample of blood from the taillight
21 in this incident, there is a DNA sample against which the sought after DNA from the
22 defendant is sought. There is a legitimate governmental interest in matching the DNA sample
23 to blood on the headlight to establish whether the defendant's blood is on the tail lamp to
24 support both the allegation of the injury to public property, and also to support any testimony
25 of eyewitnesses, who may state they saw the defendant placing his blood on the tail light. The
26 buccal swab testing in the cheek is minimally intrusive and the Court should grant the Tribe's
27 request for a saliva swab tests (Buccal) because such is not unreasonably intrusive. The
28 sampling shall be administered at a time to be arranged between the prosecutor and
defendant's counsel, so long as defense counsel is present during such testing. The Court

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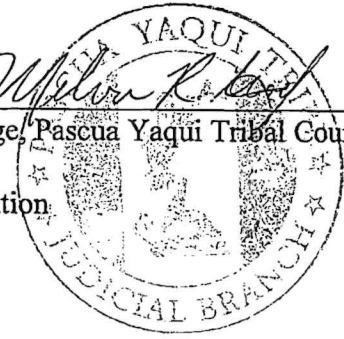
should issue an order that no law enforcement personnel shall attempt to interview Mr. Madrid, unless his counsel is present.

IT IS ORDERED that for good cause shown, the court shall grant the Tribe's motion to obtain DNA via saliva swab, for good cause shown, at a time to be arranged between the prosecutor and the defendant's counsel, so long as Ms. Dent may be present at that time of testing on the defendant. Pascua Yaqui Law enforcement personnel shall not attempt to interview Mr. Madrid, unless his counsel is present.

SO ORDERED THIS 20th DAY OF JUNE, 2017



Judge, Pascua Yaqui Tribal Court



CC: Date 06/20/17
 Tribe Defendant/Counsel _____ Detention



Clerk

Exhibit C
(Copy of Pascua Yaqui Tribal Council
Resolutions Regarding Intergovernmental
Agreements with Arizona DPS for Forensic
Testing Services)

PASCUA YAQUI TRIBE

RESOLUTION NO. C08-305-06

RESOLUTION OF THE PASCUA YAQUI TRIBE APPROVING AN INTERGOVERNMENTAL AGREEMENT WITH THE STATE OF ARIZONA DEPARTMENT OF PUBLIC SAFETY FOR CRIME LABORATORY SERVICES FOR PURPOSES OF PROCESSING EVIDENCE.

WHEREAS, the Tribal Council of the Pascua Yaqui Tribe is vested with the authority to enter into agreements with federal, state and local governmental agencies, and other entities, and is also charged with providing for the general welfare of the members of the Pascua Yaqui Tribe (Article VI, Sections 1(a) and (o) of the Constitution of the Pascua Yaqui Tribe); and

WHEREAS, the State of Arizona Department of Public Safety ("DPS") Crime Laboratory has proposed an Intergovernmental Agreement ("IGA") with the Tribe to provide evidence processing and analysis services through the DPS Crime Laboratory; and

WHEREAS, the services to be performed by DPS under the terms of the IGA will enhance the ability of the PYT Police Department and Prosecutor's Office to apprehend and prosecute criminal perpetrators on the Reservation, and are therefore essential to the provision of law enforcement and the Tribe's ability to provide for the public safety and welfare on the Reservation; and

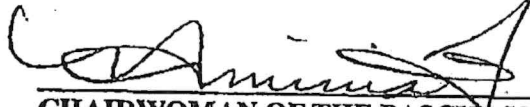
WHEREAS, based on a recommendation from the Director of the Public Safety Division, and having been reviewed by the Office of the Attorney General, the Tribal Council has determined that it is in the best interest of the Tribe to approve the IGA with DPS for Crime Lab services.

NOW THEREFORE BE IT RESOLVED BY THE TRIBAL COUNCIL OF THE PASCUA YAQUI TRIBE that the DPS IGA for Crime Lab Services is hereby approved, and that the Chairwoman of the Tribe is hereby authorized to take any necessary and proper action to execute, implement, and enforce this Resolution and Agreement.

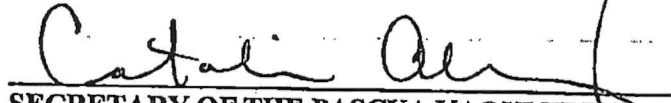
BE IT FINALLY RESOLVED that the Chairwoman is hereby delegated the authority to execute any future renewal amendments to the DPS IGA for Crime Lab services, provided that such amendments are solely for the purpose of renewing the agreement, do not alter the substantive provisions of the original agreement, or contain a waiver of sovereign immunity.

CERTIFICATION

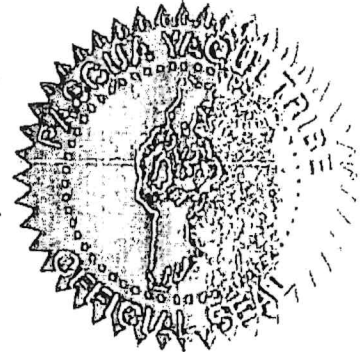
THE FOREGOING was on August 9, 2006 duly adopted by a vote of TEN in favor, ZERO opposed, and ZERO abstained, by the Tribal Council of the Pascua Yaqui Tribe pursuant to authority vested in it by Article VI, Section 1(a), (d), and (o), and Article VI, Section 2 of the Constitution of the Pascua Yaqui Tribe as adopted on January 26, 1988 and approved by the Secretary of the Interior on February 8, 1988 pursuant to Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984).



CHAIRWOMAN OF THE PASCUA YAQUI TRIBE



SECRETARY OF THE PASCUA YAQUI TRIBE



PASCUA YAQUI TRIBE

RESOLUTION NO. C04-93-18

RESOLUTION OF THE PASCUA YAQUI TRIBE APPROVING AN INTERGOVERNMENTAL AGREEMENT BETWEEN THE TRIBE AND THE ARIZONA STATE DEPARTMENT OF PUBLIC SAFETY.

- WHEREAS,** the Tribal Council of the Pascua Yaqui Tribe is vested with the authority to enter into agreements with federal, state and local governmental agencies, and other entities (Article VI, Section 1(a) of the Constitution of the Pascua Yaqui Tribe); and
- WHEREAS,** the Pascua Yaqui Police Department desires to use the Arizona State Department of Public Safety Crime Lab for scientific examination of evidence, technical assistance, and expert testimony pertaining to laboratory findings; and
- WHEREAS,** the Pascua Yaqui Police Department recommends that the Tribe enter into an intergovernmental agreement ("IGA") with the Arizona State Department of Public Safety ("Arizona DPS") for purposes of provision of forensic science services through the Arizona DPS Crime Lab; and
- WHEREAS,** the Office of Attorney General has approved to form an IGA (incorporated herein by this reference) to govern the Tribe's relationship with Arizona DPS and the Arizona DPS Crime Lab, which shall be for the period of January 1, 2018 through December 31, 2018, and which shall automatically renew for four (4) additional one (1) year periods; and
- WHEREAS,** the Tribal Council has determined that it is in the best interests of the Tribe to enter into an IGA with Arizona DPS for the provision of forensic science services through the Arizona DPS Crime Lab.

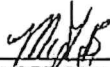
NOW THEREFORE BE IT RESOLVED BY THE TRIBAL COUNCIL OF THE PASCUA YAQUI TRIBE that the Tribal Council hereby (1) approves the IGA with the Arizona State Department of Public Safety, substantially in the form attached hereto, for the provision of forensic science services through the Arizona DPS Crime Lab, effective January 1, 2018 through December 31, 2018; (2) authorizes the Chairman to execute the IGA and any extensions or amendments thereto that extend funding or make non-substantive changes to the IGA on behalf of the Tribe; and (3) authorizes the Chairman to take necessary and proper action to execute, implement, and enforce this Resolution and the IGA.

CERTIFICATION

THE FOREGOING was on **April 25, 2018** duly adopted by a vote of **TEN** in favor, **ZERO** opposed, and **ZERO** abstaining, by the Tribal Council of the Pascua Yaqui pursuant to authority vested in it by Article VI, Section 1(a) of the Constitution of the Pascua Yaqui Tribe, as adopted on January 26, 1988 and approved by the Secretary of the Interior of February 8, 1988 pursuant to Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984).



CHAIRMAN OF THE PASCUA YAQUI TRIBE



SECRETARY OF THE PASCUA YAQUI TRIBE

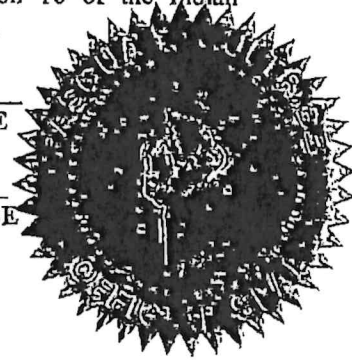


Exhibit D
(Transcript of May 23, 2019 hearing, *PYT v.*
***Madrid, CR-17-079*)**

**IN THE PASCUA YAQUI TRIBAL COURT,
COUNTY OF PIMA, STATE OF ARIZONA**

PASCUA YAQUI TRIBE,	)	NO. CR17097
Plaintiff,)	
vs.)	
)	
MICHAEL RAYMOND MADRID,)	
Defendant	)	May 23, 2019
	)	Tucson, Arizona
_____)	

BEFORE: THE HONORABLE MELVIN R. STOOFF, JUDGE OF THE PASCUA YUQAI TRIBAL COURT

APPEARANCES:
RUSSELL BOATWRIGHT, ESQ.
appearing for the Pascua Yaqui Tribe

ANNAMARIE VALDIVIA, ESQ.
appearing for Defendant

RE: HEARING

Christine McGarvey
Legal Transcription Services Plus

1
2 **INDEX**

3 Witness(s)
4 -----

5 THE COURT: Good morning. Please be seated.

6 And this is CR17097, Pascua Yaqui Tribe versus Michael Raymond
7 Madrid, who is not present. I have Annamarie Valdivia here along
8 with Russell Boatwright for the tribe. And this was a request to
9 set a hearing on this issue of consumption of a sample. And the
10 Court had set -- let's see, the Court's order on May 14th, neither
11 party has added any statute, case law or other legal authorities
12 or a specific request as to what, if any, action should be taken.
13 The Court attaches a copy of the ABA standards on DNA evidence,
14 including Standard 3.4, Consumptive Testing, as referenced by the
15 parties. So, with that in mind, have you had a chance to review
16 the ABA Standards on Consumptive Testing?
17
18
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22

23 MS. VALDIVIA: Yes, Your Honor.

24 THE COURT: Do you have any thoughts,
25
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27
28

1 suggestions as to how to address the testing?

2
3 MS. VALDIVIA: Yes, Your Honor, and I'm appearing
4 on behalf of Melissa Acosta, uhm, in this matter and we're waiving
5 the presence of our client. I know that she spoke with him. So,
6 she's just requesting at this time that the ABA guidelines, uhm,
7 according to the, uh, pursuant to the ABA guidelines that we
8 allow, uh, the presence of an expert during the consumption of the
9 DNA if the Court is going to allow, uh, the prosecution to consume
10 the entire DNA.
11
12
13
14

15 THE COURT: Okay.

16
17 MS. VALDIVIA: Uhm, so that would be our
18 recommendation.
19

20 THE COURT: Okay.

21
22 MS. VALDIVIA: Or, uh, the videotaping. I guess
23 my only concern, and I didn't have the opportunity to, to talk to
24 Miss Acosta, but, because she said she was okay with the, the
25
26
27
28

1 videotaping, my only concern is saying okay to videotaping. I
2
3 would assume that you'd need somebody that knew what they're
4 supposed to be videotaping in the procedures to do it, so, uhm,
5
6 perhaps it could be an either or, uhm, from the Court.

7 THE COURT: And actually --

8 MS. VALDIVIA: And then I'll --

9
10 THE COURT: Yeah, actually, uhm, in one case
11
12 that we had a -- the, the expert had told me after the fact that I
13
14 could have dispensed with the videographer that we hired who was
15
16 separate and apart from the expert, that the expert could have
17
18 done that himself. But I was not told that until after the fact
19
20 so --

21 MS. VALDIVIA: Yeah.

22 THE COURT: Yeah, when you say either or, uh,
23
24 you know, some experts will do their own versus, uh --

25 MS. VALDIVIA: Okay, correct. Yeah.

1 THE COURT: And --

2
3 MS. VALDIVIA: And I just -- I, I mean, you know,
4 this isn't my case, but I would feel uncomfortable just saying
5
6 okay, okay, somebody can go video it, but we're not allowed to
7
8 bring an expert in there.

9 THE COURT: Well, uhm --

10 MS. VALDIVIA: Uhm, if they don't --

11
12 THE COURT: -- my next question is, have you
13
14 done some footwork on this and found an independent evaluator to,
15
16 uh --?

17 MS. VALDIVIA: I don't know that -- that wasn't
18
19 something that was discussed with me. Uhm, I'm not sure if she's
20
21 already began that. I know she was looking for --

22 THE COURT: Okay.

23 MS. VALDIVIA: -- investigators in other cases. I
24
25 don't know that I can testify to that.

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THE COURT: Any response?

MR. BOATWRIGHT: Uh, Judge, I, I don't -- before I
get into what I was going to address this --

THE COURT: Sure.

MR. BOATWRIGHT: Uhm, uh, the Defendant's not
present. I am not aware of any waiver or --

THE COURT: Well, she just said she waives,
she's waiving presence.

MR. BOATWRIGHT: Uh, you have had good contact with
him?

MS. VALDIVIA: Yes.

MR. BOATWRIGHT: Okay.

MS. VALDIVIA: I know that she spoke with him the
other day on the phone, uhm --

THE COURT: Okay.

MS. VALDIVIA: So yes. And she has an --

1 MR. BOATWRIGHT: And the Court waives his presence?
2
3 THE COURT: Yeah. Uh-huh.
4
5 MR. BOATWRIGHT: Okay. Uh, here's, here's where I'm
6 at with it, Judge. Uhm, and you touched the ABA guidelines which
7 I, I just want to point out the tribe actually already followed.
8
9 THE COURT: Yeah, right.
10
11 MR. BOATWRIGHT: We, we --
12
13 THE COURT: Sure.
14
15 MR. BOATWRIGHT: -- we had reached out to Defense
16 counsel. We asked for them to stipulate to the consumption of it.
17 They objected. And I said, okay, well, we'll ask that it be set
18 for a hearing.
19
20 THE COURT: Sure.
21
22 MR. BOATWRIGHT: Uhm, as far as any alternative
23 goes, uhm, I'm open to whatever Defense wants to suggest, uhm, but
24
25 it should not come at the tribe's expense. We, we have a lab.
26
27
28

1 Uhm, if the, if the Defense position is now that they want to hire
2
3 an expert or an independent one, uhm, that's news to me
4
5 considering that based on my conversations with Miss Acosta that
6
7 it, it was that this was silly and a waste of resources. Uhm, so
8
9 now they want to hire an expert, uhm, to be there. Uh, it just
10
11 seems an awkward place to go with it, uhm, now. So, uhm, we're
12
13 open to that. Uh, the tribe's frustrated just because we -- as
14
15 luck would have it, we just got informed today that they decided
16
17 to withdraw so now we have to resubmit it. So, uhm, you know, if
18
19 the Defense is going to hire an expert we just ask that when I let
20
21 them know when the next, uh, when this will take place, when DPS
22
23 says it will go, that they have, uh, their expert ready to, to be
24
25 there or somebody who is, appropriately can, uhm, uh, tape it and
26
27 that no more delay be asserted into this because with -- again,
28
29 this isn't Miss Valdivia. I don't mean to, you know, but it, on
30
31 one hand I'm getting a lot of complaints over the delay of this

1 while simultaneously seeming like simu--, trying to interject it.

2
3 So, when this is set, I just ask that Defense be ready to have
4 their expert or videographer, uhm, ready to be present. Uhm, I
5
6 know there, there may have been some also conversations as to
7
8 having an independent testing done. Again, the tribe has a
9
10 relationship with Arizona Department of Public Safety's
11
12 Laboratory. If, if that is to be done and if it's at anymore
13
14 expense it should not be at the tribe and that the Defense could
15
16 then -- uhm, if, if they feel more comfortable with that, then
17
18 we're happy to accommodate it but it should not be at the expense
19
20 of the tribe. That's kind of our position, uhm, if the Judge, if
21
22 Your Honor needs anymore clarification.

23 THE COURT: Okay. Well, the question that I
24
25 have is just about the sampling. Why was there insufficient?
26
27 This is -- you know, I'm not blaming anybody but was the officer
28
not collecting enough sampling or was it just, uh --

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MR. BOATWRIGHT: It is my understanding --

THE COURT: -- not enough --

MR. BOATWRIGHT: -- the client didn't leave, uh,
enough to be tested at the scene.

THE COURT: Okay. Okay.

MR. BOATWRIGHT: Had they left more, uhm, they, it
would have been sufficient but we're talking about a blood smear.

THE COURT: Okay.

MS. VALDIVIA: So, if I can just clarify --

THE COURT: Yeah.

MS. VALDIVIA: -- a couple things. (Inaudible)
I'm not going to interrupt you --

MR. BOATWRIGHT: Right.

MS. VALDIVIA: -- if you're still --

MR. BOATWRIGHT: No, we're, I'm done (inaudible).

MS. VALDIVIA: Okay. I don't know the timeline

1 of, of, uhm -- I, I know some of the concerns of Miss Acosta and I
2 will address those right now. Uhm, with regards to the statement
3 that she made that the, the fact that our client has already
4 admitted to punching a headlight, uhm, so why they would need
5 testing it, it, that's what raises concern for her and the, the
6 need to have some kind of independent expert there. And I don't
7 think that that's a practice that is not standard or shouldn't be
8 standard for defense attorneys. Uhm, I do know as far as timeline
9 goes as long as it's reasonable -- obviously if they're going to
10 test is tomorrow that's not reasonable time for us to acquire an
11 expert. Uhm, as far as funding goes, we obtain that a num-,
12 number of ways and I don't believe, uhm, that that -- I believe
13 either if we don't have the funding in our budget that's something
14 we usually go to the Court for in an ex parte motion that, that
15 doesn't involve the prosecutor. Uhm, and so I don't believe
16 that's going to be an issue in this case, but we do need
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1 reasonable time. We do have resources with the Federal Public
2 Defender's Office. I know that they've provided that information
3 to me in the past so I'm sure that's something that we can get up
4 to speed on and get somebody hired. Uhm, and then as far as the
5 consumption, I believe that was, and please correct me if I'm
6 wrong --
7
8
9

10 MR. BOATWRIGHT: Yes.

11 MS. VALDIVIA: -- uhm, that was an issue that was
12 just brought up, uhm, kind of recently in the last whenever the
13 motion was filed. So, I don't know that she knew, uhm, that there
14 was an issue with regards to the consumption of it. Uhm, so
15 that's -- I guess that's the only thing additional that I can add
16 here and of course I, I would hope that everybody in our office,
17 uhm, you know, respects the guidelines and respects each other and
18 so, uhm, so that was just my only response.
19
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25 THE COURT: Okay. Uh, now since you've had the
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1 Arizona Department of Public Safety, uh, labs kick that back out,
2
3 uh, as far as timeframe of resubmission would we, they do the
4 same, basically give you 15 days saying you got to have notice and
5
6 we're going to be testing this? Because I also wanted to permit
7
8 the Defendant an opportunity to have some timeframe, because we're
9 shooting for what, January as the trial date at this time?

10 MR. BOATWRIGHT: August 20th, I believe.

11
12 THE COURT: Oh August, okay.

13
14 MS. VALDIVIA: Uh-huh.

15 THE COURT: So as far as a timeframe are you
16
17 shooting at -- what day, 45 days out maybe because we're --

18 MR. BOATWRIGHT: I would hope, Judge. Uhm, I'm not
19
20 sure. So, based on my conversations with the AZ DPS Crime Lab is
21
22 that they're flooded with requests --

23 THE COURT: Sure.

24
25 MR. BOATWRIGHT: Uhm, so they were really kind of
26
27
28

1 pushing us, hey, what's going on with this? What's going on with
2 this? We're going to kick it back, we need to know. Uhm, so I
3 don't know. Uh, I will reach out to them and explain where we're
4 at and then I will get a response and I, I suppose we'll go from
5 there. Uhm, if, and if I had to guess, and which it's a pure
6 guess, uhm, I would imagine 30 to 45 days --
7
8
9

10 THE COURT: Okay.

11 MR. BOATWRIGHT: -- is what they would give us --
12
13

14 THE COURT: Okay.

15 MR. BOATWRIGHT: -- as a date.
16

17 THE COURT: Well, well, let's do this. What
18 I'll go ahead and order is that, uh, the Defense can try to obtain
19 an independent evaluator. Uhm, and again, uhm, I'm going to just
20 track the language of the ABA standard which would include but is
21 not limited to, uh, the presence of an expert representing the
22 moving party during evidence preparation and testing, videotaping
23
24
25
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27
28

1 or photographing the preparation or testing.

2
3 MS. VALDIVIA: Okay.

4 MR. BOATWRIGHT: So I'll include just that language
5
6 in the order but what I'm going to have the, uh, Defense do is to
7
8 try to contact whatever resources, including public defender from
9
10 the federal, uh, folks, uh, to see if they can give you list of
11
12 whoever that evaluator is.

13 MS. VALDIVIA: Yes.

14 THE COURT: What, what I do, I, I followed, uh,
15
16 the case, uh, the case law which is 450 cap at this time. That is
17
18 still, uhm, the federal, uh, requirement and then if it's over 450
19
20 for an expert per day, uh, that has to get approval in the federal
21
22 courts from a chief judge of the district.

23 MS. VALDIVIA: Correct.

24 THE COURT: Uh, so it has to go through a
25
26 screening process. But what you can do is, uh, get billables on
27
28

1 the person, you know, what they're going to be charging for this.

2
3 MS. VALDIVIA: Yes. Is that what you're using as
4 EJA?

5
6 THE COURT: Yes, EJA.

7
8 MS. VALDIVIA: Okay.

9 THE COURT: Yeah, that's the one. It's
10 basically under public defender's provisions of what you can or
11 cannot, uh, allocate and then what I will do, uh, I am going to
12 order that the tribe pick that up because of, of the indigency
13 issue of Mr. Madrid. Because he is indigent I'm going to follow
14 the federal, uh, provision and, uh, once you've got the
15 information together about the expert, uh, and then the, the rates
16 that they're willing to, to work with within the, within the caps,
17 the 450 cap, uh, the Court can then appoint, uh, that person to be
18 there while the destructive testing is done, uh, while the -- it's
19 actually consumptive testing is done. So that way we can make
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1 arrangements and you can get the lab done and then you can
2
3 coordinate with your expert as to when that's testing done. Your
4
5 expert can be there at that time and they can also videotape if
6 they want to do that in addition to --

7 MS. VALDIVIA: Sure.

8
9 THE COURT: -- uh, to the consumptive testing.

10 MS. VALDIVIA: I'll start the request today at
11
12 least for Miss Acosta --

13
14 THE COURT: Okay.

15 MS. VALDIVIA: -- and then allow her to handle it.

16
17 THE COURT: And I'll just set this for about a
18
19 21-day review just to see where we're moving along in it.

20 MS. VALDIVIA: Twenty-one day.

21
22 MR. BOATWRIGHT: And, and Judge, just so I'm clear I
23
24 don't know, uh, the resources, but did you say that the, the tribe
25
26 is responsible for --?
27
28

1 THE COURT: Well, I'm going to be ordering
2 that. Once -- what, what I generally do is when there's
3 indigency, and I've done this a lot on an ex parte cases --
4

5
6 MS. VALDIVIA: Uh-huh.

7 THE COURT: Uh, if the, uh, defendant is
8 willing to submit that and just, you know, what the expert's for,
9 the purpose of the expert, the cost of the expert, and then I can,
10 uh, make an approval of that. What I typically do is ex parte.
11
12

13
14 MS. VALDIVIA: Okay. So, when you're saying --

15 THE COURT: Yeah.

16
17 MS. VALDIVIA: -- the tribe you're saying like the
18 tribal court, correct?
19

20 THE COURT: Right, the tribal court. Yeah.

21 MS. VALDIVIA: Yeah.

22 MR. BOATWRIGHT: Okay.

23
24
25 THE COURT: And I will, I will issue the order
26
27
28

1 | that --
2 |
3 | MS. VALDIVIA: Right.
4 | THE COURT: -- ultimately --
5 |
6 | MR. BOATWRIGHT: Okay.
7 |
8 | THE COURT: -- the AG is --
9 |
10 | MS. VALDIVIA: (Inaudible.)
11 | THE COURT: -- going to have to find funding
12 | somewhere.
13 |
14 | MR. BOATWRIGHT: Okay. I just wasn't sure --
15 |
16 | THE COURT: Yeah.
17 |
18 | MR. BOATWRIGHT: -- it would have to go through --
19 |
20 | THE COURT: Yeah.
21 |
22 | MR. BOATWRIGHT: -- our department and submit
23 | something.
24 |
25 | MS. VALDIVIA: No.
26 |
27 | THE COURT: No. No. It's basically the AG.
28 |

1 Uh, we work this out with our, uhm, psychiatric and psychological
2
3 experts in other cases where the AG then has to, you know, look
4
5 at, review the billing too. They, they have, they have obviously
6
7 a duty to make sure costs are cut down but I, I followed the, the
8
9 federal, uh, guide which is a 450 cap, uh, on that so, oh, if you
10
11 could get that information and do that within a 21-day period I
12
13 can then, uh, issue a, a separate order for the independent
14
15 evaluator or expert who wants to simply observe depending on what,
16
17 you know, context you want to use that expert in.

15 MS. VALDIVIA: Yes.

17 THE COURT: And then, uh, once I have that we
18
19 can, uh, then issue that order. I will order then for his payment
20
21 for his fees and then it's just up to you folks coordinating and
22
23 being able to get that into the lab with the same date and the
24
25 same time.

25 MS. VALDIVIA: Absolutely.

1 THE COURT: I've done this twice before and
2
3 it's, it's always the, uh, issue of scheduling and then you've got
4 a short fuse on the trial dates to try to get your recording on
5
6 time, so this moves pretty quick on this testing. And I don't
7
8 know what the testing around here is but, uh, you know, typically
9
10 a, a week or two on, uh, DNA testing results with a report. I
11 don't know what the state, how backlogged the state is here.

12 MS. VALDIVIA: Oh yeah.

13
14 THE COURT: Uh, but, uh, my experience has
15
16 been, you know, from the date of the testing it's going to take a
17
18 couple of weeks after that, uh, for the results to, to come so.

19 MR. BOATWRIGHT: So, Judge, then just so, just so
20
21 all the housekeeping's clear, uhm, I don't know when the Defense
22
23 thinks they can get you the name, uhm --

24 MS. VALDIVIA: I can send out the request for Miss
25
26 Acosta, but I try to allow people to handle their own cases and
27
28

1 | not --

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3

THE COURT: Sure.

4

MS. VALDIVIA: You know what I mean? I don't --

5

6

MR. BOATWRIGHT: Just for, the reason being --

7

MS. VALDIVIA: (Inaudible.)

8

9

MR. BOATWRIGHT: I'm sorry to interrupt you,

10

Annamarie.

11

12

MS. VALDIVIA: Uh-huh.

13

14

MR. BOATWRIGHT: Uhm, uh, the reason being is that I

15

would like to get this resubmitted.

16

17

THE COURT: Uh-huh.

18

19

MR. BOATWRIGHT: And so, I'm going to need to let

20

them know the name and, and make sure everything's okay. So, if

21

22

we could have some sort of a timeline of --

23

THE COURT: Well, that's why I'm hoping that 21

24

25

days will be the, the timeline, we've got everything arranged by

26

27

28

1 that time.

2
3 MS. VALDIVIA: Because we'll have to go to the
4 court too and then get approval from them --

5
6 THE COURT: Yeah.

7
8 MS. VALDIVIA: -- first.

9
10 THE COURT: And they can do --

11
12 MS. VALDIVIA: (Inaudible.)

13
14 THE COURT: And they can do the ex parte.
15 Yeah, there could be a, uh, an ex parte.

16
17 MS. VALDIVIA: Yeah.

18
19 THE COURT: I can squeeze that in sometime
20 through the day. And what I do on the ex parte request, we have a
21 sealed record on that and I seal the transcript on that too and I
22 seal the order and I put it into -- and, and that way the Court of
23 Appeals can review if there's any issue on the expert
24 appointments.
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1 MS. VALDIVIA: Right. I mean I don't know, but if
2
3 you wanted a sooner status conference that's fine.
4
5 THE COURT: Uh-huh.
6
7 MS. VALDIVIA: Uhm, but I believe Miss Acosta, her
8
9 schedule recently changed so she should be here next week which
10
11 she --
12
13 THE COURT: Okay.
14
15 MS. VALDIVIA: -- originally wasn't scheduled to
16
17 be here next week.
18
19 THE COURT: Okay. Well, I'm --
20
21 MS. VALDIVIA: And I can st--
22
23 THE COURT: -- I'm letting you folks do all the
24
25 footwork --
26
27 MS. VALDIVIA: Yeah, I can start the paperwork now
28
29 --
30
31 THE COURT: -- because I don't, I don't have

1 | experts on --

2

3

MS. VALDIVIA: -- to, to assist but again I just -

4

5

6

THE COURT: Uh, yeah.

7

8

MS. VALDIVIA: -- I don't feel comfortable, you

9

know, handling other people's cases.

10

11

THE COURT: Okay. Well, and she's done this

12

before. As long as I get the, uhm, you know, CV or curriculum

13

14

vitae of the, of the, uh --

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16

MS. VALDIVIA: Right.

17

18

THE COURT: -- the expert with their rates,

19

what they're going to be doing, what they intend to do, then I do

20

the approval and then I get that order out and then the AG can cut

21

22

the check, you know when --

23

24

MS. VALDIVIA: Right.

25

26

THE COURT: -- after the work is done, when the

27

28

1 invoices are submitted. Okay. So, 21 days.

2
3 MS. VALDIVIA: Yeah, it's usually --

4 THE CLERK: June 13th at 9:00 a.m.

5
6 THE COURT: Okay. June 13th --

7 THE CLERK: June 13th.

8
9 THE COURT: -- at 9:00 a.m. Okay.

10 MS. VALDIVIA: 6/13 at 9:00 a.m.

11
12 THE COURT: Okay. And so again, I'll just
13
14 issue the order tracking the language of the, uh, the guideline,
15
16 uh, with, with the independent evaluator of the Defendant to do
17
18 the analysis or that expert can also, uh, videotape or photograph
19
20 the preparation and testing.

21 MS. VALDIVIA: Thank you, Your Honor.

22 THE COURT: Okay. All right. That's good.
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BAILIFF: All rise.

[END OF HEARING]

[Transcriber's Certification Follows:]

C E R T I F I C A T E

I certify that, to the best of my ability, the foregoing is a true and accurate transcription of the original digitally recorded court proceeding in the case referenced on page 1 above.

Transcription Completed: June 21, 2019

CHRISTINE McGARVEY
LEGAL TRANSCRIPTION SERVICES PLUS
TRANSCRIBED BY: Stacey Archambault

SIGNED BY: Christine McGarvey
Christine McGARVEY

Exhibit E
(Order for Consumptive Forensic DNA Testing
and Order Setting Hearing on Review, *PYT v.*
***Madrid*, CR-17-079) (May 23, 2019)**

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IN THE PASCUA YAQUI TRIBAL COURT
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,)	
Plaintiff,	)	Case No. CR-17-079
Vs.	)	ORDER FOR CONSUMPTIVE FORENSIC
MADRID, MICHAEL R.	)	DNA TESTING AND ORDER
Defendant.	)	SETTING HEARING ON
	)	REVIEW
)	

On May 23, 2019, the court reviewed the Tribe's notice of consumptive testing and the defendant's motion to allow its expert to present for such testing. Appearing were Annamarie Valdivia, for the defendant, whose presence was waived, and Russell Boatwright, for the Tribe.

The Tribe reports that the Arizona State Crime lab, which has been backlogged, sent back the DNA sampling, because it was awaiting this court's order for Consumptive Forensic DNA testing. The court should adopt the ABA Standards on DNA Evidence and should follow Standard 3.4(e) Consumptive testing; the court should grant the defendant's request to permit an independent evaluation of the analysis, including but not limited to, the presence of an expert representing the defendant during the evidence preparation and testing, and videotaping or photographing the preparation and testing.

The defendant's counsel should file its ex parte motion for funds for its expert for the DNA consumptive testing; the defendant's counsel shall provide the court with its experts' qualifications, financial information, including hourly fee, and his or her experience as a forensic expert, before the court may order the Pascua Yaqui Tribe to pay the funds for the expert. The motion and order should be sealed in the court file, for appellate review and not opened except upon order of this court. The court should set a review hearing, as soon as possible, to accelerate the time for the Tribe's resubmission of the DNA sample to the Arizona State DNA testing lab.


IT IS ORDERED that for good cause shown, the court grants the defendant's motion for consumptive Forensic DNA testing. The court shall set a review hearing on the defendant's Motion on June 13, 2019 at 9:00 a.m..

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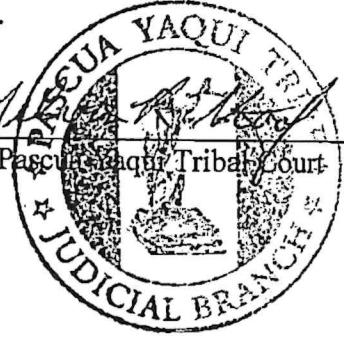
THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.

IT IS FURTHER ORDERED that the defendant's counsel shall file an ex parte motion for appointment of its DNA Forensic expert, as soon as possible, for court review. The motion and order shall be sealed in the court file, for appellate review and not opened except upon order of this court.

SO ORDERED THIS 23rd DAY OF MAY, 2019.



Judge, Pascua Yaqui Tribal Court



CC: Date 5-23-19
 Tribe Defendant/Counsel

CA

Clerk

Exhibit F
(Transcript of May 28, 2019 hearing, *PYT v.*
***Madrid, CR-17-079*)**

**IN THE PASCUA YAQUI TRIBAL COURT,
COUNTY OF PIMA, STATE OF ARIZONA**

PASCUA YAQUI TRIBE,	)	NO. CR17079
Plaintiff,)	
vs.)	
)	
MICHAEL RAYMOND MADRID,)	
Defendant	)	May 28, 2019
	)	Tucson, Arizona
_____)	

BEFORE: THE HONORABLE MELVIN R. STOOF, JUDGE OF THE PASCUA YUQAI TRIBAL COURT

APPEARANCES:
RUSSELL BOATWRIGHT, ESQ.
OJ FLORES, ESQ.
appearing for the Pascua Yaqui Tribe

MELISSA ACOSTA, ESQ.
STU DE HAAN, ESQ.
appearing for Defendant

RE: HEARING

Christine McGarvey
Legal Transcription Services Plus

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3 Witness(s)
4 -----

5 THE COURT: And this is CR17079, Pascua Yaqui
6 Tribe versus Michael Raymond Madrid, who is not present, but
7 Melissa Acosta is present for her client Mr. Madrid. I have
8 Russell Boatwright here for the tribe along with OJ Flores. This
9 is an unscheduled request for the Court to reconsider its previous
10 court order for an independent expert for DNA testing. And your
11 associate is?

12 MS. ACOSTA: Stu De Haan, Your Honor. He is
13 appearing as co-counsel as well.

14 THE COURT: Can you spell that for me?

15 MR. DE HAAN: S-T-U. Last name is D-E, H-A-A-N.

16 THE COURT: B-E, H-A-A-N?

17 MR. DE HAAN: D, delta.

18 THE COURT: Okay. De Haan?

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MR. DE HAAN: Uh-huh.

THE COURT: De Haan. Okay. Okay. Waiving presence of your client?

MS. ACOSTA: Yes, Your Honor since --

THE COURT: Okay.

MS. ACOSTA: -- this was just set.

THE COURT: Yes, well, I know you have great contact with your clients so. And this is your motion.

MS. ACOSTA: He couldn't (inaudible) that fast.

THE COURT: Okay. This is your motion. Mr. Boatwright, what are you asking for today?

MR. BOATWRIGHT: Yes, Judge. We're asking that the Court, uhm, allow the tribe to consume the sample of DNA. Uh, we reached out to the lab and having an independent party go into the lab is, it's not a thing. Uhm, that's, that's not permitted, uhm, never has been. Uh, they only allow authorized persons, uhm, due

1 to the sensitive nature of the entire lab and DNA testing and,
2
3 and, uhm, of, of that matter. Now the only alternative, uhm,
4 would be that the Defense then find an accredited, uhm, time or
5
6 accredited lab, uh, to get this conducted within the time. Uhm,
7
8 and that could be a greater expense. Basically, Judge, uhm, we
9 don't see any prejudice, uhm, to authorize what we're asking for.
10
11 The Defense has even said that they're willing to stipulate that
12
13 it was their client at the scene which is really the sole purpose
14
15 that we're trying to prove. This isn't over a broken taillight.
16
17 This is over in the event that three years later that there's a
18
19 problem with identification, we're in trouble. Well, that could
20
21 be alleviated by the DNA being tested. I don't think that there's
22
23 any concerns over, uhm, you know, DPS's ability to test the sample
24
25 or unless they're going to cite concerns over DPS just having it
26
27 out for Mr. Madrid. Uhm, I don't think those are concerns. DPS
28
tests this. They're a reliable, uhm, certified lab. I don't see

1 | any prejudice in this being done. Certainly, we can make and we
2 |
3 | will make the notes available, uhm, for Miss Acosta to review and
4 | if she wants to hire an expert to review the criminalist's labs
5 |
6 | and, and we'll even make the criminalist available for an
7 | interview. But, uhm, at this point I think it's really
8 |
9 | unnecessary to go down this other road, uhm, without some sort of
10 | citing of prejudice or a reason behind needing these, uhm,
11 |
12 | especially since the Defense is even willing to stipulate that it
13 | is his blood there. Uh, we don't want that stipulation though
14 | because it is our burden. It's our burden beyond a reasonable
15 |
16 | doubt. Uhm, juries are free to ignore a stipulation. They could
17 | say, you know, no matter what these lawyers know it wasn't tested,
18 |
19 | especially in the age of CSI it's a real thing that where they'd
20 | want that done. Uhm, it seems to me the Defense's chief concerns
21 | is finances but that's our problem to worry about not, not theirs.
22 |
23 | Uh, this is our burden of proof and we -- this is one of the ways
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1 we have to do it.

2
3 MS. ACOSTA: Your Honor, I think that the Court
4 issued its ruling according to the ABA standards on DNA testing.
5
6 Since this, uh, onset of this case, uhm, back in 2016/2017, the
7 Defense at that point always offered to the tribe that they would
8 stipulate that it was Mr. Madrid's blood on the headlight which it
9 choose to test it, and they continuously argued that they needed
10 that evidence to prove the essential element of the crime of
11 malicious, malicious mischief. That has been their argument for
12 years on this and so if their argument is, they don't want to
13 stipulate, if their argument is just to prove that that's his
14 blood and if we're stipulating that that is his blood on the
15 headlight then there is no need for DNA testing of this sample.
16
17 If the tribe insists upon not stipulating, which the rationale
18 doesn't seem to make any sense to prove the element of the crime,
19 if you look back all the pleadings that the tribe has submitted,
20
21
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1 that that has been their contention the whole entire case. Uhm,
2
3 there's no need for the testing. If, if they insist upon testing,
4
5 I think that the tribe, the Court has to order that they comply
6
7 with the guidelines. Yes, uhm, DPS lab -- we're going to 2016.
8
9 There have been issues with labs. There's been issues in fact
10
11 with the, the evidence room of this police department back in 2016
12
13 so there are issues to be concerned about. We're talking three or
14
15 some years ago and I do recall it, uhm, and I don't exactly
16
17 remember the date but I do remember it was in 2016 that that
18
19 happened, so, uhm, there are concerns and that's why we would
20
21 object to consumption of it; however, we have offered to stipulate
22
23 that that is Mr. Madrid's blood on the headlight and there's no
24
25 other reason why the tribe should not accept that stipulation.
26
27 The other elements of the offenses they, they would have to prove
28
independent of that and that's a given regardless if that DNA is
tested and it comes back that that's his blood. They still have

1 to prove all the elements of every charge that they have charged
2
3 against him. It has no, no bearing on it. So the fact that the
4 Defense is willing to stipulate and has always been willing to
5
6 stipulate to that fact there's no good-faith-basis as to why the
7
8 tribe is continuously insisting on having it tested and at the
9
10 expense of this Court and, you know, so we would ask this Court to
11
12 order a stipulation. I know that that they may not within this
13
14 Court's realm but if the C--, if the tribe insists on not
15
16 stipulating then we're going to insist that they comply with the
17
18 guidelines as the Court ordered in its original order. Nothing's
19
20 changed. Uhm, I haven't received any documentation that's showing
21
22 that DPS is not going to allow anybody in the lab. In fact, they
23
24 should provide a list of who is authorized to be in that lab
25
26 because the tribe has not attached that to its motion. So if the
27
28 tribe is not willing to accept the stipulation which would
alleviate all of this need and necessity and does not hamper their

1 case -- in fact, it facilitates that's his blood but you still
2
3 have to prove every count and the elements along with it that,
4 that we're stipulating to that as we've always suggested. Uhm,
5
6 but again, I don't understand the basis for them not agreeing and
7
8 if they choose not to stipulate then we would ask this Court to
9
10 impose what the Defense has a right to do in terms of the testing.
11
12 And again, I don't see any documentation to prove that DPS is not
13
14 going to allow an expert into it. I don't know who's authorized
15
16 based on this motion and so, uhm, again, we've offered a
17
18 reasonable solution to this issue so that this can proceed to
19
20 trial in August since this case is over 3-1/2 years old at this
21
22 point, uhm, and now I leave it in the tribe's hands to decide. I
23
24 don't, uh, again, we've offered to stipulate.
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22 MR. BOATWRIGHT: And may I respond, Your Honor?
23
24 Judge, again, you heard nothing about any prejudice to the
25
26 Defendant. The Defense does not get to dictate how we try our
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28

1 case. Uhm, that's never been a, a standard to an objection. Uhm,
2
3 again, I've, I've said why we don't want to stipulate, because the
4 jury is free to not accept that, to say lawyers don't know blood.
5
6 Uhm, I was a criminal defense attorney less than three months ago.
7
8 Uh, if we want to talk about efficiency and things of that nature,
9 when something's not in dispute to avoid having hearings and
10 things like this the parties stipulate to it. Again, they just
11 said they know it's Mr. Madrid's blood. This could only turn out
12 in their favor if by some chance it didn't come out and where, and
13 it didn't come back as him. Judge, I mean I -- without getting
14 into tactics and things like that there are things that we can't
15 foresee. We have a need for this being tested. I guarantee you
16 if at trial this identification was shaky, they would turn around
17 and say you can't even prove he was there. Also, one of the
18 things we're relying on is the ABA standards. The scientists that
19 work the lab aren't bound by that. We can't control and we can't
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1 dictate what they do. We're stuck with what we got. There's no
2 prejudice. There's no reason for this. They know it's Mr.
3 Madrid's blood. I just need to be able to prove that to the jury.
4 Uh, unless I, the Defense can provide a reason or some sort of
5 prejudice for this, Judge, I don't think that there's any reason
6 for this court not to allow us to go forward with the consumption.
7
8
9

10 THE COURT: Well, this, uh, raises an issue of,
11 uh, ABA standards are what's followed by the Court here and ABA
12 standards are followed for judicial ethics, for professional
13 responsibility ethics. It's in the code. It says all
14 practitioners have to follow the ABA standards, so we don't have a
15 provision on this so the Court will always rise in ABA standards.
16 The DNA evidence standard 3.4 for consumptive testing is pretty
17 clear, and I actually tracked the language word for word, uh, from
18 the statute. It reads, "It's ordered the Defendant's counsel can
19 file a motion for appointment of the, uh, DNA forensic expert for
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1 Court review so that the Court can appoint them so they can be an
2 observer." Now I don't know how they operate here in Arizona, but
3 I know in Texas they actually have a little lab observation.
4 It's, like, it's, it's like a room where you have questioning in a
5 police station. It's this little -- I don't know if it was a two-
6 way mirror but it was a glass. I got stay with a, with a
7 videographer, my expert and we watched the destructive testing.
8 There's no problem with that. And we, we weren't actually
9 physically in that lab. There was no contamination issue, no
10 cross-contamination questions. It was simply we had our videos,
11 able to observe and then our expert could testify about the
12 testing procedures so that's, uh, how that one case that I was,
13 uh, addressing, uh, that I mentioned earlier in my ruling that
14 that permitted everyone to be there. All experts were there.
15 There was no problems, so I'm not quite sure, uhm, this cross-
16 contamination issue or the concerns that the lab has about that.
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1 Uh, the alternative to try to have an independent lab do it is,
2
3 uh, just, it, very costly and I'm not going to order that I have a
4 DNA independent testing expert for the Defense but not the tribe.
5
6 That just doesn't -- it runs against the, uh, proof, uh, required
7
8 by the tribe that the tribe must prove beyond a reasonable doubt
9
10 each and every element of the count. So, what this entails, as
11
12 I'm not going to change my independent expert order, so this
13
14 simply because I'm going to accommodate the State of Arizona lab
15
16 that they don't want to permit an opportunity for the Defendant's,
17
18 uh, counsel and their experts to observe that. Uhm, and again,
19
20 uh, this is really a spoliation of evidence issue if it turns out
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22 that they do destructive testing without the Defense and their
23
24 expert having an opportunity to have an independent test of that
25
26 sample. So the, uh, issue becomes one of, uh, protection under
27
28 the Fifth and Fourteenth Amendments, spoliation of evidence if,
uh, the tribe has not preserved or had an opportunity to permit

1 the Defense to look at evidence which may be exculpatory, we don't
2
3 know at this point with the DNA testing, uh, but, but destruction
4 of the evidence, uh, there would be a due process violation on the
5
6 Defense side and I would certainly be more than willing at that
7
8 time if there is no ability of the, the lab to follow the Court's
9
10 clear order, uh, pursuant to the ABA standards, uh, then the Court
11
12 would be able to entertain a motion that by destructively testing
13
14 it and there no being, there being no sample left, uh, fundamental
15
16 due, uh, fundamental due process and fairness to the Defense would
17
18 permit a spoliation, uhm, instruction under Willits that the
19
20 government had it in their possession, destroyed it, did not have
21
22 an opportunity to present it to the Defense counsel and then the -
23
24 - it doesn't, it, it, you know, as far as the admissibility of the
25
26 evidence, uh, I would certainly permit it in if it, uh, meets
27
28 those standards for the proof required, but I'm also going to
permit, uh, the Defendant to be able to argue spoliation of

1 evidence, uh, because it may have had exculpatory value on the
2
3 part of the Defense counsel and they can certainly raise that
4 issue, uh, to preserve that evidence. Whether or not again it's,
5
6 uh, in the exclusive control of the tribe or not, you're still
7 responsible for pres--, preserving that evidence even if it's in
8
9 the possession of a third party which is the lab, the Arizona Lab.
10
11 So, it's unfortunate that the State of Arizona Lab has taken that
12 position saying you can't get in here, we're not going to permit
13
14 you to come into our labs because you're going to contaminate
15 them, uh, but again, that's their, uh, practice. That's their
16
17 practice and there's nothing I can do to order the State of
18
19 Arizona to do otherwise, but I am going to, uh, stick with my
20 order. My order is very clear and it's consistent with federal
21
22 rulings in this area, uhm, and it's also to permit an opportunity
23
24 to have an ex parte expert appointed to the Defense so the Defense
25
26 can be there to observe and, uh, begin the trial by, by making
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28

1 arrangements with the state lab subject to their controls, but
2
3 that does not require that the Defendant has to be subject to the
4 lab's rules and regulations when there's a clear court order, uh,
5
6 by this Court indicating what the process should follow to ensure
7
8 guarantees of the Defendant as well as the tribe's ability to
9 present its evidence. So, I have to weigh both, both of those
10
11 issues. The timeline has one focus, to prove a particular issue,
12 uh, and then to present that in an expert opinion. But to deny
13
14 the Defense an opportunity to observe and see how the testing
15
16 procedures were done, and it's going to be destructive testing
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18 with no sample left, that's the only way that you can permit is to
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20 allow the, uh, Defendant an opportunity to talk about a spoliation
21
22 of evidence issue should the testing, uh, be done without the
23
24 Defendant or without the Defendant's expert. So that's --
25
26 whatever the tribe wishes to do with its testing lab it can do so,
27
28 whether it needs to go to another testing lab other than this, the

1 | DPS testing lab. That's up to the, the tribe, whether they want
2 |
3 | to have a contract of a similar testing lab but I would expect
4 | that. I've been here 14 years and the State of Arizona testing
5 | lab is the only testing lab that the tribe has used as far as DPS
6 | testing, and so that being said I'm denying your request to
7 | reconsider the Court's order for independent expert for DNA
8 | testing. I'm going to maintain that same order because it follows
9 | the ABA standards and simply because the state of Arizona lab has
10 | its, uh, rules and regulations not to contaminate. And I'm sure
11 | they've got accommodations. I don't know what they do, if they
12 | put people in hazmat suits or something in there. I don't know
13 | how that operates but it's just, uh, to me, that's the lab's issue
14 | not the Court's issue. The Court has issued its order very
15 | clearly stating, uh, learning the interest of both the tribe and
16 | the Defense to have that, uh, testing done or to observe the
17 | destructive testing and the fact that, uh, they may not be able to
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1 do so. I'm just anticipating that if it's destroyed without the
2
3 Defense having an opportunity, I would certainly entertain the
4 Willits instructions for spoliation of evidence if the tribe
5
6 intends to, uh, introduce that DNA evidence.

7 MR. BOATWRIGHT: Just, uh, briefly, Your Honor, uhm,
8
9 I, I am familiar with tours being conducted in there. I've never,
10
11 uhm, experienced or had any, uhm, defense experts within the
12
13 laboratory and, uhm, perhaps we can just get the name of whoever
14
15 the expert is that the Defense is going to have if they're willing
16
17 to make whatever accommodations are available along the tour that
18
19 they can provide, which I don't know if they're going to have an
20
21 eyesight shot of wherever the evidence is working, so in the
22
23 interest of efficiency perhaps we can work that and that, because
24
25 if the order isn't changing the only way we can make this happen
26
27 is if, if that, uhm, scenario exists. So if we can get the
28
29 expert's name that, that would be there to, to make the

1 observations then we can coordinate to see if they can be in
2
3 whatever, you know, visitor area that, that these folks are, are
4 allowed to be in, because I, I am familiar with them doing those
5
6 types of things in the past. Uhm, I'm, I'm not familiar with the
7
8 lab letting, uh, anybody into the actual, you know, I'm
9 envisioning somebody kind of over the shoulder of the criminalist.

10
11 I don't think that's, that's --

12 THE COURT: Right.

13
14 MR. FLORES: -- that's something that actually
15 would occur. Uh, I do know there are some windows where, where,
16
17 within the Crime Lab and so, uhm, I guess that just kind of sets
18
19 it up for, for argument for us to deal with later but given the
20
21 trial date coming up, uh, we'll just have to deal with that after,
22
23 after whatever occurs, occurs. Uhm, but if we can get that we'll,
24
25 we'll certainly make, uh, coordinate, uh, schedules so if we were
26
27 going to consume it that the person can walk through the doors and
28

1 be in the building when that consumption is occurring, uh, and in
2 compliance with this court order. Uh, in the alternative, uh, we,
3 we will, uh, work with, uh, the Defense on their expert's, uh,
4 availability, uhm, as well as not, not being put in between a rock
5 and a hard, hard place a little bit here with the, with the order
6 that, uhm, if there is something that's not acceptable we'll,
7 we'll certainly, uh, uh, discuss, uh, the stipulation if that's,
8 you know, all we're going to be forced to, to allow our case to be
9 presented with. Uhm, then that's, that's just where we got to go
10 with it, but certainly, you know, that's, that's kind of the route
11 we're going to have to take at this point.
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18 THE COURT: Any response?

19 MS. ACOSTA: Well, it's hard to respond at this
20 point, Your Honor. I mean of course we would be glad to provide
21 the expert when we locate one; however, I'm not quite sure of the
22 tour aspect of it. Uhm, I think that our expert would be able,
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1 needs to be in a position to be able to observe the actual testing
2
3 and video it and to make sure that it's being done accurately, so
4 as Mr. Flores says I think that we'll just cross that bridge when
5
6 we get to it because I don't foresee an expert on a tour being
7
8 able to do that we anticipate doing but we'll --

9 MR. FLORES: Can, can we get a deadline of the -

10 -

11
12 MS. ACOSTA: I don't have one.

13
14 MR. FLORES: So that way -- because we have to,
15 we have to accommodate for the trial.

16
17 THE COURT: Sure.

18
19 THE FLORES: That's been offset so if we can get
20 that --

21
22 THE COURT: Sure. So, we have a turnaround of
23 how many weeks and what's the state lab usually? Because I
24 remember the testing for 1, uh, 1 ounce of marijuana was something
25
26
27
28

1 like, uh, 60 days and it turned into 120, so I don't know. You
2
3 know, the, uh, I'm not familiar with the state labs and backlog
4 but they've always been backlogged as long as I've been here so.
5

6 THE FLORES: Given that they know that the, uh,
7 jury, the trial date was accelerated they put it as a top priority
8
9 and it's been put there pending, uhm, the resolution of this, uh,
10 second Defense expert observation issue so, uhm, I don't have a, a
11 specific date or time but obviously time is of the essence given
12
13 where we're at, uh, relative to the trial.
14

15 THE COURT: Well, let's see what we got here.
16

17 MS. ACOSTA: I think this Court already has a
18
19 review hearing set for June 13th at 9:00 a.m. on this issue.
20

21 THE COURT: Let's see. It was the party's
22 stipulation for the hearing on physical character -- this was way,
23 way back when. It was the other DNA test. So that was 2017, June
24
25 20th, 2017. I, I'm just pointing out --
26
27
28

1 MS. ACOSTA: Uh-huh.

2
3 THE COURT: -- that you guys are talking about,
4 you know, timeliness. This has been a two-year thing. It went up
5
6 on appeal and came back so, uh, in any event, uh, the Court had
7
8 also stayed the order to obtain the DNA samples. And then August
9
10 23rd, that's when the appeal was filed. So, this was April 4th
11
12 the Court of Appeals kicked it back and then on June 20th DNA
13
14 testing was approved by the Court of Appeals on the second
15
16 hearing. And so then at that time they (inaudible) it back. So,
17
18 this has been a good three years, uh.

17 MS. ACOSTA: Correct.

18 THE COURT: And they, and then they consent.

19
20 MS. ACOSTA: And then my client provided his DNA
21
22 in January, Your Honor.

23 THE COURT: Right. Now we're talking August
24
25 5th for the pretrial, August 20th for the jury trial. Uhm, can
26
27
28

1 | you make these arrangements within 2 to 12 weeks? You have an
2 |
3 | expert to hire, so you -- I, I would anticipate --

4 | MS. ACOSTA: I have to find an expert, yes.

5 |
6 | THE COURT: I would anticipate this is going to
7 |
8 | be a little bit longer. Let, let's make it three weeks, uhm, and
9 |
10 | that way we can get someone on board hiring and then we can make
11 | arrangements at that point accommodating for your expert's
12 | schedule to see how the lab can, uh, try to work him in over there
13 |
14 | to observe and, and with the destructive test, testing. So, let's
15 | do a deadline of three weeks and that should give, you know, a
16 |
17 | four to five-week turnaround. That'll give her an opportunity to
18 | have her expert if she intends to hire one, uh, to designate so
19 | that'll be in time for the August. Let's set this out about three
20 |
21 | weeks. Uh, by June 18th?

22 |
23 | MS. ACOSTA: Are you just making that a deadline
24 |
25 | or are you setting a hearing on that date?
26 |
27 |
28 |

1 THE COURT: No, I'm trying to make it the
2 deadline, uhm --
3

4 MS. ACOSTA: Okay.
5

6 THE COURT: -- I'm, I'm hoping that you will
7 have your expert on board in time by that time to get my approval
8 with, for the funding. Of course, the AG will be happy knowing
9 that they're going to pay for the expert again. Uh, this, what I
10 do, I, I, I have been basically taking the federal statute on this
11 one requiring the AG to be responsible for that because under the
12 federal law it's the US Attorney's Office that has that, and then
13 it comes from the public defenders under the statute, uh, for
14 public defender's cost of, uh, experts. So, I'll just go ahead
15 and do that as an ex parte order and once I have that we can get
16 your expert designated. And once the Defense, uh, expert is
17 designated you can make those arrangements and we'll have that.
18 June 18th I'm setting as the deadline for you to coordinate to
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1 have something in place for the testing time, date, where you can
2 do, where the, uh, expert can observe the testing over there, so,
3 uh, June 15th and if the --
4

5
6 MS. ACOSTA: So, Your Honor --

7 THE COURT: And if the, and if the parties
8 cannot stipulate, I will hold hearing that morning.
9

10 MS. ACOSTA: I --

11 THE COURT: Let's do this early on June 18th.
12

13 MS. ACOSTA: I will not be here on the 18th.
14 Uhm, since I'm going to be out at a conference that whole week so
15 the 17th.
16

17 THE COURT: Oh you, you folks are always so
18 smart going to conferences and, and trainings.
19

20 MS. ACOSTA: Well, no, I need to get my CLE done
21 so that's --
22

23 THE COURT: Right. Keep your licenses.
24
25
26
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28

1 MS. ACOSTA: Yeah. Uhm, I've available the
2 morning of the 17th, but we had a hearing already scheduled for
3 the 13th --
4

5
6 THE FLORES: June 13th.

7 MS. ACOSTA: -- on this issue. I don't know if
8 you want to keep it.
9

10 THE COURT: Yeah, it's -- I put the review
11 hearing on the motion. It was going to be May 13th because I was
12 anticipating that you were going to have an expert by hopefully
13 before then and that was going to be an opportunity for you to do
14 this but because of the new motion, uh, this threw that issue for
15 today. That's why I said let's do it right away, this afternoon
16 so we can move on that. Uh, can you make it by the 13th? That's
17 the question. Can you get your expert to hire him on board by the
18 13th?
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24 MS. ACOSTA: I will do my best. I mean --
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1 THE COURT: Let's stick with the 13th then.

2
3 We'll --

4 MS. ACOSTA: Okay.

5
6 THE COURT: -- do it by June 13th at 9:00. And
7 if you folks have -- hopefully you have a stipulation by that
8 time. If you don't, I'll go ahead and see what the Court can do
9 as far as, uh, any additional orders. Okay, we'll see you back
10 here then June 13th. Uh, the Court denied the motion to
11 reconsider. I'm going to maintain the same order on the
12 (inaudible). And --

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17 MS. ACOSTA: Thank you.

18
19 THE COURT: -- hopefully I'll have your
20 stipulation by the 13th. If not, I guess I'll see you back here
21 on the 13th. Court's adjourned.

22
23
24 [END OF HEARING]

25 [Transcriber's Certification Follows:]

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C E R T I F I C A T E

I certify that, to the best of my ability, the foregoing is a true and accurate transcription of the original digitally recorded court proceeding in the case referenced on page 1 above.

Transcription Completed: June 21, 2019

CHRISTINE McGARVEY
LEGAL TRANSCRIPTION SERVICES PLUS
TRANSCRIBED BY: Stacey Archambault

SIGNED BY: Christine McGarvey
Christine McGARVEY

Exhibit G
(Order for Consumptive Forensic DNA Testing
and Order Denying Tribe’s Motion to Reconsider
Court’s Order for Independent Expert DNA
Testing, *PYT v. Madrid*, CR-17-079) (May 28,
2019)

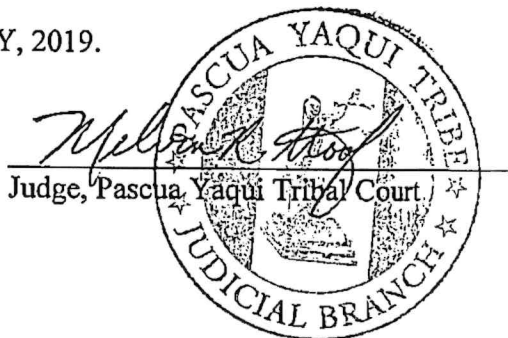
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THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.

IT IS FURTHER ORDERED that the Tribe's motion to reconsider shall be denied, for lack of good cause shown.

IT IS FURTHER ORDERED that the defendant's counsel shall file an ex parte motion for appointment of its DNA Forensic expert, as soon as possible, for court review. The motion and order shall be sealed in the court file, for appellate review and not opened except upon order of this court.

SO ORDERED THIS 28th DAY OF MAY, 2019.



CC: Date 05-28-19
 Tribe Defendant/Counsel

[Signature]
Clerk

Exhibit H
(Minute Order, *PYT v. Madrid*, CR-17-079) (June
12, 2019)

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IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,)
PLAINTIFF,)
vs.)
MADRID, MICHAEL)
DEFENDANT.)
_____)

Case No. CR-17-079

MINUTE ORDER

On June 12, 2019, the court reviewed the Ex Parte Motion to Appoint Expert Witness for observation and reporting on DNA consumptive testing by the Arizona Department of Public Safety Labs, filed by the defendant's attorney, Melissa Acosta, along with the proposed expert's resume and fee schedule.

In felony cases that may result in lengthy prison terms upon conviction, the Supreme Court has found that a denial of an indigent defendant's ex parte request for appointment of an expert, See 18 U.S.C. § 3006A(e)(1), Guide to Judicial Policy, Vol 7A, Ch. 3 §320.20.60, which is a statutory right, may also be a violation of an indigent defendant's constitutional rights to effective representation. See also *Ake v. Oklahoma*, 470 U.S. 68 (1986). In subsection (e) of the Criminal Justice Act, 18 U.S.C. § 3006A, Congress has provided that indigent defendants shall receive the assistance of all experts "necessary for an adequate defense." The court finds that based on all of the information submitted ex parte, the court finds that there is a necessity to appoint an expert for defendant's DNA consumptive testing to observe and report on the Arizona Department of Public Safety Lab's destructive testing.

The Court should grant the defendant's ex parte motion to appoint expert with a cap of \$2,400.00 for expert fees, and will reserve on its ruling as to reasonable compensation when the defense counsel has provided a more detailed invoice for Dr. Schile's expert services. The court should order that the expert be compensated firstly from the public defender's budget, and secondly, in the event such budget cannot cover the costs, then the court should issue an order for the Tribe to pay.

IT IS ORDERED that the Court shall grant defendant's Motion to appoint Dr. Schile as defendant's expert, with a cap of \$2,400.00 for her fees, and the court will reserve on ruling as to the expert's compensation, after review of her invoice for professional services. The defendant's expert shall be compensated through the public defender's office budget first. In the event the public defender office has inadequate funding to cover the expert's fees and costs, then the court shall review the costs and may order that the Tribe pay for any defendant expert fees and costs not covered under the public defenders' office budget.

SO ORDERED THIS 12th DAY OF JUNE, 2019.


Associate Judge, Pascua Yaqui Tribal Court


Exhibit I
(Order Setting Hearing on DNA Evidence
Testing, *PYT v. Madrid*, CR-17-079) (May 14,
2019)

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IN THE PASCUA YAQUI TRIBAL COURT
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE
Plaintiff,
VS.
MADRID, MICHAEL
Defendant.


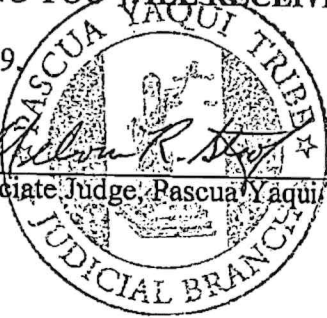
CASE NO. CR-17-079
ORDER SETTING HEARING ON
DNA EVIDENCE TESTING


On May 14, 2019, the court reviewed defendant's May 3, 2019 objection "to consumption of the sample in this case the Tribe seeks to consume for testing." The Tribe filed its response and requested a hearing. Neither party has cited to any statute, case law, or other legal authorities, or made specific requests as to what, if any action, should be taken. The court attaches a copy of the ABA Standards on DNA Evidence, including standard 3.4. Consumptive testing, as reference for the parties.

IT IS ORDERED that the court shall set a hearing on DNA evidence testing on May 23, 2019 at 10:00 a.m..

THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.

SO ORDERED THIS 14th DAY OF MAY, 2019.


Associate Judge, Pascua Yaqui Tribal Court


cc: Date: 5.14.19
 Tribe Defendant Counsel

Clerk

December 05, 2018

Standards on DNA Evidence (Table of Contents)

Share this:



Criminal Justice Section Standards

Standards on DNA Evidence (Table of Contents)

A new set of Criminal Justice Standards on DNA Evidence approved by the ABA House of Delegates in August 2006 appears along with commentary in a publication entitled: *ABA Standards for Criminal Justice: DNA Evidence, 3d ed.* © 2007. For the text of the publication, [click here](#). To go directly to individual "blackletter" standards (without commentary), click on the applicable link below. For information about purchasing the printed volume, please [click here](#).

Part III: Testing of DNA Evidence

Standard 3.1 Testing laboratories

(a) A laboratory testing DNA evidence should:

(i) be accredited every two years under rigorous accreditation standards by a nonprofit professional association actively involved in forensic science and nationally recognized;

(ii) be governed by written policies and procedures, including protocols for testing and interpreting test results, and permit deviation from protocols only by a technical leader or other appropriate supervisor;

(iii) use quality assurance and quality control procedures, including audits, proficiency testing, and corrective action protocols, that are consistent with generally accepted practices and in writing;

(iv) use protocols for testing and interpreting DNA evidence that are scientifically validated through studies that are described in writing;

(v) follow procedures designed to minimize bias when interpreting test results;

(vi) timely report credible evidence of laboratory misconduct or serious negligence to the accrediting body; and

(vii) make available to the public the written material required by this standard.

(b) A laboratory testing DNA evidence should make available to the prosecution the information and material that the prosecutor must disclose to the defense pursuant to Standard 4.1, and to defense counsel the information and material that the defense must disclose to the prosecutor pursuant to that standard.

(c) When an accrediting body receives notice of credible evidence of laboratory misconduct or serious negligence concerning DNA evidence at the testing laboratory, either as provided in subdivision (a) (vi) of this standard or through other means, it should audit laboratory procedures and cases that may have been affected by the misconduct or serious negligence and issue a written report.

Standard 3.2 Testing and interpretation of DNA evidence

(a) DNA evidence should be tested and interpreted in a timely manner by qualified personnel using the policies and procedures adopted by the laboratory as provided in Standard 3.1.

(b) Each step in the testing of DNA evidence and in the interpretation of the test results should be recorded contemporaneously in case notes.

(c) The case notes should document all information necessary to allow an independent expert to evaluate the process used and the conclusions reached.

(d) All case notes made and raw electronic data produced during testing should be preserved.

Standard 3.3 Laboratory reports

(a) A summary of all DNA testing and data interpretation should be recorded promptly in a report.

(b) The report should be sufficiently comprehensive so that an independent expert can identify the process used and the conclusions reached. Specifically, the report should include:

(i) what was tested,

(ii) who conducted the testing,

(iii) identification of the protocol used in the testing and any deviation from the protocol,

(iv) the data and results produced by the testing or data interpretation,

(v) the examiner's interpretation of the results and conclusions therefrom,

(vi) the method and results of any statistical computation, and

(vii) any additional information that could bear on the validity of the test results, interpretation or opinion.

(c) A separate section of the report should explain the test results, interpretation and opinion in language comprehensible to a layperson.

Standard 3.4 Consumptive testing

(a) When possible, a portion of the DNA evidence tested and, when possible, a portion of any extract from the DNA evidence should be preserved for further testing.

(b) A laboratory should not undertake testing that entirely consumes DNA evidence or the extract from it without the prior approval of the prosecutor if a law enforcement officer is requesting the testing, or of defense counsel if the testing is requested by defense counsel or defense counsel's agent.

(c) Before approving a test that entirely consumes DNA evidence or the extract from it, the prosecutor should provide any defendant against whom an accusatorial instrument has been filed, or any suspect who has requested prior notice, an opportunity to object and move for an appropriate court order.

(d) Before approving a test that entirely consumes DNA evidence or the extract from it, the attorney for any defendant against whom an accusatorial instrument has been filed, or for any other person who intends to conduct such a test, should provide the prosecutor an opportunity to object and move for an appropriate court order.

(e) If a motion objecting to consumptive testing is filed, the court should consider ordering procedures that would permit an independent evaluation of the analysis, including but not limited to the presence of an expert representing the moving party during evidence preparation and testing, and videotaping or photographing the preparation and testing.

Exhibit J
(Transcript of June 13, 2019 hearing, *PYT v.*
***Madrid*, CR-17-079)**

IN THE PASCUA YAQUI TRIBAL COURT
COUNTY OF PIMA, STATE OF ARIZONA

PASCUA YAQUI TRIBE,) NO. CR17079
Plaintiff,)
vs.)
MICHAEL RAYMOND MADRID,)
Defendant) June 13, 2019
Tucson, Arizona
_____)

BEFORE: THE HONORABLE MELVIN R. STOOFF, JUDGE OF THE PASCUA
YAQUI TRIBAL COURT

APPEARANCES: RUSSELL BOATWRIGHT, ESQ.
appearing for the Pascua Yaqui Tribe

MELISSA ACOSTA, ESQ.
appearing for Defendant

RE: REVIEW HEARING

Christine McGarvey
Legal Transcription Services Plus

1
2 **INDEX**

3 Witness(s)
4 -----

5 THE COURT: And this is CR17079, Pascua Yaqui
6 Tribe versus Michael Madrid, and this is a, uh, review and also, I
7 had a, uh, request for a second motion for reconsideration of the
8 Court's ruling on consumption of DNA samples. And we have two,
9 actually two issues. Uh, are you waiving presence of your client?
10

11 MS. ACOSTA: Yes, Your Honor.
12

13 THE COURT: Okay. I have Melissa Acosta here
14 with Russell Boatwright for the Tribe for a status report on the,
15 uh, testing. I see you've listed the policy of the Arizona
16 Department of Public Safety labs, that they don't permit any
17 outsiders in. They have no observation area or?
18
19

20 MR. BOATWRIGHT: So, Judge, uh, we, we have been
21 prodding them for that. They do. Uh, they said, yes, we have a
22 window.
23

24 THE COURT: Yeah.
25
26
27
28

1 MR. BOATWRIGHT: Uhm, nobody is allowed in. They,
2 they just -- it's for, for everything they listed in there --
3

4 THE COURT: Oh okay.

5 MR. BOATWRIGHT: -- uhm, that they provided us, and
6 we can still keep trying to work with them. I can try to go up
7 higher, but that was through the manager there --
8
9

10 THE COURT: Right.

11 MR. BOATWRIGHT: -- and, uhm, I mean I can go into
12 all the reasons but they, they said that they don't, they have --
13 I -- even as far as OSHA, uhm --
14
15

16 THE COURT: Yeah.

17 MR. BOATWRIGHT: -- is concerned if somebody was to
18 get hurt in there or --
19
20

21 THE COURT: Right.

22 MR. BOATWRIGHT: -- do something and, you know, uh,
23 as great as to, you know, that, uh, they, given the volume of
24 testing they'd have to do if somebody came in, they might have to
25
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1 stop other testing and --

2

3 THE COURT: Okay.

4

5

6

7 MR. BOATWRIGHT: -- and so, they just -- they have
8 their reasons. They're not illegitimate reasons. They -- and
9 they're just not going to do that just for us, so.

10

11

12 THE COURT: Okay. Have you seen this policy?

13

14 This is the first time I've ever seen a policy like this so.

15

16

17 MS. ACOSTA: I've never seen it before.

18

19 THE COURT: Well, I guess --

20

21

22 MS. ACOSTA: I mean I did receive it --

23

24 THE COURT: Yeah. Yeah.

25

26

27 MS. ACOSTA: -- with, uhm, the motion, but I
28 hadn't seen it. I mean obviously --

29

30

31 THE COURT: Yeah, see I, I -- well, my practice

32

33 was in Texas and New Mexico, but in Texas they have the little --

34

35

36 I told you there was a viewing area, so you're not actually in the

37

38 lab, but you're observing it through a window. It's a plate glass

39

40

41

1 window so they have it set up where you actually have to walk down
2 this quarter mile corridor --
3

4 MR. BOATWRIGHT: Yeah.

5 THE COURT: -- to get to the visiting area and
6 then they check you through there because they don't want to
7 contaminate any of the sampling so they actually have these doors,
8 so it's like or medically sealed kind of thing. But that -- I
9 remember there that was the whole purpose of the observation area
10 because you're not allowed in the lab, so I think that's, you know
11 --
12 --
13 --
14 --
15 --

16 MR. BOATWRIGHT: Yeah.

17 THE COURT: -- uh, sort of a standard practice.

18 MR. BOATWRIGHT: -- Texas size oil money. We have -
19 -
20 -
21 -

22 MS. ACOSTA: And then actually it looks like
23 this was --
24

25 THE COURT: Yeah.
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MS. ACOSTA: -- just, became a factor --

THE COURT: Yeah, 9 --

MS. ACOSTA: -- in September --

THE COURT: -- 9/5/2018. This is very interesting.

MS. ACOSTA: Yeah, and I mean --

THE COURT: Yeah.

MS. ACOSTA: -- and obviously I wasn't aware of it until I saw it, but I mean it concerns because, you know, when you hear about cases of --

THE COURT: Yes.

MS. ACOSTA: -- later, you know, returned because --

THE COURT: Right.

MS. ACOSTA: -- the lab was, you know, not doing things properly --

THE COURT: Right.

1 MS. ACOSTA: -- so if they're saying they're
2 never going to allow anybody in --
3

4 THE COURT: Yeah.

5 MR. BOATWRIGHT: And that --
6

7 MS. ACOSTA: -- then that's something that, you
8 know, that in the other case can be litigated but, uhm --
9

10 MR. BOATWRIGHT: And just to be clear --
11

12 MS. ACOSTA: Yeah.

13 MR. BOATWRIGHT: -- that, that's not one sided.
14 They, they also were clear that no prosecutors allowed in there,
15 no law enforcement. Uhm, if you don't work for that lab you, you
16 just don't come in.
17

18 THE COURT: Okay. Huh, interesting. They've
19 got the whole list here liability, security, loss, test
20 sensitivity, design, property damage, fiscal responsibility, a
21 whole bunch of reasons why they don't permit it. Well, any
22 thoughts, suggestions?
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1 MS. ACOSTA: Well, Your Honor, I mean we stand
2
3 by our original arguments as I filed in my response. You know, I
4 again, the thing that concerns me is, you know, it may not be
5 applicable to this particular case, but for this lab to say, you
6 know, we're not going to allow anybody in, I don't even know if
7 they would, if they would comply with a court order. I mean they
8
9 -- you would think that they would because again, as it, as it
10 came up, like there are cases where how do we know things are
11 being done properly if --

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14
15 THE COURT: Right.

16 MS. ACOSTA: -- nobody is allowed in except
17
18 people that work there and that's, that's a concern that I would
19 have. I mean I know that there's been issues with crime labs. I
20 think there's actually been issues with this crime lab years ago,
21 you know, but, uhm, so I guess I -- we would stand by our position
22 and leave it up to the Court, you know, whether it feels like it
23 has the authority to order it. Uhm, but, you know, just because
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1 that's their policy doesn't mean that that effects justice so --

2
3 THE COURT: Right.

4 MS. ACOSTA: -- that would be our position.

5
6 THE COURT: Well, notwithstanding their policy
7 of not permitting outsiders into their labs or even to observe,
8 uh, the testing, the Court, uh, follows the standards of the ABA
9 because it does look at the interests of both parties and weighs
10 the interest of both parties and certainly the Court found last
11 time that the, uh, Defendant also has an opportunity to review and
12 observe if there's going to be a total consumption of the sample
13 since that's going to prevent them from doing testing at a later
14 date. So that's the whole purpose of the consumptive testing and
15 observation, uh, so you can, uh, just determine that it's
16 properly, the procedure at least was followed and then the expert
17 can argue about the results if they wish, but the point is, uh,
18 that is to ensure that all proper procedures are being followed.
19 So, I'm going to deny the request to reconsider, I'm also going to
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1 deny the request for alternate lab, all I can suggest is perhaps
2 the, uh, State can accommodate, because I mean how can they not
3 have an observation? I'm just -- I'm just dumbfounded by this,
4 uh, and I know it takes a lot of time, I know it's like pulling
5 teeth, because in this case I had it took about three weeks for us
6 just to get into that little viewing area, let alone the lab. Uh,
7 so I know it's a challenge, but nonetheless, those folks did
8 comply with the court order, it was a Federal court order and so
9 they went ahead and accommodated by permitting us to be in this
10 hall area and, uh, and then we had to set up a video camera and my
11 expert was there too, so I mean it's one of those situations where
12 as far as the lab they have their policies, they have their
13 procedures, but there has to be some sort of accommodation. So,
14 I'm going to maintain my current order. I'm not going to require
15 that the Defense find an alternative accredited lab to perform the
16 test.

25 MS. ACOSTA: And you know, just for the Record,
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1 Your Honor, in reading this, uh, you know, now also and looking at
2 4.6.4 of the policies it says due to accreditation requires
3 certified technical assessors may witness analysis of the evidence
4 as part of an ongoing accreditation assessment. So, they
5 obviously do allow outside people in that are certified.
6 Obviously, we wouldn't send anybody in there that wasn't a
7 forensic expert, so they're choosing to limit it, but they have to
8 let people in to give them accreditation, so it's kind of like
9 under that similar --

10
11
12 THE COURT: Yeah. Because they've listed in
13 here attorney's, attorney representatives, independent experts
14 (inaudible) to view, take photograph or perform scientific
15 examinations of evidence. I mean that -- I've never seen a policy
16 like that. Uhm, and all I can suggest is if they can do an
17 accommodation, they can do it, but I'm sticking with the order,
18 uh, see if you can convince some higher ups up there at the
19 Department that the, you know, this is -- it's destructive
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1 testing, it's gone, it's one time and one time only. So, that's
2 the only way that this can be addressed. So, I'm going to deny
3 the request for motion of reconsideration and I'm going to deny
4 the request to have the Defense to arrange for a different lab.
5 Hopefully you can square this away. I've also, uh, it's just not
6 put on the Record here, it's an ex parte request, but I went ahead
7 and granted the request for Defense expert so that that expert can
8 be there to observe. And so, I don't know, uhm, what arrangements
9 can be made, but if so, I'll just order the Tribe to contact
10 Defense Counsel so she can arrange time with her expert to go over
11 and observe the consumptive testing. So, any other matters?
12
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18 MS. ACOSTA: Uhm, --

19 MR. BOATWRIGHT: Not at this time, Judge. I guess
20 Miss Acosta, we'll just get the name and as possible that person,
21 they have familiarity, where they say oh, we didn't know it was
22 that person, sure they can come.
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25 THE COURT: Right.
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MS. ACOSTA: Yeah, hopefully.

THE COURT: Okay. I don't know, maybe your expert can --

MS. ACOSTA: Talk them into it.

THE COURT: Talk to your expert and see if they've ever done this, because it seems to me like that would be a pretty fairly routine, but again, I understand the considerations for safety and the, you know, contamination of the lab, but there should be some sort of accommodations. I just don't -- I can't quite fathom that absolutely no one is permitted in there other than the lab technicians, that sort of (inaudible).

MR. BOATWRIGHT: But, but Judge, I'm sorry, but before we get off of the Record, do we have the name? I think today is --

MS. ACOSTA: Uh-huh. Yeah.

MR. BOATWRIGHT: Okay. So, we'll get that and we'll check on that. The only other thing I would -- we don't need to

1 take this up now, but just as a preview, uhm, obviously, the Tribe
2 is in a powerless position here, I can't make the lab do it,
3 they're basically, the position is well then go contract somewhere
4 else --
5

6
7 THE COURT: Yeah.

8
9 MR. BOATWRIGHT: -- is the stance they took with us.

10 THE COURT: Sure.

11
12 MR. BOATWRIGHT: And this is the contract that
13 Pascua Yaqui Tribe has, they contract with them.
14

15 THE COURT: Right.

16 MR. BOATWRIGHT: Uhm, and so, that's their stance on
17 it, is that, uh, you can get another lab then. Uhm, so, I would
18 anticipate filing a motion *in limine* that the Defense should not
19 be able to argue that we didn't do something in regards to this,
20 so I just want that to be on the Court's radar that I want the
21 Court to be aware we obviously are handicapped here. We can't
22 make them do it. And so that would be unfair to argue that we
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1 failed to do something if we can't (inaudible).

2
3 THE COURT: You can certainly bring it up at,
4 yeah, pretrial or motions *in limine*, I'll go ahead and consider
5 that at a later date. Just determined based on what these folks
6 are going to do, if they're going to accommodate my end, so,
7
8 hopefully they will. Okay. Court is adjourned.
9

10 MS. ACOSTA: Thank you.

11
12 [END OF REVIEW HEARING]

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14 [Transcriber's Certification Follows:]
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C E R T I F I C A T E

I certify that, to the best of my ability, the foregoing is a true and accurate transcription of the original digitally recorded court proceeding in the case referenced on page 1 above.

Transcription Completed: July 17, 2019

CHRISTINE McGARVEY
LEGAL TRANSCRIPTION SERVICES PLUS
TRANSCRIBED BY: Stacey Archambault

SIGNED BY: Christine McGarvey
Christine McGARVEY

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Exhibit K
(Minute Order, *PYT v. Madrid*, CR-17-079) (June
13, 2019)

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IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,)	
Plaintiff,	)	Case No. CR-17-079
Vs.)	
MADRID, MICHAEL R.	)	MINUTE ORDER
Defendant.)	
_____)		

On June 13, 2019, the court reviewed the Tribe’s SECOND Motion to Reconsider Court’s Ruling on Consumption of DNA Sample, filed by Russell Boatwright. Appearing was Melissa Acosta, whose client’s presence was waived.

Mr. Boatwright indicates that the Arizona State Crime lab would not be able to accommodate allowing the defendant’s forensic DNA expert to be present for consumptive testing, because “[t]he DPS laboratory does not allow for independent expert to be present for testing of the DNA sample.” On May 23, 2019, the court adopted the ABA Standards on DNA Evidence and should follow Standard 3.4(e) Consumptive testing and it granted the defendant’s request to permit an independent evaluation of the analysis, including but not limited to, the presence of an expert representing the defendant during the evidence preparation and testing, and videotaping or photographing the preparation and testing.

Because the ABA Standard on Consumptive Testing is one standard that addresses both the interests of the Tribe to prove its DNA evidence, but also protects the defendant’s right of due process in ensuring its expert can observe the DNA consumptive testing to ensure protocols and standard operating procedures are followed, the court maintained its prior court orders, and it denied the Tribe’s motion to reconsider, for lack of good cause shown.

The defendant’s counsel argues that although the Arizona Department of Public Safety Scientific Analysis Bureau’s SAB General Procedures Manual prohibits the presence of attorneys, independent experts and will not allow videotaping or photographing of the evidence analysis, it does accommodate for “certified technical assessors” Section 4.6.4, at page 25, SAB General Procedures Manual, to allow the assessors to witness analysis of evidence as part of an ongoing accreditation assessment, then the lab should be able to accommodate for observation by the defendant’s expert.

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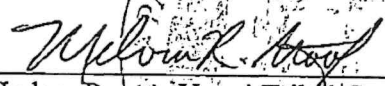
The court agreed with the defendant's counsel, and it should order that the Tribe attempt to determine whether the lab has allowed any accommodations in the past, and to notify the court as to what specific order may be necessary to effectuate such observation by defendant's experts.

Although the prosecutor was concerned that the defendant may take the lab's rejection of allowing defendant's expert to observe as possible support of an argument that the Tribe failed to do what it was legally obligated to do, such a matter may be resolved in the event the lab cannot accommodate, and more appropriately in a motion in limine at the pre-trial conference.

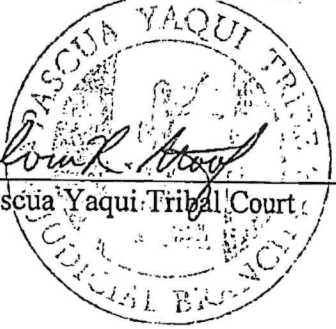
The court denies that Tribe's Second motion to reconsider, for lack of good cause shown, because the defendant does have a right to have his expert present to observe the consumptive DNA testing.

IT IS ORDERED that for the Tribe's **SECOND** motion for reconsideration of court's ruling on consumption of DNA sample shall be denied. The court shall maintain its current order of May 28, 2019. The prosecutor should make any additional reasonable efforts to determine whether the AzDPSSAB testing lab has allowed accommodations in the past, and if they are willing to do so in this case.

THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.
SO ORDERED THIS 13th DAY OF JUNE, 2019.



Judge, Pascua Yaqui Tribal Court



CC: Date 06.13.19
 Tribe Defendant/Counsel



Clerk

Exhibit L
**(Tribe's Second Motion to Resconsider Court's
Ruling to Consumption of DNA sample, *PYT v.
Madrid*, CR-17-079) (June 10, 2019) (with copies
of relevant Arizona DPS Crime Lab Policies)**

2019 JUN 10 AM 11:47

DOCKET NO. _____

CLERK _____

1 PASCUA YAQUI TRIBE
7474 S. Camino de Oeste
2 Tucson, Arizona 85757
(520) 879-6251

3 Russell Boatwright
4 Deputy Prosecutor

5
6 **IN THE PASCUA YAQUI TRIBAL COURT**
7 **IN AND FOR THE PASCUA YAQUI RESERVATION, ARIZONA**

8
9 PASCUA YAQUI TRIBE,
Plaintiff,

10 Vs.

11
12 **MADRID, MICHAEL RAYMOND**
13 Defendant

NO. CR-17-079

**SECOND MOTION TO RECONSIDER
COURT'S RULING TO ON
CONSUPTION OF DNA SAMPLE**

14
15
16 COMES NOW The Pascua Yaqui Tribe, by and through undersigned counsel, hereby
17 requests this Honorable Court to reconsider its previous rulings on the issue of consumption of the
18 DNA sample. The Court previously ruled that the Defense be allowed to have an independent expert
19 physically present for the testing of the sample. The Tribe subsequently notified the Court that the it
20 believed the lab would not allow independent persons in the facility due to accreditation issues and
21 renewed its request to be allowed to consume the sample, or, in the alternative, order the Defense to
22 find an independent lab to conduct the testing. The Court affirmed its previous ruling denying the
23 request for consumption and further denied the request that the Defense obtain an independent lab,
24 citing cost concerns. The Tribe stated it would make all efforts to see if any accommodation could be
25 made for an independent expert's presence for testing observation.

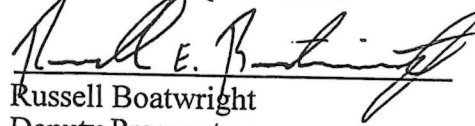
26 The DPS laboratory confirmed that no independent persons are allowed in the facility to
27 observe testing and provided their policies on the matter. *See* attachment. Therefore, given the
28

1 Court's previous ruling, the Tribe has no ability to test the sample.

2 The Tribe renews its requests that the Court allow for consumption of the sample, or, in the
3 alternative, require that the Defense find an alternative accredited lab to perform the test before trial.
4 To deny both requests negates the Tribe's ability to utilize evidence that it lawfully obtained and
5 amounts to unfair prejudice to the Tribe. The Tribe does not request a hearing on this motion.

6 **Respectfully submitted this 10th day of June, 2019.**

7
8
9 OFFICE OF THE PROSECUTOR
10 PASCUA YAQUI TRIBE

11 
12 Russell Boatwright
13 Deputy Prosecutor

14 Original of the foregoing delivered/mailed
15 This date to:

16 Clerk of the Court, Pascua Yaqui Tribal Court

17 A copy delivered to:

18 Melissa Acosta
19 Office of Public Defender

20 By:
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ATTACHMENT



ARIZONA DEPARTMENT OF PUBLIC SAFETY SCIENTIFIC ANALYSIS BUREAU

SAB General Procedures Manual

ID: 2455

Supersedes: 2455 Rev. #1

Issuing Authority:
SAB Superintendent

Revision #2

Effective Date: 09/05/2018

The Department's Public Records Unit (PRU) handles all requests for public records that relate to documents retained by the SAB. Requests for public records received by SAB employees should be referred to the PRU. In most instances coordination between the PRU and the SAB will be required in order to properly respond to the request.

Once completed, all documents associated with a public records request must be forwarded to the SQM who will forward the documents to the PRU.

In accordance with Rules of Criminal Procedure, responding to disclosure requests made by the defense attorney is the responsibility of the prosecutor. Any request for discovery made directly to an employee of the SAB should therefore be referred to the case prosecutor. The employee must work with the prosecutor in order to determine what specific documents will be provided pursuant to the request for discovery.

It should be noted that even if a record is not discoverable pending litigation, the PRU may be required to release the record pursuant to a public records request.

Any questions regarding either public records or discovery requests should be addressed with the SQM or the laboratory manager.

Any information disclosed must be in a write-protected format.

4.5 Monitoring and Disposition of Backlogged Cases

Consistent with the SAB's mission to provide timely analysis on evidence submitted for examination, the following policy is implemented:

- 4.5.1 Cases having court mandated deadlines and/or those providing immediate investigative leads will receive priority attention.
- 4.5.2 Cases not falling into the above listed categories will be evaluated for probative value by the appropriate unit supervisor after conferring with the submitting officer and/or prosecuting attorney, if applicable.
- 4.5.3 If, in the opinion of the unit supervisor, processing the case will provide no useful information or case processing is found to be unnecessary, it can be withdrawn. The case officer and/or prosecutor will be advised of the decision, and that the case can be resubmitted at a future date if its analysis will produce more meaningful results. Supervisors are responsible for ensuring that cases of this type do not remain on the backlog.
- 4.5.4 If case processing is found to be unnecessary, a Scientific Examination Report will be prepared notifying the officer that the request for scientific examination will not be performed.

4.6 Attorney/Independent Experts Access to Crime Lab Facilities, Videotaping/Photography of Evidence Analysis and Viewing Evidence Outside of Lab Examination Areas



ARIZONA DEPARTMENT OF PUBLIC SAFETY SCIENTIFIC ANALYSIS BUREAU

SAB General Procedures Manual

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4.6.1 Attorneys, attorney representatives, independent experts, or other non-SAB employees are not permitted to view, videotape/photograph or perform scientific examinations of evidence in DPS crime laboratory areas. The reasons for this policy are as follows:

- Liability - Outside personnel are not familiar with the crime laboratory, its potential hazards, safety rules, OSHA mandated Chemical Hygiene Plan, Exposure Control Plan, bio-safety cabinet operation, fume hood operation and specific scientific equipment operation.
- Security - Outside personnel would be disruptive to the work routine since all other regular case work would have to be stopped and secured while they had access to the facility. To do otherwise would jeopardize cases and on-going investigations. Cases in progress have criminal history record information (i.e., names, arrest charges, etc.), plus victims' personal information. Also, many cases involve suspects who have not yet been arrested. All of this information must be secure and protected. Valuable examination time would be lost by SAB employees repackaging and storing evidence being processed and then escorting visitors as SAB security procedures require a continuous escort for visitors.
- Loss, Cross Transfer or Deleterious Change - Outside personnel are not familiar with SAB analytical procedures, and the precautions necessary to protect evidence against loss, cross transfer or deleterious change. DPS employees are trained and knowledgeable on how to protect evidence from damage. In each DPS crime lab facility, employees have keys/proximity cards to their forensic specialty lab (e.g., Controlled Substances) but do not have keys/proximity cards to other forensic specialty labs (e.g., toxicology) in order to reduce the potential for loss, cross transfer or deleterious change.
- Test Sensitivity and Extraneous Material - Forensic science tests are extremely sensitive as exemplified by DNA analysis which is sensitive down to three or four cells. Therefore, outside personnel could easily introduce extraneous material and render unusable the evidence which is under examination. When the DNA analyst is preparing a sample for PCR thermal cycler processing, they are working in a small isolated room; are gowned, gloved, have a face mask and work at a workstation which is a bio-safety cabinet hood. Another employee entering the workstation area can inadvertently introduce their DNA (extraneous DNA) into the analysis, by simply speaking (a few cells from saliva), sloughing a few skin cells, etc. The close proximity of another lab employee is not allowed.
- Facility Design - SAB facilities are designed to minimize/eliminate any deleterious changes to evidence and to enhance workflow. Therefore, evidence examination areas are assigned to and designed for, one employee to process the evidence. In many instances, this involves a small room to isolate and protect the evidence. Space does not exist to place a second individual in these areas to view or videotape/photograph without jeopardizing the evidence. Also, a second person disrupts the workflow design, vastly increasing the opportunity for a mistake



SAB General Procedures Manual

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through physical contact, bumping into counters or video cameras, etc., and through the distraction that this second person creates at a time when extreme attention to detail must be exercised.

- Analysis Sequence and Time Delay – The analysis of evidence in the Crime Laboratory often requires the separation of items with analysis done at separate times. Therefore, an analysis of a case is not a continuous process that can be readily viewed or videotaped/photographed. A simple DNA case for example, would be processed over two to four weeks with individual steps at various times, including overnight instrument runs.
- Property Damage - The SAB utilizes a myriad of sophisticated instrumentation. State funding has been provided to ensure that SAB employees can operate this equipment in a proper manner. It would be impossible to determine the competency of others prior to their use of the SAB's specific make and model of instrumentation.
- Fiscal Responsibility - Use of State equipment by outside employees would prevent its use for current case examination by laboratory employees. It must be realized that private employees represent a commercial and often lucrative enterprise. Therefore, it should be incumbent upon them to provide their own equipment and supplies, rather than having state facilities made available to them at the taxpayer's expense.

4.6.2 The SAB is scientifically independent, utilizing complete forensic science examinations to either eliminate suspects from (i.e., exclusions), or associate suspects to (i.e., cannot exclude), the evidence or crime scene. Defense attorneys, in addition, have the right under the Arizona Rules of Criminal Procedure to have evidence reanalyzed at a laboratory of their choice, rather than disrupting DPS crime laboratory operations.

4.6.3 Attorneys can make arrangements to view evidence outside the lab examination areas if this will not compromise the evidence. This is accomplished by contacting the case officer or prosecutor who will then coordinate the time and place of viewing with appropriate SAB employees. Non-laboratory areas where such viewing may occur are limited to secure areas such as Property and Evidence triage rooms (where available), conference rooms, training rooms, etc.

4.6.4 Due to accreditation requirements, certified technical assessors may witness analysis of evidence as part of an ongoing accreditation assessment.

4.7 Re-Examination of Evidence

4.7.1 SAB employees will not examine evidence that has been previously scientifically examined by a non-SAB personnel who perform scientific analysis on an item prior to submission to the SAB. The primary reasons for this are that the SAB would not be aware of how the evidence had been handled or what conditions it had been exposed to. Exception to this policy may be made based upon additional information such as the

**IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA**

PASCUA YAQUI TRIBE,
OFFICE OF THE PROSECUTOR

Petitioner

vs.

Hon. Melvin Stoof, Judge, Pascua Yaqui Tribal
Court,

MICHAEL MADRID,
Respondent/Real Party in Interest¹

APPELLATE CASE NO: CA-_____

TRIBAL COURT CASE NO: CR-17-079

PETITIONER’S PETITION FOR SPECIAL ACTION

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Attorneys for the Pascua Yaqui Tribe

¹ In Special Actions, the complaint names the body, officer, or person against whom relief is sought. However, “[i]f any public body, tribunal, or officer is named as a defendant, the real party or parties in interest shall be joined as defendants.” Rule 2(a)(1), Ariz. R. P. Spec. Act. In such circumstances, the practice is to direct the writ in form to the court as a matter of courtesy, but in fact leave its handling to the Real Party in Interest. *See* Rule 2, Ariz. R. P. Spec. Act., Arizona State Bar Committee Notes, section (a).

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REQUEST FOR SUBMISSION OF COMPLETE TRIAL COURT RECORD

Given the nature of the rules and procedures governing special actions within this jurisdiction, as adopted, *in toto* by *PYT v. Lopez*, CA-18-001 (Oct. 2018), the Tribe respectfully requests that appropriate clerk be ordered to submit the entire trial court record, pursuant to 3 PYTC § 2-3-110. Any attachments or supplemental exhibits attached to the Tribe's Petition will not encompass the complete trial court record.

REQUEST FOR STAY OF LOWER COURT PROCEEDINGS

Trial in this matter is currently scheduled for August 20, 2019. The offenses for which Defendant/Real Party in Interest has been charged were alleged to have occurred nearly three years ago. One of the elements that the Tribe will be required to prove beyond a reasonable doubt at the time of trial is the identity of Defendant as the perpetrator. Given the age of the case, and the fact that the memories of even the best witness can fade over time, DNA comparative testing is necessary. *See* Order to Obtain DNA Via Saliva Swab, *PYT v. Madrid*, CR-17-079 (Jun. 20, 2017) (Tribe's Supplemental Exhibit B).²

In May and June of this year, the trial court issued a ruling effectively barring the prosecution from conducting forensic DNA testing in this case although it had previously ordered Defendant to provide a buccal swab for comparison. *Id.* The court's ruling prohibited the Tribe from being able to use the Arizona Department of Public Safety (DPS) crime lab³ to conduct comparative testing in this case unless Defendant's expert was present in the lab because such testing would result in the complete consumption of the initial evidentiary sample. The trial

² In this ruling, the trial court noted that there was "a legitimate governmental interest in matching" Defendant's DNA sample to samples collected at the crime scene. The court specifically and correctly noted that such evidence could serve to bolster eyewitness identification testimony, and also potentially connected Defendant to the very item he was alleged to have damaged.

³ The DPS crime lab is accredited by the American Society of Crime Lab Directors-Laboratory Accreditation Board (ASCLD-LAB). Because the Pascua Yaqui Tribal Council has authorized an intergovernmental agreement with Arizona DPS that allows the Tribe to utilize the services of the DPS crime lab for forensic testing.

court's decision was based on the trial court's interpretation of ABA standards regarding DNA testing, which is not binding law, and the fact that Defendant desired to have his own expert witness the testing procedure at the DPS lab. DPS accreditation requirements and related policies prohibit outside individuals from being present in the lab during testing procedures. Thus, it is impossible for the Tribe to comply with the trial court's order. Additionally, although a reasonable alternative was suggested — namely, using an independent lab chosen by the defense to test the evidence — that alternative was rejected by the court.

As will be discussed more fully below, the trial court's order placed an unreasonable and unduly burdensome restriction on the executive branch's ability to investigate its case and prepare for trial. This restriction has resulted in the Tribe being absolutely unable to conduct forensic DNA analysis. Without this testing, the Tribe will have a much more difficult time proving its case at trial. The trial court's ruling also has implications for other criminal cases filed in the Pascua Yaqui Tribal Courts, regardless of whether they involve DNA analysis. At its core, the trial court's ruling stands for the proposition that any time consumptive testing is required — whether it be for DNA, narcotic, fingerprint, fluid, or other samples — a defense expert, if requested, must be allowed to enter the DPS crime lab to witness the test or the test cannot happen. In the event that such testing occurs anyway, the Tribe risks receiving a spoliation instruction at trial, which the trial court insinuated that it would give such a proposed instruction. If such testing doesn't occur, the Tribe risks giving the defense a powerfully persuasive line of argument regarding the investigative efforts made by law enforcement. This is an issue of jurisdiction-wide importance that will be seen repeatedly in the future.

Because trial in this case is set for August 20, 2019, the Tribe respectfully requests that this Court stay the lower court proceedings pending resolution of this Petition for Special Action.

A stay is necessary in order to ensure that the Tribe and the victims in this case do not suffer irrevocable harm.⁴

REQUEST FOR ORAL ARGUMENT AND TIME FOR ADEQUATE BRIEFING

This Petition raises issues of first impression in this jurisdiction, and involve questions that will arise in future cases. It will require this Court to decide if the ABA Standards constitute binding legal precedent, carrying the same legislative and authoritative weight as existing Pascua Yaqui law, or if they merely constitute useful guidelines and reference material, as other courts have held. This Court will also have to determine to what extent the judicial branch may dictate the manner and mode of forensic testing in criminal cases, when the executive branch is the governmental body responsible for investigating criminal matters and seeing that laws are enforced. Specifically, it will have to determine whether the judiciary — in response to a defense objection — may place unworkable restrictions on when and how forensic testing may be conducted, thereby prohibiting the prosecution from conducting any sort of forensic analysis.

Resolution of these complex issues will turn upon this Court’s interpretation of relevant Tribal, Federal, and State law. Accordingly, the Tribe requests that the matter be set for oral argument as such would be in the interests of justice. *See* 3 PYTC § 2-3-180; 3 PYTC § 2-3-260(C)(6) and (D). The Tribe further requests, given the nature of the issues presented, that Defendant/Real Party in Interest be given adequate time in which to file a written response to the petition, and that the Tribe be given adequate time in which to file a written reply.

⁴ The Tribe further notes that it does not have the option to dismiss and refile this case in order to pursue DNA testing for two reasons. First, the trial court’s incorrect rulings are considered “law of the case” and would survive even if the case were to be dismissed and refiled. Second, the Pascua Yaqui Tribal Code establishes a one-year statute of limitations for the filing of criminal cases. 4 PYTC § 1-40. Unlike other jurisdictions, such as Arizona, the Pascua Yaqui Tribal Code does not include a “savings clause” for refiling. *See e.g.* A.R.S. § 13-107(G) (allowing for a six-month extension to the statute of limitation to refile a case following a dismissal, even if the statute of limitations has already run).

STATEMENT OF JURISDICTION⁵

The Pascua Yaqui Tribal Rules of Appellate Procedure grant parties the right to appeal in most, but not all, circumstances. *See generally* 3 PYTC § 2-3-30, *et seq.* The Tribe may not, for instance, appeal a judgment acquitting a defendant in a criminal case. 3 PYTC § 2-3-90(G); Art. I, § 1(c), Pascua Yaqui Const.; *PYT v. Montana*, CA-12-001 (PYT Ct. App. July 23, 2013). The Tribe may, however, request interlocutory or “special action” review. *PYT v. Lopez*, CA-18-001 (Oct. 2018). While the Pascua Yaqui Tribal Code and Rules of Appellate Procedure do not include rules for special actions, this Court has recently adopted, *in toto*, the Arizona Rules of Special Action. *Id.* Special action review is appropriate in situations “where no ‘equally plain, speedy, and adequate remedy is available by appeal.’” *Id.* at 1-2 (*quoting* Rule 1(a), Ariz. R. P. Spec. Act.). Special action relief is also only appropriate in situations where: “1) the trial judge has failed to exercise discretion which he/she has a duty to exercise, or to perform a duty required by law as to which he/she has no discretion; and 2) the trial judge has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority, and 3) the trial

⁵ The Arizona Rules of Procedure for Special Actions “provide no limits on the time within which a special action may be filed.” *State ex rel. McDougall v. Tvedt*, 163 Ariz. 281, 283, 787 P.2d 1077, 1079 (Ct. App. 1989). Whether a petition is timely filed depends on the unique circumstances of a case. *Id.*; *State v. Mahoney*, 25 Ariz. App. 217, 219, 542 P.2d 410, 412 (1975) (finding untimely the state’s special action petition filed 57 days *after the date of dismissal of a criminal case* where the prosecution provided no reasons justifying the delay); *Cicoria v. Cole*, 222 Ariz. 428, 430, 215 P.3d 402, 404 (Ct. App. 2009) (indicating a four month delay was not a bar to special action jurisdiction given the unique circumstances of the case, and the fact that the issues raised in the petition were ones of statewide importance that would affect numerous cases); *Star Pub. Co. v. Bernini*, 228 Ariz. 490, 492, 268 P.3d 1147, 1149 (Ct. App. 2012) (accepting special action jurisdiction that was technically moot given the state of trial court proceedings).

The Tribe’s Petition is timely. The hearings that form the basis of the trial court’s rulings occurred on May 23rd, May 28th, and June 13, 2019. Although the Tribe promptly requested copies of the recordings of the hearings and submitted them for rush transcription, the final transcript was not received until July 20th, 2019. Part of this delay was due to the fact that the transcriptionist had received a partial recording for one of the hearings, and had to submit a revised transcript once the issue was discovered. This petition was filed less than 30 days from the date that the Tribe received the required transcripts. Under the unique circumstances of this case, the Tribe’s Petition is timely.

judge's determination was arbitrary or capricious or an abuse of discretion." *Id.*; *see also* Rule 3, Ariz. R. P. Spec. Act.; *PYT v. Gracia*, CA-19-006 (May 2019) (indicating that matters should be raised pursuant to Rule 7(e), Ariz. R. P. Spec. Act.). As will be discussed in greater detail in the body of this petition, exercise of special action jurisdiction in this matter is proper.

Special action review is appropriate in this case because the Tribe is seeking review of a pretrial ruling in a criminal matter.

The "Tribe has no plain, adequate, or speedy remedy available by appeal because 3 PYTC § 2-3-90(D) prohibits governmental appeals after acquittal." *Id.* at 2. The trial court's decision amounted to an abuse of discretion because it exceeded the authority granted to the judicial branch by the Pascua Yaqui Constitution. It created an unreasonable restriction on the Tribe's duty to investigate its case in preparation for trial. Additionally, and as will be discussed more fully below, the trial court abused its discretion in a manner that will cause similar issues and repeated litigation in a multitude of criminal cases involving the consumptive forensic testing. Accordingly, this Court has jurisdiction over this Petition for Special Action.

STANDARD OF REVIEW

Although the Tribe has been unable to locate published Tribal, State, or Federal cases that is directly on point with the issues presented here, it is well settled that decisions regarding disclosure and the admittance of evidence at trial rest within a trial court's discretion. *See c.f.*, *United States v. Ornelas*, 906 F.3d 1138, 1150–51 (9th Cir. 2018), *cert. denied sub nom. Moreno Ornelas v. United States*, 139 S. Ct. 2638 (2019) (discussing, generally, a court's ability to set disclosure deadlines and to enforce its disclosure orders); *United States v. Doe*, 778 F.3d 814, 822 (9th Cir. 2015) (discussing whether the trial court's narrow, reasonable interpretation of a defendant's disclosure request was an abuse of discretion); *Cooper v. Brown*, 510 F.3d 870, 876

(9th Cir. 2007) (stating that a trial court has discretion to determine the admissibility of forensic DNA testing at trial.). Accordingly, the Tribe submits that the appropriate standard of review to be applied in this case is an “abuse of discretion” standard. This Court has stated that a court “abuses its discretion when it makes an error of law in reaching a discretionary conclusion, or when the record, viewed in the light most favorable to upholding the trial court’s decision, is devoid of competent evidence to support the decision.” *PYT v. Coleman*, CA-15-003, p.2 (PYT Ct. App. 2015).

ISSUES PRESENTED FOR REVIEW

1. May a trial court — relying on ABA suggested standards — effectively prohibit the parties from pursuing necessary forensic testing at an independent, defense-selected lab and, instead, order that any testing conducted must be done at the DPS crime lab, and in a manner that would require the lab to violate its policies?

STATEMENT OF THE CASE

I. Facts⁶ and Proceedings Below:

Defendant was charged with three counts of aggravated assault, committed in violation of 4 PYTC § 1-130, one count of injury to public property, committed in violation of 4 PYTC § 1-630, one count of disorderly conduct committed in violation of 4 PYTC § 1-300(D), three counts of threatening or intimidating, committed in violation of 4 PYTC § 1-255(A), and two counts of endangerment, committed in violation of 4 PYTC § 1-180. Complaint and Affidavit of Probable Cause, *PYT v. Madrid*, CR-17-079 (Jan. 4, 2017) (Tribe's Supplemental Exhibit A). The charges are based on the following relevant facts.

On October 31, 2016, the victims drove to the Pascua Yaqui Reservation for Halloween related festivities. *See generally, Id.* Defendant was present at the same event. *Id.* The victims witnessed Defendant strike an adult female and attempted to assist her, even as the adult female subject got into a separate car to drive away. *Id.* According to the reports provided to law enforcement by the victims, Defendant drew a knife, brandished it at them and nearly struck at least one of the victims and threatened to “cut” or “kill” all of the victims present. *Id.* According to the victims, Defendant also punched one of the tail lights of their vehicle, breaking the taillight cover and leaving behind a smear of blood.

By the time law enforcement arrived, Defendant had fled the scene. *Id.* Officers were able to locate Defendant relatively nearby. *Id.* When he was found, he was carrying a Halloween bag that appeared to have blood stains on it, and he was bleeding from injuries on his

⁶ The parties contest some of the facts and circumstances relating to the offenses charged in this case, and no factual findings have been made by the trial court or a jury. However, it is the Tribe's belief that the parties will agree as to the case's procedural history.

knuckles. Defendant spoke to officers and initially denied possessing a weapon. *Id.* However, when confronted by the fact that independent witnesses had seen him throw away a weapon while running, he admitted to having had a knife during the altercation, but claimed that he had only drawn the knife for the purposes of self-defense. *Id.* Officers collected an evidentiary sample of the small blood smear that was left on the remnants of the victims' vehicle's taillight. That sample was placed into evidence and ultimately transported to the DPS crime lab for DNA testing.

On February 23, 2017, the Tribe filed a motion requesting that Defendant provide a buccal swab for comparative DNA analysis with the sample collected from the taillight. The Tribe's Motion was granted over Defendant's objection.⁷ *See* Supplemental Exhibit B. Defendant then filed a Petition for Special Action with the Pascua Yaqui Court of Appeals that was ultimately denied.⁸ Following receipt of the appellate mandate, the trial court set a July 2, 2019, status conference. Opinion and Order, *PYT v. Madrid*, CA-17-002 (undated). The Defendant submitted a buccal swab on January 29th, 2019. After another status conference, trial was set for July 7th, 2020. Later, at the request of Defendant, the trial date was accelerated to August 20, 2019.

On April 26, 2019, the crime lab contacted the Tribe and advised it that testing of the evidentiary samples collected at the scene would result in consumption of those samples. The Tribe requested that testing be deferred until it had an opportunity to contact defense counsel about the issue. Defense counsel objected to consummative testing without providing any

⁷ Defendant's primary contention was that there was no need for DNA testing because he was willing to stipulate that he was present at the scene, and that the blood left at the scene was his. However, based on a review of court records, no written stipulation was ever submitted. Additionally, jurors are free to ignore stipulations, or to only give them limited amount of evidentiary weight. *See* Model Criminal Jury Instruction, Ninth Circuit, #2.3 (concerning stipulated testimony); *also* Model Criminal Jury Instruction, Ninth Circuit, #2.4 and commentary (concerning stipulated facts, and the manner in which a stipulating becomes binding).

⁸ Defendant's Special Action Appeal was denied because he had a viable appellate remedy if convicted.

articulations for said objection, or any grounds for how consumptive testing would prejudice Defendant. The Tribe promptly filed a motion with the trial court requesting guidance on whether, and in what manner, DNA testing could proceed. The trial court set the matter for expedited hearing on May 23, 2019, attaching a copy of the American Bar Association's (ABA) guidelines regarding consumptive testing as part of its order. Order Setting Hearing on DNA Evidence Testing, *PYT-Lopez*, CR-17-079 (May 14, 2019) (Tribe's supplemental Exhibit I).

At the hearing, Defendant requested that he be allowed to have an independent expert present at the DPS lab to personally witness or videotape the testing process. Transcript, May 23, 2019, at 3-5 (Tribe's Supplemental Exhibit D). The Tribe, at the time, did not object to the request. The trial court ultimately ordered that a defense counsel expert be allowed to attend testing at the DPS lab. As part of its oral ruling, the Court indicated "I'm going to just track the language of the ABA standard which would include but is not limited to... the presence of an expert representing the moving party during evidence preparation and testing, videotaping, or photographing the preparation and testing. *Id.* at 14-15. A part of its written ruling, the trial court indicated that it would allow the defense to submit an *ex parte* motion for funds to pay for an independent expert. *See* Order for Consumptive Forensic DNA Testing and Order Setting Hearing on Reivew, *PYT v. Madrid*, CR-17-079 (June 23, 2019) (Tribe's Supplemental Exhibit E).

Shortly after the hearing, however, the Tribe learned from DPS that their internal accreditation policies and standards prohibit non-DPS lab personnel from being present in laboratory areas. This accreditation protocol bars prosecutors, law enforcement, defense attorneys, and independent experts from entering the lab. Immediately upon receiving this information, the Tribe moved the trial court to reconsider its earlier ruling, and a hearing was set

for May 28, 2019. At the hearing, the Tribe detailed the information it had received from DPS, and indicated that independent parties were not allowed into the lab while case samples were being tested due to the “sensitive nature of the entire lab and DNA testing.” Transcript, May 28, 2019, at p.3-4 (Tribe’s Supplemental Exhibit F). The Tribe proposed as an alternative that testing could be conducted at a defense-selected, independent lab as outlined as an option in the ABA guidelines. *Id.* at 4.⁹

In its oral ruling, the trial court indicated that it would follow the ABA standards, and that those standards were also used to help govern both lawyer and judicial ethical obligations. *Id.* at 11. It then discussed its previous experience with unrelated out-of-state labs that were equipped with sheltered observation areas. *Id.* at 11-12. Although the court noted that the ABA standards allowed for defense counsel to select an independent lab, the court indicated that it felt that option to be too costly. *Id.* at 12-13. The court further noted that, if the Tribe pursued forensic testing through DPS and an independent defense expert was not allowed to enter the lab to observe the testing, that it would consider it to be a due process issue relating to the “spoliation of evidence.” *Id.* at 13, 18. Finally, the court indicated that it would issue jury instructions regarding spoliation, evidence destruction, and *State v. Willits*, 96 Ariz. 184 (1964) in the event that DPS tested the evidence without allowing a defense expert to be present. *Id.* at 17-18.¹⁰ The trial court’s written ruling comported with the oral transcript. *See* May 28, 2019 Order, *PYT v. Lopez*, CR-17-079 (Tribe’s Supplemental Exhibit G).

⁹ The Tribe further noted that, while Defendant appeared at one time to be willing to stipulate to his presence at the scene, the jury had the right to disregard the stipulation. Given that the offense in this case occurred approximately three years ago, and witnesses’ memories often fade with time, DNA testing was necessary to prove the element of identity at trial. *Id.* at 4-5.

¹⁰ There was no defense motion before the court requesting such an instruction, nor had the Tribe indicated in its motion that it would purposefully disregard the Court’s order.

After the hearing, the Tribe, out of an abundance of caution again asked DPS if an exception could be made to allow a defense expert to be physically present during any DNA analysis procedure conducted in this case. DPS indicated that they could not because such an exception would place them in direct danger of losing their accreditation. The Tribe then filed a second motion to reconsider, to which it attached a copy of the relevant DPS laboratory guidelines. A hearing was held on June 13, 2019. At said hearing, the trial court acknowledged the DPS guidelines, but indicated that, in his previous experience practicing in New Mexico and Texas, the labs in those states had sheltered areas from which attorneys and outside experts were able to observe testing procedures. Transcript, 6-13-19, at p.4-5 (Tribe's Supplemental Exhibit J). The court then stated the following:

“Well, notwithstanding their policy of not permitting outsiders into their labs or even to observe... the testing, the Court, uh, follows the standards of the ABA because it does look at the interests of both parties and weighs the interest of both parties and certainly the Court found last time that the, uh, Defendant also has an opportunity to review and observe if there's going to be a total consumption of the sample since that's going to prevent them from doing testing at a later date. So that's the whole purpose of the consumptive testing and observation, uh, so you can, uh, just determine that it's properly, the procedure at least was followed and then the expert can argue about the results if they wish.”

Id. at 9.

The trial court then denied the motion to reconsider, as well as the request that testing be conducted at an independent, accredited lab of Defendant's choosing. *Id.* at 9-10. Likewise, the trial court rejected the proposition that, in the event that DPS conducted the requisite testing, the criminalist bench notes would be disclosed for an independent expert to review, and the criminalist himself could be interviewed by defense. The Tribe has made additional inquiries with the DPS lab, which had reaffirmed its stance that it will not allow third parties into the lab to witness testing procedures.

Trial in this matter is currently scheduled for August 20, 2019. As of the date of this Petition's filing, the Tribe has been unable to conduct DNA testing in this case because of the trial court's order.

II. Summary of the Argument

The trial court inappropriately applied ABA standards, which do not constitute binding legal precedent, as precedential authority in this case. The court then interpreted those guidelines in an unduly restrictive manner. As a result, the Tribe has been forced to forego DNA forensic analysis despite the fact that reasonable testing alternatives were, and are, available. Accordingly, the trial court's decision amounted to an abuse of discretion and should be overturned.

LAW AND ARGUMENT

I. Do the ABA "Standards on DNA Evidence" Relied Upon by the Trial Court Constitute Binding Legal Precedent, or Do They Simply Constitute Useful Reference Material?

In this case, and largely because the parties were unable to provide any authority to the contrary, the trial court relied on the ABA "Standards on DNA Evidence," *see* Tribe's Supplemental Exhibit I, to determine whether consumptive testing should be conducted and, if so, under what circumstances. The Tribe will discuss the legality of consumptive in greater detail below. However, it is important to understand the nature of the American Bar Association, their publications, and the fact that their publications do not constitute binding legal precedent.

The American Bar Association is a professional organization that was founded in 1878.¹¹ While its central purpose is to advance the development of the legal profession, it is not an

¹¹ https://www.americanbar.org/about_the_aba/

organization that attorneys are required to join. Licensing matters and ethical rules are, instead, typically handled by the bar associations established by individual States and Tribes. That being said, the ABA has promulgated the “Model Rules of Professional Conduct,” which has been adopted, in whole or in part, by various sovereigns. Additionally, the ABA promulgates suggested standards regarding various legal areas, including the preferred practice standards for client representation, and regarding DNA and other types of forensic testing.

Courts are often asked to rely on ABA standards and publications as precedent in criminal cases. However, the United States Supreme Court—in at least one context—has indicated that ABA standards are not precedential or binding authority, but rather, useful reference material that a court may take into consideration when making a decision. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (stating that ABA standards “are guides to determining what is reasonable” in the context of defense attorney representation and performance, but that “they are only guides” as they cannot take into account the unique circumstances presented in individual cases); *also Bobby v. Van Hook*, 558 U.S. 4, 8–9, 130 S. Ct. 13, 17 (2009) (“Prevailing norms of practice as reflected in [ABA] standards and the like... are guides to determining what is reasonable, but they are only guides.”).

Although these cases involve use of the ABA guidelines in the context of “ineffective assistance of counsel claims,” the reasoning and principles employed in these decisions apply equally to the issues presented in this case, and in Indian country. Every case presents a unique factual situation in which a court is required to look at all factors when making a decision. In the context of consumptive forensic testing, there is no “one size fits all” rule as to what procedure should be followed. The ABA standards are not statutes, nor do they carry the same precedential weight as caselaw. Additionally, it is important to note that there is no provision of the Pascua

Yaqui Tribal Code which grants precedential or legislative force to the ABA standards.¹² For all of these reasons, the ABA standards used in this case are not binding legal precedent, but only guidelines. And, as will be discussed more fully below, the trial court both treated these guidelines as binding precedent and employed a narrow interpretation that resulted in an unreasonable and unjust result.

II. The Trial Court Abused its Discretion when it relied upon ABA “Standards on DNA Evidence,” § 3.4(c) as Binding Legal Authority and Narrowly Interpreted it so as to Limit the Ability of the Prosecution to Investigate and Ultimately Prove its Case.

As discussed above, ABA standards, while useful and potentially persuasive reference material, does not constitute binding legal authority. The trial court, however, relied upon the ABA “Standards on DNA Evidence, § 3.4” as such. Additionally, the trial court interpreted the text of this standard in an overly narrow manner that lead to an unreasonable result. The trial court’s rulings in this case placed the Tribe in an untenable position. The rulings forced the Tribe to choose investigating and preparing its case and accepting the risk of a spoliation instruction or dismissal at trial, or of not fulfilling its investigative duties and allowing Defendant to argue that the investigation was lacking as a defense at trial. And it did so even though § 3.4 specifically contemplates the use of alternative methods of consumptive testing. In short, the court’s ruling constituted an abuse of discretion.

Prosecutors have a duty to investigate in preparation for trial, and to disclose exculpatory evidence to defendants and their attorneys. *See generally Brady*, 373 U.S. 83, 83 S. Ct. 1194 (1963). The Tribe also has a duty to prove the existence of every element of every charged criminal offense beyond a reasonable doubt at trial. 3 PYTC § 2-2-430(D). Proving identity, or whether the defendant currently on trial is the individual who committed the charged offenses, is

¹² In the ABA “Standards on DNA Evidence,” the Committee indicates that the standards constitute only “ABA policy.” It is equally important to note that, while the Pascua Yaqui Tribal Code makes reference to the ABA standards in provisions relating to the certification of local attorneys and advocates, nothing in the code suggests that ABA policies dictate criminal law or criminal rules of procedure within the Pascua Yaqui Tribe.

also an element that must be proven beyond a reasonable doubt at trial. In order to meet its evidentiary burden, the prosecution and law enforcement are typically required to perform forensic testing of items of evidence collected at a crime scene. Such testing is not limited to the areas of DNA comparative analysis, but can also include areas involving fingerprint analysis, testing a sample for the presence of semen or DNA, blood alcohol analysis, and testing items for the presence of illegal drugs.

Unfortunately, in many cases, officers are only able to obtain a small evidentiary sample for testing. For instance, an almost infinitesimal amount of semen may be recovered from a rape victim's clothing, or a small amount of drugs may be recovered from a suspect's pocket, or — as was the situation in this case — a very small sample of blood may be located on a physical surface and collected via swab for testing. In these situations, the evidentiary sample is often not large enough to be split, or to be tested more than once, and any testing conducted will result in the complete consumption of the sample.

Regardless of how small an evidentiary sample is, however, federal courts have long afforded criminal defendants significant procedural safeguards designed to protect a defendant's opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528 (2532) (1984). Additionally, the prosecution typically has a duty to preserve, within reason, evidence that possesses apparent exculpatory value, and which is “of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *Id.* at 488-89, 2533-34.¹³ Nevertheless, Courts have indicated that consumptive testing is allowable, and does not automatically result in due process concerns. *See e.g. United States v. Anderson*, 169 F. Supp. 3d 60 (D.D.C. 2016) (allowing prosecution to pursue consumptive DNA testing in spite of evidentiary samples being consumed, in part, because there was a reasonable

¹³ However, while the prosecution has a duty to preserve potentially useful evidence, the United States Supreme Court has determined that, “[u]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” *Arizona v. Youngblood*, 488 U.S. 51, 51, 109 S.Ct. 333, 334 (1988).

likelihood that DNA evidence would be left over as a result of the extraction and magnification process); *Kowalak v. Scutt*, 712 F. Supp. 2d 657, 695 (E.D. Mich. 2010) (relying, in part, on *Carlson v. Minnesota*, 945 F.2d 1026, 1029 (8th Cir.1991), *United States v. Stevens*, 935 F.2d 1380, 1387 (3d Cir.1991), and *Garrett v. Lynaugh*, 842 F.2d 113, 116 (5th Cir.1988) for the proposition that the Due Process Clause places no constraints on the good faith consumptive or destructive testing of evidence by the prosecution).

Out of an abundance of caution, it has been the practice of the Tribe — as it is with a number of prosecuting agencies throughout Arizona and the United States — to notify defense counsel whenever forensic testing will result in the consumption of an evidentiary sample. This is done to give defendants the opportunity to evaluate their options to seek independent testing. *See c.f. Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935) (stating that prosecutors are “in a peculiar and very definite sense the servant of the law” with an obligation to ensure that cases are prosecuted vigorously but fairly). This practice is also detailed in the ABA “Standards on DNA Evidence,” § 3.4(c) (suggesting that prosecutors endeavor to advise opposing counsel when testing is likely to be consumptive). This is done to allow the defense an opportunity to make arrangements to observe the testing process or, as what happens more commonly in Arizona, to allow defense an opportunity to have the evidence tested by an independent, accredited lab that is not affiliated with a law enforcement agency.

In this case, the trial court relied exclusively on ABA “Standards on DNA Evidence, § 3.4(e).” That section states the following:

“If a motion objecting to consumptive testing is filed, the court should consider ordering procedures that would permit an independent evaluation of the analysis, including *but not limited to* the presence of an expert representing the moving party during evidence preparation and testing, and videotaping or photographing the preparation and testing.”

Id. (emphasis added).

Although § 3.4 is not binding legal authority, its plain language clearly indicates that each case, and each circumstance involving potentially consumptive testing is to be treated on an individual

basis. The ABA, in drafting this guideline, could have suggested that the only option available for consumptive testing was to allow a defense to have an independent expert present within the lab where the testing occurs, or to allow a third party to photograph or record the testing process. The ABA did not take such a narrow approach. Instead, the ABA indicated that options for testing in this arena were “not limited to” the examples included within the limited text of the guideline. Thus, other options are available and should be employed when called for by the particular facts of a case.

Here, the DPS crime lab is an ASCLD-LAB accredited lab. As part of its accreditation, the lab is required to employ certain standards and policies regarding contamination, disruption, or interference caused by outside forces. The DPS lab has, therefore, implemented a policy that prohibits any third party from coming into the lab to witness forensic testing procedures unless that individual is there specifically and solely for accreditation purposes. This is a policy that applies to all individuals. For instance, prosecutors, law enforcement officers, defense attorneys, defense experts, and civilians are all equally restricted from having access to the lab itself. While the DPS lab has an observation area, that area is not set up in a manner that would allow individuals to observe testing procedures within the lab.

The constraints that the DPS lab has to follow do not, in any manner, limit Defendant’s ability to seek an independent test of the sample in this case. Defendant was able to secure funding for an independent expert from the court with a cap of \$2400. *See* Tribe’s Supplemental Exhibit H.¹⁴ Said funding could have just as easily been applied to a defense-selected, independent lab capable of conducting the testing necessary in this case, and one that would not

¹⁴ The trial court also indicated that, while it expected the public defender, who represents Defendant, to pay for expert services, it would order the Tribe to pay any remaining cost for expert fees, up to the \$2400 cap, that the defense agency would be unable to cover. Such an order and cost break down could easily have been used to pay for an independent, defense-selected lab that said expert has access to.

have the same restraints and restrictions that the DPS lab does. Indeed, in jurisdictions in Arizona, and across the country, this is the preferred method.

Instead, the trial court narrowly interpreted § 3.4 as having a preference for allowing defense-hired, independent experts to be present within crime labs to observe and/or record testing procedures. The court, in issuing its ruling, indicated that DNA testing must be conducted at the DPS lab, but in a manner that would present a very real and immediate risk to the lab's accredited status. Such a threat would not just impact cases filed before the Pascua Yaqui Tribal Court, but would cases pending in Federal and Arizona State courts, sister sovereigns, which rely on the DPS lab for forensic testing.

The trial court then went a step further in its oral ruling, and indicated that it would entertain the issuance of a spoliation or *Willits* style instruction.¹⁵ This ruling placed the Tribe in an untenable position. On the one hand, it could abide by the court's order, in which case, no DNA testing could be performed. This would potentially allow Defendant a particularly powerful line of argument at trial; specifically, that law enforcement and the prosecution had failed to test any and all evidence it had, and failed to conduct a full and complete investigation. On the other hand, the Tribe could push forward with testing at the DPS lab, obtain a result—whether it was inculpatory or potentially exculpatory—and attempt to admit it at trial. However, under this scenario, the Tribe would run the risk of the evidence being determined to be inadmissible. Even if it was admitted, the Tribe would run the very real risk of an adverse jury instruction that would allow the jury to consider admission of any DNA evidence ultimately worthless. In short, the Tribe was left with two untenable options, both of which would result in

¹⁵ Pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), allows a trial court to issue a jury instruction which allows a jury — if they find that the prosecution caused material evidence to be destroyed, either directly or through inaction — to infer that the destroyed evidence would have benefitted a defendant at trial in terms of proving his innocence.

its inability to investigate its case, prepare for trial, or prove the necessary element of identification at trial.

The ABA guidelines regarding DNA testing are designed to be suggestions for prophylactic safeguards. They are not binding precedent. Nor do they encompass all options available to parties or to the court in situations where consumptive testing is required. Although Defendant asked to have an expert present in the DPS lab for the testing procedure as a witness, there was another readily, and easily, available alternative that the trial court rejected. This alternative would allow the defense to witness the required forensic testing conducted by an expert of its choosing, or to have the testing conducted by an expert and lab of his choosing. It would also obviate the concerns of accreditation and loss thereof currently at issue with the DPS crime lab. While this option would have required the expenditure of funds, the trial court ultimately authorized up to \$2400 in funding to Defendant to pay for an independent expert. The fact that the trial court has had experiences with different crime labs in different jurisdictions that may have had different policies or the resources with which to set up a dedicated and useful observation area is inapposite, as those labs are not the labs available to the Pascua Yaqui Tribe. Another option would have involved allowing the DPS lab to test the evidence, submit their complete bench notes to defense counsel and/or a defense expert for review, and submit to a defense pretrial interview themselves.

Given all of the circumstances presented in this case, the trial court abused its discretion, first, by applying the ABA guidelines as precedential authority, and then by interpreting the guidelines in an unreasonably narrow manner. As a result, the trial court issued an order regarding DNA forensic testing that the Tribe was unable to comply with, and placed the Tribe

in a position where it may not be able to prove its case at trial. For these reasons, the trial court's decision amounted to an abuse of discretion.

III. The Trial Court's Ruling Amounted to an Abuse of Discretion Because it Amounted to an Impermissible Infringement by the Judiciary into the Realms that Reside Within the Realm of the Executive.

An equally troubling result of the trial court's ruling in this case is the fact that it involves an exercise of judicial power to impermissibly limit and infringe upon matters that are normally entrusted to the executive branch of government. This infringement is direct result of the trial court's holding being so narrowly tailored as to prevent the Tribe from conducting necessary testing in this case.

The Pascua Yaqui Constitution establishes three separate branches of government, "the Legislative, the Executive and the Judicial." Art. 4, Pascua Yaqui Const. It further states that "no person or group of persons charged with the exercise of powers properly belonging to one of these branches, shall exercise any powers properly belonging to the others." *Id.* The legislative branch has the power to enact laws, and "[t]o negotiate and to execute contracts and agreements with federal, state and local governments," Art. VI, §1, Pascua Yaqui Const., and to "appropriate available tribal funds for ...purposes serving the general welfare." The judicial branch is tasked with presiding over legal matters arising out of the Tribal code, Art. VIII, Pascua Yaqui Const. The police department is considered a member of the Executive branch of government and is tasked with enforcing the laws created by the legislature. 2 PYTC § 2-8-10; Art. VII, §1, Pascua Yaqui Const. "Because our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence, the commingling of functions among branches has concerned the Court only when commingling poses the danger of "encroachment" (that is, when it threatens to undermine the authority and independence of one or another coordinate branch,) or aggrandizement (as occurs when one branch seeks "powers

more appropriately diffused among separate Branches).” *United States v. Ray*, 375 F.3d 980, 995 (9th Cir. 2004) (*internal citations and quotations omitted*).

Courts in other jurisdictions have held that the judiciary may not infringe on the realms of the legislature or executive outside of normal “checks and balances” principles. *See e.g. United States v. Neyens*, 831 F.2d 156, 162 (7th Cir. 1987) (noting courts cannot dictate parole release dates as that is a function of the executive); *also United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016) (determining that USDOJ could not use funds that had not been appropriated by the legislature as that would violated separation of powers); *also cf. United States v. Alfonso*, 143 F.3d 772, 776 (2nd. Cir. 1998) (inappropriate for a court to dismiss an indictment by looking beyond the scope of the indictment and drawing inferences to what proof prosecution/executive would be able to introduce at trial); *United States v. Farrar*, 338 F. Supp. 3d 1186, 1191 (D. Haw. 2018) (inappropriate for court to review prosecutions charging decision absent a prima facie showing that the decisions rested on an impermissible basis); *Ray*, 375 F.3d at 995 (stating that compliance of the prosecution with a standing order of the judiciary did not violate separation of powers doctrine when there was no evidence that complying with the standing order would impair the executive branch’s ability to fulfill its duties).

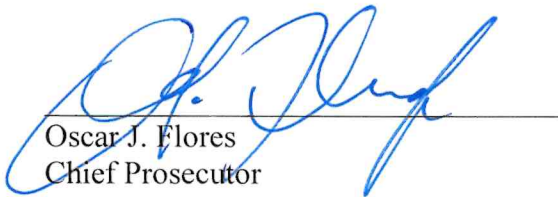
The Pascua Yaqui Tribal Council, to this end, has entered into an intergovernmental agreement with the Arizona Department of Public Safety, specifically to be able to use the services of its crime lab to conduct forensic testing in criminal cases. Whether the scope of accommodations the DPS crime lab is able to provide within the limits of its policy and accreditation standards differs from what labs in other states might be able to provide is not the issue, and should not have been a basis for the trial court’s ruling in this case.

Here, the executive branch of the Pascua Yaqui government, of which the prosecution is a designated subagency, is tasked with enforcing the law. It is also tasked with filing criminal charges against offenders when the law has been violated, and ensuring that criminal cases are investigated, prepared, and fully presented at trial. Had the trial court's ruling in this case been broader and allowed for other, reasonable alternatives, no infringement would have occurred. Instead, the trial court issued a ruling that placed the prosecution in the position of abiding by the ruling and being unable to present evidence at trial while placing the defense in a stronger position in terms of argument, which would work together to make it more difficult — if not impossible — for the prosecution to prove its case. If the prosecution chose to violate the court's order and conduct the testing it was lawfully required to do, it ran the very real risk of a *Willits* or spoliation instruction. This was an impermissible infringement on the executive's investigatory duties and, therefore, amounted to an abuse of discretion.


CONCLUSION AND REMEDY SOUGHT

For the reasons discussed above, the Tribe respectfully requests that this Court stay the trial court proceedings based on the issues presented in this Petition. The Tribe further requests that the Court set a reasonable briefing schedule, followed by oral argument. Finally, the Tribe requests that this Court find that the trial court's overly narrow ruling regarding the method and manner of consumptive DNA testing be vacated as it amounted to an abuse of discretion.

RESPECTFULLY submitted this 15th day of August, 2018.



Oscar J. Flores
Chief Prosecutor



Coleen Thoene
Deputy Prosecutor



Russell Boatwright
Deputy Prosecutor

CERTIFICATE OF SERVICE

I hereby certify that the Tribe's pleading was delivered this date to:

Benjamin Casey
Ben.Casey@pascuayaqui-nsn.gov
Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7777 S. Camino Huivisim
Tucson, AZ 85757

And that one (1) copy of the Tribe's pleading was delivered, this date to:


Annamarie Valdivia, Annamarie.Valdivia@pascuayaqui-nsn.gov
Melissa Acosta, Melissa.Acosta@pascuayaqui-nsn.gov
Pascua Yaqui Office of the Public Defender
7474 S. Camino de Oeste
Tucson, AZ 85757

And that one (1) copy of the Tribe's pleading was delivered this date to:

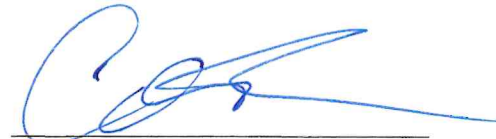
Associate Judge Melvin Stoof
Pascua Yaqui Tribal Court
7777 S. Camino Huivisim
Tucson, AZ 85757

Dated this 15 day of August, 2019.

PASCUA YAQUI PROSECUTOR



Oscar J. Flores
Chief Prosecutor

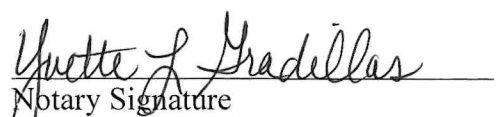


Coleen Thoene
Deputy Prosecutor

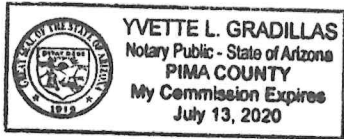


Russell Boatwright
Deputy Prosecutor

Sworn before me this 15th day of August, 2019



Notary Signature



OFFICE OF THE PROSECUTOR

PASCUA YAQUI TRIBE
7777 S. CMO. HUIVISIM
TUCSON, ARIZONA 85757
(520) 879-6251

1 testing which would yield results necessary for the Tribe to be able to prove its case beyond a
2 reasonable doubt at trial.

3 Given the rules adopted by this Court in *PYT v. Lopez*, CA-18-001, the Tribe requested
4 complete copies of the transcripts from the listed hearing dates and received them approximately
5 July 20th. As the Pascua Yaqui Tribe uses the Arizona Rules of Procedure for Special Actions, it
6 is important to know that the rules “provide no limits on the time within which a special action may
7 be filed.” *State ex rel. McDougall v. Tvedt*, 163 Ariz. 281, 283, 787 P.2d 1077, 1079 (Ct. App.
8 1989); *State v. Mahoney*, 25 Ariz. App. 217, 219, 542 P.2d 410, 412 (1975); *Cicoria v. Cole*, 222
9 Ariz. 428, 430, 215 P.3d 402, 404 (Ct. App. 2009); *Star Pub. Co. v. Bernini*, 228 Ariz. 490, 492,
10 268 P.3d 1147, 1149 (Ct. App. 2012). Interlocutory appeals, also known as “special actions” are
11 only allowed in situations “where no ‘equally plain, speedy, and adequate remedy is available by
12 appeal.’” *Id.* (quoting Rule 1(a), Ariz. R. P. Spec. Act. “[R]elief may only be granted where: 1)
13 the trial judge has failed to exercise discretion which he/she has a duty to exercise, or to perform
14 a duty required by law as to which he/she has no discretion; and 2) the trial judge has proceeded
15 or is threatening to proceed without or in excess of jurisdiction or legal authority, and 3) the trial
16 judge’s determination was arbitrary or capricious or an abuse of discretion.” *Id.* at 2 (citing Rule
17 3, Ariz. R. P. Spec. Act.).

18 Pursuant to the Pascua Yaqui Rules of Criminal Procedure, the Tribe does not have a right
19 of appeal following completion of a criminal case. *See* 3 PYTC § 2-3-90(G). In cases where the
20 Tribe requires reconsideration of a decision made by the trial court, the Tribe, should it seek a
21 remedy, may only do so pretrial, or prior to the termination of trial, through interlocutory review.
22 3 PYTC § 2-3-260(D).

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1 As is discussed more fully in the Tribe’s Petition for Special Action, filed concurrently this
2 date, the trial court’s ruling amounted to an abuse of discretion as it prevented the Tribe from being
3 able to conduct necessary investigation in order to be able to prove its case at trial. The trial court’s
4 ruling ignored reasonable alternatives for consumptive testing that were available under the laws
5 of this jurisdiction. Additionally, the issues raised in the concurrently filed Petition for Special
6 Action Review are ones of jurisdictionally-wide importance, because they are ones that will arise
7 in other cases involving forensic testing.

8 It is the Tribe’s understanding that the Defendant, through counsel, is objecting to a stay.
9 However, a court may stay a case and waive speedy trial limits when justice requires, and a stay
10 — by its very nature — serves to stop the speedy trial clock. Additionally, the Tribe notes that the
11 Defendant is currently out of custody. Appellate proceedings in this jurisdiction are governed by
12 the Pascua Yaqui Tribal Code Rules of Appellate Procedure. *See generally* 3 PYTC § 2-3-30, *et*
13 *seq.* The rules allow this Court, “upon motion for good cause shown,” to “suspend the
14 requirements or provisions of any” of the appellate procedural rules “in a particular case.” 3 PYTC
15 § 2-3-50. This includes shortening or extending the deadline for the filing of appellate briefs. 3
16 PYTC § 2-3-70(B). In the event that any normal rules of procedure are suspended, this Court
17 “may order proceedings in accordance with its discretion.” *Id.* Further, and in the spirit of the
18 Pascua Yaqui Tribal Code and Rules, the rules of appellate procedure “shall be construed to do
19 justice.” *Id.* The Tribe further notes that this Court has the power to stay proceedings. *See e.g.*
20 *Jaimez*, CA-17-005 at p. 1-3 (staying appeal to allow proceedings in a related appeal to go
21 forward).

22 Staying the proceedings in this matter to allow the interlocutory appeal to be fully litigated

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1 would be within the interests of justice as it will streamline issues for trial, allows the Tribe to
2 exercise its pretrial right to seek interlocutory review, and allows the parties an opportunity to seek
3 definitive local case law on the unique issue involved in this case, thereby, limiting the need for
4 such review in the future. Accordingly, the Tribe asks that its motion for stay to be granted,
5 especially in light of the fact that trial is set to commence in thirteen days.

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7 **RESPECTFULLY** submitted this 15 day of August, 2019.

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13 Oscar J. Flores
14 Chief Prosecutor
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Russell Boatwright, Coleen Thoene
Deputy Prosecutors

**ORIGINAL of the forgoing filed
this 15 day of August, 2019.**

Clerk of the Court
Pascua Yaqui Tribal Court

**Copy of the foregoing
delivered/mailed/provided to:**

Annamarie Valdivia, Melissa Acosta
Public Defender
Attorney for Defendant

By: _____

OFFICE OF THE PROSECUTOR

PASCUA YAQUI TRIBE
7777 S. CMO. HUIVISIM
TUCSON, ARIZONA 85757
(520) 879-6251

1 Pursuant to the Pascua Yaqui Rules of Criminal Procedure, the Tribe does not have a right
2 of appeal following acquittal in a criminal case. *See* 3 PYTC § 2-3-90(G). In cases where the
3 Tribe requires reconsideration of a decision made by the trial court, the Tribe, should it seek a
4 remedy, may only do so pretrial, or prior to the termination of trial. 3 PYTC § 2-3-260(D). *See*
5 *also* *PYT v. Stoof ex rel Lopez*, CA-18-001, p.1-2 (PYT Ct. App. Oct. 2018) (discussing the ability
6 of the prosecution to pursue “special action” relief). This Court has previously adopted Arizona
7 rules and law regarding special actions. *Lopez*, CA-18-001. The Arizona Rules of Procedure for
8 Special Actions “provide no limits on the time within which a special action may be filed.” *State*
9 *ex rel. McDougall v. Tvedt*, 163 Ariz. 281, 283, 787 P.2d 1077, 1079 (Ct. App. 1989); *State v.*
10 *Mahoney*, 25 Ariz. App. 217, 219, 542 P.2d 410, 412 (1975); *Cicoria v. Cole*, 222 Ariz. 428, 430,
11 215 P.3d 402, 404 (Ct. App. 2009); *Star Pub. Co. v. Bernini*, 228 Ariz. 490, 492, 268 P.3d 1147,
12 1149 (Ct. App. 2012).

13 The Tribe appeals the Court’s decision for the aforementioned reasons. The Pascua Yaqui
14 Tribe respectfully requests oral argument and a three-justice appellate proceeding. The Tribe
15 further requests an order for the Tribal Court to prepare and submit the record to the Court of
16 Appeals.

17 **RESPECTFULLY** submitted this 15 day of August, 2019.

18 **RESPECTFULLY** submitted this 6th day of May, 2019.

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23 Oscar J. Flores
24 Chief Prosecutor

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26 Russell Boatwright/Coleen Thoene
Deputy Prosecutors

ORIGINAL of the forgoing filed

OFFICE OF THE PROSECUTOR
PASCUA YAQUI TRIBE
7777 S. CMO. HUIVISIM
TUCSON, ARIZONA 85757
(520) 879-6251

1 **this 15 day of August, 2019.**

2 Clerk of the Court
3 Pascua Yaqui Tribal Court

4 **Copy of the foregoing**
5 **delivered/mailed/provided to:**

6 Annamarie Valdivia, Melissa Acosta
7 Public Defender
8 *Attorney for Defendant*

9
10 By: _____

1 IN THE PASCUA YAQUI TRIBAL COURT
2 IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION
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4 PASCUA YAQUI TRIBE,)
5 Plaintiff,) Case No. CR-17-079
6 Vs.) ORDER FOR CONSUMPTIVE FORENSIC
7 MADRID, MICHAEL R.) DNA TESTING AND ORDER
8 Defendant.) SETTING HEARING ON
9) REVIEW
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On May 23, 2019, the court reviewed the Tribe's notice of consumptive testing and the defendant's motion to allow its expert to present for such testing. Appearing were Annamarie Valdivia, for the defendant, whose presence was waived, and Russell Boatwright, for the Tribe.

The Tribe reports that the Arizona State Crime lab, which has been backlogged, sent back the DNA sampling, because it was awaiting this court's order for Consumptive Forensic DNA testing. The court should adopt the ABA Standards on DNA Evidence and should follow Standard 3.4(e) Consumptive testing; the court should grant the defendant's request to permit an independent evaluation of the analysis, including but not limited to, the presence of an expert representing the defendant during the evidence preparation and testing, and videotaping or photographing the preparation and testing.

The defendant's counsel should file its ex parte motion for funds for its expert for the DNA consumptive testing: the defendant's counsel shall provide the court with its experts' qualifications, financial information, including hourly fee, and his or her experience as a forensic expert, before the court may order the Pascua Yaqui Tribe to pay the funds for the expert. The motion and order should be sealed in the court file, for appellate review and not opened except upon order of this court. The court should set a review hearing, as soon as possible, to accelerate the time for the Tribe's resubmission of the DNA sample to the Arizona State DNA testing lab.


IT IS ORDERED that for good cause shown, the court grants the defendant's motion for consumptive Forensic DNA testing. The court shall set a review hearing on the defendant's Motion on June 13, 2019 at 9:00 a.m..

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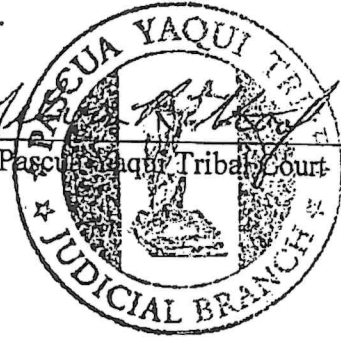
THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.

IT IS FURTHER ORDERED that the defendant's counsel shall file an ex parte motion for appointment of its DNA Forensic expert, as soon as possible, for court review. The motion and order shall be sealed in the court file, for appellate review and not opened except upon order of this court.

SO ORDERED THIS 23rd DAY OF MAY, 2019.



Judge, Pascua Yaqui Tribal Court



CC: Date 5.23.17
 Tribe Defendant/Counsel

CA

Clerk

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IN THE PASCUA YAQUI TRIBAL COURT
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,
Plaintiff,
Vs.
MADRID, MICHAEL R.
Defendant.

)
)
) Case No. CR-17-079
) ORDER FOR CONSUMPTIVE FORENSIC
) DNA TESTING AND ORDER
) DENYING TRIBE'S MOTION TO
) RECONSIDER COURT'S ORDER FOR
) INDEPENDENT EXPERT FOR
) DNA TESTING
)

10 On May 28, 2019, the court reviewed the Tribe's Motion to Reconsider Court's Order
11 for Independent Expert for DNA testing. Appearing were Melissa Acosta and Stu Dehaan, for
12 the defendant, whose presence was waived, and Russell Boatwright and O.J. Flores, for the
13 Tribe.

14 The Tribe reports that the Arizona State Crime lab would not be able to accommodate
15 allowing the defendant's forensic DNA expert to be present for consumptive testing, because
16 "[t]he DPS laboratory does not allow for independent expert to be present for testing of the
17 DNA sample. On May 23, 2019, the court adopted the ABA Standards on DNA Evidence
18 and should follow Standard 3.4(e) Consumptive testing and it granted the defendant's request
19 to permit an independent evaluation of the analysis, including but not limited to, the presence
20 of an expert representing the defendant during the evidence preparation and testing, and
videotaping or photographing the preparation and testing.

21 Because the ABA Standard on Consumptive Testing is one standard that addresses
22 both the interests of the Tribe to prove its DNA evidence and it but also protects the
23 defendant's right of due process in ensuring its expert can observe the DNA consumptive
24 testing to ensure protocols and standard operating procedures are followed, the court should
25 maintain its prior court orders, and it denies the Tribe's motion to reconsider, for lack of good
26 cause shown.

27 **IT IS ORDERED** that for good cause shown, the court grants the defendant's
28 **motion for consumptive Forensic DNA testing.** The court shall set a review hearing on
the defendant's Motion on June 13, 2019 at 9:00 a.m..


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IT IS FURTHER ORDERED that the Tribe's motion to reconsider shall be denied, for lack of good cause shown.

IT IS FURTHER ORDERED that the defendant's counsel shall file an ex parte motion for appointment of its DNA Forensic expert, as soon as possible, for court review. The motion and order shall be sealed in the court file, for appellate review and not opened except upon order of this court.


SO ORDERED THIS 28th DAY OF MAY, 2019.



Judge, Pascua Yaqui Tribal Court



CC: Date 05-28-19
 Tribe Defendant/Counsel



Clerk

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IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,)	
Plaintiff,	)	Case No. CR-17-079
Vs.)	
MADRID, MICHAEL R.	)	MINUTE ORDER
Defendant.)	
_____)		

On June 13, 2019, the court reviewed the Tribe's SECOND Motion to Reconsider Court's Ruling on Consumption of DNA Sample, filed by Russell Boatwright. Appearing was Melissa Acosta, whose client's presence was waived.

Mr. Boatwright indicates that the Arizona State Crime lab would not be able to accommodate allowing the defendant's forensic DNA expert to be present for consumptive testing, because "[t]he DPS laboratory does not allow for independent expert to be present for testing of the DNA sample." On May 23, 2019, the court adopted the ABA Standards on DNA Evidence and should follow Standard 3.4(e) Consumptive testing and it granted the defendant's request to permit an independent evaluation of the analysis, including but not limited to, the presence of an expert representing the defendant during the evidence preparation and testing, and videotaping or photographing the preparation and testing.

Because the ABA Standard on Consumptive Testing is one standard that addresses both the interests of the Tribe to prove its DNA evidence, but also protects the defendant's right of due process in ensuring its expert can observe the DNA consumptive testing to ensure protocols and standard operating procedures are followed, the court maintained its prior court orders, and it denied the Tribe's motion to reconsider, for lack of good cause shown.

The defendant's counsel argues that although the Arizona Department of Public Safety Scientific Analysis Bureau's SAB General Procedures Manual prohibits the presence of attorneys, independent experts and will not allow videotaping or photographing of the evidence analysis, it does accommodate for "certified technical assessors" Section 4.6.4, at page 25, SAB General Procedures Manual, to allow the assessors to witness analysis of evidence as part of an ongoing accreditation assessment, then the lab should be able to accommodate for observation by the defendant's expert.

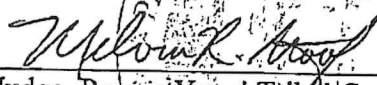

1 The court agreed with the defendant's counsel, and it should order that the Tribe attempt
2 to determine whether the lab has allowed any accommodations in the past, and to notify the
3 court as to what specific order may be necessary to effectuate such observation by defendant's
4 experts.

5 Although the prosecutor was concerned that the defendant may take the lab's rejection
6 of allowing defendant's expert to observe as possible support of an argument that the Tribe
7 failed to do what it was legally obligated to do, such a matter may be resolved in the event the
8 lab cannot accommodate, and more appropriately in a motion in limine at the pre-trial
9 conference.

10 The court denies that Tribe's Second motion to reconsider, for lack of good cause
11 shown, because the defendant does have a right to have his expert present to observe the
12 consumptive DNA testing.

13 **IT IS ORDERED** that for the Tribe's **SECOND** motion for reconsideration of
14 court's ruling on consumption of DNA sample shall be denied. The court shall maintain
15 its current order of May 28, 2019. The prosecutor should make any additional reasonable
16 efforts to determine whether the AzDPSSAB testing lab has allowed accommodations in
17 the past, and if they are willing to do so in this case.

18 **THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.**
19 **SO ORDERED THIS 13th DAY OF JUNE, 2019.**

20 
21 _____
22 Judge, Pascua Yaqui Tribal Court
23 

24 CC: Date 06.13.19
25 Tribe Defendant/Counsel

26 _____
27 Clerk
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