

**Testimony
of the Council for Court Excellence
before the
Committee on the Judiciary
Council of the District of Columbia**

Department of Forensic Sciences Act of 2011

**February 7, 2011
11:00 am**

Good morning, Chairman Mendelson and members of the committee. My name is Steven Gordon. I am a member of the Board of Directors and the chair of the Criminal Justice Committee of the Council for Court Excellence (CCE). My testimony today is on behalf of CCE and concerns the Department of Forensic Sciences Act of 2011. No judicial member of CCE participated in the formulation of this testimony.

CCE is a local nonpartisan civic organization founded in 1982 to improve the administration of justice in the courts and related justice agencies in the District of Columbia. CCE brings together members of the civic, legal, business, and judicial communities to work in common purpose to identify and promote court reforms, improve public access to justice, and increase public understanding and support of our justice system.

CCE has worked closely with the DC Council and this Committee on many issues, including the 1994 Probate Reform Act, the Advisory Commission on Sentencing Establishment Act of 1998, the Truth in Sentencing Amendment Act of 1998, the Sentencing Reform Act of 2000, the Office of Administrative

Hearings Establishment Act of 2001, the Criminal Record Sealing Act of 2006, and the Disorderly Conduct Amendment Act of 2010.

CCE strongly supports the central purpose of the Department of Forensic Sciences Act (Act) which is to establish an independent department in the executive branch of the District of Columbia to place forensic laboratory services under the administrative control of a qualified forensic scientist rather than a law enforcement agency. The Act follows the recommendation of a blue ribbon committee established by the National Academy of Sciences (NAS) which was authorized by Congress to conduct a study of forensic science in the United States. In 2009 this NAS committee issued a report¹ that made a number of recommendations to improve forensic science in this country. One of its principal recommendations was that all public forensic laboratories and facilities should be removed from the administrative control of law enforcement agencies or prosecutors' offices.

The NAS committee explained in succinct terms why forensic laboratories need to be independent. It said:

Scientific and medical assessment conducted in forensic investigations should be independent of law enforcement efforts either to prosecute criminal suspects or even to determine whether a criminal act has indeed been committed. Administratively, this means that forensic scientists should function independently of law enforcement administrators. The best science is conducted in a scientific setting as opposed to a law enforcement setting. Because forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.²

The Supreme Court underscored the need for independent forensic science in a recent decision.

It quoted this portion of the NAS report with approval and warned that, where forensic

¹ Committee On Identifying The Needs Of The Forensic Science Community, National Research Council of the National Academies, *Strengthening Forensic Science In The United States: A Path Forward* (2009).

² NAS Report Prepublication Copy at S-17.

laboratories are administered by law enforcement agencies, "[a] forensic analyst responding to a request from a law enforcement official may feel pressure -- or have an incentive -- to alter the evidence in a manner favorable to the prosecution."³

The NAS report makes clear the extent to which practitioners in a particular forensic discipline rely on human interpretation that could be tainted by error, the threat of bias, or the absence of sound operational procedures and robust performance standards. And, in recent years, the integrity of crime laboratories has been called into question by cases elsewhere in the country that have highlighted (1) unqualified practitioners, (2) sometimes lax standards that have generated questionable or fraudulent evidence, and (3) the absence of quality control measures to detect questionable evidence. Innocent people have gone to prison because of sloppy, biased, or falsified work by crime laboratories. A major part of the solution to these problems is to place forensic laboratories under the control of qualified forensic scientists who have the necessary training, experience and independence. This change may not guarantee that mistakes won't sometimes be made but it certainly reduces their likelihood.

Simply put, this community needs the best possible forensic science in order to help convict the guilty and exonerate the innocent -- and an independent forensic laboratory is more likely to ensure this result.

Our neighbor, Virginia, has had an independent forensic laboratory agency since 1972 and it has been a great success. Virginia law enforcement officials are very satisfied with the services and training that the state forensic laboratory provides to them. They praise the working partnership that exists between the laboratory and the various state and local law enforcement agencies. We anticipate that an independent Department of Forensic Science here in the District

³ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2536 (2009).

of Columbia will develop an equally strong working relationship with the Metropolitan Police Department (MPD) and other law enforcement agencies. Law enforcement, after all, will be the laboratory's principal "customer" and will work closely with laboratory personnel on a daily basis.

The Act provides for a full service forensic science laboratory capable of performing the full array of scientific tests that are commonly used in criminal and other forensic investigations. The District has never before had such a full service capability. It has been dependent on federal agencies to perform many of the routine forensic functions. For example, drug testing is currently performed by the Drug Enforcement Administration and analysis of questioned documents is performed by the U.S. Secret Service. A dedicated, full service forensic laboratory for the District would bring a number of advantages, including faster turn-around on the performance of tests and analyses that are now being "farmed out," and the ability to prioritize cases according to local needs rather than national federal priorities.

The Act is very timely legislation. Not only does it follow on the heels of the NAS report, but it anticipates the completion of the Consolidated Forensic Laboratory facility that is currently under construction and will be completed in the summer of 2012. This facility is designed to house under one roof the D.C. Medical Examiner's Office, the Department of Health/Public Health Laboratory, and a full service Forensic Laboratory. Now is the time to create an independent Department of Forensic Science (DFS) that will be responsible for operating that forensic laboratory when the new facility opens next year. This will permit a Director of the new department, selected by the Mayor and confirmed by the Council, to be hired and the necessary plans made this year for moving into and utilizing the new building.

The Act is modeled on the Virginia statutes that established its independent forensic laboratory and upon the D.C. statutes that established the Office of the Chief Medical Examiner. The Director of the new DFS would have a role comparable to the Chief Medical Examiner. The Director would be appointed for a six-year term which must overlap by at least two years the term of the Chief Medical Examiner. Because the Director and the Chief Medical Examiner both play critical roles in forensic investigations, it is highly desirable that those positions not be subject to turnover at the same time.

The Act provides that the Director must be an experienced forensic scientist and must also have at least four years experience as a supervisor in a forensic science setting. These are sensible requirements because the Director will play a crucial role in the success of the new DFS. The Director is required to ensure that the DFS gains accreditation by December 2013 by a national accrediting organization. This was another key recommendation of the NAS committee -- that all forensic laboratories should earn this type of accreditation. In addition, the Director is required to ensure that DFS forensic services are performed by skilled professionals qualified in their respective disciplines to operate in an accredited laboratory. In sum, the Director is responsible for assuring that the laboratory and its professionals meet appropriate national standards of competence.

The Act also makes the new DFS responsible for periodically testing and certifying all equipment used by any law enforcement agency in the District to test the blood alcohol content of breath. This provision is modeled on the Virginia statute, which has been implemented quite successfully there. The wisdom of having scientists test and certify this equipment, rather than law enforcement officers, is evident. And it is confirmed by the recent problems encountered by the MPD in calibrating in-house the breathalyzers that its officers use.

CCE supports all of the foregoing provisions of the Act. There are a couple of other provisions as to which CCE takes no position but that we wish to flag for the Council's consideration because of issues they raise.

One provision would enable defense counsel to make *ex parte* requests to the court to direct the laboratory to perform certain tests. This process would remain private until the test results are obtained -- at which point those results would become available both to defense counsel and the prosecutor. This provision is modeled on the Virginia statute, but the defense bar may object that it infringes on a defendant's Fifth Amendment rights. Under the Criminal Justice Act, defense counsel can ask the court for funds to engage an independent expert to conduct tests, and the results remain confidential unless defense counsel chooses to disclose them. (This option will still remain after the DFS is created). It can be argued that the defense ought not to be disadvantaged if it seeks to utilize the public forensic laboratory rather than private experts. On the other hand, it can be argued that the ethos of the new DFS is to be independent and not a partisan for either the prosecution or defense. The DFS is properly required by the Act to disclose to defense counsel the results of any analysis that it performs. If it does not keep any "secrets" from the defense with respect to its work, neither should it be expected to keep secrets from the prosecution.

Another provision that deserves examination deals with the Forensic Science Advisory Board that is established by the Act. This provision also is modeled upon the Virginia statute. In Virginia, however, members of this Board are compensated for their work whereas the Act (properly, in our view) envisions a volunteer Board. The question arises whether the number of responsibilities being imposed on the Board is too ambitious for a volunteer group and whether, as a practical matter, some of these responsibilities might detract from the ability of the DFS

Director to ensure the proper functioning of the laboratory. It may be desirable to scale back considerably the formal responsibilities imposed on the Board, while retaining its advisory and oversight functions.

This concludes the testimony of the Council for Court Excellence. I would be happy to address any questions that you may have.