



INTELNET *News*

Official Newsletter of the
International Intelligence Network, Ltd.

Intellenetwork.org

Fall 2017



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IASIR CONFERENCE 201720

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Peter's Posting

by

Peter Psarouthakis
Executive Director, Intellenet



Dear Intellenet Members:

If you are planning on attending our 2018 conference in Aruba, and we hope you are, please make your reservation sooner than later.

What a crazy time a year for many of you impacted by hurricanes and the unfortunate Las Vegas shooting. While our thoughts and prayers reach out to all who have lost family members and friends, I'm glad to report that while these events did, and in some cases still do, cause a lot of stress all our members have been accounted for and are safe. Times like these remind us how family and friends are so important and to not take life for granted. These times should also remind us as investigators and security professionals that we should have a plan in place for not only our personal and family safety, but for our businesses as well. We of all people should not be caught by complete surprise when disaster strikes, we should have a plan. Maybe one of the many talented members we have could write an article for our newsletter on this subject -- hint, hint!

Our 2018 annual conference will in beautiful Aruba. Classes will be held only in the mornings so that everyone can get out and enjoy this beautiful location. As of this writing just over 50% of our room block has been reserved. If you are planning on attending please make your reservation sooner than later.



George Michael Newman, our education director, has put together another great lineup of speakers and presentations. Our hosts this year will be Ed and Marion Spicer, who have put together a great tour of the island for those that would like to attend, and they've scheduled additional fun activities.

Next spring Aruba will be a prime vacation destination and we most likely won't be able to increase our room block. Hotel reservation information is available on the Intellenet [website](#), as well as additional conference information. As more information becomes available it will be posted on our listserv and our website, including our program schedule and speakers.

I'm happy to report that we continue to see an influx of new applications and members this year. See our newest members listed in Member News in this newsletter, and welcome them to Intellenet if you haven't already. Many thanks to the membership for stepping up and helping with the recruitment effort. While we continue to see a lot of retirements, these new members are helping keep Intellenet strong. Please continue to keep an eye out for qualified members. If you have someone that you would like to recommend please send an email to Jim Carino, Ari Morse or yours truly.

As always you can reach me at peter@ewiassociates.com.



Member News

Welcome New Members ...

Mark ADAMS — Santa Rosa, CA

Brig BARKER — Colorado Springs, CO

Cleve COATS — Lexington, MA

Joanna COLLINS — San Antonio, TX

Larry DAVIS — Lawrenceville, GA

Seth DERISH — San Jose, COSTA RICA and CA

Nick DI SANDRO — New Lenox, IL

Dan DOLLARHIDE — Daphne, AL

Michael LEWANDOWSKI — Foley, MN

Kai MESSMAN — Hamburg, GERMANY

Ladislav PAVEK — Prague, CZECH REPUBLIC

Sam ROSENBERG — Sewickley, PA

Sheila WYSOCKI — Brentwood, TN

These are our new members since we last published. To update your membership listing on the web, or in our Briefcase Roster, send info to intellenet@intellenetwork.org.

News from the stage ...

Intellenet's best known thespian is **Eileen Law**, who is appearing in two shows this season at the Milburn Stone Theatre at Cecil College in North East, Maryland. Eileen was in "*Singin' in the Rain*," which ran from Octo-



ber 13 through the 22nd, and she will be playing one of the leads in "*Beauty and the Best*," as Mrs. Potts, who sings the show's title song. "Beauty" runs for weekend performances from November 17—December 3rd.

Eileen sent along a nice note about the show, saying that tickets would make a nice gift for a date night "... especially if you have dinner at my cousin Tony's restaurant, "Steak and Main." By the way, I confess I never saw the movie "Beauty and the Beast." I thought it was for kids. Boy, was I wrong. I KNOW you'll laugh AND get choked up at the ending -- just like I did. I hope you'll be able to make these and other shows."

Congratulations, Eileen. Your editor concurs: "Beauty" is a charming show, one the whole family will enjoy. My wife and I saw one of the national touring company performances several years ago in Cincinnati. A college friend of mine played Mrs. Potts in that production. We attended college with the show's lyricist, the late Howard Ashman.

News from the Carolinas ...



Intellenet will be exhibiting at the fall conference of the [North Carolina Association of Private Investigators](#), at Harrah's Cherokee Casino Resort, from November 5-7 this year. The room rate for the hotel is \$89 (Group Code S11NCPi). Featured speakers include Intellenet members **Kelly Riddle**, presenting "Surveillance Do's & Don'ts," and **Sandra Stibbards**, presenting "Using Social Media & OSINT."

Continued on next page ...

News we won't forget ...

Ed Spicer sent this note for our newsletter, news we should never forget:



“On (September 10) 16 years ago, 246 people went to sleep in preparation for their morning flights. Two thousand six hundred six people went to sleep in preparation for work in the morning. Three hundred forty-three firefighters went to sleep in preparation for their morning shift. Sixty police officers went to sleep in preparation for morning patrol, eight paramedics went to sleep in preparation for the morning shift of saving lives. None of them saw past 10:00 a.m. September 11, 2001. In one single moment life may never be the same. Tonight, as you go to sleep in preparation for your life tomorrow, kiss the ones you love, snuggle a little tighter and never take one second of your life for granted.”

“Coming Events Cast Their Shadow Before”

George Michael Newman sent the following missive about our conference in Aruba. Appropriately enough, it arrived concurrent to Ed's note. Michael's title quote is from the poem Lochiel's Warning.

“Drafting this missive, as I am, on September 11th, and musing on the significance of the day, the overriding thought from that tragic event having occurred remains dominant: the only thing surprising or shocking about the fact that it occurred is, that anyone was surprised or shocked that it did.

As is the case with the fact that Donald Trump was elected President of the United States, which, if one delved beyond the media hysteria and elitist arrogance, was readily identifiable as the likely election outcome.

(Now reviewing this thread somewhat later, the Las Ve-

gas massacre which recently occurred should not have come as a surprise. While the specific incident might not have been predictable, and while such an event may not be specifically identifiable in advance, if one was attuned beyond the competitive and commercial media the probability of ever-greater angst-induced cataclysms was glaring.)

Living, and traveling, as I have, on or near the water for many of my years, early on I became acutely aware of the fact of undercurrents; that the movement of the reflecting surface water in a direction may be deceiving, with the deeper waters moving in other, even opposite, directions.

Living now on the coast, there is also the matter of rip currents and rip tides.

These dynamics are indicative of similar societal dynamics that, likewise, may, at minimum, distract a person from a position of safety -- or an investigator from being a finder of objective fact.

As we develop a speakers' platform for our next conference, and, in mind of the unsettled and interconnected global dynamics of the times we strive to assemble a roster which, ideally, provides a degree of enjoyment, of education collateral to earning income -- and tools which contribute to a sensing relative to interrogative undercurrents. As the saying generally goes, “For those who have an ear, let them hear.”

Join us in Aruba in 2018. Its location south of the hurricane belt graced it with minimal effect related to the recent devastation, and the beautiful beaches combined with the half-days schedule and the elegant venue imply opportunity for relaxed education and networking.

I am aware that in addition to the educational opportunities being constructed, other opportunities for interesting extracurricular activities are being put into place. So, come, learn relevant information and skills, and put an umbrella in the sand ... along with one in your drink. No doubt, one amongst the many reasons to belong to Intellenet and to attend the Annual General Meeting is the fraternity amongst peers.”

Member News continues on next page ...

News from OSMOSIS ...

At the recent OSMOSIS conference in Myrtle Beach, New York-based member **Emmanuelle Welch, LPI** gave a presentation on “Hacking the Meet-up and Hook-up Apps,” organized by long-time Intellenet member **Cynthia Hetherington**. “Even if you never work infidelity cases, dating and hook-ups apps and sites can come in very handy in your investigative toolbox,” said Welch, who specializes in French-American legal investigations. She showed how apps such as Tinder, Grindr, Growlr, OK Cupid, Happn, Plenty of Fish can help identify individuals, locate them or figure out what they do for a living. “Most of the tips can only be learned from trial and error,” she added. She shared experience drawn from real-life cases,

which often raise ethical questions. “I have no qualms conducting research on dating apps,” she said. “Participants are willing to sacrifice their privacy in order to be found —albeit, not by me or any investigator. Still, I think that it’s important to conduct this type of research only when necessary and when it’s relevant to the case.”



Marketing – How Much is Enough?

By Kelly E. Riddle

Having been in business for more than 28 years, I often get asked, “How much money does it take to have an effective marketing strategy?” I turn the question around and ask, “What does your business plan call for?” Both of these are good questions that point in the same direction but often are not considered in our fast-paced lifestyles. You first need to have an understanding of what a realistic marketing budget would be for your current situation. Secondly, you have to determine how much you need to be add to that budget to get you to the level of business you desire.

The majority of investigators do not go into business with a formal business plan and therefore just “let things happen.” Even if you are a one-person business and don’t intend to have employees, you still need to outline how you will maintain business, grow at a reasonable rate and how to exit the business when ready to retire. Business plans do not have to be large or cumbersome but should include what type of investigations you intend to perform, where the market is for these types of services, how to obtain business from this sector and how to increase your presence in that market. Business plans should outline business expenses, taxes, insurance,

equipment, salaries, database access, licensing fees, rent, phone expenses and all other business expenses. There should also be an allowance for marketing and the various methods you will market your services. Through the use of a business plan you will better understand where you’re business stands and the direction in which your business is headed.

Every business has to set aside a marketing budget whether \$50 or \$1500 a month. If you do not address marketing on a basic level you most likely will never grow your business because it is “out of sight and out of mind”. Advertising has to be a consistent and methodical process. “Name branding” is an integral part of the advertising process. There should be a mechanism for measuring the results (return on investment) of the marketing, however, sometimes this is not possible and fits into the long term goal of getting your company name better known and readily identifiable in your market. This “name branding” can take on many avenues including public speaking, assisting in local social events, radio promotions and similar non-gradable methods. A good marketing plan will have a mixture of printed, on-line and media that

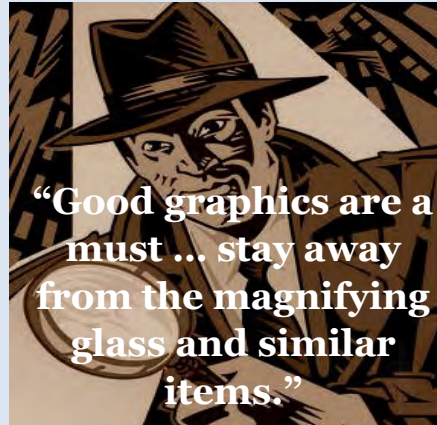
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compliment and overlap one another.

Advertising in printed material allows you to put a code on the ad and a different code should be used for each separate advertisement. The code can be a “mention the name Sherlock to get a 10% discount” or mention the code “007” to get a free consultation. If they do not volunteer this information you or your office staff need to get into the habit of asking, “How did you hear about us?” Of course it does no good unless you have some type of document to track this information so you can examine the results. In both printed and online advertising some companies use numerous “landing pages” or abbreviated websites that the marketing company does on your behalf. These websites have a different telephone number and is used strictly to measure how many leads you obtain through that website. The marketing company often has a “backend” website where you can login and review these leads, rate them and adjust your strategy. This is valuable information if you take the time to access it.

Websites need to be clean looking and not cluttered with an overabundance of text. You generally have about three minutes to get your point across and bullet points are much more useful. Good graphics are a must as people respond to different stimuli but I would stay away from the typical stereotypical badge, Sherlock Holmes image, magnifying glass and similar items. A good marketing piece will relate the basic information including a “call to action” encourag-

ing them to contact you, services provided, telephone number, email and anything unique about your company or services. Some people prefer to scan a website and then pick up the phone and call while others prefer to submit an email. You have to appeal



to both types of personalities. The website should have a corporate appeal and not be about a single person. Having an “about us” type page on the website is a good idea but your landing page should have only key information.

We could spend an entire article on what makes a good website but for now we will stick to the basics. However, search engines need certain “tags” to keep your site moving towards the top of the search engines so people can find you. Fresh information always helps and some sites use blogs as a way to generate fresh information. Video, articles, references, upcoming events and similar tactics can assist.

Having an easily identifiable domain name is important. A name like Rocket Investigations and Security Consulting (rocketinvestigationsandsecurityconsulting.com) is too long if someone tried to enter all of that

into a search engine. You should therefore look for a domain name of Rocket.com or RocketPI.com that still references the name but in a shorter version. This is important also when printing on letterhead and business cards. Additionally the shorter domain name is much easier to remember. To keep with the corporate appeal you should also have corporate email accounts such as rick@rocketpi.com. This is more professional and usually comes with websites through the larger domain companies such as Network Solutions or Go Daddy.

Once the website and emails have been tackled you need to get them in search engines. Yahoo, Bing, Google and the other big ones no longer give you free listings but there are a lot of free search engine submittal sites. Just enter “free search engine” and they will come up. Many require you to open emails and verify your email which can be a little time consuming, but considering it is free that is not too much to ask. Be careful with “pay per click” listings. Even though you can put a monetary limit on how much you want to spend each month you can waste money easily by non-verified customers who are just playing around and not really shopping for your services. To be effective you should hire a company to do your internet marketing but again, you need to have a budget in which to work with. These companies will analyze your geographic market and determine what days of the week have the higher inquiries for your services as well as the times of the day. They will then use the budget to push the

Continued on next page ...

on-line ads during these key times to help stretch and manage your budget more effectively. Some services like YP (Yellow Pages) will push you within their own directories but will also do search engine placement as well.

Marketing requires some ingenuity and real thought process to be effective. You first need to define who you want to market (individuals, corporations, attorneys, adjusters, etc) and then create a strategy to target this demographic. Not all advertising requires a monetary expenditure but you must set realistic goals and how to achieve them through marketing.

Kelly Riddle, TCI, TPLI, CII, BAI is president of [Kelmar Global](#), San Antonio, TX. He is past president of TALI, serves on FALI's advisory board and on the Board of Directors of the Freedom of Information Foundation of Texas.



Is Your Website Professional?

By William F. Blake

The Internet is a primary marketing tool for the private investigator and security consultant. Historically, if an individual wanted to locate a service, they went to the Yellow Pages. Currently, many telephone companies do not issue telephone directories. Today, the Internet has become the primary source for business information, as it has the capability of providing more business information than the one-line listing in a telephone directory.

During a recent search for potential Intellenet members, names were selected from various sources to determine the professionalism and capabilities of the individual's services. Many searches failed to identify a website for the business. In some cases, the website appeared to be outdated and less than professional in appearance and contained very little information on which to make a decision. Your website is a marketing feature that is part of presenting your business on a professional level. Your website is like your personal appearance. If it appears similar to a T-shirt and shorts image, people will relate this to an apparent lack of professionalism.

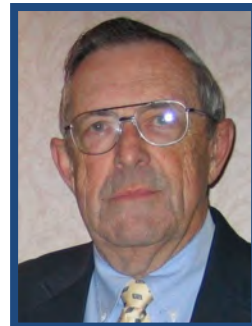
Your website should have a professional appearance; not one that appears to have been constructed by an amateur. Any designs or images should be of a high quality and not some that appear to be "cheap" or ge-

neric to a general business. Those websites containing "flash" can be distracting and are time consuming to get to the important information on a website. Flash allows for the incorporation of animations and interactive content on the website.

To be informative, selected information should appear on your website. An important item is "About Us," which gives the viewer an indication of your experience. You can also list the experiences of some key employees in this section. "Services Provided" is a list of the business services, either in-house or through a sub-contractor. "How to Contact Us" should provide listing of the business' physical location, e-mail address, telephone, fax, and cell telephone numbers. Some business websites provide an e-mail form which can be a distraction to some individuals who prefer telephone or face-to-face contact.

Marketing your business is a continuing process and involves everything that you do as an individual or business. It is your appearance, speech, courtesy and the manner in which you interact with others. This applies to business contacts, attendance at meetings, conference and other assemblies. You're always marking your business and yourself during any appearance, in private or public.

William F. "Bill" Blake, CPP, CFE is owner of Blake and Associates, Inc., Littleton, CO, and editor of the Intellenet book series.





ISPLA News for INTELLENET

By

Bruce Hulme H. Hulme, CFE, BAI

ISPLA Director of Government Affairs

This article will cover several aspects of criminal defense. In brief the subject matter will touch on the wrongfully convicted, scientific evidence, disputed DNA testing, prosecutorial misconduct and failure to disclose potentially exculpatory evidence. When ISPLA was formed in 2009, it commenced a number of initiatives relative to criminal defense as a significant portion of our ISPLA members and investigative colleagues in INTELLENET, NALI, SPI and State professional associations were engaged in some aspect of criminal justice matters. ISPLA's activities, in part, over the past eight years have included:

- **Provided Testimony to Congress on the issue of Criminal Defense Reform.**
- **Joined a National Coalition of Associations and other interested parties to work on Criminal Defense Reform at the Federal level.**
- **Represented the Investigative and Security professions at the annual meetings of the International Association of Security and Investigative Regulators (IASIR). ISPLA is the only organization representing the Private Investigation Industry on the IASIR board.**
- **Participated at U.S. House Judiciary Committee Briefing on Solutions to the Indigent Defense Crisis.**
- **At the invitation of the U.S. Department of Justice, participated the National Symposium on Indigent Defense: *Looking Back, Looking Forward, 2000-2010.***
- **ISPLA's Director of Government Affairs was the first non-lawyer invited participant to represent the In-**

vestigative profession on the Law of Ethics and Investigations at American Bar Association's Annual National Conference on Professional Responsibility.

- **Entered into agreement with the International Intelligence Network (INTELLENET) to represent their interests in government affairs, PAC activities at the federal level, and on specific international regulatory issues.**

Our motto is: *Educate to Legislate*. With that in mind, below are articles for those members of INTELLENET concerned with emerging criminal defense issues. INTELLENET members wishing to join ISPLA and support its mission are invited to go to: www.ISPLA.org.

New York: 23rd Wrongfully Convicted Kings County Defendant Freed

This case is the 23rd conviction that the Brooklyn District Attorney's office has disavowed in the last 3½ years, as it reviews over 100 convictions in one of the most sweeping reviews of its kind nationwide. A man who spent 21 years behind bars for murder was set free after prosecutors abandoned his conviction, saying their office improperly withheld information and allowed a mistaken impression that a wounded eyewitness implicated him.

"It was like a bad dream. It had to end someday," Jabbar Washington, 43, said as he left court after a Brooklyn judge dismissed the case against him. "It was hard, but I kept the faith." Washington's case is one of dozens involving a once prominent detective, now retired, whose tactics have come under scrutiny.

Washington had confessed (but long since recanted) in a deadly 1995 robbery at a drug-den apartment. Six other men also were convicted and remain so. Prosecutors stopped short of saying they believe Washington's inno-

cence in the armed holdup that killed Ronald Ellis and wounded five others. However, prosecutors conceded that Washington's trial was unfair and agreed to drop the case, saying they can't retry it now. The eyewitness died in 2006.

"Given the unresolved issues of credibility in this case, we cannot prove guilt beyond a reasonable doubt," Acting District Attorney Eric Gonzalez said in a statement.

Washington's lawyer, Ronald Kuby, called the case a reflection of "institutional failure" by the criminal justice system.

The eyewitness, who'd been shot in the robbery, identified Washington in a 1996 lineup as one of the men involved. But before testifying at the grand jury, the witness clarified to a prosecutor that she just recognized Washington as a neighbor, not as one of the robbers, the prosecutor's office said.

The grand jury prosecutor made a note of the eyewitness' explanation, and the identification wasn't repeated at the grand jury or trial. But prosecutors didn't tell Washington's then-lawyer that the eyewitness had backtracked, despite legal obligations to turn over exculpatory information, the DA's office says.

And the trial prosecutor asked the eyewitness and then-Detective Louis Scarcella multiple questions about the lineup — questions the DA's office now sees as intended to convey, "in a back-door sort of way, the impression that she had in fact made an identification," Assistant District Attorney Mark Hale said.

Scarcella, at the trial, then answered a defense lawyer's question by saying that "if he (Washington) didn't get ID'd, it would have been" particularly important to get a confession.

The trial prosecutor, Kyle Reeves, who's now in private practice, declined to comment Wednesday, ex-



cept to express disappointment about learning of the developments not from former colleagues but from the press. The grand jury prosecutor, who also has left the DA's office, didn't immediately respond to an email sent to a possible address for her Wednesday.

Scarcella, who retired in 2000, has denied any wrongdoing as the Brooklyn DA's office has reviewed roughly 70 of his cases. So far, prosecutors have abandoned about a half-dozen convictions in his cases, but stood by nearly three dozen others.

While they characterized his testimony in the Washington case as misleading, they haven't accused him of breaking any laws. His lawyers, Alan M. Abramson and Joel S. Cohen, said Wednesday that the failings in the case were prosecutors' and the trial

judge's, and "the fact that Louis Scarcella was the detective on this case is immaterial."

Washington, meanwhile, left court surrounded by the family he'd waited to rejoin, including his mother, wife, two children and a grandchild. As for his plans, "after all this time, I'm just happy to go home," he said.

Constitutional Requirement to Litigate Scientific Evidence

Criminal law is based upon constitutional law. Law enforcement agents extensively rely upon scientific principles and technology in criminal prosecutions. All cases involving criminal charges generally entail some aspect of scientific evidence and forensic science. Forensic science is used to convict the guilty and to protect and exonerate the innocent. It is the most persuasive evidence. The Due Process Clause, Confrontation Clause and the Sixth and Fourteenth Amendments of the United States Constitution require attorneys to adequately understand scientific principles for litigation of forensic science issues. The Sixth Amendment states, "[i]n criminal prosecutions the accused a person shall . . . have the Assistance of Counsel for his defense." The right to counsel is applicable to state jurisdictions through the 14th Amendment, established via *Faretta v. California* 422 U.S. 806 (1975).

The Supreme Court revised the standards for admissibility of scientific evidence and expert witness testimony through the seminal cases of *Daubert*, *Joiner* and *Kumho Tire*. The controversial issues of reliability, peer review, error and uncertainty rates, and

standardization still adversely affect competent use of forensic science.

The reliance on forensic sciences in criminal cases has increased substantially in recent years through advancing technology, thereby fostering oversight of the scientific evidence used in criminal cases. A nationwide movement has emerged advocating investigation, research and improvement of scientific methods in forensics. This sentiment is perpetuated by the discovery of flawed forensics, high-profile crime laboratory scandals, fraud, wrongful convictions, as well as the exposure of junk sciences and issuance of the National Academy of Sciences (NAS) report in 2009.

The reports

On September 16, 2016, the President’s Council of Advisors on Science and Technology (PCAST) released its report, “Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods,” condemning problems endemic in forensic science disciplines and recommending standards to validate forensic methods, training forensic examiners and making forensic laboratories independent of police and prosecutors. The NAS and PCAST reports poignantly discussed the legal profession’s failings concerning scientific evidence, including “a lack of statistical rigor to justify stating results, or repeated and objective testing to ascertain an ability to reliably produce results at all.”¹

In response to the NAS report, the government established the National

Commission of Forensic Science (NCFS) in 2013. The NCFS recommended all forensic techniques should be independently validated before being used in criminal investigations. Proclaiming evidence is “scientific” does not make it so.² Scientific validity and reliability are not determined or equated by conviction rate. These reports and findings are an inconven-



ience to law enforcement and prosecutors.

The Department of Justice (DOJ), through former Attorney General Loretta Lynch, rejected the PCAST report. AG Lynch declared the DOJ would not adopt the recommendations relating to admissibility of forensic science. The FBI stated PCAST made erroneous and overbroad assumptions.

On April 10, 2017, Attorney General Jeff Sessions ordered the DOJ to end the NCFS and suspend FBI review policy. Accordingly, scientific standards are to be determined by the DOJ. U.S. District Judge Jed S. Rakoff of New York, the only federal judge on the commission, said, “It is unrealistic to expect that truly objective, scientifically sound standards for the use of forensic science ... can be arrived at by entities centered solely within the Department of Justice.” Forensic science

evidence continues to be admitted, with and without critical judicial evaluation by courts.³

Effective representation

The Sixth Amendment and Due Process Clause are emerging as sources of regulation to increase the reliability and validity of scientific evidence and competency of counsel. The courts have sought to create workable standards to assist litigators in admitting and using forensic sciences during trial. A constitutional difference exists between admitting the expert’s opinion and using the expert to introduce the underlying report from a third party as a basis to form an opinion.⁴ Furthermore, use of false evidence, debunked sciences, or repudiated expert witness opinions is a basis for challenging a conviction through a writ of habeas corpus and new trial.⁵ Rules governing expert witness qualifications, however, lack specificity and discernible standards despite the courts’ attempt to stay current with the rapid advancements in forensic science.

Developments in forensic science have prompted the Supreme Court to issue decisions increasing counsel’s duty to competently litigate forensic science evidence. The standard for effective attorney representation is whether the performance was deficient, and errors existed depriving a person of fair trial (e.g., but for the attorney’s conduct, there would be a different result).⁶ This obligation requires a working knowledge of forensic science. Attorneys still lack a fundamen-

tal understanding of scientific issues, which impedes effective and competent representation. The inability of counsel to adequately vet scientific evidence through cross-examination has led courts to place considerable dependence on sound laboratory techniques, careful litigation, complete disclosure of scientific procedures, scientific methodologies, and the limitations of forensic evidence. Most of these decisions are made at the trial court level on a case-by-case basis.

Unfortunately, the “courts continue to rely on forensic evidence without fully understanding and addressing the limitations of different forensic science disciplines,” as stated in the NAS report.

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

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2. Sunita Sah, Arturo Casadevall, Suzanne Bell et al, *We Must Strengthen the “Science” In Forensic Science*, *Scientific American*, May 8, 2017.
3. Kennedy, *Stare Decisis Is Not Scientific*, *The SciTech Lawyer*, supra. *Crawford v. Washington*, 541 U.S.

36 (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Williams v. Illinois*, 564 U.S. 50 (2012).

4. Calif. Penal Code, Title 12, Chpt. 1, Sect. 1473 *Writ of Habeas Corpus*, eff. Jan. 1, 2015 (2016); Texas Code of Criminal Procedure, Chpt. 11, Art. 11.073, eff. Sept. 1, 2013 (2016) *Habeas - Procedures related to certain scientific evidence (The Junk Science Writ)*.
5. The right to counsel is the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1994); *Maryland v. Kulbicki*, 136 S.Ct. 2, 577 U.S. (2015).



This article appeared in the September 7, 2017 issue of *Forensic Magazine* and is adapted from Natalie Arvizu and Gil Sapir, *Constitutional Requirement To Litigate Scientific Evidence*, *American Academy of Forensic Sciences Proceedings*, Vol. 23, p. 834 (2017).

Natalie Arvizu, JD, is a law clerk for *New Mexico Appellate Court*. She may be contacted at *New Mexico Court of Appeals, 2211 Tucker, NE, Albuquerque, N.M. 87125*. **Gil Sapir, JD, MSc**, is a forensic science consultant and attorney. He may be contacted at *PO Box 6950, Chicago, Ill. 60680*

THOUSANDS OF CRIMINAL CASES IN NEW YORK RELIED ON DISPUTED DNA TESTING TECHNIQUES

The unraveling of NYC's DNA techniques

- **January 2006:** The DNA lab at New York City’s medical examiner’s office introduces high-sensitivity test to analyze very small amounts of DNA evidence
- **Mid-2011:** Lab debuts proprietary Forensic Statistical Tool (FST), software for analyzing complex samples of more than one person’s DNA mixed together
- **April 2013:** Theresa Caragine, FST’s co-inventor, resigns after allegedly violating lab protocol by changing FST results; Adele Mitchell, the other co-inventor, leaves in 2014
- **November 2014:** A Brooklyn judge declares evidence from both the high-sensitivity and FST techniques inadmissible at trial, but other courts aren’t bound by his ruling
- **April 2015:** Marina Stajic, an administrator in the medical examiner’s office, is fired after challenging the high-sensitivity method at a meeting of the state forensic science commission
- **June 2016:** A federal judge orders the lab to make FST source code available to defense experts for review
- **September 2016:** Lab announces plans to phase out both controversial DNA methods in 2017
- **October 2016:** Leading expert

who reviewed FST code questions its accuracy

- **September 2017:** New York City defense lawyers ask the state’s inspector general to investigate “serious malfeasance” and “a pattern of obfuscation” by the lab

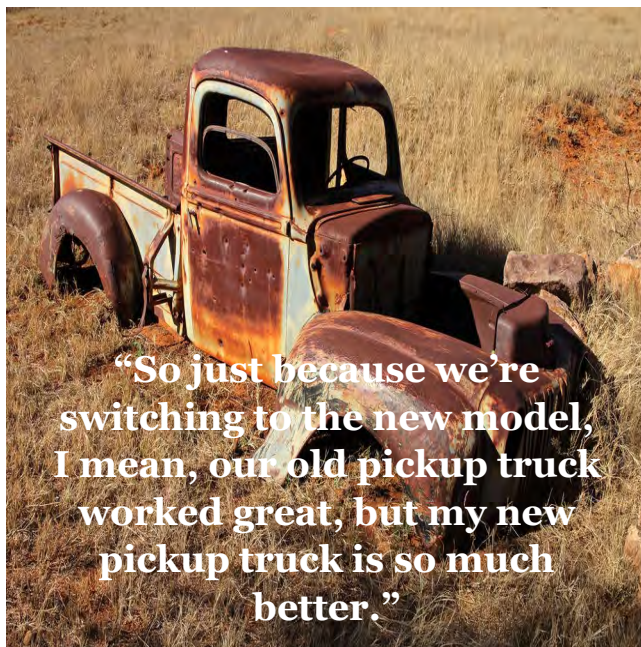
New York City’s crime lab has been a pioneer nationally in analyzing especially difficult DNA samples. But the recent disclosure of the source code for its proprietary software is raising new questions about accuracy. This story was originally published by *ProPublica*. ISPLA and INTELNET are grateful to *ProPublica* in allowing us to publish its September 5, 2017 article by Lauren Kirchner in its entirety.

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 FBI 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, Montana, and Floresville, Texas, which paid the lab \$1,100 per sample.

Now these DNA analysis methods are

under the microscope, with scientists questioning their validity, *ProPublica* has found. In court testimony, a former lab official said she was fired for 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 soft-



ware 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.

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 FBI 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 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 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.

The sample bore 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," Herskovic told ProPublica. "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 Herskovic to the attack on Patterson, who was blinded in his right eye. Neither the victim nor those who witnessed the crime identified Herskovic at trial, nor was he seen on surveillance video. Herskovic said he has

never been part of the Shomrim, and deplored the assault on Patterson.

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," 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."

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

For three decades, forensic DNA evidence has been a valuable tool in criminal investigations, incriminating or exonerating suspects. Matching a defendant's 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, Texas, and Washington, D.C. 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 FST in 1,350 cases over the past six. Cases in which both methods were used may be counted in both totals.

In February 2012, responding to a 911 call about gunshots near East Trem-

ont 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. 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 Morgan's DNA was a match. He was convicted.

Public crime labs assessing DNA evidence, including the FBI's lab, "amplify," or copy, the material 28 times to conduct their analysis. Under the high-sensitivity testing method developed by Theresa 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, 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," 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 Caragine and Adele 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 ra-

cial 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. Caragine and Mitchell testified in 2012 that about a third of all test results were favorable to defendants, by indicating that their DNA was probably absent.

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 FST as an "extremely powerful tool because it is devastating in court."

In December 2012, The New York Times profiled Mitchell and 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 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.

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, 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 FST’s accuracy. 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.”

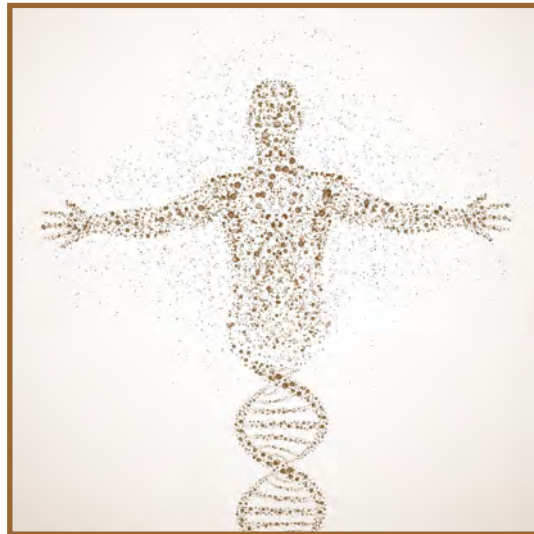
From 2012 to 2014, a hearing in Brooklyn before Judge Mark Dwyer focused on DNA evidence in two cases: it had been recovered from the handlebars of a bicycle after a shooting, and from the clothing of a sexual assault victim. With the help of testimony from Shapiro and some of the world’s most renowned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

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

Bruce Budowle, an architect of the FBI’s national DNA database, testified

that New York’s statistical methods were “not defensible.”

He said that 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 FST didn’t consider that different people in a mixture, especially family members, might share DNA.

In April 2013, weeks after testifying,

Caragine was forced to resign from the lab 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. Mitchell left in 2014. Caragine declined to comment for this article, and Mitchell did not respond to repeated requests for comment.

Perhaps the most dramatic testimony in the hearing came from Ranajit Chakraborty, who had developed the FBI’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 FST in 2010. What he had since learned about FST bothered him.

“What would your vote be today?” Jessica Goldthwaite, a lawyer for Legal Aid, asked 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 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, Scheck didn’t vote for either of the lab’s methods. His misgivings grew when he learned that the DNA sample used to convict 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.

At the October 2014 commission meeting, 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 Scheck's motion failed, it drew a vote from an unexpected supporter: 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 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 Mairs is now a prosecutor.

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

In February 2016, Stajic sued Dr. Sampson, Kupferschmid and the city for allegedly violating her First Amendment rights. The defendants' lawyer contends 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 FST's source code began with a few drops of cooking oil.

Kevin Johnson and his ex-girlfriend Octavia Martin shared custody of two sons, and he sometimes stayed

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over in her Bronx apartment. One night in April 2015, he was cooking cheeseburgers when some oil spilled. He and Martin argued about cleaning it up.

Her daughter got upset and called 911, telling the dispatcher that Johnson was pointing a gun at 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.

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

The lab found that one gun contained two people's DNA; by FST's calcula-

tion, it was 156 times more likely than not to contain 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," Adams wrote in an affidavit. Pending more rigorous testing, "the correctness of the behavior of the FST software should be seriously questioned." Characterizing Adams' criticisms as merely stylistic rather than substantive, the lab told ProPublica that FST

provided reliable calculations.

Technology consultants wrote the software code for 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 FST. "As a scientist, I can't say no."

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

Nevertheless, 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 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 FST on Jan. 1. A new chemical kit would make the additional amplification cycles of the high-sensitivity method unnecessary. The lab would retire FST in favor of STRmix, a commercially available and FBI-endorsed software program for DNA mixtures that dozens of public labs use.

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," Kupferschmid wrote in the memo. He added that the lab would raise the minimum sample size for testing to 37.5 picograms — almost twice the initial floor of 20 picograms.

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

Sitting at a table in his apartment in Williamsburg, 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 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 Patterson's sneaker was pivotal to the case against Herskovic. 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 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.

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 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," Aldea said. "This must be exposed."

CHEMERINSKY: What were the sleeper cases of the last SCOTUS term?

As Summer draws to a close, and as attention will soon shift to the October 2017 U.S. Supreme Court term—which looks to be filled with blockbuster cases—it is worth pausing and reflecting back on the stories that weren't told about October term of 2016. What were some of the "sleeper" cases that did not make the headlines of major newspapers, but will have a significant effect on legal practice? ISPLA will report on just one of the cases commented upon by Erwin Chemersky, a criminal law case of *Turner v. USA*. We previously reported on aspects of this criminal case to members of ISPLA. The information below was furnished to ISPLA by the ABA on September 7,

2017.

TURNER V. UNITED STATES

In *Brady v. Maryland* (1963), the court held that prosecutors have a constitutional duty to disclose potentially exculpatory evidence to criminal defendants. This requirement is echoed as an ethical duty for prosecutors in the American Bar Association's Model Rules of Professional Conduct and in every state's ethical code. Yet there is a serious problem with many prosecutors not complying with their obligations under *Brady*. Federal Judge Alex Kozinski of San Francisco-based 9th U.S. Circuit Court of Appeals, has declared: "There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it."

In recent years, the Supreme Court only rarely has taken up *Brady* issues. In *Turner v. United States*, the court considered and rejected a *Brady* claim, with the majority concluding that the defendants did not adequately show that they were prejudiced by the prosecution's withholding of information.

Seven men were convicted of the 1984 kidnapping, robbery and murder of Catherine Fuller in Washington, D.C. At trial, the government's theory was that Fuller, a mother of six, had been attacked by a large group of individuals. The key evidence was the testimony of two witnesses who confessed to participating in a group attack and cooperated with the government in return for leniency. Several other witnesses corroborated aspects of their testimony.

Many years after their convictions became final, the defendants learned

that the government had failed to disclose important, potentially exculpatory evidence. This included the identity of a man seen running into the alley after the murder and stopping near the garage where Fuller's body had already been found.

The Supreme Court, in an opinion by Justice Stephen G. Breyer, acknowledged that this evidence clearly would have been favorable to the defense, but it concluded that it was not "material" and therefore the convictions could stand. The court explained that "evidence is 'material' ... when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." After reviewing the evidence, the court concluded that there was not a "'reasonable probability' that the withheld evidence would have changed the outcome of petitioners' trial."

Justice Elena Kagan, joined by Justice Ruth Bader Ginsburg, wrote a powerful dissent. She said that the entire defense likely would have changed if the defendants knew of a possible alternative suspect. She wrote: "With the undisclosed evidence, the whole tenor of the trial would have changed. Rather than relying on a 'not me, maybe them' defense, all the defendants would have relentlessly impeached the government's (thoroughly impeachable) witnesses and offered the jurors a way to view the crime in a different light. In my view, that could well have flipped one or more jurors—which is all *Brady* requires."

The high court's decision in *Turner*

does not change the legal standard with regard to *Brady* violations, but it may make it more difficult to persuade courts that the prosecutor's failure to disclose evidence is "material." This may make it harder to deal with the epidemic of *Brady* violations described by Judge Kozinski and others.

Erwin Chemerinsky is dean of the University of California at Berkeley School of Law. He is an expert in constitutional law, federal practice, civil rights and civil liberties, and appellate litigation. He's the author of seven books, including The Case Against the Supreme Court (Viking, 2014).

PREDICTIVE POLICING GOES TO COURT

The Brennan Center for Justice went to court on August 30, 2017, to challenge the NYPD's refusal to produce crucial information about its use of predictive policing technologies. ISPLA received the following September 5 item from that organization prepared by Rachel Levinson-Waldman and Erica Posey.

The Brennan Center for Justice went to court on August 30, 2017, to challenge the New York Police Department's (NYPD's) refusal to produce crucial information about its use of predictive policing technologies. The hearing was the latest step in the Brennan Center's ongoing Article 78 Litigation against the police department to get information about the purchase, testing, and deployment of predictive policing software.

Black-box predictive algorithms are

increasingly in use in the criminal justice system, from bail and bond calculations to sentencing decisions to determinations about where and when crimes might occur and even who might commit them. These systems can be frustratingly opaque for anyone who wants to know how they work. The software is often sourced from private companies that fiercely protect their intellectual property from disclosure, and machine-learning algorithms can constantly evolve, meaning that outputs can change from one moment to the next without any explanation or ability to reverse engineer the decision process. Yet as these ubiquitous systems dictate more and more aspects of government, transparency as to their processes and effects is crucial. (Indeed, a recent bill introduced in the New York City Council would require just such transparency.)

In June 2016, the Brennan Center submitted a Freedom of Information Law (FOIL) request to the NYPD, seeking records relating to the acquisition, testing, and use of predictive policing technologies. Publicly available purchase records indicated that the City of New York had spent nearly 2.5 million dollars on software from Palantir, a known predictive policing software vendor. Predictive policing software typically relies on historic policing data, which can replicate and entrench racially biased policing. Combined with a lack of transparency and oversight, these systems may violate individual constitutional rights and evade community efforts to hold police accountable for their actions. The Brennan Center filed the FOIL request in the interest of educating the public

about the use of these systems and promoting a meaningful and well-informed public debate about the costs and benefits of these systems.

Just fifteen days after the Brennan Center filed the request, the department issued a blanket denial on the



grounds that “such information, if disclosed, would reveal non-routine techniques and procedures.” The Brennan Center this determination and received another cursory denial. Left with no other choice, the Brennan Center filed suit in December 2016; faced with legal action, the NYPD finally produced some responsive documents, showing that the department had built its own predictive policing system in-house. At the same time, the NYPD continued to ignore several significant parts of the request, including requests for records describing testing and utilization of the software; audit logs; and documents reflecting the NYPD’s policies and procedures for predictive policing. The Brennan Center thus continued to pursue its legal action against

the police department. As a show of good faith, the Brennan Center narrowed its request to exclude the predictive policing algorithm itself as well as the most recent six months’ worth of inputs into and outputs from the system.

At a recent hearing, attorney Ellison (Nelly) Merkel of Quinn Emanuel Urquhart & Sullivan, LLP, on behalf of the Brennan Center, detailed the NYPD’s “flippant approach” to FOIL disclosure. She noted that the NYPD provided only blanket denials until the Brennan Center filed suit, making it impossible to adequately assess the exemptions raised by the police department and forcing the Brennan Center to expend additional resources to obtain documents whose disclosure was required under the law. She urged the judge to compel the NYPD to supplement their disclosures to address the narrowed request for historical system data, and emphasized the importance of obtaining governing policies, technology audits, and data about testing and past usage, in order to shed light on the use, evaluation, accuracy, and impact of the systems. Merkel also noted the need to search the counterterrorism bureau for responsive documents; although the Domain Awareness System that houses predictive policing data was born out of the NYPD’s counterterrorism efforts, the NYPD had not looked to see if responsive documents existed within that bureau, potentially excluding additional disclosable items.

In response, the NYPD’s attorney intimated that it is standard practice for the NYPD to disregard FOIL requests until the requester gives up and files suit. She also defended the NYPD’s

use of FOIL exemptions to deny both the request and the appeal in their entirety; the fact that the NYPD produced responsive documents immediately upon the filing of the lawsuit, however, strongly indicates that the exemptions were applied indiscriminately in the first instance. The NYPD's lawyer also suggested that if historical data about inputs to and outputs from the algorithm were released, criminals could game the system and predict where police officers would be stationed. This claim is belied by the fact that the algorithm is regularly evolving, as the NYPD itself represented, and predictions change as new data emerges. The ongoing refinement of the model means that historical infor-

mation from even six months ago should be obsolete as far as replicating current results.

When it comes to FOIL, disclosure is the rule, not the exception. Citizens and watchdog organizations should not have to file lawsuits to get information about how law enforcement is allocating resources and policing the community. In the criminal justice system especially, predictive algorithms need to be carefully scrutinized to ensure that they are not entrenching systematized bias while laundering the evidence. Recent reporting suggests that the NYPD's relationship with at least one predictive policing software vendor, Palantir, has soured

in part because of high costs and data standardization issues. The information sought by the Brennan Center's FOIL request would help the public evaluate if predictive policing – whether in-house or outsourced – is a worthwhile use of police resources.

It is possible that this case will be resolved some time after September 13. ISPLA will be following it.

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CONFERENCE 2017

IASIR is pleased to announce that the Tennessee Department of Commerce and Insurance will host the 2017 Conference of the International Association of Security and Investigative Regulators Nov. 8-10 in beautiful Chattanooga, nestled along the banks of the Tennessee River and surrounded by picturesque mountains.

Hear from the man who wrote the plan for Walmart's "Black Friday" crowd management and other event security challenges. "Current Trends in Security in Sports and Entertainment Facilities: An Honest Conversation About Today's Environment" will be presented by Russ Simons, Chief Listening Officer and Managing Partner, Venue Solutions Group, Brentwood, TN.

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