

December 22, 2015

Gerry LaPorte
Director
National Institute of Justice
Office of Investigative & Forensic Sciences
810 7th Street NW
Washington, DC 20531
Email: Gerald.laporte@usdoj.gov

MSP Internal Affairs/Director of Professional Standards
http://www.michigan.gov/msp/0,4643,7-123-1579_1656_58970---.00.html

BY EMAIL and US MAIL

Re: Allegations of Serious Negligence or Misconduct in the Michigan State Police Forensic Science Division and the Paul Coverdell Forensic Science Improvement Grant Program

Dear Director LaPorte:

I write to inform you and to allege serious negligence or misconduct substantially affecting the integrity of forensic results at the Michigan State Police Forensic Science Division ("Crime Lab"). Recently, it has come to light that the Crime Lab management allows the Prosecuting Attorneys Association of Michigan to control its reporting in such a way that a misdemeanor charge under the Michigan Public Health Code can be elevated from a basic misdemeanor to a felony for the possession or manufacture of synthetic marijuana.¹ This suggests that the Crime Lab committed serious negligence or misconduct by virtue of compromising forensic science in order to allow a prosecutor in a case in Ottawa County to support a felony prosecution. This complaint is supported by emails that were obtained by the lawyer in the case are attached as Exhibit A. Other emails were obtained by the undersigned and are attached as Exhibit B. There is some overlap between the 2 exhibits.

If the allegations are true, they substantially affect the integrity of forensic results by literally altering the reporting of a forensic analysis to fit with the theory of an attorney prosecuting a case. This error may lead to the false convictions of Michigan citizens for a felony and generally undermines the faith in forensic science.

Under the Paul Coverdell Forensic Science Improvement Grant ("Coverdell") program, the Michigan State Police Internal Affairs (MSP IA) division has been designated to investigate allegations of serious negligence or misconduct at the Crime Lab, a laboratory receiving grant funding under the Coverdell program. As such, the MSP IA is required to investigate this allegation. I am sending this complaint to the email address that is on the MSP.gov website link.

The fact that the department is essentially investigating itself by virtue of this arrangement is of further concern to me. I do not hold the opinion that the internal affairs division of a police department has the will or capacity to investigate and recommend remedial measures for what appears to be institutional biases within the forensic science division. This is not an independent

¹ See article that led to discovery of error.

investigation. By its definition, the Internal Affairs office is not "external" as is required by the grant language.

I. The problem and its implications

The problem is the interference by the prosecuting attorneys association with the reporting of scientific results. It reflects a culture that the lab and its analysts are not scientists reporting forensic analyses dispassionately in court through testimony. Instead, it reflects a systematic top-down management of the reporting by the Prosecuting Attorneys Association through the MSP laboratory supervisors.

II. Other issues

The lab refused to report uncertainty in its results for blood alcohol analysis until it was ordered to do so in a district court case in 2011. Since then, the lab supervisors have been compromising and under-reporting uncertainty by failing to keep up with its accreditation standards under ISO 17025 as well as the guidelines set forth by SWG-TOX. Supervisors has misapplied statistical calculations and failed to fully inform themselves of the appropriate calculations, relying instead on conversations with teachers at conferences. One should know why they do what they do in formulating critical procedures as opposed to simply thinking that they know how to do what they do.

The lab also failed to analyze and scientifically establish a limit of detection and limit of quantitation for analytes such as THC. This omission is negligent and has a major impact on the justice system because Michigan jurisprudence criminalizes the presence of "any amount" of a schedule I substance in an operator's system while driving unless the alleged driver is a medical marijuana patient. The lab protocol has led to cases in which noise in the instrumentation is reported as the presence of the analyte. When the legal threshold is "any," these errors make people who may not be guilty convicted of vehicle code offenses for which they can never seek an expungement under the state expungement provisions.

III. Safeguards

The lab in this situation could have simply reached out with documentation to various standardization and accreditation entities such as the SWG-DRUG or even its own accreditation agency, ASCLAD-LAB. Ultimately, the lab must be made an independent entity and brought out from underneath the very law enforcement agency that collects the evidence and seeks prosecution: the Michigan State Police. The lab has declined to recognize limitations in its methodology and institutional bias. Because of that, the lab has allowed this culture of assisting prosecutors to attain convictions to fester.

V. The Required Statutory Response to Allegations

The allegations mandate specific action under the Paul Coverdell Forensic Science Improvement Grant Program, from which the Crime Lab receives funds. As a precondition to receive funding, each applicant was required to furnish:

A certification that a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system,

medical examiner's office, coroner's office, law enforcement storage facility, or medical facility in the State that will receive a portion of the grant amount.²

Congress initiated the grant program in 2000 which, since 2002, has provided states with a fertile source for forensic laboratory funding. The money is intended "to improve the quality and timeliness of forensic science and medical examiner services, and to eliminate backlogs in the analysis of forensic evidence, including controlled substances, firearm examination, forensic pathology, latent prints, questioned documents, toxicology and trace evidence."³

The grants play a central role in virtually all states' forensic laboratory funding.⁴ The Department of Justice's National Institute of Justice (NIJ), a division of the DOJ's Office of Justice Programs (OJP), administers the Coverdell grants. The NIJ disbursed \$236,000.00 to the lab.

According to Crime Lab's most recent Coverdell application, the Crime Lab has named the MSP IA to provide independent and external oversight in keeping with the Coverdell requirement.⁵ As such, the MSP IA is responsible for conducting investigations under the parameters of the Coverdell certification requirement.

VI. Scope of the Investigations

The federal government has long recognized its duty to the public to identify and remedy the causes of catastrophic errors. For example, when an airplane crashes or a train derails, the National Transportation Safety Board (NTSB) immediately conducts an investigation into the causes of the incident and makes recommendations. Such investigations enable the government to figure out what went wrong and, even more importantly, what can be done to correct the problem and prevent it from happening again. Congress realized the benefit of the approach, and with its passage of the Justice for All Act of 2004 (JFAA) and the attendant changes to the Coverdell granting process, it brought this model to the nation's forensic entities. As the office for fielding Coverdell Program allegations connected with the Crime Lab, the MSP IA is responsible for investigating these allegations for the benefit of MSP IA and the criminal justice system at large.

The process the MSP IA utilizes when it conducts this investigation is a crucial consideration, as well. The U.S. Government Accountability Office has developed standards for sound audits⁶ like the one I am requesting, and the MSP IA investigation will have the resonance and impact that Congress intended if it adopts the spirit of the GAO's recommendations. With that context in mind, I would ask the State Police to:

- (1) identify the source of the alleged problems;
- (2) identify whether there was serious negligence or misconduct;
- (3) describe the method used and steps taken to reach the conclusions in parts 1 and 2;

² 42 U.S.C. § 3797k (4) (2004).

³ A description of the funding stream is available on the National Institute of Justice's Web site, at <http://www.nij.gov/nij/topics/forensics/lab-operations/capacity/nfsia/welcome.htm>.

⁴ See U.S. Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, "Review of the Office of Justice Programs' Forensic Science Improvement Grant Program," (December 2005), available at <http://www.usdoj.gov/oig/reports/OJP/e0602/final.pdf>.

⁵ See the relevant certification within the [State] [FY] Coverdell application, attached.

⁶ See "Government Auditing Standards: January 2007 Revision," available at <http://www.gao.gov/govaud/d07162g.pdf>. See sections 3.01-3.39

- (4) identify corrective action to be taken;
- (5) where appropriate, conduct retrospective re-examination of other cases which could have been affected by the same problem;
- (6) conduct follow-up evaluation of the implementation of the corrective action, and where appropriate, the results of any retrospective re-examination;
- (7) evaluate the efficacy and completeness of any internal investigation conducted to date;
- (8) determine whether any suggested laboratory protocol change might also benefit other laboratories within its investigatory jurisdiction; and
- (9) present the results of Parts 1-8 in a public report.

Any corrective action must not result exclusively in blame of a particular person for a particular act, but instead should determine the underlying causes of the act via "root cause analysis," the purpose of which is to solve problems by correcting or eliminating root causes, as opposed to merely addressing immediately obvious symptoms.

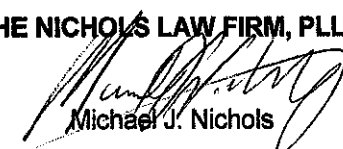
VIII. The Importance of This Investigation

The importance of this investigation is vital. Without accountability the lab has no check to try to ensure quality assurance practice are followed and not just discussed to the public via general statements and in court. A series of emails are available that show how the interplay between the PAAM and lab analysts led to changes to a protocol for reporting marihuana that did not appear to follow a proper scientific procedure or guidelines set forth by reference bodies such as SWG-DRUG.

We are thankful that Congress has made it possible for the MSP IA to investigate this allegation. We expect that public concern will be alleviated by knowing the MSP IA is involved in ensuring that Congressional intent is fulfilled for the good of The People of the State of Michigan and the criminal justice system at large. I ask that the MSP IA investigate the circumstances described above as promptly as possible and release its resulting findings without undue delay.

Very truly yours,

THE NICHOLS LAW FIRM, PLLC


Michael J. Nichols

Enclosure