NATIONAL COMMISSION ON FORENSIC SCIENCE

National Institute of Standards and Technology
U.S. Department of Commerce

Recommendations to the Attorney General Regarding Pretrial Discovery

Subcommittee
Reporting and Testimony
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Overview

The need for pretrial discovery of forensic evidence in criminal cases is critical—for both the prosecution and defense—because "it is difficult to test expert testimony at trial without advance notice and preparation."[1] Indeed, in a number of the cases in which convicted defendants were subsequently exonerated by DNA testing, the failure to disclose exculpatory forensic evidence played a role in the wrongful convictions.[2] There also are other benefits to comprehensive discovery. Even in the case of DNA, according to President Bush's DNA Initiative, "[e]arly disclosure can have the following benefits: [1] Avoiding surprise and unnecessary delay. [2] Identifying the need for defense expert services. [3] Facilitating exoneration of the innocent and encouraging plea negotiations if DNA evidence confirms guilt." These benefits likewise apply to other forensic evidence. Nevertheless, notwithstanding the great need for pretrial disclosure, discovery regarding forensic evidence intended to be offered in criminal cases is not required to be nearly as expansive as in civil litigation. Historically, this disparity has been justified on three grounds: substantial pretrial discovery in criminal actions will (1) encourage perjury, (2) lead to the intimidation of witnesses, and (3) be a one-way street because of the Fifth Amendment privilege against self-incrimination.[3] With forensic evidence, however, these traditional arguments against criminal discovery lose whatever force they might otherwise have. The first argument fails because "it is virtually impossible for evidence or information of this kind to be distorted or misused because of its advance disclosure."4[4] Also, there is no evidence that the intimidation of experts is a major problem, perhaps because the evidence can often be reexamined by another expert.[5] Finally, the Self-incrimination Clause, as presently interpreted by the Supreme Court, is not an impediment to the prosecution's obtaining pretrial discovery regarding forensic science the defendant intends to offer.[6]

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[1] Fed. R. Crim. P. 16 (1975), advisory committee's note.
[2] *See* Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 108 (2011).
[3] *See* 2 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 252, at 36-37 (2d ed. 1982).
[4] Commentary, ABA Standards for Criminal Justice, Discovery and Procedure Before Trial 67 (Approved Draft 1970).
[5] 2 Wayne LaFave & Jerod Israel, Criminal Procedure § 19.3, at 490 (1984) ("Once the report is prepared, the scientific expert's position is not readily influenced, and therefore disclosure presents little danger of prompting perjury or intimidation.").
[6] *See* Williams v. Florida, 399 U.S. 78, 85 (1970) ("At most, the [discovery] rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to

The following recommendations are in accord with the Views Document on Discovery adopted by this Commission on August 11, 2015.

Recommendations

The National Commission on Forensic Science recommends that the Attorney General take the following action(s):

- **Recommendation #1: The Attorney General should direct federal prosecutors when they intend to offer expert testimony on forensic science test results and conclusions to provide to the court and defense counsel, reasonably in advance of trial, a report prepared by this expert that contains:**
  - **(i) a statement of all opinions the witness will express and the basis and reasons for them;**
  - **(ii) the facts or data considered by the witness in forming them;**
  - **(iii) any exhibits that will be used to summarize or support them;**
  - **(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;**
  - **(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition7[7]; and**
  - **(vi) a statement of the compensation to be paid the witness.**

With minor modifications, this recommendation tracks Federal Rule of Civil Procedure 26(a)(2)(B), which provides for greater discovery than Criminal Procedure Rules 16(a)(1). The limited discovery provided by Rule 16 is particularly inadequate in forensic evidence cases because it fails to provide the detail necessary to test the witness's conclusions or even to clearly identify what the witness's testimony will be.

- **Recommendation #2: The Attorney General should direct federal prosecutors to allow the defendant full access to the expert's case file *provided* the defendant agrees, in writing, that if the defendant intends to introduce expert forensic testimony, the defendant will produce, reasonably in advance of trial, a report prepared by an expert retained by the defense meeting the above requirements, as well as providing similar access to the defense expert's case file.**

Depositions—which may be considered the most powerful discovery mechanism in civil litigation—are not permitted in federal criminal cases.[8] (Depositions are limited to the preservation of testimony.) This recommendation does *not* include discovery depositions. Instead, access to the expert's underlying case file is proposed in order to mitigate the absence of discovery depositions.

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divulge at trial."); United States v. Nobles, 422 U.S. 225, 234 (1975) (compelled production of defense investigator's notes does not violate Fifth Amendment because it involved no compulsion of the defendant).

[7] This provision is intended to be prospective.

[8] Federal Criminal Rule 15 permits the use of depositions to preserve the testimony of witnesses if they may be unavailable for trial. In other words, a party may depose its own witnesses but not the opposing party's witnesses. It is not a discovery rule. A few states, such as Florida, do provide for discovery depositions.