

# Forensic Science in the Courts

NCFS

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What is the role of the court in an age of developing science?

To make determinations in a manner that will promote public trust and confidence in the judicial system.

Today we are going to discuss both the current problems with science in the courts and how to make decisions on issues of science in a manner that promotes public trust and confidence..

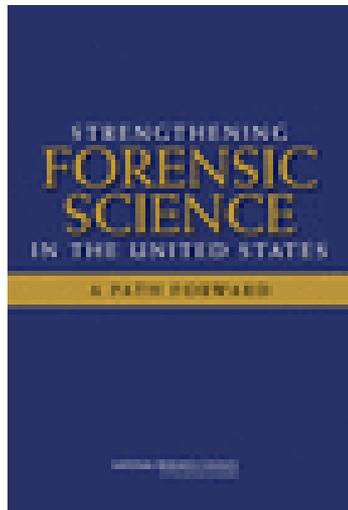
How will we do that?

# PRESENTER

- David J. Waxse
- U.S. Magistrate Judge
  - District of Kansas
- Past Chair of the Judicial Division of the ABA

# **The National Academy of Sciences Report on Forensic Sciences: What it Means for the Bench and Bar**

# “Strengthening Forensic Science in the United States: A Path Forward” (2009)



“with the exception of nuclear DNA analysis, . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source

# Reasons for the unreliability of forensic science.

The paucity of scientific research to confirm the validity and reliability of forensic disciplines.

# Reasons for the unreliability of forensic science.

The paucity of research programs on human observer bias and sources of human error in forensic examinations;

# Reasons for the unreliability of forensic science.

The absence of scientific and applied research focused on new technology and innovation;

# Reasons for the unreliability of forensic science.

The lack of autonomy of crime laboratories;

# Reasons for the unreliability of forensic science.

The absence of rigorous, mandatory certification requirements for practitioners;

# Reasons for the unreliability of forensic science.

The absence of uniform, mandatory accreditation programs for laboratories;

# Reasons for the unreliability of forensic science.

The failure to adhere to robust performance standards;

# Reasons for the unreliability of forensic science.

The failure of forensic experts to use standard terminology in reporting on and testifying about the results of forensic science investigations;

# Reasons for the unreliability of forensic science.

The lack of effective oversight; and

Reasons for the unreliability of forensic science.

A gross shortage of adequate training and continuing education of practitioners.

What has happened since the  
release of the report?

# **The Role of the Courts in an Age of [Re]developing Science and Technology**

The role of Daubert in Criminal Cases

Harvard Professor Nancy Gertner , formerly a Federal Judge in Boston, discussed the report in her Procedural Order: Trace Evidence entered in 08-cr-10104-NG on March 8, 2010. She stated:

While the [NAS] report does not speak to admissibility or inadmissibility in a given case, it raised profound questions that need to be carefully examined in every case prior to trial:

# How Did We Get Into Such a Mess?

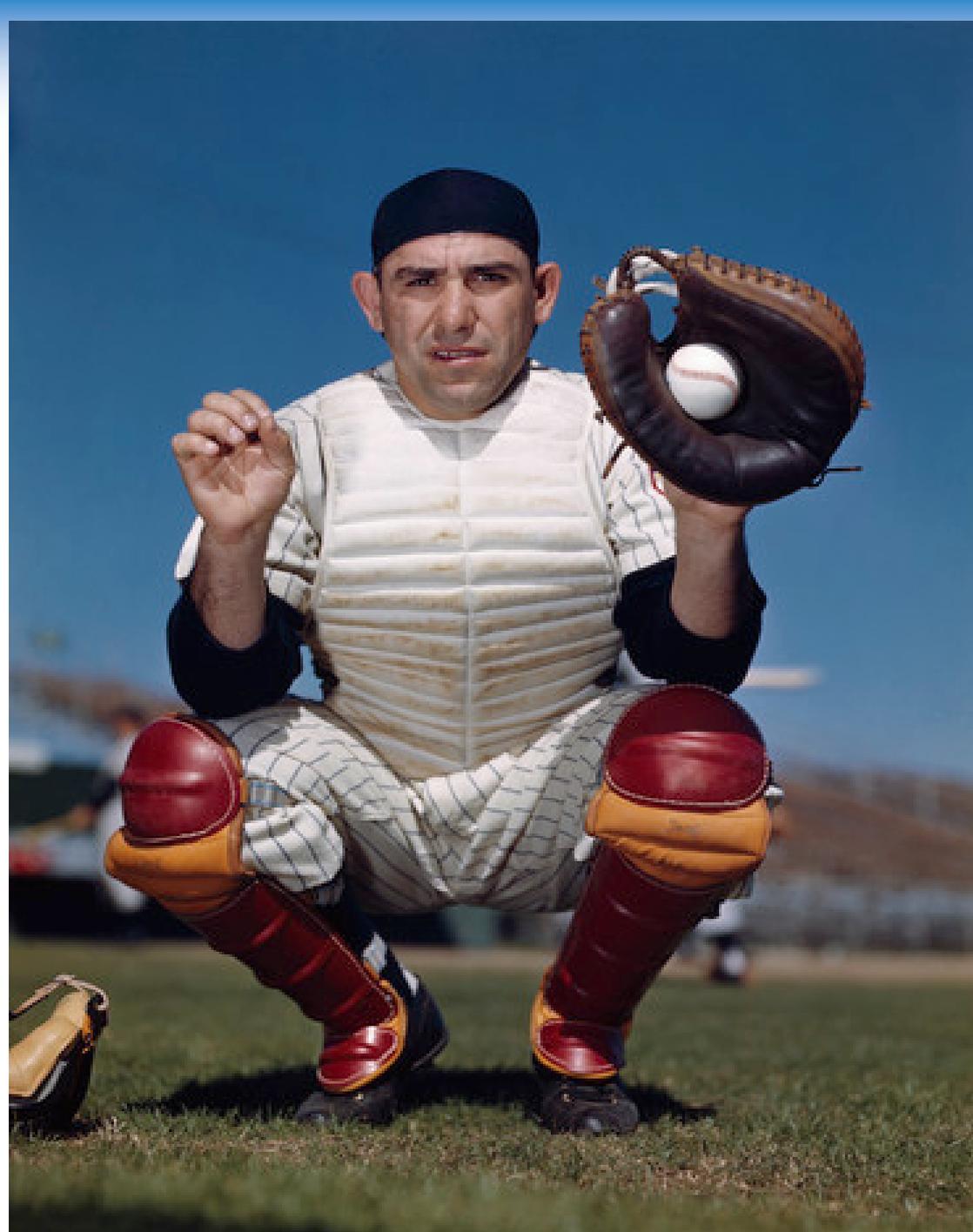
- Popular culture: scientific detectives
- Evaluating empirical/scientific claims is not a strength of lawyers and judges
- Most forensic science fields were admitted in the absence of any legal test
- Pseudo-precedential habits of mind
  - We've let it in for so long it *must* be valid
  - Presumption of validity
- Deferential standard of review

# What Can We Do to Improve?

- Admission depends upon satisfaction of 702 and the Daubert Trilogy (or state variants)
- Apply the law
  - “Everything old is new again”
  - “Though... the Daubert factors are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion.” (Scalia concurrence)
- Forensic science fields will improve to the extent courts require them to

If it is too painful to follow the law to unfamiliar results, then place limits:

- Partial admission
  - Allow description but prohibit conclusions
- Require “masked” examination
- Prohibit overpowering and misleading terminology
- Confine expert witnesses within the bounds of validated knowledge



“Are you gonna get any better, or is this it?”



# The American Bar Association

# ABA

- WHAT IS IT?
- WHAT DOES IT DO?
- HOW DOES IT FUNCTION?
- HOW IS IT STRUCTURED?

# WHAT TO DO

- EDUCATE THE BENCH
- AND BAR
- DEVELOP POLICY AND PROGRAMS TO DO THAT

WHETHER OR NOT WE CAN DO  
THAT

- IT IS THE RIGHT THING  
TO DO!