

**BEFORE THE
COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCILMEMBER CHARLES ALLEN, CHAIRMAN**



PUBLIC HEARING

on

**Bill 24-0838, the “Restoring Trust and Credibility to Forensic Sciences
Amendment Act of 2022”**

**STATEMENT OF ELANA SUTTENBERG
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UNITED STATES ATTORNEY’S OFFICE FOR THE DISTRICT OF COLUMBIA**

Thursday, June 30, 2022, 9:30 a.m.

Virtual Hearing via Zoom

Chairman Allen and Members of the Council:

My name is Elana Suttenger, and I am the Special Counsel for Policy and Legislative Affairs at the United States Attorney's Office for the District of Columbia (USAO-DC). I am accompanied today by my colleague, Lisa Kreeger-Norman, Special Counsel for DNA and Forensic Evidence Litigation, who is available to assist in answering the Committee's questions. I am also accompanied by three experts in the field of forensic sciences, James Carroll, Todd Weller, and Dr. Bruce Budowle, who have served as an independent audit team jointly hired by USAO-DC and the D.C. Office of the Attorney General (OAG-DC). James Carroll is a forensic scientist with 24 years of experience in the analysis of firearm and ammunition evidence, who is currently serving as the assistant director of one of the largest fully accredited crime laboratories in the United States, with extensive experience in crime laboratory management and quality assurance. Todd Weller is a forensic scientist with 22 years of experience, including casework in the drug chemistry, crime scenes, DNA, and firearm disciplines, the former Chair and current Vice Chair of the Organization of Scientific Area Committees Firearms and Toolmarks Subcommittee. Dr. Bruce Budowle has approximately 40 years of experience in the forensic field, including service as a Commissioner on the Texas Forensic Science Commission and Director of the Center for Human Identification. We thank you for the opportunity to appear at today's public hearing on Bill 24-0838, the "Restoring Trust and Credibility to Forensic Sciences Amendment Act of 2022."

At the outset, I want to credit my colleagues at USAO-DC for being the first to recognize an issue at the D.C. Department of Forensic Sciences (DFS) and to elevate it both within our office and outside of our office. To be clear, the *only* reason that the public is aware of these issues at DFS is because prosecutors at USAO-DC recognized exculpatory evidence, appreciated that this evidence stemmed from a significant issue at DFS, and committed themselves to investigating and addressing the root causes of these issues. These prosecutors are to be commended for their integrity and commitment to justice on behalf of District residents.

Soon after USAO-DC's discovery of these issues, we collaborated with OAG-DC, hiring an independent audit team comprised of three of the top forensic scientists in the country. As this Committee is aware, the findings of that audit team ultimately brought to light serious issues within DFS. Those issues were confirmed and expanded upon by the audit completed by SNA International (SNA) at the request of DFS.

We also want to ensure that this Committee and the community are aware of the expenditures that USAO-DC has undertaken to ensure the reliability of evidence in pending criminal cases by outsourcing evidence to outside labs for forensic testing. Historically, even before these recent issues arose at DFS, USAO-DC has outsourced cases to outside labs for various reasons—including, for example, to conduct a type of DNA testing that DFS does not perform, such as YSTR DNA testing or mitochondrial DNA testing; to DNA test on additional items of evidence; to test DNA at a rate faster than DFS can accommodate; to consolidate forensic testimony from multiple experts to one expert; or, in the case of a *Daubert* hearing expert, to obtain extremely qualified experts who have impact and work beyond DC and DFS. Additionally, where DFS outsources forensic testing—such as DNA and firearms testing—USAO-DC pays the substantial costs associated with expert preparation for trial and expert

testimony at trial.¹

Costs that USAO-DC has incurred to outsource testing (and accompanying expert testimony, if a case proceeds to trial) have significantly increased in recent years, particularly for firearms experts and fingerprint experts. The costs below are current as of June 15, 2022.

Below is a breakdown of USAO-DC obligated contracts to outsource firearms examination and expert testimony, by the original fiscal year of the contract:

Fiscal Year	Amount Paid	Amount Obligated
2018	\$125,371.02	\$192,393.52
2019	\$85,099.62	\$153,192.77
2020	\$459,783.06	\$608,248.06
2021	\$471,640.56	\$814,523.35
2022	\$154,294.86	\$723,485.11
Grand Total	\$1,296,189.12	\$2,491,842.81

Below is a breakdown of USAO-DC obligated contracts to outsource fingerprint examination and expert testimony, by the original fiscal year of the contract:

Fiscal Year	Amount Paid	Amount Obligated
2018	\$9,726.98	\$11,826.98
2019	\$5,416.27	\$5,416.27
2020	\$0	\$0
2021	\$178,962.74	\$320,716.35
2022	\$25,459.64	\$128,453.39
Grand Total	\$219,565.63	\$466,412.99

Below is a breakdown of USAO-DC obligated contracts to outsource DNA examination and expert testimony, by the original fiscal year of the contract:

Fiscal Year	Amount Paid	Amount Obligated
2018	\$460,785.89	\$861,724.27
2019	\$480,829.38	\$1,152,867.39
2020	\$286,686.15	\$757,926.74
2021	\$307,276.34	\$678,513.60
2022	\$69,087.49	\$618,621.89
Grand Total	\$1,604,665.25	\$4,069,653.89

¹ The SNA report noted the following with respect to outsourcing: “In 2020, the FBU released more reports from the casework that was outsourced to commercial vendors for testing than from the casework they processed in-house (1066 vs. 635). At the time of SNA’s assessment, the FBU had a total of 14 individuals that were regularly proficiency tested for continued casework competency: 1 technical reviewer, 2 technicians, and 11 reporting analysts. The DFS should have the capacity to address all of its customers’ forensic biology service requests in-house. While outsourcing is acceptable when there are surges in casework or to satisfy customers’ requests for specialized services (e.g., genetic genealogical and mitochondrial DNA analyses, respectively), it is easier for the client to have their casework processed by one laboratory. The coordination of discovery and courtroom testimony is streamlined when the customer uses one laboratory.” See SNA International, *DC Department of Forensic Sciences Laboratory Assessment Report*, at 48 (Dec. 8. 2021).

As to the bill under consideration today, we appreciate the Committee’s attention to the significant issues at DFS, and our shared desire to chart a path forward for DFS. We all want to ensure that the District is served by a forensics lab of the highest quality and integrity, and legislation is an important part of working toward that goal.

Our testimony today will focus on certain key issues in the bill that relate to prosecutions in the District. In addition to the concerns highlighted in our testimony, there are additional concerns related to appropriate management structures in a forensics laboratory, or to best practices for a forensics laboratory. We defer on these questions to the expertise of the USAO-DC/OAG-DC independent audit team, as they have significant experience in managing high-quality labs.

Accountability to Customers

We recommend that the statute make a change to clarify the Laboratory’s relationship with customers.² In this context, customers include the agencies that the Laboratory provides services to pursuant to D.C. Code § 5-1501.06(b) and (c). Whether or not the Laboratory is deemed independent, prosecutors are the gatekeepers for seeking the admissibility of forensic evidence at trial, and must have full and timely access to all necessary materials from the Laboratory, both to ensure that the evidence we seek to introduce is reliable and to ensure that we have complied with all of our discovery obligations to defense counsel. Accordingly, it is fundamental that the Laboratory be accountable to its customers, including prosecutors. To highlight the importance of this duty, we propose adding a new subsection to D.C. Code § 5-1501.02(b) to clarify that the mission statement of the Laboratory includes “a commitment to timely response and accountability to customers.”

Powers and Duties of the Laboratory

The bill proposes adding the following statutory language: “When evidence is submitted to the Laboratory for forensic analysis, the Laboratory shall make all efforts to ensure that extraneous and potentially biasing information is removed before dissemination to the assigned forensic unit. Unless strictly necessary for carrying out the testing, this includes information that specifically identifies the crime or charge being investigated, the victim, or any suspect currently under investigation.” *See* Proposed Amendment to D.C. Code § 5-1501.06(b-1). We agree that it is important that the Laboratory consider potentially biasing information, and develop procedures to account for that. This proposed language, however, would remove the Laboratory’s ability to access information that could more efficiently guide the testing process and ensure quality control within the Laboratory. This may include information both related to the crime or charge being investigated, and the name(s) or any victim(s), witness(es), or suspect(s).

² Notably, in its macro root cause analysis, “SNA identified ten root causes of the issues that led to the withdrawal of accreditation.” The first root cause identified was: “There was an absence of clear, relevant, descriptive expectations regarding customer service. Executive Leadership did not appear to adequately prioritize customer service as an essential part of the DFS core mission.” One of the other root causes identified was: “Executive Leadership may have misinterpreted the concept of laboratory independence resulting in not maintaining the required levels of accountability to their customers.” *See* SNA International, *DC Department of Forensic Sciences Laboratory Assessment Report*, at ES 2 (Dec. 8, 2021).

Rather than legislating one discrete aspect of the Laboratory’s testing process, we recommend that the Laboratory develop and implement its own procedures to shield examiners from potentially biasing information. The Laboratory should identify task-irrelevant information that could create bias and impact the interpretation of forensic evidence, and develop policies to address and document exposure to such information. This recommendation is consistent with the recommendation of the USAO-DC/OAG-DC audit team. It is crucial that the Laboratory have access to certain information about the crime or charge being investigated. Particularly in a large-scale investigation, crime scene technicians will collect numerous items of evidence. It is simply not possible to forensically test all items of evidence recovered, and may not be warranted. Context-specific information necessarily is required to make forensic examinations focused and efficient. Further, the identities of the victim(s), witness(es), or suspect(s), including their names, may be an important part of the processing of evidence, and removal of those names may lead to inefficiencies in evidence processing and chain-of-custody concerns.

The bill also proposes providing discovery directly to the defense, at the same time that the discovery is provided to the prosecution. *See* Proposed Amendment to D.C. Code § 5-1501.06(h)(2A). Consistent with our constitutional, ethical, and rule-based discovery requirements, we provide defense with fulsome discovery, and discovery from the Laboratory should be provided to the defense in the same manner that discovery is provided in other contexts. How and when the results of forensic analyses and underlying documentation are disclosed to the defense is a wholly separate issue from the structure, reliability, and accountability of the Laboratory—and should be stricken from this bill. Discovery is governed by Rule 16 of the Superior Court Rules of Criminal Procedure, as well as by other constitutional principles and orders of the court. This bill should not be the occasion to alter the discovery rules and practice.

Science Advisory and Review Board Membership

This bill proposes several changes to the Science Advisory Board in D.C. Code § 5-1501.11, including renaming it to the Science Advisory and Review Board. We support the bill’s proposal to require Board members with experience in each of the forensic disciplines. At the same time, we have some recommendations to make this Board more effective.

First, the bill proposes that one member of the Board have “experience in criminal prosecution or defense.” USAO-DC recommends that this one Board position be converted to two Board positions, such that one member of the Board must have “experience in criminal prosecution” and that one member of the Board must have “experience in criminal defense.” Ensuring that the Board hears both perspectives will contribute to the fairness of the Board’s decisions. Prosecutors typically work directly with both the Laboratory and outside laboratories, whereas defense counsel typically work directly with outside laboratories who they hire as independent experts. It would be valuable for the Board to have the expertise of both of these perspectives, both to benefit from their varying experience in the criminal justice system and their experience in working with different laboratories. In addition to these two Board members with legal experience, it would be prudent for the Board to have a permanent general counsel who can handle operational issues and resolve certain legal questions for the Board.

Second, the bill proposes that one member of the Board have “expertise in human factors or statistical analysis.” Notably, the fields of “human factors” and “statistical analysis” are two different fields, and it is unlikely that one person would have valuable expertise in both fields. Rather, experts in the individual forensic disciplines can incorporate their knowledge of human factors as applied to their forensic disciplines. USAO-DC recommends that, rather than requiring one Board member with this broad background, the Board have authority to hire an outside expert when the Board would benefit from expertise in a targeted area to address a particular issue, concern, or question. Such expertise could include expertise in human factors or statistical analysis. By having authority to hire an independent expert, the Board can draw from the expertise of multiple individuals who are highly qualified, and allow the Board to receive the most targeted and appropriate guidance possible.³

Functions of the Science Advisory and Review Board

The bill mandates certain functions to the Science Advisory and Review Board. USAO-DC supports providing the Board with a structure that would help to ensure that future concerns raised by stakeholders can be addressed by the Board, but also wants to ensure that the Laboratory has sufficient authority to conduct its own routine oversight and quality assurance.

The bill requires the Board to, among other things: “Review and investigate all self-disclosures, complaints, or allegations of professional negligence, misconduct, misidentification, or other testing errors that occurred in the provision of forensic science services or public health laboratory services at the Laboratory.” *See* Proposed Amendment to D.C. Code § 5-1501.12(1A). While we are not opposed to providing the Board a greater role in oversight and accountability of the Laboratory, we are concerned that this broad mandate will be unworkable in practice. These concerns are consistent with the concerns of the USAO-DC/OAG-DC audit team.

It is important that the Laboratory be given the first opportunity to investigate problems and implement corrective action for lower-level concerns, so that the Laboratory can target the root causes of those concerns closer in time to their occurrence, and with the specialized knowledge of the policies, procedures, employees, and daily workings of the Laboratory. Thus, the quality assurance team at the Laboratory should have authority to conduct initial quality assurance for most issues, and this quality assurance role should not be outsourced to the Board.⁴ Further, the Board will not have the resources, manpower, or specialized knowledge to investigate every quality assurance issue. At the same time, it is important for the Board to have

³ In addition, there are some remaining questions to resolve about mayoral appointees, including whether a Board member can be reappointed after completing a 3-year term, and whether and how a Board member could be removed from the Board, including what cause could justify removal. There are also some remaining questions to clarify about funding sources for the Board, including whether the Board or the Laboratory has control over the Board’s funding requests, and whether the Board would be permitted to use funding for purposes such as hiring outside experts to advise the Board.

⁴ It is axiomatic that, for the Laboratory to obtain and maintain accreditation, it will need to have a quality assurance manager and a quality assurance management program. *See Conformity assessment—Requirements for the operation of various types of bodies performing inspection*, International Organization of Standardization (ISO) /International Electrotechnical Commission (IEC) 17025:2017 and the American National Standards Institute (ANSI) American National Accreditation Board (ANAB), Standard AR3125, 2012. As we have maintained, it is crucial that the Laboratory views accreditation as a floor—not as a ceiling—to reliability.

a mechanism to address and investigate more serious concerns, and for the Board to be able to review the corrective actions taken by the Laboratory. The Board could also be a place for external stakeholders to raise their concerns when the Laboratory has failed to address those concerns. The Board's review of the Laboratory under proposed D.C. Code § 5-1501.12a should focus on whether the complaint or issue raised calls into question the integrity and reliability of the Laboratory's processes, procedures, or results. The Board's review should focus on allegations of serious misconduct or dishonesty, and provide a layer of accountability to the Laboratory where such concerns are present.⁵

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In summary, it is crucial that the Laboratory undergo reforms so that we, as prosecutors and the community, can have confidence in the reliability of their forensic analyses. As scientists, the Laboratory should be charged with self-identification, self-disclosure, and accountability. As a forensics laboratory, the Laboratory should be both transparent to stakeholders and willing to hold itself accountable. We look forward to continuing to work with the Council, the Laboratory, and our criminal justice partners so that the District can be served by a forensics lab of the highest quality and integrity.

⁵ USAO-DC also recommends several additional changes to the bill. First, the Board should be required to communicate its decision under proposed D.C. Code § 5-1501.12a(3) regarding certain allegations to the complainant, the Director of the Laboratory, and the Stakeholders Council. Second, the Board should have authority to take actions proactively where appropriate, for example, to address gaps in the quality of work or technical capabilities. Third, while it is appropriate for the Board to have oversight and provide accountability to the Laboratory, the Laboratory should have some ability to take its own action. For example, the Board should not have to approve all Laboratory protocols before implemented, as the Laboratory may need to make some decisions and implement protocols relatively quickly. As a further example, the Board should not be required to make recommendations on competency and proficiency "biannually," but should rather have the authority to make these recommendations "as needed." Fourth, following any appropriate redactions, minutes prepared by the Board pursuant to D.C. Code § 5-1501.11(g) should be made available to the public, including to members of the Stakeholder Council. Fifth, we recommend adding a new subsection to D.C. Code § 5-1501.04 to clarify that the Director of the Laboratory "be well-versed in all of the quality management knowledge requirements, to include but not limited to (a) Federal Bureau of Investigation's Quality Assurance Standards, (b) ANAB accreditation standards, and (c) International Organization for Standardization (ISO) 17025." Sixth, we recommend a technical update throughout the statute, replacing the words "computer forensics" with "digital evidence." Seventh, we recommend that the statute clarify that even where the Laboratory has authority to perform a designated act, other agencies are not precluded from performing those acts when appropriate. Finally, we urge the Council to consider including dates of completion and attach them to various benchmarks so that implementation of this legislation moves forward with deliberate speed.