ATTORNEYS AT LAW

December 31, 2019

Via Email & First Class Mail

Governor Gretchen Whitmer
P.O Box 30013
Lansing, Michigan 48909

Dear Governor Whitmer:

I write to request that you exercise your authority as Governor to remediate a problem in our criminal justice system by re-organizing a department and ordering the removal of the forensic science division from the Department of State Police (MSP). Recently it was discovered that a combination of misleading witness testimony and evidence that was withheld from a citizen on trial (and his jury) for the charge of Operating with a High Bodily Alcohol Content (OWHBAC) led to an improperly-obtained conviction, a subsequent order for a new trial, and the discovery of information that should have been disclosed to defendants throughout the state.

In this case, *City of Lansing v Reynolds,* one of the supervisors (Geoff French) from the MSP toxicology unit testified that he was "100% confident" in his results. That testimony was presented to a jury despite the fact that the gentlemen's blood sample had been run through a batch at least two times prior to the final "acceptable" test which the supervisor told the prosecutor was the evidence in the case.

An Assistant Lansing City Attorney represented in court that she was never told of the problems that I try to summarize below. I frankly believe her and I find the failure to disclose to be nothing more than a cover-up by the lab's team. However, it is important to point out that the source of this failure to disclose in my opinion is that the lab's staff all work for the MSP. The MSP executive team can deny all they want that they do not work hand-in-hand with prosecutors in gaining convictions but you need look no further than the over half-dozen announcements every year about MSP/PAAM coordinated training that is ONLY available to prosecutors on how to *persuade* juries in court.

This is what we learned AFTER the jury's verdict but before the sentencing through the Freedom of Information Act and the power of the subpoena issued via the judge's order for an evidentiary hearing.

The lab had shut down blood alcohol testing for approximately ten days in an attempt to resolve problems with retention time shifting and carry over which manifested in the only two gas chromatograph (GC) machines that were in use. At least two other instruments were taken out of service as far as I can tell for a lack of reliability. When only two GC's were left in service for casework, the inability by the supervisors to identify and eliminate

retention time shifting and carryover contamination left the entire state with nowhere to turn for blood alcohol analysis from the period December 26, 2018 to January 6, 2019.

The "retention time" is the time at which component parts of a blood sample break apart and are supposedly identified by virtue of the flame ionization detector in the instrument. The instrument is essentially "trained" as to what the retention time should be for a substance of interest or, analyte such as ethyl alcohol from beverage alcohol. It is "trained" by injecting a matrix of known substances such as ethyl alcohol in the calibration process. If the correct retention time is not observed by the instrument, then there is a probability that the analyte that was detected is NOT ethyl alcohol.

"Carryover" is contamination in samples in a batch from prior samples – such as the controls that are used to demonstrate the instrument's continued accuracy throughout the day that it used to analyze blood. Keep in mind that because of the volume of blood evidence kits that the lab receives, it is only practical to do multiple samples in a day. There will always be a "positive" bias in the instrument – in other words it will artificially increase the reported amount and create a falsely-elevated positive.

As of writing this letter, the problems are still unresolved – but reporting methods have been modified so that a supposedly "acceptable" level of the issues go unreported, but once a threshold level of the retention time shifting or carryover contamination are exceeded, the lab staff is to notify the MSP lab supervisors.

The central problem is that no one from MSP disclosed any of this information. The city attorney who handled the case has represented that nothing was said to her about these issues until our firm discovered the issues post-trial. Something should have been done. My theory is that the lab supervisors were so concerned about performing for the department of state police that shortcuts occurred and the lack of disclosure was part of what they perceived is their role in a system, which is to provide evidence to police agencies in order to secure convictions by prosecutors. Rather than publicly disclosing it to leaders in the Legislature, the prosecutor's association, or the citizenry, they tried to fix the problem and act as if there was "nothing to see here." I focus my practice on OWI defense and I have probably done close to 100 jury trials. I cannot imagine what a lawyer or citizen without experience in reviewing data from the lab would have done in a similar case.

There has always been the perception amongst the defense bar that the lab staff exists to help the prosecutor. For example, if I ever want to inspect evidence or ask questions of an analyst, the prosecutor must be notified, have an opportunity to participate and be present, and if the prosecutor refuses to even respond to such a request, I am unable to inspect the evidence. An example of why this might be important is if I want to verify a lot number for a blood evidence tube in order to try to rule out that the tube was subjected to a manufacturer's recall (this is an issue that arose in the summer of 2019).

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Removing the forensic science division from the MSP and placing it with another, more independent department will remediate the concern that the lab staff needs to serve 2 masters: the science and law enforcement. Sometimes, both cannot be served and satisfied to the extent that justice requires.

Removing the forensic science division from the MSP also will remediate the perception of bias and lack of transparency, and any appearance of a conflict of interest. The lack of transparency is what ultimately caused resources in the *Reynolds* case to be expended, a jury to be misled, and a person to be convicted without proper due process. Judge Stacia Buchannan of the 54A District Court ordered a new trial in this case but the gentleman had already overpaid the price for whatever alleged conduct had him before the court system in the first instance.[1]

I appreciate how busy you are with other matters of state but this warrants your attention. Despite the creation of the indigent defense commission, my personal perception is that confidence in our justice system remains low because of wrongful convictions and issues of this nature. When civil servants with critical jobs ignore major problems and fail to give the public the awareness that the problems require it only erodes pubic confidence. We have had too many opportunities to learn lessons to not put the lesson in to action in this situation. This issues affects the lives of Michiganians every single day – it certainly affected Mr. Reynolds.

I welcome the opportunity to discuss this matter with you more fully should you have any questions, comments, or concerns. Please do not hesitate to contact me at (517) 927-4734 or mnichols@nicholslaw.net.

Very truly yours,

THE NICHOLS LAW FIRM, PLLC

Michael J. Nichols

MJN:AB

Cc: **Board Members of the Criminal Defense Attorneys of Michigan**
Mr. Patrick Reynolds
Mr. Ken Stecker, Prosecuting Attorneys Association of Michigan (PAAM)
Any other interested party

[1] https://www.lansingstatejournal.com/story/news/2019/12/12/judge-prosecutors-must-disclose-failed-tests-dui-cases-michigan-state-police-lab/2588365001/; case facts disclosed with consent of the client