

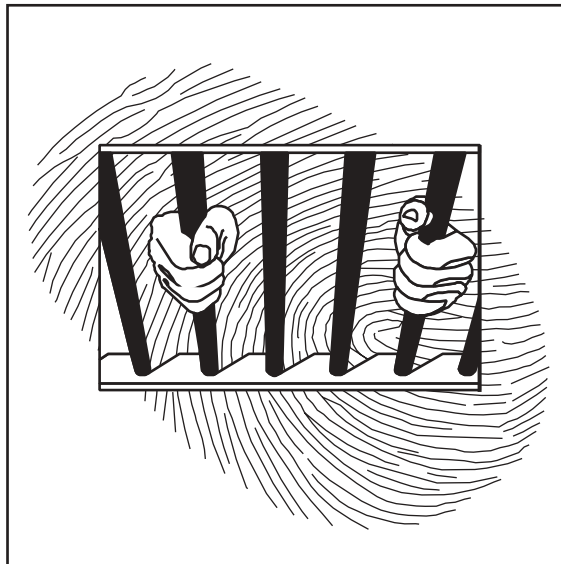
# WISCONSIN'S LETHARGIC RESPONSE TO "THE CSI EFFECT"

BRIAN HAYES

The popular television program *CSI* has both entertained and attempted to teach all of us the benefit of forensic and scientific information. The plots of the show weave scientific ingenuity with the interaction of a team of investigators studying human behavior, with the emphasis on the mental aspect of inquiring into human behavior over the raw tediousness of the work involved. It all fits into an hour show, without dead ends, and is entertaining. This has prompted a trendy influence in our legal system dubbed the "CSI effect"—the expectation of juries that crimes will be solved by science.<sup>1</sup> This expectation has contributed to increased demand for forensic information, which has spawned a backlog of cases that Wisconsin's Attorney General Peg Lautenschlager says may take over a year to process.<sup>2</sup>

## "The CSI Effect"

The use of forensic science in real trials and law enforcement is different, as might be expected, but that hasn't stopped juries from imprinting their uninformed expectations on the criminal process. The show has oversold the value of the information. While the science is depicted fairly, the application of the tech-



nology may be different.<sup>3</sup> Add a few high profile events like a Scott Peterson trial or a coed disappearance in Aruba and you have popular culture providing a cocktail for potential jurors to imbibe.

Many crimes just don't leave the telling fingerprint or DNA sample, or human error may spoil the collection. Others simply don't need the science because of the circumstances or compelling witness. In truth, a compelling eyewitness or victim should be able to get the conviction in those cases. But there are many cases where the forensic evidence is vital. For example, the domestic abuse testimony of a young wife is much more compelling when supplemented with the DNA evidence of the blood of her husband under her fingernails.

The result of the "CSI effect" is a new reality in today's criminal process as juries are selected expecting the science, and that serving on a jury is like a math problem, not a study of human behavior and determination of guilt. That new reality is changing the way prosecutors prosecute. Anecdotes of the effect are numerous and they are found here in

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Wisconsin, not just pop culture havens like California.

Andrew Sharp, Richland County District Attorney, told *Prosecutor Magazine* that he tried an arson case in which jurors acquitted based on absence of forensic evidence that would have been impossible to obtain. A man was seen leaving a house on fire immediately after he had threatened the resident of the home in a local bar. According to DA Sharp, the jury “thought the police should have gotten DNA from the burnt shovel handle in the house to determine who had used it last.”<sup>4</sup>

In Douglas County, Assistant District Attorney Kelly Thimm noted that several jurors refused to convict on an Operating While Intoxicating (OWI) charge without a scientific test. She stated “several jurors said they could not convict someone of OWI without a test.” She noted that jurors seemed reluctant to believe anything but scientific testing. This could become a common evidentiary problem as alcohol generally passes through the human body quickly.

ADA Thimm further cites a circumstantial theft case. A defendant was the only person who had the opportunity to take money out of a desk and admitted to touching where the money was, but was acquitted because fingerprint evidence was not presented.<sup>5</sup>

Some prosecutors fear a whole new burden of proof is being applied. While jury instructions may assert a “beyond a reasonable doubt” burden, prosecutors fear juries are actually using a “no doubt at all” standard.<sup>6</sup> Even if intermittently applied, this has the potential to change the meaning of guilt in our criminal system.

There have not been formal studies documenting the “CSI effect” but prosecutors know it exists. Dane County DA Brian Blanchard noted that he is concerned about the effect and is watching for it. Today, he tells juries what they can expect the evidence to be and what is available to the state. He notes that there has been no study to confirm the existence of a CSI effect,<sup>7</sup> only anecdotes, and his opinion is affirmed as well by others.<sup>8</sup>

## New Prosecution Strategies

Prosecutors still fear the expectations of a single juror that can tie up the deliberations in a criminal trial and prevent a conviction. We should expect that some guilty people will walk free. Many prosecutors are taking steps to avoid the problem. First, they are screening and educating jurors more. ADA Kelly Thimm notes that she tries “to do more voir dire questions about how this case is not TV.”<sup>9</sup> If one juror relies on the forensics more and penalizes prosecutions that do not provide the science, then that is a pop culture problem that prosecutors need to address and weigh with their jury. Prosecutors need to address an absence of forensic evidence from the beginning of a trial. This is a jury education and screening issue that Dane County DA Blanchard seems to be following.

There is a second, more powerful possible prosecutorial response: Provide the juries all the relevant tests. If it only takes one juror to spoil months of scheduling and preparation, why fight it? Some of the effects of this are discussed below.

Prosecutors note that part of the “CSI effect” asserts that forensic evidence and witness testimony appear better to a jury than testimony alone. Forensic evidence, while debatable, is also more reliable. Cocaine traces may be misinterpreted with the concurrent use of some medicine, but cocaine never changes its story on the stand. We are reaching a point in the technology where some of the information, especially DNA information, is absolutely dispositive—it is all you need to get a conviction . . . or exoneration.

This doesn’t need to be the end of the discussion however. The perceived change in importance and tactics provides an opportunity to examine how this forensic information is used. We are dealing with more than a novel pop culture effect. There are vast amounts of new kinds of extremely reliable information being plugged into a process that is several decades old. This can be a learning moment as we seek to adjust the criminal process to this new information. It would be shortsighted to expect a return to a less technological depen-

dent environment. Whatever the “CSI effect” is—real or perceived—it isn’t going away with a show cancellation. We need to understand the value and implications of this information, even in spite of any negative “CSI effect” expectations. Let’s take a cue from our jury-serving public and embrace the possibilities of real time technology.

Instead of consigning the use of forensic science to courtrooms and let prosecutors deal, we should embrace the change and push it to all corners of law enforcement. The guy that, twenty years ago, advised that personal computers were a fad and to buy a Wang should listen: the application of science and technology to solve crimes isn’t going away—it’s going to become increasingly important. The successful up-to-date criminal process will steer into the skid and magnify the force of these technological improvements. The combination of the cultural influence heightening the importance of this information and the concurrent technological improvements can make prosecution more efficient. Three points need to be made before we examine ways that Wisconsin can maximize this information.

First, the forensic science of crime in Wisconsin refers to 1) the chemical analysis—drugs, toxics, and trace substances that may be found; 2) the DNA in blood, semen, hair and biological materials; 3) firearms and physical levers/tools; 4) identification of fingerprinting, footprints, and tire treads; and 5) document examinations and forensic photography. The information is being improved as data banks are being built and sharing among jurisdictions improves.<sup>10</sup>

The use of science holds the prospect of greatly enhancing criminal prosecutions. It has the potential to be as near a slam-dunk as cur-

rently possible. In the case of DNA, it’s better than the proverbial “smoking gun” because it identifies to the personal and immutable. Where there are no suspects, comparison with databank profiles can generate potential suspects.<sup>11</sup> The near certainty of the information has the potential to make due process much more efficient.

Wisconsin courts are hierarchical, but the justice system as a whole is polycentric; courts, law enforcement, and the jailers all benefit from forensic information. These institutions and processes straddle jurisdictions and overlap authority. There are over 70,000 people on probation and parole in this state.<sup>12</sup> Any one of

these areas could, can, and do rely on our ability to use scientific information to better fight crime and to make the system more efficient. The whole system will benefit and pressure will be reduced by an increase of forensic knowledge earlier.

Taking these factors together, we have the opportunity to build a new relationship within the criminal justice system. By acknowledging the value of this forensic

information and seeing the customer as not merely the actors in a jury trial but anyone touching the criminal system, there is the potential to make for better criminal prosecution and safer streets.

### **Wisconsin Falls Behind**

Wisconsin does not have timely forensic information in its fight against crime. The State Crime Lab is Wisconsin’s CSI lab and is the fountainhead of forensic information. It is supervised by the Attorney General, Peg Lautenschlager and is a part of Wisconsin’s Department of Justice (DOJ). It processes much of the information for all the law enforcement jurisdictions in the state.

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The State Crime Lab has some serious problems, however. It can't even keep up with the current inflow of forensic requests. Frustrated prosecutors all too often are told to take a number.

There has been an uptick in cases at the State Crime Lab—no doubt due to the increased credibility and importance of this kind of information. Prosecutorial demand on getting this information for jury trials may also play a part.<sup>13</sup> In her budget request, AG Lautenschlager expected a 24% increase in caseload in 2004. AG Lautenschlager noted that there was a deep backlog of cases—over 800 cases as of August 2004—and that they can take over a year to process. Two hundred thirty-three of these cases had to be outsourced to private labs.<sup>14</sup> More recently, the director of the Madison office of the State Crime Lab, Jerome Geurts, noted that there were 2159 cases waiting for analysis statewide with 950 of them over 90 days old.<sup>15</sup>

This delay has slowed down all the law enforcement pipelines and the progress of prosecutions around the state. AG Lautenschlager noted, “most agencies must wait months for analysis to begin on their cases” and, “the effectiveness of the increased analytical power of DNA testing is diminished by the delays in getting results. . . .”<sup>16</sup>

### **The Effects of Delay**

On March 15, 2004, police in rural Dane County received a report that a 26-year-old man had sexually assaulted a 14-year-old girl a day before. The police investigated, went to the girl's school, interviewed the girl and her father, and took some blue jeans and pieces of carpet to seek DNA evidence. A full eight months later, on November 11, 2004, the State Crime Lab notified the local authorities that, yes, the man's semen was discovered on the carpet. At that point, the man folded his cards and cut his best deal with the district attorney.

The accused had denied his crime during this time and the Dane County DA had declined to charge the man until the DNA test arrived. The District Attorney noted that a con-

viction without some science would require a jury to rely on the testimony of a 14-year-old girl. This can be a crapshoot. The girl's veracity and credibility is an essential question.<sup>17</sup> For eight months the prosecution held off charging the man, and the girl and her family were left hanging. Fortunately, the accused was in custody for a parole violation, or he would have been living in the community or fled.

In another case, a Sheboygan man with a previous conviction was accused of cocaine possession when a couple bags of white powder under his car seat tested positive for cocaine in a less reliable narco-pouch field test on October 24, 2003. He denied knowledge of the \$3000 worth of cocaine noting that some people might have set him up at his father's auto repair business. But with a previous conviction, his probation was revoked, and he was jailed until a negative State Crime Lab drug test kept him from prison on January 12, 2004. Still, he had served two and a half months in the Sheboygan jail at immense cost to him and to the county.<sup>18</sup> He lost his job due to the error.

I use these two examples to put a human face on the backlog. Neither case went to trial or saw a jury. The science was enough to provide justice in both cases. One example involved a conviction and the other, exoneration. There is nothing to indicate that they were unique. But the one delay risked traumatizing a teenage victim, and the other put a man whom we are trying to rehabilitate in jail. The human and financial costs of the delayed scientific information are tremendous.

Why did it take eight months to get the semen identified to determine whether the girl was telling the truth? One expert states that extracting and comparing DNA is a process that takes eight days to two weeks.<sup>19</sup> Mr. Geurts notes that while it might take up to a month, the average analyst will handle five or six DNA cases a month at Wisconsin's State Crime Lab.<sup>20</sup> In the other case, a simple drug test took two and a half months. The interest in the man's rehabilitation was undermined when we put him in jail for that long without work or treatment. Is this the best we can do?

## Lautenschlager's Role

AG Lautenschlager told the Governor last fall that the State Crime Lab had to "triage" (her word) some cases. Triage is a fancy French word meaning, "Whoa, we got a problem."<sup>21</sup> The hooting you hear is the collection of defense lawyers noting that the first question they ask the DNA expert at their rape trial is: Is this one of the cases you triaged?

It is difficult to explain the State Crime Lab's triage policy to the girl waiting to testify for eight months against her rapist, or the man, after finally getting his life together, wrongfully put in jail for a couple months over the holidays, and losing his job. If your daughter or husband were waiting on the State Crime Lab tests, how would you feel knowing the State Crime Lab had not deemed your case important enough to do quickly, if at all? By not managing the increased caseload at the State Crime Lab efficiently and with alacrity, AG Lautenschlager has undermined the perceived effectiveness of the criminal system. Because of the delay in getting the forensic information out of the State Crime Lab, the whole system has suffered a corrosive violation of the broader public trust.

The \$11 million budget for the State Crime Lab is funded by taxpayer money and fees levied on people convicted of crimes. It employs 108 full-time employees in three offices in Madison, Milwaukee, and Wausau.<sup>22</sup> While only about one-seventh the Department of Justice budget, it is clear that the State Crime Lab is the department's most important arm. Lautenschlager calls the State Crime Lab "the cornerstone of the Department of Justice."<sup>23</sup> Most prosecutors and law enforcement personnel in Wisconsin would only request a quick and accurate test with a competent expert to testify to its accuracy from the DOJ. This is the

elemental support they seek from the Department.

In her budget request, AG Lautenschlager requested four new DNA positions to help alleviate the backlog. No stranger to the State Crime Lab or its utility, Governor Doyle and the Legislature approved her request.<sup>24</sup> But this will only begin to address the backlog. The Attorney General has yet to appreciate how important the Crime Lab is to prosecutors and victims throughout Wisconsin.

Based on her 2005-07 budget submission, the Attorney General doesn't get the problem or the potential solution. One need only compare the four added staff she requested for the Crime Lab with the \$500,000 and five positions she requested for consumer protection and the \$600,000 and six positions for a newly created public integrity unit. These tickets seem to be ill-timed luxuries in the face of a year's backlog at the State Crime Lab.<sup>25</sup>

But that doesn't stop AG Lautenschlager from blaming the Legislature for a lack of funding and the lack of "large special interest groups lobbying in [the State Crime Lab's] favor." Now, mere weeks after the biennial budget is put to bed, she wants another six DNA analysts.<sup>26</sup> It's as if she doesn't realize that the Governor and the Legislature gave her everything she wanted—all four DNA analyst positions—in her budget submission. She was obviously shortsighted—she didn't see the problem and didn't ask for enough to alleviate the backlog. This is a clear failure in planning and strategic thinking about the value of this information.

## A Change in Thinking

There needs to be a change in thinking about the role of forensic information and who the State Crime Lab serves. It is common for

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the State Crime Lab to ask a prosecutor when the trial date is, in order to meet its customer demand. This ignores the interests of the victim, the court, and the accused in a speedier result. The 14-year-old sexual assault victim had to endure eight months of uncertainty wondering whether the legal system would verify what she knew occurred. The Sheboygan man knew he was set up but could only deny it and hope that he had been set up with imitation cocaine. We all have become inured to the long waits for this forensic information. DA Blanchard is resigned, noting, "We just have to live with it."<sup>27</sup> But unlike wine or cheese, the forensic evidence does not improve with age.

The attorney general and the State Crime Lab would probably note that they are conducting science and not shipping books or making widgets. In other words, they would argue that there are reasons they can't be more efficient. They would be quick to note the cost of this improvement.

We should be hesitant to give any governmental unit a license to be inefficient but forensic science does require some time. But with the chemical and DNA tests, we can set expectations for speed and certitude from the State Crime Lab and fund improvements accordingly. We need to expect that any additional Crime Lab funding will yield specific results: speedier, more certain justice. We need to fund an output.

As noted previously, there are savings to the broader system when this information is furnished to the criminal process decision-makers with alacrity. These are difficult to measure, however. Yet it is reasonable to ask: how many costly trials might be saved if the information arrived in a couple of weeks? How many police investigations with expensive manpower could be streamlined and more successful with suspects more quickly ruled out?

The other costs are human. How much would you pay to exonerate a loved one or to avoid having your child testify to her sexual

assault? And we should never forget that an inefficient process leaves people who have committed crimes on the street.

Pop culture, through a perceived "CSI" effect, has changed the baseline by which we measure government performance. Our jury-serving electorate expects something different than what the attorney general has delivered. The State Crime Lab has benefited from amazing technological breakthroughs in the last ten years. But whether through the pop culture or the success of the forensics, we still have girls waiting eight months wondering whether they are going to testify and whether anyone believes they were sexually assaulted. To do better, we need to change the way we think about the uses of this information and its potential to provide a more efficient process. Then we need to prioritize and act as if innocent people depended upon the forensic information.

#### Notes

1. Another definition of the "CSI effect:" The impossibly high expectations jurors have for DNA and other crime scene evidence after watching a few episodes of *CSI*, by Gareth Branwyn. Jargon Watch. *Wired Magazine*: May 2003, p. 46.
2. Wisconsin DOJ Budget Request, 2005-07, p. 232.
3. "CSI Effect Is Mixed Blessing for Real Crime Labs", *National Geographic News*, by Stefan Lovgren, September 23, 2004.
4. 38-APR Prosecutor 9, March/April 2004, by Karin H. Cather, p. 12. This is a publication of the National District Attorneys Association.
5. *Ibid.*
6. *Ibid.*
7. *Wisconsin State Journal*, June 19, 2005, p. A13.
8. Elaine Leschot, a supervisory prosecutor in Monmouth, New Jersey, sees "no impact" and says that prosecutors are more afraid of the potential impact than the juries are demonstrating. 38-APR Prosecutor 9, March/April 2004, p. 12.
9. 38-APR Prosecutor 9, March/April 2004, by Karin H. Cather, p. 12
10. The Department of Justice website as good a summary of what the State Crime Lab does at : <http://www.doj.state.wi.us/dles/crimelabs>.
11. Wisconsin DOJ Budget Request, 2005-07, p. 232.

12. *Building Lives After Prison*, *Milwaukee Journal Sentinel*, July 24, 2005. Wisconsin's parole-probation population is 70,469.
13. Max Houk, an American forensics expert said that there were 200,000 to 300,000 backlogged DNA samples in US labs. He noted that "[t]his TV show comes on and everyone starts watching it—including cops and prosecutors—submissions to forensic laboratories go through the roof." BBC News, by Paul Rincon, 21 February, 2005.
14. Wisconsin DOJ Budget Request, 2005-07, p. 231-232.
15. *Wisconsin State Journal*, Sunday August 7, 2005, p. D11.
16. *Ibid*, p. 232.
17. Case No. 05 CF 535.
18. Case No. 03 CF 611.
19. "The Unrealistic 'CSI' Effect," *The Cape Cod Times*, by Karen Jeffrey, June 22, 2005, citing Kentucky State Medical Examiner Dr. Gregory J. Davis.
20. *Wisconsin State Journal*, Sunday August 7, 2005, p. D11.
21. Actually, the DOJ Budget Request, 2005-07, p. 231-232 states that the State Crime Lab identifies exceptionally important cases that must be worked on immediately. It notes that there are some cases it will never get to.
22. Informational Paper, State Criminal Justice Functions, Legislative Fiscal Bureau, January 2005, p. 11.
23. *Wisconsin State Journal*, Sunday August 7, 2005, p. D11.
24. JFC Budget Summary, 2005-07, Legislative Fiscal Bureau, p. 476.
25. Overview of State Agency Major Request Items, Legislative Fiscal Bureau, December 2004, p. 126-127.
26. *Wisconsin State Journal*, Sunday August 7, 2005, p. D11.
27. *Ibid*.