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Understanding the Allegations Against the State Police Crime Lab

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The scientist believes in proof without certainty, the bigot in certainty without proof. -- Ashley Montagu

Here is what you need to know about the Michigan State Police Crime Lab allegations: The Lab is accused of using junk science to report false positive felonies.

On June 21, 2016, our firm Komorn Law together with Figari and Davenport filed a complaint in the U.S. District Court for the Eastern District of Michigan pursuant to 42 USC 1983 naming as defendants, in their official capacities, the head of the Michigan State Police and Lab, as well as the Oakland County Sheriff and its head of forensics. The complaint alleges that the Michigan State Police Crime Lab – and its Oakland County counterpart -- rigged its testing system at the behest of the prosecutors' union and law enforcement to report marijuana oils and other edibles as synthetic, Schedule 1 THC (a felony), instead of Marihuana (a misdemeanor). The Lab's actions contravene law and science.

Under Michigan law, all marijuana plant-based cannabinoids and the flowers, oils, and other edibles containing them are controlled as "Marihuana" and the possession of these substances is a Schedule 1 misdemeanor. Only the possession of *synthetic, laboratory-manufactured* cannabinoids is a Schedule 1 felony. A medical marijuana patient's marijuana does not become "synthetic" and thus felonious simply because he bakes it into a brownie or extracts it into an oil. The Michigan Controlled Substances Act, and courts interpreting it, make this crystal clear.[1]

This is because marijuana is a special case under Michigan law. The John Sinclair case demonstrated the unconstitutionality of treating marijuana like heroin and other hard drugs under Michigan law. Michigan has long punished marijuana including oils and other edibles as a schedule 4 or 5 drug and its simple possession is a misdemeanor.

What recently uncovered emails reveal is that the prosecutors' union pressured the Lab to uniformly report marijuana edibles as Schedule 1 synthetic felony THC which the Lab knew to be contrary to the facts, the science, and the law. The emails show that pressure also came from the drug task forces so as to better establish probable cause to arrest marijuana patients and forfeit their assets.

For at least twenty years, five of the seven police labs have been wrongfully reporting marijuana edibles as "THC Schedule 1." In 2013, the prosecutors' union

pressured all labs to uniformly report edibles as "Schedule 1 THC." Ethical scientists objected to the illegality. The lab then added a qualifier "origin unknown" in an attempt to placate the scientists and cover up the flaw. This is doubly fallacious. The lab knows that these substances tested are plant-based and yet report it as a Schedule 1 synthetic THC felony. Further, the lab reports the origin is unknown when the origin is in fact discoverable and known. The Lab is systematically reporting felonies that don't exist.

Then Michigan State Crime Lab director Gregoire Michaud told the Wayne County Criminal Advocacy Program on October 23, 2015 that there have been huge increases in workload since 2008 (the year the Medical Marijuana Act was passed). It took the crime lab five years to process backlogged rape kits during that time period due to overload. "*Marijuana cases now account for 40% of the lab's daily workload,*" according to Mr. Michaud. *"Maybe legalization will help us out,"* he said. The crime lab's budget is $43 million per year.

"There is nothing worse in a forensic scientist than 'confirmation bias,'" he added. Yet this is precisely what State Police and the Oakland County Sheriff are doing. The crime labs are systematically biased towards falsely reporting Schedule 1 synthetic THC, a felony, instead of plant-based marijuana, a misdemeanor. The lab's contention that it cannot tell the difference is scientifically untrue.

The most telling evidence comes not only from the internal emails but from the Michigan State Police Crime Lab's response to the accusations in this case:

MSP: The ultimate decision on what to charge an individual with rests with the prosecutor.

An incomplete truth. The prosecutor does not have discretion to bring a charge not supported by the evidence or, as in these cases, contradicted by it. The prosecutors must rely on the crime lab reports when charging a crime. If the crime lab reports that a suspect left O+ blood at the scene, the prosecutor cannot decide that the defendant's O- blood is "close enough."

"When the government obtains a conviction through the knowing use of false testimony, it violates a defendant's due process rights."[2] Furthermore, pleas are unconstitutional where the prosecutor threatens prosecution on a charge not justified by the evidence.[3]

MSP: The role of the laboratory is to determine whether marihuana or THC are present.

Intentionally misleading. The role of the laboratory is to determine whether a substance tested is a controlled substance and, if so, what it is. Prosecutors must charge accordingly. When THC is identified, the lab's role is to determine whether the substance is plant-based marihuana (a Schedule 1 misdemeanor) *or* a synthetic equivalent of THC (a Schedule 1 felony). There is no third choice. It cannot be both. By reporting Schedule 1 THC the lab is stating the substance to be synthetic and its possession punishable as a felony.

MSP: Michigan State Police laboratory policy was changed to include the statement "origin unknown" when it is not possible to determine if THC originates from a plant (marihuana) or synthetic means.

False. The policy was changed to report marijuana oils and edibles as Schedule 1 synthetic THC when there was no visible plant material. The lab is perfectly capable of determining whether a sample is from plant or synthetic origin even without visible plant material. It's called science. A report that states a substance to be THC Schedule one (necessarily synthetic) with the added language "origin unknown" is doubly false. The oils and edibles are not synthetic and the origin is known: marihuana.

Including the statement "origin unknown" was not a policy change. It was a clumsy attempt to turn a blind eye to science while reporting felonies the lab knew had not been committed.

MSP: This change makes it clear that the source of the THC should not be assumed from the lab results.

Clearly. When the Crime Lab made the policy decision to go beyond science and law and to designate all marijuana solids and oils with no visible plant material as felony Schedule 1 THC, it destroyed its credibility and the reliability of every lab report that says THC Schedule 1. When it attempted to cover it up by adding

"origin unknown", it abdicated the scientific method and declared its inability to tell plant-based marijuana from synthetic THC. The Lab's false reporting policy has stripped it of its ability to reliably say what is or is not marihuana.

The only thing that can be assumed from the lab reports that state "THC Schedule 1" is that they are inherently unreliable.

The Crime Lab's actions in concert with the prosecutors' union was a gross violation of defendant's fundamental constitutional rights and the rights of hundreds or thousands of other Michigan citizens.

Maxwell Lorincz, a medical marijuana patient, was originally charged with possession of marihuana for having marihuana oil. When he refused to plead guilty to possessing marihuana, asserting his immunity for medical use, the prosecutor retaliated by threatening and then charging him with Schedule 1 THC, a bogus felony based on a bogus lab report. Possession of THC is not a lesser included offense of possession of marihuana. Nor vice versa.[4] The judge ultimately dismissed the case. However, Maxwell's son was taken from him by CPS for over a year.

This is happening across Michigan. As one MSP scientist relayed: "Prosecutors reportedly can charge "marihuana" even with a lab report that says 'THC' and have done so at their discretion."[5] What? How can a lab report that says THC, necessarily a schedule one synthetic, support a charge, much less a search, arrest, plea or conviction for a substance that was not confirmed? This is the dilemma recognized by the lab in the early days of this fiasco. "Once you identify THC and place it in Schedule 1 on your report, it automatically becomes the felony.... The prosecutor cannot charge this as a misdemeanor Marihuana offense because that's not what was confirmed."[6] "We could not state on the stand that this is marihuana which would make it hard if not impossible to prove possession of marihuana."[7]

The prosecutor union's attempt to force all MSP scientists to uniformly report marijuana edibles as Schedule 1 THC exposed an illegal reporting practice that had been going on for at least nineteen years. As one scientist put it: "[h]aving a similar beginning product and different end conclusion isn't going to work though we have been doing it for 19 years."[8]

For at least two decades, the crime lab has reported non-existent felonies. Worse, the crime lab systematically reported two different scientific conclusions from the same facts. This alone destroys the reliability of any lab result reporting Schedule 1 THC.

The state cannot "contrive a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."[9] The Massachusetts Supreme Court addressed these issues in a recent crime lab scandal: "[t]his particularly insidious form of misconduct (fraudulent lab reports), which belies reconstruction, is a lapse of systemic magnitude in the criminal justice system.[10]

This reporting practice must stop.

Endnotes

1. People v. Campbell, 72 Mich. App. 411 (1976). ("natural THC to be punished only under the provisions dealing with marijuana").
2. Napue v. Illinois, 360 U.S. 264, 269 (1959).
3. Brady v. United States, 397 U.S. 742 (1970).
4. Campbell, supra.
5. Email, Gormley, January 28, 2015.
6. Email, Penabaker, May 30, 2013.
7. Email, Choate, February 14, 2014.
8. Hoskins email, 2/14/14.
9. Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791, 794 (1935).
10. Commonwealth v. Scott, 467 Mass. 336 (2014).