Busted

Tens of thousands of people every year are sent to jail based on the results of a $2 roadside drug test. Widespread evidence shows that these tests routinely produce false positives. Why are police departments and prosecutors still using them?

by Ryan Gabrielson and Topher Sanders, ProPublica
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Amy Albritton can't remember if her boyfriend signaled when he changed lanes late that August afternoon in 2010. But suddenly the lights on the Houston Police patrol car were flashing behind them, and Anthony Wilson was navigating Albritton's white Chrysler Concorde to a stop in a strip-mall parking lot. It was an especially unwelcome hassle. Wilson was in Houston to see about an oil-rig job; Albritton, volunteering her car, had come along for what she imagined would be a vacation of sorts. She managed an apartment complex back in Monroe, La., and the younger of her two sons — Landon, 16, who had been disabled from birth by cerebral palsy — was with his father for the week. After five hours of driving through the monotony of flat woodland, the couple had checked into a motel, carted their luggage to the room and returned to the car, too hungry to rest but too drained to seek out anything more than fast food. Now two officers stepped out of their patrol car and approached.

Albritton, 43, had dressed up for the trip — black blouse, turquoise necklace, small silver hoop earrings glinting through her shoulder-length blond hair. Wilson, 28, was more casually dressed, in a white T-shirt and jeans, and wore a strained expression that worried Albritton. One officer asked him for his license and registration. Wilson said he didn't have a license. The car’s registration showed that it belonged to Albritton.

The officer asked Wilson to step out of the car. Wilson complied. The officer leaned in over the driver’s seat, looked around, then called to his partner; in the report Officer Duc Nguyen later filed, he wrote that he saw a needle in the car’s ceiling lining. Albritton didn't know what he was talking about. Before she could protest, Officer David Helms had come around to her window and was asking for consent to search the car. If Albritton refused, Helms said, he would call for a drug-sniffing dog. Albritton agreed to the full search and waited nervously outside the car.

Helms spotted a white crumb on the floor. In the report, Nguyen wrote that the officers believed the crumb was crack cocaine. They handcuffed Wilson and Albritton and stood them in front of the patrol car, its lights still flashing. They were on display for rush-hour traffic, criminal suspects sweating through their clothes in the 93-degree heat.

As Nguyen and Helms continued the search, tensions grew. Albritton, shouting over the sound of traffic, tried to explain that they had the wrong idea — at least about her. She had been dating Wilson for only a month; she implored him to admit that if there were drugs, they were his alone. Wilson just shook his head, Albritton now recalls. Fear surging, she shouted that there weren't any drugs in her car even as she insisted that she didn't know that Wilson had brought drugs. The search turned up only one other item of interest — a box of BC Powder, an over-the-counter pain reliever. Albritton never saw the needle. The crumb from the floor was all that mattered now.

At the police academy four years earlier, Helms was taught that to make a drug arrest on the street, an officer needed to conduct an elementary chemical test, right then and there. It’s what cops routinely do across the country every day while making thousands upon thousands of drug arrests. Helms popped the trunk of his patrol car, pulled out a small plastic pouch that
contained a vial of pink liquid and returned to Albritton. He opened the lid on the vial and dropped a tiny piece of the crumb into the liquid. If the liquid remained pink, that would rule out the presence of cocaine. If it turned blue, then Albritton, as the owner of the car, could become a felony defendant.

Helms waved the vial in front of her face and said, “You’re busted.”

Albritton was booked into the Harris County jail at 3:37 a.m., nine hours after she was arrested. Wilson had been detained for driving without a license but would soon be released. Albritton was charged with felony drug possession and faced a much longer ordeal. Already, she was terrified as she thought about her family. Albritton was raised in a speck of a town called Marion at the northern edge of Louisiana. Her father still drove lumber trucks there; her mother had worked as a pharmacy technician until she died of colon cancer. Albritton was 15 then. She went through two unexpected pregnancies, the first at age 16, and two ill-fated marriages. But she also pieced together a steady livelihood managing apartment complexes, and when her younger son was born disabled, she worked relentlessly to care for him. Now their future was almost certainly shattered.

The officers allowed her to make a collect call on the coinless cellblock pay phone. She had a strained relationship with her father and with her son’s father as well; instead she dialed Doug Franklin, an old friend who once dated her sister. No one answered. Near dawn the next morning, guards walked Albritton through a tunnel to the Harris County criminal-justice tower’s basement, where they deposited her in a closet-size holding room with another woman, who told Albritton that she had murdered someone. Albritton prayed someone would explain what would happen next, tell her son she was alive and help her sort out the mess. She had barely slept and still hadn’t eaten anything. She heard her name called and stepped forward to the reinforced window. A tall man with thinning hair and wire-rim glasses approached and introduced himself as Dan Richardson, her court-appointed defense attorney.

Richardson told Albritton that she was going to be charged with possession of a controlled substance, crack cocaine, at an arraignment that morning. Albritton recalls him explaining that this was a felony, and the maximum penalty was two years in state prison. She doesn’t remember him asking her what actually happened, or if she believed she was innocent. Instead, she recalls, he said that the prosecutor had already offered a deal for much less than two years. If she pleaded guilty, she would receive a 45-day sentence in the county jail, and most likely serve only half that.

Albritton told Richardson that the police were mistaken; she was innocent. But Richardson, she says, was unswayed. The police had found crack in her car. The test proved it. She could spend a few weeks in jail or two years in prison. In despair, Albritton agreed to the deal.

Albritton was escorted to a dark wood-paneled courtroom. A guilty plea requires the defendant to make a series of statements that serve as a confession and to waive multiple constitutional rights. The judge, Vanessa Velasquez, walked her through the recitation, Albritton recalls, but never asked why she couldn’t stop crying long enough to speak in sentences. She had managed to say the one word that mattered: “guilty.”

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Police officers arrest more than 1.2 million people a year in the United States on charges of illegal drug possession. Field tests like the one Officer Helms used in front of Amy Albritton help them move quickly from suspicion to conviction. But the kits — which cost about $2 each and have changed little since 1973 — are far from reliable.

The field tests seem simple, but a lot can go wrong. Some tests, including the one the Houston police officers used to analyze the crumb on the floor of Albritton’s car, use a single tube of a chemical called cobalt thiocyanate, which turns blue when it is exposed to cocaine. But cobalt thiocyanate also turns blue when it is exposed to more than 80 other compounds, including methadone, certain acne medications and several common household cleaners. Other tests use three tubes, which the officer can break in a specific order to rule out everything but the drug in question — but if the officer breaks the tubes in the wrong order, that, too, can invalidate the results. The environment can also present problems. Cold weather slows the color development; heat speeds it up, or sometimes prevents a color reaction from taking place at all. Poor lighting on the street — flashing police lights, sun glare, street lamps — often prevents officers from making the fine distinctions that could make the difference between an arrest and a release.

There are no established error rates for the field tests, in part because their accuracy varies so widely depending on who is using them and how. Data from the Florida Department of Law Enforcement lab system show that 21 percent of evidence that the police listed
FIELD TESTS

https://www.propublica.org/article/common-roadside-drug-test-routinely-produces-false-positives

as methamphetamine after identifying it was not methamphetamine, and half of those false positives were not any kind of illegal drug at all. In one notable Florida episode, Hillsborough County sheriff’s deputies produced 15 false positives for methamphetamine in the first seven months of 2014. When we examined the department’s records, they showed that officers, faced with somewhat ambiguous directions on the pouches, had simply misunderstood which colors indicated a positive result.

No central agency regulates the manufacture or sale of the tests, and no comprehensive records are kept about their use. In the late 1960s, crime labs outfitted investigators with mobile chemistry sets, including small plastic test tubes and bottles of chemical reagents that reacted with certain drugs by changing colors, more or less on the same principle as a home pregnancy test. But the reagents contained strong acids that leaked and burned the investigators. In 1973, the same year that Richard Nixon formally established the Drug Enforcement Administration, declaring “an all-out global war on the drug menace,” a pair of California inventors patented a “disposable comparison detector kit.” It was far simpler, just a glass vial or vials inside a plastic pouch. Open the pouch, add the compound to be tested, seal the pouch, break open the vials and watch the colors change. The field tests, convenient and imbued with an aura of scientific infallibility, were ordered by police departments across the country. In a 1974 study, however, the National Bureau of Standards warned that the kits “should not be used as sole evidence for the identification of a narcotic or drug of abuse.” Police officers were not chemists, and chemists themselves had long ago stopped relying on color tests, preferring more reliable mass spectrophotographs.

Demand for the field tests is strong enough to sustain the business of at least nine different companies that sell tests to identify cocaine, heroin, marijuana, methamphetamine, LSD, MDMA and more than two dozen other drugs. The Justice Department issued guidelines in 2000 calling for test-kit packaging to carry warning labels, including “a statement that users of the kit should receive appropriate training in its use and should be taught that the reagents can give false-positive as well as false-negative results,” but when we checked, three of the largest manufacturers — Lynn Peavey Company, the Safariland Group and Sirchie — had not printed such a warning on their tests. (Lynn Peavey Company did not respond to our request for comment. A spokesman for the Safariland Group said the company

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provides law-enforcement agencies with extensive training materials that are separate from the tests and their packaging. We asked John Roby, Sirchie’s chief executive, about the missing warnings and requested an interview in May. He responded in writing a month later saying that the boxes carrying Sirchie’s cocaine tests had been updated and now display a warning that reactions may occur with both “legal and illegal substances.” After our inquiry, Sirchie added another warning to its packaging, listing at the bottom of its printed instructions: “ALL TEST RESULTS MUST BE CONFIRMED BY AN APPROVED ANALYTICAL LABORATORY!”

Even trained lab scientists struggle with confirmation bias — the tendency to take any new evidence as confirmation of expectations — and police officers can see the tests as affirming their decisions to stop and search a person. Labs rarely notify officers when a false positive is found, so they have little experience to prompt skepticism. As far as they know, the system works. By our estimate, though, every year at least 100,000 people nationwide plead guilty to drug-possession charges that rely on field-test results as evidence. At that volume, even the most modest of error rates could produce thousands of wrongful convictions.

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After he arrested Amy Albritton, Officer Helms sent what remained of the crumb he found on the floor of her car to the Houston Police Department crime laboratory. He listed it as “.02 grms crack cocaine” and noted on the submission form that he was also sending a “syringe w/ unknown substance .01 gr” — presumably the needle Officer Nguyen reported pulling from the ceiling lining and that Albritton had not seen and still could not explain. (Helms’s submission form, which was separate from the arrest report, said it came not from the ceiling but from the “suspect visor.”) The last item Helms turned in was a ziploc bag of the “unknown whit powder” that had been removed from the BC Powder package.

“HOLD + ANALYZE FOR COURT,” Helms wrote by hand. And then, with no court case pending, the evidence sat on hold, one of several thousand samples in the laboratory’s backlog of untested pills, plants, powders and assorted crumbs and pebbles.

Albritton served 21 days of her 45-day sentence. When she was released, she took a taxi to the motel where she had planned to stay with Wilson, whom she never saw again after the arrest. (Helms and Nguyen would not comment for this article; Wilson did not respond to requests.) The manager had kept her clothes, so she took a room again and waited for her friend Doug Franklin to fly in from Louisiana. The plan was that he would lend her the money to get her impounded car and keep her company on the drive home. When they retrieved the car, it had been sitting in the summer heat for more than three weeks. Albritton was overwhelmed by the smell of rotting hamburgers.

When Albritton pleaded guilty, she asked Franklin to explain the situation to her bosses at the rental-property firm, but Franklin decided it was safer to say nothing. She was going to be fired in any case, he reasoned, and alerting an employer about the drug felony would only hurt her future prospects. Albritton had managed the Frances Place Apartments, a well-maintained brick complex, for two years, and a free apartment was part of her compensation. But as far as the company knew, Albritton had abandoned her job and her home. She was fired, and her furniture and other belongings were put out on the side of the road. “So I lost all that,” she says.

Albritton’s older son, Adam, then 24, had been living on his own for years and learned of his mother’s arrest only after she had begun her sentence. While Albritton was incarcerated, her younger son, Landon, remained with his father, who had threatened in the past to seek custody but never followed through. Albritton’s father, Tommy Franklin (no relation to Doug), was openly skeptical about her claim of innocence. “If the law said you had crack, you had crack,” she recalls him telling her.

Albritton gave up trying to convince people otherwise. She focused instead on Landon. Using a wheelchair, he needed regular sessions of physical and occupational therapy, and Albritton’s career managing the rental complex had been an ideal fit, providing a free home that kept her close to her son while she was at work, and allowing her the flexibility to ferry him to his appointments. But now, because of her new felony criminal record, which showed up immediately in background checks, she couldn’t even land an interview at another apartment complex. With a felony conviction, she couldn’t be approved as a renter either. Doug Franklin allowed Albritton and Landon to move in with him temporarily, and Albritton took a minimum-wage job at a convenience store.

Through all of this, the crumb of evidence remained in storage in the Houston crime lab. It was a closed case, and the prosecutor, as was standard practice, had filed a motion to destroy the evidence. Only some final paperwork — a request from the lab and a judge’s signature — was needed. But this was an extremely low
priority in a complex bureaucracy.

By 2010, the lab had been discredited by a decade of botched science and scandal. Thousands of untested rape kits were shelved from unsolved assaults. Errors in fingerprint matches were discovered in more than 200 cases. The lab had lost key blood samples; employees had tampered with or falsified other evidence. And it was continuing to struggle with a significant backlog of drug-test evidence — one that stemmed from what amounted to an epic experiment in field testing.

When Hurricane Katrina struck the Gulf Coast in August 2005, more than 250,000 mostly black refugees streamed into Houston, and local authorities openly anticipated a crime surge in which the refugees were portrayed as would-be perpetrators. Charles McClelland, who retired in February as Houston's police chief and was then an assistant chief, says the department decided that pursuing drug-possession charges would also help suppress the number of predicted robberies and burglaries. “Anecdotally, it makes sense: Where does a person who has a substance-abuse problem get the money to buy drugs?” McClelland argues. “One could easily make the connection that they’re committing crimes.” The city distributed thousands more of the color field tests than usual to patrol officers, and drug evidence swamped the controlled-substances section of the lab. Even as the Katrina refugees gradually left Houston, the emphasis on low-level drug enforcement remained. By 2007, annual submissions to the lab had climbed to 22,000, even as budget cuts had reduced the staff, leaving the scientists with far more samples than they could competently analyze.

In 1972, the Department of Justice published a training guide for forensic chemists in the nation’s crime labs, emphasizing that they were “the last line of defense against a false accusation,” but 40 years later, that line had largely vanished. A federal survey in 2013 found that about 62 percent of crime labs do not test drug evidence when the defendant pleads guilty. But the Houston crime lab, for all its problems, would not be among them.

James Miller, the lab’s controlled-substances manager, had long practiced a kind of evidentiary triage. Evidence tied to pending drug manufacturing, sale or possession cases — 50 a year on average — would receive immediate attention, because only laboratory analysis would be admissible in court. But evidence from cases in which the defendants pleaded guilty before going to trial — the overwhelming majority of the remaining thousands of submitted drugs samples — would also be tested. The city had no legal requirement to confirm that the substances were the illegal drugs the police claimed they were. But in Miller’s lab, everything would be checked, even if it took years. “All along, we’ve said we’re about the science,” he says — not securing convictions. So the evidence sat, waiting.

The forensic scientists in Miller’s lab keep untested samples in Manila envelopes locked in cabinets below their work benches. Some sat there for as long as four years, lab records show. Albritton’s evidence stayed locked up for six months. On Feb. 23, 2011 — five months after Albritton completed her sentence and returned home as a felon — one of Houston’s forensic scientists, Ahtavea Barker, pulled the envelope up to her bench. It contained the crumb, the powder and the still-unexplained syringe. First she weighed everything. The syringe had too little residue on it even to test. It was just a syringe. The remainder of the “white chunk substance” that Officer Helms had tested positive with his field kit as crack cocaine totaled 0.0134 grams, Barker wrote on the examination sheet, about the same as a tiny pinch of salt. Barker turned to gas chromatography-mass spectrometry analysis, or GC-MS, the gold standard in chemical identification, to figure out what was in Albritton’s car that evening. She began with the powder. First the gas chromatograph vaporized a speck of the powder inside a tube. Then the gas was heated, causing its core chemical compounds to separate. When the individual compounds reached the end of the tube, the mass spectrometer blasted them with electrons, causing them to fragment. The resulting display, called a fragmentation pattern, is essentially a chemical fingerprint. The powder was a combination of aspirin and caffeine — the ingredients in BC Powder, the over-the-counter painkiller, as Albritton had insisted.

Then Barker ran the same tests on the supposed crack cocaine. The crumb’s fragmentation pattern did not match that of cocaine, or any other compound in the lab’s extensive database. It was not a drug. It did not contain anything mixed with drugs. It was a crumb — food debris, perhaps. Barker wrote “N.A.M.” on the spectrum printout, “no acceptable match,” and then added another set of letters: “N.C.S.” No controlled substance identified. Albritton was innocent.

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Inger Chandler oversees the small conviction-integrity unit of the Harris County district attorney’s office, where she has been a prosecutor for 12 years. Conviction-integrity units are a fairly new concept in law enforcement: Prosecutors re-examine convictions in light of new evidence, often in the form of previously
unavailable DNA tests. Conviction-integrity units originally focused on murder and rape cases, but they also increasingly investigate drug convictions.

In early 2014, Chandler took a call while sitting at her desk, encircled by stacks of case files and pictures of her toddler twins. Eric Dexheimer, a reporter at The Austin American-Statesman, told her he had noticed a series of unusual exonerations coming out of the Texas Court of Criminal Appeals. He’d tracked 21 drug convictions across Texas that had been reversed because labs had found that the drugs in question weren’t really drugs. The laboratory results came after defendants had already pleaded guilty. Did Harris County have any other bad drug convictions beyond what the courts had overturned? Chandler didn’t know, but she said she would try to find out.

Chandler called Miller, the controlled-substances manager at the lab, and asked him if there was something wrong with any of their drug convictions. Miller was not surprised to hear from Chandler. He explained that the lab had indeed found problems with their drug convictions; when his forensic scientists found discrepancies in the evidence — officially labeled “variants” — they sent the details by email to the district attorney’s office, and they had been doing so for years. Chandler hadn’t known any of this. She found the email inbox for lab notices, and it did indeed contain hundreds of messages that were sent from the lab. One after another, the lab notices said, “No Controlled Substance.” In cases involving drug possession, that meant the defendants were not guilty. (Drug manufacturing and selling charges can hold even if the underlying substance is not illegal.)

It was unclear if anyone had ever followed up on the notices. When Chandler entered several of the court case numbers into the district attorney’s records-search system, however, she found that a majority of the convictions remained in place. She started a list. Over the course of the following year, she found that the district attorney’s office had failed to correct 416 “variants” between January 2004 and June 2015, all of them in cases that ended in guilty pleas. Some variants were legally ambiguous — the field test was positive, but for the wrong drug; the drug weights were incorrect; or there was too little of the evidence to analyze — but in 251 cases, the results were simple: “No Controlled Substance.”

Under the 1963 Supreme Court opinion in Brady v. Maryland, prosecutors must provide defendants with exculpatory evidence, even after a conviction. Chandler could have met that mandate simply by alerting the convicting court and the defense attorneys to the lab reports — “Every other Brady situation, as long as I give notice, I’m done,” she says — but in these cases, Chandler says, she knew very few of the wrongful drug convictions would be reversed if she let the system handle each of them individually. The exoneration effort needed to be centralized, so that someone would become responsible for finding the defendants themselves. Chandler took the list to Devon Anderson, Harris County’s district attorney.

Anderson, a former district-court judge, had been the top prosecutor for only seven months. Her husband, Mike Anderson, who took office as district attorney in January 2013, died of cancer eight months into his term, and Gov. Rick Perry appointed her to replace him. Now, as Chandler described the problem, Anderson felt sickened. The litany of wrongful convictions was not just enormous — it was still growing. Her office, she says, was to blame for “a breakdown at every point in the system.” She hired a former prosecutor to research the cases and find the defendants. “It may sound corny, but it’s true: Our duty under Texas law is to seek justice,” she says. “A lot of people think it’s convictions, but it’s justice.”

In April 2014, The American-Statesman published Dexheimer’s story, which focused on 21 wrongful drug convictions across Texas caused by lab delays. But prosecutors in Harris County were still uncovering the scale of their own problem.

Based in part on the information gathered by Marie Munier, the former prosecutor Anderson hired to examine the drug convictions, we determined that 301 of the 416 variants began as arrests by the Houston Police Department, with the rest coming from surrounding municipalities, and that 212 of those 301 arrests were based on evidence that lab analysis determined was not a controlled substance, or N.C.S.
In our own examination of those 212 cases — thousands of pages of arrest reports, court filings and laboratory-testing records, along with interviews of prosecutors, police executives, officers, defense attorneys and innocent defendants who pleaded guilty — we saw a clear story about both who is being arrested and what is happening to them. The racial disparity is stark. Blacks made up 59 percent of those wrongly convicted in a city where they are 24 percent of the population, reflecting a similar racial disparity in drug enforcement nationally. Patrol units, not trained narcotics detectives, appeared to be the most prolific field-test users.

The kits, or the officers interpreting them, got it wrong most often when dealing with small amounts of suspected drugs. Sixty-three percent of the N.C.S. cases involved less than a gram of evidence. The smallest possession cases are the ones in which a field test can be of greatest consequence; if officers find larger quantities of white powder in dozens of baggies or packaged in bricks, they have sufficient probable cause to make an arrest regardless of what a color test shows. (Though in those cases, too, they are generally required to test the drugs.) It’s widely assumed in legal circles that these wrongly convicted people are in fact drug users who intended to possess drugs. Barry Scheck, a founder of the Innocence Project, a nonprofit group that seeks to overturn wrongful convictions, says some who work toward exoneration have complained to him that those exonerated of drug charges often are just accidentally not guilty, and shouldn't be added to the National Registry of Exonerations. The assumption is not entirely without basis — 162 of the 212 N.C.S. defendants had criminal histories involving illegal drugs. However, 50 had no criminal history involving drugs at all.

All of the 212 N.C.S. defendants struck plea bargains, and nearly all of them, 93 percent, received a jail or prison sentence. Defendants with no previous convictions have a legal right in Texas to probation on drug-possession charges, even if they’re convicted at trial. But remarkably, 78 percent of defendants entitled to probation agreed to deals that included incarceration. Perhaps most striking: A majority of those defendants, 58 percent, pleaded guilty at the first opportunity, during their arraignment; the median time between arrest and plea was four days. In contrast, the median for defendants in which the field test indicated the wrong drug or that the weight was inaccurate — that is, the defendants who actually did possess drugs — was 22 days. Not only do the innocent tend to plead guilty in these cases, but they often do so more quickly.

On July 29, 2014, Munier sent a letter to Amy Albritton. It was a form letter, one of hundreds Munier was sending to exonerated defendants, opening with the salutation “Dear Sir or Madam,” but the contents were highly personal. It stated that the Harris County district attorney’s office had learned that the drug evidence in Albritton’s case was not a controlled substance: “Accordingly, you were prosecuted for a criminal drug offense and convicted in error.” Munier mailed the letter to the address on Albritton’s driver’s license, but Albritton did not receive it. She had long since moved on.

She had struggled to rebuild her life as a felon. The hours at the convenience store were erratic, so she started waiting tables and tending bar as she tried to find work in property management again. In 2013, she heard about a small set of rentals in Baton Rouge that needed someone to run them day to day. The pay was low compared with what she had made at Frances Place, and there was no free apartment. But the owner agreed to interview Albritton, even with her drug felony, and quickly hired her. She had almost nothing to pack besides her clothes and Landon’s before relocating to the state capital. The reason this property owner was willing to hire a drug felon became apparent soon enough. The apartments were in disrepair, with broken heaters and plumbing, and the owner forced his property manager to deal with angry tenants. She had gone to work for a slumlord.

Albritton quit and took a bartending position at the restaurant attached to a Holiday Inn near Louisiana State University. Tips included, she was earning about $15,000 a year, but she liked her co-workers and impressed her bosses. One of them tried to promote her to shift supervisor, Albritton recalls, but the promotion was denied when a criminal-background check by the hotel chain’s corporate office flagged the Houston conviction. She could
pour drinks and do nothing more. She remembers how desperate she had been to leave her jail cell, naively believing that the punishment for pleading guilty would end with her sentence. “No,” she says. “You’re not ever free and clear of it. It follows you everywhere you go.”

In the two years since the efforts to overturn wrongful convictions began at the Harris County district attorney’s office, Inger Chandler and her colleagues at the integrity unit have struck 119 N.C.S. convictions from the record. At least 172 remain. They haven’t been able to locate all of the wrongly convicted, at times even after hiring private investigators, and some defendants they have reached have declined to interact with the courts, even to clear their record. Last year, as we examined records in Harris County, we came upon Albritton’s file and decided to search for her ourselves to find out what had happened to one representative figure out of hundreds. Her case fit the larger pattern of convictions for no controlled substance: It moved rapidly, with Albritton pleading guilty within 48 hours of her arrest, and it involved an exceedingly small amount of supposed drugs. We searched for Albritton in public databases, finding likely relatives but no phone numbers or a current address. We called her sister, who said that Albritton was in Baton Rouge and provided a cellphone number. It was disconnected. But knowing where Albritton lived now, we found a Facebook profile she had been updating regularly with details of her life, including her work. Interestingly, we also found that Albritton had pleaded guilty to a 2008 misdemeanor, a D.U.I. conviction in Louisiana, despite breathalyzer results showing her blood-alcohol level at 0.0. When we asked her about this, she said that she had caused a collision by pulling onto the wrong side of a two-lane highway, and because she was guilty of that, she did not protest the other charges; she’s still unable to explain why she confessed to a crime there was no evidence she committed.

In August, we called and left a brief message for Albritton at the Sporting News Grill. She returned the call a couple of hours later, her voice small, wondering what this was about. When we described the details from the lab report and the letter from the district attorney that she never received, Albritton gasped. She didn’t make a sound for several seconds before shouting into the phone: “I knew it! I told them!”

If Albritton’s case is one of hundreds in Houston, there is every reason to suspect that it is just one among thousands of wrongful drug convictions that were based on field tests across the United States. The Harris County district attorney’s office is responsible for half of all exonerations by conviction-integrity units nationwide in the past three years — not because law enforcement is different there but because the Houston lab committed to testing evidence after defendants had already pleaded guilty, a position that is increasingly unpopular in forensic science.

Crime labs have been moving away from drug cases to focus on DNA and evidence from violent crimes. In some instances, the shift has been extreme. The Las Vegas Metropolitan Police Department’s forensic laboratory analyzes the evidence in, on average, 1,757 drug cases a year. Many of its 8,000 annual possession arrests depend on field-test results.

The United States Department of Justice was once among the leading voices of caution regarding field tests, and encouraged all drug evidence go to lab chemists. But in 2008, the Justice Department funded a program developed by the National Forensic Science Technology Center, a nonprofit that provides crime-lab training, to reduce drug-evidence backlogs. Titled Field Investigation Drug Officer, the program consisted of a series of seminars that taught local police officers how to administer color field tests on a large scale. In its curriculum, the technology center states that field tests help authorities by “removing the need for extensive laboratory analysis,” because “the field test may factor into obtaining an immediate plea agreement.” The Justice Department declined repeated interview requests.

Field tests provide quick answers. But if those answers and confessions cannot be trusted, Charles McClelland, the former Houston police chief, says, officers should not be using them. During an interview in March, McClelland said that if he had known of the false positives Houston’s officers were generating, he would have ordered a halt to all field testing departmentwide. Police officers are not chemists, McClelland said. “Officers shouldn’t collect and test their own evidence, period. I don’t care whether that’s cocaine, blood, hair.”

Judges, too, have the power, and a responsibility, some argue, to slow down the gears of the system. Patricia Lykos, the Harris County district attorney from 2009 to 2013, says that when she served as a criminal-court judge in the 1980s and 1990s, she would ask the defendants questions about their lives and the crimes they were accused of committing. If she wasn’t satisfied that the defendant was guilty of the charge, Lykos says, she wouldn’t accept the plea. At times the situation is even easier to decipher, says David LaBahn, president of the Association of Prosecuting Attorneys. The defendant can be heard arguing his or her innocence to the appointed
attorney. In such drug-possession cases, when the prosecutor doesn’t have a lab report, “if I’m that judicial officer, this case is continued” — adjourned — “until everybody can do their job,” LaBahn says.

But that means the defendant, depending on his or her custody status, could go back to jail until the case proceeds, presenting a significant dilemma. Last year, Devon Anderson, the current Harris County district attorney, prohibited plea deals in drug-possession cases before the lab has issued a report. The labs issue reports in about two weeks, but defendants typically wait three before they can see a judge — enough time to lose a job, lose an apartment, lose everything. And yet since Anderson implemented the rule, case dismissals have soared 31 percent, primarily because the lab has proved defendants not guilty. People plead guilty when they’re innocent because they see no alternative. People who have just been arrested usually don’t know their options, or even that they have an option. “There’s a fail-safe in there, and it’s called the defense lawyer,” says Rick Werstein, the attorney now representing Albritton as she seeks to finalize her exoneration. Defense lawyers can demand a lab analysis, and they exist to help defendants navigate the consequences of the jail time while they wait, even as they explain the even higher costs of a felony conviction. They are fully authorized to pursue alternative deals.

In fact, Richardson, Albritton’s original court-appointed lawyer, says the prosecutor offered her a deferred adjudication, in which she may have been able to wait for the results of a lab test outside the walls of a jail cell. Richardson, who first said he had no memory of their conversations, says he told her about the offer but she refused it. Albritton says she has never heard of anything called deferred adjudication. Neither could explain what actually happened. Perhaps they simply accepted that the field test, with its promise of scientific inevitability, would eventually convict her. “The entire country works on these field-test kits, right?” Richardson asks.

In the past three years, people arrested based on false-positive field tests have filed civil lawsuits in Sullivan County, Tenn.; Lehigh County, Pa.; Atlanta, Ga.; and San Diego, Calif. Three of the four cases also named the manufacturers Safariland Group or Sirchie as defendants. Three of the cases have already been settled. In one of them, the Sullivan County case, Safariland secured a gag order on the plaintiff, explicitly to prevent media coverage, before entering settlement negotiations. The plaintiffs in each of the suits were people who were arrested, refused to plead guilty and were detained for a month or longer. So far, we have been unable find anyone who pleaded guilty based on field-test results and later filed suit, though Werstein said he and Albritton are considering their additional legal options.

The Texas Criminal Court of Appeals overturned Albritton’s conviction in late June, but before her record can be cleared, that reversal must be finalized by the trial court in Houston. Felony records are digitally disseminated far and wide, and can haunt the wrongly convicted for years after they are exonerated. Until the court makes its final move, Amy Albritton — for the purposes of employment, for the purposes of housing, for the purposes of her own peace of mind — remains a felon, one among unknown tens of thousands of Americans whose lives have been torn apart by a very flawed test.

Correction, July 27, 2016: An earlier version of this article erroneously included an analysis of cocaine field tests results used by the Las Vegas police department. The sampling did not represent a broad submission of results to the department’s lab — it was an isolated group of field test failures including officer mistakes and false positives — and the data should not have been used to calculate an error rate. The article also misstated the average number.
of drug cases analyzed by the police department. The department says it was an average of 1,757 cases per year, not 73. And the article overstated the role field tests play in Las Vegas’s possession arrests. According to the Las Vegas police department, forms of evidence other than field tests can lead to drug possession arrests. They are not based exclusively on field test results.
‘No Field Test is Fail Safe’: Meet the Chemist Behind Houston’s Police Drug Kits

Decades after L.J. Scott developed a test for cocaine, his invention played a role in hundreds of wrongful convictions in Houston.

by Ryan Gabrielson, ProPublica
July 11, 2016, 8 a.m.

In 1973, L.J. Scott, Jr., was a chemist at the recently created Drug Enforcement Agency, hard at work on a critical breakthrough: a chemical mixture that could identify the presence of cocaine. The trafficking and use of the drug was exploding, and federal and local authorities wanted help confronting the problem. Scott and the DEA wanted something that could be used in the streets — cheap and handy, and, if possible, authoritative.

Scott’s invention became part of drug test kits that agents and officers could carry with them. Scott said he spent nine months validating his new test — first in the DEA’s lab and then with detectives in the field — before declaring success. “The method proposed herein is almost impossible to misinterpret,” he wrote in an internal memo introducing the field test, “and is highly sensitive and specific.”

Chemical field tests in the ensuing decades have served as a ubiquitous, daily tool in law enforcement’s war on drugs. Weeks after Scott declared success, arrests were being made based on the tests’ results. And in less than a decade, there were at least 12 brands of kits, which could test not only for cocaine, but also a variety of other illegal drugs. Police departments across the country purchased and used them by the thousands. In 1990, Scott left the DEA and started his own field test outfit, Scott Company. His longtime top client has been the Houston Police Department.

A ProPublica investigation, the first installment of which was published last week, found that Scott’s kits were central to the wrongful convictions of scores of people in Houston. The tests had either registered false positives or had been misinterpreted by the officers using them. The wrongly accused had pleaded guilty. Since 2014, the Harris County District Attorney’s Office has been working to remedy the wrongful convictions, and the office no longer accepts guilty pleas for drug possession before the crime lab has confirmed the evidence is actually an illegal drug.

During our investigation, ProPublica interviewed Scott, as well as Charles McClelland, who had served as Houston’s police chief until earlier this year, and Ray Hunt, the head of Houston’s police union. None were aware of how many people had been wrongly convicted based on Houston officers’ arrests, or that the Scott Company kits had been at the center of the disaster.

“I don’t know of jurisdictions that send a man up to the slammer based upon just a field test,” Scott said.

Hunt conceded more training for officers on how to use and interpret the tests would be welcome. “I think it would be important for officers to know that these tests are not infallible,” Hunt added.

McClelland said the embarrassment in Houston should

be cause for law enforcement across the country to reconsider the wisdom of relying upon the field tests — including police, prosecutors and judges.

“It’s not working, and we see the negative effects it’s had on our communities and our societies,” he said. “So why should we continue doing the same thing, that’s my question.”

Back in the 1970s, when Scott went to formulate his test for cocaine, chemists had been using a pink liquid called cobalt thiocyanate to help detect the drug for more than four decades. When cocaine combines with the liquid, a blue color forms. But errors plagued the tests, Scott said, because dozens of substances besides cocaine also produce a blue reaction.

Scott experimented with adding other chemicals to the cobalt thiocyanate to improve the results. (All the chemicals would be released in a pouch containing glass vials.) Scott’s final formulation was a three-step test. It still began with cobalt thiocyanate. A blue reaction signaled the suspect drugs might be cocaine. In step two, he used hydrochloric acid to turn the solution pink again. In step three, chloroform was supposed to cause positive tests to separate into two layers, pink on top and blue on the bottom.

But Scott’s claims about the reliability of the three-step process proved overly confident. In 1975, a pair of toxicologists at Duquesne University in Pittsburgh documented false positives in the Scott test with mixtures that included the numbing agent lidocaine. Drugs sold on the street are often combinations of several substances, making the color reactions in field tests harder to decipher or rely upon. Some officers even injured themselves when breaking the vials of acid.

For some reason, when he got into the business himself, Scott abandoned the improved three-step model of test and returned to the single chemical interaction. It is unclear why. In our interview, he said he had been able to become competitive in the industry by keeping his prices low. He said he uses cheaper plastic containers, and charges police less than $1 per kit, about half the price of the leading manufacturers. He eventually won the business of large police departments across Texas, Alabama, Florida and North Carolina. Scott’s kits do not reference the risk of false positives. The term appears with “disclosures and disclaimers” on the company website: “it is possible (though unlikely) to receive a false positive result under certain conditions.”

Today, Scott’s products remain in use throughout the country, and they are a staple of Houston’s police department, which bought 9,000 of them in 2014, the last year for which records are available. Yet his kits have undergone next to nothing in the way of improvement over the decades. Indeed, in 1997, an industry rival expressly highlighted the shortcomings of the Scott test while applying for a patent.

“No field test is fail safe,” he said. “Any field test can give you an erroneous result, even if you run two or three field tests in a row. You have to do that in a sequence and you can get greater reliability using that technique. But it burns up tests, it burns up time, and it puts an officer in the role of a chemist. The result you get would be more reliable than a single test, but it’s still not conclusive.”

He said common sense and the rest of the justice system reduced the risk of people being arrested or taking pleas as a result erroneous field tests.

“No field test is fail safe,” he said. “Any field test can give you an erroneous result, even if you run two or three field tests in a row. You have to do that in a sequence and you can get greater reliability using that technique. But it burns up tests, it burns up time, and it puts an officer in the role of a chemist. The result you get would be more reliable than a single test, but it’s still not conclusive.”

“Usually, the guy involved in drugs knows he’s dealing in drugs,” he said. “And if he is innocent, and it’s not a drug, he’s probably not going to plead. If he is dealing in cocaine or meth or heroin, the odds are he’d love to have a plea.”

Police don’t rely purely on chemistry, but a combination of that and their day-to-day experience to recognize when drugs are present, Scott maintained.

“The officer in the field probably has a reasonable expectation in his area, in his experience,” he said. “He knows what drugs are prevalent in his area. And he knows what they look like. He has a reasonable cause, or he has a reasonable suspicion what kind of drug he has before he runs a field test in many cases. If he’s used to seeing crack, and it looks like crack, and it’s packaged the way crack normally is packaged, there’s a pretty good chance it’s crack. And if the field test comes up and says, ‘Yeah, that’s crack, all right,’ then he has an even better reason.”

ProPublica’s investigation showed that guilty pleas are allowed based on field tests alone in dozens of jurisdictions, among them Atlanta, Boston, Dallas, Jacksonville, Las Vegas, Los Angeles, Newark,
Philadelphia, Phoenix, Salt Lake City, San Diego, Seattle and Tampa.

We asked Scott whether departments should be requiring all field test results to be confirmed in a lab.

“I would,” he said. “But that’s just me.”
Unreliable and Unchallenged

Years after the Las Vegas crime lab wanted to replace faulty police drug kits, they are still used in thousands of convictions.

by Ryan Gabrielson, ProPublica
Oct. 28, 2016, 11 a.m.

Yet to this day, the kits remain in everyday use in Las Vegas. In 2015, the police department made some 5,000 arrests for drug offenses, and the local courts churned out 4,600 drug convictions, nearly three-quarters of them relying on field test results, according to an analysis of police and court data. Indeed, the department has expanded the use of the kits, adding heroin to the list of illegal drugs the tests can be used to detect.

There’s no way to quantify exactly how many times the field tests were wrong or how many innocent people pleaded guilty based on the inaccurate results, or to assess the damage to their lives.

To be sure, most field tests are accurate and most drug defendants who take plea deals are guilty. But — just as certainly — there have been some number of convictions based on false positives. How many? The department maintains it has never established an error rate. The department destroys samples after pleas are entered and does not track how many of its field test results are re-checked. Drug arrest and lab testing data show the number could be as low as 10 percent.

What is clear is that even as they continue to employ field tests to secure arrests and gain convictions, neither the Las Vegas Metropolitan Police Department nor the Clark County district attorney’s office has informed local judges of the long-standing knowledge of their unreliability. And neither has taken any additional steps to prevent mistakes.

Informed recently of the findings reported to the Justice Department, Joe Bonaventure, chief judge of the Las Vegas Justice Court, expressed concern about the flaws but did not say whether he plans to change his court’s regard for the tests.

“These are tests that have been accepted for years,” said Bonaventure, who became a judge in 2004. “They’re not being challenged.”

Kim Murga, the director of the Las Vegas police crime lab, said the department still wants to stop using chemical field tests in arrests for methamphetamine and
cocaine. “We don’t turn a blind eye” to the risk of false positives, Murga said. But she acknowledged that the lab had not tried to more effectively eliminate errors.

In 2014, the same year the Las Vegas lab’s report to the DOJ detailed misgivings about the reliability of field tests, prosecutors in Houston identified more than 300 cases in which innocent people took plea deals largely based on field test results that proved wrong. Unlike in Las Vegas, Houston’s lab hung on to evidence even after defendants pleaded guilty. Lab tests later proved that the alleged drugs were not controlled substances. By that time, though, many people had spent time in jail or prison. Some were saddled for years with felony convictions that devastated their lives.

The district attorney’s office in Harris County, the jurisdiction where Houston is, no longer accepts guilty pleas based on field tests. Drug evidence must be confirmed by the crime lab for prosecutors to obtain a conviction.

Officials at the Clark County district attorney’s office would not be interviewed about the use of field tests in Las Vegas or their reliability. Jennifer Knight, a spokeswoman for the police department, said the lab had informed the district attorney’s office of the concerns about field test reliability when it sent the 2014 report to the Department of Justice.

In some respects, people arrested for drug offenses based on field tests in Las Vegas find themselves in more dire circumstances than they might elsewhere.

- People allegedly possessing even small amounts of a drug like cocaine can be charged with trafficking and thus be exposed to stiff sentences and steep bail amounts.
- Prosecutors routinely resist efforts to have drug evidence quickly retested in the lab, often keeping those who fight the charges in jail longer.
- Police and prosecutors have made presentations to judges vouching for the reliability of field tests. Defense attorneys say such proceedings leave judges predisposed to accept field test results as authoritative.

Phil Kohn, chief of the Las Vegas public defender’s office, acknowledged that the prospect of serious prison time has the effect of strong-arming pleas.

“If you’re wondering why the public defender is pleading these cases, it’s because the alternative is horrific,” Kohn said.

Chemical field tests were first widely deployed by law enforcement in the 1960s amid the early skirmishes of the war on drugs. Today, they are used by hundreds of police agencies across the country, from the giant New York Police Department to far smaller departments throughout rural America. In 2011, the Department of Justice hired a private research firm for a national survey, and every jurisdiction it contacted used field tests for drug arrests.

The tests are cheap — $2 apiece or less — and they are enormously convenient for police. Over the years, numerous studies have concluded that they are legitimate tools to establish probable cause to make an arrest. But those studies have always emphasized the limits of the tests. For instance, they ought never be seen as definitive evidence of illegal drugs. Federal guidelines say all drugs in criminal cases must be identified by a qualified lab. Kevin Lothridge, head of the National Forensic Science Technology Center, said scientists’ position has been that field tests could provide only “an indication something might be there.” Courts across the country have repeatedly refused to admit field test results as evidence at trial. The Safariland Group, which produces the brand of tests purchased by Las Vegas police and is the largest manufacturer of the test kits, said in a statement last week that “field tests are specifically not intended to be used as a factor in the decision to prosecute or convict a suspect.”

Nonetheless, in jurisdictions of all sizes and in all corners of the country, unconfirmed field tests are being used to help extract guilty pleas. The 2011 national study commissioned by the Justice Department found that prosecutors in nine of the 10 jurisdictions surveyed accepted guilty pleas using unconfirmed field tests. ProPublica’s analysis of the available data — arrests, convictions, plea bargains, rates of field test use — suggests that every year, a minimum of 100,000 people nationwide plead guilty to drug charges that rely on field-test results as evidence. Even a modest error rate, then, could produce hundreds or even thousands of wrongful convictions.

David LaBahn, president of the Washington-based Association of Prosecuting Attorneys, said the hundreds of wrongful convictions in Houston had effectively put the nation’s criminal justice system on notice. Jurisdictions still accepting guilty pleas based on field tests were playing with fire.

“It’s sloppy work,” he said. “If they haven’t heard about Houston, people better start paying attention.”
Perhaps no jurisdiction in the country is as equipped to understand the risk of wrongful convictions as Las Vegas. The unreliability of field tests, after all, is not theoretical here. Their shortcomings were painstakingly memorialized in the 2014 report that called for the tests to be replaced.

Yet Las Vegas police continue to arrest people using field tests, and the volume of drug pleas continues largely unabated. The police made some 13,000 arrests involving cocaine, methamphetamine or marijuana offenses from 2013 through 2015. More than 10,000 convictions resulted from these drug arrests and 99 percent of them were achieved through guilty pleas, court data show. The records establish that some 70 percent of the pleas came at the earliest possible moment, during preliminary hearings and before any lab retesting.

Perfect Solution, Perfect Storm

During the 1980s, as the population of Las Vegas exploded, the number of drug arrests did, too. As in other U.S. cities, the Las Vegas police force saw drug enforcement as a way to reduce all forms of crime, especially burglaries and other thefts. Las Vegas patrol officers aggressively searched out small-time sellers and users on and around the Strip, eager to safeguard residents and tourists alike.

But as the department came to average some 4,000 drug arrests a year by the decade’s end — a formidable figure for a city of 250,000 — its crime lab became swamped. The department budgeted for fewer than three full-time scientists to test the huge volume of drug evidence. Without lab reports identifying drugs, prosecutors couldn’t file criminal charges and were legally limited to detaining suspects for eight days. As a result, hundreds of suspects waited out the eight days and were released.

Field tests were an appealing answer to the problem. Bill Jansen, a former FBI agent who became a judge on the Las Vegas Justice Court in 1985, remembers attending a presentation with colleagues by Becton Dickinson, which manufactured the NIK Public Safety brand of chemical field test kits. The police were there as well. Company officials demonstrated how the tests could be used to detect cocaine and how officers would perform the tests.

The benefits would be multiple: preliminary positive results would be enough to hold defendants longer in jail; pleas could happen in the interim; and the lab would need to retest the alleged drugs only in cases where the accused maintained their innocence and proceeded toward trial. The judges on the Justice Court were assured by police, prosecutors and the manufacturer that the chance for mistakes was microscopic, less than one in 4,000, according to a November 1989 article in the Las Vegas Review-Journal. Individual judges then held formal evidentiary hearings and signed off, allowing the tests to be used first in cocaine prosecutions and then in methamphetamine and marijuana cases as well.

“This was only for the purpose of the preliminary hearing,” Jansen, now 80, said in an interview. “That is all.”

Over time, though, preliminary hearings became just about the only hearings taking place in criminal drug cases in Las Vegas. Last year, for example, just eight of 4,633 drug cases that resulted in convictions went to trial, according to court data. Plea deals sealed the rest.

The explosion in the use of field tests by police and their increasingly decisive role in criminal convictions have received scant attention over the years. An array of anecdotal accounts describe arrests based on what later turned out to be soap or doughnut crumbs or grains of sand.

https://www.propublica.org/article/unreliable-and-unchallenged
Field tests have received a similar lack of scrutiny from government and law enforcement. No central agency, for instance, regulates the manufacture or sale of the tests, and no comprehensive records are kept about their use. There’s no evidence any federal, state or local law enforcement agency has sought to formally establish error rates for the tests. While DOJ standards for the last 40 years have called for qualified labs to re-examine all field test results, the agency has made no effort to insist that happens or to install other protections against mistakes and the wrongful convictions that could result.

And the destruction of field tests after guilty pleas is hardly limited to Las Vegas. In some jurisdictions, defendants accepting guilty pleas agree as a term of the arrangement that the evidence against them will be destroyed. In others, the alleged evidence is simply discarded over time. In a 2013 federal survey of local and state crime labs, 62 percent reported that police agencies don’t submit suspected drugs when a defendant pleads guilty early on in the process.

As a result, officers on the street almost never know whether there are problems with the accuracy of the tests and thus have little reason for skepticism. As far as they know, the system works.

Throughout, the manufacturers of the tests have pushed them as an indispensable and effective tool for catching and punishing drug users. Currently, at least nine different companies sell tests to identify cocaine, heroin, marijuana, methamphetamine, LSD, MDMA and more than two dozen other drugs. And three of the largest suppliers of the kits, including the company that sells field tests to the Las Vegas police, long ignored the Justice Department’s guidelines calling for manufacturers to include warnings of test fallibility on their packaging.

In Las Vegas, the police came to create a partnership with one major kit manufacturer, ODV Inc. The Maine company made the NarcoPouch brand, and it produced a kind of quality-control checklist for the Las Vegas authorities that is billed in company promotional materials as boosting the tests’ credibility with courts. Officers, at least in theory, were required to check off boxes indicating they had followed every step in the testing process and interpreted the results correctly.

“With this form having been completed, a DA can then feel more comfortable that the proper controls were followed and the results of the field test given more weight,” the company’s newsletter said.

Judges got the completed checklists — which always carried the declaration “Result POSITIVE” — as part of the case file at preliminary hearings. So did defense attorneys, often at the same time they received the prosecution’s plea offer. And that’s how things work to this day.

Ownership of the ODV NarcoPouch brand field tests has changed a number of times over the years. But Las Vegas has remained a customer, almost without exception buying nothing but the brand for close to two decades. Murga, the police forensics director, said the department purchases only those tests deemed acceptable by the lab and supported by the Justice Court. The lab endorses only ODV NarcoPouch. Between 2010 and 2014, the Las Vegas police purchased more than 42,000 test kits.

The brand is owned today by the Safariland Group, based in Ontario, California. When asked about its tests’ reliability and proper use, the company gave a response that seems to call into question years of practice by police, prosecutors and judges in Las Vegas.

“False positives are possible in field tests due to the limitations of the science, which is why we also clearly state in our training materials and instructions that they are not a substitute for laboratory testing,” a Safariland spokesman said in a written statement.

“In a trial or other criminal procedure setting,” the statement continued, “field tests should not be used as evidence of the presence, or lack thereof, of any substance.”

Jansen, who served on the bench until 2012, said he and other judges hadn’t anticipated just how many drug cases would result in pleas and just how quickly they would be brokered. But he said he had no reason to find fault with the use of the tests. It was up to defense lawyers to challenge their reliability. Bonaventure, the court’s current chief judge, agreed.

“I’m surprised that defense attorneys haven’t brought it up,” Bonaventure said.

**A Tattered Line of Defense**

Defense attorneys are the most obvious protection against unreliable field tests leading to wrongful convictions.

In Las Vegas, there is considerable evidence that defense attorneys have been derelict in that duty.
A federal review of Nevada’s indigent defense programs in 2000 turned up worrisome and pervasive problems with court-appointed counsel in Clark County. The National Legal Aid and Defender Association came to similar conclusions in examining the public defender’s office two years later.

“The perception among the client population, gleaned from courtroom observation and client interviews, is that the public defender office seeks to get clients to plead as quickly as possible, regardless of whether they are guilty or of other needs and concerns the client may have,” the association’s report found. Few lawyers filed motions to suppress evidence, the report said, with some admitting they hadn’t done so in as much as five years.

In 2008, the association said problems with sheer indifference had lessened, but the quality of representation remained unimpressive. Judges told the association that public defenders simply weren’t very aggressive.

Kohn, chief of the public defender’s office, defended the integrity of his attorneys and said they did their best in difficult circumstances. He noted, for instance, that caseloads remain crushing — more than 200 active cases per attorney — and the office’s work on behalf of those accused of drug offenses is handicapped in other ways as well.

Minimum bail for those charged with drug possession is $5,000, requiring defendants to have at least $500 available to secure bonds and their release from jail. Furthermore, cases that would be low-level possession prosecutions in the rest the country are counted as trafficking offenses in Nevada. The state’s drug laws say possession of just 4 grams of cocaine, methamphetamine, or heroin constitutes trafficking — a far graver felony offense. By comparison, federal law requires 500 grams of powder cocaine for a trafficking charge, 100 grams of heroin or 50 grams of methamphetamine. Bail at the Las Vegas Justice Court for a trafficking offense is $20,000.

The expense of posting bail and the risk of going to trial, Kohn said, can make plea offers knocking felonies down to misdemeanors more attractive even though misdemeanors can bring up to 180 days in jail and tough probation terms.

“A lot of clients are going to do one of two things,” Kohn said. “They’re going to say, ‘Hey, look, I know I had this stuff. I’m getting a misdemeanor and I’m getting out. All I want is out.’”

Alternatively, Kohn said, the thinking is this:

“I have no idea what was in my pocket but I’ve got to get back to work. I’ve been out for 72 hours, I’ve got the kind of job where if I miss one more day, I lose it.”

Kohn’s analysis is echoed by others. Laurie Diefenbach, a former public defender who is now a private defense attorney in Las Vegas, said even clients inclined to fight frequently choose to take a conviction in the belief that it is less harmful than months lost to a jail cell.

Putting a human face on the innocent in Las Vegas who might have pleaded guilty in such circumstances is close to impossible, given the routine destruction of the alleged evidence against them. The hundreds of wrongful convictions in Houston came to light only because the lab retested every field test that had produced a conviction. Still, the retesting took months or even years, and the district attorney’s office for years overlooked the lab reports proving hundreds innocent.

Among those wrongly convicted in Houston, even some of those who avoided much time behind bars lost jobs and the chance at future employment. One pleaded guilty after a grain of sand had tested positive for cocaine. Another after caffeine had done the same. The innocent, the Houston data show, pleaded guilty quickly, on average within four days of being arrested and well before the lab ever had a chance to confirm the field test results. Scores of them had never been convicted of anything prior to being jailed on erroneous drug charges, according to court records. They had families to get back to, careers to try to save.

In Las Vegas, the clearest evidence of faulty field test results emerges from the tiny number of cases in which defendants have gone to trial to challenge drug evidence. In several cases, the defendants were seasoned street hustlers, dealers of phony drugs to tourists along the Strip. They pushed for trial and compelled lab tests because they knew the nature of their scams — and that their drugs weren’t real.

Such embarrassing outcomes happened dozens of times between 2010 and 2013, police and court records show. Las Vegas patrol officers pulled over a local man’s car in December 2010 because it “did not have any functioning license plate lights,” the arrest report states. He had small knotted baggies that held six grams of off-white powder. Eight months later, officers detained another man after watching him walk around the Imperial Palace hotel and casino’s blackjack tables without sitting down to gamble. He had 21 grams of powder in plastic bags.
In both cases, prosecutors charged the defendants with crimes punishable by a dozen years in state prison based in large part on positive field tests of the suspected drugs. In both cases, the evidence was not cocaine but the numbing agent lidocaine, packaged to look like the illegal stimulant. The Las Vegas police crime lab proved the first man innocent eight months after his arrest, analysis records show. The other man’s results took almost 19 months to arrive.

ProPublica interviewed more than a dozen defense lawyers and public defenders in Las Vegas, and they all said prosecutors delayed having field tests retested in a lab until the eve of trial. The tactic, they said, extended defendants’ jails stays and pressured them to plead guilty.

The Clark County district attorney’s office declined to answer questions about delays in retesting drug evidence, but Glen O’Brien, the chief deputy district attorney, detailed the thinking behind the practice in a 2014 court filing.

“Due to the great number of drug cases that are prosecuted but the relatively few that actually go to trial, such testing is generally done just prior to trial commencing, when it is clear the matter is actually going to trial,” O’Brien wrote.

**An Alarm Bell, Rung Quietly**

By 2010, the Las Vegas Police Department was ready to move on from chemical field tests. The tests had produced more than 50,000 arrests and scores of convictions. The defense bar was not up in arms. The judges had long ago accepted their value.

But new technology was available: spectrometers that shine a laser on suspicious material and reveal its chemical makeup. The hand-held devices cost about $20,000 apiece, but a manufacturer offered to partner with the police to tailor the devices for law enforcement. The crime lab saw the technology as the future.

Stephanie Larkin, a forensic scientist in the Las Vegas lab, set about making the case for spectrometers, securing funding from the Department of Justice to do research. Over the next several years, she and others did testing they said showed the spectrometers performed well. The devices didn’t produce any false positives for cocaine or methamphetamine in Larkin’s study. Occasionally, when the device failed to identify illegal drugs, the manufacturer made adjustments.

Larkin, though, did not just document the ostensible strengths of the spectrometers. Again and again, in the 95-page report she finalized in 2014, she explicitly documented the shortcomings of the field tests her department had been using for decades.

“Over the past few years,” Larkin wrote, “false positive results have been discovered due to subjectivity of color interpretation and tedious procedures.”

Larkin’s report acknowledged that problems with field tests were in fact what had led the department to recognize “the need to find a more reliable method” for identifying suspected drugs outside the lab.

Larkin also worried openly about issues of contamination, noting that given the problems with conducting the tests cleanly and competently, defense attorneys might raise doubts about their integrity. A considerable number of chemical field tests performed in a formal lab setting during her years of study had produced what are known as false negatives, a failure to identify what were indeed illegal drugs.

In sounding an alarm, however, Larkin’s report focused not on whether innocent people might have been convicted by faulty evidence or that guilty people might have gone free, but instead on the prospect of the lab having to go back to the days of wholesale drug testing.

The lab, she feared, would be swamped again.

“With over 34,000 items of evidence being field tested each year, the elimination of the field testing program
would overwhelm the laboratory and compromise due process,” she wrote.

Larkin could have sought to answer the questions that judges and defendants might have found most valuable: Just how flawed were the tests? Just how often were mistakes happening?

John Goodpaster, the forensic sciences director at Indiana University, said such a step would have been logical, even imperative. “The determination of error rates in forensic science is an important issue and it has been recommended by numerous organizations and committees,” he said.

But the Las Vegas police have made no effort to quantify the likelihood of mistakes — in effect, an error rate for the field tests.

“The true percentage of errors due to false positives is unknown,” Larkin wrote in the report.

ProPublica talked at length with Larkin and Murga, the lab chief. They confirmed that one of the central rationales for the study and report was alarm about the shortcomings of field tests. Larkin said false positives produced by field tests were their “number one” concern.

“Obviously, we don't want false positives,” Larkin said during an interview in July.

But neither Murga nor Larkin explained why they had not taken further steps to prevent such results.

The department today remains intent on switching to laser technology and has even purchased one or two spectrometers. The spectrometers have attracted interest but few buyers among the nation’s police agencies. The cheaper chemical field tests still dominate police drug testing.

As for Larkin’s report, it was sent to the Department of Justice, which posted it online with other forensic science studies the agency had funded over the years. It does not seem to have circulated much beyond that.

ProPublica found it in a digital archive in 2015, just as the Las Vegas Police Department was ordering its latest supply of field tests.

**The Latest Sales Pitch**

On July 8, 2015, the judges of the Las Vegas Justice Court gathered at lunchtime in Chief Judge Joe Bonaventure’s courtroom. They were there for one of their regular meetings on logistics and scheduling, but on that day there was an added agenda item: the latest chapter in chemical field testing in Las Vegas.

A year after the police had made an argument to abandon the kits because of their unreliability, they were back before the judges to argue for expanding their use to combat increases in heroin abuse and trafficking.

Clark County Chief Deputy District Attorney Tina Talim told the judges that the police lab had assigned scientist Michael Noble to find a way to quickly and accurately identify suspected heroin seized by officers, according to an official summary of the meeting obtained by ProPublica. Noble, in his first year as a staff scientist, had helped produce a fairly complicated protocol designed to reduce the potential for false positives.

His plan was to have police use a series of three different field tests with each one producing a distinct color change — first purple, then green, then purple again. One field test can easily malfunction or be misread. Requiring officers to use three tests, Noble believed, might enhance accuracy. Noble organized a study and examined how the tests responded to more than 350 different substances, most of them pure compounds purchased from chemistry supply firms, research records show. Noble also tried the method on 50 samples of suspected heroin obtained in arrests.

Judge Diane Sullivan wanted to know about the potential for mistakes. Of the samples from arrests, she asked Noble, how many of those were later found to have been false positives?

None, he responded.

Noble didn't mention the lab’s report from just a year before laying out problems with officers misinterpreting and mishandling field tests. He didn't mention the false positives for cocaine and methamphetamine.

None of the judges asked another question about field test reliability.

Noble’s statement about heroin field test errors was technically accurate. But a ProPublica examination of his work shows that Noble didn't add an important detail in answering the judge’s concern about false positives.

Noble, it turns out, had determined that the suspected heroin seized by officers was indeed heroin before he subjected the samples to the new testing method. The
research did not find false positives because there were none to find.

The chemical field tests that Noble prescribed will detect heroin. However, there’s no telling what else police might mistake for heroin when performing the tests themselves.

Noble said he does not recall his exchange with the judges more than a year ago. He added that every detail of the results and methodology was in a written report provided to all judges at the meeting.

Several experts pointed out that Noble’s study did not attempt to assess how well police officers perform the tests.

“The ideal probably would have been not to have the scientist do this,” said Michael Kalichman, founding director of the research ethics program at the University of California, San Diego.

Over the last 18 months, police have routinely used the test protocol in making heroin arrests. Prosecutors have just as regularly used those results to help obtain guilty pleas. And judges have, week after week in Justice Court, signed off on the pleas and sentenced the defendants.

None of the Justice Court’s judges has held a formal evidentiary hearing on the reliability of the new heroin test. Bonaventure, the top judge, said the bench was effectively waiting for defense attorneys to ask for one.

Asked about the use of field tests in heroin arrests and prosecutions, Christopher Lalli, an assistant district attorney for Clark County, said they are “sufficiently reliable for the purpose (they are) being utilized (for).” He then asserted that the tests are authorized for this use in jurisdictions in at least eight other states.

Lothridge, the head of the National Forensic Science Technology Center, said the tests’ shortcomings are less about science and more about their use by the justice system.

“Science can do some things,” Lothridge said. “But if the legal community chooses to go another way and allows people to plead without additional testing or those kinds of things, that’s not a science problem. That’s really the legal system’s issue.”

Topher Sanders contributed reporting.
Sustained Objections

For years, police and prosecutors have used special presentations to sell judges on the reliability of drug tests that help convict thousands.

by Ryan Gabrielson, ProPublica
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Tom Pitaro, a prominent Las Vegas defense attorney, took a seat in the back of Chief Judge Joe Bonaventure’s courtroom. Pitaro didn’t make a practice of attending the regular meetings of the city’s Justice Court, but that day in July 2015, a friend had asked him to sit in. He said he couldn’t believe what he heard.

Police and prosecutors were briefing the judges on their latest plan for using chemical field tests, the $2 kits that for years had been instrumental in gaining cocaine and methamphetamine convictions.

The more he listened to the conversation, Pitaro said, the more inappropriate he thought it was. “That’s when I got up and started ranting and raving,” he said.

Pitaro didn’t know much about field tests and thus whether they would be any good at what the police and prosecutors were promoting that day: expanding the use of the kits to win heroin convictions. His objection was more fundamental. The judges were allowing prosecutors what amounted to an unchallenged, prejudicial communication about evidence to be used in criminal proceedings.

Pitaro said the appropriateness of such scientific evidence is normally presented in a formal hearing as part of a criminal case. Those hearings allow both the prosecution and the defense to call experts; statements are made under oath; judges make individual decisions on what is admissible.

Pitaro demanded that the judges end the presentation. They didn’t. Bonaventure, according to an official record of the meeting, reassured Pitaro that nothing underhanded was going on. The presentation, Bonaventure said, was only “informational.”

What Pitaro stumbled upon that day was an arrangement that has existed for decades. Police and prosecutors had made a similar presentation in 1989, at the very outset of the use of field tests in Las Vegas. And it also provoked a little opposition.

Kelly Slade, then a Justice Court judge, chose not to attend the event put on by the Las Vegas Metropolitan Police Department and a field test manufacturer because it seemed inappropriate and unfair.

“Any decision I make will be based on the evidence and information presented to me in court, where both sides have an opportunity to cross examine each other’s witnesses,” Slade told the Las Vegas Review-Journal at the time.

Records and interviews show that such presentations have happened regularly over the years, almost always when the police and prosecutors wanted to widen the use of the tests. The presenters attested to their accuracy and vouched for their usefulness.

ProPublica contacted two experts in legal ethics, Dmitry Bam at the University of Maine and Brooks Holland at Gonzaga University, for their opinion of the practice. Both said they could see the value in judges seeking to be as informed as possible about the latest advances in forensic science. But both said the presentations had the potential for trouble.

“This from an appearances perspective, this meeting is problematic,” said Bam. “Putting myself in the place of a
litigant who is trying to challenge this procedure, I would have a concern that judges attending the meeting are predisposed to rule against them.”

Holland’s take: “It doesn’t mean it’s unethical necessarily, but I certainly understand the concern on the other side.”

Kevin Burke, a Minnesota district court judge and a former president of the American Judges Association, said he had been in similar meetings during his 30 years on the bench and said he believes that they happen on occasion around the country. Burke said he understands the concern that prosecutors could be lobbying judges, and as a result, he said, it’s preferable for both the defense bar and prosecutors to be in the room.

Lance Hendron, president of Nevada’s private defense lawyer association, was in the courtroom during the 2015 presentation before the Las Vegas Justice Court judges. But he said he had been given only 24 hours notice and was unprepared to challenge the substance of the proceedings.

Bonaventure, the chief judge, said in an interview that he’d be happy to grant the defense bar a full hearing, but “they’ve never requested to do so.”

“There were no rulings being made,” Bonaventure said of the meeting. “It was simply a presentation. It was really a courtesy of what to expect at future hearings. It’s not testimony; it’s not under oath. It’s simply a presentation. There was no precedent or law created.”

Christopher Lalli, a Clark County assistant district attorney, said there was nothing unethical about the presentations. Kim Murga, the head of the Las Vegas police crime lab, agreed. She said the presentations had been so persuasive over the years that the Justice Court judges actually had voted to approve the latest use of the tests at the meetings.

Judge Bita Yeager, a Justice Court judge since early 2015, said any such vote would be improper and would have no legal power over what evidence can be presented in court. Yeager, who was at the presentation on the heroin tests, had spent years in the public defender’s office and had never heard of such presentations. She didn’t take issue with the presentation she attended, though, and said judges did not vote at the meeting on heroin tests. If such votes happened in the past, they would have been inappropriate, she said.

Decisions about the propriety of evidence can’t be made

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