E. G. Morris
President

August 1, 2016

Jonathan J. Wroblewski, Principal Deputy Assistant Attorney General
Office of Legal Policy
United States Department of Justice
950 Pennsylvania Avenue N.W.
Washington, D.C. 20530

RE: Docket No. OLP 158

Dear Mr. Wroblewski,

The National Association of Criminal Defense Lawyers (NACDL) has worked collaboratively with the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), the Innocence Project, and the *pro bono* law firm Winston & Strawn on the FBI Microscopic Hair Comparison Analysis Review (FBI MHCA Review) since 2012, and, as a result, NACDL has seen firsthand how pervasively examiner opinions exceeded the limits of science in hair comparison cases. Thus, this initiative by DOJ, along with its commitment to a process that is "deliberative" and "transparent" is most welcome. In the spirit of that commitment, NACDL offers these comments.

NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 9,000 direct members in 28 countries –and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal

justice system. NACDL has a strong interest in ensuring the accuracy and reliability of all evidence that may be introduced to support a criminal prosecution. NACDL has played a vital role in several significant historic reviews of flawed forensic science evidence.

Before offering specific comments on the Department of Justice Forensic Science Discipline Review of Testimony: Draft Methodology (OLP Docket No. 58), NACDL wishes to clarify some of the statements made in the Draft Methodology proposal regarding the FBI MHCA Review. Discussion of the MHCA Review permeates this proposal and lessons learned through the MHCA should inform the development of this document. Although NACDL applauds DOJ for attempting to build on the MHCA Review, many of the descriptions of that project in this document are misleading and in some cases incorrect.

Characterization of MHCA Review[1]

First, it is important to clarify that the reviewers do in fact take into account surrounding language when determining whether a statement exceeded the limits of science. If the examiner made a statement in close proximity to the original erroneous statement that fully clarified the erroneous statement, such that the examiner did fully and appropriately describe the limit of hair comparison as reflected in the review standard, then it would not be regarded as error. Therefore the FBI MHCA Review actually does credit examiners' attempts to "correct" or "mitigate" improper testimony when that correction fully clarifies the limits of the discipline.

The Draft Methodology cites the "consistent with" error (MHCA Review Error 2) for the proposition that determination of erroneous statements differs depending on the interpretation of the reviewer. This anomaly does not illustrate that the review is subjective. Rather, the language "consistent with" is not erroneous in every instance. For example, a statement is not found to exceed the limits of science when an examiner states the hair is consistent with originating from the defendant, and then notes that what he means by that phrase is that the hair *could have come* from the defendant. The surrounding language does more than "mitigate"—the immediate explanation of the term "consistent with" renders this statement appropriate under the terms of the FBI MHCA Review.

[1] "One of the distinguishing characteristics of the FBI MHCA review is that it treats any statement that reviewers feel may fall within one of the three defined error types as an 'error.' This is done by considering statements on their own in a 'line-by-line' approach, and the review gives no weight to attempts to qualify, correct, mitigate, or offer context for those statements." Department of Justice Forensic Science Discipline Review of Testimony: Draft Methodology, p. 10. Although the FBI MHCA Review does not "credit" the "limiting language" disclaimers in the analysis of erroneous testimony, those statements are noted on the review sheet.

On the other hand, the FBI Laboratory review team also noted what they identified as "limiting language" disclaimers. These disclaimers typically included statements such as "hair is not like a fingerprint" or "it is pointed out that hair comparison is not a means of absolute personal identification" and are reported in the FBI MHCA Review Results in accordance with the governing protocols for the review. The decision not to consider the possible effect of those statements on the testimony that exceeded the limits of science was deliberate because these disclaimers fail to ameliorate the prior or subsequent testimony, as detailed below.

First, this review is the direct result of the wrongful incarceration and subsequent exoneration of several defendants who were convicted based on the testimony of FBI hair comparison experts. A review of those cases confirms that the examiners used "limiting language" during their testimony.[2] And yet, those defendants were still convicted based on that hair evidence. Thus, this clearly shows that such limiting language does not prevent an erroneous conclusion by the trier of fact, nor does it prevent a wrongful conviction.

Second, to try and intuit the effect of the limiting language on the jury would be a fool's errand. The scientific research cited in the Review Methodology confirms that limiting language disclaimers have little effect on the jury.[3] The implication of that research is that once an exaggerated statement is presented to the jury, the testimony of that examiner is polluted. Thus, a proper review must make an objective determination of whether testimonial statements are appropriate and fully reflect the limits of science as defined by the FBI and DOJ. It is not the role of the reviewer, but rather that of the court to weigh the effect of the hair evidence on the jury viewed in light of all the evidence in the case.

Finally, the MHCA review demonstrates that "limiting language" often leads directly to exaggerated and erroneous testimony. For example: The examiner correctly states that he does not know how many other individuals may have hair that also looks the same microscopically, but then uses his experience to provide a scientifically unsupported probability by stating that based on his experience it would be very rare for two individuals to have hair that cannot be distinguished by microscopic comparison. In this example, the non-erroneous statement regarding

[2] *Santae Tribble v. United States*, 447 A.2d 766 (D.C. 1983), Trial Transcript at 71: 10-14; *Donald Eugene Gates v. United States*, 481 A.2d 120 (D.C. 1984), Brief for Appellee p. 8:23-25; *United States v. Kirk L. Odom*, Lab Report at 2.

[3] Dawn McQuiston-Surrett & Michael J. Saks, *Communicating Opinion Evidence in Forensic Identification Sciences: Accuracy and Impact*, 59 HASTINGS L.J. 1159-1190 (2008); Dawn McQuinston-Surrett & Michael J. Saks, *The Testimony of Forensic Identification Science: What Expert Witnesses Say and What Factfinders Hear*, 33 LAW & HUM. BEHAV. 436-453 (2009).

the limitations of the discipline leads directly into an Error 3 attempt to bolster and assign a probability or likelihood of a match based on personal experience.

For the aforementioned reasons NACDL urges the DOJ not to ascribe weight to limiting language or disclaimers in conducting its review of other disciplines.

Time and Discipline Limits

When first announced by Deputy Attorney General Sally Yates, the FSDR was presented as an examination into "whether the same kind of 'testimonial overstatement' found during the review of microscopic hair evidence could have crept into other disciplines that rely heavily on human interpretation and where the degree of certainty can be difficult to quantify."[4] Now, it appears the proposal is to examine only cases from 2008-2012, which necessarily limits both the universe of cases and disciplines. Fiber, for example, which was the brother discipline to hair comparison in the FBI Hair and Fiber Unit, is not represented on the table of cases on page 17 of the proposal.

Although NACDL welcomes a DOJ review of testimony, limiting the FSDR in the manner proposed will create the false impression that these disciplines were not subject to testimonial overstatements. By 2008 DNA testing was regular practice in the FBI lab and thus, there was less of a need for the use of other forensic disciplines. While recognizing the potential difficulty of obtaining old transcripts and records, the MHCA Review demonstrates that it is possible. In fact, fiber testimony was identified in the course of the MHCA review. By 2009 when the National Academy of Science Report was released, many of the issues surrounding pattern-matching disciplines were well known. Three of the four years under review occurred after the issuance of this report. By limiting the scope of the FSDR, some of the most egregious failures of forensic science will escape detection.

Testimonial Standards

NACDL agrees with DOJ that the ULTRs are insufficient as a testimonial standard for this review. It is difficult to comment on a testimonial review without knowing the standards against which that testimony will be judged. NACDL urges adoption of the same type of standards used in the FBI MHCA Review, which will prohibit those same three types of overstatements. The FBI MHCA standards are well-defined, and plainly state limits of science that are also applicable to other comparison disciplines, with appropriate modifications based on limits of the

[4] Deputy Attorney General Sally Yates, Remarks During the 68th Annual Scientific Meeting Hosted by the American Academy of Forensic Science (available at: https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-during-68th-annual-scientific).

particular science as currently known and accepted by the scientific community. This is particularly important since the genesis of the FSDR was the findings of the FBI MHCA Review.[5]

Evaluation of Error

This proposal is particularly sensitive to the effects of such a review on forensic examiners. While recognizing that the identification of "error" in testimony or lab work is troubling for an examiner, no other term accurately conveys that the opinion exceeded the limits of science. In order to have parity with other review efforts, and to indicate the appropriate level of concern about testimonial overstatements, it is important to maintain use of the term "error" in this review.

Conclusion

NACDL again commends DOJ for its commitment to making every attempt to ensure that forensic science is fair, accurate, and reliable. In particular NACDL applauds DOJ's commitment to the recognized duty for forensic and legal practitioners to correct the record and provide notification when mistakes are made or science changes.

This proposal, however, shifts focus away from the historic post-conviction review of other forensic disciplines announced by Deputy Attorney General Yates. While establishing prospective standards for forensic testimony is critical, and a goal NACDL wholeheartedly supports, the proposed review does nothing to address decades of problematic testimony introduced before the proposed review period. This proposal calls the FBI MHCA Review error rate "misleading." On the contrary, this error rate, produced and accepted by the DOJ and FBI, shows how prevalent testimonial overstatements are and alerts the criminal justice community to the harmful consequences of erroneous forensic testimony. While looking towards the future of forensic science testimony, NACDL urges DOJ not to lose sight of the damage done by decades of unchecked testimonial overstatements.

Sincerely,

E.G. "Gerry" Morris
NACDL President

[5] Id.