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February 25, 2016

Dr. Willie May and Sally Q. Yates, Co-Chairs
Dr. John Butler and Nelson Santos, Vice-Chairs
National Commission on Forensic Science
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Dr. May, Ms. Yates, Dr. Butler, and Mr. Santos:

The National Association of Criminal Defense Lawyers (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.

After reviewing the “Recommendations to the Attorney General Regarding the Use of the Term ‘Reasonable Scientific Certainty’” (Recommendations), the NACDL wholly agrees with and supports all three recommendations of the subcommittee which, taken together, would end the use of the terms “to a reasonable degree of scientific certainty” or “to a reasonable degree of (discipline) certainty” by those employed and appearing on behalf of the Department of Justice.

Science demands accuracy and lucidity in the reporting of results. In 2009, the National Research Council of the National Academies published “Strengthening Forensic Science in the United States: A Path Forward” (NAS Report). That report noted that in many of the scientific disciplines, no consensus had been reached on the meaning of commonly used terms in forensic testimony ascribed to results such as “match,” “consistent with,” “identical,” “similar in all respects tested,” and “cannot be excluded as the source of.” Such terms were then, and are now, still being utilized to

describe the findings and conclusions of examiners and the degrees of association between the evidentiary material and particular individuals or objects. The NAS Report called for raised standards of reporting and testifying about the results of examinations.

The primary cause for the confusion cited by the NAS Report was engendered by a paucity of research in the forensic sciences and corresponding limitations in interpreting forensic analyses results. Both before and after the NAS Report's issuance, testimonial and reporting confusion was magnified by the use of the generic term "reasonable scientific certainty." As the Recommendations clearly denote, the reasonable scientific certainty terminology has no scientific meaning, and even worse may mislead triers of the fact as to the objectivity involved, the degree of scientific reliability and any limitations being asserted, as well as the ability of the analysis to reach an individualized conclusion.

In the courtroom, the presentation of a scientific conclusion has an outsized impact on the presentation of the evidence, and its magnified effect results in shifting aside concomitant evidence that the jury should consider in reaching a conclusion as to guilt beyond a reasonable doubt. Even more egregious is that testimony presented as "probably" or "possibly" linked to a particular source when coupled with the term "reasonable scientific certainty" has the effect of completely confusing a jury as to what value, if any, such evidence has in the trial context, a result which can be equally damaging to both the prosecution and the defense. The confusion taken as a whole can cause the jury to assign an aura of infallibility to science that is not deserved under current standards.

By eliminating the term "reasonable scientific certainty," testimony as to forensic conclusions will be expressed in more accurate terms. This term is not routinely used by medical professionals or other scientists in expressing conclusions. Neither the *Frye* and *Daubert* tests nor case law across the nation require the use of the term "reasonable scientific certainty."

The prohibition against the use of this term by attorneys appearing on behalf of the government as well as by forensic science service providers and forensic medical providers will result in more accurate courtroom testimony if the recommendations are adopted by the Commission and subsequently by the Attorney General. It will also serve as a benchmark by which the states can emulate the same standard as they seek to achieve the same clarity in proceedings across the nation.

Sincerely,



E. G. "Gerry" Morris

President,

National Association of
Criminal Defense Lawyers