**E. G. Morris**
**President**

July 8, 2016

**Comment by the National Association of Criminal Defense Lawyers on Department of Justice Proposed Uniform Language for Testimony and Reports**

**Docket No. DOJ-OLP-2016-0012**

To whom it may concern:

The National Association of Criminal Defense Lawyers (NACDL) commends the Department of Justice (DOJ) for developing uniform standards for testimony and lab reports generated by the Federal Bureau of Investigation (FBI), the Bureau of Alcohol Tobacco and Firearms and Explosives (ATF) and the Drug Enforcement Administration (DEA). NACDL further commends the DOJ for releasing these standards for public comment, particularly for comment from the scientific community. NACDL has worked collaboratively with DOJ, the FBI and the Innocence Project on the microscopic hair analysis review project since 2012, and, as a result, we have seen firsthand how pervasively hair examiners exaggerated their conclusions when testifying in hair comparison cases. Thus, this initiative by DOJ, along with its commitment to making both efforts "deliberative" and "transparent" is most welcome. In the spirit of that commitment to a deliberative and transparent process, NACDL offers these comments on the proposed "Uniform Language for Testimony and Reports" (ULTR).

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 keen 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. First, NACDL partnered with the Innocence Project and the FBI to review comparative bullet lead analysis (CBLA) cases, following the FBI's admission that its agents potentially gave flawed or misleading testimony in thousands of CBLA cases. In addition, NACDL currently works with the Department of Justice Office of Enforcement Operations to correct the serious injustice caused by the failure to notify thousands of defendants whose cases were affected by the findings of wrongdoing in the 1996 Office of the Inspector General Report and FBI Task Force investigation. Finally, as mentioned above, NACDL partnered with the FBI, DOJ, the Innocence Project and the law firm Winston & Strawn to review criminal cases in which the FBI conducted microscopic hair comparison testimony or lab examinations. While the Microscopic Hair Comparison Analysis Review (MHCA Review) is ongoing, the results thus far have conclusively documented the extraordinary frequency of exaggerated testimony. The FBI and Department of Justice agreed that FBI examiner testimony exceeded the limits of the science in over 90% of trials reviewed.

As a result of its participation in this project, NACDL has unique insight into the character and prevalence of testimonial overstatements made by FBI analysts. The results of the MHCA Review demonstrate the urgent need for clear, precise, and binding guidelines that govern the language used by forensic experts in both testimony and lab reports. Although not a panacea, it is NACDL's hope that if the ULTRs are developed with significant and meaningful peer review, they will finally set firm limits on the language that analysts use to convey their results to a jury in order to prevent the miscarriages of justice identified by the CBLA Review, the FBI Task Force Review, and the MHCA Review.

Given NACDL's experience reviewing testimony and lab reports in pattern-matching forensic disciplines, we offer specific comment only on the fiber, footwear and tire treads, and latent print examination ULTRs. However, much of our comment is applicable to all testimonial standards.

## I. The MHCA Review Established the Limits of Appropriate Hair of Comparison Testimony and Illustrates the Dangers of Overstated Conclusions in Similar Disciplines.

The MHCA Review identified three common scientific overstatements made by FBI hair examiners in testimony and in lab reports. Moreover, as part of the Review, the FBI and DOJ agreed upon what the science of microscopic hair comparison supports and established appropriate testimonial limits for the discipline. The FBI and the DOJ now recognize that statements that exceed those scientific limits are not supported and are erroneous. These erroneous statements were found in over 90% of the hundreds of trials reviewed thus far in which FBI examiners testified.

The errors fall into three categories:

- **Error Type 1:** The examiner stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of all others.
- **Error Type 2**: The examiner assigned to the positive association a statistical weight or probability or provided a likelihood that the questioned hair originated from a particular source, or an opinion as to the likelihood or rareness of the positive association that could

lead the jury to believe that valid statistical weight can be assigned to a microscopic hair association.

- **Error Type 3:** The examiner cites the number of cases or hair analyses worked in the lab and the number of samples from different individuals that could not be distinguished from one another as a predictive value to bolster the conclusion that a hair belongs to a specific individual.

Pursuant to the scientific standards adopted by the FBI and DOJ for the MHCA Review, a well-trained hair examiner may only provide an opinion that an individual can be excluded as a possible source of a questioned hair, or included as a possible source at the class level. Testimony is only acceptable if it: "appropriately reflected the fact that hair comparison could not be used to make a positive identification, but that it could indicate, at the broad class level, that a contributor of a known sample could be included in a pool of people of unknown size, as a possible source of the hair evidence (without in any way giving probabilities, an opinion as to the likelihood or rareness of the positive association, or the size of the class) or that the contributor of a known sample could be excluded as a possible source of the hair evidence based on the known sample provided." Identification is not permitted, and an opinion regarding rareness of an association would only ever be potentially appropriate with hair samples that have distinct unusual characteristics, such are certain diseases. FBI Microscopic Hair Comparison Analysis Scientific Standards (11/9/2012).

Like hair examination, latent print examination, fiber examination and footwear and tire tread examination, and to some extent glass examination, rely on the subjective judgments of well-trained examiners. All subjective pattern-matching disciplines rely on two assumptions (1) that a well-trained examiner can associate a known item with an unknown item based on visual identification of similarities and differences and (2) that that identification has value because of the uniqueness of those characteristics. Similar to hair comparison, the probative value of those disciplines is limited because the pool of items that share the characteristics identified by the examiner is unknown. In conveying that association or exclusion to a jury, examiners in unvalidated, subjective fields are similarly at risk of making the same overstatements as the FBI Hair and Fiber Unit, because assigning any statistical probability or weight to the association is not is supported by the current scientific research.

## II. The Proposed Uniform Language for Testimony and Reports for Pattern-Matching Disciplines Will Not Prevent the Kind of Erroneous Testimony Now Disavowed by the FBI and DOJ that was offered for Decades in the Discipline of Microscopic Hair Comparison.

The proposed ULTRs for the Forensic Textile Fiber Discipline, Forensic Footwear and Tire Tread Discipline, and Latent Print Discipline only prohibit three statements: (1) Individualization, (2) Statistical Weight/Numerical Certainty, and (3) Zero Error Rate. Short of proclaiming identification to the exclusion of all others, assigning a numerical statistical weight to that association, or implying that the discipline has an error rate of zero, examiners may still generally state that they have made an identification between a known and questioned item.[1]

[1] Each discipline differs slightly in in the definition of acceptable testimony. The ULTR for Forensic Textile Fiber Discipline allows classification into natural and manufactured fibers, and does not allow for

FBI hair examiners were always prohibited from testifying that a hair came from a certain individual to the exclusion of all others.[2] And yet, agents frequently made statements such as "my opinion is that those hairs came from [Victim]." FBI Guidance, Error 1. Similarly, although there has never been a statistical basis for hair comparison, analysts routinely used their own experience to add numerical certainty or assign a likelihood to a positive association. For example: "However, in my experience, in looking at hundreds and hundreds of hair samples, it's very rare for me to find two known head hair or pubic hair samples that I can't distinguish microscopically." FBI Guidance, Error 3. Indeed, analysts regularly used their own experience to effectively communicate an unvalidated error rate and bolster the conclusions they offered to the jury. For example: "The ten thousand known samples I have looked at over the last fifteen years, and I have been keeping track of them, during that time I have only had two occasions out of those ten thousand known samples, where I had hairs from two different people, that I was not able to distinguish from one another..." FBI Guidance, Error 3.

The draft ULTRs are simply too broad and too permissive to prevent testimonial overstatements that convey scientific certainty to the jury in disciplines that are highly subjective. In order to prevent the type of testimonial overstatements identified by the MHCA Review, the guidance provided to examiners about testimony and lab reports must be detailed and specific. Examiners must be provided with examples of acceptable and unacceptable language for testimony and reports, based on the limits of the particular science as currently known and accepted by the scientific community. Without specifically delineating unacceptable testimony, forensic experts could continue to provide the erroneous testimony that has plagued hundreds of FBI microscopic hair comparison cases. For example, several pattern and impression evidence ULTRs would still permit scientifically invalid probabilistic testimony regarding the "likelihood or rareness of the positive association" or use of experience to imply an error rate for the discipline that is not scientifically supported. Such statements would be equivalent to FBI MHCA Review Error Types 2 & 3.

Preventing and identifying scientifically unsupported forensic is critical to ensuring the fairness and integrity of the criminal justice system. This erroneous testimony has very real consequences. Hair comparison testimony now identified by the FBI as erroneous has resulted in the wrongful conviction of defendants later proven innocent by DNA testing. For example, Kirk Odom was convicted and spent 22 years in prison based in large part on flawed testimony by an FBI examiner. The examiner used his experience to provide unsupported probabilities, stating there were "only eight or ten times in the past ten years, while performing thousands of analyses" that he had not been able to distinguish between two hairs from different individuals (MHCA Error Type 3). Mr. Odom was exonerated when DNA testing proved that he was actually innocent, and that the hair the analyst "matched" to him was not his. Similarly, we now know

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"identification" only "inclusion" or "exclusion." The ULTR for Forensic Footwear and Tire Impression also allows for many more conclusions beyond Identification, Inconclusive, or Exclusion. These distinctions provide an even greater risk that this testimony will mislead a jury by giving a statistical weight to the association.

[2] FBI Agents frequently gave the disclaimer that "hair is not like a fingerprint" and "hair comparison is not a means of positive identification" then proceeded to give testimony that misled the jury about the evidence and exceeded the limits of science.

that in several other cases in which a conclusive exoneration was established by DNA testing, various forms of erroneous testimony by the FBI were admitted. The draft ULTRs would not prevent analysts in other disciplines from giving the same type of flawed testimony. Establishing the correct standards is not just an intellectual exercise—it is about reducing the risk of wrongful conviction, and ensuring that there is fundamental fairness in how forensic science is used in the criminal justice system.

## III. The DOJ Must Directly Solicit and Implement Feedback From the Scientific Community Outside of Legal and Forensic Practitioners.

While NACDL commends the DOJ on their ongoing commitment to transparency, the release of the ULTRs on www.regulations.gov does not constitute a peer review of those standards. As it has in the MHCA Review, the federal government must engage scientists and statisticians must continue to set the boundaries of acceptable testimony based on the accepted limits of each individual discipline. Thus, NACDL strongly encourages DOJ to seek input on the ULTRs from statisticians, including at the statistician roundtable scheduled for July. NACDL further encourages DOJ to seek input the scientific community, including from the NIST OSACs as they also work to develop standards. Moreover, it is unclear how the ULTRs will interface with the OSAC guidelines, and the President's Council of Advisors on Science and Technology (PCAST) Report. DOJ must firmly establish the role of the ULTRs and be explicit that they will not replace guidelines set by scientists based on actual discipline validation.

In addition, NACDL asks DOJ to clarify the process by which these comments are adjudicated and how feedback from the comments will be incorporated into the development of the final ULTRs. Clarification is also requested as to the next steps in this process, including the method for releasing updated/revised versions of the ULTRs after this comments period.

NACDL thanks DOJ for its commitment to ensuring the accuracy of forensic testimony presented at criminal trials, and looks forward to continued participation in this important endeavor.

Sincerely,

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President, NACDL