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May 9, 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 156

Dear Mr. Wroblewski,

The National Association of Criminal Defense Lawyers (NACDL) commends the Department of Justice (DOJ) for conducting an independent root cause analysis on testimonial errors by microscopic hair analysts and for conducting a “quality review” of other disciplines to see if similar “testimonial statements” were made in other comparison disciplines. NACDL has worked collaboratively with DOJ, the FBI and the Innocence Project on the microscopic hair analysis project since 2012, and, as a result, we have seen firsthand how pervasively examiners exaggerated their conclusions 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.

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—including 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 dominant 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 Federal Bureau of Investigation (FBI) to review comparative bullet lead analysis (CBLA) cases, following the FBI's admission that its agents gave false 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. The Microscopic Hair Comparison Analysis Review (MHCA Review) is ongoing, but the results have been staggering—The FBI and Department of Justice agree that FBI analyst testimony exceeded the limits of the science in over 90% of trials reviewed.

As a result of these partnerships, NACDL has unique insight and expertise in post-conviction evidentiary reviews of flawed forensic science testimony that we hope will be useful to the DOJ in developing the Forensic Science Discipline Review (FSDR).

1. FSDR Methodology and Protocols

As a threshold matter, the DOJ must identify the disciplines it will review, the scope of the review, and the methodology. As to the methodology, NACDL encourages the DOJ to engage experts and statisticians from outside of the DOJ with expertise in designing such studies. With respect to scope, NACDL submits that the review should include more than just testimony and should also evaluate laboratory reports for overstatements. Finally, with respect to the choice of disciplines, NACDL submits that all comparison disciplines are ripe for a quality review. If asked to choose where to start, NACDL recommends that the DOJ select the most commonly used comparison disciplines involving pattern and impression evidence. The MHCA Review has identified significant problems with

hair comparison testimony. As a result, we now know that that at least one comparison discipline generated high rates of testimony that exceeded existing testimonial standards. If that phenomenon occurred in other similarly subjective comparison disciplines it needs to be addressed expeditiously.

To determine a methodology, the DOJ must specifically identify the questions the FSDR is designed to address.¹ Deputy Attorney General Sally Yates stated that this review is not designed to question the validity of the underlying disciplines. It is our opinion that as a strictly-testimonial review, and given the state of the knowledge of the science underlying the questioned disciplines, the FSDR can only address two questions.²

First, did the testimony or lab report provided exceed the guidance provided to analysts at the time they testified? This question will help address two issues: (a) if the analysts did exceed instructions, is it possible to study the cause and develop systems to address this problematic practice and (b) did the specific excesses impact the outcome of specific cases.

Second, did the testimony or lab report exceed what the DOJ now finds is appropriate? This second inquiry should be informed by input from independent scientists and statisticians and may be guided by revised FBI Approved Standards for Scientific Testimony and Report Language (ASSTRs) or standards promulgated and entered into the registry by the Organization of Scientific Area Committees (OSAC).

2. ASSTRs as Testimonial Standards for the FSDR

Release ASSTRs for Public Comment

The FSDR framework signals that the ASSTRs will likely be the testimonial standards on which the FSDR is based after they have undergone review and possible revisions. NACDL supports DOJ's intention to independently review and critique the ASSTRs before using them as the basis of the FSDR. But before

¹ DOJ has stated that this quality review is not to challenge nor assess the scientific validity of the discipline. And while NACDL submits that this is much needed research, NACDL agrees this is not research that the DOJ is suited to undertake.

² NACDL has significant reservations about the validity of the underlying disciplines. Since the revelation in the 2009 NAS Report that "the level of scientific development and evaluation varies substantially among the forensic science disciplines," little is known about the scientific validity of most forensic disciplines. NAS Report at 7. NACDL continues to question the validity of the underlying disciplines. Recognizing that the FSDR is not designed to deal with the validity of the disciplines, NACDL reserves comment on validity pending validation by the NCFSS.

NACDL can comment further the ASSTRs must be released for meaningful public comment.

NACDL hopes that any revised ASSTRs will be more rigorous and more cognizant of limitations and sources of error than past standards for the comparison disciplines. This belief forms the basis for NACDL's position that a comparison of reports and testimony against these standards will be of some value. The ultimate value of comparing reports and testimony with a specific ASSTR depends on the ASSTR.

Although the FBI has publicly discussed the ASSTRs, and repeatedly implied that they are final and will be released, the ASSTRs have not been released to the NCFS, the larger scientific community or the public. ASSTRs—like any scientific protocol—must be subject to meaningful peer review. Without broad input from the relevant scientific and legal communities, it is impossible to determine whether the ASSTRs will identify the full extent to which testimony or reports exceeded the testimonial limits of the discipline.

Ensure the ASSTRs Adequately Protect Against False and Misleading Testimony

The ASSTRs for highly subjective disciplines must be thoroughly scrutinized to ensure that they do not allow for testimony that will mislead the jury about the capabilities of subjective forensic disciplines. In particular, NACDL is concerned that the ASSTRs will permit the type of testimonial overstatements that were prevalent in the microscopic hair comparison testimony analyzed in the MHCA Review, making a comparison against them meaningless.

Individualization testimony is particularly problematic. For example, although there is no existing scientific data to support the assertion that the effect of gait on the sole of a shoe makes a shoeprint unique, the testimonial standards issued by the Scientific Working Group for Shoeprint and Tire Tread Evidence for Shoeprint and Tire Tread³ examination allows an examiner to make an “Identification”—that is, that a particular shoe or tire is the source of a questioned impression and that another item of footwear or tire being the source of the impression is “considered a practical impossibility.” SWGTREAD guidance allows for this type of individualization despite acknowledging that “accurate and reliable data and/or statistical models for use in calculations do not currently exist.” SWGTREAD

³ SWGTREAD was founded by the FBI and issued standards for the examination of shoeprint and tire tread evidence until 2014. SWGTREAD has since been discontinued following the formation of the Footwear and Tire OSAC.

Range of Conclusions Standard for Footwear and Tire Impression Examinations (3/2013). In effect, this standard allows for practically any identification testimony. Thus, a comparison of shoe print testimony against this standard would be essentially meaningless.

3. Transparency and the Use of Statisticians

NACDL commends the DOJ on their commitment to transparency and to using the resources of the broader forensic and scientific communities in developing the FSDR. NACDL strongly encourages the use of independent statistical expertise throughout the development and implementation of the FSDR. Based upon NACDL experience with CBLA and the MHCA Review, independent statisticians must be involved at every stage of the process, including methodology development, selection of disciplines to be reviewed, assessment of the ASSTRs, and the determination of the limits of appropriate testimony for each discipline.

NACDL similarly encourages the DOJ to include independent lawyers and other experts at every stage of the FSDR.

4. Meaningful Notification and the Duty to Correct

DOJ must ensure that the FSDR does not meet the same fate as other historic evidentiary reviews by the federal government. Thus, NACDL recommends that the DOJ start planning now for secondary review, that the secondary review include defense counsel and post-conviction experts, meaningful notification, and that the DOJ be prepared to, as it did for MHCA cases, waive procedural bars and agree that erroneous statements should be treated as false evidence.

The secondary review cannot be done solely by the DOJ. Although the methodology for the secondary review will not be developed until the primary review is underway (and is dependent on the results of the initial review) the duties to correct and to notify require the “fulsome” secondary review to be structured in a transparent, holistic, and expert manner utilizing the full skill of the criminal defense bar.⁴ Qualified criminal defense attorneys and post-conviction litigators must be utilized to determine whether the error identified potentially affected the

⁴ The government has a duty to correct the record when mistakes or scientific developments call a forensic discipline into question. This duty has been recognized in the context of the MHCA Review. Amy Hess, Executive Assistant Director, Science and Technology Branch, FBI has said: “The Department and the FBI are committed to ensuring that affected defendants are notified of past errors and that justice is done in every instance.” Joint Press Release, April 20, 2015.

outcome of the case. Any review that excludes input from the defense bar ignores the risks of contextual bias.

Further, in recognition of the significance of the error identified in the FBI MCHA Review, the DOJ agreed to waive procedural bars in federal MHCA cases. The government will not dispute in those cases that the erroneous statements should be treated as false evidence and that knowledge of the falsity should be imputed to the prosecution. The FBI also agreed to provide DNA testing in many MHCA cases. To allow final resolution on the merits, DOJ should make a similar commitment to correction in the FSDR.

Concurrent with the duty to correct is the duty to notify. The FSDR must be designed to achieve meaningful notification. Thus, DOJ must thoroughly alert prosecutors, defense counsel, and the defendant when errors are identified. This includes the timely tracking and public dissemination of data and results.

NACDL thanks DOJ for its commitment to ensuring the accuracy of forensic testimony presented at criminal trials. We look forward to contributing to this significant effort and hope to be a continued resource to the Department of Justice throughout the FSDR.

Sincerely,

A handwritten signature in black ink, appearing to read "E.G. Morris". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

E.G. Morris
President, NACDL