

STATEMENT REGARDING TEXAS HAIR MICROSCOPY REVIEW TEXAS FORENSIC SCIENCE COMMISSION

Background: FBI Review of Hair Microscopy Cases

The Federal Bureau of Investigation (FBI) is currently reviewing testimony in criminal cases containing microscopic hair comparisons with positive associations made by its examiners before 1999. The FBI believes some of its examiners may have testified in a manner that did not appropriately explain the scientific limitations of microscopic hair analysis to the finders of fact in those cases.

For several decades, the FBI assisted state and local crime laboratories in training hair examiners, including many examiners in Texas. The fact that Texas examiners received some of their training from the FBI *does not necessarily mean* they made statements of concern similar to those identified in the FBI review. However, to determine whether the issues identified by the FBI are also present in the testimony provided by state, county and municipal laboratories, the Texas Forensic Science Commission decided the most prudent course would be to review a sub-sampling of hair microscopy cases from all 20 laboratories (including 12 DPS regional labs) that performed hair microscopy examinations. As a critical partner in this collaboration, the Texas Association of Crime Lab Directors publicly acknowledged their “ethical and professional duty, as scientists, to take appropriate action if there has been a miscarriage of justice.”

Note: Neither the FBI review nor the Texas review is intended to assess the underlying scientific validity of microscopic hair examination as a forensic discipline.

Chronology of Texas Statewide Review

On April 21, 2013, the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) released a memorandum to all accredited crime laboratories describing the FBI review and encouraging (but not requiring) state and local crime laboratories to review microscopic hair comparison reports and associated testimony made by their examiners. ASCLD/LAB noted the forensic science community’s ethical obligation to “take appropriate action if there is potential for, or there has been, a miscarriage of justice due to circumstances that have come to light, incompetent practice or malpractice.”

At its quarterly meeting on July 12, 2013, the Texas Forensic Science Commission (“Commission”) discussed the FBI review and the ASCLD/LAB memorandum. Commission staff then sent a survey to Texas laboratories to identify the number of laboratories that performed microscopic hair analysis and assess what level of resources would be needed to review the cases.

At its November 1, 2013 meeting, the Commission appointed an investigative panel to coordinate a case review. The panel currently includes Dr. Art Eisenberg

(Chair), Dr. Nizam Peerwani, Assistant District Attorney Richard Alpert and criminal defense Attorney Bobby Lerma. The panel held an initial meeting at the Department of Public Safety Regional Crime Laboratory in Houston on November 22, 2013, during which members sought input on the best way to approach the review from Texas laboratories that have performed microscopic hair analysis.

At its January 10, 2014 meeting, the investigative panel reported to the full Commission regarding the feedback received at the November meeting of crime laboratory directors in Houston. The Commission instructed the panel to bring together subject matter experts and attorneys for the purpose of advising the panel and the full Commission on a process and criteria for reviewing cases. The Commission also allocated \$50,000 for the purpose of supporting the laboratories in their efforts to identify relevant case files.

The Commission approved a sub-sampling approach to case identification that allows for the generation of a significant number of cases without adding to any existing laboratory backlogs. The Commission requested that each laboratory provide the first 10 cases from every decade for which the laboratory performed microscopic hair comparisons. The Commission received over 600 cases from the laboratories in response to the sub-sampling request. After reviewing the first round of cases, the Commission may decide to identify additional cases if recommended by the hair review team. However, any additional work would require deliberation and approval by the full Commission, including an allocation of additional funds for that purpose.

The Hair Microscopy Review Team

On January 21, 2014, the Texas Association of Crime Laboratory Directors (“TACLD”) sent a letter to the Commission offering their support for the review and citing their “ethical and professional duty, as scientists, to take appropriate action if there has been a miscarriage of justice.” The TACLD also suggested a list of subject matter experts to serve on the review team. The hair microscopy panel selected four subject matter experts and three attorneys to serve on the team based, in part, on the list submitted by the TACLD. The full Commission initially approved the review team at its meeting on April 4, 2014, and has since updated the team roster to include a second prosecutor (Baldwin Chin) and a subject matter expert from DPS (Sandy Parent).

The review team currently consists of the following individuals:

1. Baldwin Chin (Harris County District Attorney’s Office)
2. Deborah Lind (Pasadena Police Department Crime Laboratory)
3. Michael Martinez (Bexar County Crime Laboratory)
4. Sandy Parent (Department of Public Safety Crime Laboratory)
5. Jack Roady (Galveston County Criminal District Attorney)
6. Bob Wicoff (Harris County Public Defender’s Office)
7. Melissa Valadez (Department of Public Safety Crime Laboratory)
8. Nick Vilbas (Executive Director, Innocence Project of Texas)

Scope of the Texas Review

The review team's scope of work is to advise the Commission regarding the following areas: (1) review process flow; (2) review criteria; (3) individual case reviews and outcomes; and (4) educational lessons learned from the review. The review team does not make decisions for or represent the panel or the Commission as a whole. All guidance offered by the review team is subject to deliberation at panel meetings and full Commission meetings that are open to the public.

The review panel will limit its review of cases to those in which an individual was convicted of a crime, there was a positive, probative association made by a hair examiner in a laboratory report, and the examiner either: (a) provided subsequent testimony as an expert witness at trial; or (b) included scientifically invalid language in the report to such a degree that the defendant's plea could have been involuntary. The team will ask the following questions regarding all cases it reviews:

1. Did the report or testimony contain a statement of identification?¹
2. Did the report or testimony assign probability or statistical weight?
3. Did the report or testimony contain any other potentially misleading statements or inferences?

If the answer to any of these questions is affirmative, the Commission will notify interested parties of the review team's specific findings. The Commission is working collaboratively with the Texas Criminal Justice Integrity Unit under the leadership of Texas Criminal Court of Appeals Judge Barbara Hervey to ensure a robust notification protocol is established for any cases for which the review team identifies potential issues with the laboratory report and/or expert testimony rendered at trial. The notification protocol will ensure, to the extent possible, that all affected parties are notified regarding the review team's findings.

The Commission is not a court of law and therefore will not make any legal determinations regarding the materiality of the reports and/or testimony reviewed to any specific criminal case outcome. To the extent the review raises potential legal issues in individual criminal cases, those issues will be resolved by Texas courts of competent jurisdiction. The Commission will publish a report describing the review, the findings of the hair review team and lessons learned. The timing of that report will depend on how long the case reviews take, which likely will be many months due to the time-intensive nature of the work involved.

¹ A properly trained hair examiner can make an association between a questioned hair and a known hair sample from an individual. However, the examiner cannot provide a scientifically valid estimate of the rareness or frequency of that association. *The examiner's testimony should reflect the fact that hair comparison cannot be used to make a positive identification of an individual.* In other words, hair comparison can indicate, at the broad class level, that a contributor of a known sample could be included in a pool of people as a possible source of the hair evidence. However, the examiner should not give an opinion as to the probability or the likelihood of a positive association.

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All questions regarding the Texas hair microscopy review should be directed to Lynn Robitaille Garcia, General Counsel of the Texas Forensic Science Commission, at 512-936-0770 or lynn.garcia@fsc.texas.gov.