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VIA FEDEX

Justice Margot Botsford
Supreme Judicial Court
for Suffolk County
John Adams Courthouse
One Pemberton Square, Suite 1300
Boston, Massachusetts 02108-1707

Re: Further Submission of *Amicus Curiae* National Association of Criminal Defense Lawyers in Support of Petitioners

Kevin Bridgeman, Yasir Creach and Miguel Cuevas

vs.

District Attorney for Suffolk County and District Attorney for Essex County;

No. SJ-2014-0005

Dear Justice Botsford:

In proceedings before the full Supreme Judicial Court (the "SJC") in SJC-11764, the National Association of Criminal Defense Lawyers ("NACDL") appeared as *amicus curiae* in support of the Petitioners. In its brief, NACDL argued that "Due Process and the Rules of Professional Conduct Require the Prosecutors to Promptly Notify Individual Defendants of the Exculpatory Evidence in Each Affected Case." *Brief of NACDL as Amicus Curiae in Support of Petitioners* at *i.* Proceedings in this matter since the SJC issued its opinion have reiterated the need for the Court to squarely address the argument advanced by NACDL in its brief.

Thus, NACDL writes today for two reasons. First, NACDL respectfully reiterates below the position it advanced before the full Court. Second, in an effort to assist the parties and the Court with the practical challenges still extant in this matter, NACDL writes to call attention to, and to provide as a guide, certain materials from its collaborative work since 2012 with the U.S. Department of Justice to address convictions tainted by flawed forensic evidence.

I. NACDL Reiterates That Due Process and the Rules of Professional Conduct Require the Prosecutors to Promptly Notify Individual Defendants of the Exculpatory Evidence in Each Affected Case.

As the Supreme Court in *Brady v. Maryland* explained, its affirmative requirement of disclosure of exculpatory evidence is based on the principle that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." 373 U.S. 83, 87 (1963). The Supreme Court went on to explain that failing to disclose exculpatory evidence in possession of the state "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." *Id.* at 87-88; *see also*, U.S. Dep't of Justice, Office of Inspector Gen., *An Assessment of the 1996 Dep't of Justice Task Force Review of the FBI Laboratory* 83 (July 2014), http://www.justice.gov/oig/reports/2014/e1404.pdf (concluding, among other things, that in cases tainted by unreliable or overstated testimony of FBI laboratory analysts, Justice Department prosecutors should "**[p]rovide *case-specific* notice to currently and previously incarcerated defendants whose cases were reviewed by the Task Force**" unless the issue has been previously litigated or deemed immaterial) (bold emphasis added).

It is hard to imagine a set of circumstances that more directly illustrates the notion of state actors designing and building criminal proceedings in a manner inconsistent with standards of justice than the set present here. The Commonwealth itself has conceded that "[Dookhan] ensured that samples would test positive for controlled substances thus eviscerating both the integrity of the lab's internal testing processes, and the concomitant fact finding process that was a jury's to perform." R. 702. Similarly, the SJC's opinion in this matter deemed these unique circumstances a "systemic lapse that . . . is entirely attributable to the government." *Bridgeman v. District Attorney for Suffolk Dist.*, 471 Mass. 465, 476 (2015).

The Commonwealth was both the "architect" and the builder responsible for the flaws that cracked the foundation of its cases against Petitioners and that have shaken the foundation of the criminal justice system in Massachusetts. *See, e.g.*, *Commonwealth v. Charles*, 466 Mass. 63, 65 (2013) ("In October, 2012, the Chief Justice of the Superior Court assigned specific judges in seven counties to preside over special 'drug lab sessions' . . . . From October 15 to November 28, the judges presiding over the drug lab sessions held 589 hearings, placing an enormous burden on the Superior Court."). *Brady* requires that the Commonwealth and its lawyers right their wrongs, in part, by making affirmative, case-specific notice to each affected defendant. The Rules of Professional Conduct further require such disclosures. And although the Commonwealth fought this premise at oral argument, the SJC's opinion acknowledged, this obligation of the prosecutors, explicitly citing Rule 3.8 when lauding certain preliminary disclosures by prosecutors in certain "Suffolk and Essex County cases." *Bridgeman*, 471 Mass. at 481 (quoting Mass. R. Prof. C. 3.8 (d) ("The prosecutor in a criminal case shall . . . make

timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . .")).

A. Prior Decisions Of Both The U.S. Supreme Court And This Court Support The Conclusion That *Brady* Requires Disclosure For All "Dookhan Defendants."

The Commonwealth cannot, and does not, seriously dispute that the failure to notify the defense of Dookhan's misconduct is a *Brady* violation. *See, e.g.*, *Commonwealth v. Scott*, 467 Mass. 336, 338 (2014) (holding Dookhan's misconduct by fabrication of evidence, perjury, and suppression of exculpatory evidence was "was egregious, and that it is attributable to the Commonwealth"); *Commonwealth v. Beal*, 429 Mass. 530, 531 (1999) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.") (quoting *Brady*, 373 U.S. at 87)).

And the government's *Brady* obligations—obligations which arise in each individual case and which must be discharged in each individual case—do not vanish simply because a defendant has been convicted or sentenced. *See, e.g.*, *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) ("[T]he duty to disclose [exculpatory information] is ongoing[.]"); *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986) (Marshall, J. dissenting from denial of certiorari) (explaining that the Constitution requires *Brady* obligations to survive conviction because the justice system's "quest for truth may not terminate with a defendant's conviction"); *see also Beal*, 429 Mass. at 531-32 (collecting cases of this Court, and confirming, without temporal limitation, that prosecutors' disclosure obligations "extend to information in possession of a person who has participated in the investigation or evaluation of the case and has reported to the prosecutor's office") (citation omitted); *Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997) ("[T]he duty to disclose is ongoing and extends to all stages of the judicial process."); *Whitlock v. Brueggemann*, 682 F.3d 567, 587-88 (7th Cir. 2012).

Rather, "*Brady* continues to apply to an assertion that one did not receive a fair trial because of the concealment of exculpatory evidence known and in existence at the time of that trial." *Whitlock*, 682 F.3d at 588. Like the plaintiffs in *Whitlock*, who accused police of withholding exculpatory evidence through trial and post-conviction proceedings, the Petitioners have demonstrated, and this Court has already held, that the Commonwealth possessed and suppressed exculpatory evidence throughout the course of their cases, and that such conduct negated the presumption that they were "proved guilty after a fair trial." *Id.* at 587-88 (citation omitted); *cf. also Scott*, 467 Mass. at 352 (categorizing Dookhan's misconduct as "a lapse of systemic magnitude in the criminal justice system," thus necessarily concluding that convictions tainted by her participation were not the products of fair trials).

The constitutional duty to make individual disclosures of exculpatory evidence remains on the Commonwealth as to each Dookhan Defendant.[1] The Commonwealth's troubling position at oral argument that this duty evaporated upon the conviction of these defendants, or that it never existed at all, is without basis in law. *See* Oral Argument at 44:30 – 48:30 (Jan. 8, 2015, http://www2.suffolk.edu/sjc/archive/2015/SJC_11764.html; *see also* Dahlia Lithwick, *Crime Lab Scandals Just Keep Getting Worse*, Slate.com (Oct. 29, 2015), http://www.slate.com/articles/news_and_politics/crime/2015/10/massachusetts_crime_lab_scandal_worsens_dookhan_and_farak.single.html ("Despite the ongoing scandal, the district attorneys take the position that it is not their responsibility to help identify Dookhan or Farak defendants. . . . [A]s they have argued in oral argument in the *Bridgeman* case—prosecutors have no special duty to notify defendants that their convictions might have been obtained with evidence that was falsified by government employees.")

B. As The Court Questioned At Oral Argument And Noted In Its Opinion, Prosecutors Of Dookhan Cases Have An Ethical Obligation To Promptly Disclose This Exculpatory Evidence Pursuant To Massachusetts Rule Of Professional Conduct 3.8(d).

The position asserted by attorneys for the Commonwealth that they have no duty to disclose Dookhan's misconduct to affected defendants is not only unconstitutional, but it is also contrary to the individual ethical duties of the prosecutors and supervisors in each of the Dookan Defendants' cases.

Each prosecutor of a Dookhan case has an ethical obligation to notify each defendant of the presence of the exculpatory evidence in their case. *See, e.g.*, *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) (distinguishing standards under which a court must evaluate *Brady* claims from the

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[1] That the same due process analysis applies to Dookhan Defendants who were convicted based upon pleas of guilty rather than verdicts of guilty is inherent in the SJC's opinion in this matter. *Bridgeman*, 471 Mass. at 475-77 (applying due process principles to hold that Dookhan Defendants filing Rule 30(b) motions to vacate their pleas based on Dookhan's misconduct cannot receive harsher sentences than those previously imposed); *Scott*, 467 Mass. at 345-46 (explaining that due process requirement of a voluntary plea includes, in certain circumstances, consideration of "external circumstances or information that later comes to light") (citation omitted); *cf.* Univ. of Mich. L. Sch., *Nat'l Registry of Exonerations* 12 (Jan. 27, 2015), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_report.pdf. (collecting "detailed information about every known exoneration in the United States since 1989," including details on 164 cases in which defendants pled guilty and were later conclusively exonerated based on a combination of factors including perjury, official misconduct, and false or misleading forensic evidence).

"obligation to disclose evidence favorable to the defense [that] may arise more broadly under a prosecutor's ethical or statutory obligations") (citing Standard 3-3.11(a) of the Prosecution Function Standards and Rule 3.8(d) of the ABA Model Rules). Rule 3.8 provides:

> The prosecutor in a criminal case shall: (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.

The Massachusetts rule is patterned after the corresponding ABA Model Rule, which "reflects the legal community's long-standing consensus, first expressed in the ABA's 1908 Canons of Professional Ethics . . . that it would be 'highly reprehensible' to allow prosecutors to withhold evidence that might establish a defendant's innocence." *Brief of the American Bar Association as Amicus Curiae in Support of Petitioner* at 7, *Smith v. Cain*, 132 S. Ct. 627 (2012) (No. 10-8145) ("ABA Smith Br.").

As suggested by the Court in *Cone*, and confirmed by the ABA's *amicus* brief in *Smith*, Rule 3.8(d) imposes a broader responsibility to disclose information than the obligation imposed by *Brady*. This broader responsibility stems from the longstanding principle that prosecutors have "special obligations as representatives 'not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.'" ABA Formal Op. 09-454 at 3 (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). ABA Formal Opinion 09-454 also relies (at 3) on the commentary to Rule 3.8 that "[a] prosecutor has the *responsibility of a minister of justice* and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice . . . *and that special precautions are taken to prevent and to rectify the conviction of innocent persons*." ABA Model R. 3.8(d) cmt. 1 (emphasis added). Relying on these tenets, the ABA has consistently explained that prosecutors have an ethical duty that goes beyond the Constitutional confines of *Brady* to ensure that convictions are just and that the rights of defendants are procedurally safeguarded. *See, e.g.*, ABA Smith Br. at 13 (explaining that disclosure obligation imposed by ethical rule "goes beyond the corollary duty imposed upon prosecutors by constitutional law") (citation omitted).

The plain language of the Massachusetts Rule and the ABA Model Rule, as well as the commentary for, and history of, those rules, places an ethical obligation on each prosecutor, or his or her office's supervisory lawyers, to timely notify any affected defendant of Dookhan's conduct, regardless of when the information came to light. Questions from the Chief Justice and from Justice Lenk at oral argument, and language in the Court's opinion in this matter touched on this principle. The Commonwealth's refusal to embrace and discharge its ethical obligation to notify affected Defendants is as baffling as it is troubling. NACDL respectfully urges your Honor to explicitly hold that Rule 3.8 requires individualized disclosure of exculpatory evidence to each Dookhan Defendant.

II. Such Disclosure Is Not Impossible And, Indeed, Is Ongoing In at Least One Prominent Case of Crime-Lab Related Error.

At oral argument before the full Court, in response to questioning from the bench about its duty to notify affected defendants of Dookhan's misconduct, the Commonwealth, among other things, claimed that such notification was "effectively impossible" because it would be too burdensome. Oral Argument at 45:35-46:00. Not only is such defeatism no legal answer to constitutional and ethical misconduct of the Commonwealth's own making, but it is also not true.

Such notification can be done, and is underway, on a nationwide basis for state and federal cases dating back to the 1980s in which the FBI crime lab conducted hair examination and offered testimony consistent with that analysis. In 2009, a National Academy of Sciences (NAS) report (the "NAS Report") concluded that a hair analysis technique long used by the FBI crime lab was not scientifically reliable. *See* Norman L. Reimer, *The Hair Microscopy Review Project: An Historic Breakthrough for Law Enforcement and a Daunting Challenge for the Defense Bar*, The Champion (July 2013), enclosed herewith and available at https://www.nacdl.org/champion.aspx?id=29488. Following the NAS Report, the FBI and the Department of Justice recognized "that there is an affirmative duty to correct when events establish that the evidentiary value of a scientific opinion has exceeded the limits of science." *Id.* at 16. Similarly following the NAS Report, the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) noted that its members, scientists and directors of crime labs across the United States, have an *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." *Id.* at 18 (internal citation omitted).

Acting to discharge its duty to correct improper forensic testimony offered in support of its convictions, the FBI and the Department of Justice joined with NACDL and others to devise and implement a protocol to notify, and review the cases of, defendants affected by the faulty forensic evidence. Among other things, this agreed-upon protocol provides, "[t]he DOJ will send the notification of the review results to the appropriate prosecutor, and shortly thereafter the notification will be sent to the defense counsel as well as to NACDL and the I[nnocence Project]."[2] *Id.* at 18.

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[2] Further details of the Hair Microscopy Review Project are set forth in the enclosed article, which was reviewed by the FBI Office of General Counsel before its publication. In addition, NACDL would be pleased to provide the Court with further information or assistance, should the Court deem that helpful.

Quite simply, the Commonwealth's insistence that notification of defendants is "effectively impossible" rests on the same amount of support as its claim that such notifications are not constitutionally or ethically required. None.

III. Conclusion.

The Court's opinion in this matter provided significant remedies for defendants whose convictions have been undermined by the unprecedented misconduct of Annie Dookhan. But, as the questions of the Chief Justice and Justice Lenk at oral argument underscored, such remedies are only meaningful if defendants know that their cases were affected. The Constitution and the Rules of Professional Responsibility make clear that the onus to meaningfully notify each individual defendant of their tainted conviction falls on the Commonwealth and its lawyers. NACDL respectfully urges your Honor to explicitly confirm those constitutional and ethical obligations in the proceedings now underway.[3]

Very truly yours,

Jean-Jacques Cabou

JC:mv

CC via email:

Vincent J. DeMore
District Attorney for Suffolk County

Quentin R. Weld
District Attorney for Essex County

Benjamin H. Keehn
Committee for Public Counsel Services

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[3] Petitioners have asked, among other things, that your Honor set a briefing schedule on which the parties would address the existence and scope of the Commonwealth's constitutional and ethical duties to provide disclosure to affected defendants. If your Honor concludes that the Commonwealth's duties are issues which require further formal briefing prior to a decision on them, NACDL respectfully requests that this further submission be considered by your Honor as part of that process.

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The Hair Microscopy Review Project: An Historic Breakthrough For Law Enforcement and A Daunting Challenge For the Defense Bar

NACDL's recently announced partnership with the Innocence Project (IP) and the Federal Bureau of Investigation (FBI), once an almost inconceivable concept, embodies an historic breakthrough in how law enforcement addresses overstated scientific conclusions or opinions, but also presents an extraordinary challenge for the legal profession.[1] The existence of the Hair Microscopy Review Project constitutes a commendable recognition by the FBI and the Department of Justice (DOJ) that there is an affirmative duty to correct when events establish that the evidentiary value of a scientific opinion has exceeded the limits of science. At the same time, the criminal defense bar has an overarching obligation to ensure that individuals who may have been wrongfully convicted have access to qualified counsel to pursue all available relief. This article will explain the contours of the project, the protocols that will be applied in the collaborative review process, and the nature and extent of the notification of error. Finally, it will describe the challenges that await clients and lawyers after the error has been disclosed.

The Contours Of the Project

In July 2013, NACDL and the IP signed the groundbreaking and historic agreement with the FBI and DOJ to review thousands of criminal cases in which the FBI conducted microscopic hair analysis of crime scene evidence. Two major developments created the impetus for this review. First, in 2009, the National Academy of Sciences (NAS) issued its report on forensic science and specifically identified microscopic hair comparison evidence as problematic.[2] The report observed that "[n]o scientifically accepted statistics exist about the frequency with which particular characteristics of hair are distributed in the population. There appear to be no uniform standards on the number of features on which hairs must agree before an examiner may declare a 'match.'"[3] Further, the NAS committee found "no scientific support for the use of hair comparisons for individualization in the absence of nuclear DNA. Microscopy and mtDNA analysis can be used in tandem and may add to one another's value for classifying a common source, but no studies have been performed specifically to quantify the reliability of their joint use."[4]

The second and more direct triggering event was the exoneration of three men between 2009 and 2012 who had served lengthy prison sentences, and whose convictions were tainted by microscopic hair comparison evidence that exceeded the limits of science. DNA testing contradicted the conclusions of three different FBI hair examiners who had provided the flawed testimony.[5]

BY NORMAN L. REIMER

The review will focus on cases in which either the FBI laboratory reports or the testimony included statements that exceeded the limits of science. NACDL and the IP began preliminary discussions with the FBI in the spring of 2012, and in July 2012 the DOJ confirmed the launch of the largest postconviction review ever conducted by the FBI.[6] Since that time, NACDL and the IP have worked together with the FBI to establish protocols for the project and the content of the eventual notifications.[7]

It is important to understand the breadth of the universe of cases that will be subject to review. The review will focus on all cases analyzed prior to Dec. 31, 1999, and will extend back at least until the early 1980s or earlier if cases can be identified. The reason cases in which the offense occurred after 2000 will not be examined is that beginning in 1996, DNA testing augmented hair microscopy as the means of determining whether two hair specimens were determined to be a match. Hence, at least in terms of the FBI laboratory, the practice of relying solely upon hair microscopy ended. Because the FBI provided microscopic hair analysis for state and local law enforcement entities, many, if not most, of the cases will be state prosecutions.[8]

The touchstone for the review is a fundamental agreement as to the permissible limits of the science of hair microscopy. NACDL and the IP have agreed with the FBI that an examiner's testimony concerning the relationship between two hairs is appropriate if it reflected the fact that hair comparison could not be used to make a positive identification. Instead, 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, as an opinion 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.[9] In essence, with some specific exceptions in cases involving dyed hair or hair evincing signs of certain diseases, hair microscopy can reliably exclude a match but it cannot support any statement as to the likelihood of a match.[10]

Types of Error

When the testimony concerning hair microscopy is examined through the lens of this basic understanding about the limits of the science, three types of error can be identified:

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.

Example:[11]

A: I found brown, Caucasian head hairs on two items of clothing, the sports coat, and a pair of slacks that were reported to me as belonging to [the defendant]. Now, these hairs matched in every observable microscopic characteristic to that known hair sample of DEC [the decedent] and consistent with having originated from her. In my opinion, based on my experience in the laboratory and having done 16,000 hair examinations, my opinion is that those hairs came from DEC.

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.

Example:

Q: Now, based on your training and experience and your expertise in the field, and based on your knowledge of hair transfer and hair comparison, and based on the work done in this case, do you have an opinion, within the degree of scientific certainty, as to whether or not the pubic hair found in the underpants of [victim] came from [defendant]?

A: I would say that it would be a very high degree of probability that it does. Or to reverse it, I would say the chances of it being from somebody else, other than Mr. XX, would be highly unlikely at best.

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.

Example:

A: Now over the last 12 years, I personally have looked at hairs from about 10,000 different people, and over that time, I've only had two occasions out of the 10,000 people where I had hairs from two different people that I could not separate them.

The Review Process And Protocols

As of early August, the FBI has identified approximately 21,700 cases in which FBI hair examiners may have conducted a microscopic hair comparison. Of the first 15,000 cases reviewed, lab reports finding a positive association between a questioned hair and a suspect's (or victim's) hair were discovered in approximately 2,100 cases. Already more than 120 trial transcripts have been reviewed with at least one type of error present in most of them.

In most cases, the FBI will initiate the review through internal processes within the laboratory. After the reports with a positive association have been identified, the FBI will seek additional information from the contributing agency, usually a state or local law enforcement entity, and from the prosecuting authority. NACDL and the IP have also sought information and transcripts, specifically focusing on capital cases. The ultimate goal in all cases in which the report indicates that there was a positive association is to obtain the transcript or otherwise determine whether the evidence was utilized in a manner that exceeded the permissible limit of science.

This is a truly collaborative process, and as a result, if the FBI is unsuccessful in getting information about a case from the contributing agency or from the prosecutor, NACDL and the IP will make independent efforts to get the information necessary to complete a meaningful review.

After the transcript or other relevant information is on hand, the FBI will conduct a review pursuant to the above-described agreement as to the limits of hair microscopy to determine whether or not any of the three types of error are present. After the FBI makes its determination, it will share its findings and the relevant materials with NACDL and IP for an independent review. NACDL and the IP will conduct that review within two weeks, and either agree with the FBI or specify any disagreement. The FBI will then consider any objections to the initial finding, and either modify its conclusions or confer with representatives from NACDL and IP to explain the rationale for their conclusion. At the end of this review process, the DOJ will send letters

of notification. Those letters will either indicate that there is agreement as to the types of error, or will provide the FBI finding and note the contrary position of NACDL and the IP.

The Notification of Error

The DOJ will send the notification of the review results to the appropriate prosecutor, and shortly thereafter the notification will be sent to the defense counsel as well as to NACDL and the IP.[12] If there is no defense attorney, steps will be taken to notify the defendant. Where error has been found, there will be several key ingredients in the letter of notification.

First, the letter will specify each of the types of error found in the case, with appropriate references to reports or transcripts. The letter will unequivocally state that because the statements by the examiner exceeded the limits of science, they were invalid.[13]

Second, the letter will specify that upon request of the prosecutor or court order, the FBI will conduct DNA testing on the hair samples, or, if the hair samples cannot be located, will offer DNA testing for any other biological evidence in the case, provided that the chain of custody has been maintained.[14]

Third, in federal cases the DOJ will specifically state that it is waiving any statute of limitations defense or procedural bars under 28 U.S.C. § 2255.[15] In state cases, the DOJ will note that it is waiving those procedural obstacles in federal cases.[16]

NACDL staff members are working with the Innocence Project and the FBI to review thousands of cases in which the use of microscopic hair comparison evidence may have resulted in wrongful convictions. NACDL needs all defense lawyers in the United States to aid in this effort to identify cases — regardless of whether the FBI was involved.

If you have knowledge of this evidence being used in a case, or would like to assist on this important project, contact NACDL Resource Counsel Vanessa Antoun at vantoun@nacdl.org or 202-465-7663.

The Challenges Upon Notification

First and foremost, it is imperative to understand what the review process does not include: there will be no determination of materiality whatsoever.[17] Accordingly, when either existing or new counsel evaluates the significance of the error notification, the first order of business will be to determine the importance of the microscopic hair evidence under the specific facts and circumstances of the case. For individuals with active cases, especially people under a sentence of death, this may be a manageable chore for existing counsel. But for individuals whose cases were resolved years ago, and for all cases in which new counsel will have to be identified, this could be quite a herculean task.

As the project has been crafted, NACDL and the IP will continue to follow the cases after notification. In cases in which there is an existing attorney, the organizations will take steps to confirm that the lawyer has received the letter and will follow up. In other cases, the project team will endeavor to ensure that the defendant is aware of the notification and ascertain whether the individual seeks representation. In cases in which a person seeks representation, but is unable to secure such representation on his own, NACDL has pledged to seek volunteer attorneys who will be available to assist these clients. NACDL Past President Steve Benjamin stated that "NACDL needs all defense lawyers in the United States to aid in this effort to identify cases in which hair microscopy evidence was used in a conviction, regardless of whether the FBI was involved in the analysis or testimony involved in the conviction."

As to all cases, irrespective of whether the case is handled by pre-existing counsel or by new counsel, NACDL and the IP will provide resources to support the lawyers. As of the date of this writing, the two organizations are in the process of developing practice guidance memoranda and assembling lawyers to serve as resources and consultants who can be available throughout the various regions of the country to provide post-conviction litigation guidance. Albeit highly ambitious, the goal will be to see that every client who may have suffered a wrongful conviction as a result of the use of this flawed evidence has the best possible chance of securing relief on the merits.

What to Do About Flawed State or Local Examinations

There is another class of cases, which might be quite substantial, that is not embraced by the FBI's historic review: cases in which flawed microscopic hair comparison evidence was presented by state or local examiners. Although many of these examiners may have been trained by the FBI laboratory, the review is limited to cases in which FBI examiners offered statements that exceeded the permissible limits of science. What redress will there be in these cases?

On April 11, 2013, the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) posted an extraordinary advisory. Noting the FBI review project, ASCLD/LAB essentially called on all laboratories to review their work involving microscopic hair analysis:

> It has recently been brought to ASCLD/LAB's attention that the FBI and the USDOJ are jointly in the process of reviewing pre-1999 microscopic hair comparison cases. ... The purpose of this notification is not intended to highlight the events taking place in the FBI laboratory, but to raise awareness within the forensic science community and the criminal justice system that there may be a broader need for review of reports and testimony provided in microscopic hair comparisons made prior to the routine implementation of DNA technology in hair comparisons.

The ASCLD/LAB advisory went on to note that "we have an 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.'"

Indeed, NACDL has learned that at least one state forensic science board has taken steps in furtherance of this advice. On July 12, 2013, the Texas Forensic Science Commission took initial steps to commence a review of microscopic hair comparison analysis conducted by laboratories in Texas. It remains to be seen whether other states will undertake a similar review. Even more importantly, it remains to be seen whether and to what extent local prosecutors will follow the model set by the FBI and DOJ and

similarly embrace a duty to correct.

Irrespective of how all of this unfolds, NACDL and the IP are determined to develop mechanisms to assist clients and their counsel, regardless of the source of the flawed scientific evidence. In a perfect world, funds would be available to provide every client whose case was tainted by overstated scientific conclusions or opinions with the necessary resources to mount the necessary postconviction challenge. But this is far from a perfect world. And hence, it will be up to the defense bar and the legal profession as a whole to ensure that this wrong is rectified and that fundamental rights are vindicated. This project is not only vital for dealing with the problem of flawed microscopic hair analysis evidence. It could also serve as a model for rectifying flaws that may be identified in other disciplines.

Notes

1. The project is a collaboration among NACDL, the Innocence Project, and the FBI. This partnership is aided by a team of pro bono lawyers from Winston & Strawn LLP, and Michael Bromwich of The Bromwich Group.

2. National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward (2009).

3. NAS Report, at 160.

4. NAS Report, at 161.

5. The cases were those of Donald Gates (2009), Kirk Odom (2012) and Santae Tribble (2012). Keith L. Alexander, *DNA Tests Set Free D.C. Man Held in Student's 1981 Slaying*, Wash. Post, Dec. 16, 2009; Spencer S. Hsu, *Kirk L. Odom Officially Exonerated; DNA Retesting Cleared Him in D.C. Rape, Robbery*, Wash. Post, Jul 13, 2012; *Spencer S. Hsu, D.C. Judge Exonerates Santae Tribble in 1978 Murder, Cites Hair Evidence DNA Test Rejected*, Wash. Post, Dec. 14, 2012.

6. *Justice Department, FBI to Review Use of Forensic Evidence in Thousands of Cases*, Wash. Post, July 10, 2012.

7. Even while discussions were continued, the review commenced with a focus on any cases in which an individual was under a death sentence with a firm execution date. This early review led to the issuance of a letter in the case of Willie Jerome Manning, which led to an eleventh hour stay. *Manning v. State*, 112 So. 3d 1082 (Miss. 2013) (granting motion to stay execution pending further order of court).

8. There is an entire other universe of cases that is not part of the joint project with the FBI and DOJ. Many cases in which evidence of microscopic hair comparisons was introduced involved state and local laboratory examiners. Often those laboratory examiners were trained by the FBI, and it is likely that similar defects arose in their lab reports and testimony. Some thoughts about how those cases may be handled are discussed *infra* at page 18.

9. This rather lengthy formulation reflects the formal agreement among the FBI, IP, and NACDL as to the permissible limits of microscopic hair analysis.

10. Indeed, in a highly regarded controlled FBI study of mitochondrial DNA analysis versus microscopic hair comparisons, the fallibility of hair microscopy was confirmed. In 11 percent of cases in which a competent hair examiner declared two hairs to be "similar," subsequent DNA testing revealed that the hairs did not match. Max Houck & Bruce Budowle, *Correlation of Microscopic and Mitochondrial DNA Hair Comparisons*, 47 J. Forensic Sci. 964-967 (2002).

11. These examples are provided solely to illustrate the three types of error.

12. The delay was built into the protocol in order afford prosecutors an opportunity to make appropriate victim notifications.

13. The specific language as to the determination of error will be as follows: "We have determined that the microscopic hair comparison analysis testimony or laboratory report presented in this case included statements that exceeded the limits of science and were, therefore, invalid."

14. The specific language as to the offer of testing will be as follows: "In the event that your office determines that further testing is appropriate or necessary, the FBI is available to provide mitochondrial DNA testing of the relevant hair evidence or STR testing of related biological evidence if testing of hair evidence is no longer possible, if (1) the evidence to be tested is in the government's possession or control, and (2) the chain of custody for the evidence can be established."

15. The specific waiver language is as follows: "In the event that the defendant seeks postconviction relief based on the department's disclosure that microscopic hair comparison laboratory reports or testimony used in this case contained statements that exceeded the limits of science, we provide the following information to make you aware of how we are handling such situations in federal cases. In such cases under 28 U.S.C. § 2255, in the interest of justice, the United States is waiving reliance on the statute of limitations under Section 2255(f) and any procedural-default defense in order to permit the resolution of legal claims arising from the erroneous presentation of microscopic hair examination laboratory reports or testimony."

16. Naturally, it would be wonderful if the DOJ could waive those considerable procedural obstacles in state cases. But that is not possible either as a matter of law or as a practical matter due to principles of federalism. In advocating for this language, the representatives of NACDL and the IP hope that the waiver of bars by the DOJ with respect to federal cases will encourage state prosecutors to follow that example.

17. Specifically, the notification letter will include this proviso: "We take no position regarding the materiality of the error in this case." ■

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