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FBI/DOJ Microscopic Hair Comparison Analysis Review

Updates:

- **4/20/15 Press Release: FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review**
- **4/19/15 Press Release: Department of Justice and FBI Joint Statement on Microscopic Hair Analysis**

The FBI, in conjunction with the Department of Justice (DOJ), is engaged in a review of scientific testimony provided by FBI Laboratory examiners in cases involving microscopic hair comparisons.

The purpose of the review is to ensure that FBI Laboratory examiner testimony regarding microscopic hair comparison analysis met accepted scientific standards. In cases in which those standards were not met, remedial action may be taken if appropriate.

It's important to note that microscopic hair comparison analysis is a valid scientific technique still conducted by the FBI Laboratory. The science of microscopic hair comparisons is not the subject of the review. In 1996, the FBI Laboratory developed and implemented mitochondrial DNA (mtDNA) analysis in conjunction with probative hair analysis because it is the most effective protocol for the forensic examination of hair, and it provides a more meaningful association than either technique used alone.

Cases with hair evidence recovered from a crime scene are examined both visually and through a microscope. If these hairs share similar characteristics with a known hair sample, a probative association may be established. A probative association can occur when there is a transfer of hair from a victim directly to a suspect or from a victim to the weapon used during the commission of a crime. Recovery of hair found inside a victim's house that is microscopically similar to the victim's hair is an example of a non-probative association because you would expect to find the victim's hair in their home.

The FBI will review cases with a probative association if they meet the following criteria:

1. The defendant was convicted;
2. DNA analysis was **not** conducted on the evidentiary hair;
3. The case was submitted to the FBI Laboratory and the analysis occurred prior to December 31, 1999; and
4. The FBI provided the contributing law enforcement agency a Laboratory report regarding the results of the microscopic hair comparison.

The review is being conducted with the assistance of the Innocence Project (IP) and the National Association of Criminal Defense Lawyers (NACDL). Among other things, the IP and NACDL are providing an independent review of transcripts that meet the review criteria. This independent review is further described in: "The Hair Microscopy Review Project: An Historic Breakthrough For Law Enforcement and A Daunting Challenge For the Defense Bar," originally published in the NACDL magazine, *The Champion*, July 2013.

As reviews are completed, DOJ provides the results of the FBI, IP, and NACDL reviews to prosecutors and defense counsel associated with the case.

While the FBI is working closely with the IP and the NACDL to identify relevant cases, the FBI welcomes the public's assistance in identifying any cases that may be subject to this review—particularly those that occurred before 1982.

Further information can be obtained by contacting the FBI Hair Review Team at FBICaseReview@ic.fbi.gov.



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FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review

26 of 28 FBI Analysts Provided Testimony or Reports with Errors

Washington, D.C.
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The United States Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), the Innocence Project, and the National Association of Criminal Defense Lawyers (NACDL) reported today that the FBI has concluded that the examiners' testimony in at least 90 percent of trial transcripts the Bureau analyzed as part of its Microscopic Hair Comparison Analysis Review contained erroneous statements. Twenty-six of 28 FBI agent/analysts provided either testimony with erroneous statements or submitted laboratory reports with erroneous statements. The review focuses on cases worked prior to 2000, when mitochondrial DNA testing on hair became routine at the FBI. The DOJ, FBI, Innocence Project, and NACDL have been working jointly on this review and share the same goal of ensuring the integrity of the American justice system in all respects. All of the parties are committed to addressing this situation properly and will continue to work together in a collaborative and professional manner.

"The Department has been working together with the Innocence Project and NACDL to address errors made in statements by FBI examiners regarding microscopic hair analysis in the context of testimony and laboratory reports. Such statements are no longer being made by the FBI, and the FBI is also now employing mitochondrial DNA hair analysis in addition to microscopic analysis," said Amy Hess, Executive Assistant Director, Science and Technology Branch, FBI. "However, 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. The Department and the FBI also are committed to ensuring the accuracy of future hair analysis testimony, as well as the application of all disciplines of forensic science. The Department and FBI have devoted considerable resources to this effort and will continue to do so until all of the identified hair cases are addressed."

"These findings confirm that FBI microscopic hair analysts committed widespread, systematic error, grossly exaggerating the significance of their data under oath with the consequence of unfairly bolstering the prosecutions' case," said Peter Neufeld, Co-Director of the Innocence Project, which is affiliated with Cardozo School of Law. "While the FBI and DOJ are to be commended for bringing these errors to light and notifying many of the people adversely affected, this epic miscarriage of justice calls for a rigorous review to determine how this started almost four decades ago and why it took so long to come to light. We also need lawmakers in Washington to step up and demand research and national standards to prevent the exaggeration of results in reports and in testimony by crime lab analysts."

Norman L. Reimer, Executor Director of NACDL added, "It will be many months before we can know how many people were wrongly convicted based on this flawed evidence, but it seems certain that there will be many whose liberty was deprived and lives destroyed by prosecutorial reliance on this flawed, albeit highly persuasive evidence. Just as we need lawmakers to prevent future systemic failures, we need courts to give those who were impacted by this evidence a second look at their convictions."

The FBI and DOJ agreed to conduct a review of criminal cases involving microscopic hair analysis after the exoneration of three men convicted at least in part because of testimony by three different FBI hair examiners whose testimony was scientifically flawed. The Innocence Project and NACDL, with its partners David Koropp, Partner at Winston & Strawn LLP, and his colleagues, and Michael R. Bromwich, Managing Principal of The Bromwich Group, who served as the Inspector General of DOJ

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- 04.20.15 FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review

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encompasses cases where FBI microscopic hair comparison was used to link a defendant to a crime and covers cases in both federal and state court systems. It does not, however, cover cases where hair comparison was conducted by state and local crime labs, whose examiners may have been trained by the FBI. The FBI has trained hundreds of state hair examiners in annual two-week training courses.

The government identified nearly 3,000 cases in which FBI examiners may have submitted reports or testified in trials using microscopic hair analysis. As of March 2015, the FBI had reviewed approximately 500 cases. The majority of these cases were trials and the transcript of examiner testimony was reviewed. Some of these cases ended in guilty pleas, limiting the review to the original lab report. In the 268 cases where examiners provided testimony used to inculpate a defendant at trial, erroneous statements were made in 257 (96 percent) of the cases. Defendants in at least 35 of these cases received the death penalty and errors were identified in 33 (94 percent) of those cases. Nine of these defendants have already been executed and five died of other causes while on death row. The states with capital cases included Arizona, California, Florida, Indiana, Missouri, Ohio, Oklahoma, Pennsylvania, Tennessee, and Texas. It should be noted that this is an ongoing process and that the numbers referenced above will change.

All but two of 28 FBI examiners provided testimony that contained erroneous statements or authored lab reports with such statements. The review has shown that the FBI examiners testified in cases in 41 states.

In light of these findings, the Department of Justice and FBI have committed to working with the Innocence Project and NACDL to take the following steps:

- Conduct an independent investigation of the FBI Laboratory protocols, practices, and procedures to determine how this occurred and why it was allowed to continue for so long.
- Continue aggressive measures and review the process to determine whether additional steps could be taken to secure the transcripts and/or lab reports and review the hundreds of remaining cases that may contain invalid scientific statements.
- Strongly encourage the states again to conduct their own independent reviews where its examiners were trained by the FBI.

The Innocence Project, NACDL, and Winston & Strawn LLP are assisting the Department of Justice as it works to locate and notify defense counsel of the results of this review—especially critical in the cases of each person where error was identified in accordance with the protocols established for the review. NACDL is working to ensure that all individuals who were defendants in affected cases will have access to a volunteer lawyer to review this new evidence, advise them on how it may impact their conviction, and challenge convictions based on the invalid evidence in appropriate cases. The legal groups are not releasing the names of the defendants affected at this time, leaving it to the defendants and their lawyers to determine what to do with the information and whether to disclose the error to the press.

The FBI has agreed to provide free DNA testing where there is either a court order or a request for testing by the prosecution. Additionally, in federal cases, DOJ will not raise procedural objections, such as statute of limitations and procedural default claims, in response to defendants' petitions seeking a new, fair trial because of the faulty evidence. But the majority of the FBI examiner testimony was provided in state court prosecutions, and it will be up to the individual states to determine if they will follow DOJ's leading in permitting these cases to be litigated.

Before mitochondrial DNA testing was used to analyze hair in criminal cases, prosecutors throughout the country routinely relied on microscopic hair comparison to link a criminal defendant to a crime. The practice was deemed "highly unreliable" in the 2009 National Academy of Sciences report on forensic science, *Strengthening Forensic Science in the United States: A Path Forward*. Nevertheless, some jurisdictions continue to use hair analysis where mitochondrial DNA testing is deemed too expensive, time consuming or is otherwise unavailable. According to Innocence Project data, 74 of the 329 wrongful convictions overturned by DNA evidence involved faulty hair evidence.

Over the course of 25 years, the FBI conducted multiple two-week training courses that reached several hundred state and local hair examiners throughout the country and that incorporated some of the same scientifically flawed language that the FBI's examiners had used in some lab reports and often in trial testimony. In response to the FBI/DOJ review, the Texas Forensic Science Commission has already begun a review of cases handled by analysts at state and local crime labs. Similar audits are needed in most other states.

- More on FBI/DOJ Microscopic Hair Comparison Analysis Review

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