

**NAPD Public Comment in Reference to:
Docket No. OLP 160**

Re Forensic Evidence

The National Association for Public Defense is an organization of over 15,000 public defense professionals, almost all of whom are currently active in courtrooms around the country. Our membership includes over 110 organizations large and small, with members from every state in the country. We are committed to a reasonable criminal justice system that includes hearing the call of our clients for being treated with justice and fairness. We write to address the recent decision to sunset the National Commission on Forensic Science.

Our defender organizations vary in size and structure, but all strive to provide effective assistance of counsel for those facing criminal charges who cannot afford a lawyer. While there is considerable variation in our organizations, we are all confronted with forensic evidence on a daily basis while also handling significant caseloads with limited budgets; thus our keen interest in federal leadership, federal guidance, and federal review of forensic evidence.

Few, if any, state or local defender offices or criminal justice systems can afford or access the scientific and policy expertise available at the federal level to fully address the serious questions being raised about forensic evidence. If the state and local systems were so equipped the questions being raised by the scientific community about the scientific foundation of forensic evidence and about quality assurance in forensic laboratories would have already been resolved given that most criminal cases relying on forensic evidence occur at the state and local level. Instead, scandals involving malfeasance and incompetence in forensic laboratories continue at an alarming level at the local level,¹ with the drug analysis problems in Massachusetts being only the most recent example, and forensic evidence is routinely admitted in state and local courts conveyed in bare bone reports and without serious scientific analysis of the evidence's reliability or limitations.

Based on our collective experience we believe that addressing quality assurance in forensic laboratories and addressing the scientific foundation of forensic evidence testimony requires national policy and scientific leadership. That said it is not at all clear that the Department of Justice is best suited, or well suited, to this task.

For any organization or process to "improve the underlying science and validity of forensic evidence" independent scientists need to be the controlling voice. The Department of Justice is not a scientific organization. It has a different mission, different expertise, and a different culture. Studies on human and organizational behavior teach us that it is very difficult for an institution or an individual with a vested interest in a result or a technique to see or investigate the flaws and the limitations. That is why scientific research and medical research strives to identify and minimize biases. It is why clinical trials blind participants and researchers. It is why the hallmark of science is transparency, data sharing, and peer review.

¹ Few states have been unaffected. Since 2012 just a cursory review of information available on the web reveals that misconduct or incompetence has been uncovered in California, Colorado, the District of Columbia, Illinois, Massachusetts, Minnesota, Mississippi, New York, Oregon, Pennsylvania, South Carolina, and Texas. See <https://www.nacdl.org/criminaldefense.aspx?id=28286> and http://www.corpus-delicti.com/forensic_mis.html

The Department of Justice is not designed to be transparent often for good reason. As a result, when looking for entities or processes to “improve the underlying science and validity of forensic evidence” the Department of Justice needs to see itself as a consumer of science and turn to scientific institutions, federal and academic, to assess and improve the forensic disciplines.

For this reason we are troubled by the decision to sunset the National Commission on Forensic Science and the apparent proposal to create an office of forensic science within the Department of Justice. The announcement suggests that the Commission had “met its initial mandate.” But a cursory review of the Commission’s work and its summary report makes clear that the Commission was stopped mid-stream.² And the questions being posed to the public in this announcement are mostly contained within the Commission’s charter. The Commission, despite its considerable diversity – state, local, and federal actors; defense and prosecution; victims advocates and the judiciary; academics and practitioners; researchers and investigators; lab directors and sheriffs – found common ground on a wide variety of issues as evidenced by the sheer number of consensus based documents developed by the Commission. In addition to these Views Documents and Recommendations the Commission developed a considerable list of issues that still need to be addressed.³

The Commission was clearly productive – it produced 43 documents. It used the subcommittees and public comment periods to further diversify its membership and allow for even greater input. None of the participants were paid for their work allowing the Department of Justice and the criminal justice system, including state and local systems, to benefit from untold thousands of dollars of free expertise. And it was the first open and transparent engagement with the scientific community and stakeholders about forensic evidence.

Many of its recommendations were accepted by the Department of Justice. Of particular importance to State and local defenders were the recommendations on making quality assurance documents available on the internet and broadening discovery regarding expert testimony. But while these recommendations were accepted the Attorney General they have not been fully implemented. A critical mission not yet fulfilled by the Commission is assessing implementation and whether the goals of the recommendations have been met. Is the 2016 discovery memo having its intended affect? Are quality assurance documents (SOPs etc.) available on request electronically? Are the Department’s efforts in these areas having the desired affect on State and local practices or is more needed to ensure that pretrial discovery is practiced in a manner that ensures that criminal convictions are only obtained on the basis of reliable scientific evidence.

The Department should reconstitute the Commission with the current members and task it with assessing the implementation of past recommendations for possible additional action and addressing the questions posed in this announcement. But it seems clear that at a minimum the Department should expand the Commission’s ability to coordinate with National Institute of Standards and Technology (a scientific organization suited to assessing forensic techniques) and the Organization of Scientific Area Committees (an organization designed to produce standards for forensic techniques). Though every stakeholder group might find issue with the current make-up of the Commission (for example, we wonder why it has as voting members DOJ employees) changing the make-up would suggest that the Department was trying to silence some or give extra weight to others. Instead, we should all recognize that it has been a collaborative consensus process that, despite its diversity and the requirement of a 2/3rds vote to pass a recommendation or views document, has been very productive at addressing difficult issues. And a complete turnover of personnel would likely create considerable lag time before the Commission became as productive as it has been in the last three years, unnecessarily delaying critical work.

² See “NCFs Summary Report” at <https://www.justice.gov/ncfs/meeting-materials-term-2#mtg13>

³ Id.

Aside from supporting the work of the National Institute of Standards and Technology assessing the technical merit of forensic methods and the Organization of Scientific Area Committees in developing standards for forensic techniques and reinstating the Commission, the most important work the Department can do to “improve the underlying science and validity of forensic evidence” is move forward both the discipline review and the uniform language projects. Both projects are overdue and central to ensuring scientific accuracy in the courtroom. Few, if any, state or local systems could afford such a review or undertaking. Nor would a single local effort provide the potential guidance needed across the country. The resources available to the Department of Justice, internal data and management and external independent experts and scientists, make it the best and most obvious choice to undertake a discipline review to assess past testimony in pattern matching disciplines and to develop uniform language for reporting on and testifying about forensic evidence that is scientifically sound. The Department should seek the Commission’s assessment of both the process and results of these two projects. And it should seek the Commission’s advice on implementing reforms nationally and locally based on these results of these two projects.

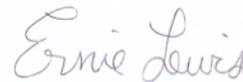
Forensic evidence is having an ever greater role in criminal cases. But many, if not most techniques, have not been generated by the scientific community. Instead, the techniques have been and likely will continue to be developed in the investigative community. As a result, to ensure the scientific accuracy of the forensic evidence used in criminal cases it is critical that the scientific community be at the table and that the scientific method be brought to bear on assessing forensic methods. Though the Commission at times has been fraught with debate, disagreement, and imperfect compromise, it has been a watershed entity promoting an open and public discussion on a topic of growing importance -- the accuracy and reliability of the forensic evidence being used to both convict and exonerate.

NAPD encourages the Department of Justice to continue the National Commission on Forensic Science, to complete the discipline review and uniform language projects, and to support the National Institute of Standards and Technology’s role assessing the technical merit and the role of the Organization of Scientific Area Committees in setting standards for forensic techniques.

Sincerely,



Mark Stephens
Chair of the Steering Committee



Ernie Lewis
NAPD Executive Director



ON BEHALF OF THE NAPD STEERING COMMITTEE

MARK STEPHENS, CHAIR
 District Defender, Knox County Public Defender
 Community Law Office, Knoxville, TN

PAUL DEWOLFE, VICE-CHAIR
 State Public Defender, Office of the Public
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 San Francisco, CA

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JANET MOORE
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 Law School, Cincinnati, OH

ALEX BASSOS
 Director of Training and Outreach, Metropolitan
 Public Defender, Portland, OR

RICK JONES
 Executive Director, Neighborhood Defender
 Services of Harlem, Harlem, NY

TERI MOORE
 Investigator, Federal Public Defender's Office,
 District of New Jersey, Trenton, NJ

NANCY BENNETT
 Deputy Chief Counsel for the Private Counsel
 Division of CPCS, Boston, MA

JUSTINE M. LUONGO
 Attorney-in Charge of the Criminal Practice,
 Legal Aid Society of New York, New York, NY

NDUME OLATUSHANI
 Children's Defense Fund, death row exoneree
 (wrongfully convicted, served 29 years), Nashville, TN

KEIR BRADFORD-GREY
 Chief Defender, Philadelphia Defender's Association,
 Philadelphia, PA

CARLOS J. MARTINEZ
 Public Defender, 11th Judicial Circuit of Florida,
 Miami, FL

TAMARA STECKLER
 Attorney-in-Charge, Juvenile Rights Division, Legal
 Aid Society of New York, New York, NY

DERWYN BUNTON
 District Defender, Orleans Public Defenders,
 New Orleans, LA

JANENE MCCABE
 Director of Technical and Strategic Litigation,
 Colorado Office of the Public Defender, Denver, CO

TIM YOUNG
 Director, Ohio Public Defender,
 Columbus, OH

AMY P. CAMPANELLI
 Chief Defender, Cook County Office of the Public
 Defender, Chicago, IL

ED MONAHAN
 Public Advocate, Department of Public Advocacy,
 Frankfort, KY

WILLIAM WARD
 State Public Defender, Minnesota Board of Public
 Defense, Minneapolis, MN

STEPHEN F. HANLON, GENERAL COUNSEL, Washington, D.C.

NORMAN LEFSTEIN, SPECIAL ADVISOR, Professor of Law/Dean Emeritus, Indiana University Robert H. McKinney School of Law

