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Final - Minutes
Hair Microscopy Subcommittee of the
Forensic Science Board
March 17, 2016
Department of Forensic Science, Central Laboratory, Classroom 1

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Subcommittee Members Present

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Vince S. Donoghue, Essex Commonwealth’s Attorney and Designee of Senator Mark D. Obenshain, Chair of the Senate Courts of Justice Committee (Subcommittee Chair)
David A. C. Long, Esq.
Lieutenant Colonel Robert B. Northern, Deputy Superintendent, Virginia State Police, and Designee of Colonel W. Steven Flaherty, Superintendent, Virginia State Police

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Staff Members Present

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Amy M. Curtis, Department Counsel
Katya N. Herndon, Chief Deputy Director
Linda C. Jackson, Department Director
Alka B. Lohmann, Director of Technical Services
M. Scott Maye, Chemistry Program Manager
Robert W. Scanlon, Principal Forensic Scientist
Carisa M. Studer, Legal Assistant

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Invited Guests Present

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Matthew Dullaghan, Senior Assistant Attorney General
Jae K. Davenport, Virginia Indigent Defense Commission (IDC)

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Call to Order by Subcommittee Chair Vince Donoghue

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Mr. Donoghue called the meeting of the Hair Microscopy Subcommittee (“Subcommittee”) to order at 1:30 p.m. He welcomed the Subcommittee members, the invited guests and Department of Forensic Science (“DFS or the Department”) Staff.

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Adoption of Agenda

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The Chair asked if there were any additions or changes to the draft agenda for the meeting. Being none, Lt. Col. Northern made a motion to adopt the agenda, which was seconded by Mr. Long and adopted by unanimous vote of the Subcommittee.

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Discussion

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The Forensic Science Board (“Board”) created the Hair Microscopy Subcommittee at its January 6, 2016 meeting after hearing a presentation about the Hair Microscopy Case Review being undertaken by the Texas Forensic Science Commission (TFSC). Lynn Robitaille-Garcia, General Counsel of TFSC, spoke to the Board via conference call on the process utilized by

47 TFSC to review hair microscopy cases and the criteria adopted for the review of trial testimony
48 from hair microscopy examiners. The Subcommittee was also reminded of the joint review by
49 the Federal Bureau of Investigation (FBI) and the U.S. Department of Justice of FBI microscopic
50 hair comparison cases.

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52 Robert W. Scanlon, Forensic Biology Principal Forensic Scientist and former DFS hair
53 examiner, gave a presentation on microscopic hair examinations, including the differences
54 between hairs and fibers and an explanation of the characteristics of hair and the stages of hair
55 growth. Before the Department had the capability to conduct DNA (PCR) examinations, the
56 Forensic Biology Section would conduct visual and microscopic comparisons on hairs and
57 natural fibers. The Trace Section conducted examinations on synthetic fibers. In the mid-1990s,
58 the Forensic Biology Section began conducting DNA analysis on hair roots (where tissue was
59 present), and at that time, the responsibility for conducting microscopic hair comparisons was
60 transferred to the Trace Evidence Section. Mr. Scanlon provided examples of how the results of
61 hair examinations were reported by the Department, and he generally described areas of
62 testimony for hair examiners.

63
64 The Subcommittee discussed the need to formulate procedures for a hair microscopy case
65 review. The first phase of the process would be the identification of cases that would need to be
66 reviewed. Ms. Curtis explained to the Subcommittee that hair microscopy cases completed by
67 DFS from 1995 to the present could be identified by the Department using its Laboratory
68 Information Management System (LIMS). Cases prior to 1995, however, would require more
69 research because LIMS did not exist until 1995.

70
71 The Subcommittee was reminded of and provided an update on the archived case file project.
72 DFS created a database to enter information on historical cases, and two wage employees are
73 scanning the historical certificates of analysis and entering case information into the database.
74 However, this process is cumbersome and time consuming, and a review of hair comparison
75 cases cannot wait for its completion. There are approximately 1 million historical (pre-LIMS)
76 case files. To date, approximately 7,000 historical cases have been entered into the database.

77
78 The Subcommittee discussed ideas on how to identify cases in which there was testimony by
79 DFS examiners involving hair comparisons. The Subcommittee discussed resources that could be
80 utilized to assist in identifying such cases, including legal research engines (e.g., Westlaw and
81 Lexis), as well as assistance from local bar associations, Commonwealth's Attorneys and law
82 schools. There was discussion about notifying legal publications, such as Virginia Lawyers
83 Weekly, to further spread the word to the legal community.

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85 There was also a discussion about prioritizing the review of capital cases where the death penalty
86 was imposed. Ms. Curtis informed the Subcommittee that DFS had already identified and pulled
87 Department case files in those matters for potential review. Matthew Dullaghan, Senior
88 Assistant Attorney General, informed the Subcommittee that the Attorney General's Office had
89 reviewed all death penalty cases upon initially being notified of the FBI's review of hair
90 comparison testimony. Mr. Dullaghan indicated that only one death penalty case involved hair
91 comparison testimony and that, in that case, the hair comparison testimony had been exculpatory.

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93 The Subcommittee will recommend to the Board that a letter be sent out to Bar groups and others
94 soliciting information to assist in identifying DFS cases in which hair comparison testimony was
95 presented, and the defendant was convicted. The letter will be sent out under the Board Chair's
96 signature. Staff was asked to prepare a draft letter for the Subcommittee's consideration at its
97 next meeting.

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99 The Subcommittee then discussed the second phase of the review process, which will involve an
100 initial screening of the cases identified as having testimony from a hair examiner. The initial
101 screening phase will involve a determination as to whether the suspect was convicted. Also,
102 research would need to be conducted to locate any available transcripts or factual summaries of
103 trial proceedings.

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105 The Subcommittee discussed the need for a checklist for use during the initial screening process.
106 The Subcommittee agreed that cases identified with incarcerated defendants should be
107 prioritized. DFS staff was asked to prepare a draft checklist for the Subcommittee's review at
108 the next meeting.

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110 The Subcommittee briefly discussed a third phase of the review process, which would involve
111 the transcript review. Hair comparison cases identified where the defendant was found guilty
112 and a hair examiner testified regarding a hair comparison would undergo a thorough review. The
113 Subcommittee proposed that the review team include two prosecutors and two defense attorneys
114 (one from private practice and one from a public defender's office). Guidelines for the review
115 team to use when evaluating each case will be discussed at the next Subcommittee meeting. All
116 individuals assisting in the initial screening process and the review team members will sign a
117 confidentiality agreement before reviewing the Department's case file records. DFS staff will be
118 available for technical questions but will not serve as members of the review team.

119
120 The Subcommittee recommended that, if the review team determined that there was an issue
121 with a certificate of analysis or the testimony of a hair examiner, the review team would send
122 any needed notifications to interested parties, to include the Department, the Commonwealth's
123 Attorney, the defense attorney, the defendant, and the Court. If the review team is unable to
124 reach a consensus whether there was an issue in a case (i.e., there was a tie vote), the
125 Subcommittee recommended that notifications be made in the case.

126
127 Based on the Subcommittee's discussion of the proposed procedures for the hair microscopy
128 case review, the Chair asked DFS staff for assistance in creating the checklists and review
129 criteria for the first two phases of the process. DFS staff was asked to forward the transcript
130 criteria utilized by TFSC and the FBI for further consideration by the Subcommittee. DFS staff
131 will also create a confidentiality agreement for review participants. The Subcommittee will meet
132 again before the next Board meeting to finalize the review process and the recommendations it
133 will to present to the Forensic Science Board for approval.

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135 **Public Comment**

136 Jae K. Davenport, IDC, commented that she would report back to the IDC that procedures for a
137 hair microscopy case review process are in process.

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139 Katya Herndon, Chief Deputy Director, shared comments from Shawn Armbrust, Executive
140 Director of the Mid-Atlantic Innocence Project, who was not able to attend the meeting. Ms.
141 Armbrust wanted to make the Subcommittee aware that most of the cases will not be DNA
142 and/or innocence claims, but will instead involve constitutional claims. She also wanted to point
143 out that, with the FBI review, the Department of Justice agreed to waive procedural bars to
144 litigating these cases, and requested that such a waiver be considered in Virginia.

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146 Ms. Curtis read an email from Brandon Garrett, the Justice Thurgood Marshall Distinguished
147 Professor of Law at the University of Virginia, School of Law, who was also unable to attend the
148 meeting. Mr. Garrett recommended that the Subcommittee consider the FBI's use of outside
149 groups to help in the case review and the FBI's clear criteria for evaluating cases. He hoped the
150 Subcommittee would consider using the FBI criteria given that they were sensible and had
151 already been vetted.

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153 **Next Meeting**

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155 The Hair Microscopy Subcommittee will meet next on Tuesday, April 19, 2016 at 1:30 p.m.

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157 **Adjournment**

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159 Mr. Long moved that the meeting of the Subcommittee be adjourned, which was seconded by
160 Lt. Col. Northern and passed by unanimous vote.

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162 The meeting adjourned at 3:15 p.m.