TEXAS FORENSIC
SCIENCE COMMISSION
Justice Through Science

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STATEMENT OF THE TEXAS FORENSIC SCIENCE COMMISSION REGARDING "ALTERNATE FIREARMS OPINION TERMINOLOGY"

This statement responds to the attached document titled "Dealing with Alternate Firearms Opinion Terminology," (Terminology Document) which was drafted by an assistant general counsel for the Federal Bureau of Investigation Forensic Laboratory.[1] The document is currently being circulated among state and local forensic laboratories that perform firearms examination, including laboratories in Texas.

The Terminology Document addresses the following scenario:

A court holds a pre-trial hearing regarding the admissibility of firearms evidence and related testimony. The analyst is prepared to identify a weapon as having fired the cartridge casings and/or bullets in question. After hearing arguments from both sides on reliability and relevance, the court admits the examiner's testimony with limitations. For example, the court instructs the analyst not to make a definitive statement that the gun was the source of the fired bullets or cartridge casings, or limits the examiner's testimony to general rifling or class characteristics.

The position advocated in the Terminology Document is that analysts faced with the possibility of limiting instructions should provide scripted questions to the prosecutor designed to "put the court on notice" that limiting the analyst's interpretation to something less definitive than individual identification *would constitute perjury by the analyst*. According to the author, an analyst who testifies under these circumstances that the weapon "could have fired" the bullets and/or cartridge cases, or that the criteria examined were "consistent with" the weapon having fired the bullets and/or cartridge cases, or that the weapon "could not be excluded" as having fired the bullets and/or cartridge cases, are "acquiescing to the judge's faulty terminology," and "ratifying these bogus statements."

Texas Law on Admissibility of Scientific Evidence

The admissibility of scientific testimony is governed by the Texas Rules of Evidence and caselaw. Texas Rule 702 governs the admission of expert testimony as follows:

> "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."

The Texas Court of Criminal Appeals addressed the admissibility of scientific evidence in Kelly v. State.[2] Under Kelly, the trial court is responsible for determining whether scientific testimony is reliable and relevant. The burden is on the proponent of the scientific evidence to

[1] While the document does not appear to be an official position of the FBI, to date the Bureau has not disavowed its contents, and the document was sent from the assistant general counsel's government email.
[2] 824 S.W.2d 568 (Tex. Cr. App. 1992).

prove reliability by clear and convincing evidence. To demonstrate reliability, the proponent must satisfy three criteria:

1. The underlying scientific theory must be valid;
2. The technique applying the theory must be valid; and
3. The techniques must have been properly applied on the occasion in question.

Additionally, Kelly provides seven non-exclusive factors for consideration:

1. The extent to which the underlying scientific theory and technique are accepted as valid in the relevant scientific community;
2. The qualifications of the expert testifying;
3. The existence of literature supporting or rejecting the underlying scientific theory and technique;
4. The potential error rate of the technique;
5. The availability of other experts to test and evaluate the technique;
6. The clarity with which the underlying scientific theory can be explained to the court; and
7. The experience and skill of the person who applied the technique on the occasion in question.

The Commission makes four key observations:

First, a fundamental tenet of the Texas forensic analyst licensing program is to ensure forensic analysts understand and appreciate the intersection between science and the law. The Texas Code of Professional Responsibility requires analysts to conduct thorough, fair and unbiased examinations, leading to independent, impartial, and objective opinions and conclusions.[3] It is the role of the trial judge as gatekeeper to admit or exclude scientific evidence, or to allow scientific testimony with limitations based on the information presented during the admissibility hearing in consideration of the factors set forth in Kelly. The author of the Terminology Document encourages analysts to insert themselves as lawyer proxies instead of maintaining their essential role as independent scientists operating within a system where the court is gatekeeper.

Second, it is wrong to suggest an analyst would commit perjury by following a judge's instructions in limiting testimony to observations regarding class characteristics, or refraining from individualization testimony in favor of more cautious language.[4] Indeed, even DNA analysts who have access to robust population data use probabilistic language to describe the association between a known profile and an evidentiary sample. Under the author's logic, DNA analysts would perjure themselves by testifying that John Doe "cannot be excluded" as a potential contributor

[3] 37 Tex. Admin. Code § 651.219 (2020).

[4] The extent to which published studies support statements commonly offered in firearms reports and related testimony, including but not limited to "individualization" language, is currently under review by the Commission. These concepts will be discussed in a separate report to be published in 2022.

instead of stating that "John Doe contributed the DNA."[5] This logic is irredeemably faulty and runs counter to core principles in science.

Third, there are situations in which scientists may be unable to answer a question posed by a lawyer because the response would be misleading or inaccurate. The Texas Code of Professional Responsibility addresses these scenarios, as does ANAB's Guiding Principles. The Commission reiterates the importance of pre-trial meetings between analysts and counsel to discuss the capabilities and limitations of the discipline. Guarding against misleading answers in the context of questioning is fundamentally different than resisting a judge's instruction to refrain from individual identification after an admissibility hearing.

Finally, the author asserts that by following the court's instructions in adopting language that falls short of individualization, the analyst risks losing credibility in future cases. The Commission is aware of no evidence to support this view. Testimony limitations are common in criminal cases. The Commission works with Texas lawyers and judges on various forensic science issues and finds unpersuasive the author's view that limitations placed in one case would be fatal to *either* a righteous prosecution in that case *or* to future firearms testimony in other cases. Indeed, the more pressing credibility concern is when forensic scientists are perceived as arms of the State or hired guns for the defense. It is for this reason that forensic laboratories in Texas embrace independence, transparency and quality as core values.

[5] The notion that an analyst would commit perjury by not testifying to source attribution under the instructions of a judge is disingenuous at best. This is true even in DNA analysis where courts have accepted "source attribution" statements once reported statistics reach certain extremely rare numbers.

ATTACHMENT

Dealing with Alternate Firearms Opinion Terminology

So far, no court has excluded the testimony of a firearms identification expert witness. The greater likelihood is that the court will attempt to compromise and craft some kind of language that weakens or neuters the expert's identification opinion, substituting that terminology for the examiner's identification opinion. Some courts have put in place so-called "limitations" to that testimony, which fundamentally alter the examiner's opinion. However, these are not true limitations because they make material and substantive changes to the expert's testimony. These are wholesale attempts to rewrite the firearm expert's testimony by a layman with no experience in forensic science. This practice is not supported by either science or the law.

In reviewing how examiners should deal with this issue, I gave some thought on how to deal with the terminology issue. After some thought, here is how I would handle it now:

I believe firearms examiners and prosecutors should address the terminology issue head-on during their direct examination at the admissibility hearing. Preempt this issue early. Don't wait for the judge or the defense counsel to bring it up.

On direct examination, have the prosecutor ask the following.

Prosecutor: *Can you testify truthfully that your opinion is that the cartridge cases and/or bullets in this case....*

- *"Could or may have been fired by this gun?"*
- *"Are consistent with having been fired by this gun?"*
- *"Are more likely than not having been fired by this gun?"*
- *"Cannot be excluded as having been fired by this gun?"*

Examiner: *No, I cannot testify truthfully to any of those statements or just the class characteristics alone.*

Prosecutor: *Why not?"*

Examiner: *For three reasons:*

First, there are no empirical studies or science to backup any of those statements or terminology.

Second, those statements are not endorsed nor approved by my laboratory, any nationally recognized forensic science organization, law enforcement, or the Department of Justice.

Third, those statements are false as they do not reflect my true opinion of identification. Such statements would mislead the jury about my opinion in this case. It would also constitute a substantive and material change to my opinion from one of Identification to Inconclusive. This would constitute perjury on my part for I would not be telling the jury the whole truth.

That will put the court on notice. It is now on the record and the judge can't un-ring that bell.

If the court insists on limiting the firearms expert testimony to GRC or class characteristics, I probably would not call the examiner at all. Instead, I would put on a lay witness such as the case agent or an armorer for the police department to testify about the similar class characteristics of the weapon and the bullets and/or cartridge cases. Having an expert testify only about class characteristics alone is demeaning to the profession of firearms examiners, especially when they have found sufficient agreement of individual characteristics to opine about identification. Testimony about class characteristics alone may falsely imply an examiner was unable to reach a conclusion of identification.

My chief concern is that if firearms examiners agree to testify to the terms of "*Could or may have fired*," or "*Consistent with*," "*More likely than not*," or "*Cannot be excluded*," they are ratifying these bogus statements and adopting this as their testimony, giving the judge a pass on the difficult decision to admit or exclude their testimony. They are also acquiescing to the judge's faulty terminology.

This is fatal. Why? Once you testify to these bogus terms, you are wedded to them for life. At subsequent trials, defense counsel will pull out the verbatim transcript of the examiner's previous testimony where they used these court-induced terms. On cross examination, they will confront the examiner with their previous testimony and contrast their opinion of "Identification" with those in previous cases, then claim the expert is merely making this stuff up. The examiner no longer has any credibility in the jury's eyes.

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