



Update from the Microscopic Hair Comparison Case Review Subcommittee

Virginia Review History



- January 2016 Meeting
 - Lynn Garcia, General Counsel, Texas Forensic Science Commission (TFSC)
 - Overview of the FBI Microscopic Hair Comparison Case Review
 - Board created the Microscopic Hair Comparison Case Review Subcommittee (Subcommittee) to recommend a process for reviewing DFS's microscopic hair comparison cases
- 2016 Subcommittee meetings
 - The Subcommittee, comprised of a prosecutor, defense attorney and law enforcement representative, met five times in 2016
 - Process developed with input from stakeholders
 - Criteria determined for transcript review
 - FSB Chair sent out request for assistance in identifying cases for the review

Virginia Review History



- The Review Team has continued to meet as transcripts are available for their consideration.
- The Subcommittee meets shortly after the Review Team. These meetings are posted on Virginia's Town Hall, although the portion where the Subcommittee is discussing specific cases is closed pursuant to Virginia Code § 2.2-3711(A)(35).
- In 2018, DFS forwarded a notice to inmates through the Department of Corrections to inform them of the Review. Over 30 letters were received from inmates inquiring if their case qualified, but there were only a handful with microscopic hair comparison testimony as part of their trial.

Other Microscopic Hair Comparison Case Reviews



FBI Review

- Conducted with the Department of Justice (DOJ) who possessed transcripts for positive probative associations where the scientist had testified
- Transcript review completed by the Innocence Project (IP) and the National Association of Criminal Defense Lawyers (NACDL)
- DOJ would provide results to the prosecutors and defense counsel associated with the case
- As of March 2015, testimony errors identified in 96% of the 257 transcripts reviewed
- No update available on FBI website

Texas Forensic Science Commission Review

- Commission requested that Texas laboratories assist in the identification of relevant cases by submitting the first 10 cases with microscopic hair comparison analyses from every decade—693 cases were submitted
- A subsampling of 287 cases with positive probative associations were identified
- Of those 287 cases, 45 transcripts were obtained
- TFSC added transcripts from 5 death penalty cases
- The purpose of the review was to determine if examiners exceeded the limitations of the science and make notifications to interested parties
- No notifiable errors were identified in the death penalty cases. Notifications were made in 22 of the remaining 45 cases.

Criteria for Transcript Review



FBI

- Did the examiner state or imply that the evidentiary hair could be associated with a specific individual to the exclusion of all others?
- Did the examiner assign to the positive association a statistical weight or probability or provide a likelihood that the questioned hair originated from a particular source, or an opinion as to the likelihood or rareness of the positive association?
- Did the examiner cite the number of cases or hair analyses worked 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 belonged to a specific individual?

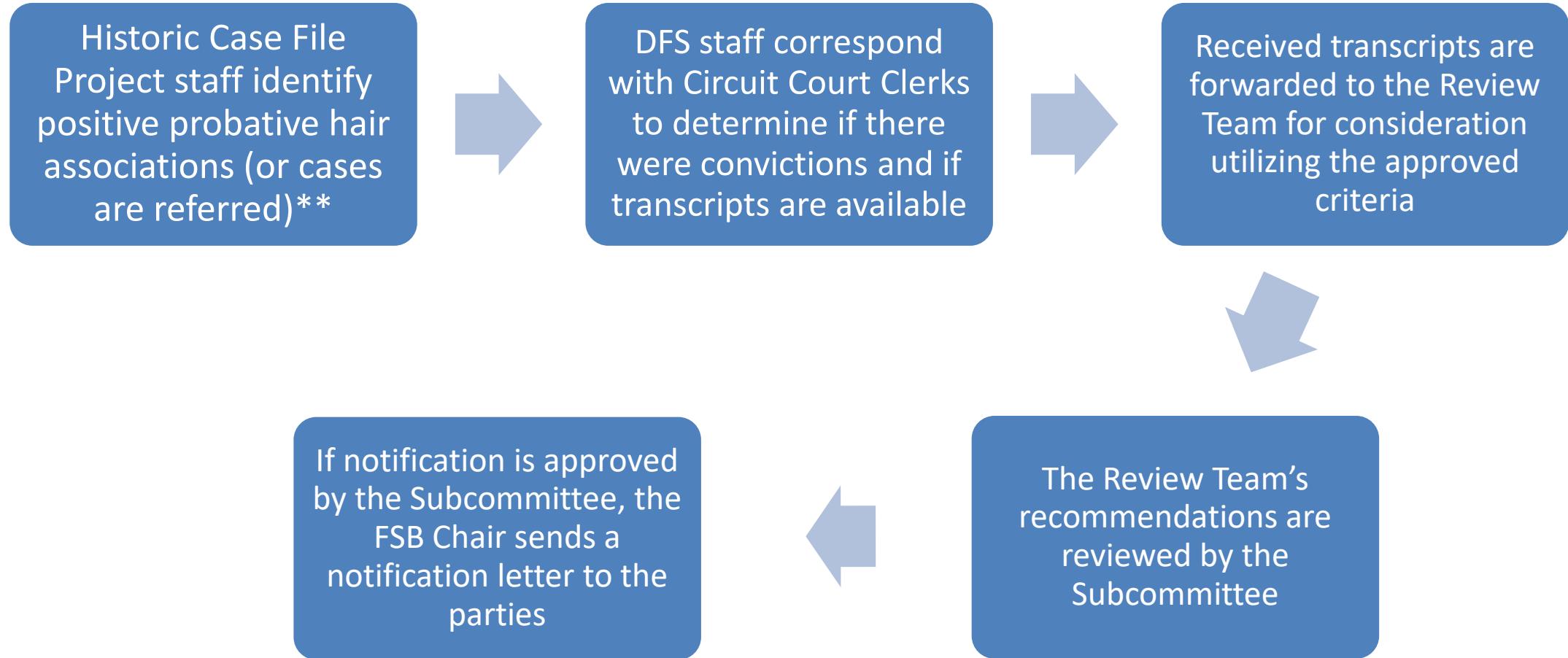
TFSC

- Did the report or testimony contain a statement of identification?
- Did the report or testimony assign probability or statistical weight?
- Did the report or testimony contain any other potentially misleading statements or inferences?

Virginia

- Did the examiner state that an evidentiary hair could be associated with a specific individual to the exclusion of all others?
- Did the examiner assign a statistical weight or probability or provide a likelihood that the questioned hair originated from a particular source?
- Does the testimony contain any other potentially misleading statements or inferences?

Review Process



Issues with Locating Transcripts Specific to Virginia



- DFS does not know if a suspect listed on a positive probative association was charged and convicted, and the only method of ascertaining this information is to make an inquiry with the Circuit Court for that locality. We get numerous “no record” responses.
- We get numerous responses with dismissals, *nolle proseques*, not guilty findings and guilty pleas.
- While most Circuit Court Clerks’ offices are extremely helpful, some indicate that we must come view the case files to obtain the transcripts. Others may not be responsive to our inquiry.
- There may have been a trial, and a transcript is not part of the court record. Transcripts were only prepared if the defendant filed an appeal of the conviction.

Statistics to Date



1,417 cases identified

49 transcripts
reviewed

23
notifications

Issues with Locating Transcripts Specific to Virginia



- If there is a trial and conviction, sometimes courts indicate that the transcripts are only available from the court reporter, and the court reporters no longer have records from that period (record retention requirements are generally ten years).
- The appellate courts did not retain the record (including the transcript) after the appeal was concluded. The records were returned to the Circuit Court.
- The Office of the Attorney General was only involved in an appeal if the petition was granted.
- If the petition for appeal was granted, an appendix was prepared. Sometimes the appendix included the entire testimony of the hair examiner, and sometimes it only included pieces of the testimony depending on the appellate issues. [The Virginia State Law Library has been extremely helpful in checking on these and forwarding full hair examiner transcripts, if they have them.]

Examiner Cases and Notifications



Examiner	Number of cases reviewed	Number of notifications
Dabbs	4	1
Gist	5	4
Li	1	0
Emrich	1	0
Faunce	11	3
Browne	3	2
Staffieri	2	2
Burton	4	2
Vanty	1	1
Scholberg	8	6
Marone	2	0
Scanlon	5	1
Rauf	1	1
Linch	1	0

Notifications



- Notifications made to the prosecutor and law enforcement agency head
- Notifications made to the defendant and defense counsel, if able to locate addresses (DFS has obtained Lexis subscription to enable staff to meet due diligence requirements)
- The Notice indicates that hair examiner's testimony exceeded the acceptable limits of the science
- The Review Team's documentation regarding what overstatements were noted is included
- The Notice indicates that the Review Team made no findings or observations regarding the impact of the testimony on the overall outcome of the case
- The defendant is provided with contact information for the Institute for Actual Innocence at the University of Richmond School of Law for assistance
- DFS is willing to discuss DNA testing options if the evidence is still available
- **Testing must either be agreed to by the parties or sought pursuant to a court order (DNA Post-Conviction Testing under Virginia Code § 19.2-327.1)**