

To: Brette Steele
From: Jed Rakoff and Matt Redle, co-chairs, Subcommittee on Reporting and Testimony
Date: November 6, 2014

Re: Why discovery is within the scope of the Commission's mandate

At the October meeting of the National Commission on Forensic Science, the Subcommittee on Reporting and Testimony presented a draft report on discovery that, reduced to essentials, recommends that the Attorney General direct his prosecutors to require that forensic science experts testifying on behalf of the Government make considerably fuller disclosure of their data, methodology, experience, and results than is presently disclosed. While the discussion that followed suggested a number of helpful ways in which the Discovery Report could be improved (and will undoubtedly lead to a better draft in the near future), the argument was also made that the report's recommendations exceeded the scope of the Commission's authority. We respectfully suggest that this is erroneous and unsupportable.

The Commission's Charter specifies six specific Duties that the Commission must fulfill. The third is "To develop proposed guidance concerning the intersection of forensic science and the courtroom." A primary way in which forensic science intersects with the courtroom is through discovery. Indeed, from the standpoint of improving forensic science and making its application to criminal prosecutions more accurate (which were key reasons for the very creation of the Commission), discovery is probably the most important area of intersection between forensic science and the courtroom, because it is only through adequate discovery that forensic science can be meaningfully scrutinized in any specific case. The notion that improved discovery is therefore not within the scope of the Commission's work seems to us to be counter to both to the plain words of the Charter and to the Commission's overall purpose.

At the Commission's first meeting, moreover, the Commission, without objection, created a Reporting and Testimony Subcommittee which, by its very title, is concerned with how forensic science is reported in advance of testimony, i.e., discovery. This was further confirmed by the mandate that was sent by Robin Jones to the Group on Legal Issues (the sub-subcommittee that initially drafted the Discovery Report), which states in its first sentence: "This Group should consider the legal issues raised by recommendations made by other groups as well as other legal issues inherent in reporting and testimony, **such as discovery.**" (emphasis supplied)

Among the other "scope" objections raised at the Commission's October meeting was the argument that problems with forensic science discovery was not one of the issues raised by the National Academy of Science's report, Strengthening Forensic Science in the United States (hereinafter "the Report") that was one of the catalysts for the Commission's creation. This is doubly erroneous, first, because the Commission's work is expressly not limited to the issues raised by that Report, and second, because it is, in fact, an issue raised by that Report.

As to the first point, the section of the Commission's Charter in which its Duties are specified requires, as already noted, developing guidance for the intersection of forensic science and the courtroom. By contrast, nowhere in the Charter is there any indication that the Commission's

scope is limited to the specific issues raised by the National Academy's Report. And it would have been artificial indeed to cabin the work of the Commission on the happenstance of whether the Report happened to refer to a particular issue or not. The gist of the National Academy's Report was that forensic science, i.e. science used in criminal cases, was problematic in its standards, accuracy, assessment, and use, and it was this broad sweep that helped lead to the Commission's creation.

Second, and in any event, it is simply not accurate to suggest that the National Academy's Report neglects the issue of discovery, even though it may not use that specific term. For example, Chapter 3 of the Report, which is concerned with strengthening forensic science in the context of the legal system, recommends, in terms very similar to our subcommittee's Discovery Report, that laboratory reports of forensic science be much more detailed than they often are at present, stating:

As a general matter, laboratory reports generated as the result of a scientific analysis should be complete and thorough. They should describe, at a minimum, methods and materials, procedures, results, and conclusions, and they should identify, as appropriate, the sources of uncertainty in the procedures and conclusions along with estimates of their scale (to indicate the level of confidence in the results).

Report, *id.* at page 6-3. This recommendation would be meaningless if the reports were not disclosed to adversary counsel in advance.¹

As we were requested to keep this memorandum to two pages, we will not multiply examples, but we suggest that any fair reading of Chapter 3 of the National Academy's Report shows that its authors were concerned that complete and useful information was not being adequately provided by forensic experts, and this concern would have been pointless unless it was assumed that such information would be provided by way of discovery. At the October meeting of the Commission, moreover, two Commissioners who were involved in preparation of the National Academy's Report confirmed as much.

In sum, we believe that recommendations regarding discovery fall easily within the scope of the Commission's mandate, and for the Commission to fail to address such issues would be a distinct disservice to all concerned.

¹ At the Commission meeting in October, it was suggested, as an objection to the Discovery Report's recommendation regarding release of reports, that federal law already requires the release of certain such reports if requested by adversary counsel. Without getting into a debate here as to what the scope of such discovery might be under current federal law, it should be noted that this very objection presupposes that the Commission's scope includes making recommendations in this area, i.e., the objection is that such a recommendation is unnecessary, not that it is beyond the Commission's scope.

