

**Texas Forensic Science Commission
Minutes from August 16, 2019 Meeting in Austin, Texas**

The Texas Forensic Science Commission met at 8:30 a.m. on Friday, August 16, 2019 at the Tom C. Clark Building, 1st Floor Conference Room, 205 West 14th Street, Austin, Texas 78701.

Members of the Commission were present as follows:

Members Present: Barnard, Budowle, Daniel, Drake, Johnson, Kerrigan, Parsons, Downing, Buzzini

Staff Present: Lynn Garcia, General Counsel
Kathryn Adams, Commission Coordinator
Leigh Savage, Associate General Counsel

- 1. Review and adopt minutes from May 3, 2019 Forensic Science Commission Quarterly meeting.**

MOTION AND VOTE: *Downing moved to adopt the meeting minutes draft. Parsons seconded the motion. The FSC unanimously adopted the motion.*

- 2. Office administrative update (FY2019 budget status report third quarter; review of budget for FY2020).**

Staff reported on the status of the FY 2019 budget and reviewed the forecasted budget for FY2020.

MOTION AND VOTE: *Daniel moved to approve the forecasted FY2020 budget. Drake seconded the motion. The FSC unanimously adopted the motion.*

- 3. Update from 86th Legislative Session.**

Garcia reported on legislation impacting the Commission and its activities from the 86th Texas Legislative session, including HB-8, HB-1590, SB-284, and HB-1325. Brady Mills, Deputy Assistant Director of Crime Laboratory Services at the Department of Public Safety (“DPS”), gave an update and description on HB-8 activities by DPS.

- 4. Discuss and consider pending complaints and laboratory self-disclosures as well as new complaints and self-disclosures received through July 26, 2019.**

Disclosures Received as of July 26, 2019

1. No. 19.17; Southwestern Institute of Forensic Sciences (Seized Drugs)

A self-disclosure by Southwestern Institute of Forensic Sciences (SWIFS) reporting an incident in its seized drugs section where an analyst switched evidentiary items from two cases and results in the two cases were reported incorrectly.

MOTION AND VOTE: *Daniel moved to take no further action given the corrective action taken by the laboratory, including root cause analysis, notification to affected district attorneys, case reviews, and revisions to the laboratory's Analysis and Reporting of Casework. Budowle seconded the motion. The FSC unanimously adopted the motion.*

*Commissioner Barnard recused himself from discussion and vote on this item.

2. No. 19.18; Department of Public Safety – Waco (DNA, Seized Drugs, Blood Alcohol)

A self-disclosure by the Department of Public Safety (DPS) Waco regional lab reporting the results of a vault audit including three disciplines (some DNA items; all seized drugs items and all blood alcohol items) where 58 items of evidence were not in the expected locations as documented in the lab's LIMS.

MOTION AND VOTE: *Daniel moved to table the disclosure pending completion of the laboratory's effort to locate the evidentiary items, determine the root cause of the missing items and notify affected stakeholders. Parsons seconded the motion. The FSC unanimously adopted the motion.*

Brady Mills addressed the Commission on behalf of the laboratory and explained the entire DPS lab system transitioned to a 100% vault audit policy now and these missing items discovered are a result of the audit. DPS is working to identify the root cause as to whether the items were misplaced or mislabeled.

*Commissioner Johnson recused himself from discussion and vote on this item.

3. No 19.19; Department of Public Safety – Lubbock (Toxicology)

A self-disclosure by the DPS Lubbock regional lab reporting an incident where an evidence technician incorrectly packaged a blood tube from a sexual assault kit sent for toxicological analysis and the blood tube arrived at the DPS Austin lab damaged.

MOTION AND VOTE: *Daniel moved to take no further action given the root cause analysis and corrective action taken, including revisions to the guidance document used by the technician and notification to affected stakeholders. Drake seconded the motion. The FSC unanimously adopted the motion.*

*Commissioner Johnson recused himself from discussion and vote on this item.

4. No. 19.20; Corpus Christi Police Department Crime Laboratory (Latent Prints)

A self-disclosure by Corpus Christi Police Department Crime Laboratory describing an incident in its latent print section where an analyst made an erroneous identification on a latent print proficiency test.

MOTION AND VOTE: *Daniel moved to take no further action given the actions taken by the lab, including the root cause analysis, casework review, retraining of the analyst, revisions to the lab's proficiency test policy and hiring of another latent print examiner to assist with the caseload. Buzzini seconded the motion. The FSC unanimously adopted the motion.*

5. No. 19.23; Harris County Institute of Forensic Sciences (Serology)

A self-disclosure by the Harris County Institute of Forensic Sciences (HCIFS) describing an incident in its forensic biology section where several cases initially reported negative for acid phosphatase (AP) but showed positive AP results upon retesting due to improper AP pressing technique used by two serologists.

MOTION AND VOTE: *Budowle moved to table the disclosure pending the completion of the monitoring period for the analysts. Buzzini seconded the motion. The FSC unanimously adopted the motion.*

Michal Pierce, Quality Director at HCIFS, addressed the Commission's questions with regard to the disclosure and agreed to report back at the end of the analysts' monitoring period.

6. No. 19.26; Department of Public Safety – Austin (Toxicology)

A self-disclosure by the DPS Austin laboratory reporting an incident in the lab's toxicology section where two of the calibrators for morphine did not meet acceptance criteria in a batch and subsequent investigation revealed 5 additional batches were impacted by the same issues totaling approximately 50 affected cases.

MOTION AND VOTE: *Downing moved to table the disclosure pending receipt of the risk evaluation and root cause analysis currently ongoing. Kerrigan seconded the motion. The FSC unanimously adopted the motion.*

*Commissioner Johnson recused himself from discussion and vote on this item.

Complaints Received as of July 26, 2019

7. No. 19.16; Hughes, Nicholas (Harris County Institute of Forensic Sciences; Seized Drugs)

A complaint by Harris County Public Defender's Office attorney Nicolas Hughes alleging HCIFS does not use an analytical method sufficient to provide clear results to stakeholders regarding (1) whether any of the exceptions to the definition of "marihuana" in the Texas Health and Safety Code apply to the substance analyzed; or (2) whether the substance is hemp and therefore legal under the federal Farm Act. This complaint was filed before the passage of HB-1325 in Texas.

MOTION AND VOTE: *Budowle moved to dismiss the complaint because it fails to allege negligence or misconduct with regard to any forensic analysis, but alleges generally that the analytical method used by laboratories is not legally sufficient to provide clear results to*

stakeholders on whether any of the legal exceptions to the definition of marihuana apply. Kerrigan seconded the motion. The FSC unanimously adopted the motion.

MOTION AND VOTE: *Daniel moved to establish a task group to include Commissioners Parsons, Drake, Daniel, Johnson and Kerrigan to address the legal sufficiency of the analytical methods used by laboratories in identifying marihuana. Budowle seconded the motion. The FSC unanimously adopted the motion.*

Complainant Nicholas Hughes, Harris County Public Defender's Office, and Dawn Boswell, Assistant District Attorney and Chief of the Conviction Integrity Unit at the Tarrant County District Attorney's Office, offered to participate in the panel.

8. No. 19.22; Gowans, Sr., Rodney D. (Department of Public Safety – Austin; Blood Alcohol)

A complaint by defendant Rodney D. Gowans, Sr., alleging Department of Public Safety – Austin laboratory analyst, Sheryl Peyton, provided false testimony about the results of Mr. Gowan's blood alcohol analysis at his 1997 trial that led to his false conviction for involuntary manslaughter.

MOTION AND VOTE: *Daniel moved to dismiss the complaint because it concerns a blood alcohol case from 1997, before the 2003 crime lab accreditation program began in Texas. Further, DPS has no lab report or case file that can be reviewed, and there is no testimony cited that would merit further review by the Commission. Drake seconded the motion. The FSC unanimously adopted the motion.*

*Commissioner Johnson recused himself from discussion and vote on this item.

9. No. 19.24; Frederick, Charles Lorey (Orange County Sheriff's Office; Crime Scene)

A complaint by defendant Charles Lorey Frederick alleging Orange County Sheriff's Department officers were unqualified to process the crime scene and gave unqualified crime scene and ballistics testimony at Frederick's May 2000 trial leading to his false conviction for homicide.

MOTION AND VOTE: *Drake moved to dismiss the complaint because the allegations concern the actions of investigating officers and their alleged failure to investigate and test certain evidentiary items from the crime scene rather than any particular complaint about a forensic analysis. Further, the Commission's Crime Scene Working Group is already addressing the areas of crime scene processing and reconstruction, including defining the limits of crime scene processing activities and providing further education through the basic peace officer training course with regard to crime scene processing and preservation. Budowle seconded the motion. The FSC unanimously adopted the motion.*

10. No. 19.25; Green, Jimmy D. (University of North Texas Health Science Center; Forensic Biology/DNA)

A complaint by defendant Jimmy D. Green, alleging University of North Texas Health Science Center—Center for Human Identification (UNTHSC-CHI) DNA analyst, Amy Smuts, gave

insupportable testimony at his trial that led to his false conviction for aggravated robbery with a deadly weapon.

MOTION AND VOTE: *Daniel moved to dismiss the complaint because it fails to allege any credible allegation of professional negligence or professional misconduct with regard to the forensic analysis at issue in the complaint. Drake seconded the motion. The FSC unanimously adopted the motion.*

*Commissioner Budowle recused himself from discussion and vote on this item.

11. No. 19.27; Abbott, Frederick R. (Department of Public Safety – Waco; Serology, Forensic Biology/DNA)

A complaint by defendant Frederick Riley Abbott alleging the DPS Waco regional lab performed DNA testing on a sample of his blood but never provided the results at his trial or to his attorney and led to his false conviction for aggravated sexual assault in 2006.

MOTION AND VOTE: *Daniel moved to dismiss the complaint because it is a request for DNA testing and for a copy of a lab report that does not exist, because DNA testing was never performed by the lab in this case, and the Commission has no authority to order DNA testing in any particular case. Further, the complaint involves allegations about the district attorney and investigating officers beyond the scope of the Commission’s jurisdiction. Buzzini seconded the motion. The FSC unanimously adopted the motion.*

12. No. 19.28; Innocence Project, Inc for Larry Swearingen (Department of Public Safety – Austin; Serology/Forensic Biology/DNA)

This complaint was withdrawn by the complainant before the meeting.

5. Presentation and discussion with Gordon Gillerman and Warren Merkel of the Standards Coordination Office (“SCO”) at the National Institute for Standards and Technology (“NIST”) regarding possible pathways for improving accreditation for forensic science service providers in Texas.

Gordon Gillerman, Director of the SCO at NIST, and Warren Merkel, Chief of Standards Services at NIST, gave a presentation to commissioners on the SCO and explained how the agency supports the development of standards by identifying areas where they are needed, convening stakeholders and providing technical and scientific guidance and expertise to help stakeholder groups reach a consensus. The representatives discussed with Commissioners how the SCO may be of assistance to Texas in addressing and improving accreditation for forensic science service providers, including addressing areas such as validation, criteria for competence and standards adoption and implementation.

MOTION AND VOTE: Budowle moved to establish a working group to include commissioners Kerrigan, Johnson and Budowle to address accreditation issues in collaboration with the SCO and to establish a baseline for the ideal Texas accreditation program.

6. Discuss status of crime laboratory accreditation program, including:

a. Accreditation non-conformances received since May 3, 2019 quarterly meeting;

Staff described accreditation reports and non-conformances received since the May 2019 meeting. Commissioners expressed concern that the CAP – Forensic Drug Testing accreditation for one Texas-accredited laboratory, Expertox, was renewed despite several serious nonconformances cited and deemed resolved at the on-site audit for the laboratory. Commissioners directed staff to gather information on CAP’s Forensic Drug Testing program requirements and follow up with the laboratory.

MOTION AND VOTE: *Kerrigan moved to direct staff to obtain information on CAP’s Forensic Drug Testing program requirements and follow up with the laboratory.. Parsons seconded the motion. The FSC unanimously adopted the motion.*

b. Update on final publication of accreditation rules, including the following;
i. Document examination exemption;
ii. Professional negligence and professional misconduct clarifications; and

Staff updated members on the publication and adoption of these rules approved at the Commission’s May 3, 2019 quarterly meeting.

c. Review outstanding accreditation rules and proposed rule concepts for approval, including SAMHSA correction.

Staff addressed two outstanding rule proposals: a correction to the spelling of the acronym for the recognized accrediting body SAMHSA, and recognition of a merger between accrediting bodies ANAB and ABFT.

d. Discuss inquiries from laboratories serving the agricultural industry for the purpose of quantitating THC that have also expressed an interest in seeking Texas accreditation for criminal actions.

Garcia discussed with members inquiries received from laboratories serving the agricultural industry. Staff explained to the inquiring laboratories the requirements for accreditation recognition with respect to forensic testing in Texas criminal cases, which include required forensic supplements to ISO-17025.

7. Discuss Licensing Advisory Committee, including:

a. Update on licenses issued;

Staff provided an update on licenses issued. Staff has issued a total of 1256 licenses, consisting of 799 regular licenses, 22 provisional, and 435 blanket licenses.

- b. Update on final publication of licensing rules including the following:**
 - i. Continuing forensic education rule updates, including number of discipline-specific training hours required for multiple disciplines, roll-over of hours from previous license cycle and clarification of credit for “date-delivered”;**
 - ii. Rule regarding authority to deny for conduct on initial application; and**
 - iii. Revisions to rules post-January 1 requirements.**

Staff updated commissioners on the publication and adoption of the above rules. All rules were published in the Texas Administrative Code as of May 3, 2019.

- c. Review outstanding licensing rules and proposed rule concepts for approval, including:**
 - i. Clarifications to Professional Misconduct definition in licensing rules;**
 - ii. Expansion of exemption for retired examiners and forensic discipline changes;**
 - iii. Removal of document examination references from licensing rules;**
 - iv. SB-284 and SB-1342 appeals process changes;**
 - v. SB-1200 reciprocity for military spouse changes;**
 - vi. SB-1342 changes to criminal history eligibility pre-determinations;**
 - vii. Discussion of provisional license changes to eligibility; and**
 - viii. Discussion of CFE for Technicians.**

MOTION AND VOTE: *Daniel moved to accept all accreditation and licensing rule proposals as drafted and discussed by staff and commissioners. Drake seconded the motion. The FSC unanimously adopted the motion.*

Staff will work on publication of all accreditation and licensing rules approved at today’s meeting.

- d. Discuss Agreed Order pursuant to outstanding license denial due to criminal history;**

The license candidate originally offered an agreed settlement to obtain licensure for a probationary period due to the candidate’s current criminal probation status. She subsequently received an early discharge from probation. In light of the candidate’s discharge from probation, the Licensing Advisory Committee recommended licensure for the candidate.

MOTION AND VOTE: *Kerrigan moved to approve the candidate for licensure. Budowle seconded the motion. The FSC adopted the motion.*

e. Update from July 17, 2019 Blanket Rule Task Group and discussion of action items; and

Staff provided an update from the Blanket Rule Task Group's July 17, 2019 call, including a document summarizing the changes to the blanket license option for out-of-state crime laboratories. The group was tasked with addressing the appropriate level of oversight for blanket out-of-state laboratories offering forensic services in Texas criminal cases. Requirements for blanket licensure to be effective upon renewal of the analyst's blanket license will now include:

1. Change in cost:

\$50/analyst/year (\$100/analyst over two-year license cycle) versus the current \$10/analyst over a one-year license cycle

2. License Term

2-year term changed from the current 1-year term.

3. Coursework Requirements (not previously required)

Must meet same coursework requirements as in-state analysts, must submit transcripts to demonstrate fulfillment of this requirement upon application. This will only be checked once.

4. Proficiency Testing (PT) Requirements (not previously required)

Must meet same PT requirements as in-state analysts which are simply compliance with whatever the lab's current accrediting body requires of the analyst (including certification of this by the laboratory representative where the analyst works). Must submit the PT certification form at each renewal (every 2 years).

5. Exam Requirement (not previously required)

Applicants must pass 3 modules of the General Forensic Analyst Licensing Exam—Evidence Handling, Brady/Michael Morton Act, and Professional Responsibility modules. The number of total questions in each subject will be determined at a future date.

MOTION AND VOTE: *Kerrigan moved to adopt the recommended changes to the Blanket License rule. Drake seconded the motion. The FSC unanimously adopted the motion.*

Staff will draft a rule proposal for public comment addressing each of the changes described above.

f. Review applications from TACLD and vote on appointments to licensing advisory board to fill 5 seats expiring August 31.

Members reviewed resumes for candidates nominated by the Texas Association of Crime Laboratory Directors (TACLD) and appointed five candidates to its Licensing Advisory Committee:

MOTION AND VOTE: *Kerrigan moved to appoint the following candidates to the Commission's Licensing Advisory Committee:*

*Erin Reat
Aliece Watts
Emily Esquivel
Cristina Vachon
Donna Eudaley*

Buzzini seconded the motion. The FSC unanimously adopted the motion.

8. Update from investigative panel regarding Sorenson DNA Quality Incident Reviews (Forensic Biology) #18.30.

Garcia explained the Commission has asked for the laboratory's accrediting body (ANAB) to assess the DNA quality incidents cited by the Commission in light of the fact that the Commission has been unable to obtain requested documents. Staff will report back to the Commission on ANAB's response at the next quarterly meeting.

9. Review and adopt final report from investigative panel regarding Culbertson complaint (DPS El Paso; Blood Alcohol) #18.21.

Members reviewed and discussed a draft report in the matter. Members discussed the difficulty in ascertaining whether the analyst's acts were intentional given the known facts in the case, the unavailability of the analyst, and the passage of time.

MOTION AND VOTE: *Parsons moved to adopt the draft report which includes a negligence finding against the analyst in the investigation. Downing seconded the motion. The FSC adopted the motion.*

*Johnson recused himself from discussion and vote on this item.

10. Update from Fort Worth Police Department Crime Laboratory (Forensic Biology) self-disclosure #19.12 investigative panel.

Members reviewed and discussed an internal investigative report provided by the crime laboratory along with the original corrective action disclosed by the laboratory in this incident. Members also discussed that the analyst voluntarily resigned her forensic analyst license.

MOTION AND VOTE: *Parsons moved to concur with the laboratory's finding of professional misconduct against the analyst as described in its disclosure and internal investigative report and*

to accept the analyst's voluntary resignation of her license. Drake seconded the motion. The FSC unanimously adopted the motion.

11. Update from Collins, Robert (DPS Houston; Forensic Biology) complaint #19.04 investigative panel.

Garcia reported the investigation in ongoing. Staff will provide an update on the investigation's progress at the Commission's October 25 quarterly meeting.

12. Update from outside investigative panel regarding Criner case (DPS Austin; Forensic Biology) #19.03.

Commissioners discussed the final report by the outside investigative panel in this matter, including the finding of professional negligence on the part of the analyst. Garcia reported the analyst who was the subject of the investigation resigned her position as Senior Scientific Advisor for the Commission the Monday following the release of the investigative report.

MOTION AND VOTE: *Daniel moved to adopt the findings in the report provided by the outside investigative panel, including the finding of professional negligence against the forensic analyst. Parsons seconded the motion. The FSC unanimously adopted the motion.*

Members reviewed and discussed the recommendations in the report. Commissioners discussed consulting with the TACLD to form a working group to address issues and develop guidelines for analysts who have departed employment but return to testify in a case. Members also discussed how to effectively provide trial testimony and Daubert hearing training to analysts in collaboration with TACLD.

13. Update from July 15, 2019 Crime Scene Investigation Working Group meeting.

Garcia presented a PowerPoint presentation describing actions taken at the Crime Scene Investigation Working Group's last meeting, including changing the oversight approach to voluntary licensure of crime scene reconstruction analysts. The group is now working on licensing requirements that will be proposed and evaluated by the Commission's Licensing Advisory Committee and presented to the full Commission for approval and final recommendation. Members discussed some of the key components that should be required for the license and the positive and negative aspects of voluntary licensure versus a required Texas-based accreditation program formerly contemplated by the group.

MOTION AND VOTE: *Johnson moved to approve the approach of voluntary licensure for crime scene reconstructionist in Texas. Budowle seconded the motion. The FSC unanimously adopted the motion.*

Texas Ranger and member of the Crime Scene Working Group, Jeffrey Wolf, briefly addressed the Commission on the Committee's approach to licensure and the Rangers' support of the approach. Celestina Rossi, Montgomery County Sheriff's Office Crime Scene Specialist and member of the Crime Scene Working Group, also addressed the Commission with regard to her

concern that voluntary licensure may not prevent “rogue” analysts acting as experts from being admitted in court but that licensure is a step in the right direction.

14. Adopt draft guidelines from statistical sampling committee.

Garcia reported a draft of the statistical sampling guidelines is in the works as comments from the working group are still being incorporated into the document. Garcia expects to publish the document in the next couple of weeks.

15. Discuss Becton Dickenson (BD) recall of BD Vacutainer® Fluoride Tubes for Blood Alcohol Determination.

Members discussed the Becton Dickenson (BD) recall. Several laboratories reported how they are working through the issues, including identifying tubes in the affected lot.

16. Discuss use of Rapid DNA technology and letter to ANDE.

Garcia reported on a meeting with ANDE representatives regarding the use of Rapid DNA technology.

17. Report from July 29, 2019 STRmix Working Group Meeting.

Garcia reported on the STRmix Working Group’s July 29, 2019 meeting in Austin and the action items discussed at the meeting.

18. Update on triage projects for DNA mixture review; update on Austin Police Department cases under review by UNTHSC-CHI.

Bob Wicoff, Harris County Public Defender’s Office Appellate Division Chief and Director of the DNA Mixture Review Project, reported 3500-4000 cases have been reviewed. A few cases have been reanalyzed and even fewer with any potential change in the outcome of the case, as expected. Wicoff has written an article to be published in the ABA Journal with regard to the successes and pitfalls of statewide reviews such as the DNA Mixture Review.

Stacie Lieberman, Capitol Area Defender Service (CAPD), addressed the Commission to report the internal audit of cases in Travis County is ongoing. Budowle conducted a DNA Mixture Review training at the CAPD office this week.

19. Discuss developments with respect to kit backlog reduction and standardization efforts.

Downing gave a presentation on the new guidelines for sexual assault kit standardization and the efforts to reduce sexual assault kit backlogs.

20. Update on Raman Spectroscopy Texas State Bar working group.

Garcia, Brady Mills and Buzzini reported on the Texas State Bar group working to evaluate Raman spectroscopy technology. DPS is in the early stages of validating a benchtop Raman instrument that can potentially assist with seized drug backlog issues.

21. Update on Rio Grande Identification Project.

Budowle gave a brief update on the Rio Grande ID project. UNTHSC-CHI and other entities have made progress with the FBI, the government of Mexico and other governments in the northern triangle region on the ability to compare family reference samples to samples from unidentified remains.

22. Update from Texas Association of Crime Laboratory Directors.

Aliece Watts, Secretary of the TACLD reported Peter Stout was re-elected as President of the association at the TACLD's August 15, 2019 meeting. Watts was re-elected as secretary of the association.

23. Report from various recent and upcoming conference presentations by staff.

Garcia reported she has been invited to speak at a congressional hearing on behalf of the Commission by Congresswoman and Committee Chair Eddie Bernice Johnson on September 10, 2019 in Washington D.C.

24. Consider proposed agenda items for next quarterly meeting.

Staff will include all discussed items on the next quarterly meeting agenda and circulate the proposed agenda for additions.

25. Schedule and location of future panel and quarterly meetings.

The Commission will meet again October 25, 2019 in Austin.

26. Hear public comment.

No further public comments were given other than that noted throughout the agenda above.

27. Adjourn.