

## **Texas Forensic Science Commission – Norma Clark Investigative Panel Minutes from August 2, 2017 Meeting in Bryan, Texas**

The Norma Clark Investigative Panel of the Texas Forensic Science Commission met at 10:30 a.m. on Wednesday, August 2, 2017, at the Brazos County Courthouse Grand Jury Room, 300 E. 26<sup>th</sup> St., Bryan, Texas 77803.

Members of the Panel were present as follows:

Members Present: Pat Johnson (Chair)  
Dr. Sheree Hughes-Stamm  
Jarvis Parsons

Members Absent: None

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

### **Introduce panel members, lab representatives, experts and other stakeholders present.**

Garcia convened the meeting at 10:39 a.m. and explained that Johnson was appointed the panel chair and would be facilitating the rest of the meeting. Members, staff and guests introduced themselves. Members and staff discussed scope/focus of the Clark investigation—review of the blood pattern analysis ("BPA") and the statistical evaluation concerning gunshot residue (GSR) found on victim Norma Clark's nightgown and related trial testimony.

### **Discuss report on blood spatter analysis and accompanying trial expert's testimony from expert Bob Henderson.**

Members reviewed and discussed blood stain pattern analysis expert Bob Henderson's report. Garcia summarized Henderson's report. Henderson believes the presence of one microscopic bloodstain (confirmed by a hematrace test) on Clark's nightgown was sufficient to justify proceeding to BPA, and that Duncan's (the original expert who conducted the hematrace test) analysis of the nightgown in evidence was supportable. Garcia explained she consulted with Commissioner and DNA expert Dr. Budowle concerning the reliability of the hematrace test. Budowle confirmed its reliability and that the test is not presumptive but actually confirmatory. Budowle explained that degradation may cause an inability to detect DNA in a sample, but the same sample may still test positive for blood. Kahn and Hughes-Stamm concurred with Budowle's opinion.

### **Discuss follow-up questions from Investigative Panel re: DNA testing and effect on blood stain pattern analysis.**

Hughes-Stamm and Johnson expressed reticence with Henderson's conclusion that confirmation of only one microscopic spot of blood on Clark's nightgown was a sufficient amount to proceed

with BPA. Hughes-Stamm pointed out there was confirmation of blood on only one sample, while nine others tested negative.

Garcia related that the National Academy of Science in its 2009 *Strengthening Forensic Science* report generally criticized the use of BPA. The panel discussed presenting the possibility of investigating the discipline of BPA before the full Commission. Garcia explained that she consulted with the Registry of Standards of the Organization of Scientific Area Committee ("OSAC") for BPA and confirmed there are not yet any published standards or guidelines in place for BPA.

Members discussed the fact that Henderson's report stressed the need for peer review in the discipline and this is almost never done for BPA. No peer review was done in the Clark case.

Members discussed BPA relative to the statutory definition of "forensic analysis" and whether or not it should be exempt from accreditation. The panel concluded it is an "accreditable" discipline, but has historically been performed by law enforcement (Houston Police Department did the analysis in this case) and rarely the crime laboratory setting.

Garcia explained that under DPS accreditation exemptions at the time of the analysis in the Clark case, BPA did not fall under "Crime Scene" because it applied only to the scene collection portion, not to analysis of evidence taken from a crime scene. Johnson reported the DPS crime lab phased out BPA at least 10 years ago and no longer conducts BPA. Parsons stated the Texas Rangers are often called for crime scene investigation in rural areas that may include BPA. Garcia volunteered to speak with the Texas Rangers for perspective and input concerning BPA.

Panel members agreed to bring their concerns about BPA as a discipline before the full Commission at its next quarterly meeting. Dawn Boswell briefly summarized a recent conversation with Dr. Peerwani (Tarrant County Medical Examiner) about BPA in which Peerwani expressed his opinion that the discipline is highly subjective and unreliable.

Garcia volunteered to create a PowerPoint outlining points discussed today regarding BPA for presentation at the next full commission meeting. She will contact Mr. Henderson to confirm whether or not he can be present. Garcia's main talking points concerning the panel's concerns will be: 1) no proficiency testing; 2) no requirement for peer review; 3) no uniform protocols/standards; and 4) no established threshold for determining when to proceed with BPA.

Garcia suggested the Texas Association of Crime Lab Directors discuss these issues at its next meeting. Garcia asked Kahn to survey laboratories to see if there is an "appetite" for BPA by any. The group recommended Sandra Mays as a possible blood stain pattern consulting expert.

**Discuss report on GSR analysis and accompanying trial expert's testimony from expert Cliff Spiegelman.**

Statistics expert Cliff Spiegelman reviewed questions submitted to him by the Commission regarding the GSR analysis in Norma Clark's case. The main conclusions reached by Spiegelman are: 1) no reliable data regarding the presence of GSR on nightgowns or any other

fabric have been established as a threshold on which to base a conclusion that someone is/is not a shooter; 2) the only statistical baseline studies for GSR have been performed on hands, which are completely different than fabric; 3) there were no scientific bases or statistical guidelines for William Davis's (GSR expert that provided testimony at Norma Clark's trial) testimony; 4) the environment from which the evidence was taken was not considered in this case; and 5) the amount of GSR on Clark's nightgown was rare for both shooters and non-shooters, which was not made clear to the jury.

Davis was present and responded that in forensic science there are never publications that exactly mirror those of a certain case. Analysts therefore must make interpretations of data to the best of their abilities. Spiegelman reiterated that hands and fabric are so fundamentally different that it is impossible to apply a study of GSR on hands to its presence on fabric; there was therefore nothing on which Davis's interpretations were based. Davis relied upon the "Poisson Model" for non-shooters in this case. Based upon this model (for hands), the amount of GSR present on Clark's nightgown was rare for both shooters and non-shooters and could not be interpreted- this was not made clear to the jury.

Spiegelman stated it is reasonable to inquire about the environment from which evidence is taken. This fact is referenced in the "Kaplan" paper. Members acknowledged that Davis stated near the end of his trial testimony that the statistics presented were not reliable relative to this defendant, but this was not made clear to the jury. Trial testimony was confusing and bolstered by attorneys' questions and interruptions. Garcia pointed out Kaplan has a disclaimer in it about its use in actual casework.

Spiegelman explained his opinion that the scientist must clarify his/her testimony by adding information, even if it is not asked for. In this case, the issue of a total lack of information relative to GSR on fabric, and the fact that the amount found was rare for hands *whether or not the person was the shooter* should have been made clear to the jury. Lawyers are not great scientists and often do not ask the right questions. Spiegelman suggested meeting with the client/attorney prior to testifying to discuss the substance of the testimony, and to outline what can and cannot be stated with regard to the specific discipline.

On cross-examination, an expert may be put in the position of answering poorly framed questions or trying to tailor an answer to a question not really asked; this might illicit a "non-responsive" objection. Spiegelman suggested this is better than not saying the right thing at all- at least the jury will hear it.

Roger Kahn, Harris County Institute of Forensic Science Crime Lab Director, pointed out Davis stated twice on cross that the study he referenced was not applicable to this case. Garcia asked if the study has no relevance to GSR on Norma Clark's nightgown why are they using it? She gave examples of attorneys asking poorly framed questions and interrupting witnesses, and of judges ordering witnesses to give "yes or no" answers to questions that should not be answered in that manner as contributing factors to questionable and confusing testimony.

Hughes-Stamm stated her belief that "the damage was done early" in this case, and clarification on cross-examination was not sufficient to overcome the confusing testimony about GSR.

Panel members and stakeholders discussed the subjectivity of the discipline. Hughes-Stamm pointed out the difficulty with an arbitrary list of circumstances under which testing for GSR should not be performed (i.e. if the suspect is a hunter, soldier or police officer), as there may be other circumstances to consider such as a soldier who has not been deployed for 6 months.

Kahn pointed out the possibility that GSR testimony in this case was not flawed because the amount present on fabric taken from environments such as Clark's is simply not known. Hughes-Stamm responded if the data does not exist then results are inclusive; a scientist should say no more about it.

Attendees discussed the importance of statistics relative to the disciplines from the Clark case. Kahn reported the statistics course he took as a college undergraduate was not valuable for forensics and he has learned on the job. Garcia and Hughes-Stamm informed members that SHSU is developing statistics courses geared specifically for forensic analysts.

Parsons requested guidance for prosecutors regarding statistics and expressed his opinion that most lawyers and judges do not understand statistics at this higher level.

**Discuss recommendations regarding report content and instruct staff re: same.**

Garcia reviewed items for follow-up including: discussion of the HCIFS thresholds and how they were chosen; review of OSAC language concerning establishment of thresholds; Kaplan language concerning thresholds and application of this study's language in courtroom situations; setting up educational workshops for lawyers and judges to learn more about basic forensic information, and examination of witnesses without "bullying" them into making erroneous and confusing statements on the stand; issuance of a guidance document supported by Spiegelman's work.

Sarah Wood, Norma Clark's appellate attorney, stated the only evidentiary difference between the evidence originally presented to the grand jury that declined to indict Clark and evidence presented at trial was the forensics.

**Assign staff follow-up items as necessary.**

Members and staff will begin working on a draft of a final report in the matter.

**Schedule next Investigative Panel meeting.**

Panel members did not schedule another meeting at this time.

**Public comment.**

The following members of the public provided comment as noted throughout the agenda—  
Dawn Boswell, Tarrant County Conviction Integrity Unit Chief  
Roger Kahn, Harris County Institute of Forensic Science Crime Lab Director

Cliff Spiegelman, Statistics Expert and Advisor to the Commission  
William Davis, Expert who provided GSR Analysis at Norma Clark's trial  
Sarah Wood, Appellate Attorney for Norma Clark

**Adjourn.**

Parsons moved to adjourn the meeting. Hughes-Stamm seconded the motion. The meeting was adjourned at 2:45 pm.