

Texas Forensic Science Commission
Minutes from April 12, 2016 Meeting in Austin, Texas

The Texas Forensic Science Commission met at 8:00 a.m. on Tuesday, April 12, 2016 at the Omni Austin Southpark, 4140 Governor's Row, Austin, Texas 78744

Members of the Commission were present as follows:

Members Present: Di Maio, Alpert, Barnard, Hughes-Stamm, Kessler, Mozayani, Peerwani

Members Absent: Eisenberg, Lerma

Staff Present: Lynn Garcia, General Counsel
Leigh Tomlin, Associate General Counsel
Nick Vilbas, Assistant General Counsel
Kathryn Adams, Commission Coordinator

Review and adopt minutes from February 11, 2016 Licensing Advisory Committee meeting, February 11, 2016 Bite Mark Panel meeting, February 12, 2016 Complaint Screening Committee meeting, and February 12, 2015 Forensic Science Commission Quarterly meeting.

MOTION AND VOTE: *Kessler moved to adopt the meeting minute drafts. Alpert seconded the motion. The FSC unanimously adopted the motion.*

Office administrative update (FY2016 budget status update; discussion of 2017 legislative appropriations request (LAR) and meetings with SHSU, technology/database/website improvements).

Garcia requested assistance with formulating the Commission's legislative appropriation request (LAR) through the appropriate channels at Sam Houston State University (SHSU). Di Maio, Alpert, Kessler and Hughes-Stamm volunteered to assist with the LAR.

Garcia updated the members on the budget and stated that the FSC is on track for this stage in the fiscal year especially considering the additional responsibilities of the Commission relative to the human identification and forensic licensing projects.

Members discussed future meeting locations and Garcia stated that most meetings will be held in Austin from now on. The Licensing Advisory Committee may use another governmental facility for meetings, but the main Commission meetings will remain at the Omni.

Garcia explained the need to hire someone to administer the licensing program and to acquire new software since FSC's current system is unequipped to handle the volume and

security that will be needed. At least 1400 scientists will need to be licensed by 2019. Members discussed functional requirements for new software and decided to start the process of evaluating different software packages and determining licensing fee requirements in the near term.

Peerwani asked about the possibility of moving the Commission to the purview of another government agency. Members and staff agreed that FSC's goal has always been to stand alone, but that has not been possible up to this point. Garcia pointed out that for the FSC to stand alone, an administrator familiar with state rules would need to be hired and built into the budget.

Tomlin explained the logistical and support advantages of being under the purview of SHSU. SHSU provides a layer of accountability by handling FSC's budget and funds. The Commission would need a full time person familiar with state "rules" concerning procurement, travel, accounting, etc.

Discuss and consider recommendations from complaint screening committee concerning pending complaints and laboratory self-disclosures and all complaints or self-disclosures received through March 28, 2016.

Disclosure Pending from February 12, 2016

No. 15.05; DPS—Weslaco (Latent Print)

DPS Weslaco self-disclosed an incident in the laboratory's latent print section where an analyst excluded a suspect who was later identified as the source of a latent palm print.

Barnard reviewed discussion of the case from the last FSC meeting and reasons why it was tabled.

Brady Mills, DPS Deputy Assistant Director, updated the Commission on the progress of DPS's ongoing internal investigation and case evaluation. Eleven cases were submitted for re-evaluation and the laboratory has completed three so far with no findings of irregularities.

The review should be concluded before the next Commission meeting unless DPS receives more additional requests for re-evaluation from submitting agencies.

MOTION AND VOTE: *Alpert moved to table the disclosure and keep the case open until the next commission meeting. Hughes-Stamm seconded the motion. The FSC unanimously adopted the motion.*

Disclosures Received as of March 28, 2016

No. 15.04; DPS—Abilene (Controlled Substance)

DPS Abilene self-disclosed an incident in the laboratory's controlled substance section where the laboratory manager allegedly tampered with and stole drug evidence from 14 cases stored in the laboratory's evidence vault.

Barnard explained the lab manager resigned and was indicted by grand jury for theft of hydrocodone. Mills provided an update on DPS's internal investigation. A team from Lubbock was sent to investigate the incident after DPS was notified in July of 2015. The Texas Rangers and Inspector General were also called in to assist.

Mills provided an update on the case and gave specifics on actions that the lab has taken and new policies and procedures that are being implemented. The lab has a new manager who has ensured the laboratory knows exactly which items were stolen. The District Attorney has been notified of affected cases. DPS has implemented a Quality Action Plan but no report has been generated yet. Alpert asked why the pending criminal case was affecting writing final report and presenting it to the Commission. Mills explained that material related to the QAP is being used as evidence in the pending criminal case and lab personnel may be called as witnesses.

Alpert asked if there was a gap in finding the missing evidence. Mills pointed out that lab managers are the persons depended upon to oversee the labs; in this case the manager was the problem so there was definitely a gap in the system. The laboratory services about 30 counties. Garcia suggested notifying the Texas District and County Attorney's Association since so many counties were involved.

MOTION AND VOTE: *Barnard moved to table the disclosure and keep the case open to give the lab time to complete the quality action report. Mozayani seconded the motion. The FSC unanimously adopted the motion.*

Complaints Received as of March 28, 2016

No. 16.07; Douthit (SWIFS, Ballistics)

Inmate Shannon Douthit filed this complaint alleging, among other general allegations of police misconduct, that SWIFS firearms examiner Allan Jones was unqualified to conduct the testing in his case and the laboratory failed to test certain hair and blood evidence taken from the crime scene.

Dr. Barnard recused himself from this complaint due to his position at SWIFS.

MOTION AND VOTE: *Alpert moved to dismiss the complaint as it does not state a claim of negligence or misconduct regarding forensic analysis but rather makes general allegations and the case occurred prior to enactment of lab accreditation program. Peerwani seconded the motion. The FSC unanimously adopted the motion.*

No. 16.09; Kujala (Fort Worth Police Department Crime Lab, Firearms/Toolmarks)

Victoria Kujala, a former Fort Worth Police Department firearms examiner, filed this complaint alleging laboratory management tampered with the examiner's casework and engaged in unethical/harassing behavior in the firearms section of the laboratory.

Barnard stated the CSC's view that additional information is needed, such as whether ASCLD/LAB was notified of the missing evidence. Garcia read a response to the complaint in the form of a letter from a Fort Worth City Attorney. Barnard stated that the letter did not adequately address all the issues that need to be reviewed in this case, especially the month-long delay from when the case was originally analyzed to the discovery of missing evidence.

Members discussed questions about the root cause analysis performed in the case including: how it was done; how the conclusion was drawn that the missing evidence was attributable to the actions of a single examiner; and whether the incident was reported to the lab's accrediting body. Garcia will call the accrediting agency about this case. She also pointed out the decision early on was not to do a corrective action report (CAR), which raises questions about the laboratory's understanding of the purpose of a CAR.

MOTION AND VOTE: *Barnard moved to table the complaint and direct FSC staff to obtain additional information relative to the case. Alpert seconded the motion. The FSC unanimously adopted the motion.*

No. 16.10; Hayes (McClellan County, Laboratory Unknown, Blood Sugar Test)

Inmate Charles Ray Hayes filed this complaint alleging McClellan County law enforcement officials falsely arrested and convicted him of driving while intoxicated because a blood sugar test given to him at the hospital after the arrest registered "82," and had he been intoxicated at the time the number would have been higher.

Garcia asked how blood sugar and blood alcohol are related. Medical and scientific experts on the Commission expressed agreement that they are unrelated.

MOTION AND VOTE: *Barnard moved to dismiss the complaint for failure to make any allegations of negligence or misconduct in forensic analysis. Hughes-Stamm seconded the motion. The FSC unanimously adopted the motion.*

No. 16.11; Hicks (Child Assessment Center—Houston, Susan Odhiambo, Forensic Interview)

Inmate Leonard Charles Hicks filed this complaint alleging Child Assessment Center—Houston forensic interviewer Susan Odhiambo failed to follow proper protocol in conducting her interview with the child victim, and the Texas Mental Health Center Rosenberg gave the child drugs and a false diagnosis that led to Hicks' conviction.

MOTION AND VOTE: *Barnard moved to dismiss the complaint for failure to make any allegations of negligence or misconduct in forensic analysis by an accredited laboratory. Peerwani seconded the motion. The FSC unanimously adopted the motion.*

No. 16.12; Anonymous (Houston Forensic Science Center, Toxicology)

This complaint was filed anonymously and alleges that a Houston Forensic Science Center analyst's error resulted in contamination of one of two vials of blood taken from a defendant with no notice provided to the defendant, and the same incident happened in two other (unidentified) cases where no notification was provided to the defendant or the District Attorney.

Barnard stated that the CSC recommended presentation of this case to the full Commission for discussion. The incident occurred on May 28 and was not reported to the Harris County DA's office until late July. A CAR was not issued until November 16 only after similar incidents happened 2 more times.

The City of Houston Office of Inspector General determined the incident's main cause was failure of toxicology section manager to promptly report the original error to the lab manager. Garcia read the OIG's conclusion that no professional negligence occurred. Di Maio pointed out that no erroneous reports were issued as a result of the lab's errors.

Dr. Peter Stout, who was also present at the CSC meeting, was present to answer questions.

Alpert pointed out that the lab took ownership of the errors and acknowledged that certain language in the corrective action documentation such as the sample "became unsuitable" is inadequate to describe the facts of the situation.

Attorneys present discussed the issue of notification. Alpert expressed the view that most prosecutors would want to know as soon as possible that a specimen was tainted and that the last specimen had to be utilized. There was general agreement that the notification process needs improvement. Inger Chandler from the Harris County DA's office expressed concern about the timeline for notification of attorneys especially where a defendant is in custody.

Peerwani explained the need for obtaining two vials of blood. Not only would there be an extra specimen in case of contamination, but if a defendant wanted to have his/her own testing done a second specimen would be available.

Alpert asked for clarification that the incident was not reported until the same mistake occurred two more times—he wanted to make sure he understood exactly what happened with regard to the delay in reporting.

Dr. Peter Stout from HFSC explained that this incident happened about 8 weeks after he joined the management team. He believes the initial incident would have been trivial had it been handled correctly in the first place. Corrective action has been taken and quality manuals are being revised.

Garcia asked to work with Tom Allen and Inger Chandler on providing clarification around when notification to affected parties is necessary and appropriate. He felt the integrity of the laboratory could be questioned in court if it fails to timely report non-conformances and/or uses language to ambiguous language in describing an error or series of errors.

Garcia pointed out that a second anonymous complaint was filed with the FSC shortly before the meeting and is also being sent to the City of Houston OIG.

MOTION AND VOTE: *Alpert moved to defer any decision on the complaint so that Garcia work on notification training issues and materials with Tom Allen and Inger Chandler. Barnard seconded the motion. The FSC unanimously adopted the motion.*

#16.13; Adams (Grapevine Police Department and Tarrant County District Attorney's Office, Crime Scene Video and Blood Alcohol)

This complaint was filed by Laura Jenkins whose son, Roy Adams Jr., was convicted of intoxication manslaughter and sentenced to 12.5 years in prison on August 3, 2005 for driving under the influence of alcohol in Grapevine where he struck Grapevine Police Officer Darren Medlin as he was performing a routine traffic stop. A dams' blood was drawn at the hospital following the accident and ultimately tested at the Tarrant County Medical Examiner's Office, indicating a .11 blood alcohol content.

In her complaint, Ms. Jenkins alleged Grapevine Police Officer Deana Ramsour tampered with the dash cam video recorder footage and provided false statements that led to the conviction of her son. Ms. Jenkins also provided an affidavit from alleged expert Herbert Joe, who concluded in his report the dash cam footage was "edited and altered."

Ms. Jenkins also alleged that Tarrant County Assistant District Attorney Richard Alpert subverted the Euless Police Department's blood draw policy by directing her son's blood specimen to the Tarrant County Medical Examiner's Office instead of the Texas Department of Public Safety so the blood alcohol content could be altered to show her son was intoxicated. Ms. Jenkins believes her son's accident was due to a seizure and not his intoxication.

FSC staff recommended dismissal as there were no allegations of negligence and misconduct in forensic analysis but rather general allegations of evidence tampering, police and prosecutorial misconduct. Garcia pointed out that the allegation against a police officer with respect to the dash cam video was not a complaint concerning forensic video analysis. The FSC has no jurisdiction over allegations of police misconduct. There was also a blanket allegation of tampering with a blood sample by the TCME's office

with no support for the claim. The question of whether the complainant had a seizure behind the wheel is medical and not anything the Commission has jurisdiction over.

MOTION AND VOTE: *Barnard moved to dismiss the complaint due to lack of jurisdiction but refer the case to the innocence clinics. Kessler seconded the motion. The FSC unanimously adopted the motion.*

Laura Jenkins gave public comment. Her son has been up for parole 5-6 times and has always been denied. She read from the sheet documenting his last parole hearing. She described many good qualities of her son and repeated her accusations of misconduct by government representatives in the case.

16.16; Lenox (DPS (Garland), Blood Alcohol and Urine Test)

Inmate Robert W. Lenox filed this complaint alleging a DPS trooper and DPS Garland and/or Austin laboratory employees falsified reports confirming Lenox had amphetamines and marihuana in his system at the time of an auto accident that lead to Lenox's conviction for aggravated assault with a deadly weapon. He also alleged that reports of drugs found in his possession were falsified, and that the only drugs in his possession at the time of his arrest were prescribed by his doctor.

MOTION AND VOTE: *Barnard moved to dismiss the complaint because it made no allegations relative to a forensic analysis but rather contained general allegations of falsified reports. Mozayani seconded the motion. The FSC unanimously adopted the motion.*

Members briefly discussed possible additions and changes to the Complaint Screening Committee in light of Dr. Eisenberg's extended absence. Peerwani and Mozayani volunteered for positions on the committee. Barnard was selected as the new committee chairman.

MOTION AND VOTE: *Alpert moved to accept Peerwani and Mozayani as new members of the CSC and to elect Barnard as the new committee chairman. Kessler seconded the motion. The FSC unanimously adopted the motion.*

Discuss status and any updates for crime laboratory accreditation program, including review and discussion of forensic disciplines previously exempted by DPS and Attorney General Opinion request regarding reporting requirements for unaccredited disciplines under Texas Code of Criminal Procedure article 38.01.

Garcia discussed questions regarding exempt forensic disciplines and suggested the Commission revisit the list generated by DPS. She pointed out that someone had to actually file for an exemption in the discipline with DPS at some point. Mills stated that there are packets of information at the DPS available for review that contain applications for exemption and supporting documents enumerating the reason(s) for granting the exemption.

Garcia suggested seeking advice from the Attorney General's office concerning actions that should be taken with regard to disciplines not the exemption list. She explained that she wants to seek guidance regarding the statutory bases on which the FSC can grant exemptions. Di Maio suggested adding new category for disciplines such as bite marks. He clarified he was referring to disciplines that are on questionable scientific footing and have no accrediting agency. Alpert pointed out the FSC might need to take on the responsibility of vetting these disciplines.

Garcia explained she would like for the AG opinion request to include the question of what authority the FSC has to decide whether or not a particular discipline should be accredited or exempt.

Peerwani asked members their thoughts on inviting people from exempt disciplines to address the Commission concerning why they should be exempt from accreditation. Garcia explained that the Commission's legal authority should be clearly defined by the AG before that type of action is taken and suggested that obtaining DPS's packets and determining whom to contact in these disciplines would be a good start to the project.

Kessler related his belief that an important task for the Commission is to create a category of disciplines for which the underlying scientific basis needs to be justified. Alpert agreed and said there are some disciplines in which the Commission can be proactive. Members agreed to allow Garcia to pursue seeking advice from the AG's office with regard to unaccredited disciplines.

Discuss licensing advisory committee progress and updates, including presentations from certification bodies, scheduling of additional meetings and next steps.

Hilbig gave a summary of yesterday's Licensing Advisory Committee ("LAC") meeting including presentations from several outside agencies that were very helpful to the LAC. The LAC decided to meet monthly as members felt that they could not accomplish all that needs to be done with only quarterly meetings. The LAC will have full day meetings in May and June and must be prepared to report progress to the Legislature sometime between January and May 2017. Garcia said she expects the report to be ready in the February to March timeframe. Alpert pointed out the LAC's needs will affect Commission budget review. Hilbig reported the LAC is concluding the information-gathering phase and is ready to move to action. The examination prong was more time consuming than anticipated. Peerwani mentioned conducting a survey in the state with regard to fees for licenses charged by other agencies. DiMaio suggested looking at the nursing profession. Overall, the committee members feel the need to increase the pace of their work.

Discuss Rio Grande Identification Project progress, including teleconferences and collaboration efforts with EAAF, UNT, pathologists and medical examiners (Farley, Stern, and Peerwani), status of comparison of EAAF reference samples to UNT local databank, execution of MOU with instruction and requirements about cross-referencing samples between BODE (which houses EAAF DNA databank) and

UNT's local databank of missing person samples, organization of future collection of reference samples in each country to be submitted by an investigative agency that satisfies federal requirements, recent NAMUS meeting hosted by NIJ, and other next steps.

Hughes-Stamm provided an update on the status of the project, including a draft Memorandum of Understanding for searching existing reference samples and a meeting called by the National Institute of Justice which she attended as a representative of the Commission along with other stakeholders in Texas, California and Arizona. Attendees discussed the many challenges in efficiently and effectively identifying human remains in border regions.

Garcia speaks to the complexity of this project, which involves the FBI, the state CODIS administrator, the University of North Texas Center for Human Identification, human rights group, justices of the peace and medical examiners among other interested parties.

Update from Texas Association of Crime Laboratory Directors

There was no one in attendance at this meeting to provide an update from the TACLD.

Update on Retrograde Extrapolation Education Project.

Alpert discussed the attendance of two individuals from Tarrant County to a national conference on the subject. He confirmed that other states besides Texas are interested in education on the subject, but it is still a work in progress and he expects to have more to report by the next Commission meeting.

Update from Hair Microscopy Panel, including notification recommendations, finalization of notification letters and communication of same to stakeholders; update on transcript review.

Garcia reported there are no notification cases at this time; Latham & Watkins reviewed 5 transcripts and recommended no notification. The team agreed that attorneys are eliciting testimony that is not faithful to the analyses and recommendations will be made about this issue. Judge Hervey asked that the team pay close attention to this. Transcripts are still being reviewed and no decision has yet been made with regard to how much longer this project will go on and if a more targeted approach should be taken.

Currently about 30 transcripts have been reviewed and 40% of those have received notification. Garcia explained the scope and process used in the project.

Vilbas stated that some cases will fall out of consideration for various reasons (e.g., the transcript was unavailable even after extensive efforts to locate it); 80 cases have been submitted but not all will have records available. Di Maio asked about how many total hair cases there are. Di Maio concluded that there are 3,000-4,000 thousand total cases; 700 cases will have been reviewed by the end of the Commission's sampling process.

For a case to be reviewed, there must have been a conviction and the transcript must be made available. Garcia pointed out that the Commission needs to decide what action will be taken based on the results of the reviewed transcripts.

Garcia asked what action would be taken in notification cases where a defendant is deceased. Roady relayed the discussion and conclusions of the review team and members of the Commission agreed notification is not feasible for cases in which the defendant is deceased but that the case analyses may be included in the final report which will be made public.

Update from Blazek (SWIFS–Firearms/Tool Marks) #14-08 investigative panel, including deliberation, review and adoption of final investigative report.

Garcia reviewed the facts and background of the case and Murdock's findings and recommendations. Commissioners considered the draft report in this matter via overhead projector including factual assessment, root cause analysis and corrective action including a model training program, recommendations, observations and findings in detail. Commissioners discussed the importance of viewing the mistaken identification as a systemic quality control breakdown and not just an error by an individual examiner.

MOTION AND VOTE: *Alpert moved to accept and publish the draft Final Report with the discussed revisions. Hughes-Stamm seconded the motion. The FSC unanimously adopted the motion. Barnard recused himself from deliberation on this item.*

Update from Bell County (Forensic Video Analysis) #14-01 investigative panel, including deliberation, review and adoption of final investigative report.

Barnard reviewed the original complaint and reminded members that forensic video analysis is not an accredited discipline so the Commission's jurisdiction is limited to observations regarding integrity and reliability, best practices and other recommendations. Garcia reviewed the draft report in detail via overhead projector. Barnard gave a reminder that the Commission will not render an opinion on the guilt or innocence of any person.

Garcia explained that NIST's Organization of Scientific Area Committees is currently in the process of developing standards for this discipline. There currently is no accreditation requirement in Texas. The FSC's report reflects the current state of the field. Garcia discussed current programs that incorporate forensic video analysis and also stated that the more pervasive digital media becomes the more criteria is needed to guide the community. Members agreed should be a reasonable margin of error among results between analysts regardless of the methodology used. The wide discrepancy among analysts' conclusions in this case was concerning.

Barnard asked for public comment and Paul McWilliams from the Bell County DA's office addressed the Commission. He relayed his understanding from the State's expert technological changes from 2009-2015 accounted for differences in the expert's reports.

He explained Mills' critique of the Fredericks report and stated that the information has been provided to Powell's writ attorney.

MOTION AND VOTE: *Kessler moved to accept the draft Final Report with the discussed revisions. Alpert seconded the motion. The FSC unanimously adopted the motion.*

Update from Bite Mark Panel (Chaney–National Innocence Project) #15-07, including deliberation, review and adoption of interim investigative report.

Garcia reviewed the Commission's draft Final Report on bite mark evidence, including assessment of the research and recommendations. Commissioners discussed the report and findings in detail including deliberations from the work of the Bite Mark Panel.

MOTION AND VOTE: *Alpert moved to accept the draft Final Report. Peerwani seconded the motion. The FSC unanimously adopted the motion.*

Status of DNA Mixture Interpretation Review, including:

- a. Laboratory progress—protocols, case reviews and training, including presentation by Dr. Bruce Budowle;
- b. Update from April 11, 2016 DNA Mixture Interpretation Subcommittee on Notification meeting;
- c. Training for lawyers and scientists; and
- d. Status of case review, including collection of DNA review forms, triage of cases and any expected retesting thus far.

Dr. Bruce Budowle joined the meeting via Skype to discuss his observations stemming from his review of state crime lab protocols. The laboratories were very willing and receptive of his observations and integrated those observations in their protocols. Common issues regarding allele dropout and other stochastic effects were identified and addressed by the laboratories.

Garcia described notification procedures relative to the DNA mixture case review including expected case volumes and the process for triaging cases. Public comment was received from Elected District Attorney Jack Roady and Assistant District Attorney Inger Chandler regarding their experiences identifying cases in their jurisdictions.

Garcia related an issue that came up in the subcommittee meeting regarding whether labs outside Texas that do work in the state should undergo the same protocol review as Texas labs. Members agreed that all labs should be reviewed regardless of their physical location if they perform DNA analysis in Texas criminal cases. Garcia and Tomlin will contact out-of-state labs and let them know about the DNA protocol review.

DNA training for lawyers will be simplified as it is too complicated as it currently stands. The next training for lawyers will be in Central Texas and it will be less technical than in the past sessions.

More resources are needed to review laboratories' work products; Dr. Budowle cannot be expected to do it all. Garcia suggested the possibility of building funds for this purpose into a Legislative Appropriations Request (LAR).

Report from 68th Annual American Academy of Forensic Science meeting in Las Vegas, Nevada February 22-27.

Di Maio related that at the American Academy of Forensic Science forensic dentists are still saying they can do bite mark comparison.

Report from Innocence Network Conference in San Antonio April 8-9

The Commission made presentations at both the NACDL conference and the Innocence Network Conference.

Report from presentation in AZ and Bode West conference.

Garcia and Brady co-presented in Arizona at the request of Judge Ron Reinstein.

Adjourn.