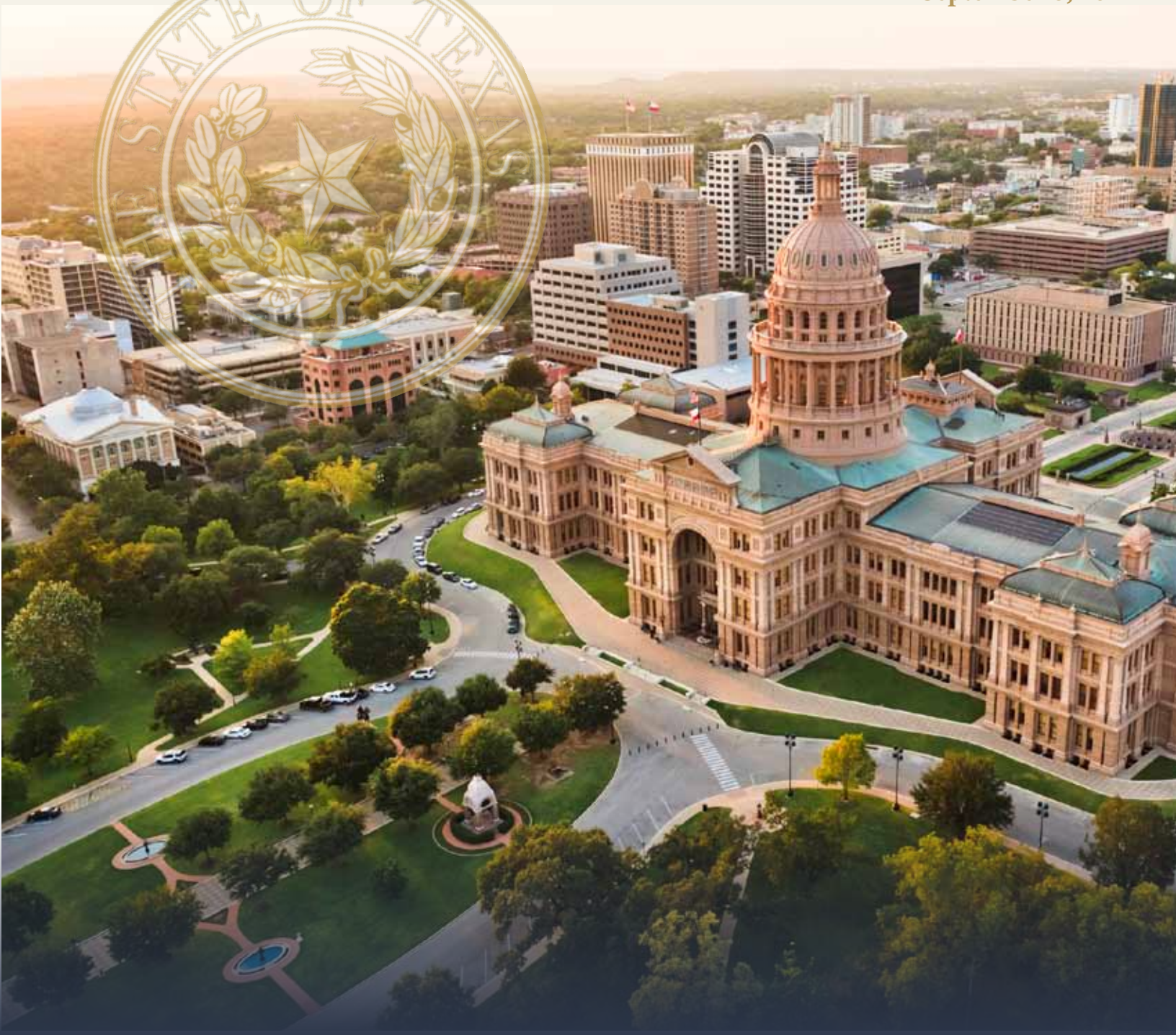
Texas Forensic Science Commission

Justice Through Science

INVESTIGATION MEMORANDUM, TFSC CASE NO. 09.02, INNOCENCE PROJECT FOR BRANDON LEE MOON (TEXAS DEPARTMENT OF PUBLIC SAFETY- EL PASO; FORENSIC BIOLOGY/SEROLOGY)

September 8, 2011



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I. Factual Background

On January 14, 1988, Brandon Lee Moon was convicted by a jury in El Paso, Texas of three counts of sexual assault arising from an April 1987 rape. Moon was sentenced to 75 years in prison. He was released from prison in December 2004 based on the results of a DNA test showing that he was not the donor of the seminal fluid found on two pieces of evidence at the crime scene (a comforter and a bathrobe).

Key testimony at trial included the victim's identification of Moon and collaborative eyewitness identification testimony from another woman who had been sexually assaulted in a similar manner. Department of Public Safety ("DPS") Criminalist Glen David Adams also testified regarding the serology analysis conducted in the case. At the time of trial, DPS labs did not yet conduct DNA testing. The testing of bodily fluids such as blood, saliva and semen— commonly referred to as serological evidence—was often used to exclude a particular person as a suspect or to include a person within a particular sub-group of the population.

Mr. Adams testified that the semen found at the crime scene came from a "non-secretor" (*i.e.,* someone whose blood type is not detectable in other bodily fluids). (*See* Exhibit A at 236-237.) He testified that approximately 15% of the population consists of non-secretors, and that Moon was a non-secretor while the victim and the only two males in her household (her son and husband) were all "secretors" (*i.e.,* their blood type is detectable in other bodily fluids). (*Id.* at 230- 231, 238-239.) DNA testing later showed this analysis to be inaccurate; it is more likely that the sample Mr. Adams used to determine the "non-secretor" status of the donor was too diluted or degraded to reach a conclusion. (*See* Exhibit B.)

On August 13, 2008, the Innocence Project ("IP") filed a formal complaint ("Complaint") with the FSC alleging professional negligence and/or misconduct in: (1) DPS's hiring, training and supervision of Mr. Adams; (2) the analysis, interpretation and testimony of Mr. Adams; (3) DPS's failure to conduct a DNA test on a new sample of Moon's blood after DPS analyst Donna Stanley determined in 1996 that the serology testing in the case was flawed; and (4) DPS's failure to take subsequent, necessary steps to complete further DNA testing as set forth in its report dated April 24, 2003, which conclusively excluded Moon as the source of seminal fluid found on the victim's comforter and robe.

II. Timeline of Post-Conviction DNA Testing

Lifecodes Testing (1989). In 1989, Moon requested and was granted access to the evidence in his case for DNA testing. Testing was conducted by Lifecodes Corporation, which released its results in February 1990. (*See* Exhibit C.) Using restriction fragment length polymorphism (RFLP), an early form of DNA technology available at the time, the lab obtained a DNA profile from a comforter found at the crime scene. The results excluded Moon as the contributor of the semen on the comforter. However, semen was also found on a bathrobe used by the victim to flee the home after the attack, and the lab did not reach a conclusion regarding the bathrobe. In addition, the profile from the comforter was not compared to the profiles of the victim, her husband or her son. In its report, Lifecodes stated that a definitive conclusion could not be reached as to the source of the DNA. *Id.*

Attempts to Obtain Additional Relief (1990-1996). After receiving the results from Lifecodes, Moon filed various appeals requesting relief based on DNA evidence,

among other grounds. Numerous state and federal courts rejected those appeals, finding that the evidence was insufficient to order a new trial.

DPS Testing (1996). Moon filed his last pro se appeal in 1995. John Davis, the Appellate Chief in the El Paso District Attorney's Office, was responsible for preparing the State's response to Mr. Moon's request for relief. On May 9, 1996, Mr. Davis sent a letter to the DPS lab in Austin requesting that one of their analysts (Donna Stanley) contact Lifecodes "for a full explanation of the tests conducted by them and the results obtained, and to determine what further testing can and should be done." (*See* Exhibit D.) Mr. Davis also requested that Ms. Stanley sign an affidavit outlining the testing that would be required to determine whether Moon was a donor. (*See* Exhibit E.) Mr. Davis submitted the affidavit to the court with the State's response to Moon's request for relief. Moon's appeal was rejected almost immediately.

A few days after Moon's appeal was rejected, Ms. Stanley received the stored evidence from Lifecodes and conducted further DNA testing using the "DQ-Alpha" method. She concluded that the DNA profile for the semen on the comforter was *different* than the profile for the semen on the bathrobe. (*See* Exhibit F.) She informed the District Attorney that in order to reach any further conclusions, she would need reference samples from Moon, the victim, and the two other males in the household (the victim's husband and the victim's son). No reference samples were obtained, and Moon was not informed of the results ofMs. Stanley's review.

Additional DPS Testing (2002). In 2001, Texas passed landmark legislation allowing for post-conviction DNA testing (TEX. CODE CRIM. PROC. art. 64.01 et seq.) Moon filed a request for DNA testing under the statute, and his request was granted in 2002 pursuant to an unpublished order of the 346th Judicial Court of El Paso, Texas (Baca, J.) The

evidence was sent to the DPS lab in El Paso in October 2002. The El Paso lab conducted "Short Tandem Repeat" (STR) testing, a more advanced method of DNA testing, on the remaining evidence.

Christine Ceniceros, an analyst from the DPS lab in El Paso, called Mr. Davis in November 2002 to inform him of her conclusion that Mr. Moon's DNA did not match the semen stains. (*See* Exhibit G.) Both of the samples contained the victim's DNA and an unknown male's DNA, but neither contained Moon's DNA. According to Ms. Ceniceros' notes, Mr. Davis stated that he would work to obtain samples from the son and husband to rule them out as contributors. *Id.* Ms. Ceniceros made various follow-up telephone attempts to inquire about the status of the reference samples before releasing her final report on April 24, 2003.(*See* Exhibit H.)

Reference testing (2004). In early 2004, the DPS lab results were compared to the victim's son, and he was also excluded as a contributor. In November 2004, the victim's ex-husband's DNA was compared to the profile and found to be the DNA from the contributor of the semen on the comforter.

Release (2004). Moon was released from prison in December 2004.

Exoneration (2005). On April 6, 2005, Moon was exonerated by the Texas Court of Criminal Appeals on grounds of actual innocence.

III. July 29, 2011 Opinion of Texas Attorney General Greg Abbott

Texas Attorney General Greg Abbott issued a legal opinion regarding the scope of the FSC's jurisdiction on July 29, 2011 ("Opinion"). Pursuant to the Opinion, the FSC does not have jurisdiction to take action with respect to evidence offered or entered into evidence before September 1, 2005. Mr. Moon was released from prison in December 2004. All forensic analysis in his case had already occurred before the effective date of

the Act. As a result, the Commission will not be pursuing any further investigative action or issuing any finding of negligence or misconduct against the Department of Public Safety or any of its current or former employees for any of the allegations submitted by the complainant.

IV. Recommendations

Notwithstanding the jurisdictional limitations imposed by the Opinion, the Commission believes that important lessons can be learned from this case, and offers the following observations and recommendations.

RECOMMENDATION 1: CONTINUE DPS INTERNAL REVIEW.

DPS Deputy Assistant Director Pat Johnson initiated an internal review of all cases in which analyst Glen Adams testified at trial and the defendants are still incarcerated. The Commission encourages DPS to develop a plan for continuing this review. The Commission also encourages DPS to continue its inquiry into the question of whether the serology interpretation at issue in this case was based on an incorrect assumption by the testifying analyst, the limitations of the test itself, the limitations of the associated DPS procedures for interpreting the test, or other reasons.

RECOMMENDATION 2: CONSIDER PEER-REVIEW TEAM.

While the 2001 post-conviction DNA testing legislation has given defendants the opportunity to test remaining biological material when certain criteria are met, it does not address situations in which a conviction was based primarily on serology analysis but there is no biological material or insufficient biological material remaining for testing. The Commission encourages DPS to consider assembling a collaborative peer review team to discuss whether such cases merit further review, and whether it is even

possible or worthwhile to isolate and pursue such cases. DPS should consider working collaboratively with external stakeholders as appropriate.

RECOMMENDATION 3: CASES WHERE REFERENCE SAMPLES ARE REQUESTED BY DPS BUT NOT RECEIVED.

An issue of concern to the Commission in this case is the fact that important scientific conclusions could not be reached until DPS received reference samples, but DPS was dependent on its client (in this case the El Paso District Attorney's office) to determine how and when the samples were obtained. As previously noted, DPS analyst Donna Stanley communicated clearly in 1996 that she needed reference samples but DPS did not receive those reference samples. Further, in 2002, DPS analyst Christine Ceniceros concluded definitively that Moon was not the donor of the semen on the robe or the comforter, but it took two additional years for attorneys to obtain the reference samples. The FSC believes that DPS should reflect on the lessons learned in this process and consider developing a mechanism for red-flagging delayed responses. While the FSC recognizes that the 2001 post-exoneration testing legislation may address many of these concerns, it may also be helpful for DPS to consider whether any further control mechanisms would be helpful.

RECOMMENDATION 4: TRAINING FOR ANALYSTS REGARDING LANGUAGE USED IN EXPLAINING DEGREES OF ASSOCIATION.

Forensic scientists often use terms in their expert reports that describe findings, conclusions, and degrees of association between evidentiary material and particular people. As the National Academy of Sciences report notes, such terminology should be standardized within disciplines, as the terms used to describe degrees of association can have a profound effect on how the trier of fact perceives and evaluates scientific evidence. The Commission notes that in this case, the analyst was cautious in not overstating the limits of his analysis regarding Moon's secretor status. However, broad concepts of association such as the percentage of the population falling into secretor vs.

non-secretor population groups (*i.e.,* the fact that 85% of the population consisted of non-secretors while 15% consisted of secretors) must be expressed very cautiously in reports and courtroom testimony. DPS and other laboratories should continue to review and refine the standards and protocols they use for data reporting and related testimony.

Dr. Garry Adams
Professor and Coordinator of Biodefense & Emerging Disease
Texas A&M University, College of Veterinary Medicine and Biomedical Sciences
College Station, Texas

Dr. Arthur J. Eisenberg
Professor and Director, DNA Identity Laboratory
University of North Texas Health Science Center
Fort Worth, Texas

Lance T. Evans
Partner, Criminal Defense Attorney
Evans, Daniel, Moore & Evans LLP
Fort Worth, Texas

Dr. Jean Hampton
Professor and Director, College of Pharmacy and Health Sciences
Texas Southern University
Houston, Texas

Dr. Stanley R. Hamilton
Director, M.D. Anderson Division of Pathology & Laboratory Medicine
Houston, Texas

Dr. Sarah Kerrigan
Professor and Director, Sam Houston State University Regional Crime Lab
Huntsville, Texas

Dr. Nizam Peerwani
Chief Medical Examiner
Tarrant County, Texas

Dr. Nizam Peerwani
Presiding Officer
Texas Forensic Science Commission

EXHIBIT A

A. When we usually get the rape kit in we go through the kit and check it for all the items, do the blood sample, type the sample, and do a preliminary check for semen on all the other items, like the vaginal swabs and the vaginal slides. Then when we receive a suspect's sample we go ahead and type the suspect's blood to see if they have the same types, and then do further testing on the suspect's blood and saliva samples, hair samples, and make a comparison.

Q. Okay. And you might compare some of your findings from known group, the blood group or the secretor-nonsecretor status with items that are unknown. You don't know where they originated from.

A. Right.

Q. In this case, looking at State's Exhibit No. 42, you received a sample you would blood-type it?

A. Right.

Q. You said an ABO where you get the blood types?

A. Right. That's the blood group system.

Q. And then you would determine secretor-nonsecretor?

A. Right.

Q. And there are different ways to determine that?

A. That's correct.

Q. Okay. And as to the secretor-nonsecretor, is a fair generally accepted percentage, would that be 85 percent of the population secretor and 15 percent nonsecretor?

A. That's correct.
Q. And then you do certain tests with -- semen tests?
A. Right.
Q. And sperm tests?
A. Right.
Q. Okay. If I group it all into one you can call it semen or sperm?
A. Right.
Q. Let's say that you have an unknown. Let's say you have an item that there may have been some semen detected on it. Can you confirm that there was semen?
A. Yes, sir, we can.
Q. Okay. There was a preliminary detection, say, with one of the lamps. What do you call them? When do they call the lamps?
A. The lamps?
Q. Is there such a test that you put a florescent light and if there is semen it has a certain color?
A. Well, we don't do that testing. What we do, there are ways of detecting the seminal stains without laser lights and things of that nature. What we do is go through and by visual means and by the use of what we call a azophosphate spot test, go through and just go over every inch of the clothing until we find a stain.
Q. Okay. Is this something that would have been done in

a sexual assault case, the azophosphate test?

A. Azophosphate. Yes, it is.

Q. And is that a generally accepted test for determining where there is semen present?

A. Correct.

Q. Let's just say that you got a robe or a comforter with suspected semen.

A. Okay.

Q. What do you do when you get that?

A. Well, okay, if my presumptive test was positive, we go ahead and do other tests, what we call a P30 test, which is a semen specific protein that we look for on the stain, and if that's positive we know that there is semen there.

Q. Okay. Was this done in this particular case?

A. Yes, it was.

Q. What was that test done on it?

A. It was done on -- the P30 test was done on item number 4, the comforter.

Q. Okay. And what else?

A. Okay. On some of the other items a P30 was not done to confirm the presence of semen. What we did on the other items, which are the vaginal swabs, the dark blue bathrobe, and it was also done on the comforter.

Q. Okay.

A. We looked for what we call spermatozoa, which are sperm.

Q. So you look for spermatozoa first and if you find it then there's no need to do a P30, is that right?
A. Right.
Q. And if you don't find it and you do the P30 then you can determine that there was semen?
A. Right.
Q. Okay. Was a test done on the bathrobe for semen?
A. On the bathrobe?
Q. Yes.
A. Yes, it was.
Q. All right. What was the result of that test, did you find any or not?
A. Yes, we did, it was positive.
Q. Okay. So on the bathrobe would it be fair to put on here "Yes"?
A. Yes.
Q. State's Exhibit 42. Okay. On the comforter?
A. On the comforter we found spermatozoa and P30 and it would be positive to say that there was semen.
Q. Okay. So it would be fair to put "Yes" under the sperm-semen on the comforter?
A. Yes.
Q. You said there were two swabs?
A. Right. There were two swabs that were received and both of them had semen on them.

Q. Both of those swabs were received with the rape kit from the items taken from the alleged victim's person.
A. Right.
Q. Okay. One of the swabs was identified as coming from the vaginal?
A. Right.
Q. And the other swab?
A. It was unmarked.
Q. Was there a test for semen on the vaginal swab?
A. Yes.
Q. And what was the result of that?
A. That there was semen there.
Q. And for the unmarked swab, was a test for semen run?
A. Yes.
Q. And what was the result of that?
A. There was semen there.
Q. Okay. So, basically, given that the swabs were taken from a female, if you run these tests on the swabs, you can say that it was male semen on there?
A. Correct.
Q. And if there were any secretions on the comforter that included those of a female, given the result of the semen-sperm test, you would conclude that there was also male substances on there?
A. Correct.

Q. And the same for the bathrobe, there were stains or there was presence of semen or sperm on the bathrobe, you would conclude that even if they were mixed with vaginal secretions there was some male deposits?

A. Right.

Q. Okay. And then you had your known items, those being the blood types of the individuals whose blood was submitted to DPS, is that correct?

A. Correct.

Q. Okay. Now, the complaining witness or the victim in the case, if her name were Dana Mocherman, do you have a listing there for submissions of the victim?

A. Yes, I do.

Q. Okay. Was her blood typed?

A. Yes, it was.

Q. What was her blood type?

A. She is a blood type A.

Q. Okay. And did you have any submissions for her spouse?

A. Yes, I did.

Q. What was his blood type?

A. His blood type was also A.

Q. Okay. And were there any submissions from the victim's son?

A. Yes, there was.

Q. And what was his blood type?

A. His blood type was O.
Q. And you have a child from an O blood type?
A. Yes, you can.
Q. Okay. And was Brandon Moon's blood, the suspect, also typed?
A. Yes, it was.
Q. And was that blood type?
A. His blood type is O.
Q. Okay. Now, blood typing would not apply for the seminals, the secretions on the bathrobe, the comforter or the swabs, is that correct?
A. Correct.
Q. So would it be fair to put -- it's a "No", it doesn't apply, is that correct?
A. Right.
Q. Determination of secretor-nonsecretor status, was that done?
A. Yes, it was.
Q. And were you able to do that from the semen samples that were drawn?
A. Yes, I was.
Q. And was that done with any of the semen that was extracted from the bathrobe?
A. Yes, it was.
Q. All right. And what secretor-nonsecretor status did

that have?

A. We found no blood group substances to make a nonsecretor.

Q. Nonsecretor? Okay. So from the semen on the bathrobe you got a determination of nonsecretor. Would it be fair to label it that way on State's Exhibit 42?

A. Yes, it would.

Q. Okay. And on the comforter, the bedspread, were you able to make a determination of secretor-nonsecretor status based on the sample of sperm and semen that you had?

A. Yes, I was.

Q. And what was the status?

A. Nonsecretor.

Q. All right. And it was on the basis of the sperm-semen on the comforter?

A. Correct.

Q. Would it be fair to label that in the manner that I am labeling it on State's Exhibit 42?

A. Correct.

Q. All right. And from the swab, the vaginal swab that was taken from Dana Mocherman in which sperm received was tested, was there enough of that sperm-semen substance to make a determination of secretor-nonsecretor?

A. Yes, there was.

Q. Okay. And what was that determination?

A. Nonsecretor.

Q. Nonsecretor? Okay. So would it be fair to label it the way I have it on State's Exhibit 42?

A. Yes, it would.

Q. Okay. On the unmarked swab on Dana Mocherman in which sperm or semen substances were found, were they found in enough volume to be able to make a determination of secretor-nonsecretor status?

A. I called that one inconclusive because the amount of semen was too low to determine.

Q. Okay. And going to your known subjects, was a determination of Dana Mocherman's secretor or nonsecretor status made?

A. Yes, it was.

Q. Okay, and was it made on the basis of her -- What fluids from her body?

A. They were made on the basis of both her blood sample and a saliva sample.

Q. Okay. Which would you consider more accurate?

A. The saliva sample.

Q. Saliva? Okay. What was that, were they both the same determination?

A. Yes.

Q. And was she a secretor or nonsecretor?

A. She is a secretor.

Q. And what about her spouse, Reid Mocherman?

A. He is also a secretor.
Q. And what about Chris Mocherman, her son?
A. Again, he is a secretor.
Q. And, finally, was a determination of the secretor-nonsecretor status made of Brandon Moon?
A. Yes, it was.
Q. And what is he?
A. He's a nonsecretor.
Q. Now, on Brandon Moon, was that determination made on the basis of his blood or saliva?
A. It was made on the basis on his blood sample and semen sample that we received from him.
Q. So you also got a semen sample?
A. Yes.
Q. That wasn't detected -- I'll put it in parenthesis -- It wasn't detected in the manner that these other ones were?
A. Correct.
Q. You got a sample?
A. A known sample.
Q. Okay. Were any semen samples taken from Dana Mocherman's spouse or her son?
A. No, there weren't.
Q. And none were taken from her?
A. No.
Q. Mr. Adams, I need to ask you some questions about these

EXHIBIT B

AFFIDAVIT OF MARK D. STOLOROW AND LEWIS MADDOX

1. We are, respectively, the Executive Director and Laboratory Director of Orchid Cellmark, Inc., in Germantown Maryland. Our *curricula vitae* are attached to this affidavit.

2. We have been asked to provide this Affidavit upon review of certain documents in the case of Texas v. Brandon Moon.

Background and Scope of Review

3. We have reviewed the following documents as part of this review: (a) the trial testimony of DPS/Lubbock's serologist, Glen David Adams, (b) a report by Mr. Adams dated November 17, 1987, (c) an April 24, 2003 report from the Texas Department of Public Safety/El Paso division on the results of post-conviction STR DNA testing it conducted on items of evidence from the case in 2002, as well as two pages of laboratory data summarizing the genetic profiles it yielded from those tests. (d) electropherograms reportedly underlying the two pages of laboratory data provided in (c) above.

4. We have been informed by the Innocence Project, Inc., that the case of Texas vs. Brandon Moon involves a 1987 sexual assault perpetrated by a single assailant, for which Mr. Moon was convicted.

5. Although we have not reviewed the full trial record, we have reviewed documents from the case indicating that a serologist named Glen David Adams from the Texas Department of Public Safety ("DPS"), Lubbock Division, performed serological testing and analysis on three items of evidence collected by authorities immediately after the rape, which alleged to contain semen deposited by the perpetrator: (1) a semen-stained comforter, taken from the bed upon which the rape occurred, (2) a bathrobe in which the nude victim had wrapped herself immediately after the rape, containing a series of stains on the interior buttock area; and (3) a vaginal swab from the victim's rape kit.

6. We have been told by the Innocence Project that at trial, the jury was asked to infer that each of these items of evidence contained semen from the perpetrator, and that neither side disputed this proposition. We have further been told by the Innocence Project that at trial, the victim testified that she was married, with three children (an older son, and twin daughters), and that her medical records reflect that she had two pregnancies, each resulting in delivery by Cesarean section.

7. We have also been informed that the prosecution argued to the jury at Mr. Moon's trial that the results of Mr. Adams' serological testing conclusively established that (1) the semen on each of these items came from a non-secretor (that is, a person who does not secrete detectable levels of ABO blood group antigens into his or her other bodily fluids, such as semen and saliva); (2) Mr. Moon was a non-

secretor, (3) the victim, her husband, and her teenage son (who owned the bathrobe on which the semen stains were found) were all secretors, and thus (4) the victim's son and husband are excluded as semen donors on these items, while Mr. Moon, as a non-secretor, was a potential donor.

8. Prior to our receipt or review of any documentation in connection with the case, Orchid Cellmark conducted STR-DNA testing on a reference sample from the victim's former husband, Reid Mocherman. We conducted such testing "blindly," that is, without knowing the results of the STR-DNA testing that DPS had conducted on the underlying evidence. The results of our testing on Mr. Mocherman's buccal swab were published in a report dated December 8, 2004.

9. For purposes of this review, we have assumed the validity of the STR-DNA results reported by DPS/El Paso, and that the data reflected in the documents provided by the laboratory reflect the actual STR-DNA profiles they obtained. We have also assumed that the victim's son is in fact her biological child, as we understand is indicated by her trial testimony and medical records.

10. We have received no compensation for our consultation on this case, nor do we expect to receive any. Our laboratory, Orchid Cellmark, has also provided the testing on Mr. Mocherman's sample *pro bono*, under a preexisting arrangement with the Innocence Project, pursuant to which their organization may submit DNA evidence for testing without charge in a limited number of cases each year.

STR-DNA Test Results

11. The STR-DNA testing conducted by DPS/El Paso ("the 2003 DNA tests") yielded the DNA profile of a single male on all five samples tested from the stained bathrobe.

12. The single male profile obtained from the sperm fraction on the bathrobe was mixed with DNA types consistent with the victim, *i.e.*, from the victim's own epithelial cells.

13. The 2003 DNA tests also yielded the DNA profile of a single male on all three samples tested from the stained comforter.

14. The single male profile obtained from the sperm fraction on the comforter was also mixed with DNA types consistent with the victim.

15. The male contributor to the mixed male/female stains on the bathrobe is a different individual than the male contributor to the mixed male/female stain on the comforter.

16. The DNA profiles from these mixed stains, containing a mixture of semen from a male and epithelial cells reportedly from the female's vagina, are consistent with those produced by acts of sexual intercourse during which the male ejaculated.

Brandon Moon

17. The April 2003 DPS/El Paso report concludes that Brandon Moon is conclusively excluded as the donor of the semen on the bathrobe.

18. The April 2003 DPS/El Paso report concludes that Brandon Moon is conclusively excluded as the donor of the semen on the comforter.

Reid Mocherman

19. The DNA profile from the sperm fraction of the comforter stains is consistent with the DNA profile of Mr. Mocherman, the victim's husband.

20. Mr. Mocherman is excluded as the donor of the DNA from the sperm fraction of the mixed male/female stains on the bathrobe.

The Victim's Son

21. Comparison of the STR DNA profiles yielded from the victim's reference sample with the STR DNA profiles yielded from the bathrobe and comforter reveals that the victim's son, assuming he is truly the biological offspring of the victim, is conclusively excluded as the donor of the sperm fraction from both of these items.

22. This conclusion is clear from the data that the victim herself does not share any genetic types, or "alleles," with the male donor of each stain at several locations tested, and thus, her biological offspring are excluded as potential donors as well.

23. STR-DNA testing measures the number of "repeats" of a particular genetic sequence at designated STR locations, or "loci." The number of repeats of a particular genetic sequence inherited by a person at each locus is referred to as an "allele."

24. At each locus, an individual will share at least one-half the alleles of his or her parent (with each STR test measuring two alleles at each locus). This is because each parent contributes one allele to the offspring's DNA sequence. Accordingly, the data from STR DNA test results will show two alleles (for example, "15, 17") at each locus, except when the individual is a "homozygote" at that locus (i.e., "15, 15"), meaning that the allele contributed by each parent is the same.

25. The data from the 2003 DNA tests on the bathrobe stains reflect that the victim, Dana Mocherman, does not share *any* alleles with the male contributor to the bathrobe stains at the following four loci: FGA, D18S51, D16S539, and TPOX.

26. The data from the 2003 DNA tests also reflect that the victim, Dana Mocherman, does not share *any* alleles with the male contributor to the comforter stains at the following six loci: D3S1358, vWA, FGA, D8S1179, D18S51, and THO1.

27. Accordingly, the victim's son is conclusively excluded as the male contributor to the stains on either the bathrobe or the comforter.

DPS/Lubbock's 1987 Serological Analysis

28. In his 1987 report, DPS/Lubbock's serologist, Glen David Adams, allegedly wrote that based upon the serological testing he had performed, he concluded that "Evidentiary semen on the [vaginal] swab, bathrobe, and comforter are from a non-secretor individual."

29. At trial, Mr. Adams repeated this assertion to the jury. He explained that he had tested the semen stains from the bathrobe, comforter, and a vaginal swab, and those tests failed to yield any ABO blood group substances. This led him to conclude that the donor of the semen on each item of evidence was a non-secretor. (TT.236-37)

30. Mr. Adams told the jury that Reid Mocherman, the victim's husband, was conclusively excluded as the donor of the semen on the comforter (as well as on the other evidentiary items) because that semen came from a non-secretor, while Mr. Adams' tests on Mr. Mocherman's blood and saliva samples showed that he was a Type A secretor. (T.247, 254)

31. As the 2003 and 2004 DNA data demonstrates, however, Mr. Mocherman shares the identical, 13-STR-loci DNA profile of the male contributor to the stain on the comforter. The composition of the stain is consistent with that resulting from an act of sexual intercourse between the victim and her husband.

32. Accordingly, these DNA results make clear that, in 1987, DPS/Lubbock must have incorrectly determined the secretor status of the victim's husband, the contributor(s) to the comforter stain, or both.

33. As Mr. Adams has now been shown to have made this error, there may well be reason to doubt the accuracy or integrity of *any* of the findings he presented to the jury – including whether or not Brandon Moon was in fact included or excluded as the donor of any of the semen-stained evidence used against him at trial. The 2003 DNA tests, of course, prove to a scientific certainty that Mr. Moon was <u>not</u> the source of that evidence. But given that the DNA results also prove that at least one aspect of this serologist's 1987 analysis was erroneous, it is certainly possible that a properly conducted serological analysis may have excluded Mr. Moon at the time of trial as well.

34. We have learned from the 2003 and 2004 DNA test results that the mixed semen stains on the comforter are consistent with having originated from a mixture of epithelial cells from the victim, Dana Mocherman and from semen from her husband, Reid Mocherman. According to Mr. Adams' trial testimony, both the victim and her husband are ABO type A secretors. Consequently, it is unlikely that a mixed semen stain created by the mixture of semen and vaginal secretions from two people who are both ABO type A secretors would, if Absorption Inhibition testing were properly conducted in 1987, have failed to demonstrate the presence of *any* detectable ABO substances.

35. Mr. Adams also provided testimony that he tested the victim's vaginal swab and identified the presence of semen. Although we have been informed that no STR DNA tests were subsequently conducted on the semen-vaginal secretion mixture on the vaginal swab, this evidence item further begs the question of the plausibility of failure to find any detectable ABO substances by Absorption Inhibition testing. Assuming that Mr. Adams correctly identified Dana Mocherman as an ABO type A secretor, it is surprising to learn that Mr. Adams concluded that the semen donor was a non-secretor. If Mr. Adams failed to detect any ABO substances on the vaginal swab from a woman who herself is an ABO type A secretor, it is difficult to explain why Mr. Adams was not suspicious of the absence of any secreted ABO substance and, more peculiarly, how Mr. Adams could conclude that the semen must have originated from a non-secretor.

36. It is also worth noting that Mr. Adams' trial testimony was also questionable on its face, in making the unqualified assertion that all of the semen stain evidence came from a non-secretor. Even assuming that his tests did not, as he claimed, yield any detectible ABO blood group substances, he should not have definitively concluded from that fact alone that the semen donor was necessarily a non-secretor. A finding that the semen could only be consistent with having originated from a non-secretor is too limiting for the test results reported in this case by Mr. Adams in 1987. With the uncertainty created by the absence of any detectable ABO substances in semen-vaginal stain mixtures on the vaginal swab and other stains from a victim who is an ABO type A secretor, it was inadvisable to exclude any male as a semen donor in this case. (For example, Mr. Adams' exclusion of Reid Mocherman as a possible donor of the semen on the comforter was particularly inadvisable, inasmuch as the semen stain on the comforter matches Reid Mocherman, as it turns out.)

37. The absence of any ABO antigens in Mr. Adams' test results made the tests themselves of no value to the jury. Indeed, if the evidence was too degraded or diluted to obtain an interpretable ABO result, these tests may not reveal anything about the serology of semen donor at all – *i.e.*, making it no more likely that Brandon Moon was the perpetrator than any other man.

I swear under the penalties of perjury that the statements in the foregoing affidavit are true and correct to the best of my knowledge and ability.

Mark D. Stolorow — 12/13/04
Date

Lewis O. Maddox, Ph.D — 12-13-04
Date

STATE OF MARYLAND

COUNTY OF MONTGOMERY

SWORN AND SUBSCRIBED before me on this 13th day of December, 2004

Notary Public

Roseann Zaner
Printed Name

My commission expires June 1, 2006

EXHIBIT C

LIFECODES CORPORATION
SAW MILL RIVER ROAD
VALHALLA, NEW YORK 10595
(914) 784-2600

Division of Quantum Chemical Corporation

February 23, 1990

Thomas S. Hughes
Attorney
120 North Florence
El Paso, TX 79901

Re: Lifecodes Case #:FB20959

I. Evidence Receipt

The following evidence was received on May 16, 1989 from El Paso County Sheriff's Department, 600 E. Overland, El Paso, TX in a sealed container via Federal Express.

Accession #	Sample
FB20959	1 Red top blood vial Exb. A
FI20960	1 Royal blue bath robe Exb. #3
FI20961	1 Peach colored bedspread Exb. #4
FI20962	1 Box containing 2 rape kits (N.R.) Exbs.# 32,34,35,36,37,38 & 44)

II. Summary of Results:

The DNA recovered from the peach bedspread and the blood from Brandon Lee Moon can be excluded as having a common origin.

However, since a blood exemplar from the victi. has not been provided for comparison, a definite conclusion can not be reached as to the source of the DNA recovered from the peach bedspread.

Exh. C

EXHIBIT E

LIFECODES CORPORATION
SAW MILL RIVER ROAD
VALHALLA, NEW YORK 10595
(914) 784-2600

Division of Quantum Chemical Corporation

II. Results:

	SAMPLE #	NOT PROCESSED	SPERM VISUALIZED	INSUFFICIENT DNA	HIGH MOL WEIGHT DNA	DEGRADED DNA	DNA PARTIALLY DEGRADED	HUMAN DNA	Y CHROMOSOME DNA	DNA PRINT MATCHES	DNA PRINT NON MATCHES	BACTERIAL DNA
1	FB20959				X			X	X		3	
2	FI20960		X	X								
3	FI20961		X				X	X			1	
4	FI20962	X										

The DNA isolated from the peach bedspread (FI20961) did not match the pattern of the exemplar (FB20959) with four genetic systems: DXYS14, D17S79, D14S13 and D18S27.

The DNA isolated from the peach bedspread (FI20961) did not yield a DNA-PRINT™ with the genetic system D2S44.

A minimum of 5% of the undigested DNA recovered from all processed evidentiary saples has been retained.

LIFECODES CORPORATION
SAW MILL RIVER ROAD
VALHALLA, NEW YORK 10595
(914) 784-2600

Division of Quantum Chemical Corporation

III. Conclusion

A comparison of the DNA-PRINT™ pattern obtained from sample FI20961 excludes Brandon Lee Moon (FB20959) as the source of the DNA recovered from the evidence sample. No conclusions can be made without a victim exemplar for comparison.

IV. Disposition of Evidence

The evidence will be repackaged and returned under separate cover to Thomas S. Hughes via UPS as per your Evidence Return Confirmation sheet.

The DNA isolated in this case is retained on a nylon membrane(s) at Lifecodes and can be made available for additional analysis.

Joanne B. Sgueglia, B.A.
Forensic Scientist

Joanne B. Sgueglia

cc: Steve Simmons, D.A.
34th Judicial District
3rd Floor
El Paso City - County Building
El Paso, TX 79901
Attn: Dan Kopra

EXHIBIT D

L-147973
A

JAIME ESPARZA
DISTRICT ATTORNEY
THIRTY-FOURTH JUDICIAL DISTRICT
(EL PASO, CULBERSON AND HUDSPETH COUNTIES)
201 COUNTY BUILDING
EL PASO, TEXAS 79901
915/546-2059

May 9, 1996

Donna M. Stanley
Criminalist, Texas Department of Public Safety
5805 N. Lamar Blvd.
P.O. Box 4143
Austin, Texas 78765-4143

Re: *Ex parte Brandon Lee Moon*; Applications for writ of habeas corpus
Cause numbers 50015-327-04, 50033-327-04
Lifecodes Case #FB20959

Dear Ms. Stanley:

The above-named defendant was convicted of two counts of aggravated sexual assault and sentenced to 75 years' confinement in each case in 1988. In 1990, it appears that evidence from one or both of those cases was released to a local defense attorney who sent the evidence to Lifecodes Corporation of Valhalla, New York, for DNA comparison of the evidence to a sample of the defendant's blood. A report (of which you have a copy) in the above-referenced Lifecodes case is attached to the writ application indicating that DNA found on some of the evidence does not match the DNA from the defendant's blood sample.

This agency is requesting that you contact Lifecodes Corporation for a full explanation of the tests conducted by them and the results obtained, and to determine whether further DNA testing can and should be done. If further testing is advisable and can be done, this agency also requests that you seek release of any DNA currently in the possession of Lifecodes concerning these cases for immediate transmission to the Texas Department of Public Safety for further testing.

Thank you for your assistance.

Very truly yours,

John L. Davis
Appellate Chief

EXHIBIT
E

L-24,473
A

STATE OF TEXAS

COUNTY OF TRAVIS

AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared, Donna M. Stanley, a person known to me, who after being first duly sworn, stated on her oath that she had personal knowledge of the facts contained in this affidavit, and stated as follows:

"My name is Donna M. Stanley. I am over the age of 18 years and am competent to make this affidavit. I am employed as a criminalist assigned to the Serology/DNA Section of the Texas Department of Public Safety Laboratory in Austin, Texas. I am a forensic serologist trained and experienced in DNA analysis. I have received training at the FBI Academy in Quantico, Virginia, in DNA analysis. That training included my successful completion of the "Laboratory Application of DNA Typing Methods School" and the "Forensic Application of DNA typing Methods School" both conducted in April-May 1991. Additionally, in March-May, 1992, I successfully completed the "Visiting Scientist Program" in DNA analysis at the FBI Academy. I have performed hundreds of DNA analyses. Also, I have qualified to testify as an expert in the field of DNA analysis in both state and federal courts in Texas.

I have reviewed a DNA report prepared by Lifecodes Corporation dated February 23, 1990 (hereinafter referred to as "DNA report"), and addressed to Thomas Hughes, Attorney, El Paso, Texas. I have also reviewed the application for writ of habeas corpus made by Brandon Lee Moon in cause numbers 50015 and 50033 in the 327th District Court, El Paso County, Texas, dated March 26, 1995. I have also reviewed a summary of the evidence from applicant Moon's trial in cause numbers 50015 and 50033.

Additionally, I have personally talked to Dr. Michael Baird, Vice-President/Director of Laboratory Testing of Lifecodes Corporation. Dr. Baird told me that Lifecodes has been performing DNA analysis in sexual assault cases since 1987. Upon my request, Dr. Baird reviewed the DNA report and the analysis and notes from Lifecodes' lab analysis of the evidence submitted as shown on the first page of the DNA report. After completing his review, Dr. Baird informed me that the DNA examined by Lifecodes from the peach bedspread could not be excluded as being the DNA from the victim because it was possible that the DNA examined by Lifecodes from the peach bedspread was female DNA only. Female DNA is that DNA which would be contributed by a female victim in a sexual assault. This statement by Dr. Baird comports with the statement on the Lifecodes report under the heading "Summary of Results," that states, "[S]ince a blood exemplar from the victim has not been provided for comparison, a definite conclusion can not be reached as to the source of the DNA recovered from the peach bedspread." Dr. Baird's statement is also consistent with the failure of the report (on page 2) to show evidence of the male Y chromosome in the DNA tested from the peach bedspread. Consequently, because it is possible that the DNA examined from the peach bedspread came from the victim, and because a known sample of the victim's blood was not analyzed and compared to the DNA recovered from the peach bedspread by Lifecodes, the DNA report, while

L-HF173
9

concluding that the DNA from Brandon Lee Moon and the DNA recovered from the peach bedspread do not match, cannot -- and does not -- exclude Brandon Lee Moon as a suspect in the sexual assault of the victim. At this time, in order to reach any reliable conclusions, the evidence would have to be retested against new samples of applicant's blood, the victim's blood, the victim's husband's blood, and the victim's son's blood.

I also asked Dr. Baird if he still had the evidence that he had received as shown on the first page of the DNA report. He stated that he did. As I have been instructed by the District Attorney's Office for the 34th Judicial District, I have requested Dr. Baird to ship to me all of the evidence. He stated that he would, and would also send the remaining extracted DNA retained by Lifecodes (as shown on page 3 of the DNA report), as well as duplicates of developed autoradiographs and any pertinent laboratory documentation. Upon receipt of this shipment from Lifecodes, I will determine if any of the evidence is still in a condition in which a new DNA test can be done. If so, to properly test the evidence, I will require a new blood sample from the victim, and from applicant, Brandon Lee Moon. Additionally, since the victim stated that she had sexual intercourse with her husband the night before the sexual assault occurred, I will need a blood sample from the victim's husband to insure that any male DNA that I may be able to recover and test from the evidence does not come from the victim's husband as it is possible that the closeness in time between the sexual intercourse between the victim and her husband and the sexual intercourse between the victim and the perpetrator of the assault would yield the victim's husband's DNA on the victim's rape kit or even on the peach bedspread. Further, since the victim left the house wearing her son's bath robe, I need a blood sample from the son to exclude the possibility that any male DNA recovered from the bath robe did not originate from the victim's son. I will require new blood samples from the victim and applicant, Brandon Leo Moon, to perform a DNA test because I believe that any such blood samples received from Lifecodes will be degraded and therefore inappropriate to use for further testing.

The evidence, when received by me from Lifecodes, will remain in my custody at the Texas Department of Public Safety Lab in Austin, Texas."

I HAVE READ THE FOREGOING AFFIDAVIT AND STATE THAT IT IS TRUE AND CORRECT.

Donna M. Stanley

DONNA M. STANLEY

SUBSCRIBED AND SWORN TO May 17, 1996.

Kay Melton

NOTARY PUBLIC
STATE OF TEXAS

NOTARY PUBLIC STATE OF TEXAS
KAY MELTON
Notary Public, State of Texas
My Commission Expires
AUG. 21, 1997

EXHIBIT
F

TEXAS DEPARTMENT OF PUBLIC SAFETY

5805 N. LAMAR BLVD. - BOX 4087 - AUSTIN, TEXAS 78773-0001

CRIME LABORATORY SERVICE
P.O. BOX 4143
AUSTIN, TEXAS 78765-4143
512/465-2105

December 13, 1996

Re:L-247973
Donna Stanley
December 13, 1996

After reviewing all the documentation from LifeCodes and the original testing from the Lubbock and Midland DPS Crime labs, it appears that the DPS crime lab included Brandon Moon as the suspect on the vaginal swabs and the comforter and the bathrobe through the ABO inhibition testing. No BGS was detected in these evidentiary stains, and the suspect Brandon Mood was a non-secretor. Thus the conclusion that he could not be eliminated. The acid phosphatase dilution was sufficient to make an interpretation of the BGS. However, it should be noted that the victim was a ABO blood group "A" secretor and her "A" BGS was not detected in her own vaginal swab. It should also be noted that the victim's husband was also a blood group "A" secretor and the son was a ABO blood group "O" secretor.

David Mahan (DPS Lubbock) sampled and performed three tests from the comforter. It is hard to determine from the Microfilm copies, if these were three separate stains or three samples of the same stain. From my notes and diagrams of the comforter, I found one large area removed and initialed by David. This same area is initialed by the LifeCodes analyst as well, as per date of sampling markings on the comforter. There was no remaining stain left from this area for me to perform testing. It is then likely that the LifeCodes analyst removed from the same stained area so as to remain consistant with what David removed. Two other small areas of the comforter had been removed, but this could be substrate control areas by David. I used the LumaLite on the comforter and located two more stained semen areas near the original area sampled. On the reverse side of the comforter, two more stains were located. Each of these have been removed by me and frozen. And each have been tested with DQα .

The three tests performed by David on the comforter were not determined to be an acid phosphatase dilution sufficient for interpretation of the inhibition BGS results. However, he did make a conclusion. No BGS was detected in these three tests and thus, the conclusion in the report that the semen donor was a non-secretor. I would have expected the victim's BGS "A" should have been detected from these stains. None was detected. This would have suggested that perhaps the stains are not sensitive enough in this particular case to detect the victim's BGS. If so, then the suspect or semen donor to these stains may not be detected as well. The victim's husband is a blood group "A" secretor and it should be expected that he would be detected in the semen stains. At the original time of sampling, not all stains were tested. It is hard to say at this point if the semen stain tested had to do with the rape or was the coital stains from the husband and wife. LifeCodes indicated in their report that the stain tested from the comforter excluded Brandon Moon as the semen donor. They excluded him with three RFLP probes. LifeCodes did not sample the victim's blood, which they received in the rape kit and never opened, and therefore did not identify the victim's contribution to the stain which eliminated Brando Moon as the donor.

David Mahan sampled one area from the bath robe. This stain had sufficient acid phosphatase dilution for BGS interpretation and no BGS was detected. The semen on this bath robe is most likely the evidentiary semen which needs to be sampled since the victim wore this robe to the hospital. LifeCodes sample from this robe is probably in the same area as David Mahan. No other deletions of fabric were observed by me. LifeCodes found the semen to be too degraded for successful RFLP probing. Therefore, no information was gained from LifeCodes. When I observed the robe for semen with the aid of the LumaLite, I found numerous stains other than the one originally sampled. I sampled the edges of the original cutout and sampled four other stains. Each of these stains have been removed and frozen. Each of these were tested with DQα testing.

I performed DQα testing on the stick portion of the remaining vaginal swabs, the vaginal glass slides, four stains from the bathrobe, and four stains from the comforter. The vaginal glass slides, the vaginal swab sticks and the robe stains appeared to be the best evidence to indicate the DQα type of the semen donor for this rape. It appears that the semen on the vaginal specimens and the robe are all consistent with the same semen donor. The semen on the comforter is different than the robe or the vaginal specimens. It appears at this time without reference samples from all the individuals, that LifeCodes eliminated Brandon Moon from stains which may not have had evidentiary value. The semen on the vaginal specimens and the robe are distinctly different from the comforter. It is imperative to obtain a blood sample from Brandon Moon and the victim's husband in order to resolve this case. An additional blood sample from the victim is also needed.

EXHIBIT G

Laboratory Information Sheet

Case number: L4E- 41169
Analyst: (C)

Date: 11-8-02

Called John Davis 253-0275 to tell him Moon's std did not match semen stains - There are two males one on robe and one on comforter - but neither is moon. He said he will work on getting stds from son + husband to rule them out as contributors. - the robe belongs to the son

11-18-02
Called John Davis for an up date left msg.
Called back - had not spoken to Defense attorney would see them in court soon - asked to see if they would resample. moon - only have partial profile.

1/22/03 Called John Davis - said he had a court date coming up where he would see Defense attorney Scott Segall - will approach him + find out. Still have not located the family. Will call in two weeks.

2/4/03 - Scott Segall - he will locate the family - and get samples from Moon. (In progress hopefully)

Laboratory Information Sheet

Case number: L4E- 41169
Analyst: ca
Date: 2/6/03

2/6/03 Phone call from John Davis cont'd - they still haven't located family - they've left town. Mom is willing to give another sample. Are they still interested in DNA results. Should know something for sure by march 1.
2/26/03 - phone call to John Davis left message to see if any progress being made in obtaining new samples - if not she'll issue a report by March 1 - as stated by him. (on previous phone call)

4-3-03 at Pretrial for Swyers for LUE40546 I met briefly with John Davis. He still had not heard from the defense on recollection & samples. I told him I was getting ready to issue the report.

EXHIBIT H

TEXAS DEPARTMENT OF PUBLIC SAFETY

TEXAS DPS FIELD CRIME LABORATORY
11612 SCOTT SIMPSON
EL PASO, TEXAS 79936-6210
Voice 915-849-4120 Fax 915-849-4113

April 24, 2003

F. Zubia #1866
El Paso Police Department
911 N. Raynor
El Paso, Texas 79903

Laboratory Case Number	Agency Case Number	Offense Date
L4E- 41169	04-23040I	04/27/87

Suspect(s)
Moon, Brandon Lee 08-28-61

Victim(s)
Mocherman, Dana 01-19-55

Offense: Sexual Assault
County of Offense: El Paso (071)

Evidence Submitted

Among other items submitted in person by F. Zubia on October 24, 2002:

A. Blue bath robe
B. Rape kit from suspect Moon with Red top tube
C. Rape kit from victim with Red top tube
D. Blankets, sheets, orange bed spread

Requested Analysis

Compare semen stains found by Donna Stanley using STR loci.

Results of Analysis

Please refer to the reports issued on July 20, 1987 by Burgess J. A. Cooke from the Midland Lab, November 7, 1987 by David E. Mahan and Glen Adams from the Lubbock Lab, and January 9, 1997 by Donna Stanley from the Austin Lab.

Extracts saved from Donna Stanley's work in 1997 were analyzed using PCR DNA. Items B and C were extracted by a method that yields DNA. The DNA isolated from all the samples was then analyzed using PCR DNA. The following STR loci were characterized: D3S1358, vWA, FGA, Amelogenin, D8S1179, D21S11, D18S51, D5S818, D13S317, and D7S820. Additionally, D16S539, TH01, TPOX, and CSF1PO were characterized for the robe stains A, B1 and 2, C, D, E, comforter B, Mocherman and Moon.

The DNA profile from the robe, stains A, B1 and 2, C, D, E sperm cell fractions and the comforter A1, A2 and B sperm cell fractions are not consistent with the DNA profile of Mr. Moon. Mr. Moon is excluded as a contributor to the robe stains A, B1 and 2, C, D, E, the comforter A1, A2 and B sperm cell fractions. Statistics are available upon request.

The DNA profile from the robe stains A, B1 and 2, C, D, E epithelial cell fractions are consistent with a mixture of Ms. Mocherman and an unknown male. Statistics are available upon request.

Laboratory Case Number	Agency Case Number	Offense Date
L4E-41169	04-23040I	04/27/87

The DNA profile from the comforter A1, A2, and B epithelial cell fractions are consistent with a mixture of Ms. Mocherman and an unknown male. Statistics are available upon request.

Disposition of Evidence

The remaining cuttings and DNA extracts will be stored frozen to preserve their biological constituents.

Except for the items retained frozen in our laboratory, the evidence has been returned to the El Paso Police Department.

Christine Ceniceros
Criminalist IV
Texas DPS El Paso Laboratory

EXHIBIT
I

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 29, 2011

The Honorable Nizam Peerwani
Presiding Officer
Texas Forensic Science Commission
Post Office Box 2296
Huntsville, Texas 77341-2296

Opinion No. GA-0866

Re: Investigative Authority of the Texas Forensic Science Commission (RQ-0943-GA)

Dear Mr. Peerwani:

Your predecessor asked three questions about the investigative authority of the Texas Forensic Science Commission (the "FSC").[1]

Before addressing the specific questions, we note that the FSC was created in 2005 with the addition of article 38.01 to the Code of Criminal Procedure. *See* Act of May 30, 2005, 79th Leg., R.S., ch. 1224, § 1, 2005 Tex. Gen. Laws 3952, 3952–53 (the "2005 Act"). Under article 38.01(4), the FSC has three purposes. *See* TEX. CODE CRIM. PROC. ANN. art. 38.01(4) (West Supp. 2010). For the present inquiry, the most relevant of the FSC's purposes is found in article 38.01(4)(a)(3), which authorizes the FSC to:

> investigate, in a timely manner, any allegation of professional negligence or misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by an accredited laboratory, facility, or entity.

Id. art. 38.01, § 4(a)(3).

We now address the first question:

> Does the Act's effective date provision restrict the FSC's investigative authority to cases in which the requirements set forth in that provision are met?

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[1]Letter from Honorable John M. Bradley, Presiding Officer, Texas Forensic Science Commission, to Honorable Greg Abbott, Attorney General of Texas at 1 (Jan. 28, 2011), https://www.oag.state.tx.us/opin/index_rq.shtml ("Request Letter").

Request Letter at 3. As noted above, section 4(a)(3) grants general investigative authority to the FSC. However, the 2005 Act also contains specific provisions restricting that general authority. One such provision is section 22 of the Act, the "effective date provision" to which the request letter refers. *See* 2005 Act, § 22, at 3964–65. Section 22 is not codified in article 38.01, but it is nonetheless governing law. *Baldridge v. Howard*, 708 S.W.2d 62, 63–64 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (discussing legislative intent and validity of uncodified session law). Under section 22, "[t]he change in law made by this Act applies to . . . evidence tested or offered into evidence on or after the effective date of this Act." 2005 Act, § 22(a)(1), at 3964–65. The effective date of the 2005 Act is September 1, 2005. *Id.* § 23, at 3965. Thus, section 22 provides that "[t]he change in law made by this Act applies to . . . evidence tested or offered into evidence" *after* September 1, 2005. 2005 Act, §§ 22–23, at 3964–65. By its plain terms, the Act does not apply to evidence tested or offered into evidence *before* September 1, 2005. The FSC therefore lacks authority to take any action with respect to such evidence.

Some of the briefs submitted to this office contend that the law's effective date limitations will foreclose FSC review of important matters that may merit further investigation.[2] As the Texas Supreme Court has observed, "[T]he truest manifestation of what legislators intended is what lawmakers enacted, the literal text they voted on. [The] enacted language is what constitutes the law, and when a statute's words are unambiguous and yield a single inescapable interpretation, the judge's inquiry is at an end." *Alex Sheshunoff Mgmt. Servs. v. Johnson*, 209 S.W.3d 644, 651–52 (Tex. 2006). Some briefers have also argued that pre- and post-enactment statements by certain legislators support an outcome that diverges from this opinion's application of the statute's plain language.[3] Again, the Texas Supreme Court has warned against such arguments: "[The court is] mindful that over-reliance on secondary materials should be avoided, particularly where a statute's language is clear. If the text is unambiguous, we must take the Legislature at its word and not rummage around in legislative minutiae." *Id.* at 652 n.4. Finally, the court has noted that "the statement of a single legislator, even the author and sponsor of the legislation, does not determine legislative intent." *AT & T Commc'ns of Tex. v. Sw. Bell Tel. Co.*, 186 S.W.3d 517, 528–29 (Tex. 2006). Thus, as directed by the Texas Supreme Court, our analysis of the first question is limited to the clear language of the statutory text and is not influenced by public policy considerations or legislative history.

While section 22's time limitation prohibits the FSC from taking any action with respect to evidence that was tested or offered into evidence before September 1, 2005, the Act contains no time limitation on the FSC's general authority under section 4(a)(3) to "investigate in a timely manner, any allegation of professional negligence or misconduct." 2005 Act, §§ 22–23, at 3964–65. Thus, although the FSC may investigate allegations arising from incidents that occurred prior to September

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[2]*See* Brief from Ms. Lisa Graybill, American Civil Liberties Union of Tex. at 10–13 (Mar. 14, 2011) (Graybill Brief); Brief from Mr. Stephen Saloom, Innocence Project of New York at 7–10 (Mar. 7, 2011) (Saloom Brief); Brief from Mr. Gary Udashen, Innocence Project of Texas at 2–14 (Mar. 3, 2011) (Udashen Brief).

[3]*See* Graybill Brief, *supra* note 2, at 7–11; Saloom Brief, *supra* note 2, at 3–6; Udashen Brief, *supra* note 2, at 7 nn.2–3, 10–12.

1, 2005, it is prohibited, in the course of any such investigation, from considering or evaluating specific items of evidence that were tested or offered into evidence prior to that date.

The second question is as follows:

> Does the Act limit the investigative scope of the FSC to allegations of negligence and misconduct involving forensic analyses conducted only by laboratories, facilities or entities that were *accredited* by the Department of Public Safety ("DPS") when the analyses took place?

Request Letter at 3 (emphasis added). Section 4(a)(3) of article 38.01 restricts the FSC's investigative authority to acts "that would substantially affect the integrity of the results of a forensic analysis conducted by an accredited laboratory, facility, or entity." TEX. CODE CRIM. PROC. ANN. art. 38.01, § 4(a)(3) (West Supp. 2010). While article 38.01 itself does not define the term "accredited," other provisions in the Act clarify its meaning. The 2005 Act creates an accreditation process applicable to a "crime laboratory" or other entity that conducts "forensic analyses of physical evidence for use in criminal proceedings." *See* 2005 Act, § 3, at 3954–55; TEX. GOV'T CODE ANN. § 411.0205(b)(1) (West Supp. 2010). Under this provision, the DPS director is instructed to establish the accreditation process. Considered in context, the term "accredited" in section 4(a)(3) refers to the statutory accreditation process established by the DPS director.

Read in isolation, section 4(a)(3) does not provide precise clarity about the question regarding the timing of a laboratory, facility, or entity's accreditation relative to when the analysis took place. The most natural reading of section 4(a)(3) limits the FSC's investigative authority to laboratories, facilities, or entities that were accredited by the DPS at the time the forensic analysis took place. However, section 4(a)(3) could also potentially be read to limit the FSC's investigative authority to laboratories, facilities, or entities that were accredited when the FSC investigation took place.

While our conclusion regarding the second question is based primarily on a natural reading of the text of section 4(a)(3), we are aided in resolving any potential ambiguity by the canon of statutory construction known as *in pari materia*, under which statutes on the same subject matter must be read consistently, especially those statutes enacted as part of the same bill.[4] Guided by the principle of *in pari materia*, we turn to section 38.35(d)(1) of the Code of Criminal Procedure, which, like section 4(a)(3), was added to the Code by the 2005 Act. Section 38.35(d)(1) provides that a forensic analysis of physical evidence is not admissible if, "*at the time of the analysis*, the

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[4]"It is a settled rule of statutory interpretation that statutes that deal with the same general subject, have the same general purpose, or relate to the same person or thing or class of persons or things, are considered as being *in pari materia* . . . ." *State v. Vasilas*, 253 S.W.3d 268, 271 (Tex. Crim. App. 2008); *In re J.M. R.*, 149 S.W.3d 289, 292 (Tex. App.—Austin 2004, no pet.) (observing that when determining whether *in pari materia* analysis is appropriate, an important factor is whether the two provisions in question are contained in the same legislative act). *See also* Tex. Att'y Gen. Op. No. GA-0119 (2003) at 3–4 (discussing rule of *in pari materia* as means of statutory construction).

crime laboratory conducting the analysis was not accredited by the [DPS] director." TEX. CODE CRIM. PROC. ANN. art. 38.35(d)(1) (West Supp. 2010) (emphasis added). Thus, under section 38.35(d)(1), the relevant inquiry is whether the crime laboratory was accredited when the forensic analysis took place. Likewise, under section 4(a)(3), when determining whether a laboratory, facility, or entity is subject to FSC investigation, the relevant test is whether the laboratory, facility, or entity was accredited when the forensic analysis took place. In sum, the most natural reading of the statutory text is also supported by the principle of *in pari materia*. Accordingly, we conclude that section 4(a)(3) limits the FSC's investigative authority to those laboratories, facilities, or entities accredited by the DPS at the time the forensic analysis took place.

The final question follows:

> Does the Act prohibit the FSC from investigating fields of forensic analysis that have been expressly excluded by DPS pursuant to its rulemaking authority under Section 411.0205(c) of the Texas Government Code? When the FSC receives a complaint involving forensic analysis that is *neither* expressly included *nor* expressly excluded by the Act or DPS rule, does the FSC have authority to investigate such a complaint?

Request Letter at 3. Article 38.01 expressly incorporates the definition of "forensic analysis" from article 38.35(a) of the Code of Criminal Procedure:

> (4) "Forensic analysis" means a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action. The term includes an examination or test requested by a law enforcement agency, prosecutor, criminal suspect or defendant, or court.

TEX. CODE CRIM. PROC. ANN. art. 38.35(a)(4), *id.* art. 38.01, § 2 (West Supp. 2010). This statutory definition is not limited to specifically enumerated types of forensic analysis but encompasses any "medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence . . . for the purpose of determining the connection of the evidence to a criminal action." Notwithstanding that broad definition, the Act specifically excludes the following items from its generic definition of "forensic analysis:"

> (A) latent print examination;
>
> (B) a test of a specimen of breath under Chapter 724, Transportation Code;
>
> (C) digital evidence;

> (D) an examination or test excluded by rule under Section 411.0205(c), Government Code;
>
> (E) a presumptive test performed for the purpose of determining compliance with a term or condition of community supervision or parole and conducted by or under contract with a community supervision and corrections department, the parole division of the Texas Department of Criminal Justice, or the Board of Pardons and Paroles; or
>
> (F) an expert examination or test conducted principally for the purpose of scientific research, medical practice, civil or administrative litigation, or other purpose unrelated to determining the connection of physical evidence to a criminal action.

Id. § 38.35(a)(4)(A–F). In answer to the first part of this question, the Act, by its plain terms, prohibits the FSC from investigating fields of forensic analysis expressly excluded from the statutory definition of "forensic analysis." *Id.* art. 38.01, § 4(a)(3). As for the second part of this question, forensic analysis that is neither expressly included nor expressly excluded by the Act or DPS rule, but falls under the generic definition of "forensic analysis" found in section 38.35(a)(4), is generally subject to the FSC's investigative authority, assuming all other statutory requirements are satisfied.

SUMMARY

Although the Forensic Science Commission may conduct investigations of incidents that occurred before September 1, 2005, the law that created the Commission prohibits the FSC from considering evidence that was tested or offered into evidence prior to that date. The Forensic Science Commission's investigative authority is limited to those laboratories, facilities, or entities that were accredited by the Department of Public Safety at the time the forensic analyses took place. The FSC may not investigate fields of forensic analysis expressly excluded from the statutory definition of "forensic analysis." Forensic analysis that is neither expressly included nor excluded by the Act or DPS rule, but that falls under the generic definition of "forensic analysis" found in section 38.35(a)(4), is generally subject to FSC investigation, assuming all other statutory requirements are satisfied.

Very truly yours,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID J. SCHENCK
Deputy Attorney General for Legal Counsel

JASON BOATRIGHT
Chair, Opinion Committee

Rick Gilpin
Assistant Attorney General, Opinion Committee