Texas Forensic Science Commission

Justice Through Science

FINAL REPORT ON COMPLAINT NO. 21.46, DAMON EARL LEWIS (SEXUAL ASSAULT NURSE EXAMINER KIM BASINGER)

April 22, 2022

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I. COMMISSION BACKGROUND

A. History and Mission of the Texas Forensic Science Commission

The Texas Forensic Science Commission ("Commission") was created during the 79th Legislative Session in 2005 with the passage of HB-1068. The Act amended the Code of Criminal Procedure to add Article 38.01, which describes the composition and authority of the Commission.[1] During subsequent legislative sessions, the Texas Legislature further amended the Code of Criminal Procedure to clarify and expand the Commission's jurisdictional responsibilities and authority.[2]

The Commission has nine members appointed by the Governor of Texas.[3] Seven of the nine commissioners are scientists or medical doctors and two are attorneys (one prosecutor nominated by the Texas District and County Attorney's Association and one criminal defense attorney nominated by the Texas Criminal Defense Lawyer's Association).[4] The Commission's Presiding Officer is Jeffrey Barnard, MD. Dr. Barnard is the Chief Medical Examiner of Dallas County and Director of the Southwestern Institute of Forensic Sciences in Dallas.

B. Jurisdiction Over Accredited Laboratories and Forensic Disciplines

The Commission is charged with accrediting crime laboratories and other entities that conduct forensic analysis of physical evidence for the purpose of connecting the evidence to a criminal action. The Commission also administers a licensing program for forensic analysts conducting analysis or performing technical review on behalf of crime laboratories. The disciplines currently subject to accreditation and forensic analyst licensing include: seized drugs, toxicology,

[1] See, Act of May 30, 2005, 79th Leg., R.S., ch.1224 §1 (2005).
[2] *See e.g.*, Acts 2013, 83rd Leg. ch. 782 (S.B. 1238) §§ 1-4 (2013); Acts 2015, 84th Leg. ch. 1276 (S.B. 1287) §§ 1-7 (2015); TEX. CODE CRIM. PROC. art 38.01 § 4-a(b).
[3] TEX. CODE OF CRIM. PROC. art. 38.01 § 3.
[4] *Id.*

forensic biology, firearms/toolmarks, materials (trace). When investigating complaints related to these accredited disciplines, the Commission evaluates whether professional negligence or misconduct occurred and issues a report describing the allegations and related findings.

C. Jurisdiction for Disciplines Not Subject to Accreditation

For complaints involving disciplines *not* subject to accreditation such as the sexual assault examination of a person, the Commission may investigate but for limited purposes.[5] The Commission's report may include: (1) observations regarding the integrity and reliability of the forensic analysis conducted; (2) best practices identified during the course of the investigation; and (3) other relevant recommendations.

D. Limitations of Authority

The Commission's authority contains important statutory limitations. For example, no finding by the Commission constitutes a comment upon the guilt or innocence of any individual.[6] The Commission's written reports are not admissible in civil or criminal actions.[7] The Commission has no authority to subpoena documents or testimony. The information the Commission receives during any investigation is dependent on the willingness of stakeholders to submit relevant documents and respond to questions posed. The information gathered in this report has not been subject to the standards for admission of evidence in a courtroom. For example, no individual testified under oath, was limited by either the Texas or Federal Rules of Evidence (*e.g.*, against the admission of hearsay) or was subject to cross-examination under a judge's supervision.

[5] The Commission has exempted the sexual assault examination of a person from accreditation requirements by administrative rule. 37 Tex. Admin. Code § 651.7(a)(1) (2021).
[6] TEX. CODE CRIM. PROC art. 38.01 § 4(g).
[7] *Id*. at § 11.

II. SUMMARY OF COMPLAINT AND INVESTIGATION

A. Description of Complaint

On August 19, 2021, Damon Earl Lewis filed this complaint alleging the forensic examination and testimony of Kim Basinger, the Sexual Assault Nurse Examiner ("SANE") who testified at his 2002 trial, was scientifically invalid. Lewis was convicted of several counts of aggravated sexual assault of a child and indecency with a child stemming from allegations he molested his girlfriend's child by digital-vaginal penetration beginning at age nine. The child testified against Lewis when she was 13 years old.

At its October 22, 2021 quarterly meeting, the Commission voted to accept the complaint for investigation and form an investigative panel ("Panel") to address recommendations in the area of pediatric sexual assault nurse examinations. The Panel includes Nancy Downing, Ph.D., Jasmine Drake, Ph. D., and Elected District Attorney Jarvis Parsons, Esq.

B. Document Review and Interviews

The Commission's administrative rules set forth the process by which it determines whether to accept a complaint or self-disclosure for investigation as well as the process used to conduct the investigation.[8]

Once an investigative panel is created, the Commission's investigation includes (1) relevant document review; (2) interviews with the subject of the complaint as needed to assess the facts and issues raised; (3) collaboration with any relevant investigative agency; (4) request for follow up information where necessary; (5) hiring of subject matter experts where necessary; and (6) any other steps needed to meet the Commission's statutory obligation.

[8] *See*, 37 Tex. Admin. Code § 651.304-307 (2019).

Dr. Nancy Downing, forensic nursing expert and member of the Commission, spoke with the SANE regarding her testimony in the case. Commission staff also reviewed materials including relevant child sexual abuse guidance publications and the SANE's response to the complaint.

C. The Importance of Acknowledging Evolution in Published Guidelines

In 1992, Adams, et al. developed and published a proposed classification system for anogenital findings in children with suspected sexual abuse.[9] The classification scale incorporated data from various studies and recommendations by the American Academy of Pediatrics committee on child abuse. The published literature describing consensus guidelines evolved over time, and there have been intermittent updates.[10] Currently, the 2018 Adams, et al. guidance is the generally accepted document used by practitioners when documenting and interpreting findings from sexual assault examinations of children.

The importance of recognizing and taking responsibility for changes in medical or scientific guidelines when they occur cannot be overstated. While the practice of science and medicine is continuously evolving, a criminal conviction and sentencing is intended to be the final assessment of guilt or innocence and related punishment. Once these decisions are made, it is extremely difficult to reverse them.

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[9] Adams, J. A., Harper, K., & Knudson, S. *A proposed system for the classification of anogenital findings in children with suspected sexual abuse.* Adolescent and Pediatric Gynecology, 5(2), 73-75 (1992).

[10] Adams, J.A., Harper, K., Knudson, S., & Revilla, J. *Examination findings in legally confirmed child sexual abuse: It's normal to be normal.* Pediatrics, 94(3) (1994); Adams, J. A., & Knudson, S. *Genital findings in adolescent girls referred for suspected sexual abuse.* Archives of Pediatrics & Adolescent Medicine, 150(8), 850-857 (1996); Adams, J. A. *Evolution of a classification scale: Medical evaluation of suspected child sexual abuse*. Child Maltreatment, 6(1), 31-36 (2001); Adams, J. A., Kaplan, R. A., Starling, S. P., Mehta, N. H., Finkel, M. A., Botash, A. S., ... & Shapiro, R. A. *Guidelines for medical care of children who may have been sexually abused.* Journal of Pediatric and Adolescent Gynecology, 20(3), 163-172 (2007); Adams, J. A., Kellogg, N. D., Farst, K. J., Harper, N. S., Palusci, V. J., Frasier, L. D., ... & Starling, S. P. *Updated guidelines for the medical assessment and care of children who may have been sexually abused.* Journal of Pediatric and Adolescent Gynecology, 29(2), 81-87 (2016); Adams, J.A., Farst, K.J., & Kellogg, N.D. *Interpretation of medical findings in suspected child sexual abuse: An update for 2018.* Journal of Pediatric and Adolescent Gynecology, 31(3), 225-231 (2018).

There is no clearer example of the devastating impact of inaccurate testimony regarding visual indicators of sexual abuse than in the case of the San Antonio Four, a group of women who were wrongfully convicted of aggravated sexual assault of a child in 1998. In that case, the prosecution's expert witness, who also happens to be one of the most well-known experts in the field, testified that she had examined approximately 3,500 sexual assault victims, most of them children. She examined the survivor in the case and observed a scar "on the hymen" that was "about two to three millimeters," a scar normally caused by "penetration."[11] This expert later recanted her prior testimony based on changes in published guidance. In 2016, the Texas Court of Criminal Appeals recognized the expert's testimony was unreliable and declared the women actually innocent:

> By proving its case at trial according to the applicable standard, the State secures the ability to proclaim to the citizens of Texas that the person responsible for a crime has been brought to justice, that the person is guilty. When defendants have accomplished the Herculean task of satisfying their burden on a claim of actual innocence, the converse is equally true. Those defendants have won the right to proclaim to the citizens of Texas that they did not commit a crime. That they are innocent. That they deserve to be exonerated. These women have carried that burden. They are innocent. And they are exonerated. This Court grants them the relief they seek.[12]

The exoneration of the San Antonio Four reminds us that published guidelines regarding indicia of child sexual assault can have a critically important role in criminal cases, even years after the case was originally tried.

Finally, it is important to note that even the most recent Adams, et al. 2018 guidelines are based primarily upon the consensus observations of practitioners in the field. In a sexual assault

[11] For a discussion of the interpretation of findings in the case of healed injury, *see* McCann, J., Miyamoto, S., Boyle, C., & Rogers, K. *Healing of hymenal injuries in prepubertal and adolescent girls: A descriptive study*. Pediatrics, 119(5), e1094-e1106 (2007).
[12] *Ex Parte Mayhugh*, 512 S.W.3d 285, 307 (Tex. Crim. App. 2016).

examination, the subject of the analysis is a human patient who may have suffered acute or non-acute trauma. It is common for children, for example, to have delayed outcry of sexual abuse.[13] The patient history is a necessary and key component, which makes the establishment of a particular set of physical indicators of sexual abuse more challenging to validate than, for example, the analysis of white powder on a GC/MS instrument where one can run multiple samples to test the limits of the assay. It also creates opportunities for confirmation bias, which makes support for research and the establishment of data-driven guidance even more important.

III. OBSERVATIONS

This section provides the Commission's observations regarding the differences between the SANE's testimony at the time of trial and the information contained in published literature. While earlier Adams, et al. guidance was in effect at the time of the examination, the 2001 Adams, et al. guidance, had already been published by the time the case was tried. A SANE should testify based on the published literature that existed at the time of the trial, not at the time of the examination. To the extent the two differ, the more recent guidance should apply.

- Assertion at trial: The hymen develops "wear and tear" that indicates if somebody maybe is sexually active." (Trial Transcript, p. 41, lines 5-6)
    - Literature: There is no evidence to support that one can determine whether someone is sexually active based upon the visual appearance of their hymen. (*e.g.,* Adams, et al., 2004, Kellogg, et al., 2004.)[14]
- Assertion at trial: She observed a "pie shaped wedge" indicating a "well-healed tear" that was "indicative that something has gone past the hymen that was big enough to cause trauma to it."[15] (Trial Transcript, p.41, lines 17-20)

[13] *See*, Schaeffer, P., Leventhal, J. M., & Asnes, A. G. *Children's disclosures of sexual abuse: Learning from direct inquiry.* Child Abuse & Neglect*, 35(5),* 343-352 (2011).
[14] Adams, J.A., Botash, A.S., & Kellogg, N. *Differences in hymenal morphology between adolescent girls with and without a history of consensual sexual intercourse*. Archives of Pediatrics and Adolescent Medicine, 158(3), 280-285 (2004); Kellogg, N.D., Menard, S.W., & Santos, A. *Genital anatomy in pregnant adolescents: "Normal" does not mean "nothing happened".* Pediatrics, 113(1), e67-e69 (2004).
[15] It is possible one or more of the notches did form a complete transection. However, the SANE did not state this during testimony or document the depths of the notches.

- Literature in 2001: A notch or cleft in the posterior (inferior) portion of the hymen, which extends through no more than 50% of the width of the hymenal rim" is a nonspecific finding. (Adams, et al., 2001, p. 34.)
- Literature in 2018: The only non-acute hymenal finding considered "clear evidence of past injury" (Adams et al., 2018, p. 226) is a healed hymenal transection/complete hymen cleft—a defect in the hymen below the 3-9 o'clock location that extends to or through the base of the hymen, with no hymenal tissue discernible at that location." (Adams, et al., 2018, p 227.)

Additional observations regarding the testimony include the following:

- All abnormal exams should be reviewed by a second expert provider. It does not appear the findings in this case were reviewed.

- During testimony, the SANE was asked about the difference between "tears" and "notches." The Adams, et al., 2018 guidance define "notch" and "cleft" as interchangeable; each refers to areas of the hymen where tissue is indented. Based on the testimony and a review of the evolving guidance, there seems to be a fair amount of confusion between terms such as "notch," "cleft," "tear," and "scar." In fact, at one point the SANE responded to the defense attorney that there were scars on the hymen even though she communicated to the Commission that she did not observe any scarring during the exam.

- At trial, the SANE testified her physical examination "backs up" the child's story. SANEs are trained to use objective language when asked to provide an opinion. In communications with the Commission, the SANE recognized her intent was to indicate her findings were "consistent with" the patient history.

- The examination records do not include an indication of the depth of the notches observed by the SANE. It is not possible to assess the accuracy of the SANE's interpretation under current guidelines without information about the depth of the notches observed. This information should be noted at the time of the examination.

In sum, the observations made by the SANE at trial in December 2002 regarding indicia of trauma to the hymen are inconsistent with the 2001 child sexual abuse interpretation guidelines published (Adams, et al., 2001) as well as under current child sexual abuse interpretation guidelines (Adams et al., 2018). Whether this observation would have had any bearing on the outcome of the criminal case falls within the sole purview of a court with competent jurisdiction.

In discussions with the SANE during the preparation of this report, it was noted that the SANE, who is still in practice, acknowledged she was inexperienced at the time of her testimony

and unaware the guidelines she was taught during her initial pediatric training had been updated. She is knowledgeable of the current injury interpretation guidelines and has her cases reviewed through the Midwest Regional Children's Advocacy Center.

IV. RECOMMENDATIONS

The following recommendations are intended to assist the forensic nursing community in efforts to improve through training and standardization. Of particular note is the fact that forensic nursing was recently added as a subcommittee of the National Institute of Standards and Technology/Organization of Scientific Area Committees for Forensic Science ("OSAC"). The Commission is hopeful these recommendations will assist with OSAC-related initiatives as well as other continuous improvement efforts in the field.

- Terminology: The forensic nursing discipline should examine what terminology has been confusing historically and endeavor to create a glossary of preferred terms with clear definitions to assist stakeholders in understanding clinical observations and related interpretations.

- Review by a Second Qualified Expert in Child Sexual Abuse Physical Examination: Case review by a second qualified examiner should be a core requirement of any forensic nursing standard. For SANEs working in areas without expert child sexual abuse clinicians, virtual options are available.

- Documentation: Thorough documentation of exam findings is critical. In this case, no notes were available regarding the depth of the notches observed. This makes it impossible for another qualified practitioner to evaluate the interpretation of the original SANE.

- Training: The Commission has observed a gap between information contained in published literature and the understanding held by practitioners in many forensic disciplines, from forensic nursing to DNA mixture interpretation. Training efforts should be directed at improving the dissemination of evidence-based knowledge through the establishment of continuing education standards for practitioners in the field.

- Data-Driven Interpretation: By all accounts, forensic nursing guidance has historically been based on the consensus of practitioners. While this is certainly not without value, establishing standards based on empirical data is more likely to lead to reliable and accurate outcomes. In setting research priorities, the forensic nursing subcommittee of the OSAC should focus on the need to collect and evaluate data as the foundation for future guidance.

- Human Factors: All areas of forensic science have an element of cognitive bias, but this is especially true in disciplines where patient history is a critical component of the practitioner's work. The forensic nursing subcommittee of the OSAC should work with human factors experts to develop training and guidelines focusing on confirmation and other forms of cognitive bias.