SECOND ANNUAL REPORT

May 2012—November 2013

TEXAS FORENSIC SCIENCE COMMMISSION

JUSTICE THROUGH SCIENCE

TFSC SECOND ANNUAL REPORT
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I. Introduction and Executive Summary

Welcome to the second annual report of the Texas Forensic Science Commission ("TFSC" or "Commission"). The first annual report provided a historical assessment of the Commission's work since the agency was created in 2005, covering Commission decisions through the April 2012 meeting. This second report covers Commission activities from May 1, 2012 through November 1, 2013. After the release of this second report, the Commission will release all future reports each year by December 1st in accordance with the schedule set forth in its new statute. (*See* **Exhibit A**, Tex. S.B. 1238, 83rd Leg., R.S. §8 (2013)).

Texas has become a leader among states seeking to advance the integrity and reliability of forensic science in criminal courts. This report focuses on the following key developments in the Commission's work:

1. Passage of SB-1238 by the Texas Legislature and its impact on the scope of the Commission's jurisdiction, membership and budget;
2. Complaints filed and the status of those complaints;
3. Investigations conducted and reports issued by the Commission;
4. Stakeholder roundtables on certification and notification in July 2013;
5. Crime Lab Management Leadership Academy in August 2013;
6. Description of other state and national forensic development activities in which the Commission has participated;
7. Items on the horizon, including possible microscopic hair analysis review; and
8. Brief discussion of the remaining statutory annual report items set forth in SB-1238, including an explanation of why they are not yet ripe for consideration.

II. Texas Forensic Science Commission Legislative Duties and Investigative Scope

A. Historical Perspective

For a complete historical perspective on the creation and evolution of the Texas Forensic Science Commission, please see Section II of our first annual report. Copies of the first annual report may be obtained on our website or by emailing Commission staff at info@fsc.texas.gov.

B. Impact of SB-1238 on Duties of the TFSC

This section outlines the impact of SB-1238, which was passed unanimously by the Texas Legislature during the 83rd Legislative Session. The bill was co-authored by Senator Juan "Chuy" Hinojosa and Senator Joan Huffman.

1. Changes to Appointments

All appointments now reside with the Governor's Office. Commissioners serve two-year terms subject to confirmation by the Texas Senate. Beginning September 1, 2013, the Governor will appoint Commissioners under a schedule set forth in the bill. For the seats currently occupied by Dr. Vincent Di Maio, Dr. Nizam Peerwani, Mr. Richard Alpert, Mr. Robert Lerma, Dr. Jean Hampton, Dr. Brent Hutson and Dr. Jeffrey Barnard, terms expire on September 1st of each odd-numbered year. For the seats currently occupied by Dr. Art Eisenberg and Dr. Sarah Kerrigan, terms expire on September 1st of each even-numbered year.

2. Changes to Definitions

The bill distinguishes between "accredited fields of forensic science" and the broader concept of "forensic analysis," which is no longer limited to DPS-accredited fields. The broader term "forensic analysis" includes 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. However, "forensic analysis"

specifically excludes the portion of an autopsy conducted by a medical examiner or other forensic pathologist who is a licensed physician. The bill also added the term "crime laboratory" which is defined as a "public or private laboratory or other entity that conducts a forensic analysis" subject to Article 38.35.

3. Investigative Jurisdiction

As with the prior version of the statute, the Commission is responsible for implementing a system through which crime laboratories may report professional negligence or professional misconduct. The Commission must require crime laboratories that conduct forensic analyses to report professional negligence or professional misconduct to the Commission.

The statute also divides the Commission's investigative responsibilities into the following three categories:

a) **Investigations Initiated by the Commission:** The Commission may *initiate an investigation* of a forensic analysis *for educational purposes without receiving a complaint* if the Commission *determines by majority vote* that the investigation *would advance the integrity and reliability of forensic science* in Texas.

b) **Complaints Involving Unaccredited Labs or Unaccredited Forensic Fields:** The Commission may *investigate a complaint involving a crime laboratory* that is not accredited by DPS, or *conduct an investigation in response to an allegation involving a forensic method or methodology that is not an accredited field of forensic science.*

c) **Complaints Involving Accredited Labs and Accredited Forensic Disciplines:** As with the current version of the statute, the Commission is also charged with investigating allegations of professional negligence or misconduct against *accredited crime laboratories* involving *accredited forensic disciplines*.

For the first two investigative categories set forth above, Commission reports *may not issue a finding of negligence or misconduct*, and the report categories are limited to: (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, as determined by the Commission.

However, under the third category of investigations, Commission reports are more extensive. They must include: (1) a description of the alleged negligence or misconduct; (2) whether negligence or misconduct occurred; (3) any corrective action required of the laboratory; (4) observations regarding the integrity and reliability of the forensic analysis conducted; (5) best practices identified during the course of the investigation; (6) other relevant recommendations, as determined by the Commission; and (7) the methods and procedures used by the Commission to identify the items listed above.

In addition, Commission reports under the third category may include: (1) retrospective reexamination of other forensic analyses conducted by the laboratory that may involve the same kind of negligence or misconduct; and (2) follow-up evaluations of the laboratory to review: (a) implementation of any corrective action required; or (b) conclusion of any retrospective reexamination.

The Commission may require that a laboratory pay costs incurred to ensure compliance with an investigation conducted under the statute. The Commission is also permitted to delegate its investigative duties to subject matter experts where appropriate.

The Commission may not issue a finding relating to the guilt or innocence of any party in a civil or criminal trial involving conduct investigated by the Commission. Commission reports are not admissible in a civil or criminal action. Information filed or obtained as part of an allegation of professional misconduct or negligence is not subject to release under the PIA until the conclusion of a Commission investigation.

III. TFSC Members and Budget

A. Appointments to Date

To date, the TFSC has had 22 different Commissioners and 2 staff members. The following is a table of each of the current Commissioner's years of service and appointing authority:

Current Members*	Original Appointment	Appointment Office	Expiration/Re-Appointment Date
Alpert, Richard	10/31/2011	Governor	09/01/2013
Barnard, Jeffrey	10/31/2011	Lt. Governor, Shifted to Governor under SB-1238	09/01/2013
Di Maio, Vincent J.	10/31/2011	Governor	09/01/2013
Eisenberg, Arthur J.	10/30/2006	Att. General, Shifted to Governor under SB-1238	09/01/2014
Hampton, Jean M.	3/16/2006	Lt. Governor, Shifted to Governor under SB-1238	09/01/2013
Hutson, Brent	6/4/2012	Lt. Governor, Shifted to Governor under SB-1238	09/01/2013
Kerrigan, Sarah	12/1/2007	Att. General, Shifted to Governor under SB-1238	09/01/2014
Lerma, Richard "Bobby"	10/31/2011	Governor	09/01/2013
Peerwani, Nizam	9/1/2009	Governor	09/01/2013
*All members are appointed for a term of two years and remain on the Commission as "holdover" appointments until the Governor names a replacement.			

B. Annual Budget

The TFSC's budget was increased during the 83rd Legislative Session to $500,000 per year. Until the 83rd Session, the budget had been set at $250,000 per year. A copy of the TFSC's projected budget for FY2014 is attached as **Exhibit B.** The Commission will dedicate funds to the following critical priorities during FY2014: (1) funding of staff salary and overhead; (2) investigative activities; (3) transition of information technology functions from Sam Houston State University to DIR-approved contractor; (4) discipline-specific case review(s); (5) extension of leadership academy to more practitioners in Texas; (6) implementation of recommendations

from certification and notification roundtables; (7) support of Foresight project for participating laboratories; (8) collaborative training projects with the Texas Criminal Justice Integrity Unit ("TCJIU") including development of *Brady* video for forensic scientists; (9) other state and national forensic development initiatives as they arise; and (10) administrative expenses including office supplies, phone service, copier service, mail and shipping, etc. **Exhibit B** provides a breakdown of projected costs in each category.

IV. Summary of Complaints and Dispositions

Commission staff receives complaints from a range of sources, including but not limited to current inmates, friends and family of inmates, national advocacy groups, former laboratory employees, other laboratories and interested members of the public. The TFSC relies upon accredited crime laboratories and interested members of the public to bring issues of concern to the TFSC's attention. The intent of this section is to provide the reader with a summary of the number and type of complaints the Commission has received since January 1, 2012. We also provide the disposition status for each complaint. A complete matrix detailing each complaint is provided at **Exhibit C**.

A. Complaint Tally

To date, the Commission has received a total of 80 complaints and 2 self-disclosures, and has disposed of 76 complaints, either through dismissal, investigation, and/or referral to another agency. Of the 82 total complaints and self-disclosures received, 30 were received from January 2012 to November 2013. The Commission has 4 complaints currently pending for consideration.

The following table summarizes those complaints received from January 2012—November 2013 for which the Commission could determine the nature of the complaint. Note that some complaints fall into more than one forensic discipline.

B. Subject Matter Summary

Discipline	Name of Laboratory or Other Entity
Autopsy	Southwestern Institute for Forensic Science, Harris County Medical Examiner's Office, NMS Laboratories, Christus Spohn Memorial Hospital – Corpus Christi,
Ballistics, trace evidence and/or firearms	DPS – Corpus Christi Crime Lab, Lubbock County District Attorney's Office, Fort Worth Police Department Crime Lab
Controlled substance	Austin Police Department Crime Lab, DPS – Houston Crime Lab, Tarrant County Crime Lab, Expertox, Inc., DPS – Abilene Crime Lab, DPS – Garland Crime Lab, DPS – Austin Crime Lab
DNA (usually requests for testing or complaints about lack of remaining evidence for testing)	McLennan County, Forensic Science Association of California, DPS – Houston Crime Lab, Houston Police Department Crime Lab, Ector County District Attorney's Office, DPS – Austin Crime Lab, DNA Diagnostics, Inc., Southwestern Institute of Forensic Science, DPS – McAllen Crime Lab,
Hair microscopy	Southwestern Institute of Forensic Science
Serology	Tarrant County Medical Examiner's Office, Houston Police Department Crime Lab,
Toxicology	NMS Laboratories; Tarrant County Medical Examiner's Office
Other complaints with no specific forensic discipline listed (usually includes eyewitness ID, police and/or prosecutorial misconduct allegations)	State of Illinois, Texoma Medical Center, DPS – McAllen Crime Lab

C. Complaint Process

To understand the disposition of many complaints, it is important to recall the significant limitations on the scope of the Commission's jurisdiction until SB-1238 was passed during the 83rd Legislative Session. Under an opinion released by Attorney General Abbott in July 2011 ("AG Opinion"), the Commission's jurisdiction was limited to cases involving accredited crime laboratories and accredited forensic disciplines. The Commission was also prohibited from considering any complaint where the forensic analysis occurred or was entered into evidence before September 1, 2005. (For a detailed description of the AG Opinion, please refer to the

Commission's first annual report.) In the vast majority of complaints dismissed by the Commission, either one or a combination of these jurisdictional limitations was present. In the remaining cases, the Commission dismissed the complaints because they were incoherent, lacked fundamental information or simply failed to state an actual complaint.

V. Summary of Investigative Reports Issued

Since January 2012, the Commission has conducted investigations and released investigative reports in the following four matters: (1) El Paso Police Department Crime Laboratory (Controlled Substance—report released July 27, 2012); (2) Austin Police Department Crime Laboratory (Controlled Substance—report released October 5, 2012); (3) Tarrant County Medical Examiner's Crime Laboratory (Forensic Biology—report released October 5, 2012); and (4) DPS—Houston Regional Laboratory (Controlled Substance—report released April 15, 2013). A copy of the full text of the reports with exhibits may be found on the Commission's website.

A. El Paso Police Department Crime Laboratory (Controlled Substance)

On July 27, 2012 the Texas Forensic Science Commission finalized its report in the El Paso Police Department Crime Lab investigation. The TFSC's investigation consisted of three main phases, including (1) document collection; (2) document review; and (3) interviews of laboratory personnel and management. Commission staff also consulted extensively with the Executive Director of ASCLD-LAB and the Deputy Assistant Director of DPS, and maintained ongoing contact with the El Paso County District Attorney's Office and the complainant.

At its April 13, 2012 meeting, the Commission voted unanimously that no evidence of "professional misconduct or negligence" was found during the course of the investigation. The conclusion was based on the following investigative components: (1) the Commission's review

of thousands of pages of documents; (2) the Commission's on-site interviews of laboratory management and personnel; (3) hundreds of pages of follow-up information and responses to Commission questions provided by the laboratory; (4) results of DPS re-testing of evidence; (5) results of a DPS audit; and (6) communications with ASCLD-LAB throughout the course of the investigation.

Commission members commended the handling of issues in the case by District Attorney Jaime Esparza in their report. The Commission highlighted the fact that prosecutors affected by challenges to the integrity and reliability of crime laboratory analysis play a critical role in ensuring appropriate stakeholders are informed of the potential scope and significance of issues raised. The Commission continues to encourage other prosecutors facing similar factual scenarios to respond as proactively as District Attorney Esparza did in the case.

Commission members made the following final recommendations in the case:

1) The Commission's strong preference is to have a full-time and 100% on-site scientifically qualified laboratory director at EPPDCL. While the City continues its search for a permanent director, EPPDCL should continue to retain a scientifically qualified interim director. The current interim director spends 50% of his time on-site in the laboratory; the Commission believes any subsequently retained interim or permanent director should be on-site 100% of the time. The Commission recognizes this recommendation may be rendered moot if the City decides to outsource to an ASCLD-LAB accredited laboratory instead of continuing in-house testing.

2) Before a laboratory report is issued in any case, the scientifically qualified laboratory director must perform technical review of the case. This process is already documented in the laboratory's operating procedures and should not be changed.

3) The Commission strongly supports an enhanced surveillance visit to be conducted by ASCLD-LAB within one year of the date on which ISO accreditation was granted in March 2012. EPPDCL should send a copy of any report generated by ASCLD-LAB to the Commission.

4) EPPDCL should continue communicating any changes in personnel, actions by ASCLD-LAB, or other material changes to the Commission as they occur.

The narrative portion of the Commission's report in this case is attached as **Exhibit D**. For a copy of the report with exhibits, please consult the Commission's website.

B. Austin Police Department (Controlled Substance) Complaint

At its October 5, 2012 meeting, the Texas Forensic Science Commission adopted an investigation report for the Austin Police Department crime lab complaint. The complaint related to concerns raised by two parties regarding the integrity and reliability of the forensic analysis performed by the drug chemistry section of the Austin Police Department's crime lab. The Commission consolidated the two related concerns for purposes of the investigation and report, though each complaint was investigated independently.

The TFSC's investigation consisted of four main phases: (1) document collection; (2) document review; (3) interviews with the complainants, laboratory personnel and management and (4) a retrospective re-examination of evidence. Commission staff also consulted extensively with the Executive Director of ASCLD-LAB and the Deputy Assistant Director of DPS, and maintained periodic contact with the Travis County District Attorney's Office and the complainants.

Commissioners did not reach a finding of professional negligence or misconduct in the case, but issued the following final recommendations in the complaint:

1) The Commission recommends that APDCL implement all improvements suggested in the June 1, 2012 and July 24, 2012 ASCLD-LAB reports and accompanying "Opportunities for Improvement" document. To the extent any report or monitoring document is created to evidence APDCL's progress with these issues, the Commission requests a copy of such documentation;

2) To address the concerns raised by IFL regarding discrepancies in identifying "marihuana" vs. "tetrahydrocannabinols" from laboratory to laboratory across Texas, the Commission will work with DPS and the Texas Association of Crime Laboratory Directors to establish an advisory board to make recommendations on this issue. The Commission will also consult with the Texas District and County Attorneys'

Association and the Texas Criminal Defense Lawyers' Association to encourage their involvement in this discussion;

3) The Commission requests that APDCL notify the Commission of the results of ASCLD-LAB's inquiry into whether any other sections of the laboratory observe a similar rush case policy as the policy suspended by the drug chemistry section in October 2010; and

4) The Commission requests that any corrective action taken as a result of the inquiry described in #3 above be documented and reported to the Commission.

The narrative portion of the Commission's report in this case is attached as **Exhibit E**. For a copy of the report with exhibits, please consult the Commission's website.

C. Tarrant County Medical Examiner's Office Self-Disclosure (Forensic Biology)

At its October 5, 2012 meeting, the Texas Forensic Science Commission adopted an investigation report for the Tarrant County Medical Examiner's Office Crime Lab ("TCMECL") self-disclosure complaint. The complaint was the first laboratory self-disclosure received under the Commission's recently implemented self-disclosure program. The laboratory notified the Commission about a significant nonconformance in the lab's DNA section, where a particular analyst did not open the seals on items of evidence for which he reported results. After an extensive investigation by a TFSC three-person investigation panel, including Dr. Arthur Eisenberg, Dr. Garry Adams (former commission member replaced by Dr. Brent Hutson at the Commission's July 2012 meeting), and Mr. Robert Lerma, the Commission voted to issue a finding of professional misconduct against the analyst in question. The investigative report highlights three distinct recommendations, including:

The Tarrant County Medical Examiner's crime laboratory should continue to implement and monitor the effectiveness of all corrective actions taken in the course of their own internal investigation;

1) The Tarrant County Medical Examiner's crime laboratory should report any materially significant updates regarding the status of the corrective actions and the re-testing of cases to ASCLD-LAB, DPS and the Commission; and

2) The laboratory should include a copy of the investigative report in the analyst's permanent personnel file.

The Commission commended TCMECL in their investigative report for its swift and thorough response to the serious non-conformances in the case. The Commission encourages other crime laboratories in Texas facing similar issues to take a similar proactive and transparent approach.

The narrative portion of the Commission's report in this case is attached as **Exhibit F**. For a copy of the report with exhibits, please consult the Commission's website.

D. DPS—Houston Regional Crime Lab Self-Disclosure (Controlled Substances)

On June 21, 2012, the Commission received a laboratory disclosure form and corresponding documentation from DPS Deputy Assistant Director Pat Johnson, related to the DPS (Houston) crime lab's controlled substance section. The disclosure explained that an analyst in the drug section used an alprazolam sample from an unrelated case to support his identification of alprazolam in the case he was working at the time.

The analyst was suspended by DPS effective February 10, 2012. The Texas Rangers conducted a criminal investigation of the analyst and submitted a report to the Harris County District Attorney's Office. On February 21, 2012, DPS contacted law enforcement officers and prosecuting attorneys in the counties served by the lab via email. The email informed law enforcement and prosecutors of the drug analysis violation, and advised prosecutors that all evidence worked by the analyst in question in the previous 90 days would be re-tested.

During the 90-day re-testing process, problems were found with identification of two other items. Additionally, numerous deficiencies regarding "poor documentation," "poor technique," and "dirty solvent or injection port" were observed by reviewing examiners. On

April 26, 2012, DPS emailed a second notice to prosecutors identifying every drug case worked by the analyst during the analyst's employment by DPS from 2006-2012, which encompassed 4,944 cases. The email notice advised prosecutors that they could request re-analysis of any of the 4,944 by DPS at no charge.

On April 27, 2012, the Texas District and County Attorneys' Association ("TDCAA") posted a notice on its website advising affected prosecutors (approximately 33 counties) of a suggested protocol for alerting stakeholders. The suggested protocol includes the following: (1) notify the courts of the issue; (2) notify the local criminal defense bar; (3) pull all of the cases on the list provided by DPS – check the disposition for convictions (4) find the evidence, if it still exists, and submit for retesting (DPS or local departments); and (5) for any case with a bad retest, or cases with now-destroyed evidence, request that the court appoint an attorney to take the case through a writ process if appropriate.

In collaboration with the Texas District and County Attorney's Association, the Texas Commission on Indigent Defense, the Office of Court Administration and the Innocence Project of Texas, the Commission developed a memorandum and sample defendant-notification letter to assist prosecutors with providing notice to affected defendants and provide a resource for defendant inquiries. Copies of the memorandum and sample letter were distributed to district attorneys and judges in the affected counties.

At its January 25, 2013 meeting, the Commission voted unanimously that the analyst's actions in this case constituted "professional misconduct" as defined in the Commission's policies and procedures. This conclusion was based on the following analysis: (1) by using the evidence in one case to support the results issued in a separate case, the analyst failed to follow the standard of practice generally accepted at the time, both as expressed in DPS policies and

procedures and in the ASCLD-LAB Guiding Principles of Professional Responsibility; (2) the report generated by the analyst for the case at issue substantially affected the integrity of the results of the forensic analysis because it was based on evidence from a different case, and thereby required the laboratory to re-analyze the evidence and re-issue a report. Though the re-analysis confirmed the initial scientific findings reported by the analyst, the results were based upon inaccurate supporting data from the case in question. The analyst in this case was found to have fraudulently misrepresented data after attempting analysis on a pharmaceutical drug exhibit.

In its report, the Commission emphasized that it is imperative that Texas crime laboratories use this case experience as a tool for improving quality standards, especially with respect to identifying red flags in employee performance. As the case so powerfully demonstrated, the safety and security of our communities often depend upon the integrity and reliability of the work performed in our state's crime laboratories.

In its final report, the Commission made the following recommendations:

1. Texas crime laboratories should develop methods to reduce the likelihood of ethical violations. For example, laboratories should re-examine evidence at random (where possible) to ensure reported results are consistent, and to discourage examiners from taking short-cuts, even when there are severe backlogs.

2. Texas crime laboratories should ensure their evaluation systems effectively reflect staff performance. Evaluations containing consistent questions about an examiner's understanding of analytical processes, attention to detail, or tendency to take "short cuts" demand special attention.

3. Texas crime laboratories should review their hiring systems to flag issues early during the probation period. If current recruiting and probation programs are ineffective, management should initiate appropriate changes to strengthen them.

4. Laboratory management should be cautious not to allow an examiner's positive and collegial demeanor to mask inadequate or marginal performance. Though "compassion" is an admirable quality in many circumstances, the potential impact of a major non-conformance is simply too great to justify or minimize signs of underperformance in a crime laboratory.

5. Consequences of examiner underperformance should be clear and consistent. Government bureaucracy should not impede laboratory management's ability to make key hiring and termination decisions. Moreover, laboratory supervisors and managers, who are ultimately responsible for the performance of their employees, should have effective means to recommend changes in employment scope or status where necessary.

6. DPS should continue to provide re-analysis results for Salvador cases to the Commission. The Commission will publish final results in an addendum to this report.

7. Limited resources and the lack of centralization of legal representation pose a number of challenges regarding notification practices. In high volume cases where notice to defendants is particularly challenging, stakeholders in the criminal justice community should use the example set in this case, and work together to provide a common sense approach to notice. Such an approach should ensure actual notice is given to defendants to the extent possible, and that defendants are given a resource to consult regarding applicable legal remedies.

8. As the Commission gains more experience with crime laboratory self-disclosures and complaints, issues may emerge that were not anticipated, and for which no other agency appears to be in a position to coordinate a response. A glaring example in this case is the need to facilitate a uniform approach to communication with prosecutors and notice to defendants, especially considering: (a) numerous counties with disparate resources have been affected; (b) large volumes of evidence have been brought into question; and (c) many defendants are indigent with limited access to legal representation. Statewide policymakers and members of the Legislature should consider these issues when crafting future policies affecting the criminal justice system.

9. All laboratories should follow DPS's example by taking a proactive approach to disclosure, including but not limited to reporting facts that may rise to the level of negligence or misconduct.

10. The Texas Forensic Science Commission should sponsor a crime laboratory management training program for all publicly funded Texas laboratories addressing such issues as interviewing and selecting quality examiners, succession planning, leadership development, and performance management.

11. The Texas Legislature should adequately fund crime laboratories to support high quality examiners and reduce the impact of financial pressures on management decisions related to the hiring and termination of staff.

The narrative portion of the Commission's report in this case is attached as **Exhibit G**.

For a copy of the report with exhibits, please consult the Commission's website.

VI. Forensic Development Activities

A. Forensic Science Conference and Stakeholder Roundtables: June 2012

To promote forensic science education and encourage collaboration among judges, lawyers, scientists, legislators, advocacy groups and other stakeholders, the TFSC and the TCJIU hosted a two-day forensic science conference at the Texas State Capitol on June 4-5, 2012. Close to 300 people registered, and the conference covered a wide range of forensic and legal topics. The Commission received positive feedback from conference attendees and plans to host a similar conference in the future.

On June 6, 2012 the TFSC sponsored a roundtable discussion entitled "Strengthening Forensic Science in Texas: Moving Forward." A diverse group of forensic stakeholders were invited to discuss challenges and improvements that were broadly based upon the 2009 report from the National Academy of Sciences (Strengthening Forensic Science in the United States: A Path Forward). Topics for discussion included: 1) trends in certification of forensic examiners; 2) quality and timeliness of services; 3) ethical dilemmas in forensic science; 4) independence of crime laboratories; 5) research and reliability of methods; 6) strategies for improving consistency; 7) training of scientists, lawyers and judges; and 3) addressing "junk science." Participants included scientists, lawyers, judges, law enforcement, executive/legislative staff, and advocacy groups. For the narrative portion of the report from this stakeholder meeting, please see **Exhibit H**.

B. Stakeholder Roundtable Meetings on Certification and Notification: July 2013

As a follow up to the initial June 2012 roundtable meeting, the TFSC and the Texas Criminal Justice Integrity Unit convened a meeting of more than sixty forensic science stakeholders representing crime laboratories, certification bodies, accrediting bodies, prosecuting attorneys, defense attorneys, the judiciary, law enforcement, policy makers and policy advocates. The purpose of the meeting was to discuss the many viewpoints and challenges associated with the certification of forensic examiners so that the Texas Forensic Science Commission could prepare a report on the topic as part of its forensic development activities.

The TFSC was specifically interested in gauging overall support for mandatory versus voluntary certification efforts and the considerations and practical limitations weighing for and against. The nature and scope of various incentives were discussed as a way to encourage examiner certification. It was clearly recognized that policy and resource limitations among such a diverse array of laboratories pose a number of challenges. Strategies for improving certification rates among personnel were discussed as well as the need for additional resources in terms of funding, training resources and personnel. Appropriate means by which reputable certifying bodies could be identified at the state level was discussed, as was the need for certifying bodies to be accredited, ideally under ISO 17024. The timeframe for implementing certification on a widespread scale must take into consideration the limitations of certifying bodies themselves, as well as the resource limitations of the forensic science community.

Though there is widespread support for certification in Texas, any initiative will require a realistic and well-informed approach. Moreover, it will require strategic partnerships between many groups including the forensic science community, institutes of higher education who can assist with training, and the legislative branches of government who have the authority to appropriate funds to make this possible.

Following the certification roundtable, the Commission and the Integrity Unit convened a similar stakeholder meeting to discuss strategies for establishing a notice protocol for future cases involving major forensic non-conformances, and to determine how to streamline the process and realize increased efficiencies in a state that strongly values local and decentralized control.

Recognizing that a state-funded public defense system is highly unlikely in Texas, participants identified existing state agencies and organizations that can play a greater role in the notification process. Participants also emphasized the importance of notice redundancy, and suggested many enhanced training opportunities to ensure stakeholders understand their respective roles. The group discussed special challenges faced by rural prosecutors and strategies for addressing them. The Commission and the Integrity Unit also plan to create a training video on the impact of *Brady v. Maryland* that is specifically geared toward forensic scientists. The Texas State Bar will assume a greater role in identifying and training attorneys on forensic science issues with specific focus on how to effectively process an appellate writ in a forensic nonconformance case. Finally, participants emphasized the critical importance of educating members of the legislature and the public on these issues.

For the narrative portion of the white papers summarizing the certification and notification roundtables, please refer to **Exhibits I and J, respectively**. For copies of the papers with exhibits, please visit the Commission's website.

C. Crime Lab Managers' Leadership Academy: August 2013

In August 2013, the Commission hosted a three-day crime lab leadership academy with faculty from the West Virginia University crime lab boot camp program. The program was extremely well received by attendees. Topics included: (1) employee recruiting, retention and

succession planning; (2) performance management: managing competencies and performance metrics; (3) when things go terribly wrong with personnel; (4) how to effect change as a new leader; (5) project management: the key to successful technology management; (6) process improvement: metrics, measurement and management; (7) developing effective leadership styles; (8) leading high performance teams; and (9) conflict management.

Because attendees responded so positively to the academy, the Commission is considering how to expand the program to a greater number of laboratory representatives. The Commission will discuss this issue further at upcoming meetings.

D. National Development Activities and Consultation with Other States

Commission members and staff have participated in numerous national and international conferences and panels over the last two years. For example, Commissioners and/or staff have spoken at the following events: (1) the Crown Defence Conference in Winnipeg, Manitoba; (2) White House Subcommittee on Forensic Science meeting of state oversight bodies in Washington, DC; (3) the American Academy of Forensic Sciences annual meeting 2013 and 2014 in Washington, DC and Seattle, Washington; (4) the Texas Tribune Festival 2012 and 2013 in Austin, Texas; (5) the North Carolina Innocence Network conference in Charlotte, North Carolina; (6) the Texas Criminal Defense Lawyers Association conference in Austin, Texas; (7) the State Fire Marshal's panel in Austin, Texas; and (8) the Texas District and County Attorney's Associations Elected Prosecutor's Conference in San Antonio, Texas.

The Commission has also consulted with other states facing challenges in their publicly funded crime laboratories, including Massachusetts and Colorado. These challenges include how to manage significant forensic non-conformances in high-volume disciplines such as controlled substances.

E. National Forensic Science Commission and Federal Reform Legislation

In February 2013, the U.S. Department of Justice ("DOJ") and the U.S. Department of Commerce's National Institute of Standards and Technology ("NIST") announced the establishment of a National Commission on Forensic Science. The National Commission will be composed of approximately 30 members, including practitioners, researches, prosecutors, defense attorneys, judges and other members of the criminal justice community. The National Commission will be responsible for providing guidance concerning the intersection between forensic science and the courtroom as well as developing policy recommendations.

Though DOJ and NIST have collected over 600 applications for the National Commission from individuals across the country, they have not yet announced any potential candidates or held any meetings. Thus, as of this writing, the Commission appears to be stalled in its tracks.

Both Senator Leahy (D-VT) and Senator Rockefeller (D-WV) have introduced forensic science reform legislation since the National Academy of Sciences Report was released in 2009. Both bills, though different in scope and direction, attempt to respond to the observations in the report. Though many interesting hearings have been held on both pieces of legislation over the past few years, neither bill has gained any meaningful traction to date. The Commission will continue to monitor developments with both pieces of legislation.

VII. Discipline-Specific Reviews

At its November 2013 meeting, the Commission will consider coordinating a statewide review of hair microscopy cases with crime laboratories that conducted this type of analysis. Microscopic hair analysis was a forensic technique used from the 1970's to the early 1990's to establish or exclude a suspect by comparing his or her hair sample to crime scene evidence. It

was replaced by mitochondrial DNA testing in the mid to late 1990's. The FBI is engaged in a review of microscopic hair analysis cases performed by its laboratory before 2000. The agency believes some of its examiners overstated the extent to which the science underlying hair microscopy allowed for a positive association between a known hair sample and crime scene evidence.

The FBI has also indicated that it trained many microscopic hair analysts in state and local crime laboratories, including some laboratories in Texas. Of course, *this does not necessarily mean* that state and local analysts in Texas made similar overstatements. It is also unclear whether the FBI actually trained analysts using principles that could overstate a positive association, or whether the analysts who received FBI training followed the FBI's lead in their own testimony.

On April 11, 2013, the American Society of Crime Laboratory Directors-Laboratory Accreditation Board (ASCLD-LAB) released a memorandum describing the FBI review and encouraging (but not requiring) laboratories to review their hair microscopy case files. ASCLD-LAB noted the forensic science community's ethical obligation to "take appropriate action if there is potential for, or there has been, a miscarriage of justice due to circumstances that have come to light, incompetent practice or malpractice."

Numerous DNA exonerations have revealed that FBI analysts exceeded the limits of science by overstating the significance of positive hair associations, including three recent exonerations in Washington, DC. A 2002 study conducted by Bruce Budowle and Max Houck showed that 9 of 80 cases in which positive hair identifications were found actually resulted in exclusions when mtDNA testing was performed.

To address concerns regarding these cases at the national level, the FBI has partnered with the Innocence Project and NACDL to conduct a retroactive case review. So far, the FBI has identified 2,100 cases with positive associations in all 50 states from 1982-1999, though that number is expected to decrease to 1,700-1,800 after further review of the relevant case transcripts.

As a first step after its July 12, 2013 meeting, the Commission surveyed Texas state and local crime laboratories (public and private) to determine which laboratories performed microscopic hair analysis. To date, it appears 20 labs (including 12 DPS labs) performed some type of microscopic hair analysis. Some have already begun reviewing cases while others will need additional resources to perform the review. The Commission will work with laboratories, the legal community and other affected stakeholders to ensure any review is performed in a responsible and balanced manner, and that results of the review will be used both for educational purposes and to help improve the integrity and reliability of forensic science in Texas.

Finally, the Commission continues to receive updates from the Texas State Fire Marshal's Office on its review of arson cases. The review resulted from 17 recommendations issued by the Commission in April 2011. The review is a collaborative, ongoing process involving stakeholders from the scientific, law enforcement and legal communities. For specific information regarding the status of the arson review, please contact the Office of the State Fire Marshal.

VIII. Additional Items Required in Annual Report by Statute

There are two items in the Commission's statute for which the Commission does not have any recommendations at this time. The first is "a description of any specific forensic method or methodology the commission recommends to the public safety director of the Department of

Public Safety for validation or approval under Section 411.0205(b-1)(2), Government Code as part of the accreditation process . . . " The second involves recommendations for "best practices concerning the definition of 'forensic analysis' provided by statute or by rule of the Department of Public Safety . . ." The Commission has not identified any disciplines, methods or methodology that should be recommended for accreditation that are not already covered by DPS in its accreditation program. Similarly, the Commission has not identified any recommendations regarding the definition of "forensic analysis" used by DPS. The Commission reserves the right to change its position on these issues if at some point in the future it identifies additional forensic disciplines for which accreditation in Texas is both advisable and feasible.

IX. Live Meeting Broadcasts and Public Information Act Requests

The Commission began live-streaming its meetings in July 2013. Members of the public may now watch quarterly meetings online at www.fsc.state.tx.us. Though live-streaming of meetings is not required under Texas law, the Commission plans to offer this service for as many meetings as possible to encourage public participation and transparency. Note that previously recorded Commission meetings may also be accessed on the Commission's website.

Pursuant to the Public Information Act, Texas Government Code, Chapter 552, the Texas Forensic Science Commission accepts public information requests for information currently existing in its records. The Commission accepts requests via email at info@fsc.texas.gov, via facsimile at 1(888) 305-2432, or via regular U.S. mail. You may access the public information request form on the Commission's website at www.fsc.state.tx.us/pia-request.html.

If you have any questions about meeting broadcasts or how to submit a public information request to the Commission, please feel free to contact our office.

EXHIBIT A

AN ACT

relating to the composition and duties of and investigations conducted by the Texas Forensic Science Commission, the administrative attachment of the Texas Forensic Science Commission to Sam Houston State University, the accreditation of criminal laboratories by the Department of Public Safety of the State of Texas, and the status of certain local government corporations as criminal justice agencies for the purpose of engaging in criminal identification activities, including forensic analysis.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 2, Article 38.01, Code of Criminal Procedure, is amended to read as follows:

Sec. 2. DEFINITIONS [~~DEFINITION~~]. In this article:

(1) "Accredited field of forensic science" means a specific forensic method or methodology validated or approved by the public safety director of the Department of Public Safety under Section 411.0205(b-1)(2), Government Code, as part of the accreditation process for crime laboratories established by rule under Section 411.0205(b) of that code.

(2) "Commission" means the Texas Forensic Science Commission.

(3) "Crime laboratory" has the meaning assigned by Article 38.35.

(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, except that the term does not include the portion of an autopsy conducted by a medical examiner or other forensic pathologist who is a licensed physician[~~, "forensic analysis" has the meaning assigned by Article 38.35(a)~~].

SECTION 2. Subsections (a) and (b), Section 3, Article 38.01, Code of Criminal Procedure, are amended to read as follows:

(a) The commission is composed of [~~the following~~] nine members[~~:~~

[~~(1) four members~~] appointed by the governor as follows:

(1) two members who [~~(A) two of whom~~] must have expertise in the field of forensic science;

(2) [~~(B)~~] one member who [~~of whom~~] must be a prosecuting attorney that the governor selects from a list of 10 names submitted by the Texas District and County Attorneys Association;

(3) [~~and~~

[~~(C)~~] one member who [~~of whom~~] must be a defense attorney that the governor selects from a list of 10 names submitted by the Texas Criminal Defense Lawyers Association;

(4) one member who [~~(2) three members appointed by the lieutenant governor:~~

[~~(A) one of whom~~] must be a faculty member or staff member of The University of Texas who specializes in clinical

laboratory medicine that the governor selects [~~selected~~] from a list of 10 names submitted [~~to the lieutenant governor~~] by the chancellor of The University of Texas System;

(5) one member who [~~(B) one of whom~~] must be a faculty member or staff member of Texas A&M University who specializes in clinical laboratory medicine that the governor selects [~~selected~~] from a list of 10 names submitted [~~to the lieutenant governor~~] by the chancellor of The Texas A&M University System;

(6) one member who [~~(C) one of whom~~] must be a faculty member or staff member of Texas Southern University that the governor selects [~~who has expertise in pharmaceutical laboratory research selected~~] from a list of 10 names submitted [~~to the lieutenant governor~~] by the chancellor of Texas Southern University;

(7) one member who [~~and~~

[~~(3) two members appointed by the attorney general:~~

[~~(A) one of whom~~] must be a director or division head of the University of North Texas Health Science Center at Fort Worth Missing Persons DNA Database; and

(8) one member who [~~(B) one of whom~~] must be a faculty or staff member of the Sam Houston State University College of Criminal Justice and have expertise in the field of forensic science or statistical analyses that the governor selects [~~selected~~] from a list of 10 names submitted [~~to the lieutenant governor~~] by the chancellor of the Texas State University System.

(b) Each member of the commission serves a two-year term. The terms expire [~~term of the members appointed under Subsections~~

~~(a)(1) and (2) expires~~] on September 1 of:

(1) each odd-numbered year, for a member appointed under Subsection (a)(1), (2), (3), or (4); and

(2) [~~. The term of the members appointed under Subsection (a)(3) expires on September 1 of~~] each even-numbered year, for a member appointed under Subsection (a)(5), (6), (7), or (8).

SECTION 3. Section 4, Article 38.01, Code of Criminal Procedure, is amended by amending Subsections (a), (b), (d), and (e) and adding Subsections (a-1), (b-1), (b-2), (f), and (g) to read as follows:

(a) The commission shall:

(1) develop and implement a reporting system through which a crime laboratory may [~~accredited laboratories, facilities, or entities~~] report professional negligence or professional misconduct;

(2) require a crime laboratory [~~all laboratories, facilities, or entities~~] that conducts [~~conduct~~] forensic analyses to report professional negligence or professional misconduct to the commission; and

(3) investigate, in a timely manner, any allegation of professional negligence or professional misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by a crime laboratory [~~an accredited laboratory, facility, or entity~~].

(a-1) The commission may initiate for educational purposes an investigation of a forensic analysis without receiving a

complaint, submitted through the reporting system implemented under Subsection (a)(1), that contains an allegation of professional negligence or professional misconduct involving the forensic analysis conducted if the commission determines by a majority vote of a quorum of the members of the commission that an investigation of the forensic analysis would advance the integrity and reliability of forensic science in this state.

(b) If the commission conducts an [~~An~~] investigation under Subsection (a)(3) of a crime laboratory that is accredited by the Department of Public Safety under Section 411.0205, Government Code, pursuant to an allegation of professional negligence or professional misconduct involving an accredited field of forensic science, the investigation:

(1) must include the preparation of a written report that identifies and also describes the methods and procedures used to identify:

(A) the alleged negligence or misconduct;

(B) whether negligence or misconduct occurred; [~~and~~]

(C) any corrective action required of the laboratory, facility, or entity;

(D) observations of the commission regarding the integrity and reliability of the forensic analysis conducted;

(E) best practices identified by the commission during the course of the investigation; and

(F) other recommendations that are relevant, as determined by the commission; and

(2) may include one or more:

(A) retrospective reexaminations of other forensic analyses conducted by the laboratory, facility, or entity that may involve the same kind of negligence or misconduct; and

(B) follow-up evaluations of the laboratory, facility, or entity to review:

(i) the implementation of any corrective action required under Subdivision (1)(C); or

(ii) the conclusion of any retrospective reexamination under Paragraph (A).

(b-1) If the commission conducts an investigation under Subsection (a)(3) of a crime laboratory that is not accredited by the Department of Public Safety under Section 411.0205, Government Code, or the investigation is conducted pursuant to an allegation involving a forensic method or methodology that is not an accredited field of forensic science, the investigation may include the preparation of a written report that contains:

(1) observations of the commission regarding the integrity and reliability of the forensic analysis conducted;

(2) best practices identified by the commission during the course of the investigation; or

(3) other recommendations that are relevant, as determined by the commission.

(b-2) If the commission conducts an investigation of a forensic analysis under Subsection (a-1), the investigation must include the preparation of a written report that contains:

(1) observations of the commission regarding the

integrity and reliability of the forensic analysis conducted;

(2) best practices identified by the commission during the course of the investigation; and

(3) other recommendations that are relevant, as determined by the commission.

(d) The commission may require that a crime laboratory[~~, facility, or entity~~] investigated under this section pay any costs incurred to ensure compliance with Subsection (b), (b-1), or (b-2) [~~(b)(1)~~].

(e) The commission shall make all investigation reports completed under Subsection (b), (b-1), or (b-2) [~~(b)(1)~~] available to the public. A report completed under Subsection (b), (b-1), or (b-2) [~~(b)(1)~~], in a subsequent civil or criminal proceeding, is not prima facie evidence of the information or findings contained in the report.

(f) The commission may not make a determination of whether professional negligence or professional misconduct occurred or issue a finding on that question in an investigation initiated under Subsection (a-1) or for which an investigation report may be prepared under Subsection (b-1).

(g) The commission may not issue a finding related to the guilt or innocence of a party in an underlying civil or criminal trial involving conduct investigated by the commission under this article.

SECTION 4. Article 38.01, Code of Criminal Procedure, is amended by adding Sections 8, 9, 10, and 11 to read as follows:

Sec. 8. ANNUAL REPORT. Not later than December 1 of each

year, the commission shall prepare and publish a report that includes:

(1) a description of each complaint filed with the commission during the preceding 12-month period, the disposition of each complaint, and the status of any complaint still pending on December 31;

(2) a description of any specific forensic method or methodology the commission recommends to the public safety director of the Department of Public Safety for validation or approval under Section 411.0205(b-1)(2), Government Code, as part of the accreditation process for crime laboratories established by rule under Section 411.0205(b) of that code;

(3) recommendations for best practices concerning the definition of "forensic analysis" provided by statute or by rule of the Department of Public Safety;

(4) developments in forensic science made or used in other state or federal investigations and the activities of the commission, if any, with respect to those developments; and

(5) other information that is relevant to investigations involving forensic science, as determined by the presiding officer of the commission.

Sec. 9. ADMINISTRATIVE ATTACHMENT TO SAM HOUSTON STATE UNIVERSITY. (a) The commission is administratively attached to Sam Houston State University.

(b) The Board of Regents of the Texas State University System shall provide administrative support to the commission as necessary to carry out the purposes of this article.

(c) Only the commission may exercise the duties of the commission under this article. Except as provided by Subsection (b), neither the Board of Regents of the Texas State University System nor Sam Houston State University has any authority or responsibility with respect to the duties of the commission under this article.

Sec. 10. OPEN RECORDS LIMITATION. Information that is filed as part of an allegation of professional misconduct or professional negligence or that is obtained during an investigation of an allegation of professional misconduct or professional negligence is not subject to release under Chapter 552, Government Code, until the conclusion of an investigation by the commission under Section 4.

Sec. 11. REPORT INADMISSIBLE AS EVIDENCE. A written report prepared by the commission under this article is not admissible in a civil or criminal action.

SECTION 5. Subchapter A, Chapter 411, Government Code, is amended by adding Section 411.0011 to read as follows:

Sec. 411.0011. CERTAIN LOCAL GOVERNMENT CORPORATIONS ENGAGED IN CRIMINAL IDENTIFICATION ACTIVITIES. For purposes of this chapter, a reference to "criminal justice agency" includes a local government corporation created under Subchapter D, Chapter 431, Transportation Code, for governmental purposes relating to criminal identification activities, including forensic analysis, that allocates a substantial part of its annual budget to those criminal identification activities.

SECTION 6. Section 411.0205, Government Code, is amended by

adding Subsection (b-3) to read as follows:

(b-3) The director shall require that a laboratory, facility, or entity that must be accredited under this section, as part of the accreditation process, agree to consent to any request for cooperation by the Texas Forensic Science Commission that is made as part of the exercise of the commission's duties under Article 38.01, Code of Criminal Procedure.

SECTION 7. The term of a person appointed under former Subdivision (3), Subsection (a), Section 3, Article 38.01, Code of Criminal Procedure, as that law existed immediately before the effective date of this Act, expires September 1, 2014, and the governor shall appoint a person to fill each vacancy on that date in accordance with Subdivisions (7) and (8), Subsection (a), Section 3, Article 38.01, Code of Criminal Procedure, as amended by this Act. On the expiration of a term under former Subdivision (1) or (2), Subsection (a), Section 3, Article 38.01, Code of Criminal Procedure, as that law existed immediately before the effective date of this Act, the governor shall appoint a person to fill each vacancy in accordance with Subdivision (1), (2), (3), (4), (5), or (6), Subsection (a), Section 3, Article 38.01, Code of Criminal Procedure, as amended by this Act, as applicable.

SECTION 8. Not later than December 1, 2014, the Texas Forensic Science Commission shall submit the first annual report required by Section 8, Article 38.01, Code of Criminal Procedure, as added by this Act.

SECTION 9. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as

provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2013.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 1238 passed the Senate on April 4, 2013, by the following vote: Yeas 30, Nays 0; and that the Senate concurred in House amendment on May 20, 2013, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

I hereby certify that S.B. No. 1238 passed the House, with amendment, on May 17, 2013, by the following vote: Yeas 141, Nays 0, two present not voting.

Chief Clerk of the House

Approved:

Date

Governor

EXHIBIT B

FY 2014 BUDGET STATUS REPORT 10/10/2013

Current Balance			**$ 279,268.00**
Local funds+			*$ (2,744.87)*
Anticipated Expenditures through 8/31/14			
Travel - Full FSC Meetings			
est. $400 per mbr. X 9 X 4 meetings			*$ (14,400.00)*
Travel/Conference/Training Fees - Staff			*$ (5,000.00)*
Meeting Room/Recording Costs - Full FSC Meetings			
4 meetings			*$ (11,418.20)*
Supplies (conferences, office, general)			
			$ (5,000.00)
IT Services			*$ (4,932.00)*
Website Design and Maintenance			*$ (11,760.00)*
General Operating Expenses (copier, phone, internet, newspaper other utilities)			*$ (15,140.00)*
Mailing/Fedex			*$ (1,300.00)*
Planned Forensic Development			
Stakeholder Roundtables	*Travel Fees for Moderators/Presenters*	$500/moderator	*$ (5,000.00)*
Lab Manager Bootcamp	*Meeting Space/Technology*		*$ (5,000.00)*
	Overnight rooms		*$ (1,100.00)*
Other Forensic Development (Certification, Training, etc.)			$ (190,000.00)

FY 2014 BUDGET STATUS REPORT 10/10/2013

Miscellaneous Expenses			*$ (6,000.00)*
Projected Balance/Unexpended FY13 Funds			
			$ 472.93

EXHIBIT C

TFSC Complaint Assignment Table

Date	Complaint Name, Agency	Forensic Analysis	Laboratory or Other Entity	Case #	Status (A-Accepted, R=Rejected, P=Pending)	Investigative Panel Participants (*=Chair)	Final Report Released to public and all interested parties (Y/N), DATE, Notes
8/13/08	Willingham, IP	Arson	State Fire Marshal's Office, City of Corsicana	09-01	A	Kerrigan, Bradley, Peerwani, Evans	Y: 4/15/11, 10/28/11
8/13/08	Moon, IP	Serology	DPS (El Paso)	09-02	A	Eisenberg, Evans, Farley	Y: 9/9/11
10/6/08	Seitz	Serology, Ballistics, Autopsy	SWIFS	09-03	R juris (D)		
10/13/08	Padilla	DNA	SWIFS	09-04	R juris (D)		
9/13/09	Garrett	Serology	Fort Worth PD	09-06	R juris (D)		
9/27/08	Winland	Trace evidence, Firearms	Houston PD Crime Lab	09-08	R juris (D)		
12/12/08	Wilson	Autopsy	Ellis County	09-10	R Juris (Aut)		
2/17/07	Hartless	Autopsy	Lufkin ME	09-11	R Juris (Aut)(D)		
12/9/08	Resendez	Serology, Autopsy	Hidalgo County	09-12	R Juris (D)		
12/18/08	Kingerly	DNA	Houston PD Crime Lab	09-13	R Juris (SM)		
1/27/09	Hughes	Serology	Houston PD Crime Lab	09-14	R Juris (D)		
6/10/09	SWIFS Anon	General allegations re: quality assurance issues	SWIFS	09-15	R Merit		
11/6/09	Propes	Ballistics, Trace evidence	Plano PD	09-18	R Juris (D)		
9/16/09	Pherwani	Toxicology	LabCorp	09-19	R Juris (D)		
10/5/09	Robinson	Autopsy	SWIFS	09-20	R Juris (D)(SM)		
1/20/10	Hurst	Trace Evidence, DNA	DPS (unidentified location)	N/C	R lack of info		
10/11/10	Holleman	Police reporting error	Dallas County DA	N/C	R Juris (D)(SM)		
1/26/10	Cruthird	Autopsy	Unidentified	N/C	No form		
10/29/09	Easley-Moore	Figenerprint, Digital evidence, Autopsy	Austin PD Crime Lab, Travis County ME	N/C	No form		
6/9/09	Yoakum	Controlled substance	Unidentified	N/C	No form		
3/5/10	Young (PA)	Arson	Pennsylvania	N/C	R Juris		
5/5/10	Cupp	Autopsy	Harris County Medical ME	10-21	R Juris (SM)		
1/13/11	Sherrill	Police misconduct	Unidentified	N/C	No form		
6/27/10	Wilcox	DNA	Unidentified	N/C	No form		
7/8/10	APD DNA	General allegations re: quality assurance issues	Austin PD Crime Lab	10-25	A	Kerrigan, Eisenberg, Evans	Y: 4/14/11
6/30/10	Todd	DNA	SWIFS	10-22	R Juris (D)		
7/30/10	Frederick	Ballistics	Orange County Sheriff's Department	10-23	R Juris (D)		
6/28/10	Johnson	Serology	DPS (Lubbock)	N/C	R Juris (D)		
8/26/10	SWIFS - SAO	General allegations re: quality assurance issues	SWIFS	10-24	R: merit		
9/19/10	Holmes	Toxicology, Autopsy	Harris County ME	10-26	R Juris (D)(SM)		
9/28/10	Cacy	GC/MS testing for accelerant	Bexar County ME	10-27	R Juris (D)		
10/8/10	Moreno, Jason	Police misconduct	Unidentified	N/C	R Juris (SM)		
10/8/10	Moreno, Valentin	Ballistics, DNA, Fingerprinting	Unidentified	N/C	No form: D		
9/9/08	Martinez	Police misconduct	Pasadena PD	N/C	No form: SM		
11/3/10	Luera	DNA	Fort Worth PD Crime Lab	10-28	R Juris (SM-request)		
12/23/10	Weeks	DNA	DPS (Austin)	11-03	R Juris (SM-request)		
3/7/11	Whitlock	Trace evidence	SWIFS	11-01	R Juris (D)		
1/10/11	Helm	Trace evidence, Firearms	SWIFS	11-02	R Juris (D)		
3/29/11	Gibson	Arson	Waco Fire Department	11-04	Referred: IPOT		
3/23/11	Mole	Toxicology	Unidentified	N/C	Request for info		
4/19/11	Cockerham	Dog Scent Line-up	Dpty Sheriff Pikett	11-05	R Juris (SM)		
4/13/11	Caraway	Toxicology, Autopsy	Tarrant County ME	11-10	R Juris (D)(SM)		
4/18/11	Stephens - APD	General allegations re: quality assurance/human resources	Austin PD Crime Lab	11-07	R Juris (SM)		
6/27/11	Devening	Toxicology	Forensic DNA & Drug Testing Services, Inc.	11-08	Referred (SM)		
4/11/11	Cooksey	Controlled substance	DPS (Waco)	11-09	R: merit		
9/4/11	El Paso Crime Lab	Controlled substance	EPPDCL	11-11	A	Kerrigan, Eisenberg, Alpert	Y: 7/27/12
10/3/11	Mcdade	Digitial Evidence, Handwriting Analysis, Forensic Photography	FBI	11-12	Referred: IPOT		
11/30/11	Garrett (TN)	Arson	TN	N/C	R Juris (SM)		
11/14/11	Arrellano	Arson	Unidentified	N/C	Referred: IPOT		
11/10/11	Castillo	Arson	Unidentified	N/C	Referred: IPOT		
12/7/11	Florence	DNA	UNT Health Science Center	11-13	R Juris (SM)		

TFSC Complaint Assignment Table

12/22/11	Castillo	Arson	Edna, Texas Fire Department	11-14	R Juris (SM)		
2/9/12	APD Controlled	Controlled substance	APD Crime Lab	12-01	A	Barnard, Alpert, Hampton	Y: 10/5/12
2/23/12	Cruthird	Autopsy	SWIFS	12-02	R Juris (SM) (D)		
3/21/12	Melendez	DNA	McClennan County-Forensic Science Assoc. of California	12-05	R - Juris (D) and California Lab		
4/2/12	Tarrant County Disclosure	Serology	Tarrant County ME	12-03	A	Eisenberg, Lerma, Adams	Y: 10/5/12
6/29/12	Houston DPS - Controlled Substance Disclosure	Controlled substance	DPS Houston Crime Lab	12-06	A	Kerrigan, Lerma, Peerwani	Y: 4/5/13
4/23/12	Wilson	DNA	DPS - Houston	12-04	R - Juris (D)		
4/23/12	Suarez	N/A	N/A	N/C	N/C	mailed CF 04/24/2012	
4/23/12	Johnson, Errick	Autopsy	Harris County ME	N/C	N/C	mailed CF 04/24/2012	
6/1/12	Wille	General allegations: police corruption	Illinios	N/C	N/C	forwarded to Di Maio	
8/10/12	Trevino	Trace evidence, Firearms	DPS-Corpus Christi	12-07	R - Juris (D)		
8/23/12	Roberts	General Testimony	Texoma Medical Center	12-08	R - Juris (D)		
9/18/12	Desormeaux	DNA	DPS - Houston	12-09	R - Juris (D)		
10/1/12	Rodney	DNA	Ector County DA's Office	12-10	R - Juris (D)		
10/16/12	Yoakum	Controlled substance	Tarrant County ?	12-11	R - Juris (D)		
11/12/12	Hines	DNA	DPS - Austin	12-12	R - Juris (D)		
11/30/12	Ketchum, Melba	DNA	DNA Diagnostics, inc.	12-13	R - Juris (D)		
12/7/12	Moreno, Jason	DNA inquiry	None	N/C	N/C	no CF; inquiry	
1/17/13	Austin, Rhonda	Toxicology, Autopsy	NMS Lab, PA	13-01	R - Juris(D) (SM)		
2/11/13	Nulf	DNA, general allegations	SWIFS	13-02	R - Juris (D)		
4/1/13	Ellis	serology/DNA	Houston PD Crime Lab	13-03	R - Juris (D)		
5/3/13	Starkey	Controlled substance	ExperTox, Inc. Deer Park, TX	13-04	P		
5/9/13	Williams	Trace evidence, DNA	Lubbock County District Attorney's Office	13-05	R - Juris (D)		
7/8/13	Mireles	DNA, fingerprints	DPS - McAllen	13-06	Referred: IPOT		
7/31/13	Hutchinson	Controlled substance	DPS - Abilene	13-08	R - Juris (D)		
7/15/13	Hawkins	Controlled Substance	DPS - Garland	13-07	P		
8/15/13	Barganski	Autopsy	Christus Spohn Memorial Hospital - Corpus Christi	13-09	R - Juris (D)		
8/19/13	Eldridge	Hair Microscopy	SWIFS	13-10	R- Juris (D)		
8/30/13	Johnson, Cordell	Controlled substance	DPS - Austin	13-11	R - Juris (D)		
10/23/13	Gaines	Ballistics	Fort Worth PD Crime Lab	13-12	P		
11/8/13	Roche	Toxicology	Tarrant County ME/SWIFS	13-13	P		

EXHIBIT D

REPORT OF THE
TEXAS FORENSIC SCIENCE COMMISSION

EL PASO POLICE DEPARTMENT
CRIME LABORATORY INVESTIGATION

JULY 27, 2012

I. BACKGROUND

A. History and Mission of the Texas Forensic Science Commission

In May 2005, the Texas Legislature created the Texas Forensic Science Commission ("TFSC" or "Commission") by passing House Bill 1068 (the "Act"). The Act amended the Code of Criminal Procedure to add Article 38.01, which describes the composition and authority of the TFSC. *See* Act of May 30, 2005, 79th Leg., R.S., ch. 1224, § 1, 2005. The Act took effect on September 1, 2005. *Id.* at § 23.

The Act provides that the TFSC "shall 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." TEX. CODE CRIM. PROC. art. 38.01 § 4(a)(3).

The term "forensic analysis" is defined as a medical, chemical, toxicological, ballistic, or other examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action. *Id.* at art. 38.35(4). The statute excludes certain types of analyses from the "forensic analysis" definition, such as latent fingerprint analysis, a breath test specimen, and the portion of an autopsy conducted by a medical examiner or licensed physician.[1]

The FSC has nine members—four appointed by the Governor, three by the Lieutenant Governor and two by the Attorney General. *Id.* at art. 38.01 § 3. Seven of the nine commissioners are scientists and two are attorneys (one prosecutor and one criminal defense attorney). *Id.* The TFSC's presiding officer is designated by the Governor. *Id.* at § 3(c).

[1] For complete list of statutory exclusions, *see* TEX. CODE CRIM. PROC. art. 38.35(a)(4)(A)-(F) & (f).

The TFSC's policies and procedures set forth the process by which it determines whether to accept a complaint, as well as the process used to conduct an investigation once a complaint is accepted. (*See* TFSC Policies & Procedures at § 3.0, 4.0.) The ultimate result of an investigation is the issuance of a final report.

B. Attorney General Opinion No. GA-0866

On January 28, 2011, the Commission asked Texas Attorney General Greg Abbott to respond to three questions regarding the scope of its jurisdiction under its enabling statute (TEX. CODE CRIM. PROC., art. 38.01). Interested parties submitted briefs on the legal issues contained in the opinion request. On July 29, 2011, the Attorney General issued the following legal guidance:

1. The TFSC lacks authority to take any action with respect to evidence tested or offered into evidence before September 1, 2005. Though the TFSC has general authority to investigate allegations arising from incidents that occurred prior to September 1, 2005, it is prohibited, in the course of any such investigation, from considering or evaluating evidence that was tested or offered into evidence before that date.

2. The TFSC's investigative authority is limited to laboratories, facilities, or entities that were accredited by the Texas Department of Public Safety ("DPS") at the time the analysis took place.

3. The Commission may investigate a field of forensic science that is neither expressly included nor expressly excluded on DPS' list of accredited forensic disciplines, as long as the forensic field meets the statute's definition of "forensic analysis" (*See* Article 38.35 of the Act) and the other statutory requirements are satisfied.

The Commission's investigation of the El Paso Police Department Crime Laboratory ("EPPDCL") falls within its statutory jurisdiction as set forth in the Opinion for the following reasons: (1) the alleged negligence or misconduct occurred after the effective date of the Act; (2) EPPDCL is accredited by DPS; and (3) controlled substance analysis is a DPS-accredited forensic discipline.

C. Limitations of this Report

No finding contained herein constitutes a comment upon the guilt or innocence of any individual. A final report by the TFSC is not prima facie evidence of the information or findings contained in the report. TEX. CODE CRIM. PROC. art. 38.01 § 4 (e); FSC Policies and Procedures § 4.0 (d). The Commission does not currently have enforcement or rulemaking authority under its statute. The information it receives during the course of any investigation is dependent upon the willingness of concerned parties to submit relevant documents and respond to questions posed. The information gathered has not been subjected 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 subjected to formal cross-examination under the supervision of a judge. The primary purpose of this report is to encourage the development of forensic science in Texas.

II. SUMMARY OF COMPLAINT AND KEY FACTS

A. Complaint History

On September 2, 2011, the national Innocence Project ("IP") filed a complaint alleging "serious scientific negligence or misconduct" substantially affecting controlled substance analyses and reporting by the EPPDCL. (*See* **Exhibit A**.) The complaint followed on the heels of a letter and report issued by ASCLD-LAB in June 2011, in which the accrediting agency expressed serious concerns regarding EPPDCL's work and placed the laboratory on probation. In its complaint, IP asked the Commission to identify whether serious negligence or misconduct occurred, and if so to take the following steps:

(1) determine the impact; and (2) identify any corrective policies, actions, or forms of support.

On September 8, 2011, the Commission voted unanimously to investigate the complaint. Soon thereafter, the Commission began working with the EPPDCL, the American Association of Crime Laboratory Directors—Laboratory Accreditation Board ("ASCLD-LAB"), DPS, and the El Paso District Attorney's Office regarding the allegations contained in the complaint.

B. EPPDCL Accreditation History

The EPPDCL provides forensic services in breath alcohol testing and controlled substance testing. When the complaint was filed in this case, the laboratory employed three forensic examiners (one of whom served as quality manager) and one police sergeant who served as the laboratory director. Currently, the laboratory employs one forensic examiner who also serves as the quality manager, and one scientifically qualified, interim laboratory director.

EPPDCL was first accredited under the ASCLD-LAB Legacy program on March 3, 2006 for the five-year term through March 2011. In February 2011, the lab was granted a six-month extension to its Legacy accreditation to allow it to transition to accreditation under the ASCLD-LAB-*International*, or ISO program.

The ASCLD-LAB ISO-accreditation program incorporates internationally recognized conformity standards for testing and calibration, based on ISO/IEC 17025:2005. The ISO-accreditation program is generally regarded as more rigorous than the Legacy program. One of the most significant differences between the two programs for purposes of this investigation is the Legacy program only requires one on-site

assessment by ASCLD-LAB every five years, while the ISO program requires an on-site assessment every year. All laboratories accredited by ASCLD-LAB currently will move to ISO accreditation when their Legacy accreditations expire. All new accreditations are performed under the ISO program exclusively.

In preparation for the lab's transition to ISO, ASCLD-LAB conducted an on-site assessment from May 24-26, 2011. On June 27, 2011, ASCLD-LAB issued a full assessment report containing 18 corrective actions, 15 of which were classified as Level 1 corrective actions, and 3 of which were classified as Level 2 corrective actions. (*See* Assessment Reports at **Exhibit B**.) As the Commission noted throughout the investigation, it is not the number of corrective actions but rather the nature of the corrective actions that is important in determining the quality of a laboratory's work.

Some of the most significant corrective actions identified by the ASCLD-LAB lead assessor may be summarized as follows: (1) insufficient detail in spectral data to allow for independent reviewer to evaluate/interpret data; (2) criteria for identification were not acceptable for the analysis of solid dosage drugs; (3) insufficient mass spectral data raised concerns about the analytical competency of the examiners; (4) lab management failed to demonstrate that technical responsibility in the drug section has been delegated to an individual with appropriate technical training or experience; and (5) discrepancies in one analyst's proficiency test raised concerns about the competency of that analyst and the efficacy of the technical review process.

On June 27, 2011, ASCLD-LAB sent a letter to the laboratory highlighting the lead assessor's concerns and placing the laboratory on probation under the Legacy program until September 2, 2011. (*See* **Exhibit C**.) The letter required the suspension of

all instrumental analysis of casework until examiner competence could be demonstrated. It also required the external review of six months worth of casework by competent personnel from an ASCLD-LAB accredited laboratory. Finally, the laboratory was required to submit a corrective action plan to ASCLD-LAB within fourteen days. (*See* **Exhibit D**.)

In July 2011, Integrated Forensics Laboratories ("IFL") of Euless, Texas was retained to assist the laboratory in fulfilling its conditions of probation. IFL conducted technical review for six months worth of previous casework (122 cases). The technical review included examination of electronic records for administrative and quality errors, but not re-testing of the evidence. In a report issued on August 16, 2011, IFL noted numerous data and documentation problems but did not observe any false positive findings. (*See* **Exhibit E**.) For example, IFL observed poor technical review and overly complicated case notes in many files, making it difficult for an independent examiner to conduct a review of the files. Reviewers also observed a lack of consistent policy and reporting of subsampling, and the incorrect "unconfirmed" de facto identification of non-controlled substances in exhibits.

On September 2, 2011, ASCLD-LAB extended EPPDCL's probation until December 31, 2011. (*See* **Exhibit F**.) ASCLD-LAB allowed EPPDCL to resume instrumental analysis, subject to 100% external review (by a controlled substance proficiency tested examiner from an ASCLD-LAB accredited facility). From September-November 2011, IFL conducted technical review for all cases generated by the laboratory. ASCLD-LAB requested a report on the results of that review by December 5, 2011.

In August 2011, EPPDCL submitted an appeal for five of the corrective actions issued by the ASCLD-LAB lead assessor in his June 2011 report. On October 19, 2011, ASCLD-LAB sustained two of the appeals and denied three. The Board also added one additional corrective action. (*See* **Exhibit G**.)

On December 4, 2011, IFL management issued a report summarizing the results of a 10-day site visit and technical review for the period from September-November, 2011. (*See* **Exhibit H**.) In addition to extensive on-site training of examiners, IFL reviewed 79 cases, revised EPPDCL's standard operating procedures, removed one instrument from use, recommended the removal of an examiner from casework, recommended hiring a "technically qualified" laboratory director, encouraged management to expose analysts to other laboratories and training programs, and recommended re-testing of cases worked by the removed analyst. IFL also recommended the casework of the remaining two examiners be subject to 100% technical review while the laboratory searched for a technically competent laboratory director.

On December 23, 2011, ASCLD-LAB sent a letter to EPPDCL extending the lab's Legacy accreditation until April 6, 2012 and lifting the sanction of probation. (*See* **Exhibit I**.) On March 26, 2012, ASCLD-LAB granted ISO accreditation to EPPDCL. (*See* **Exhibit J**.)

III. TFSC INVESTIGATION

A. Statutory Requirement for Written Report

An investigation under the TFSC's enabling statute "must include the preparation of a written report that identifies and also describes the methods and procedures used to identify: (A) the alleged negligence or misconduct; (B) whether the negligence or

misconduct occurred; and (C) any corrective action required of the laboratory, facility, or entity." *Id.* at 4(a)(3)(b)(1). A TFSC investigation may include one or more: (A) retrospective reexaminations of other forensic analyses conducted by the laboratory, facility, or entity that may involve the same kind of negligence or misconduct; and (B) follow-up evaluations of the laboratory, facility, or entity to review: (i) the implementation of any corrective action required . . . . ; or (ii) the conclusion of any retrospective reexamination under paragraph (A). *Id.* at 4(a)(3)(b)(2).

B. TFSC Investigative Methods and Procedures

The TFSC's initial investigation consisted of three main phases: (1) document collection; (2) document review; and (3) interviews of laboratory personnel and management. Commission staff also consulted extensively with the Executive Director of ASCLD-LAB and the Deputy Assistant Director of DPS, and maintained ongoing contact with the El Paso County District Attorney's Office and the complainant. As a result of the initial investigation, the Commission made numerous recommendations at its January 13, 2012 meeting. (*See* **Section D** below).

1. Document Review

Commission staff began collecting and reviewing documents in September 2011. The EPPDCL was extremely responsive and provided all requested documents quickly. From September 2011 to the writing of this report, Commission staff reviewed thousands of pages of documents provided by EPPDCL, and made numerous follow-up inquiries to documents received. A list of documents provided to the Commission as part of the initial collection and review phase may be found at **Exhibit K**.

2. Interviews of EPPDCL Analysts and Management

On December 13, 2011, Dr. Sarah Kerrigan (Chair of the EPPDCL Investigative Panel) and Lynn Robitaille (Commission General Counsel) traveled to El Paso to conduct interviews of laboratory management and forensic analysts. Dr. Kerrigan and Ms. Robitaille also met with District Attorney Jaime Esparza and his staff. Commissioner Richard Alpert joined the meeting with the District Attorney via teleconference. The EPPDCL Investigative Panel (Kerrigan, Alpert, Eisenberg) also held non-deliberative telephone conferences periodically for the purpose of ensuring necessary information was gathered from EPPDCL, ASCLD-LAB and DPS in a timely manner.

C. Observations

The Commission's interviews at EPPDCL yielded numerous observations, which may be divided roughly into the following subjects: (a) August 2010 proficiency exam; (b) scientific leadership and authority of quality manager; and (c) sufficiency of spectral data, technical review process and analyst competence.

As a threshold matter, the on-site visit indicated that examiners were committed to good science and extremely eager to improve their work. Management also expressed a strong desire to take the corrective action needed to remedy the situation in the laboratory. The Commission commends the laboratory and EPPD management for their openness and willingness to respond to the various corrective actions suggested by ASCLD-LAB and the Commission. The Commission also commends EPPD leadership for their decision to alert the public regarding the laboratory's probation by posting the June ASCLD-LAB letter and assessment report on their website. The Commission

encourages all crime laboratories in Texas to embrace a similar commitment to transparency.

1. August 2010 Proficiency Exam

In August 2010, one of the EPPDCL analysts completed a standard proficiency examination. The proficiency examination was *not* a blind examination; the examiner was aware she was completing a proficiency test. The analyst performed 44 injections of a white powder sample into the GC/MS instrument, and 43 of the 44 results were negative. However, she reported the result as positive for cocaine, relying on the single positive run. The original sample was re-tested by another examiner—the same examiner who performed the technical review in the case. His result was negative.

The three EPPDCL examiners discussed the discrepant findings, and the quality manager expressed concern to the laboratory director that the sole positive GC/MS run was likely attributable to a switched sample or contamination from a previously run case. Nevertheless, the lab director instructed the technical reviewer to re-run what remained of the sample used by the analyst to reach the positive finding, which of course tested positive. The director then decided to report the result as positive, which was incorrect. This decision overrode the initial negative finding by the technical reviewer as well as concerns expressed by the quality manager regarding the possibility of contamination and/or switched sample in the single positive run, thus raising serious concerns about lack of scientific leadership in the laboratory. In addition, the test itself raised fundamental concerns regarding the competency of the analyst who performed it.

2. Scientific Leadership and Authority of Quality Manager

When ASCLD-LAB first accredited the laboratory in March 2006, the inspection report indicated that "responsibilities and authority [for the quality manager] were not clearly defined or understood. . . ." This dynamic was still evident to a large degree during the Commission's interviews in December 2011, though analysts expressed optimism regarding positive changes implemented by IFL, including much greater authority for the quality manager.

Until January 2012, EPPDCL was directed by a police sergeant with little scientific education or training. The sergeant had ultimate decision-making authority in all matters affecting the laboratory. As ASCLD-LAB Executive Director Ralph Keaton explained during the Commission's January 2012 meeting, accreditation standards do not require that a laboratory director have scientific education or training. However, in the absence of a scientifically qualified director, there must be a scientifically competent technical lead to provide guidance and make decisions when necessary. This role is often filled by the quality manager. Under such a scenario, the quality manager must have the authority to make technical determinations when questions arise. One of the most obvious deficiencies in the laboratory during the five-year period from 2006 to 2011 was a lack of authority on the part of the quality manager. The laboratory director was unable to adequately discern key analytical information needed for decision-making in challenging situations like the proficiency test example, and did not always defer to the quality manager in those situations.

In addition, the Commission learned during interviews that before failing her August 2010 proficiency test, the analyst in question was: (1) signed off to perform independent casework; (2) authorized to perform technical review; and (3) assumed the

role of quality manager, all within a relatively short time period. Though there appears to have been some confusion regarding who served in the quality manager role during that period, the analyst believed she served as quality manager shortly after being authorized to perform independent casework. This dynamic is inconsistent with the process used in most accredited crime laboratories to clearly identify an appropriately qualified individual to perform the role of quality manager, and provides another example of a lack of scientific leadership and lack of exposure to commonly accepted principles and practices.

3. Sufficiency of Spectral Data, Technical Review and Analyst Competence

Another concern expressed in EPPDCL's March 2006 inspection report (**Exhibit O**) was that spectra in the case file was insufficient to support the identification made by the examiners. Further, the report noted the laboratory did not have a system of technical review for instrumental casework to ensure the conclusions of its examiners were reasonable and within the constraints of scientific knowledge. Finally, the report noted the controlled substance examiners did not have a firm understanding of the instruments, methods and procedures used, or the interpretation of data for samples other than marijuana. *During the June 2011 ASCLD-LAB assessment, the most critical corrective actions involved precisely the same issues.*

Based on the similarities between the 2006 and 2011 assessments, the Commission was concerned that systemic deficiencies had persisted in the laboratory over a five-year period. Because ASCLD-LAB only conducted on-site assessments every five years under the Legacy program, it was easy for these issues to go undetected. Moreover, in response to the original assessment in 2006, laboratory management hired a

consultant from the University of Texas at El Paso to advise the laboratory on addressing the corrective actions. In retrospect, it appears the consultant made recommendations that may have been better suited to university research than a crime laboratory setting. For example, the consultant recommended EPPDCL purchase an alternate (ion trap) GC/MS with notably different features, over the existing (quadrupole) system. As IFL noted in its December report, the differences between the two GC/MS systems created significant operational difficulties in the laboratory. IFL recommended the alternate (ion trap) GC/MS be taken out of commission in December 2011. This issue was also addressed in the subsequent DPS Audit, which commented specifically on the use of an instrument not typically used for forensic drug analysis, and one that did not facilitate inter-laboratory comparisons, collections/libraries, and comparison of results from other forensic laboratories (*See* **Exhibit M**).

In addition, the training modules and standard operating procedures created in 2006 did not provide sufficient clarity regarding the quality of spectral data needed in the file to support drug identifications, the reporting of sub-sampling or the confirmation of non-controlled substances in exhibits. These shortcomings have been a main focus of ongoing corrective work in the laboratory. Additional recommendations regarding quality of the spectral data were also made by DPS during its audit of the laboratory, as discussed below.

Because the laboratory is relatively small and none of the examiners had forensic experience before working at the EPPDCL, they were unable to recognize needed improvements in the areas described above. Though they attended occasional training outside the laboratory, they deferred to the standard operating procedures and established

training modules developed by the consultant at the University of Texas at El Paso, and approved by the EPPDCL. As further discussed below, the laboratory has since made measurable improvements with respect to analyst understanding of the instruments, methods and procedures used, and the interpretation of data.

D. Initial TFSC Recommendations

At its January 13, 2012 meeting, the Commission made five recommendations to EPPDCL to address the concerns cited above. (*See* **Exhibit L**). They included the following:

1. By February 7, 2012, the Texas Department of Public Safety ("DPS") will conduct an audit of the EPPDCL, including but not limited to: (a) technical and administrative review of every controlled substance case processed by EPPDCL since November 1, 2011; (b) interviews with each laboratory employee, ensuring new policies and procedures have been implemented and are understood by the examiners; and (c) any other applicable audit standards DPS would typically utilize when conducting an internal audit of a DPS system laboratory.

2. By April 6, 2012, DPS will re-test every controlled substance analysis performed by analyst Sifuentes, giving priority to the 60 cases on the DPS list with the greatest possible impact.

3. Within seven days, the City of El Paso will retain a qualified full-time interim laboratory director for EPPDCL until a permanent qualified laboratory director is hired. The hiring of a permanent qualified laboratory director shall be accomplished by April 6, 2012 (the expiration date for EPPDCL's ASCLD-LAB Legacy accreditation).

4. The interim laboratory director will conduct technical and administrative review of all casework performed during his or her tenure.

5. The EPPDCL will provide periodic progress reports to the Commission regarding the hiring of the permanent qualified laboratory director.

The EPPDCL responded proactively to all recommendations made by the Commission. First, the laboratory contracted with IFL to retain Ron Fazio as its interim,

full-time laboratory director. Mr. Fazio has worked diligently with the remaining EPPDCL examiners to make significant improvements in the laboratory's policies and procedures and to address the other issues of concern raised by ASCLD-LAB and the Commission. The City of El Paso posted an opening for the laboratory director position, though the department has yet to identify a qualified director to fill the position. Mr. Fazio will remain as full-time, interim director until the position is filled permanently or until the City identifies another cost–effective alternative, such as outsourcing the testing to another ASCLD-LAB accredited laboratory in Texas. The interim director continues to conduct all technical and administrative review of casework, and EPPD management has provided periodic updates to the Commission regarding the laboratory's status.

E. Retrospective Re-Analysis of Cases and DPS Audit

Two of the recommendations listed in the Commission's January 18, 2012 letter involved the assistance of DPS, as follows:

1. Retrospective Re-Analysis of Cases

The DPS laboratories in El Paso and Midland performed re-testing on 100 cases in which instrumental analysis was performed. This group represented all non-marijuana drug cases worked by the analyst who failed the proficiency test discussed above. DPS did not observe any incorrect drug identifications for any of the analyst's cases. While issues regarding evidence labeling and weights were identified and addressed by the interim director, there was no indication that the analyst misidentified any of the drugs in the cases reviewed.

2. DPS Audit

DPS conducted an on-site audit of EPPDCL from January 30, 2012 to February 2, 2012. (*See* **Exhibit M**.) During the visit, DPS conducted technical and administrative review of every controlled substance case processed by EPPDCL since November 1, 2011. DPS also conducted interviews with each laboratory employee, ensuring new policies and procedures were implemented and understood by the examiners. Emphasis was concentrated in the following areas: case documentation; quality assurance/quality control; and evidence handling. At the time of the DPS audit, the laboratory was already in the process of remediating several findings from the June 2012 ASCLD-LAB ISO assessment, and Mr. Fazio was serving as interim laboratory director.

The DPS audit report yielded six findings. Two of the findings involved minor issues in evidence handling practice that did not comply with the lab's new procedures. The laboratory addressed those issues promptly. The remaining three findings involved casework documentation issues. One involved documentation of the use of abbreviations in case notes. The auditors also noted a lack of documentation regarding extraneous and/or missing ions, and insufficient information in the case record for cases in which an FTIR instrument was used for confirmation. DPS also cited a number of cases in which the laboratory report did not reference the sampling plan/method used as required in the new procedures.

DPS concluded the remaining EPPDCL analysts had good technical skills, but would benefit from additional training in the areas of instrument troubleshooting, critical evaluation of results, and awareness/exchange of practices and processes with other forensic laboratories as well as the forensic community in general. EPPDCL addressed each of these issues with additional training and revisions to the case documentation and

procedures as appropriate. All samples identified as having poor FTIR spectra were re-analyzed via GC/MS. None produced conflicting identifications.

In the weeks following the DPS audit, DPS and the Commission requested additional case files at random from EPPDCL, to ensure issues identified regarding the quality of the data in the file had been resolved. The Commission and DPS were satisfied the issues were remedied based on the review of case folders. (*See* DPS Addendum Report at **Exhibit M**.) Moreover, during the April 2012 TFSC meeting, the lead DPS auditor expressed the opinion that the EPPDCL was currently operating within the minimum standards recommended by SWGDRUG (the Scientific Working Group for the Analysis of Seized Drugs).

F. Negligence/Misconduct Determination

The Commission's enabling statute requires it 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. TEX. CODE CRIM. PROC. art. 38.01 § 4(a)(3). The term "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. *Id.* at 38.35 (a)(4).

While the terms "professional negligence" and "professional misconduct" are not defined in the statute, the Commission has defined these terms in its policies and procedures, as follows:

> "Professional Misconduct" means, after considering all of the circumstances from the actor's standpoint, the actor, through a material act or omission, deliberately failed to follow the standard of practice generally accepted at the time of the forensic analysis that an ordinary forensic

> professional or entity would have exercised, and the deliberate act or omission substantially affected the integrity of the results of a forensic analysis. An act or omission was deliberate if the actor was aware of and consciously disregarded an accepted standard of practice required for a forensic analysis." (TFSC Policies & Procedures at 1.2.)
>
> "Professional Negligence" means, after considering all of the circumstances from the actor's standpoint, the actor, through a material act or omission, negligently failed to follow the standard of practice generally accepted at the time of the forensic analysis that an ordinary forensic professional or entity would have exercised, and the negligent act or omission substantially affected the integrity of the results of a forensic analysis. An act or omission was negligent if the actor should have been but was not aware of an accepted standard of practice required for a forensic analysis." (TFSC Policies & Procedures at 1.2.)

1. "Professional Misconduct"

At its April 13, 2012 meeting, the Commission voted unanimously that no evidence of "professional misconduct" was found during the course of the EPPDCL investigation. This conclusion was based on the following investigative components: (1) the Commission's review of thousands of pages of documents; (2) the Commission's on-site interviews of laboratory management and personnel; (3) hundreds pages of follow-up information and responses to Commission questions provided by the laboratory; (4) results of DPS re-testing of evidence; (5) results of the DPS audit; and (6) communications with ASCLD-LAB throughout the course of the investigation.

2. "Professional Negligence"

At its April 13, 2012 meeting, the Commission voted unanimously that no evidence of "professional negligence" was found during the course of the EPPDCL investigation. This conclusion was based on the following investigative components: (1) the Commission's review of thousands of pages of documents; (2) the Commission's on-site interviews of laboratory management and personnel; (3) hundreds pages of follow-up

information and responses to Commission questions provided by the laboratory; (4) results of DPS re-testing of evidence; (5) results of the DPS audit; and (6) communications with ASCLD-LAB throughout the course of the investigation.

Nevertheless, the Commission expressed significant concern regarding the lack of scientific leadership in the laboratory from 2006-2011, failure of the laboratory director to exercise judgment in deferring to the quality manager during the August 2010 proficiency exam, and a hierarchical culture that prioritized police department chain of command over scientific expertise in decision-making. These issues were most acutely demonstrated by the August 2010 proficiency test example. However, the proficiency exam did not "substantially affected the integrity of the results of a forensic analysis" as defined by the Commission's enabling statute and policies and procedures and thus does not satisfy the TFSC's current definition of "professional negligence."

Concerns regarding scientific leadership and laboratory culture have been remedied by EPPD leadership's agreement that any laboratory director (interim or permanent) will possess the scientific training and education necessary to ensure the integrity and reliability of the laboratory's work. The quality manager has also been granted the appropriate level of decision-making authority to ensure any issues are identified and addressed in a timely manner. In addition, EPPDCL has worked diligently to correct concerns regarding quality of spectral data and other quality issues raised by the June 2011 ASCLD-LAB assessment and the January 2012 DPS audit. EPPDCL also cooperated fully in adopting the recommendations made by the Commission at its January 13, 2012 meeting. For all these reasons, EPPDCL has made significant

improvements to ensure the integrity and reliability of the forensic analysis performed by the laboratory.

The Commission provides a few final recommendations to EPPDCL in Section IV below. They are designed to ensure ongoing vigilance as the laboratory moves forward.

G. Action Taken by El Paso District Attorney Jaime Esparza

The Commission commends District Attorney Jaime Esparza for his office's handling of the issues raised by the EPPDCL investigation. Prosecutors affected by challenges to the integrity and reliability of crime laboratory analysis play a critical role in ensuring appropriate stakeholders are informed of the potential scope and significance of issues raised. The Commission encourages other prosecutors facing similar factual scenarios to respond as proactively as District Attorney Esparza did in this case.

The EPPDCL informed the District Attorney that ASCLD-LAB had placed the laboratory on probation shortly after the probation letter was issued in late June 2011. On July 1, 2011, District Attorney Esparza received a list of cases worked by the EPPDCL from March 2006 (when the laboratory was first accredited) through July 2011. That list contained a law enforcement agency case number. The District Attorney immediately sent the list to the El Paso County Information Technology Department to run each law enforcement case number through the County's Justice Information Management System ("JIMS"). This process generated a report with key identification information for each case.

After receiving the information from JIMS, the District Attorney's Office researched the addresses for each defendant or defense attorney who represented a

defendant on the list. The office then drafted and mailed individual notices informing each defendant or defense attorney of the probationary status of the laboratory. The notice included a link to ASCLD-LAB's full assessment report, which was posted on the District Attorney's website.

In addition, the District Attorney's office participated actively in the Commission's site visit in December 2011, as well as Commission meetings in Austin in January and April 2012. The District Attorney also fully supported the re-testing of cases by DPS, and was extremely responsive to inquiries from the Commission throughout the course of the investigation.

IV. ADDITIONAL RECOMMENDATIONS

The Commission makes the following additional recommendations:

1. The Commission's strong preference is to have a full-time *and* 100% on-site scientifically qualified laboratory director at EPPDCL. While the City continues its search for a permanent director, EPPDCL should continue to retain a scientifically qualified interim director. The current interim director spends 50% of his time on-site in the laboratory; the Commission believes any subsequently retained interim or permanent director should be on-site 100% of the time. The Commission recognizes this recommendation may be rendered moot if the City decides to outsource to an ASCLD-LAB accredited laboratory instead of continuing in-house testing.

2. Before a laboratory report is issued in any case, the scientifically qualified laboratory director must perform technical review of the case. This process is already documented in the laboratory's operating procedures and should not be changed.

3. The Commission strongly supports an enhanced surveillance visit to be conducted by ASCLD-LAB within one year of the date on which ISO accreditation was granted in March 2012. EPPDCL should send a copy of any report generated by ASCLD-LAB to the Commission.

4. EPPDCL should continue communicating any changes in personnel, actions by ASCLD-LAB, or other material status changes to the Commission as they occur.

EXHIBIT E

REPORT OF THE
TEXAS FORENSIC SCIENCE COMMISSION

AUSTIN POLICE DEPARTMENT
CRIME LABORATORY
CONTROLLED SUBSTANCE INVESTIGATION

OCTOBER 5, 2012

I. BACKGROUND

A. History and Mission of the Texas Forensic Science Commission

In May 2005, the Texas Legislature created the Texas Forensic Science Commission ("TFSC" or "Commission") by passing House Bill 1068 (the "Act"). The Act amended the Code of Criminal Procedure to add Article 38.01, which describes the composition and authority of the TFSC. *See* Act of May 30, 2005, 79th Leg., R.S., ch. 1224, § 1, 2005. The Act took effect on September 1, 2005. *Id.* at § 23.

The Act requires the TFSC 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." TEX. CODE CRIM. PROC. art. 38.01 § 4(a)(3). The Act also requires the TFSC to develop and implement a reporting system through which accredited laboratories, facilities, or entities may report professional negligence or misconduct, *and* require all laboratories, facilities, or entities that conduct forensic analyses to report professional negligence or misconduct to the Commission. *Id.* at § 4(a)(1)-(2).

The term "forensic analysis" is defined as a medical, chemical, toxicological, ballistic, or other examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action. *Id.* at art. 38.35(4). The statute excludes certain types of analyses from the "forensic analysis" definition, such as latent fingerprint analysis, a breath test specimen, and the portion of an autopsy conducted by a medical examiner or licensed physician.[1]

[1] For complete list of statutory exclusions, *see* TEX. CODE CRIM. PROC. art. 38.35(a)(4)(A)-(F) & (f).

The statute does not define the terms "professional negligence" and "professional misconduct," though the Commission has defined those terms in its policies and procedures. (TFSC Policies & Procedures at 1.2.) The Commission also released additional guidance for accredited crime laboratories regarding the categories of nonconformance that may require mandatory self-reporting; this guidance is provided with the self-disclosure form located on the Commission's website at http://www.fsc.state.tx.us/documents/LABD.pdf.

The FSC has nine members—four appointed by the Governor, three by the Lieutenant Governor and two by the Attorney General. *Id.* at art. 38.01 § 3. Seven of the nine commissioners are scientists and two are attorneys (one prosecutor and one criminal defense attorney). *Id.* The TFSC's presiding officer is designated by the Governor. *Id.* at § 3(c).

The TFSC's policies and procedures set forth the process by which it determines whether to accept a complaint, as well as the process used to conduct an investigation once a complaint is accepted. (*See* TFSC Policies & Procedures at § 3.0, 4.0.) The ultimate result of an investigation is the issuance of a final report. *Id.*

B. Attorney General Opinion No. GA-0866

On January 28, 2011, the Commission asked Texas Attorney General Greg Abbott to respond to three questions regarding the scope of its jurisdiction under its enabling statute (TEX. CODE CRIM. PROC., art. 38.01). Interested parties submitted briefs on the legal issues contained in the opinion request. On July 29, 2011, the Attorney General issued the following legal guidance:

1. The TFSC lacks authority to take any action with respect to evidence tested or offered into evidence before September 1, 2005. Though the TFSC has general authority to investigate allegations arising from incidents that occurred prior to September 1, 2005, it is prohibited, in the course of any such investigation, from considering or evaluating evidence that was tested or offered into evidence before that date.

2. The TFSC's investigative authority is limited to laboratories, facilities, or entities that were accredited by the Texas Department of Public Safety ("DPS") at the time the analysis took place.

3. The Commission may investigate a field of forensic science that is neither expressly included nor expressly excluded on DPS' list of accredited forensic disciplines, as long as the forensic field meets the statute's definition of "forensic analysis" (*See* Article 38.35 of the Act) and the other statutory requirements are satisfied.

The Commission's review of the Austin Police Department Crime Laboratory ("APDCL") complaint falls within its statutory jurisdiction as set forth in the Opinion for the following reasons: (1) the forensic analyses under review occurred after the effective date of the Act; (2) APDCL is accredited by DPS; and (3) controlled substance analysis is a DPS-accredited forensic discipline. Any subset of allegations made within the broader APDCL complaint falling outside the scope of the Commission's jurisdiction are noted herein.

C. Limitations of this Report

No finding contained herein constitutes a comment upon the guilt or innocence of any individual. A final report by the TFSC is not prima facie evidence of the information or findings contained in the report. TEX. CODE CRIM. PROC. art. 38.01 § 4 (e); FSC Policies and Procedures § 4.0 (d). The Commission does not have enforcement or rulemaking authority under its statute. The information it receives during any investigation is dependent upon the willingness of concerned parties to submit relevant documents and respond to questions posed. The information gathered has not been subjected 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 subjected to formal cross-examination under the supervision of a judge. The primary purpose of this report is to encourage the development of forensic science in Texas.

II. SUMMARY OF COMPLAINT AND KEY FACTS

A. Complaint History

The complaints in this case are related to concerns raised by two parties regarding the integrity and reliability of the forensic analysis performed by the drug chemistry section of the Austin Police Department Crime Laboratory ("APDCL"). The first complaint was submitted by Debra Stephens, a former employee of the drug chemistry section of the Austin Police Department Crime Laboratory ("APDCL") and the second by Integrated Forensic Laboratories, Inc. ("IFL") a private accredited laboratory in Euless, Texas that worked three cases for defense counsel behind the APDCL. Because the complaints involve concerns regarding the same forensic discipline in the laboratory, the Commission consolidated them for purposes of this report. However, the issues raised by Ms. Stephens are independent from concerns raised by IFL. Each complaint is reviewed in turn below.

1. Complaint Filed by Debra Stephens

On December 27, 2011, Debra Stephens, a former employee in the drug chemistry section of the APDCL, submitted a letter to Travis County District Attorney Rosemary Lehmberg, in which she raised significant concerns about APD controlled substance cases "being analyzed without regard to proper laboratory procedures and without regard to policies required under the accreditation inspection guidelines." In the letter, Ms. Stephens cited 23 specific cases in which she alleged results were issued without regard to laboratory procedure. (*See* **Exhibit A**.)

Ms. Stephens previously filed a complaint with the Commission in April 2011, outlining various broad-based quality concerns and personnel issues, which she argued led to her wrongful termination. On September 8, 2011, the Commission dismissed Ms. Stephens'

original complaint because it did not specify an allegation of negligence or misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by the laboratory, as required by the Commission's enabling statute.

On January 13, 2012, the Commission voted to re-open Complaint #11-07, in light of the new information submitted by the complainant to the Travis County District Attorney in December 2011. On March 9, 2012, Ms. Stephens submitted an additional letter describing concerns regarding the laboratory, including allegations regarding laboratory security and alleged cheating on a proficiency exam. (*See* **Exhibit B**.) On February 28, 2012, she submitted responses to a DPS audit and statements made by the APDCL manager during a TFSC Complaint Screening Committee meeting. (*See* **Exhibit C.**) The Commission also solicited feedback from the APDCL regarding the allegations filed by Ms. Stephens. (*See* **Exhibit D**.)

2. Complaint Filed by IFL Laboratories, Inc.

In February 2012, Commission staff received a copy of an email sent by IFL to ASCLD-LAB Executive Director Ralph Keaton raising serious concerns regarding court-ordered re-testing of three APD controlled substance cases. (*See* **Exhibit E.**). Commission staff requested that IFL submit a complaint form so the issues raised could be reviewed formally by the Commission. IFL submitted a complaint form on February 8, 2012. IFL was hired by defense counsel in three cases to conduct independent testing of controlled substance evidence worked by the APD lab. IFL expressed the following concerns regarding the three cases:

(1) *Crack cocaine case* (IFL 1108165/APD L10-12068): IFL alleged that APDCL's results were inconsistent with previous results reported by the laboratory and also

inconsistent with results reported by IFL. IFL also expressed concern that APDCL did not appear to have conducted an investigation when a significant difference in weight was noted from initial testing in October 2010 to subsequent testing in August 2011. IFL expressed doubt that a 42% reduction in evidence weight could be attributable to degradation of the sample over time, specifically the breakdown of cocaine base to benzoylecognine.

(2) *Marihuana/Tetrahydrocannabinols case* (IFL Case # 1111143/APD #L-1013202): Immediately after finishing the crack cocaine case, IFL received another case reported by APDCL. The lab reported the evidence as material other than marihuana containing tetrahydrocannabinols. In Texas, this category is a PG1 group and carries a stiffer penalty compared to marihuana, a PG3 group. On re-examination of this case, IFL determined the material was comprised almost entirely of cystolithic trichomes, non-cystolithic trichomes, and glandular trichomes. IFL raised concerns regarding the discrepancy between reporting "marihuana" vs. "material other than marihuana containing tetrahydrocannabinols." Initially, IFL was concerned the discrepant results indicated the material may not have been properly examined by APDCL. After learning about differences in the way crime laboratories in Texas report material with these characteristics (differences not attributable to laboratory error), IFL asked the Commission for guidance and further clarification regarding the two categories to encourage consistency from laboratory to laboratory across Texas.

(3) *IFL Case #XXXXXXXX (redacted case number/pending criminal case):* IFL received a court-ordered request to re-weigh a large number of MDMA tablets. However, APDCL cut the tablets in half and sent only half of the tablets to IFL. APDCL claims standard operating procedure was to retain half of the exhibit, in case there is a disagreement with the defense laboratory regarding results. IFL asserted this was inconsistent with the

court order and the prior practice of APDCL, and IFL was unable re-weigh the tablets per the court order because only half of the evidence was sent.

On April 13, 2012, the Commission voted to include the IFL concerns in its review of Ms. Stephens' complaint. APDCL submitted a response to IFL's allegations on February 15, 2012. (*See* **Exhibit F**.)

III. INVESTIGATIVE ACTIVITIES

Due to the potentially serious nature of the allegations raised in this complaint, this investigation involved the Department of Public Safety and the TFSC at the state level, as well as ASCLD-LAB, the APDCL's national accrediting body. Involvement by DPS was limited to an initial audit of documentation for the 23 cases cited by Ms. Stephens in her complaint, though the TFSC kept DPS apprised of further investigative work due to DPS' role as the statewide accrediting authority for APDCL. The TFSC and ASCLD-LAB conducted independent investigations of the APDCL because the objectives of ASCLD-LAB and the TFSC are distinct. While ASCLD-LAB focuses on measuring APDCL compliance with its own standard operating procedures and applicable accreditation standards, the TFSC is charged with reviewing and assessing allegations of negligence and misconduct, and recommending re-analysis and corrective action as necessary to ensure the public trust in the integrity and reliability of work performed by the APDCL. To minimize disruption in the laboratory, the TFSC and ASCLD-LAB conducted on-site interviews of analysts and lab management during the same two-day window from June 7-8, 2012.

A. Initial Review: DPS Audit of Cases Raised in Stephens Complaint

In January 2011, Travis County Assistant District Attorney Buddy Meyer asked the Deputy Director of the Department of Public Safety to conduct an audit of the 23 cases cited

by Ms. Stephens in her complaint. DPS complied with the request. On January 30, 2012, Deputy Director Pat Johnson issued a final report for these cases. (*See* **Exhibit G**.)

The scope of DPS' review was limited to examination of documents contained in the case file to ensure the data supported the conclusions reached in the laboratory reports. DPS concluded that the preliminary results were supported by subsequent laboratory testing in all but one case. The exception was case L-1000034, in which the compound originally reported to the officer (quetiapine) was determined in supplemental testing not to be present. *Id.* However, this compound was not a controlled substance and therefore did not impact the outcome of the criminal case.

However, of the 23 cases examined, there were seven in which the preliminary results were issued to the officer but not recorded in the lab's electronic system (LIMS) until after the report was issued. Handwritten notes used to conduct the preliminary testing in this group of cases were disposed of once the data was entered in the LIMS and thus are not available in the case file.

Of the 23 cases, five involved marihuana samples (L-0900075, L-0900078, L-0905372, L-1001182, L-1001185), one involved cocaine (items #1-10 on case L-10001183) and one involved phencyclidine (L-1006342).

In all other cases, either the data was entered into the LIMS before preliminary results were issued to the officer or the GC/MS run shows the instrumental analysis was performed before the preliminary results were issued to the officer.

DPS also noted that in eight of the cases, while sufficient analytical data was recorded before release of preliminary results, the weights of the exhibits on which the preliminary

results were issued were not recorded in the LIMS until after the preliminary results were released.

DPS concluded that for cases in which preliminary results and weights were issued to the officer but not recorded until later, the lab did not meet ASCLD-LAB Legacy accreditation standard 1.4.2.16 requiring the generation and maintenance of records to support conclusions.

On October 15, 2010, the APD crime lab officially suspended the practice of providing preliminary results to officers. The practice occurred over a two-year period from 2008-2010, and involved 534 cases. (*See* Exhibit D.)

B. TFSC Investigation

1. Statutory Requirement for Written Report

An investigation under the TFSC's enabling statute "must include the preparation of a written report that identifies and also describes the methods and procedures used to identify: (A) the alleged negligence or misconduct; (B) whether the negligence or misconduct occurred; and (C) any corrective action required of the laboratory, facility, or entity." TEX. CODE CRIM. PROC. Art. 38.091 at 4(a)(3)(b)(1). A TFSC investigation may include one or more: (A) retrospective reexaminations of other forensic analyses conducted by the laboratory, facility, or entity that may involve the same kind of negligence or misconduct; and (B) follow-up evaluations of the laboratory, facility, or entity to review: (i) the implementation of any corrective action required . . . . ; or (ii) the conclusion of any retrospective reexamination under paragraph (A). *Id.* at 4(a)(3)(b)(2).

2. TFSC Investigative Methods and Procedures

In accordance with TFSC Policies and Procedures §4.0, after the TFSC votes to accept a complaint for investigation, the TFSC Chair nominates three Commissioners to an investigative panel subject to the approval of the full TFSC. The panel coordinates the complaint investigation. At the TFSC's April 13, 2012 quarterly meeting, members voted to establish an investigative panel for the APD disclosure consisting of Mr. Richard Alpert (Chair), Dr. Jeffrey Barnard, and Dr. Jean Hampton.

The TFSC's investigation consisted of four main phases: (1) document collection; (2) document review; (3) interviews of the complainant, laboratory personnel and management; and (4) retrospective re-examination of evidence. Commission staff also consulted extensively with the Executive Director of ASCLD-LAB and the Deputy Assistant Director of DPS, and maintained periodic contact with the Travis County District Attorney's Office and the complainant.

a. Document Collection and Review

Commission staff began collecting and reviewing documents in December 2011. The APDCL was responsive and provided requested documents in a timely manner. From December 2011 to the writing of this report, Commission staff reviewed thousands of pages of documents provided by APDCL, the complainants (Ms. Stephens and IFL) and DPS, and made numerous follow-up inquiries to documents received.

b. Interviews of Complainant, APDCL Analysts and Management

On May 11, 2012, Commission General Counsel Lynn Robitaille and Commission Coordinator Leigh Tomlin met with the complainant, Debra Stephens, to review the substance of her complaint. This meeting assisted staff in preparing a list of questions for the

on-site interviews, and provided the complainant with an opportunity to explain her concerns in greater detail.

On June 7-8, 2012, Commissioner Richard Alpert, General Counsel Lynn Robitaille and Patti Williams, a controlled substance subject-matter expert and case manager from ASCLD-LAB, traveled to the APDCL to meet with analysts and management regarding the issues raised by the complaints. The investigative team toured the laboratory, conducted interviews with each analyst, and spent extensive time reviewing cases at random in LIMS. Observations from the site visit are discussed in detail below. The team met with the following employees during the course of the two days: Lab Manager William Gibbens, Quality Manager Tony Arnold, Section Supervisor Gloria Rodriguez; Senior Analyst Glen Harbison; Analyst Ralph Salazar; Analyst Chris Kiyak; Analyst Quynh Nguyen; and Analyst Katherine Sanchez.

c. Case Re-Examination by NMS Labs

At the April 13, 2012 meeting, the Commission determined the most prudent course of action would be to re-test evidence in the 23 cases cited by Ms. Stephens in her complaint. After the meeting, the APDCL investigative panel researched various options for re-testing the evidence. DPS Deputy Director Pat Johnson requested that DPS *not* be sent the evidence because the agency is overloaded with other cases. The panel then sought the assistance of the United States Drug Enforcement Agency's ("DEA") Southwestern regional lab in Dallas. Though the laboratory director was extremely receptive to assisting the Commission, he was required to consult his supervisors at DEA headquarters in Washington, D.C. The DEA Chief Counsel's Office denied the Commission's request for assistance with re-testing, citing a general policy against performing such services. Commission staff requested a letter from

the Chief Counsel's Office that would explain the policy, but were informed that a letter would not be provided.

The panel then researched other laboratories on the DPS accreditation list and determined that NMS Labs in Willow Grove, Pennsylvania would be a strong choice due to the timeliness with which it is able to conduct re-testing and its independent location outside of Texas. APDCL agreed with this approach and APD leadership agreed to pay for the re-testing. The Travis County District Attorney's Office also supported re-testing. NMS Labs re-tested all non-marihuana evidence in the cases cited by Ms. Stephens in her complaint. *In every case, the re-testing confirmed the identification of the controlled substance(s) originally reported.* (*See* **Exhibit H**.)

3. ASCLD-LAB Investigation

ASCLD-LAB conducted investigations of both the Stephens and IFL complaints. As stated above, the June 7-8, 2012 onsite visit by the Commission was conducted collaboratively with Patti Williams, the ASCLD-LAB case manager assigned to the investigation. Ms. Williams released two reports to the ASCLD-LAB Board addressing the IFL and Stephens complaints, respectively.

The Executive Director of ASCLD-LAB released a report addressing issues raised by IFL on June 1, 2012. (*See* **Exhibit I**.) The Board concluded the following:

> (1) With respect to IFL's concerns regarding the crack cocaine case, the differences reported by the analysts are explainable but were not appropriately detailed in the case file documentation.

(2) With respect to the "marihuana" vs. "tetrahydrocannabinols" analysis discrepancy, the ASCLD-LAB Board concluded the analyst did not sufficiently document the observations made during examination so that a subsequent examiner could follow the rationale used to reach the conclusion stated in the report. The Board also noted there may be a need for legal clarification as to what constitutes marihuana and/or tetrahydrocannabinols in Texas.

(3) With respect to the third allegation, the Board concluded that compliance (or lack thereof) with a court order is a legal interpretation issue and does not fall within the purview of ASCLD-LAB.

On July 24, 2012, the ASCLD-LAB Executive Director issued a draft report addressing issues raised by Ms. Stephens. (*See* **Exhibit J**.) On October 4, 2012, the ASCLD-LAB Board finalized the draft report and closed its investigation. The report concluded that the APDCL's prior practice—suspended in October 2010—of discarding handwritten notes generated during preliminary testing after entry of the information into the LIMS system, failed to comply with the requirements of criterion 1.4.2.16 of the ASCLD-LAB Legacy program. However, the Board concluded that the allegations raised by Ms. Stephens regarding erroneous results leading to false filing of charges by detectives and prosecutors, as well as allegations that results were released to law enforcement without appropriate examination and supporting data, were without merit. Though the Board concluded these allegations were without merit, Ms. Williams prepared a document for the laboratory entitled "Opportunities for Improvement," highlighting various areas in which the laboratory can improve its procedures and documentation. In addition, the ASCLD-LAB Board requested that APDCL provide a random sampling of case files in other forensic disciplines to ensure the suspended preliminary result practice discussed herein does not exist in other disciplines.

IV. TFSC OBSERVATIONS

A. Complaint Filed by Debra Stephens

The Commission's site visit on June 7-8, 2012 focused primarily on the allegations cited in Ms. Stephens' complaint, including the subsequent letter she sent on March 9, 2012 raising concerns regarding laboratory security, alleged cheating on a proficiency exam and the erroneous quetiapine result identified by DPS during its audit. A summary of observations made by the Commission is set forth below.

As a threshold matter, TFSC investigative team found the APDCL drug section analysts to be credible, open and for forthcoming throughout the course of the site visit. Management was also cooperative, providing unfettered access to the LIMS system for random audits and tracking down follow-up information to every request made by either the TFSC or ASCLD-LAB. Management stated on numerous occasions that they welcomed the visit because it gave them the opportunity to learn and to make improvements. When ASCLD-LAB or the TFSC pointed out non-conformances or concerns regarding issues cited in Ms. Stephens' complaint, management was receptive and took responsibility for the issues.

The subject areas discussed below emerged during the course of the on-site interviews. Though they do not rise to the level of negligence or misconduct as defined in the Commission's policies and procedures, in some cases they constitute ASCLD-LAB non-conformances, and in all cases they represent opportunities for improvement in the laboratory.

1. Discarding Notes From Rush Cases

From 2008-2010, the APDCL drug chemistry section engaged in a practice of communicating rush results to officers on weekends when information was needed immediately to file charges pursuant to statutory requirements in misdemeanor and felony cases. During this period, the APDCL did not have a documented procedure regarding the minimum data needed to release preliminary results, methods for communicating those results, or the retention of documentation used during the process of generating the results. Standard operating procedures simply provided that preliminary reports may be administratively reviewed by the analyst if stated explicitly in the preliminary report. Analysts followed a one-page preliminary result template containing the drug's identity and weight. The template was issued to the requesting officer until a final report was generated in the LIMS system. The Travis County District Attorney's office did not receive these preliminary results, and thus took no action based on them.

After issuing the preliminary report in a rush case, the analyst would return to work (typically on a Monday) and conduct the remaining required testing before issuing a final report. The final case record typically includes (as applicable) the preliminary result, a matrix worksheet (describing evidence, weights, color test results, instrumental techniques and conclusions) data generated by the instrument, laboratory reports and documentation of technical and administrative review.

During interviews, it was clear that before APDCL suspended the policy of issuing draft reports to officers in rush cases in October 2010, a senior APDCL analyst engaged in the practice of writing results down at the time he conducted a rush analysis and throwing his notes away after entering the information into the LIMS system later in the week. A review

of LIMS data for each case cited by Ms. Stephens in her complaint indicated this practice was isolated to one currently employed analyst. He is the most senior analyst in the laboratory apart from the section supervisor, and he was often called in to perform rush analyses on weekend. When asked why he would throw his notes away, he explained it was a "bad habit" he had developed during the transition to a paperless system, but he understands why it is a violation of ASCLD-LAB Legacy standard 1.4.2.16 and no longer engages in this practice. He also explained that for a period of time, analysts who worked rush cases on weekends did not receive any overtime pay. They typically performed the minimum amount of testing required to feel comfortable issuing a result to an officer, leaving the remaining confirmatory analyses for the following workweek.

As previously stated, the discarding of notes taken in rush cases upon entering information in the LIMS violated standard 1.4.2.16 of the ASCLD-LAB Legacy Program. While the analyst's explanation may be an honest description of the laboratory environment at the time, it is not an adequate justification for the APDCL's failure to comply with the ASCLD-LAB Legacy standard. A discussion of the Commission's deliberations regarding alleged professional negligence as applied to these facts is set forth below.

2. Substitution of Laboratory Standards for Actual Evidence

One of the points made by the Ms. Stephens was that the analyst who threw his notes away also had access to the locked drug standards and could have used those standards in rush cases for which he was unable to make a positive identification. The investigative team asked every analyst whether there was any indication of this behavior at any point during the analyst's tenure. Each analyst vehemently (and credibly) denied they would ever pull from a drug standard to make a positive identification. Results from NMS re-testing support the

assertion that drug standards were not used, since each piece of evidence tested was confirmed as consistent with the original APDCL report.

When asked whether officers ever pressure analysts to achieve certain test results, the analysts admitted they occasionally receive pressure and/or criticism from police investigators when the lab results do not turn out the way the investigator had hoped. Analysts consistently stated this dynamic arises about once or twice per year. However, each analyst was firm in his or her resolve not to be swayed by pressure from law enforcement. They also felt laboratory management supports them in resisting pressure on those rare occasions. The Commission emphasizes the importance of independence in any crime laboratory setting. As set forth in ASCLD-LAB's *Guiding Principles of Professional Responsibility for Crime Laboratories and Forensic Scientists*, forensic analysis must be based on "the evidence and reference material relevant to the evidence, not on extraneous information, political pressure, or other outside influences." (*See* **Exhibit L** at 31.)

3. Technical Review

While reviewing various cases in LIMS, the investigative team noticed the senior analyst referenced above had performed technical review on some of his own cases. Ms. Williams noted to management that this constitutes a non-conformance under ASCLD-LAB standards. The investigative team asked the quality manager why the LIMS permits an analyst to tech review his own cases. He explained there is a function in the system to prevent this but the lab disabled it to accommodate the review process in the DNA section, where each analyst is required to conduct a review of his or her own case in addition to review by another qualified analyst. As a result of this observation, APDCL management worked with the LIMS provider to remedy the issue within the LIMS system. All cases in

which the analyst performed his own technical review were re-reviewed by other analysts. It is important to note that APDCL policy only requires technical review in 75% of cases, and the laboratory met that threshold notwithstanding the non-conformances described here

4. Proficiency Test

One of the complaints noted by Ms. Stephens in her March 9, 2012 correspondence is that an analyst in the laboratory was allowed to change the results of her proficiency test after having submitted the test to the section supervisor. The analyst is no longer employed by the laboratory. During on site interviews, the section supervisor explained the analyst requested her test back before either administrative review or technical review had been completed. Because neither review had been completed, the supervisor was not concerned by the request. She provided the case folder back to the analyst but not the test sample.

After reviewing the audit trail for the test, it appears the analyst did change her proficiency test result. The correct answer for the test was "no controlled substances" for one sample and "hydrocodone" for the second sample. On May 14, 2010, the analyst initially submitted results indicating "no controlled substance" for both samples. The analyst released a final report for the proficiency test in question on May 26, 2010. In that final report, she changed the result for one of the test samples from "no controlled substance" to "hydrocodone."

ASCLD-LAB reviewed APDCL policies and procedures related to proficiency testing. Though the procedure does not state that independent analysis is a responsibility of each examiner during proficiency testing, analysts all expressed their understanding that proficiency tests should be worked independently. Every examiner denied providing assistance to the examiner in question or speaking with the examiner in question regarding

the proficiency test. ASCLD-LAB concluded that laboratory procedure does not prohibit changes to proficiency exam results before technical and administrative review, as occurred in this situation. Because this allegation is beyond the scope of the Commission's jurisdiction as set forth in the Attorney General's Opinion, the Commission refers readers to pages 7-8 of ASCLD-LAB's report at **Exhibit J** for additional information.

5. Incorrect Preliminary Results Identified by DPS Audit

As stated above, DPS noted an error in the issuance of preliminary results for one non-controlled substance (quetiapine) in case L10-00034. Quetiapine was erroneously identified by the analyst as a result of carryover from a case sample previously run by another analyst. The analyst informed the supervisor of the issue, and the error was communicated to the officer on January 6, 2010. Evidence in the case file demonstrates the examiner documented the sequence of events appropriately, informed her supervisor, notified the office and retained appropriate records. The analyst recalled the case in question during the interview and explained the process she engaged in to correct the error, inform her supervisor and the officer who submitted the evidence for testing. In its report, ASCLD-LAB observed that the laboratory missed an opportunity to use the event to create awareness about the challenges of analyzing quetiapine and its retention on the instrument (*See* **Exhibit J** at 8-10.)

6. Laboratory Security Policy Concerns

In her March 9, 2012 letter, Ms. Stephens described an incident in 2010 in which the APDCL's Quality Manager used another analyst's key to gain access to the drug chemistry section. While the Quality Manager was authorized to access the area, he did not have a personal key card for the section at the time (this issue has since been remedied). Employees

are responsible for maintaining access cards in a secure manager; using a fellow employee's access card is prohibited under APDCL policy. The Commission refers readers to page 6-7 of ASCLD-LAB's report at **Exhibit J**, as this allegation is beyond the scope of the Commission's jurisdiction as set forth in the Attorney General's Opinion.

7. Analyst Storage of Old Samples

Another allegation by Ms. Stephens is that one of the analysts stored samples of drugs that were received by the lab over the years in his personal work area. The analyst admitted this was true but it happened years ago (around 2002). He would collect unusual samples he had been given during a period when he worked for the county medical examiner. At one point before the laboratory moved into its new facility, he and the quality manager boxed the samples and sent them to evidence destruction. There is no documentation regarding the disposal. Ms. Williams agreed this was a somewhat common practice in laboratories before accreditation, but that today it would be unacceptable. This incident falls outside the scope of the Commission's jurisdiction as it occurred before September 1, 2005.

8. Strengthening of Case File Documentation

Throughout the course of the two-day visit it was apparent that though APDCL examiners were competent, credible and performed forensic analyses that met expected standards of the discipline, case file documentation and/or standard operating procedure did not always adequately explain in written form the rationales used for making certain determinations. One example is in the case of marihuana analysis, as outlined in detail by ASCLD-LAB in its report. (*See* **Exhibit I** at pages 10-11.) The investigative team emphasized the fact that as APDCL transitions to ISO accreditation, attention to detail will

become even more important. Management agreed and expressed their willingness to make the necessary improvements.

B. IFL Complaint

1. Crack Cocaine Case

The first IFL allegation related to a discrepancy in the results of a forensic analysis performed on crack cocaine. On October 7, 2010, an APDCL analyst generated a report on a substance described as "off-white rocks" with the result being cocaine, 15.24 grams net. The case notes referred to the rocks as "moist." The evidence was stored in the APD property room from November 2010 until August 9, 2011. On August 9, 2011, the evidence was pulled for viewing by defense counsel. At that point, the evidence previously described as "off-white rocks" had turned into "brown liquid sludge." Defense counsel and the Travis County District Attorney's office agreed to a re-analysis by APDCL. A second analyst generated a report indicating the presence of benzoylecognine, 8.65 grams (42% less than what was previously reported.) The case notes of the second analyst clearly document the presence of both benzoylecognine and cocaine, but only benzoylecognine was reported. Defense counsel then requested re-testing by IFL. On September 12, 2011, IFL generated a report with the result being cocaine, 4.90 grams.

IFL was concerned that cocaine was not reported by APDCL after the second test. IFL was also concerned that APDCL did not appear to investigate the loss in weight of the evidence from October 2010 to August 2011.

As ASCLD-LAB stated in its report (*See* **Exhibit I**), "reference literature and Technical Advisory Committee input support that cocaine base will break down to benzoylecognine and the exiting moistness may have accelerated the breakdown. Though

the second analyst reported benzoylecognine only, he clearly documented the presence of cocaine in the case file. He was not tasked with a special request such as 'confirm the presence of cocaine,' and his testing proceeded with the analytical scheme used for normal casework." Commissioners agree that the reference literature supports the breakdown of crack cocaine into benzoylecognine, resulting in a potentially dramatic loss in weight in some circumstances. The likelihood of weight loss is enhanced if the sample is moist, as was the situation in this case. (*Id.*)

APDCL did not have sufficient detail in the case file to describe the discrepancy between the original report (positive for cocaine) and the second report (positive for benzoylecognine) or to describe the loss in weight from the first test to the second. This is an example of an area in which APDCL can make improvements in case documentation, so that a subsequent examiner who picks up the case folder understands the rationale employed.

2. Marihuana/Tetrahydrocannabinols Case

IFL's second allegation relates to a discrepancy between the reporting of a piece of evidence as "tetrahydrocannabinols" by APDCL and "marihuana" by IFL. ASCLD-LAB concluded the APDCL analyst did not sufficiently document observations made during the examination of the sample in question to allow another analyst to know what had been observed as required by ASCLD-LAB Legacy standard 1.4.2.16. ASCLD-LAB also concluded that APDCL procedures, at the time of the original analysis, did not clearly specify the minimum requirements needed to report "tetrahydrocannabinols" vs. "marihuana."

Representatives from the ASCLD-LAB Technical Advisory Committee noted this particular analysis is becoming more difficult as examiners are faced with distinguishing between synthetic tetrahydrocannabinols and plant tetrahydrocannabinols. Guidelines for classifying marihuana in Texas are found in Title 6, Subtitle C, Chapter 481, Subchapter A, Section 481.002 of the Health and Safety Code. (*See* **Exhibit K**.)

ASCLD-LAB believes there may be a need for legal clarification as to what constitutes marihuana under Texas law, but did not feel it was appropriate for the accrediting body to determine where the line should be drawn. Commission staff also consulted with DPS on the issue, and the DPS Quality Manager suggested that it would be worthwhile to convene a task force to look at standardizing the criteria for distinguishing between "tetrahydrocannabinols" and "marihuana" in Texas. Such standardization would contribute to a more even-handed application of penalties in Texas. The Commission discusses establishment of a task force on this issue in the recommendation section below.

3. MDMA Court Order

IFL's final concern involved a perceived failure by APDCL to follow a court order instructing that MDMA tablets be released from APDCL to IFL for re-weighing. APDCL cut the tablets in half before sending them to IFL, which made it difficult for IFL to determine the weight of the evidence. The court order states, in pertinent part: "For purposes of testing and making a quantitative and qualitative analysis for the percent composition and total weight of actual substance, the Travis Co. D.A.'s Office through its agents . . . delivery to IFL of: The alleged controlled substances . . . ." APDCL's position is that when possible, the lab withholds a portion of the evidence in case questions arise later. Though APDCL will release an entire sample when necessary (such as in the case of the brown liquid sludge crack

cocaine degradation) its preference is to retain some of the sample wherever possible. There is disagreement between the parties regarding interpretation of the court order. The interpretation of a court order falls outside the scope of the Commission's jurisdiction as described in the Attorney General Opinion discussed above.

V. NEGLIGENCE/MISCONDUCT ANALYSIS

The Commission's enabling statute requires it 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. TEX. CODE CRIM. PROC. art. 38.01 § 4(a)(3). The term "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. *Id.* at 38.35 (a)(4).

While the terms "professional negligence" and "professional misconduct" are not defined in the statute, the Commission has defined these terms in its policies and procedures, as follows:

> "Professional Misconduct" means, after considering all of the circumstances from the actor's standpoint, the actor, through a material act or omission, deliberately failed to follow the standard of practice generally accepted at the time of the forensic analysis that an ordinary forensic professional or entity would have exercised, and the deliberate act or omission substantially affected the integrity of the results of a forensic analysis. An act or omission was deliberate if the actor was aware of and consciously disregarded an accepted standard of practice required for a forensic analysis." (TFSC Policies & Procedures at 1.2.)
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> "Professional Negligence" means, after considering all of the circumstances from the actor's standpoint, the actor, through a material act or omission, negligently failed to follow the standard of practice generally accepted at the time of the forensic analysis that an ordinary forensic professional or entity would have exercised, and the negligent act or omission substantially affected the integrity of the results of a forensic analysis. An act or omission was

> negligent if the actor should have been but was not aware of an accepted standard of practice required for a forensic analysis." (TFSC Policies & Procedures at 1.2.)

At its July 27, 2012 meeting, the Commission deliberated regarding a finding of negligence or misconduct before instructing staff to draft a report. Commissioners agreed the site visit and case file review did not reveal any evidence of professional misconduct as the term is defined in the Commission's policies and procedures. The one issue within the Commission's jurisdiction that could rise to the level of professional negligence was the discarding of notes by an analyst in rush cases. However, for negligence to be found, that act must "substantially affect the integrity of the results of a forensic analysis," as the term is defined in the statute. Because the NMS re-testing confirmed the results of the APDCL reports, and no report (preliminary or otherwise) was issued externally containing incorrect information (or information that would otherwise impact the report's integrity) Commissioners concluded the practice does not meet the definition of professional negligence. However, the Commission recognizes that the practice of discarding notes, (regardless of whether the notes are subsequently entered into a laboratory's electronic case management system) does not constitute "best practice" in the forensic discipline. The Commission strongly discourages forensic practitioners in Texas from engaging in this practice under any circumstances.

VI. INVOLVEMENT OF TRAVIS COUNTY D.A. AND DEFENSE BAR

The Commission stresses the importance of crime laboratory communication with affected district attorneys and law enforcement agencies when concerns arise such as those described in this report. In this case, the Travis County District Attorney posted information about the complaints on the local defense bar's blog and contacted individual attorneys in

cases for which material concerns were raised. Throughout the course of the investigation, prosecutors in the Travis County District Attorney's office maintained close contact with the Commission, requesting periodic updates to ensure compliance with any disclosure obligations to defense counsel under *Brady v. Maryland* 373 U.S. 83 (1963). District attorneys must have sufficient information to understand the nature and scope of material nonconformances in a crime laboratory so they may evaluate and attend to their prosecutorial obligations properly. The Commission encourages all Texas crime laboratories to be transparent in communicating potential concerns to prosecuting authorities, so they may in turn take proactive steps to ensure compliance with *Brady* and any other applicable legal and/or professional obligations.

VII. RECOMMENDATIONS

1. The Commission recommends that APDCL implement all improvements suggested in the June 1, 2012 and July 24, 2012 ASCLD-LAB reports and accompanying "Opportunities for Improvement" document. To the extent any report or monitoring document is created to evidence APDCL's progress with these issues, the Commission requests a copy of such documentation.

2. To address the concerns raised by IFL regarding discrepancies in identifying "marihuana" vs. "tetrahydrocannabinols" from laboratory to laboratory across Texas, the Commission will work with DPS and the Texas Association of Crime Laboratory Directors to establish an advisory board to make recommendations on this issue. The Commission will also consult with the Texas District and County Attorneys' Association and the Texas Criminal Defense Lawyers' Association to encourage their involvement in this discussion.

3. The Commission requests that APDCL notify the Commission of the results of ASCLD-LAB's inquiry into whether any other sections of the laboratory observe a similar rush case policy as the policy suspended by the drug chemistry section in October 2010.

4. The Commission requests that any corrective action taken as a result of the inquiry described in #3 above be documented and reported to the Commission.

EXHIBIT F

REPORT OF THE

TEXAS FORENSIC SCIENCE COMMISSION

TARRANT COUNTY
MEDICAL EXAMINER'S OFFICE
CRIME LABORATORY SELF-DISCLOSURE

OCTOBER 5, 2012

I. BACKGROUND

A. History and Mission of the Texas Forensic Science Commission

In May 2005, the Texas Legislature created the Texas Forensic Science Commission ("TFSC" or "Commission") by passing House Bill 1068 (the "Act"). The Act amended the Code of Criminal Procedure to add Article 38.01, which describes the composition and authority of the TFSC. *See* Act of May 30, 2005, 79th Leg., R.S., ch. 1224, § 1, 2005. The Act took effect on September 1, 2005. *Id.* at § 23.

The Act requires the TFSC 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." TEX. CODE CRIM. PROC. art. 38.01 § 4(a)(3). The Act also requires the TFSC to develop and implement a reporting system through which accredited laboratories, facilities, or entities may report professional negligence or misconduct, *and* require all laboratories, facilities, or entities that conduct forensic analyses to report professional negligence or misconduct to the Commission. *Id.* at § 4(a)(1)-(2).

The term "forensic analysis" is defined as a medical, chemical, toxicological, ballistic, or other examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action. *Id.* at art. 38.35(4). The statute excludes certain types of analyses from the "forensic analysis" definition, such as latent fingerprint analysis, a breath test specimen, and the portion of an autopsy conducted by a medical examiner or licensed physician.[1]

[1] For complete list of statutory exclusions, *see* TEX. CODE CRIM. PROC. art. 38.35(a)(4)(A)-(F) & (f).

The statute does not define the terms "professional negligence" and "professional misconduct," though the Commission has defined those terms in its policies and procedures. (TFSC Policies & Procedures at 1.2.) The Commission also released additional guidance for accredited crime laboratories regarding the categories of nonconformance that may require mandatory self-reporting; this guidance is provided with the self-disclosure form located on the Commission's website at http://www.fsc.state.tx.us/documents/LABD.pdf.

The FSC has nine members—four appointed by the Governor, three by the Lieutenant Governor and two by the Attorney General. *Id.* at art. 38.01 § 3. Seven of the nine commissioners are scientists and two are attorneys (one prosecutor and one criminal defense attorney). *Id.* The TFSC's presiding officer is designated by the Governor. *Id.* at § 3(c).

The TFSC's policies and procedures set forth the process by which it determines whether to accept a complaint, as well as the process used to conduct an investigation once a complaint is accepted. (*See* TFSC Policies & Procedures at § 3.0, 4.0.) The ultimate result of an investigation is the issuance of a final report.

B. Attorney General Opinion No. GA-0866

On January 28, 2011, the Commission asked Texas Attorney General Greg Abbott to respond to three questions regarding the scope of its jurisdiction under its enabling statute (TEX. CODE CRIM. PROC., art. 38.01). Interested parties submitted briefs on the legal issues contained in the opinion request. On July 29, 2011, the Attorney General issued the following legal guidance:

1. The TFSC lacks authority to take any action with respect to evidence tested or offered into evidence before September 1, 2005. Though the TFSC has general authority to investigate allegations arising from incidents that occurred prior to September 1, 2005, it is prohibited, in the course of any such investigation, from considering or evaluating evidence that was tested or offered into evidence before that date.

2. The TFSC's investigative authority is limited to laboratories, facilities, or entities that were accredited by the Texas Department of Public Safety ("DPS") at the time the analysis took place.

3. The Commission may investigate a field of forensic science that is neither expressly included nor expressly excluded on DPS' list of accredited forensic disciplines, as long as the forensic field meets the statute's definition of "forensic analysis" (*See* Article 38.35 of the Act) and the other statutory requirements are satisfied.

The Commission's review of the Tarrant County Medical Examiner's Crime Laboratory's ("TCMECL") self-disclosure falls within its statutory jurisdiction as set forth in the Opinion for the following reasons: (1) the incident in question occurred after the effective date of the Act; (2) TCMECL is accredited by DPS; and (3) serology and DNA testing are DPS-accredited forensic disciplines.

C. Limitations of this Report

No finding contained herein constitutes a comment upon the guilt or innocence of any individual. A final report by the TFSC is not prima facie evidence of the information or findings contained in the report. TEX. CODE CRIM. PROC. art. 38.01 § 4 (e); FSC Policies and Procedures § 4.0 (d). The Commission does not currently have enforcement or rulemaking authority under its statute. The information it receives during the course of any investigation is dependent upon the willingness of concerned parties to submit relevant documents and respond to questions posed. The information gathered has not been subjected 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 subjected to formal cross-examination under the supervision of a judge. The primary purpose of this report is to encourage the development of forensic science in Texas.

II. SUMMARY OF COMPLAINT AND KEY FACTS

A. TCMECL Disclosure #12-03 History

On March 15, 2012, the TCMECL notified the Commission by telephone about a potentially significant nonconformance in the lab's DNA section. The issue was discovered when a senior forensic biologist retrieved a sexual assault kit from storage on March 14, 2012 for the purposes of performing further testing on the kit. The evidence in the kit had already undergone initial serological screening, which included an acid phosphatase test to determine the presence or absence of spermatozoa. The senior forensic biologist retrieved the kit from storage in response to a request for additional testing by the prosecutor in the case. Upon retrieving the evidence from storage, the senior biologist noticed the seals on two of the items in the kit were not broken. This raised an immediate red flag because the analyst who conducted the serological screening indicated negative acid phosphatase results on *all* samples in a lab report issued on May 11, 2011.

The Commission's General Counsel instructed the TCMECL to complete a laboratory self-disclosure form and submit the form with relevant attachments to the Commission. The laboratory submitted its self-disclosure on April 2, 2012. (*See* **Exhibit A**.)

B. TCMECL Internal Investigation

In recognition of the potentially serious nature of the nonconformance identified by the senior biologist, the TCMECL suspended the analyst in question effective March 15, 2012, pending the results of the internal investigation. (*See* **Exhibit B** at 1.) Throughout the course of his tenure with the TCMECL, the analyst's forensic work was limited to serology screening, an example of which is acid phosphatase testing used to determine the presence or absence of spermatozoa. If spermatozoa had been identified as a result of the initial serological screening,

further DNA testing would have been performed in an attempt to identify the donor. Such testing would have been performed by a forensic biologist with appropriate training and credentials.

As noted above, the TCMECL also notified the Commission and the Tarrant County District Attorney's Office of the nonconformance on March 15, 2012. On March 23, 2012, the analyst formally resigned from his position with the TCMECL. At the time of the analyst's suspension and subsequent resignation, approximately twenty cases assigned to him were in some stage of technical or administrative review. The TCMECL re-assigned all of these cases to senior forensic biologists within the laboratory. Each senior biologist was instructed to: (1) complete the re-work of cases in progress; (2) complete the re-work of cases in the process of technical or administrative review; and (3) begin work on cases in the analyst's custody but on which work had not yet started. (*Id.* at 4.) Because the analyst in question was a serologist who only performed initial screening, and was *not* a DNA analyst, his serology duties for new cases were assigned on a rotating basis to the senior forensic biologists in the laboratory pending the hiring of a replacement.

The TCMECL immediately initiated retroactive re-examination of casework for the six-month period surrounding the analysis in question. The laboratory examined every case during the period for which it had evidence in storage. The re-examination encompassed over 100 cases (constituting over 500 items of evidence) for the period from February 11, 2011 through August 26, 2011. Testing for this group of cases was completed between March 17, 2012 and March 18, 2012. All results from the re-testing were consistent with the initial reports issued by the examiner in question. (*Id.* at 1.)

TCMECL leadership also interviewed the analyst in question. He "could not recall the specific case in which the nonconformity was discovered, and could not identify anything in the normal process that would routinely cause such nonconformity to occur." (*Id.* at 1.) In conducting its root cause analysis, the TCMECL noted the analyst was experiencing "significant distractions" in his personal life during the one-year time period during which the deviations occurred. (*Id.* at 2.) However, the analyst's inability to recall the analyses in question makes it impossible to determine whether the issues are attributable, in whole or in part, to these distractions.

C. Subsequent Phases of TCMECL Internal Investigation

While conducting the re-examination, analysts found an additional case in which the seal on an item of evidence had not been broken, despite the fact that the analyst had reported negative acid phosphatase screening results on the sample in that case. (*Id.*) Upon discovering this case, TCMECL management decided to examine the seals on all of the analyst's casework for the entire period of his employment. (*Id.*) This review was conducted by the lab's DNA Technical Leader and Quality Manager, and began on March 20, 2012. Seals were examined in approximately 1,000 cases spanning the period from the analyst's hiring in June 2006 through his resignation in March 2012. (*Id.*)

The review of this evidence yielded three additional cases in which seals were not broken by the analyst. In all three cases, the analyst reported negative findings for screening on all items of evidence in the sexual assault kit. (*Id.*) Though the analyst did not recall the cases and did not offer an explanation for failing to test all items of evidence, it appears he may have limited his testing to the items of evidence most likely to yield results based on information included in the case file (*e.g.*, testing of vaginal slides but not anal slides where the victim's allegations were

limited to digital penetration.) This selective testing constituted a failure to examine items of evidence less likely to yield results based on the factual scenario described by the victim, though lab reports indicated such items had been tested and showed a negative result.

The TCMECL DNA section re-tested the remaining cases found to have unopened seals. In four of the five total cases discovered, evidence was available for re-testing. The re-testing confirmed the initial reported results in all cases. (*Id.*)

D. Disclosures Made to Stakeholders by TCMECL

The TCMECL notified the following stakeholders regarding the non-conformances at issue in this case:

1. On March 15, 2012, the TCMECL notified the TFSC's General Counsel of the issues identified by telephone. TCMECL management also filed a self-disclosure form and supporting material on April 2, 2012.

2. On March 15, 2012, the TCMECL notified the Chief Felony Prosecutor for the Tarrant County District Attorney's office. The TCMECL conducted additional follow-up discussions with the District Attorney's office on March 23, 2012. Information was provided for all discrepant cases affecting Tarrant County, and the option for re-testing was extended to the District Attorney indefinitely.

3. On March 22, 2012, the TCMECL notified the Quality Assurance Manager for the Texas Department of Public Safety's crime laboratory system regarding the issues identified, and provided an additional update regarding the investigation's status on March 28, 2012. The DPS Quality Assurance Manager agreed with the steps taken by the laboratory and provided suggestions and guidance on additional possible corrective actions. On April 10, 2012, the TCMECL submitted a corrective action report to DPS.

4. On March 28, 2012, the TCMECL notified the Executive Director of ASCLD-LAB, Ralph Keaton, and provided information regarding the nature of the nonconformance. On April 10, 2012, the TCMECL submitted a corrective action report to ASCLD-LAB.

5. On April 3, 2012, the TCMECL notified the Johnson County District Attorney. Information was provided for all discrepant cases affecting Johnson County, and the option for re-testing was extended indefinitely.

6. On April 4, 2012, the TCMECL sent a memorandum to affected law enforcement submitting agencies and prosecutors in the five cases in which seals were found unopened. The memorandum included an explanation of the deviations that occurred and amended reports reflecting the re-testing performed in each case.

7. On April 12, 2012 and April 13, 2012, the TCMECL Laboratory Director and DNA Technical Leader attended the Commission's Complaint Screening Committee meeting and full Commission meeting and responded to questions raised by Commissioners.

E. Additional Corrective Action

The TCMECL took the following corrective action in addition to examiner suspension, re-testing, re-evaluation of evidence seals and disclosure to stakeholders:

1. The TCMECL adopted a policy to enhance the existing comprehensive, documented training program and competency testing used before examiners may assume casework. The training program will be tailored to the employee's education, prior employment and experience, and review of proficiency test data. A forensic biologist was hired to replace the analyst in question on May 21, 2012 and has participated in the training. (*Id.* at 3-4.)

2. The TCMECL will monitor all new forensic biologists, including independent verification of screening results in a subset of cases. The monitoring program will be expanded beyond technical review to include independent verification in a subset of cases. (*Id.*)

3. The TCMECL does not currently have a full-time dedicated Quality Manager. The responsibilities of Quality Manager have been performed by a senior forensic biologist who also conducts casework. To ensure the laboratory has a dedicated Quality Manager whose responsibilities are comprehensive and independent from the casework conducted in the laboratory, TCMECL management has requested funds for a full-time dedicated Quality Manager in its FY'2013 budget. (*Id.*)

4. The TCMECL's current Quality Manager (or any individual subsequently hired for this position in a dedicated capacity) will conduct random monthly reviews of evidence in storage (before the evidence is returned to the submitting agency) *in all sections of the laboratory*. The random review is designed to ensure evidence is labeled and sealed properly, and to ensure lab reports accurately reflect the forensic analysis performed in the case. (*Id.*)

5. The Quality Manager will maintain a checklist of all corrective action items to monitor completion of tasks on an ongoing basis. (*Id.* at 4.)

III. TFSC INVESTIGATION

A. Statutory Requirement for Written Report

An investigation under the TFSC's enabling statute "must include the preparation of a written report that identifies and also describes the methods and procedures used to identify: (A) the alleged negligence or misconduct; (B) whether the negligence or misconduct occurred; and (C) any corrective action required of the laboratory, facility, or entity." *Id.* at 4(a)(3)(b)(1). A TFSC investigation may include one or more: (A) retrospective reexaminations of other forensic

analyses conducted by the laboratory, facility, or entity that may involve the same kind of negligence or misconduct; and (B) follow-up evaluations of the laboratory, facility, or entity to review: (i) the implementation of any corrective action required . . . . ; or (ii) the conclusion of any retrospective reexamination under paragraph (A). *Id.* at 4(a)(3)(b)(2).

B. TFSC Review Process

On April 13, 2012, the Commission voted to elect a three-member investigative panel to review the disclosure. Commissioner Nizam Peerwani abstained from discussion and voting in all matters related to the TCMECL disclosure throughout the course of the investigation due to his role as Chief Medical Examiner for Tarrant County. The TCMECL Disclosure Panel includes the following members: Dr. Art Eisenberg (Chairman); Dr. Garry Adams (replaced by Dr. Brent Hutson at the Commission's July 2012 meeting); and Mr. Robert Lerma. Panel members reviewed documents submitted by the TCMECL during an information-gathering teleconference held on May 4, 2012 and determined what additional information might be necessary to assist the Commission in conducting deliberations.

On June 4, 2012, the investigative panel discussed the results of the laboratory's internal investigation including the retroactive review of cases and stored evidence, and voted on recommendations for the full Commission during a public meeting held at the Texas State Capitol. Commission staff also reviewed documents, conducted follow-up inquiries as appropriate (*see* **Exhibit C**) and consulted with the Executive Director of ASCLD-LAB, the Deputy Assistant Director of DPS, the Quality Manager of DPS, the Chief Felony Prosecutor in the Tarrant County District Attorney's Office and TCMECL management.

After reviewing the results of the internal investigation conducted by the TCMECL, the investigative panel asked the laboratory for additional information regarding the following subject areas: (1) possibility of interviewing the analyst in question; (2) copies of any counseling

or other personnel documentation regarding the issues affecting the analyst during the time period in question; (3) confirmation that the TCMECL contacted all affected law enforcement agencies and provided an opportunity to return evidence for re-examination as appropriate.

The Human Resources division responsible for the TCMECL declined to provide contact information pursuant to its policy not to provide contact information for current or former employees. The Commission discussed the issue at its July meeting and determined that though it is generally preferable to interview all individuals involved in a nonconformance of this nature, the Commission: (1) has collected sufficient documentary evidence to reach a conclusion in this case; (2) is unlikely to receive any additional feedback from the analyst beyond the lack of recollection expressed to TCMECL management; and (3) is without statutory authority to compel the analyst to respond in any event.

With respect to the second follow-up request, no documentation was found regarding counseling of the analyst. The laboratory manager recalls speaking with the analyst on one occasion regarding compliance with a new policy regarding work timeliness, but the discussion did not rise to a level where it would require documentation in the analyst's personnel file. With respect to the third follow-up inquiry, laboratory management confirmed it has contacted all affected law enforcement agencies and provided them an opportunity to return evidence depending upon the posture of the case.

At its June 4, 2012 meeting, the investigative panel voted to recommend to the full Commission that sufficient re-testing was performed during the internal investigation, and that no further re-testing was necessary under the circumstances. The panel also voted to recommend that the TCMECL be commended for its swift and thorough response. The panel decided to defer a discussion regarding professional negligence or misconduct to the full Commission.

On July 13, 2012, the full Commission voted to accept the findings of the TCMECL investigative panel. The Commission also voted to issue a finding of professional misconduct against the analyst in question. A discussion of the full Commission's observations, findings, and recommendations for follow-up is provided below.

C. Observations

The Commission recognizes that the failure by a forensic analyst to test evidence while reporting results on that evidence is one of the most serious violations that can occur in a crime laboratory. As set forth in ASCLD-LAB's *Guiding Principles of Professional Responsibility for Crime Laboratories and Forensic Scientists*, forensic scientists are obligated to conduct full and fair examinations. Conclusions must be based on "the evidence and reference material relevant to the evidence, not on extraneous information, political pressure, or other outside influences." (*See* **Exhibit E** at 31.) In addition, forensic scientists must "honestly communicate with all parties (the investigator, prosecutor, defense and other expert witnesses) about all information relating to their analyses, when communications are permitted by law and agency practice." (*Id.*) The forensic analyst in this case failed to comply with these principles. Though the re-testing of all cases confirmed the initial results, law enforcement and prosecuting authorities relied upon inaccurate information in determining whether to pursue further investigation or prosecution against the alleged offender. The fact that the initial results were confirmed by re-testing, though arguably less impactful on individual cases, does not alter the tremendous risk that misleading forensic reporting will undercut the public's faith in the reliability and integrity of the forensic analysis conducted by the laboratory. Moreover, a test that reports negative findings incorrectly may seriously impede the ability of law enforcement and prosecutors to hold an individual who commits an offense responsible for that offense.

When faced with such a situation, the manner in which a crime laboratory responds is key to ensuring the accuracy and integrity of forensic analysis performed by the laboratory, as well as public perception regarding the quality and reliability of work performed by the lab. The Commission commends the TCMECL for its swift and thorough response to the serious nonconformances in this case. As outlined above, the TCMECL took deliberate and decisive steps to: (1) remove the analyst in question from casework; (2) conduct reasonable re-examination of cases; (3) review the evidence packaging for 1,000 cases representing the entire body of the analyst's work in the possession of the TCMECL; (4) notify affected agencies and extend the option of re-examination in any case deemed by law enforcement and/or the affected prosecutor to merit re-examination; (5) initiate various additional corrective actions designed to protect against future recurrence of a similar incident; and (6) ensure all agencies with oversight and/or regulatory authority were notified promptly of the situation. The Commission encourages other crime laboratories in Texas facing issues such as those described herein to take a similarly proactive and transparent approach.

D. Negligence/Misconduct Determination

The Commission's enabling statute requires it 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. TEX. CODE CRIM. PROC. art. 38.01 § 4(a)(3). The term "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. *Id.* at 38.35 (a)(4).

While the terms "professional negligence" and "professional misconduct" are not defined in the statute, the Commission has defined these terms in its policies and procedures, as follows:

> "Professional Misconduct" means, after considering all of the circumstances from the actor's standpoint, the actor, through a material act or omission, deliberately failed to follow the standard of practice generally accepted at the time of the forensic analysis that an ordinary forensic professional or entity would have exercised, and the deliberate act or omission substantially affected the integrity of the results of a forensic analysis. An act or omission was deliberate if the actor was aware of and consciously disregarded an accepted standard of practice required for a forensic analysis." (TFSC Policies & Procedures at 1.2.)
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> "Professional Negligence" means, after considering all of the circumstances from the actor's standpoint, the actor, through a material act or omission, negligently failed to follow the standard of practice generally accepted at the time of the forensic analysis that an ordinary forensic professional or entity would have exercised, and the negligent act or omission substantially affected the integrity of the results of a forensic analysis. An act or omission was negligent if the actor should have been but was not aware of an accepted standard of practice required for a forensic analysis." (TFSC Policies & Procedures at 1.2.)

At its July meeting, the Commission voted unanimously that the analyst's actions in this case constituted "professional misconduct" as defined in the Commission's policies and procedures. This conclusion was based on the following analysis: (1) by reporting negative results on untested evidence, the analyst failed to follow the standard of practice generally accepted at the time of the analysis (*See* **Exhibit D** for TCMECL Policies and Procedures and **Exhibit E** for ASCLD-LAB Guiding Principles of Professional Responsibility); (2) the analyst's actions substantially affected the integrity of the results of the forensic analyses because the reports generated misrepresented the forensic analysis conducted by the laboratory; and (3) the reports showed negative results for each individual item of unopened evidence, with the same failure occurring in five separate cases. The repetitive nature of the violations undermines any suggestion that the actions were accidental and not part of a deliberate decision not to take the necessary steps to test all envelopes of evidence.

E. Importance of Communication with Affected Stakeholders

The Commission stresses the importance of crime laboratory communication with affected district attorneys and law enforcement agencies when nonconformances arise such as those described in this report. Because the results in the cases described herein were negative and no defendants were charged, the prosecuting attorneys did not face any disclosure obligations to defense counsel under *Brady v. Maryland* 373 U.S. 83 (1963). However, if the results had been positive, such a disclosure obligation could have applied. District attorneys must have sufficient information to understand the nature and scope of material nonconformances in a crime laboratory so they may evaluate and attend to their prosecutorial obligations properly.

In this case, the TCMECL communicated appropriately with the affected prosecutorial and law enforcement agencies. The Commission encourages the TCMECL to maintain ongoing communication with those agencies, and to perform additional re-testing of potentially affected cases upon request.

IV. CLOSING RECOMMENDATIONS

In closing, the Commission makes the following recommendations:

1. The Commission recommends that TCMECL continue to implement and monitor the effectiveness of all corrective actions outlined in **Exhibit B** to this report.

2. The Commission requests that any materially significant updates regarding the status of the corrective actions and the TCMECL's re-testing of cases (as requested by submitting agencies) be provided to ASCLD-LAB, DPS and the Commission.

3. The Commission does not have the statutory authority to take any enforcement action against the analyst. The analyst was not certified by a national certifying body (certification is not mandatory for serologists at this time) and was not a member of the American Academy of Forensic Sciences, thereby limiting the scope of possible disciplinary action. However, due to the significant nature of the deviations described herein, the Commission recommends that TCMECL include a copy of this report in the analyst's permanent personnel file.

EXHIBIT G

REPORT OF THE

TEXAS FORENSIC SCIENCE COMMISSION

TEXAS DEPARTMENT OF PUBLIC SAFETY HOUSTON REGIONAL CRIME LABORATORY SELF-DISCLOSURE

APRIL 5, 2013

EXHIBIT LIST

Exhibit A	OIG Report
Exhibit B	Texas Rangers Report
Exhibit C	DPS Disclosure
Exhibit D	April Email Alert from Keith Gibson to Law Enforcement & Prosecutors
Exhibit E	Harris Co. DA Letter to Defendants
Exhibit F	Harris Co. Pub. Defender Letter
Exhibit G	Commission Memo to Prosecutors and Judges
Exhibit H	ASCLD-LAB Guiding Principles
Exhibit I	J. Salvador Performance Evaluations
Exhibit J	QAPs re: Salvador Re-Testing Cases

I. BACKGROUND AND STATUTORY AUTHORITY

A. History and Mission of the Texas Forensic Science Commission

In May 2005, the Texas Legislature created the Texas Forensic Science Commission ("TFSC" or "Commission") by passing House Bill 1068 (the "Act"). The Act amended the Code of Criminal Procedure to add Article 38.01, which describes the composition and authority of the TFSC. *See* Act of May 30, 2005, 79th Leg., R.S., ch. 1224, § 1, 2005. The Act took effect on September 1, 2005. *Id.* at § 23.

The Act provides that the TFSC "shall 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." TEX. CODE CRIM. PROC. art. 38.01 § 4(a)(3). The Act also provides that the TFSC shall develop and implement a reporting system through which accredited laboratories, facilities, or entities may report professional negligence or misconduct, *and* require all laboratories, facilities, or entities that conduct forensic analyses to report professional negligence or misconduct to the Commission. *Id.* at § 4(a)(1)-(2).

The term "forensic analysis" is defined as a medical, chemical, toxicological, ballistic, or other examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action. *Id.* at art. 38.35(4). The statute excludes certain types of analyses from the "forensic analysis" definition, such as latent fingerprint analysis, a breath test specimen, and the portion of an autopsy conducted by a medical examiner or licensed physician.[1]

[1] For complete list of statutory exclusions, *see* TEX. CODE CRIM. PROC. art. 38.35(a)(4)(A)-(F) & (f).

The statute does not define the terms "professional negligence or misconduct," though the Commission has defined those terms in its policies and procedures. (TFSC Policies & Procedures at 1.2.) The Commission also released guidance for accredited crime laboratories regarding the categories of non-conformances that may require mandatory self-reporting; this guidance is provided with the self-disclosure form located on the Commission's website at http://www.fsc.state.tx.us/documents/LABD.pdf.

The TFSC has nine members—four appointed by the Governor, three by the Lieutenant Governor and two by the Attorney General. *Id.* at art. 38.01 § 3. Seven of the commissioners are scientists and two are attorneys (one prosecutor and one defense attorney). *Id.* The TFSC's presiding officer is designated by the Governor. *Id.* at § 3(c).

The TFSC's policies and procedures set forth the process by which it determines whether to accept a complaint, as well as the process used to conduct an investigation once a complaint is accepted. (*See* TFSC Policies & Procedures at § 3.0, 4.0.) The ultimate result of an investigation is the issuance of a final report.

B. Attorney General Opinion No. GA-0866

On January 28, 2011, the Commission asked Texas Attorney General Greg Abbott to respond to three questions regarding the scope of its jurisdiction under its enabling statute (TEX. CODE CRIM. PROC., art. 38.01). On July 29, 2011, the Attorney General issued the following legal guidance:

1. The TFSC lacks authority to take any action with respect to evidence tested or offered into evidence before September 1, 2005. Though the TFSC has general authority to investigate allegations arising from incidents that occurred prior to September 1, 2005, it is prohibited, in the course of any such investigation, from considering or evaluating evidence that was tested or offered into evidence before that date.

2. The TFSC's investigative authority is limited to laboratories, facilities, or entities that were accredited by the Texas Department of Public Safety ("DPS") at the time the analysis took place.

3. The Commission may investigate a field of forensic science that is neither expressly included nor expressly excluded on DPS' list of accredited forensic disciplines, as long as the forensic field meets the statute's definition of "forensic analysis" (*See* Article 38.35 of the Act) and the other statutory requirements are satisfied.

The Commission's investigation of the Texas Department of Public Safety, Houston Regional Crime Laboratory's ("DPS") self-disclosure falls within its statutory jurisdiction for the following reasons: (1) the negligence or misconduct occurred after the effective date of the Act; (2) DPS is accredited by ASCLD-LAB; and (3) controlled substance analysis is an accredited forensic discipline.

C. Limitations of this Report

No finding contained herein constitutes a comment upon the guilt or innocence of any individual. A final report by the TFSC is not prima facie evidence of the information or findings contained in the report. TEX. CODE CRIM. PROC. art. 38.01 § 4 (e); FSC Policies and Procedures § 4.0 (d). The Commission does not currently have enforcement or rulemaking authority under its statute. The information it receives during the course of any investigation is dependent upon the willingness of concerned parties to submit relevant documents and respond to questions posed. The information gathered has not been subjected 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 subjected to formal cross-examination under the supervision of a judge. The primary purpose of this report is to encourage the development of forensic science in Texas.

II. SUMMARY OF KEY FACTS AND DISCLOSURE TIMELINE

A. Key Facts

The facts of this self-disclosure are straightforward. On January 26, 2012, DPS examiner Andrew Gardiner was attempting to diagnose a problem with his gas chromatograph-mass spectrometer ("GCMS") as part of the normal course of his work in the laboratory. (*See* OIG Report at **Exhibit A;** Texas Rangers Report at **Exhibit B, 1.7**). To verify the problem he experienced was not with the sample itself but rather with his instrument, Gardiner attempted to run the sample on examiner Jonathan Salvador's GCMS. *Id.* Salvador was out of the office at the time, assisting the drug section supervisor with routine evidence destruction duties. *Id.* In the process of troubleshooting his instrument, Gardiner determined he should run an alprazolam sample on his own instrument to assess how it would perform. *Id.* Gardiner noticed on Salvador's sequence log that the sample directly above the sample he had just run on Salvador's machine was alprazolam, so he decided to use that vial to run on his machine. *Id.* On the sequence log, the sample was labeled L2H-222396 item 1, and it was in location 18. *Id.* Gardiner attempted to retrieve the vial in location 18, but it was labeled L2H-222403. *Id.* Gardiner's first thought was that Salvador had mistyped the label number or inadvertently swapped the vial's location. *Id.* However, no other location in the tray contained vial L2H-222396, so it was apparent to Gardiner the sample's location had not been switched accidentally. *Id.*

Gardiner then pulled the case folder for L2H-222396 and noticed Salvador had experienced difficulty analyzing a pharmaceutical exhibit that appeared to be a slow-release alprazolam tablet. The mass spectral data for L2H-222396 was insufficient to

report a positive finding, while case file L2H-222403 was complete and needed no further analysis. *Id.* Gardiner then sought input from colleague Haley Yaklin regarding her impression of whether Salvador had used the data from L2H-222403 to support the result for L2H-222396. *Id.* Ms. Yaklin agreed it looked suspicious, and both examiners decided to wait to see if Salvador would correct his own mistake during the review process over the next week. *Id.* On January 30, 2012, Gardiner observed that Salvador completed file L2H-222396 and submitted it for technical review (*See* **Exhibit B**). He also observed the data used to support the results in file L2H-222396 was the same data he saw in file L2H-222403. *Id.* Gardiner reported his concerns to section supervisor Severo Lopez on February 3, 2013, while the case was in administrative review. *Id.*

On February 3, 2012, Lopez pulled the case folder and evidence for L2H-222396 and re-tested the sample himself. He confirmed the evidence from L2H-222396 was in fact alprazolam, but that Salvador had used the evidence from L2H-222403 to generate the data supporting his results in L2H-222396. The report Salvador drafted for L2H-222396 was not issued outside the laboratory, and Lopez removed Salvador from casework immediately. On February 6, 2012, DPS management informed the Texas Rangers and the Office of Inspector General. On February 10, 2012, DPS suspended Salvador. (*See* DPS Disclosure Form at **Exhibit C**.) On July 24, 2012, DPS notified Salvador of the agency's intent to terminate his employment (*See* OIG Report at **Exhibit A**). On August 6, 2012, Salvador resigned from DPS.

B. DPS Management Consults Texas Rangers and Office of Inspector General

On February 6, 2012, DPS management reported the situation to the Texas Rangers and the Office of Inspector General. The Rangers assigned investigators on

February 7, 2012, and began interviewing crime lab management and staff on February 8, 2012.

The purpose of the Texas Rangers' investigation was to determine whether there was evidence of criminal activity by Salvador, and to report their conclusions to the Harris County District Attorney's office. The Rangers reviewed relevant case documents and interviewed Salvador, Gardiner, Yaklin, Lopez and Keith Gibson, the director and quality manager of the laboratory. (*See* **Exhibit B**.) The Rangers observed that Salvador was defensive throughout their interview and was "unable to provide a consistent, plausible reason explaining why or how the evidence from file L2H-222403 ended up being used to generate the results report which was submitted for file L2H-222396." (*See* **Exhibit B**.) Though Salvador "conceded he might have made a mistake," he denied that he engaged in any intentional wrongdoing. *Id.*

The Rangers reported their findings to the Harris County District Attorney's office. On May 5, 2012, the Harris County District Attorney's office presented the case to a Harris County grand jury. (*See* **Exhibit B**.) The grand jury returned a no-bill, and the Rangers closed their file on September 12, 2012. *Id.*

The DPS Office of Inspector General ("OIG") interviewed crime lab management and staff in April 2012, after the Rangers completed their investigation. (*See* **Exhibit A**.) The OIG's investigation was internal to DPS and administrative in nature. *Id.* OIG investigators reviewed relevant documents and interviewed Salvador, Gardiner, Yaklin, Lopez and Gibson. *Id.* The investigators concluded the following:

> The evidence supports that on Thursday, 01-26-2012, at approximately 8:55 a.m., while performing his duty as a forensic scientist, Jonathan Salvador improperly acted with total disregard for policy and procedure by testing sample L2H-222403 and recording those results for sample L2H-222396. *Id.*

Both the OIG and Texas Ranger investigations focused narrowly on alleged wrongdoing by Salvador during the alprazolam incident. As discussed below, the Commission's investigation incorporated the work of the Rangers and OIG without duplicating efforts. Because conclusions regarding the specific incident were clear, the Commission focused its investigation on the circumstances and environment in the laboratory leading to the incident; lessons learned from the incident; and recommendations for DPS and other laboratories going forward. The Commission's work is intended to benefit Texas crime laboratories that may face similar circumstances, and also to educate the criminal justice system regarding challenges faced in cases involving high volume disciplines such as controlled substance.

III. COLLABORATIVE EFFORTS TO PROVIDE NOTICE TO AFFECTED DEFENDANTS AND MEMBERS OF CRIMINAL JUSTICE SYSTEM

A. Step One: DPS Notice to TFSC, ASCLD-LAB, Prosecutors and Submitting Law Enforcement Agencies

On February 21, 2012, DPS management alerted the Commission, ASCLD-LAB, prosecuting attorneys and submitting law enforcement agencies about the alprazolam incident (*See* **Exhibit C**). The email communication advised affected parties that all evidence worked by Salvador in the previous 90 days would be re-analyzed. *Id.* On April 26, 2012, DPS management emailed a second notice to the agencies explaining that two additional errors were discovered in Salvador's work during the review of 148 cases constituting 90 days of work. (*See* **Exhibit D**.) DPS also identified 4,944 total drug cases by county (equaling 9,462 pieces of evidence) worked by Salvador during his employment from 2006-2012, and advised law enforcement and prosecutors they could request re-analysis of any case in which the evidence has not yet been destroyed. *Id.* On

June 30, 2012, DPS submitted a follow-up written disclosure to the Commission, including the results of re-testing conducted. (*See* **Exhibit C**.)

The Commission contacted submitting law enforcement agencies in an attempt to estimate the percentage of the 4,944 total cases for which evidence was destroyed as part of the normal course. Evidence submitted by DPS officers constituted a total of 1,978 cases, and only 21 of those cases were destroyed. Though the Commission did not receive answers from all agencies, staff estimate that between 50-75% of the evidence is available for re-testing, including evidence submitted by DPS officers.

On April 27, 2012, immediately after DPS released the re-testing results, the Texas District and County Attorneys' Association ("TDCAA") posted a notice on its website advising affected members of a suggested protocol for alerting stakeholders, including: (1) notifying the courts of the issue; (2) notifying the local criminal defense bar; (3) pulling all of the cases on the list provided by DPS and checking the disposition for convictions; (4) locating the evidence, and if it still exists, submitting it for retesting (DPS or local departments); and (5) for any case where re-testing yielded inconsistent results (or cases with now-destroyed evidence) requesting that the court appoint an attorney to take the case through a writ process if appropriate.

B. Step Two: Notice to Defendants

1. Counties Affected

Salvador performed casework for 36 Texas counties during his employment, including: Angelina; Austin; Brazoria; Brazos; Burleson; Chambers; Colorado; Fort Bend; Galveston; Grimes; Hardin; Harris; Hidalgo; Houston; Jackson; Jasper; Jefferson; Leon; Liberty; Madison; Matagorda; Montgomery; Nacogdoches; Newton; Orange; Polk;

Sabine; San Augustine; San Jacinto; Shelby; Trinity; Tyler; Walker; Waller; Washington; and Wharton.

The following table divides the counties into tiers by volume of cases. Commission staff tabulated the total number of cases using DPS case identification numbers. The vast majority of Salvador casework is concentrated in 23 counties. The numbers represent all cases worked by Salvador, including *both* felonies *and* misdemeanors. The table also includes cases with a wide range of dispositions, including but not limited to dismissals, plea agreements and jury convictions.

TIER	**COUNTIES BY TIER**
ONE: > 250 cases	**5 Counties:** Fort Bend, Galveston, Harris, Liberty, Montgomery
TWO: 101-250 cases	**10 Counties**: Brazoria, Chambers, Grimes, Hardin, Jasper, Matagorda, Polk, Walker, Waller, Wharton
THREE: 10-100 cases	**8 Counties:** Austin, Jefferson, Newton, Orange, San Jacinto, Trinity, Tyler, Washington
FOUR: < 10 cases	**13 Counties:** Angelina, Brazos, Burleson, Colorado, Hidalgo, Houston, Jackson, Leon, Madison, Nacogdoches, Sabine, San Augustine, Shelby

2. Responses of Harris, Galveston and Montgomery

The top three counties affected (by volume of cases) are Montgomery (1,287), Galveston (849), and Harris (327), in that order. In Harris County, the District Attorney sent letters to potentially affected defendants (*See* **Exhibit E**) informing them of the non-conformance and referring them to the Harris County Public Defender's Office, which

will handle requests for re-testing and initiate the writ process where appropriate. The Harris County Public Defender then sent a letter to each defendant (*See* **Exhibit F**) alerting him or her that the office is available to assist with re-testing requests and related court filings.

The Montgomery County District Attorney has taken the position that all cases for which evidence still exists shall be re-tested by DPS. The District Attorney's office also sent notice to the last known address of each potentially affected defendant and/or defense counsel. In addition, the District Attorney suggested the most prudent course would be for the county to appoint specific counsel for the purpose of handling writs for affected cases. Since that time, Montgomery County has been working with DPS to achieve re-testing using a systematic approach that prioritizes cases in which defendants are serving or have served jail time.

In Galveston County, the District Attorney sent letters to potentially affected defendants. The Galveston County courts also appointed specific defense counsel to assist defendants with the writ process. The Galveston County District Attorney has adopted a general policy to dismiss charges in cases where no evidence is left to test or where evidence was ever left in Salvador's custody.

At its October 2012 meeting, the Commission concluded the policies established by the three most affected counties, while not identical, were all reasonable methods of ensuring defendants are: (1) notified of the issue in the crime lab; and (2) given access to designated counsel for assistance with re-testing and/or the writ-filing process. However, Commissioners were concerned the notice process may not be equally robust in the other 33 counties affected. Because courts, prosecutors and defendants in smaller counties may

not have access to the same resources as Montgomery, Galveston and Harris Counties, the Commission instructed its staff to work with TDCAA, the Texas Criminal Defense Lawyers' Association ("TCDLA"), the Texas Commission on Indigent Defense and the Innocence Project of Texas ("IPOT"), to determine whether a notice protocol could be offered to ensure affected defendants in smaller counties have the same notice and access to counsel as defendants in larger counties. Commissioners determined such a protocol could be used as a model in future cases involving high volume forensic analyses, such as in the controlled substance discipline.

On November 14, 2012, Investigative Panel Chair Dr. Sarah Kerrigan and the Commission's General Counsel held a conference call with representatives from the Texas Commission on Indigent Defense, the Harris County Public Defenders' Office, and IPOT. The group agreed to the following approach during the call:

1. Harris, Montgomery and Galveston Counties have notice methods in place already, using the Harris County Public Defender's Office as a contact point for Harris County defendants and court-appointed counsel in Montgomery and Galveston Counties for defendants in those counties. Those three counties should continue to implement their approaches as discussed.

2. For the remaining counties, IPOT will serve as the point of contact for assisting defendants with re-testing requests and the related writ-filing process as necessary. Because IPOT has extensive experience with high volume case screening, they are well positioned to review cases and work with courts and prosecutors in the various counties affected.

3. The Commission will request the list of affected defendants from DPS so that IPOT may send letters similar to the Harris County Public Defender's letter.

4. Using Harris County as a model, the Commission will put together a model notice letter and distribute it to affected prosecutors (*See* **Exhibit G**.)

5. The Commission on Indigent Defense will discuss the model notice with the judge responsible for the affected administrative region and ask for his support in distributing the notice to other affected judges.

6. IPOT will inform the Texas State Bar Committee on Indigent Defense and the Governor's Office regarding the collaborative process envisioned and seek their feedback. The Commission will seek similar input from DPS.

On November 16, 2012, the Commission's General Counsel met with TDCAA's Director of Government Relations, who agreed to assist with review of the model notice and distribution to TDCAA's affected members. The issue was also discussed during TDCAA's December 2012 conference for elected district and county attorneys. TDCAA canvassed its members to determine whether any additional information or assistance would be helpful, and provided updated contact information to the TFSC for counties in which prosecutor turnover occurred as a result of the November 2012 election.

On December 3, 2012, the Commission distributed the model notice to prosecutors and responded to emails and follow-up questions. On December 17, 2012, the Commission on Indigent Defense briefed the regional presiding judges on the non-conformance and the model notice. The regional presiding judges agreed to forward the memo describing the incident and the model notice to the judges in each of the affected counties in their region.

On January 18, 2013, DPS provided the list of defendants to the Commission for distribution to IPOT. IPOT is currently in the process of contacting affected defendants in the 33 counties outside of Harris, Galveston and Montgomery. To facilitate this process, IPOT developed a partnership with TCDLA to request volunteer attorneys who accept court appointments and will represent defendants in smaller counties. Assistance from TCDLA is critical in light of the resource limitations and lack of uniformity among

the 33 counties. In addition, IPOT prepared standardized notice and pleading documents to assist volunteer attorneys. IPOT is also tracking data on the number of defendants in each county who have been contacted by either IPOT or a volunteer attorney. IPOT will submit this data to the Commission at the end of the notification process.

IV. TFSC INVESTIGATION

A. Statutory Requirement for Written Report

An investigation under the TFSC's enabling statute "must include the preparation of a written report that identifies and also describes the methods and procedures used to identify: (A) the alleged negligence or misconduct; (B) whether the negligence or misconduct occurred; and (C) any corrective action required of the laboratory, facility, or entity." *Id.* at 4(a)(3)(b)(1). A TFSC investigation may include one or more: (A) retrospective reexaminations of other forensic analyses conducted by the laboratory, facility, or entity that may involve the same kind of negligence or misconduct; and (B) follow-up evaluations of the laboratory, facility, or entity to review: (i) the implementation of any corrective action required . . . . ; or (ii) the conclusion of any retrospective reexamination under paragraph (A). *Id.* at 4(a)(3)(b)(2).

B. TFSC Review Process

On July 27, 2012, the Commission voted to elect a three-member investigative panel to review the DPS disclosure. Panel members include: Dr. Sarah Kerrigan (Chair), Dr. Nizam Peerwani, and Atty. Bobby Lerma. Commission staff reviewed thousands of pages of documents and audio/video material submitted by DPS over the course of the investigation and made those documents available to Commissioners for review. Panel members also held non-deliberative conference calls on December 20, 2012 and January 17, 2013, to assess whether sufficient documentary evidence had been gathered to allow

Commissioners to conduct substantive deliberations, and instructed staff regarding requests for additional information. Dr. Kerrigan and Commission staff visited the DPS Houston Regional Crime Laboratory on January 8, 2013, at which time they conducted interviews of Gardiner, Yaklin, Lopez, and Gibson. Dr. Kerrigan and staff also met with D. Pat Johnson, DPS Deputy Assistant Director of Law Enforcement Support, Crime Laboratory Service. General Counsel Lynn Garcia contacted Salvador and his attorney, informed them of the Commission's deliberative process and the timing of this report, and provided contact information and an opportunity to speak with the Commission at any time leading to the release of this report. The Commission has not been contacted by either party.

On October 5, 2012, Dr. Kerrigan and the investigative panel provided an update regarding the status of the investigation to the full Commission. On January 25, 2013, the full Commission deliberated regarding the contents of this report, voted to issue a finding of professional misconduct against Salvador, and instructed staff regarding the contents and recommendations to be provided in this report. The Commission's findings are reflected below.

C. Observations

1. Crime Laboratory Transparency and Cooperation

The Commission commends DPS for its transparency in disclosing the issues described to the Commission, ASCLD-LAB, law enforcement and other stakeholders. The panel was particularly impressed by the honest and forthcoming nature of discussions with staff and management during the site visit. It is clear this incident affected the examiners and management at DPS in a profound way. Despite being

chronically understaffed, management worked hard to provide the Commission with follow-up information and additional data when requested.

2. Ethical Standards of Forensic Scientists

The act of using evidence in one case to support the results issued in another case is one of the most serious ethical violations that can occur in a crime laboratory. As set forth in ASCLD-LAB's *Guiding Principles of Professional Responsibility for Crime Laboratories and Forensic Scientists*, forensic scientists are obligated to conduct full and fair examinations. Conclusions must be based on "the evidence and reference material relevant to the evidence, not on extraneous information, political pressure, or other outside influences." (*See* **Exhibit H**.) In addition, forensic scientists must "honestly communicate with all parties (the investigator, prosecutor, defense and other expert witnesses) about all information relating to their analyses, when communications are permitted by law and agency practice." *Id.*

The specific incident involving the alprazolam analysis in case #L2H-222396 was investigated thoroughly by the Rangers and OIG, and nothing in the record provides an alternative explanation for Salvador's actions. Fortunately, DPS performs technical review on 100% of the controlled substance casework prior to administrative review and release to the submitting agency. This review ensures that results meet the reporting criteria and standards set by DPS. However, the misrepresentation of the data would not be identified during the technical review process. During interviews with the Rangers, it was clear Salvador struggled to maintain acceptable performance. It was well-recognized by those performing technical reviews, and his supervisor, that his work was frequently returned for administrative and technical corrections. Therefore, the Commission

decided it was more important to focus on the circumstances and environment in the laboratory leading up to the violation itself. The Commission's inquiry included a review of Salvador's performance over his six years at DPS. The Commission focused on identifying systemic issues that may have allowed the incident to occur so that improvements may be made to protect against future recurrence.

3. Low Case Output

Salvador's performance evaluations show he had difficulty maintaining adequate case output throughout the course of his employment. (*See* **Exhibit I.**) In his evaluations, drug section supervisor Severo Lopez noted a "lower case output than expected" for multiple years. Though DPS does not have a quota requirement, most examiners in the drug section are expected to complete between 85-100 cases per month, absent extraordinary circumstances. Salvador often had difficulty meeting the minimum expectation. He often "scrambled" toward the end of the month and was frequently concerned about whether he would meet expectations.

4. High Correction Rate

In addition to problems analyzing a sufficient number of cases per month, Salvador had problems with too many corrections. His evaluations stated that "more than 1 in 3 of Salvador's case folders were returned for corrections." *Id.* Most of the corrections were administrative in nature, but some technical corrections were noted as well. Salvador's evaluations also indicated that he should "pay careful attention to details especially when encountering difficult or unusual samples." *Id.* The evaluations further stated that he should "carefully explore and determine possible causes for negative results before reaching a conclusion of negative." *Id.* The evaluations instructed Salvador to

"avoid short cuts" and "strive to minimize clerical and technical errors on reports to less than 10% returned for correction." *Id.*

Meetings with examiners further supported the conclusion that Salvador struggled with corrections and an overall understanding of the chemistry, especially in difficult cases. One examiner who performed a large percentage of the technical reviews on Salvador's cases observed that he "just made so many mistakes." While most of the mistakes were administrative, a few were technical. Examiners were consistent in their view that Salvador was very friendly and helpful, just not the right type of person for the job. More than one examiner shared concerns about Salvador's high error rate and lack of understanding of the chemistry with the drug section supervisor.

In retrospect, examiners and management observed that Salvador might have been afraid to ask for help with the alprazolam analysis in case #L2H-222396, because he had been spoken to about two other analysis-related problems in the months before the alprazolam case. One involved the contamination of his instrument by tadalafil and another involved his failure to positively identify hydrocodone. There was a perception that Salvador simply "could not afford" to have another mistake, such as the failure to positively identify the alprazolam in L2H-222396.

Interviews with management further support the conclusion that the quality of Salvador's work was not optimal. Issues with Salvador's work were described as "very systemic." At one point, the laboratory director maintained an error log to monitor the number of cases returned for correction per examiner. The log revealed that Salvador's work was sent back for correction in more than 1 in 3 cases. Management tried to work with Salvador, conducting remedial training and providing coaching and counseling.

Salvador was very accepting of the criticism, and always corrected issues immediately and vowed to do better. When asked whether the quality of Salvador's work was acceptable under DPS standards, management described the quality of Salvador's work as "right on the edge" of acceptability.

Salvador's high error rate caused the drug section supervisor concern, which he shared with the laboratory director. The laboratory relied on the review process—both technical and administrative review—to provide a safety net for Salvador's work product. The drug section supervisor described his attempts at "compassion" toward Salvador because despite his limitations, Salvador's attitude was always positive, he accepted redirection, and was a valuable member of the laboratory—often volunteering for routine tasks and duties that other examiners preferred to avoid. It was clear management made good-faith efforts to help Salvador improve, and were completely shocked that Salvador would ever use evidence from one case to support the results in another.

When asked why Salvador's written evaluations do not appear to fully capture the concerns about Salvador shared by employees and management, management explained they tried to note the concerns in the written section of the evaluation, but conceded the evaluations may have been "too polite." When asked why he received "meets expectations" in the vast majority of the categories, the drug section supervisor explained that Salvador was always "on the line" between "meets expectations" and "needs improvement." The laboratory manager also explained that he and the section supervisor struggled in deciding which of the two categories was appropriate. When asked why Salvador was promoted despite the concerns regarding his lack of attention to detail and understanding of the chemistry, the section supervisor indicated that promotions at DPS

are standard based on years of service, and he did not feel it was appropriate to deny a promotion unless the person was totally inept, which Salvador was not. There was also a perception that forensic scientists at DPS are paid below their peers in the field, and thus they try not to deny people salary increases. The lab manager explained that in running a laboratory, management recognizes that "everyone has their strengths and weaknesses," and the issues raised about Salvador's work were never anything "catastrophic" until the incident with the alprazolam.

5. Salvador's Value in Other Areas of Laboratory Work

As indicated above, there was consensus among management and examiners that Salvador was a major asset in the laboratory when it came to volunteering for difficult jobs that no one wanted to do. He was friendly and easy to work with, accepted criticism and direction well, and assisted during difficult projects such as when the laboratory moved buildings in 2011. Salvador's easygoing and collegial demeanor contributed to management's reluctance to more aggressively discipline or dismiss him before the alprazolam incident. Because he accepted criticism well, management tried very hard to work with him by providing verbal counseling and remedial on-the-job training.

6. Perceptions Regarding Discipline

Until recently, there was a perception in the laboratory (among both examiners and management) that it was extremely difficult to discipline or terminate an employee within the DPS system. During Director McCraw's tenure, greater efforts have been made to re-vamp the evaluation system and roll out new evaluation procedures. Management will begin using a new evaluation form in the next evaluation cycle, beginning at the end of 2013. In addition, DPS top management has reminded all

laboratory managers and section supervisors—both verbally and in writing—of their obligation to accurately report employee performance on evaluations, and to use the various disciplinary tools and forms available.

7. Laboratory Staffing Challenges

During on-site interviews in January, the Commission observed that examiners displayed competence, diligence and great concern for the integrity and reliability of the work performed in the laboratory. While the Commission was impressed with the quality of the current examiners, the DPS Houston regional laboratory is operating under tremendous budgetary strain. Though the laboratory has new examiners in training for drug analysis, the drug chemistry section had only three people actively performing full-time casework during the Commission's on-site visit in January 2013. Two of the section's most experienced examiners were not working controlled substance cases at the time of the visit because they were being cross-trained to perform blood-alcohol analysis to alleviate the tremendous backlog in that area. As of April 5, 2013, the laboratory has an additional two examiners who just completed training and are performing supervised casework, while one additional examiner still in training. The under-resourcing of the crime lab has also impacted management's staffing decisions. Terminating an employee means hiring and training a replacement, which takes many months and is difficult to bear when the laboratory is already understaffed.

D. Negligence/Misconduct Finding

While the terms "professional negligence" and "professional misconduct" are not defined in the Commission's enabling statute, the Commission has defined these terms in its policies and procedures, as follows:

> "Professional Misconduct" means, after considering all of the circumstances from the actor's standpoint, the actor, through a material act or omission, deliberately failed to follow the standard of practice generally accepted at the time of the forensic analysis that an ordinary forensic professional or entity would have exercised, and the deliberate act or omission substantially affected the integrity of the results of a forensic analysis. An act or omission was deliberate if the actor was aware of and consciously disregarded an accepted standard of practice required for a forensic analysis." (TFSC Policies & Procedures at 1.2.)

> "Professional Negligence" means, after considering all of the circumstances from the actor's standpoint, the actor, through a material act or omission, negligently failed to follow the standard of practice generally accepted at the time of the forensic analysis that an ordinary forensic professional or entity would have exercised, and the negligent act or omission substantially affected the integrity of the results of a forensic analysis. An act or omission was negligent if the actor should have been but was not aware of an accepted standard of practice required for a forensic analysis." (TFSC Policies & Procedures at 1.2.)

At its January 25, 2013 meeting, the Commission voted unanimously that Salvador's actions in this case constituted "professional misconduct" as defined in the Commission's policies and procedures. This conclusion was based on the following analysis: (1) by using the evidence in case #L2H-222403 to support the results issued in case #L2H-222396, Salvador failed to follow the standard of practice generally accepted at the time, both as expressed in DPS policies and procedures and in the ASCLD-LAB Guiding Principles of Professional Responsibility (*See* **Exhibit A**, **Exhibit H**); (2) the report generated by Salvador for case #L2H-222396 substantially affected the integrity of the results of the forensic analysis because it was based on evidence from case #L2H-

222403, thereby requiring the laboratory to re-analyze the evidence and re-issue a report. Though the re-analysis confirmed the initial scientific findings reported by Salvador, the results were based upon accurate supporting data from the case in question.

Salvador fraudulently misrepresented data after attempting analysis on a pharmaceutical drug exhibit. However, during the course of the Commission's investigation, there was no evidence to suggest that there were property control issues of a systemic nature that might preclude future re-testing of evidence.

E. Results of DPS Re-Testing to Date

Re-analysis of Salvador's casework during the 90-day period surrounding the incident resulted in four additional corrective actions, referred to by DPS as "Quality Action Plans" (QAPs). Following is a description of each QAP:

1. One exhibit containing two packets of powder, visibly different in color. Salvador reported that both contained Cocaine-HCl. Upon retesting, one contained Cocaine-HCl, and one contained Cocaine base (crack). Salvador had conducted the FTIR confirmation test on only the Cocaine-HCl item.

2. Smoking pipe exhibit. Salvador reported contained Tetrahydrocannabinol. Upon retest, 0.46 gram of Marihuana was scraped from the pipe bowl.

3. One completed item of evidence discovered unsealed in Salvador's work station.

4. Plant material identified as Marihuana despite only a faint color test; re-analysis indicated it was not Marihuana.

In addition, examiners who reviewed the cases during the 90-day period described "poor documentation, poor technique and poor decision-making" by Salvador. In the months since the initial 90-day re-analysis was performed, examiners have re-analyzed 440 additional cases. The laboratory also has 155 requests for re-testing pending as of April 5, 2013. The re-analysis of the 440 cases resulted in the following QAPs:

1. Weight of Cocaine exhibit reported by Salvador as 8.06 kg. Upon retest, the weight was corrected to 6.95 kg. The incorrectly reported weight was attributable to a math error, not a weighing error or a loss of weight.

2. Failure to properly identify mushrooms which contained psilocin, likely due to incorrect extraction method or insufficient sample.

3. Weight on a Cocaine exhibit incorrectly reported by Salvador as 33 gm. Upon retest, it was reported as 0.33 gm. This was not a weighing error, but a data entry error on the lab report.

The attached QAPs correspond to the cases cited above. (*See* **Exhibit J**.) The Commission will release an addendum to this report reflecting any additional QAPs when all re-analysis is completed.

V. APPELLATE COURT DECISIONS IN SALVADOR CASES

The Texas Court of Criminal Appeals has begun hearing applications for writs of habeas corpus in cases where Salvador analyzed the evidence. The Court releases its decisions on a weekly basis. Decisions may be accessed by clicking on the "Hand Down List" tab on the Court's website at http://www.cca.courts.state.tx.us. As of this writing, all published decisions have involved cases from Galveston County, though the Commission anticipates cases from other counties will follow in the near future. To date, the Court has overturned convictions *both* in cases where the evidence was destroyed *and* in cases where there is still evidence remaining to re-test. The Court reasoned that because the evidence was in Salvador's custody, ". . . custody was compromised, resulting in a due process violation." (*See e.g., Ex Parte Sereal*, No. 76,972 (Tex. Crim. App. 2013), *Ex Parte Hobbs*, No. AP-76,980 (Tex. Crim. App. 2013).)

The potential impact of these decisions on convictions obtained in Salvador cases is difficult to overstate. Though it is too early to tell whether every conviction for which a writ application is filed will be overturned, these decisions emphasize the absolutely

critical role played by forensic scientists in the criminal justice system. It is imperative that Texas crime laboratories use this experience as a tool for improving quality standards, especially with respect to identifying red flags in employee performance. As this case so powerfully demonstrates, the safety and security of our communities often depend upon the integrity and reliability of the work performed in our state's crime laboratories.

VI. LESSONS LEARNED AND RECOMMENDATIONS

The Commission makes the following recommendations:

1. Texas crime laboratories should develop methods to reduce the likelihood of ethical violations. For example, laboratories should re-examine evidence at random (where possible) to ensure reported results are consistent, and to discourage examiners from taking short-cuts, even when there are severe backlogs.

2. Texas crime laboratories should ensure their evaluation systems effectively reflect staff performance. Evaluations containing consistent questions about an examiner's understanding of analytical processes, attention to detail, or tendency to take "short cuts" demand special attention.

3. Texas crime laboratories should review their hiring systems to flag issues early during the probation period. If current recruiting and probation programs are ineffective, management should initiate appropriate changes to strengthen them.

4. Laboratory management should be cautious not to allow an examiner's positive and collegial demeanor to mask inadequate or marginal performance. Though "compassion" is an admirable quality in many circumstances, the potential impact of a major non-conformance is simply too great to justify or minimize signs of underperformance in a crime laboratory.

5. Consequences of examiner underperformance should be clear and consistent. Government bureaucracy should not impede laboratory management's ability to make key hiring and termination decisions. Moreover, laboratory supervisors and managers, who are ultimately responsible for the performance of their employees, should have effective means to recommend changes in employment scope or status where necessary.

6. DPS should continue to provide re-analysis results for Salvador cases to the Commission. The Commission will publish final results in an addendum to this report.

7. Limited resources and the lack of centralization of legal representation pose a number of challenges regarding notification practices. In high volume cases where notice to defendants is particularly challenging, stakeholders in the criminal justice community should use the example set in this case, and work together to provide a common sense approach to notice. Such an approach should ensure actual notice is given to defendants to the extent possible, and that defendants are given a resource to consult regarding applicable legal remedies.

8. As the Commission gains more experience with crime laboratory self-disclosures and complaints, issues may emerge that were not anticipated, and for which no other agency appears to be in a position to coordinate a response. A glaring example in this case is the need to facilitate a uniform approach to communication with prosecutors and notice to defendants, especially considering: (a) numerous counties with disparate resources have been affected; (b) large volumes of evidence have been brought into question; and (c) many defendants are indigent with limited access to legal representation. Statewide policymakers and members of the Legislature should consider these issues when crafting future policies affecting the criminal justice system.

9. All laboratories should follow DPS's example by taking a proactive approach to disclosure, including but not limited to reporting facts that may rise to the level of negligence or misconduct.

10. The Texas Forensic Science Commission should sponsor a crime laboratory management training program for all publicly funded Texas laboratories addressing such issues as interviewing and selecting quality examiners, succession planning, leadership development, and performance management.

11. The Texas Legislature should adequately fund crime laboratories to support high quality examiners and reduce the impact of financial pressures on management decisions related to the hiring and termination of staff.

EXHIBIT H

TEXAS FORENSIC SCIENCE COMMISSSION STAKEHOLDER ROUNDTABLE REPORT

TEXAS STATE CAPITOL
JUNE 6, 2012

I. Background

On February 18, 2009, the National Academy of Sciences released a report entitled "Strengthening Forensic Science in the United States: A Path Forward," (the "NAS Report").[1] The NAS Report identified key areas for improvement in forensic science and offered a number of specific recommendations.[2] The intent of the report was to elevate forensic science standards uniformly across the United States.[3]

In the three years since its release, state and federal courts, legislators, scientists and academics have cited the NAS report frequently as an authoritative source on the strengths and limitations of various disciplines in forensic science.[4] At least two Congressional committees held hearings to address the issues raised in the report.[5] Senator Patrick Leahy introduced legislation attempting to address issues of concern.[6] The Executive Branch appointed its own advisory committee on forensic science.[7] Numerous national organizations have released responses to the recommendations contained in the report, and it remains a significant subject of discussion at every annual meeting of the American Academy of Forensic Sciences.[8]

The Texas Forensic Science Commission ("TFSC" or "Commission") also recognized and supported the NAS Report's efforts to draw attention to needed improvements and resource gaps in forensic science.[9] The Texas Legislature created the Commission in 2005 to investigate allegations of negligence and

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[1] Nat'l Research Council, Nat'l Acad. of Scis., *Strengthening Forensic Science in the United States: A Path Forward* (2009) [hereinafter NAS Report].
[2] *Id.*
[3] *E.g.*, Paul C. Giannelli, *The 2009 NAS Forensic Science Report: A Literature Review*, 48 Crim. L. Bulletin 378 (2012); *Ex parte Robbins*, 360 S.W.3d 446 (Tex. Crim. App. 2011); *United States v. Cerna*, No. CR 08-0730, 2010 U.S. Dist. LEXIS 144424 (N.D. Cal. Sept. 1, 2010).
[4] *See Turning the Investigation on the Science of Forensics: Hearing before Committee on Commerce, Science and Transportation*, 112th Cong. (2011)*; Automated Fingerprint Identification System (AFIS) interoperability and the appropriate Federal Executive Branch responses to the AFIS interoperability issues identified in the National Academy of Sciences 2009 report: Strengthening Forensic Science in the United States: A Path Forward: Hearing Before the Subcomm. on Forensic Sci. of the Senate Comm. on Science*, 112th Cong. (2011); and *National Research Council's Publication "Strengthening Forensic Science in the United States: A Path Forward: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009).
[5] *Turning the Investigation on the Science of Forensics: Hearing before Committee on Commerce, Science and Transportation*, 112th Cong. (2011); *National Research Council's Publication "Strengthening Forensic Science in the United States: A Path Forward: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009).
[6] Criminal Justice and Forensic Science Reform Act of 2011, S. 132, 112th Cong. (2011).
[7] NAT'L SCI. & TECH. COUNCIL, CHARTER OF THE SUBCOMMITTEE ON FORENSIC SCIENCE 1 (2009), *available at* http://www.forensicscience.gov/assets/pdfs/subcommittee_charter.pdf.
[8] http://www.aafs.org/
[9] http://www.fsc.state.tx.us/nas-report/

misconduct in accredited crime laboratories.[10] As part of its oversight mission, the Commission is committed to taking a proactive approach to engaging stakeholders throughout the forensic science community in Texas. Commissioners have long believed that a statewide conversation regarding the NAS Report would be beneficial. This need has become more acute over time because many forensic science initiatives recommended in the NAS Report have been stalled in Congress due to political discord, lack of funding or other factors. The Commission recognizes that Texas has and will continue to take a leadership role in identifying ways to improve the integrity and reliability of forensic science, regardless of the pace at which similar initiatives may proceed at the federal level.

II. June 6, 2012 Stakeholder Roundtables

On June 6, 2012, the Commission provided a forum at the Texas State Capitol for issues of concern to forensic scientists, judges, legislators, policymakers, law enforcement and attorneys. The purpose was to identify the most pressing issues facing the forensic science community and highlight possibilities for improving the quality of forensic science and accessibility of forensic services to stakeholders in Texas. Collectively, these roundtable discussions helped identify the most critical issues in our state and allowed those who have already implemented successful new practices to share their success. Through this exchange, the group identified specific areas in which stakeholders may work collaboratively to improve the quality of forensic science in Texas.

Among the roundtable attendees were county laboratories, state laboratories, federal laboratories, city police department laboratories and private laboratories. The funding sources for the laboratories were diverse, including state, federal, county, city and fee-for-service methods. The group also included some forensic scientists and engineers operating as consultants outside traditional accredited laboratory settings. Participants from non-scientific disciplines included defense counsel, prosecutors, judges, legislators and their staff, representatives from the Offices of the Governor and Lieutenant Governor, and representatives from the Commission on Indigent Defense and the Innocence Project. The group's diversity allowed for an educational and productive dialogue including a variety of perspectives within the criminal justice system in Texas.

Following were the subject areas discussed during the roundtables: (1) education and training of scientists, lawyers and judges; (2) certification of forensic examiners; (3) quality and timeliness of forensic services; (4) strategies for improving quality and consistency of forensic reporting and testimony; (5) research and reliability of methods; (6) ethical dilemmas in forensic science; (7) addressing pseudo-science in Texas courts; and (8) independence of crime laboratories in Texas.

[10] Tex. Crim. Proc. Code Ann. art. 38.01 (West 2005).

Roundtable moderators[11] addressed three main themes for each subject area. The first was "strengths and success stories." This provided an opportunity for participants to share their experiences addressing various challenges, and to learn about successful initiatives at other Texas laboratories and in the Texas criminal justice system generally. The second area of focus was "key issues and challenges." This discussion allowed participants to identify the most significant and pressing areas for improvement currently facing scientists and other stakeholders in the criminal justice system. The third focus was "action items," which identified possible solutions, opportunities for collaboration and resource sharing.

[11] The Commission would like to thank everyone who generously donated their time to serve as moderators, including: (1) Judge Patrice McDonald and Dr. Sarah Kerrigan for Education and Training; (2) Dr. Elizabeth Todd and Dr. Art Eisenberg for Certification of Examiners; (3) Dr. Roger Kahn and Mr. Manuel Valadez for Quality and Timeliness of Laboratory Services; (4) Ms. Sarah Chu and Mr. Forrest Davis for Laboratory Reporting and Testimony; (5) Mr. Jeff Blackburn and Judge Sharen Wilson for Pseudo/Junk Science; (6) Mr. Edwin Colfax and Mr. Pat Johnson for Independence of Laboratories and Cognitive Bias; (7) Mr. Ron Singer and Ms. Melissa Gische for Research and Reliability of Methods; and (8) Dr. Nizam Peerwani and Mr. Richard Alpert for Ethical Dilemmas in Forensic Science. The Commission would also like to thank Mr. Steve Collins of the University of Texas system for serving as the group facilitator.

I. EDUCATION AND TRAINING OF SCIENTISTS, LAWYERS AND JUDGES

The NAS Report identified three main purposes for education and training in the forensic science disciplines.[12] The first is to prepare the next generation of forensic practitioners through high-quality undergraduate and graduate programs.[13] The second is to provide continuing professional development for forensic science practitioners so that they may stay current in forensic techniques and research.[14] The third is to educate the users of forensic science analysis, especially judges, lawyers and law students.[15] This roundtable addressed all three of these areas, with a particular focus on the second two.

A. Strengths and Success Stories

Stakeholders identified the following strengths and success stories in the area of education and training in Texas:

- Resources already exist for training of attorneys and judges (*e.g.*, Texas State Bar, Texas Criminal Justice Integrity Unit, Texas Center for the Judiciary, Texas Criminal Defense Lawyers Association ("TCDLA"), and Texas District and County Attorneys Association ("TDCAA")).

- Training resources also exist for forensic scientists *but* to a far lesser extent. Training funds for forensic scientists are often dependent upon the funding capability of the laboratory.

- Some existing national Scientific Working Groups (SWGs) have established recommendations for training and education (*e.g.*, DNA) but recommendations have not been developed uniformly for all disciplines.

- There are some free training resources available through the National Institute for Justice ("NIJ") and other agencies. However, those resources are limited in their availability and scope.

- Texas is extremely fortunate to have *four* programs accredited by the Forensic Science Education Programs Accreditation Commission ("FEPAC") including two programs at the University of North Texas Health Science Center, one at Texas A&M University and one at Sam Houston State University. However, the proliferation of "junk" forensic science programs continues; thus not all forensic science programs offer the same caliber of education and training.

[12] NAS Report at 8-1.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 8-2.

- Texas has many solid organizations representing individual stakeholder groups (*e.g.*, Texas Association of Crime Laboratory Directors (TACLD), TDCAA, TCDLA, Texas Police Chiefs' Association, etc.). However, no one is currently responsible for facilitating ongoing communication between these organizations.

B. Key Issues and Challenges

Stakeholders identified the following key issues and challenges in the area of education and training in Texas:

- There are major deficits in training and education for forensic scientists as well as a need for more interdisciplinary training involving lawyers, judges, law enforcement and forensic scientists.

- There is no dedicated statewide funding source for training and education of scientists as there is for lawyers and judges, leaving laboratories to find the money in their own budgets. Because laboratories are struggling financially, training and education is typically one of the first things cut from the budget.

- There is a lack of uniformity in training and education requirements among forensic scientists. Requirements for training and education tend to be discipline-specific and vary greatly depending upon the particular discipline.

- There is a need for additional training and education opportunities at the regional level within Texas. In-house training is a good start but it is far more beneficial to expose analysts in a given laboratory to analysts from other laboratories, as well as to other members of the criminal justice system such as lawyers and judges. Because it can be cost-prohibitive to send analysts out of state for training, a more cost-effective alternative would be to develop regional training centers within Texas that bring together subject matter experts within each region.

- Training challenges vary from laboratory to laboratory. Larger laboratories have more in-house training resources because they typically have more internal experts per discipline. Lab budgets range from zero training dollars per Full-Time Equivalent (FTE) to $2,000-$3,000 per FTE, though such a high number is extremely rare.

- Attrition of experienced analysts in many laboratories makes it difficult to sustain a robust in-house training program.

- There is no clear indication of what the training needs in the state actually are, including how many forensic scientists there are per discipline, how

many of them receive training currently, and at what level. This makes it difficult to assess potential cost.

- Some lab directors noted a loss of productivity associated with training. Even if the training is free through NIJ, some directors expressed concern that they cannot afford to release people from benchwork even for a week. Loss of analysis time impacts backlogs and the financial bottom line for fee-for-service labs in particular.

- Standards for training need to be determined collaboratively by stakeholders. The quality of training varies considerably, and stakeholders should come together to set standards for training in Texas.

- Currently, there is no comprehensive list of qualified experts in Texas available to provide training.

- Members of the Judiciary noted their needs for training curricula are not necessarily communicated to the people delivering the training. There is a disconnect between what is needed by members of the Judiciary and what is actually delivered.

- Funds for training and education are largely perceived to be non-essential, and it is difficult to measure and quantify the cost to society of inadequate training.

C. Action Items and Opportunities for Collaboration

Stakeholders identified the following potential action items and opportunities for collaboration in the area of education and training in Texas:

- The TFSC and TACLD should prepare and distribute a survey to determine what training and education expenditures exist in Texas. The survey should include numbers of FTEs per forensic discipline and budgets for training per FTE. Results may be compared to the average training dollars for other stakeholder groups.

- The TFSC and TACLD should work with laboratories to conduct a needs assessment to determine what the specific training needs in Texas actually are. How many scientists? Which disciplines? Entry level or continuing education, or both?

- The TFSC should consider conducting a cost/benefit analysis that shows the cost of re-testing evidence versus training and education.

- Texas should invest in a cutting edge training academy where all stakeholders can go to receive great quality training, and where

interdisciplinary training is emphasized. Most of the resources to begin such an academy already exist in Texas among various universities, stakeholders and scientists but need to be coordinated. The TFSC should serve as the coordinator of the training (location, faculty, curricula, etc.) with the assistance of one or two additional FTEs, possibly from one of the FEPAC-accredited programs.

- More academic and private sector partnerships should be explored. For example, many laboratories in Texas purchase their scientific instrumentation from the same vendors. Stakeholders should ask these vendors to help support training programs in the same way that forensic scientists in DNA have leveraged their relationships with vendors in their discipline.

- The TFSC and TACLD should establish interagency technical advisory groups for the various accredited disciplines. Forensic examiners do not benefit from working in a vacuum. The groups would allow for sharing of ideas and resources. The groups should involve practitioners, academicians and researchers.

- The TFSC should consider drafting best practices in training and education relying upon what has already been done in the national SWGs. Currently, most forensic scientists do not have a requirement for a minimum number of training hours. Approaches to implementing this could include: (1) mandating a certain number of hours per discipline through legislative action; (2) mandating a certain number of hours per discipline through DPS rulemaking; or (3) TFSC and TACLD work collaboratively to issue recommendations on best practices in training and education that become part of a collective statewide set of expectations without a mandate.

- TFSC should explore funding opportunities to cover costs. One example is to ask the Governor's Office to consider setting aside a small portion of the Coverdell funds (or other similar funding) to assist with training. The Governor's Office may be receptive to this approach, especially if it helps some of the smaller laboratories in more remote locations with limited access to training funds.

- The general consensus among representatives from the Legislature is that there will be no funding for a new training institute, so the TFSC, TACLD, DPS and others will need to be creative about using existing resources for this purpose.

- Currently, training funds administered by the Court of Criminal Appeals do not include forensic scientists among the constituency served. The TFSC should work with the Court to determine whether this could be changed.

II. CERTIFICATION OF FORENSIC EXAMINERS

Crime laboratory accreditation primarily addresses the management systems, technical methods and quality of the work of a laboratory.[16] Unlike the broad approach taken by accreditation, certification is designed to ensure the competency of individual examiners.[17] Certification is a discipline-specific process, and varies widely from discipline to discipline. Unlike accreditation, certification is currently not required by Texas law. However, the NAS Report, major accreditation bodies, and the American Academy of Forensic Sciences all support the concept of certification. This roundtable discussed the potential benefits, drawbacks and costs of certification for Texas crime laboratories.

A. Strengths and Success Stories

Stakeholders identified the following strengths and success stories in the area of certification of forensic examiners in Texas:

- Texas has already taken a leadership role by conditioning the admission of evidence in criminal actions upon the accreditation of the examining laboratory, and by creating the TFSC. Stakeholders acknowledged that mandatory certification is inevitable nationwide, though the form it will take (national vs. state regulation, etc.) is unclear at this time.

- This reality provides another opportunity for Texas to lead in developing appropriate certification requirements and training opportunities. Participants noted that some of the current certification examinations offered in certain disciplines are lacking in substance and do not provide the level of questioning that would ensure the competency of an examiner.

- Certification provides a strong perception that the certified individual has integrity, is competent and provides a quality work product, but there needs to be more rigor built into the certification process than just the examination, such as continuing education.

- Certain disciplines have done a better job establishing minimum competency (*e.g.*, DNA) than others, which have no minimum standards.

- In Texas, we have large forensic science agencies and laboratories already invested in encouraging certification for examiners. Some agencies provide financial incentives for certification or fee reimbursements for successfully completed examinations. Others incorporate certification as part of their advancement process and career path. The inevitability of

[16] NAS Report at 7-12.
[17] *Id.* at 7-13.

certification is recognized, particularly among larger forensic science service providers.

B. Key Issues and Challenges

Stakeholders identified the following key issues and challenges in the area of certification of examiners in Texas:

- Some stakeholders felt that examiners would bear much of the cost of certification, and though it makes sense to require certification for new examiners, some felt more experienced senior examiners whose testimony has been admitted for years should not be required to bear the same burden.

- Stakeholders noted that there is no standardization across certification programs. Some programs are so weak that it seems anyone could pay a fee and receive a certification. There is no clarity regarding what kind of knowledge is being tested, with some questions being so esoteric or antiquated that they lack value.

- Participants noted that proficiency testing also lacks consistency. For example, proficiency testing in DNA is very specific. One must take the examination two times a year in certain time increments. Other disciplines only require an examination every two years.

- Many laboratories cannot afford to remove examiners from benchwork to allow the time required for examination preparation.

- Certification is not the perfect solution; it does not guarantee one will always avoid mistakes, and it does not guarantee an examiner's ability to communicate the most important information effectively to a trier of fact.

- Participants observed a disconnect between when an individual is released for independent casework and when the same individual can qualify to sit for certification in some disciplines (*e.g.*, DNA). If the purpose of certification is to provide assurances of integrity and competency to the public and trier of fact, why should an examiner be qualified to conduct independent case work yet not be qualified to sit for the certification examination?

- Many stakeholders felt without a mandate or incentive, most examiners will not independently become certified.

C. Action Items and Opportunities for Collaboration

Stakeholders identified the following potential action items and opportunities for collaboration in the area of certification of examiners in Texas:

- TACLD and the TFSC should conduct a survey to assess how many analysts exist in the various disciplines. How many are certified? Who certifies them? Which are the most appropriate certification bodies? What would the cost of certification per examiner be?

- Existing national SWGs can help in determining core competencies for certification. What is the level of education, training and core competency required per discipline? Certification examinations should have all o built in.

- Action items are dependent upon collaboration between TFSC, DPS and TACLD. DPS has recognized, vetted and acknowledged certain accrediting bodies. Perhaps DPS could conduct the same type of vetting for certification bodies.

- Analysts already take written competency exams to qualify as examiners. The core competency exams of laboratories throughout Texas could be collected, and the TFSC could assemble a test bank to ensure that questions represent baseline knowledge considered appropriate by stakeholders in the particular discipline.

- Continuing education is critical to ensure that analysts maintain their core competencies. Certification and further continuing education should be built into career path for examiners.

- Some stakeholders felt that the forensic science community should encourage accrediting bodies to incorporate some level of certification in their requirements. A minimum basic certification could be established and built upon.

- Most stakeholders felt that certification should be mandated by the legislature to achieve the highest rate of compliance. The Legislature and Governor's Office should consider allocating funds in support of certification, or using some of the Coverdell or similar federal funds to assist.

III. QUALITY AND TIMELINESS OF LABORATORY SERVICES

Improving the quality and timeliness of laboratory services is an ongoing challenge for laboratories in Texas, regardless of whether they are funded by the state, federal or local governments, or take a fee-for-service approach to funding. This roundtable discussed strategies for improvement with a specific focus on the ways in which timeliness impacts quality of service.

A. Strengths and Success Stories

Stakeholders identified the following strengths and success stories in the area of quality and timeliness of service in Texas crime laboratories:

- Participants did not express many significant concerns regarding the quality of forensic services, except to the extent quality of service was affected by timeliness (or lack thereof). Participants noted that this does not necessarily mean that there are no quality issues in Texas laboratories but rather that the more looming concern is timeliness.

- During large group discussion, participants noted that many of the more significant quality concerns are in forensic disciplines in smaller laboratories exempt from accreditation, such as latent print analysis.

- Some stakeholders expressed appreciation for gains that have been made by laboratories in reducing turnaround times.

B. Key Issues and Challenges

Stakeholders identified the following key issues and challenges in the area of quality and timeliness of services in Texas crime laboratories:

- Many stakeholders are not satisfied with current turnaround times, though there is no commonly accepted definition of what a reasonable turnaround time is in a given discipline. There did not appear to be any consistent metric for what kind of turnaround time would trigger dissatisfaction.

- Stakeholders wondered whether it is possible or desirable to establish a definition of "turnaround time" and/or to have a single set of statewide turnaround time goals/metrics per discipline.

- Participants noted many factors contributing to poor turnaround times, including: training burdens for small laboratories, legislative mandates, (e.g., SB-1636), no refusal blood alcohol weekends, overly broad discovery requests, the "accreditation burden" and the cumbersome administrative requirements for hiring new examiners in many laboratories. This alone

can result in months passing before new examiners are hired, further increasing turnaround times.

C. Action Items and Opportunities for Collaboration

Stakeholders identified the following potential action items and opportunities for collaboration in the area of quality and timeliness of service in Texas crime laboratories:

- Laboratories need more funding to reduce their turnaround times. One suggestion was to try to allocate fines from non-indigent defendants, though there was significant disagreement around this issue.

- The TFSC could encourage establishment of a statewide database showing the status of criminal cases and the forensic testing requested (*i.e.*, un-submitted, closed case, lab reports released, etc.). Often, the lack of communication between lawyers and scientists adversely impacts turnaround times because analysts are working closed cases when they could be moving on to other assignments.

- Many forensic scientists expressed a desire to be permitted to testify via videoconference to save transportation and wait time outside courtrooms.

- Because many analysts face backlogs, they spend a significant amount of their time discussing why cases are not completed from a process standpoint. Management should work on case acceptance policies (*e.g.*, for processing large numbers of samples) and other process flow methods to minimize the amount of time analysts spend discussing backlogs and responding to questions regarding backlogs.

- One suggestion was to develop statewide "centers of excellence" for particular forensic disciplines, so that all toxicology work would be done at one location, all DNA work at another, although there was not a consensus on this issue.

- Another suggestion was to develop a thorough business case for the value of crime laboratory work. TFSC/TACLD/DPS could partner with a business school to make a case for enhanced crime laboratory support. The case could include subjects like: the cost of incarceration while cases are pending; definition of key terms (such as turnaround time); examination of backlogs; identification of key efficiency and quality metrics; relative cost of public and private labs; fee-for-service pluses and minuses; process mapping and improvement; advantages/disadvantages of privatization, etc.

- TFSC/TACLD/DPS should consider leading a coordinated statewide process mapping and improvement initiative to identify optimal methods

for crime laboratory workflow on a statewide basis. Process mapping and improvement could include automation efforts to streamline test efficiencies. (The Foresight Project was mentioned as a resource as the organization has completed similar initiatives.)

IV. CONSISTENCY & QUALITY OF LAB REPORTING & TESTIMONY

Most members of the forensic science community agree that the terminology used in reporting and testifying about the results of forensic analysis should be standardized to the extent possible.[18] Forensic scientists use many different terms to describe findings, conclusions, and degrees of association between evidence and people or objects.[19] The use of terminology may have a major impact on how a trier of fact perceives and evaluates evidence.[20] This roundtable discussed strategies for improving quality and consistency of reporting and analysis in Texas.

A. Strengths and Success Stories

Stakeholders identified the following strengths and success stories in the area of lab reporting and testimony in Texas:

- There are a number of stakeholders already engaged in mock trial training programs, including some crime laboratories and especially TDCAA. Staff attorneys conduct regular training and could be used as a resource to further enhance the mock trial programs of crime laboratories.

- New ISO-based accreditation standards are more rigorous; they are the main reason labs are moving forward with measured reporting standards and testimony tracking. These requirements will help ensure all laboratories are improving reporting and tracking testimony. Currently, about 1/3 of Texas laboratories are ISO-accredited but more labs are moving in that direction annually.

B. Key Issues and Challenges

Stakeholders identified the following key issues and challenges in the area of lab reporting and testimony in Texas:

- Some accrediting bodies (other than ASCLD-LAB) do not have standardized reporting practices. Participants felt this should be included as part of the accreditation process.

[18] *See* NAS Report Exec. Summ.
[19] *Id.*
[20] *Id.*

- Members of the defense community and judges are currently not involved in testimony monitoring or mock trials in crime laboratories. All participants thought it would be advantageous to involve those two constituencies in the process.

- Scientists expressed concern that they do not have enough contact with both prosecution and defense. Similarly on the defense side, attorneys expressed concern regarding their lack of access to laboratories. There was not a perception that laboratories were unwilling to communicate with defense counsel, but rather that they are required to go through a series of steps to ensure that they are releasing information to someone with the legal right to access the case. If some of that communication could be streamlined, it would help increase transparency.

C. Action Items and Opportunities for Collaboration

Stakeholders identified the following potential action items and opportunities for collaboration in the area of lab reporting and testimony in Texas:

- TFSC should create a Texas Working Group to evaluate and recommend consistent and uniform terminology for use in laboratory reporting. There are already national SWGs in the process of developing report-writing standards. Having our own TWGs would allow us to implement change more efficiently, achieve buy-in from Texas laboratories and participation from other stakeholders in Texas. Stakeholders noted that each discipline is different; perhaps we would need TWGs for each one of them. Judges, law enforcement, attorneys and scientists should all be represented.

- TWGs could also help develop standards, involving everyone in the process of standard-setting instead of mandating standards (either from inside the state or from the federal government). Stakeholders could consider asking the legislature to budget money for standards development in forensic science.

- TWGS could help develop a standard including a model report and model litigation package (with underlying information and cover sheet itemization) at a minimum. This would help scientists and lawyers transition toward a more consistent statewide approach. Roll-out of the models could include training for lawyers about the scope and content of the reports so they have a better understanding of what information they should be looking for and why.

- Many suggested that certain key information about a crime laboratory's work should be posted online. This should include information such as: (1) copy of policies and procedures; (2) SOPs; and (3) calibration records. It would also be helpful to develop online protected access to case

documentation and raw data for individual criminal cases. If a laboratory has a LIMS system, it could provide information to courts or to prosecutors who can in turn authorize transmission to defense counsel.

- Mock trial training should be expanded to include more scientists, judges, and attorneys (both defense and prosecution). This would be mutually beneficial to everyone because counsel and judges could learn about scientific concepts at the same time that scientists are learning about trial examination.

V. PSEUDO/JUNK SCIENCE

Many forensic science disciplines were not developed in laboratories, but rather to meet the practical investigative needs of law enforcement. As the NAS Report notes, though some techniques used in forensic science are built on sold bases of theory and research (*e.g.*, DNA, forensic pathology, toxicology, chemical analysis, digital and multimedia, etc.) others were developed on the basis of observation, experience and reasoning.[21] This does not mean that such disciplines are invalid, but it does raise questions about the ability of judges to make scientific determinations regarding admissibility, especially in the less scientifically grounded disciplines. Recent cases in Texas involving dog scent lineups and other questionable "scientific" techniques have raised awareness of the potential for pseudo/junk science to materially impact the outcomes of criminal cases. This roundtable discussed strategies for addressing the issue proactively.

A. Strengths and Success Stories

Stakeholders identified the following strengths and success stories in the area of pseudo/junk science:

- Due to the nature of the subject, it was difficult for participants to identify any real strengths in this area. However, participants felt it was important to identify what the term means. Pseudo/junk-science was generally defined as "science" introduced as evidence with a lack of adequate underlying research, poor documentation of testing, no repeatable results, no manner of replicating testing, little or insufficient peer review, and an "individualized" approach to analysis. The category also includes cases in which scientific principles are overstated in testimony beyond the bounds of scientific integrity, resulting in communication of materially misleading information to a trier of fact.

- Participants noted in the wake of the NAS Report, even unaccredited, established disciplines have been questioned as pseudo/junk science despite

[21] NAS Report 5-1.

their history of admission in many courts. Some examples include questioned documents, bite mark analysis, latent print examination, etc.

B. Key Issues and Challenges

Stakeholders identified the following key issues and challenges in the area of pseudo/junk science:

- Many participants are concerned there is no disciplinary mechanism to identify practitioners of pseudo/junk science and prevent them from testifying in court. Unlike the State Bar or the Medical Board, there is no central repository identifying problematic cases.

- Stakeholders wrestled with the question of who should decide when something is pseudo/junk science. Traditionally, admissibility determinations have been made by the courts and should continue to be made by the courts. However, judges are not always in the best position to make broad-based scientific determinations, and judges tend to err on the side of including evidence. Participants agreed that the Legislature operates too slowly to make any concrete determinations on what should be considered pseudo/junk science.

- There are many limitations in the current adversarial process that make it challenging to identify possible pseudo/junk science. First, defense lawyers are not always competent enough to raise the issues. Second, judges are sometimes reluctant to exclude evidence, and they make poor calls on reliance and reliability. Third, there can be legal precedents in appellate court decisions directly impacting a lower court's ability to act in pseudo/junk science cases.

C. Action Items and Opportunities for Collaboration

Stakeholders identified the following potential action items and opportunities for collaboration in the area of pseudo/junk science:

- The TFSC should consider creating a standing committee including TDCAA, TCDLA and various scientists to review issues related to pseudo/junk science and highlight concerns as they are raised.

- Forensic scientists agreed that for cases in which allegedly outdated or invalid science was admitted and a person was convicted, they would be more than willing to review their own analysis if asked by counsel seeking in good faith to ensure the integrity and reliability of the evidence. This continuous examination and review process is a core component of the scientific method, and it exists in tension with the legal system's need to achieve definitive outcomes in criminal cases. Most stakeholders agreed

that the Legislature should consider the impact of *Ex Parte Robbins* and determine whether something can or should be done to address cases in which a conviction was based on outdated or invalid scientific principles.

- Stakeholders envision a bigger role for the TFSC in alerting the community about information in changing forensic science and related technology. The TFSC should provide these resources to attorneys and to the court system through its website.

- The TFSC should highlight legitimate forensic disciplines and contrast them with examples of junk science (including factual scenarios) so the public understands the factual scenarios in which pseudo/junk science can result in a flawed conviction.

- The Texas Bar, TCDLA and TDCAA should encourage better lawyering and more open communication regarding forensic science, and defense attorneys should be more aggressive about seeking better funding for experts.

VI. INDEPENDENCE OF CRIME LABORATORIES & COGNITIVE BIAS

The NAS Report recommended that public forensic science laboratories be "independent of or autonomous within law enforcement agencies."[22] On the subject of cognitive bias, the report observed that "few forensic science methods have developed adequate measures of the accuracy of inferences made by forensic scientists."[23] This roundtable discussed strategies for improving independence and transparency in Texas crime laboratories as well as for reducing the potential risks associated with cognitive bias.

A. Strengths and Success Stories

Stakeholders identified the following strengths and success stories in Texas in the area of independence and cognitive bias:

- Many laboratories in Texas already have a strong organizational culture rooted in science. There is also a clear trend toward more transparency in forensic laboratories. However, participants noted that the culture of transparency and scientific integrity is not universal.

- Stakeholders acknowledged one of the reasons behind the "independence" recommendation in the NAS Report is to achieve budgetary independence so that a department does not have to choose, for example, between having officers on the street or running the laboratory. A good example of

[22] NAS Report 6-1.
[23] *Id.*

budgetary independence within a law enforcement organization is DPS; the funds allocated to the crime laboratory are not fungible and therefore cannot be diverted to other DPS priorities.

- Some laboratories have evidence intake procedures that provide a buffer between scientists and investigators so there is less contact between the officers and the scientists. This is a good strategy for managing risk associated with cognitive bias in forensics.

- Many laboratories are increasingly moving toward additional verification in laboratory testing. More review is required now than under prior accreditation systems. Most scientists feel this is a positive trend in the quality assurance process.

- One "best practice" used to reduce cognitive bias was to institute a process for evaluating a piece of evidence to determine if sufficient information is available for analysis before beginning any comparison with an exemplar.

- Independent laboratories (separate from police) have been successful in and outside of Texas. Examples include the Southwestern Institute of Forensic Sciences, the Bexar County crime laboratory, and the Arkansas state model.

B. Key Issues and Challenges

Stakeholders identified the following key issues and challenges in Texas in the area of independence and cognitive bias:

- Some laboratories still feel they are a competing budgetary priority within the parent law enforcement agency.

- Some analysts receive pressure from law enforcement investigators to achieve a certain result. This does not happen as frequently now as it once did, but it still happens occasionally.

- There appears to be a lack of transparency between some labs and defense counsel; some agencies make it very complicated and cumbersome to provide access regarding forensic analysis to the defense.

- It is challenging to strike a balance between regulating the flow of information to the analyst for the purpose of preventing cognitive bias and ensuring the analyst has the contextual information he or she needs to understand what the evidence is. Contextual information can be important to the analysis in many circumstances.

- The fact that many laboratories are housed within law enforcement creates a public perception that laboratories and law enforcement are "on one team" in the adversarial system. It is a problem and a challenge to convince the public that the law enforcement affiliation does not influence the conduct and forensic analysis of examiners.

- Participants identified a need to expand discovery in a way that makes sense for all parties; the defense bar needs to be educated about what they really need to be asking for in discovery requests to laboratories.

- Stakeholders noted that even if laboratories were removed from law enforcement, establishing physical/budgetary independence alone does not change the fact that the customer base will always be predominantly law enforcement. So the risk of a biased relationship is still there; structural removal from law enforcement is not a panacea and does not necessarily guarantee independence.

C. Action Items and Opportunities for Collaboration

Stakeholders identified the following action items and opportunities for collaboration in Texas in the area of independence and cognitive bias:

- More and better training would be helpful. Training should increase analyst awareness regarding the risk of bias, using case studies to show how results have gone off-track due to cognitive bias (*e.g.,* FBI Brandon Mayfield latent print analysis and similar cases).

- Stakeholders should develop more and better training to directly address forensic science testimony and to ensure results are accurately communicated in the context of adversarial question and answer process.

- Laboratories should consider exploring protocols to appropriately regulate the flow of information to protect against cognitive bias. This should include limiting extraneous information that could risk impacting the scientific interpretation, especially when subjective elements are involved.

- Laboratories should consider developing protocols for identifying close/hard cases where the risk of cognitive bias is greater, and providing extra safeguards. Some laboratories already have a system in place to ensure certain protocols kick in when needed; their methods could be shared with other laboratories to increase consistency across the system.

- Laboratories should ensure documentation of interaction with investigators that is necessary to provide the information analysts need, while protecting against extraneous information that could impact the integrity of the results.

VII. RESEARCH AND RELIABILITY OF METHODS

The NAS Report recommended that research be conducted to address issues of accuracy, reliability and validity in the different forensic science disciplines. The Report suggested the National Institute of Forensic Science competitively fund peer-reviewed research in certain areas. However, actual funding for research projects has yet to materialize for most disciplines. This roundtable discussed potential strategies for funding research and reliability studies in Texas.

A. Strengths and Success Stories

Stakeholders identified the following strengths and success stories in Texas in the area of research and reliability of methods:

- United States Customs and Border Patrol ("CBP") partners with two Texas universities—Texas A&M and Lamar. CBP provides a venue in its laboratory for Ph.D. candidates at those institutions to test research; in return the CBP gains co-authorship of any emerging research publication.

- Another example is the University of North Texas Health Science Center, which brings academia into the forensic laboratory. University professors use the laboratory to conduct their research. The dual advantage of this approach is that the professor publishes his or her research while the laboratory gains the benefit of the research project.

- FEPAC accredited programs are required to maintain this type of relationship to ensure scientific relevance. For example, the forensic science program at Sam Houston State University maintains strong academic-industrial partnerships through internships, research and external funding.

B. Key Issues and Challenges

Stakeholders identified the following key issues and challenges in Texas in the area of research and reliability of methods:

- Student academic research is a positive step, but to do the kind of fundamental research needed, academic researchers must be involved. Universities do not tend to fund the kind of practical research needed in various forensic science disciplines because the money is not available to do this type of research absent a crisis. Validating the underlying science in the comparison disciplines requires a university environment and dedicated academics.

- Validation of new techniques at the laboratory level is a different issue, but even there the financial support is lacking. Most laboratories consider themselves fortunate if they have a Quality Assurance/Quality Control manager who is able to conduct validation on new technology or instrumentation.

- The NAS Report recommended significant research but left the funding to the federal government. There certainly has not been a noticeable increase in research funding felt at the state or local level.

- As previously stated, Texas is fortunate to have four FEPAC-accredited forensic science programs. These accredited programs maintain rigorous standards and their graduates are prepared to enter forensic laboratories upon completion of their studies. However, there are some forensic science programs that do not meet FEPAC standards, and typically their graduates are not qualified to begin work in forensic laboratories after graduation without significant additional education and training.

- One challenge is whether there really is an incentive to conduct the research recommended in the NAS Report. The results may have an adverse impact, especially if the scientific underpinnings of forensic disciplines are revealed as flawed. On the other hand, if the research results support the scientific methods already employed, the only positive result would be to validate what is already routinely admitted in court. Nonetheless, the consensus among the group was that the research is justified, important to the integrity of forensic science, and should be conducted.

C. Action Items and Opportunities for Strategic Collaboration

Stakeholders identified the following action items and opportunities for collaboration in Texas in the area of research and reliability of methods:

- Establish a designated research liaison at the TFSC who would: (1) work with crime laboratories to assess their research needs and identify key areas; and (2) consult with existing research programs at various universities in Texas to determine if any of them would be interested in launching collaborative research projects to fulfill those needs.

- Laboratories could begin offering internships to students in exchange for research projects that would be done at the university level. The group felt much of the validation research would be well suited for an interdisciplinary approach, combining hard sciences (such as Chemistry) with other disciplines such as Engineering, Statistics and Social Sciences (specifically with respect to the cognitive research needed in pattern disciplines such as firearms/toolmarks, latent print, blood spatter, etc.)

- Ideally, each large laboratory would have a section dedicated to research and validation. However, participants recognize this highly impractical in the current financial environment.

- In the absence of research groups in individual laboratories (a solution determined to be highly impractical by participants) the TFSC could work to establish a statewide research institute/consortium that could offer assistance with validation studies, research needs and perhaps even support external audits of crime laboratories. This could be either a new entity or a collaborative effort among existing programs.

- The group also suggested statewide discipline-specific working groups including practitioners and university researchers. The purpose would be to establish guidelines, define common terminology and develop relationships between labs and universities that could eventually develop into collaborative research projects.

VIII. ETHICAL DILEMMAS IN FORENSIC SCIENCE

ASCLD-LAB, the largest accreditation body in the United States and the entity responsible for accrediting the vast majority of Texas crime laboratories, relies upon a professional responsibility document entitled *Guiding Principles of Professional Responsibility for Crime Laboratories and Forensic Scientists*. The principles cover various topics such as professionalism, competency and proficiency, and clear communication. This roundtable focused on ways in which forensic scientists and other stakeholders in Texas can foster an environment of ethically responsible scientific analysis, reporting and testimony.

A. Strengths and Success Stories

Stakeholders acknowledged that lawyers, forensic scientists, law enforcement and judges must adhere to a common set of ethical standards to ensure the reliability of evidence in Texas criminal courts. Participants also recognized a number of strengths in Texas that contribute to the reliability of evidence. They include:

- The Texas Legislature's decision in 2003 to condition the admission of evidence in criminal actions upon the accreditation of the examining laboratory (House Bill 3703, 78th Legislative Session). Though accreditation is not an absolute safeguard against errors in forensic analysis, it provides a baseline level of confidence and an expectation that all accredited laboratories comply with certain ethical and quality standards, including procedures for addressing non-conformances when they arise.

- The increasingly proactive approach taken by crime laboratories in Texas to: (1) identify any potential problems as they arise; (2) immediately conduct an internal investigation to determine the issue's scope; (3) self-disclose the problem to the Commission, DPS and the appropriate accrediting body.

- The efforts of TDCAA and TCDLA to enhance forensic science-related training opportunities and to alert prosecutors and defense counsel when a forensic science-related issue is raised.[24]

- The work of the Texas Forensic Science Commission in conducting comprehensive investigations of accredited crime laboratories when issues are raised either through public complaints or voluntary self-disclosures.

- The work of the Innocence Project and Conviction Integrity Units to ensure wrongful convictions are addressed and to highlight situations in which forensic science evidence was a contributing factor in the conviction.

B. Key Issues and Challenges

Stakeholders identified the following key issues and challenges in the area of ethical dilemmas:

- The adversarial process limits the ability of forensic scientists to share information freely with prosecutors and defense counsel. Scientists are often not contacted by counsel until the last minute before trial. Scientists expressed a strong desire for greater pre-trial preparation.

- Lawyers typically have weak backgrounds in science and may not fully understand the implications and limitations of a particular forensic test. Lawyers who practice in criminal courts need far better scientific training, and examiners need to be more proactive and assertive when explaining the constraints, limitations and assumptions of their testing.

- Scientists expressed frustration about being "directed too much" during testimony, which leads them to feel less confident that the court and/or jury

[24] Examples of proactive responses in this area include but are not limited to: (1) El Paso District Attorney alerting defense counsel immediately regarding concerns identified in the controlled substance division of the El Paso Police Department Crime Laboratory; (2) TDCAA alerting its membership regarding a significant controlled substance testing issue at the Houston DPS lab, and advising members on the best approach to notify potentially affected defendants and their counsel; and (3) Travis County District Attorney notifying defense counsel regarding allegations in the controlled substance division of the Austin Police Department's crime laboratory, and maintaining ongoing contact with the Commission to ensure any potential *Brady* issues are identified and disclosed in a timely manner.

heard the appropriate analytical explanation for a particular test or test result.

- Scientists and defense counsel expressed a desire for better communication. Scientists would like to be able to share more background information with defense counsel so they better understand and can credibly use scientific information. They would also like to assist defense counsel in understanding the scope of information maintained by the laboratory, narrowing the scope of discovery requests and providing information that is really necessary to protect the rights of clients.

- Scientists and attorneys expressed a desire for greater uniformity in reporting across Texas (language needs to better communicate scientific results, limitations, assumptions, etc.). Attorneys on both sides often do not understand enough to be able to spot key issues in forensic reporting.

C. Action Items and Opportunities for Strategic Collaboration

Stakeholders identified the following action items and opportunities for strategic collaboration:

- Greater interdisciplinary education, including discussions between scientists, defense counsel, prosecutors and judges. Education should be conducted in a safe environment where stakeholders can ask whatever questions they may have. Participants felt a coordinated educational approach would identify stakeholder needs and reduce the likelihood of "bad evidence" being introduced.

- More extensive pre-trial preparation: TCDLA and TDCAA could take a role in encouraging this.

- Defense counsel and prosecutors should consider being more open to the input of scientists. Forensic reports should "telegraph weaknesses and strengths in the analysis" so prosecutors and defense counsel may have a more realistic and open discussion of evidence in the case.

- Different counties across Texas should adopt the same forensic terminology so everyone understands the scientific concepts better and the criminal justice system can achieve greater internal consistency.

- Attorneys should work with the forensic science community to ensure they are kept up-to-date on changes in science, which would help stakeholders reach consensus more easily on the question of whether a particular case requires subsequent review. Not all participants agreed on the appropriate way to address convictions subsequently determined to have been based on outdated or invalid scientific principles, but all agreed that better

- The TFSC should maintain a repository including neutral scientific publications about major changes in scientific understanding in the various forensic disciplines for educational purposes.

EXHIBIT I

CERTIFICATION OF FORENSIC EXAMINERS IN TEXAS: OUR PATH FORWARD

A Joint White Paper Authored By:

Texas Forensic Science Commission and
Texas Criminal Justice Integrity Unit

November 27, 2013

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EXECUTIVE SUMMARY

On July 11, 2013, the Texas Forensic Science Commission ("TFSC") and the Texas Criminal Justice Integrity Unit ("TCJIU") hosted a stakeholder roundtable meeting focused on certification of forensic examiners in Texas. Participants included forensic science practitioners and managers, prosecutors, defense attorneys, members of the judiciary, advocacy groups and representatives from various national certification and accreditation bodies.

The goal of the roundtables was to assess whether and how the State of Texas may increase the number of certified examiners in publicly funded crime laboratories, with the ultimate goal of achieving 100% certification of forensic examiners statewide. The overwhelming consensus was that Texas is in a good position to assume a leadership role on certification. However, stakeholders recognize a number of challenges must be addressed before laboratories will be able to require certification for all examiners. Many of these challenges are outside the control of laboratories and individual forensic scientists.

The main challenges to certification of Texas examiners statewide include: (1) need for ISO-17024 accreditation of existing national certification bodies; (2) significant need for mobilization of financial resources to support certification incentives and continuing education; (3) establishment of high quality training and continuing education programs through collaboration with Texas universities; (4) need for recommendations regarding which existing certification bodies provide high-quality, meaningful certification programs; (5) shift in some certification programs to include rigorous practical component with testing levels for various tiers of forensic expertise; and (5) establishment of alternative certification process for disciplines with no existing certification body.

The group consensus is that *it will take 7-10 years* for most examiners to be certified. Texas stakeholders should begin this process by encouraging a major push toward increased numbers of certified examiners during the next five years, on a voluntary basis. After the voluntary push, the Texas Legislature may consider a deliberate and measured timeframe under which to implement a mandatory certification program. In support of this process, the following action steps should be taken in the near term:

1. The TFSC and Texas Association of Crime Laboratory Directors ("TACLD") should meet with Texas universities with FEPAC-accredited programs (Sam Houston State University, University of North Texas Health Science Center, Texas A&M University, etc.) to assess their interest in partnering on certification training and continuing education.

2. The TFSC and TACLD should communicate with the certification bodies on a regular basis to assess their progress toward ISO-17024 accreditation, and to make suggestions on general testing improvements as appropriate. The TFSC should report back to the larger community regarding these efforts.

3. The TFSC should determine what resources are available to assist laboratories with certification costs and incentives, pursue those resources to the extent possible, and report back to the stakeholder group.

4. The TFSC and the Department of Public Safety ("DPS") should post a list of recognized certification bodies on their respective websites, using the existing Forensic Specialties Accreditation Board ("FSAB") list and/or American Society of Crime Laboratory Directors—Laboratory Accreditation Board ("ASCLD/LAB") list as a guide.

5. The TACLD should release a position statement on examiner certification well before the next legislative session begins. In the meantime, the TFSC should make public recommendations on certification and the need for support of certification incentives.

6. Stakeholders should begin meeting with key members of the Legislature to educate them on the certification process and the plan to achieve a greater number of certified examiners in Texas.

7. To monitor progress, the TFSC should report at every quarterly meeting and send TACLD and other stakeholders periodic updates. The TFSC and DPS should post a list of recognized certification bodies as soon as possible.

In sum, while there is widespread support for certification in Texas, the initiatives suggested in this white paper will require a realistic, deliberate and well-informed approach. They will also require strategic partnerships between many groups including the forensic science community, institutions of higher education who can assist with training, and the legislative branches of government who have the authority to appropriate funds to make meaningful certification possible for a greater number of forensic examiners in Texas.

THE AUTHORS

Texas Forensic Science Commission

In May 2005, the Texas Legislature created the Texas Forensic Science Commission ("TFSC" or "Commission"). Under its enabling legislation, the Commission is required to investigate allegations of negligence or misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by an accredited laboratory, facility or entity.[1] The Legislature also required the Commission to develop and implement a reporting system through which accredited laboratories, facilities, or entities may report professional negligence or misconduct.[2]

In May 2013, the Legislature expanded the scope of the Commission's jurisdiction by passing SB-1238.[3] Under the new legislation, the Commission may investigate complaints involving forensic disciplines that are not subject to accreditation under Texas law, with the exception of autopsies.[4] The Commission may also affirmatively initiate an investigation of a forensic analysis for educational purposes without receiving a complaint if the Commission determines by majority vote that the investigation would advance the integrity and reliability of forensic science in Texas.[5]

The TFSC has nine members, all of whom are appointed by the Governor of Texas. Seven of the members are scientists and two are attorneys (one prosecutor and one defense attorney).[6] The TFSC's presiding officer is designated by the Governor.[7] Following are the current members of the Commission:

- Vincent Di Maio, MD, Former Chief Medical Examiner of Bexar County (Presiding Officer).
- Sarah Kerrigan, PhD, Chair of the Department of Forensic Science, College of Criminal Justice, Sam Houston State University (Vice Chair).
- Richard Alpert, JD, Chief of Misdemeanor Division, Tarrant County DA's Office.
- Jeffrey Barnard, MD, Chief Medical Examiner of Dallas County.
- Arthur Eisenberg, PhD, Chairman of Department of Forensic and Investigative Genetics, University of North Texas Health Science Center.
- Jean Hampton, PhD, Chairman of Department of Health Sciences, Texas Southern University.
- Brent Hutson, PhD, Forensic Odontologist and Director of Department of Clinical Fixed Prosthodontics, Texas A&M University Health Science Center, Baylor College of Dentistry.

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[1] TEX. CODE CRIM. PROC. § 38.01(4)(a)(3).
[2] *Id.* at (4)(a)(1)-(2).
[3] Tex. S.B. 1238, 83rd Leg., R.S. (2013)
[4] *Id.* at 3(b-1).
[5] *Id.* at 3(a-1).
[6] *Id.* at 2(a).
[7] TEX. CODE CRIM. PROC. § 38.013(c).

- Bobby Lerma, JD, Criminal Defense Attorney, Brownsville, and Past President of Texas Criminal Defense Lawyer's Association.
- Nizam Peerwani, MD, Chief Medical Examiner of Tarrant, Parker, Denton and Johnson Counties.

In the years since the Commission was established, Commissioners have committed significant time and resources to improving forensic policy and practice in Texas. In addition to handling complaints, self-disclosures and related investigations, the Commission is actively engaged in promoting the development of professional standards and training and recommending legislative improvements. The certification initiative that is outlined in this white paper is a major component of the Commission's commitment to forensic development in Texas.

Texas Criminal Justice Integrity Unit

The Texas Criminal Justice Integrity Unit ("TCJIU") is an ad hoc committee created by Judge Barbara Hervey of the Texas Court of Criminal Appeals ("CCA").[8] The TCJIU was established in June 2008 and held its first formal meeting in August 2008. The TCJIU was created to review the strengths and weaknesses of the Texas criminal justice system. The TCJIU's purpose is to bring about meaningful reform through education, training, and legislative recommendations. The TCJIU meets periodically as needed, and meetings are called by the Chair.

Members of the TCJIU include a diverse group of policymakers and stakeholders in the criminal justice community in Texas. Current members include:

- Judge Barbara Hervey, Texas Court of Criminal Appeals (Chair)
- Judge Sid Harle, District Judge, San Antonio
- Senator Rodney Ellis, Texas Senate
- Senator Carlos Uresti, Texas Senate
- Senator Jose Rodriguez, Texas Senate
- Jaime Esparza, District Attorney, El Paso
- Pat Johnson, Director, Texas Department of Public Safety Crime Lab
- James McLaughlin, Executive Director, Texas Police Chiefs Association
- Mary Anne Wiley, Deputy General Counsel to Governor Rick Perry
- Russell Wilson, Special Fields Bureau Chief, Dallas County District Attorney
- Jim Bethke, Director, Texas Indigent Defense Commission
- Bill Allison, Clinical Professor of Law and Director, University of Texas Criminal Defense Clinic
- Gary Udashen, Criminal Defense Attorney, Dallas
- Edwin Colfax, Project Manager, Texas Indigent Defense Commission

[8] The CCA is the highest level appellate court for criminal cases in Texas. The TCJIU website may be accessed at: http://www.cca.courts.state.tx.us/tcjiu/tcjiuhome.asp

Shared Collaborative Mission

Over the past two years, the TFSC and TCJIU have worked together to develop training and educational programs for attorneys, judges, and law enforcement entities in Texas. Both organizations are committed to working collaboratively to encourage stakeholder participation and provide cost-efficient training and educational programs.

The purpose of this white paper is not to impose any requirements or rules on forensic science stakeholders in Texas. Rather, the paper provides a forward-looking vision for achieving broader levels of certification for forensic examiners in Texas through a combination of voluntary initiatives and legislative engagement.

The Texas Advantage

There are a number of reasons why Texas is well positioned to be a leader on certification issues. Texas has four universities with forensic science programs that are accredited by the Forensic Science Education Programs Accreditation Commission ("FEPAC") of the American Academy of Forensic Sciences. The programs are housed at Sam Houston State University ("SHSU") (Master's program and a PhD pending approval), the University of North Texas Health Science Center ("UNTHSC") (two Master's programs), and Texas A&M University (undergraduate program). All of these top-tier programs could effectively partner with the forensic science community to meet education and training goals using state-of-the-art distance learning technology.

Texas is also fortunate to have members of the Legislature and Executive Branch who are engaged in forensic science issues and committed to improving the integrity and reliability of forensic science. The committees responsible for criminal justice and public safety in both the Texas House and Senate have consistently expressed strong interest in ensuring just outcomes based on valid scientific principles, as have representatives from the Governor's Office, the Lieutenant Governor's Office and the Attorney General's Office.

Texas also has an active and well-organized Association of Crime Laboratory Directors ("TACLD"). The group meets at least two times per year and includes representation from virtually every crime laboratory in the state. Members regularly participate in both TFSC meetings and events sponsored by the TFSC and TCJIU.

Texas also has one of the largest organizations of prosecutors in the world—the Texas District and County Attorneys' Association ("TDCAA"), as well as an active association of defense lawyers—the Texas Criminal Defense Lawyers' Association ("TCDLA"). Moreover, the TFSC has worked collaboratively and proactively with the Innocence Project of Texas on discipline-specific reviews among other projects.

Open lines of communications with laboratory directors and members of the legal community make it much easier to implement a collaborative strategy tailored to the needs of communities across the state.

Unlike some large states in other regions of the country, Texas is not highly unionized. Thus, crime laboratories are not subject to the same restrictions that may be imposed by union contracts and associated rules in implementing policies designed to encourage examiner certification.

Texas also has a forensic science commission dedicated to forward-looking initiatives focused on forensic development. Though the TFSC takes its investigative role and retroactive review responsibilities very seriously, Commissioners spend significant time and energy working on initiatives to improve forensic science going forward.

The CCA receives over $18,000,000 per biennium from the Legislature in training funds for lawyers, judges and law enforcement. The training grant is administered by Judge Hervey who also chairs the TCJIU. This allows for close coordination between the CCA's available training resources and the educational needs of the forensic science community.

Finally, Texas was among the first states to require accreditation of its crime laboratories in 2003. Because Texas was able to successfully implement this requirement and learn from the process, it is easier for the forensic science community to envision a similar scenario with certification.

CERTIFICATION VS. ACCREDITATION: UNDERSTANDING TEXAS LAW

The terms "certification" and "accreditation" are sometimes confused by stakeholders in the criminal justice system. However, the terms have distinct meanings and the policy objectives of each concept are important to understand. As a backdrop for the discussion on certification of individual examiners, it is helpful to review what accreditation is and what Texas law says about accreditation of crime laboratories.

Accreditation refers to a program through which a forensic laboratory complies with an established set of quality standards and relies upon commonly accepted practices based on those standards.[9] While accreditation does not provide 100% protection against lapses in integrity or mistakes by individual examiners, accreditation standards are a key element of a laboratory's quality assurance program.[10]

[9] *See* NAT'L RES. COUNCIL, NAT'L ACAD. OF SCIS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) at 195 [hereinafter NAS REPORT].
[10] *Id.*

In 2009, the National Academy of Sciences released a report entitled "Strengthening Forensic Science in the United States: A Path Forward" ("NAS Report"). The Report recommended that all laboratories be accredited.[11] In 2003, *six years before the Academy released the NAS Report*, the Texas Legislature passed a law requiring all laboratories and other entities conducting forensic analysis of physical evidence, whether public or private, to be accredited by the Texas Department of Public Safety ("DPS") in order for the entity's analysis of evidence or testimony to be admissible in a criminal proceeding.[12]

For a laboratory or other entity to receive DPS accreditation, it must first be accredited by a recognized national accrediting body.[13] The following national accrediting bodies are recognized by DPS:

- American Board of Forensic Toxicology ("ABFT")—recognized for accreditation of toxicology discipline only.
- American Society of Crime Laboratory Directors/Laboratory Accreditation Board ("ASCLD/LAB")—recognized for accreditation of all disciplines that are eligible for accreditation.
- College of American Pathologists ("CAP")—recognized for accreditation of toxicology discipline only.
- Department of Health and Human Services ("DHHS"), Substance Abuse and Mental Health Services Administration (formerly known as the DHHS National Institute on Drug Abuse)—recognized for accreditation of toxicology discipline only in the sub-discipline of urine drug testing for all classes of drugs approved by the accrediting body.
- Forensic Quality Services ("FQS") an outgrowth of the National Forensic Science Technology Center—recognized for accreditation of all disciplines that are eligible for accreditation.

Under Texas law, certain forensic disciplines must be accredited while others are exempt from accreditation either by statute or administrative rule. For a list of required disciplines and exemptions, please refer to **Exhibit A.**[14] The list of disciplines for which accreditation is required under Texas law is subject to change by the Legislature and/or DPS. Additional disciplines may be added to the list as forensic science evolves.

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[11] *Id.* at 215.
[12] TEX. GOV. CODE § 411.0205.
[13] *See* http://www.txdps.state.tx.us/CrimeLaboratory/LabAccreditation.htm for additional information on the DPS crime laboratory accreditation program.
[14] *Id.*

While the accreditation process *does not include certification* of individual forensic examiners, accreditation standards do require laboratories to maintain procedures to ensure examiners achieve a baseline level of competency and demonstrate satisfactory qualifications before being released to perform independent casework. Some accreditation bodies such as ASCLD/LAB also require laboratories to participate in periodic proficiency testing administered by external testing agencies to ensure examiners maintain a satisfactory level of competency over time. However, this baseline level of competency is a far more elementary assessment than what would be demonstrated through achieving certification, as described below.

WHAT IS CERTIFICATION?

Unlike accreditation, which monitors the quality standards of a particular laboratory as a whole, certification assesses the knowledge, skills and abilities of *individual forensic examiners*.

> Professional certification is the recognition by an independent certification body that an individual has acquired and demonstrated *specialized knowledge, skills, and abilities* in the standard practices necessary to execute the duties of their profession. Certification also provides the general public and the judicial system a means of identifying those practitioners who have successfully demonstrated compliance with established requirements.[15] [emphasis added.]

Many national and state policymakers and most forensic scientists in and outside of Texas support certification for forensic examiners, at least in theory. Indeed, Recommendation 7 of the NAS Report states that "individual certification of forensic science professionals should be mandatory, and all forensic science professionals should have access to a certification process."[16]

[15] *See* **Exhibit B**, White House Subcommittee on Forensic Science, Interagency Working Group on Accreditation and Certification, Observations Concerning Certification of Forensic Science Practitioners at 3 (2013) (unpublished work paper) [hereinafter IWG Paper].
[16] NAS REPORT at 215.

In support of its recommendation, the NAS Report makes a frequently cited comparison to other professions, noting that nurses, doctors, lawyers and engineers must be certified or licensed before they are authorized to practice.[17] Some have taken this observation to an extreme, wondering why hair stylists and nail technicians are regulated under state law while forensic scientists face no such requirement.[18] While these comparisons are tempting, they fail to take into account the very real and practical challenges facing even the most valiant and aggressive certification efforts. They also assume certification indicates a baseline level of competency, when in fact most reputable certification bodies award certification in recognition of significant and measurable expertise and skill in a discipline.

In light of the frequent tendency to compare forensic scientists to other professions, there is a risk that policymakers and legislators in Texas will view the question of mandatory certification as a simple one with an obvious answer: "Why not just require that all forensic examiners be certified before they may testify in court?"

While certification enjoys widespread support among Texas stakeholders, the consensus within the forensic science community is that the state should take the lead on this issue in an inclusive and deliberate manner, accounting for the practical realities described below. Those realities will require a resource-building period before certification can be effectively mandated by the state.

In forming its conclusions, the Texas stakeholder group relied in part on a recommendation document drafted by the Interagency Working Group ("IWG") on Accreditation and Certification, a sub-group of the National Science and Technology Council's Committee on Science (Subcommittee on Forensic Science). This group was established by the White House in 2009 for the purpose of advising policymakers on implementation of the NAS Report. As part of that effort, the Subcommittee created IWGs for certain subject areas, including certification. The IWGs included representatives from federal, state and local forensic science and law enforcement agencies, prosecutors, defense counsel and academic communities from across the country. The stakeholder group is indebted to the IWG for the many hours of work and thoughtful deliberation that went into its observations and recommendations. The IWG Paper is attached as **Exhibit B**.

[17] *Id.*

[18] Regulatory requirements for these professions typically involve a licensing regime. Though one roundtable raised the possibility of implementing a licensing system for forensic examiners (in part as a source of potential continuing education funds), most roundtables focused on certification as the most viable next step.

Structural Challenges with Current Certification System

A major challenge for any state looking to increase its percentage of certified examiners is the varying levels of quality among existing certification bodies. There is no single body charged with certifying forensic examiners either at the national or state level. As noted by the IWG, various certification bodies have existed in different disciplines in forensic science for decades.[19] However, certification bodies do not exist for all forensic disciplines.

Some certification bodies are accredited by the Forensic Specialties Accreditation Board ("FSAB").[20] However, FSAB accreditation is a voluntary process. Certification bodies are invited to participate in FSAB accreditation if they meet certain established requirements, "such as periodic recertification, a sufficient knowledge base for certification, a process for providing credentials, and a code of ethics."[21] The list of certification bodies accredited by FSAB is attached at **Exhibit C.**[22]

Even among those certification bodies accredited by FSAB, programs vary in certain key areas, such as: "eligibility, use of proficiency tests, practical exercises, training, continuing education, recertification requirements, etc."[23] Moreover, there are "vast differences in the certification examination processes and essential elements for forensic science disciplines which leads to fragmentation of the various certification programs accredited by the same entity."[24]

While FSAB accreditation is an important first step in creating similar standards among certification bodies, FSAB accreditation standards "are not recognized by a third party or accredited under ISO/IEC 17011."[25] The International Organization for Standardization ("ISO") is the world's largest developer of voluntary International Standards. ISO standards provide "state of the art" specifications for products, services and good practice in many areas of industry.[26] As the NAS report noted in Recommendation 7, certification should take into account established and recognized standards, such as those published by ISO.[27] ISO/IEC 17011 (Conformity assessment -- General requirements for accreditation bodies accrediting conformity assessment bodies) specifies standards for accrediting bodies. In essence, it is the process by which an accrediting body is *itself* accredited.

ISO/IEC 17024 (Conformity assessment -- General requirements for bodies operating certification of persons), describes the necessary standards for organizations who certify individuals. In recommending that all certification bodies achieve ISO 17024 accreditation within 10 years, the IWG asserted that accreditation under ISO/IEC 17024

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[19] IWG Paper at 3.
[20] http://thefsab.org/accredited.htm
[21] NAS Report at 209.
[22] http://thefsab.org/accredited.htm
[23] *Id.*
[24] *Id.*
[25] IWG Paper at 4.
[26] http://www.iso.org/iso/home.html
[27] NAS Report at 215.

"ensures the validity, reliability and quality of the certification programs."[28] Moreover, a certification body accredited under ISO/IEC 17024 "must demonstrate a fair and equitable evaluation of all candidates; an organizational structure to support the mission; policy and procedures for complaints, appeals and confidentiality; and a certification and recertification scheme."[29]

While the forensic science community in Texas may rely on FSAB as an important interim step while certification bodies strive to achieve ISO 17024 accreditation, there are many certification bodies that have not even attained FSAB accreditation. In fact, some bodies simply require that an examiner pay a fee, take a short online course and submit administrative forms in return for a certification document. These discrepancies in standards undermine the fundamental goal of certification, which is to recognize individual skills and abilities and provide the public and judicial system with an accurate and reliable assessment of an examiner's level of ability and expertise. In addition, even the most rigorous certification bodies are managed by volunteers with limited administrative support staff. This means that different bodies are able to offer different levels of service on varying timelines depending upon the availability of its members.

In addition to these structural challenges, some forensic disciplines do not have any corresponding certification body, whether FSAB-accredited or not.[30] Both the IWG and Texas stakeholders recognize that something must be done to provide certification for these smaller disciplines. Suggestions for how to handle this dilemma in Texas are proposed below.

The purpose of enumerating these challenges is to describe the certification environment accurately so that policymakers and stakeholders may craft an effective and efficient plan for Texas. *However, stakeholders agree that these issues should not deter efforts to move forward, and that Texas is well positioned to emerge as a model state for increasing certification among its examiners.*

[28] IWG Paper at 4.
[29] *Id.*
[30] *See* IWG Paper Appendix.

THE PATH IN TEXAS:
COLLABORATION THROUGH STAKEHOLDER ROUNDTABLES

The TFSC has sponsored two forensic roundtable events to date. The first was a gathering at the Texas Capitol in June 2012 entitled "Strengthening Forensic Science in Texas: Moving Forward." A diverse group of forensic stakeholders were invited to discuss challenges and improvements broadly based upon the 2009 NAS Report. The TFSC released a paper summarizing the roundtable findings. It is attached hereto as **Exhibit D.**[31]

One of the recommendations from the 2012 roundtables was that the TFSC conduct a survey of Texas crime laboratories to determine the extent to which forensic examiners in Texas are certified, and to better understand the challenges related to certification efforts. A narrative document describing the full survey results is attached as **Exhibit E**.

TFSC Certification Survey

A total of 489 forensic examiners were represented in 22 publicly funded laboratories at the state (59%), county (23%) and city (18%) level. Controlled substances (22%), forensic biology/DNA (17%), alcohol toxicology (15%) and firearms/tool marks (15%) were the most common disciples or sections within the laboratory population, representing the largest numbers of examiners (167, 123 and 49, respectively).

None of the publicly funded laboratories reported having sufficient examiners to maintain a 30-day turnaround in all disciplines in which they were accredited. The number of additional examiners needed to maintain a 30-day turnaround totaled 95 and ranged from 1 to 42 per organization. This represents a significant increase in scientific personnel of almost 20%. Data regarding laboratory workload and turnaround times is important to consider when assessing the potential ramifications of pulling examiners off the bench, whether for certification activities or any other initiative that does not involve pending casework.

Of the 489 examiners covered by the survey, a total of 63 (13%) were certified. Two laboratories did not report certification by forensic discipline, but among the remaining 20 laboratories, the disciplines with the highest rates of certification were latent prints (21%) and firearms (16%). Certification rates among examiners in the most common disciplines, controlled substances and forensic biology/DNA, were 4% and 5% respectively. The American Board of Criminalistics (ABC), the Association of Firearm and Tool Mark Examiners (AFTE), the International Association for Identification (IAI) and the American Board of Forensic Toxicologists (ABFT) were the most common certifying bodies.

[31] http://www.fsc.state.tx.us/documents/StakeholderRoundtableReport-June62012.pdf.

Support for certification among the forensic laboratory leadership was evidenced by the fact that 50% of the participating organizations already offered some form of incentive for examiners to become certified. Most of the laboratories support certification or view it as inevitable, but also recognize the formidable challenges associated with this effort in terms of funding, training resources and personnel.

Participating laboratories provided estimates of certification cost per examiner. However, these estimates varied widely, from a few hundred dollars per examiner in straight examination fees to thousands of dollars when accounting for the cost of study, travel and test-taking time away from the bench. Though the TFSC has not calculated a precise estimate of cost per examiner, it is clear that direct costs will include the examination fees, associated membership fees (if required), travel costs where necessary, cost of study materials, and cost of time away from forensic casework for study and/or test-taking. Cost of continuing education will also be significant, and will be in addition to the initial certification expenses.

OBSERVATIONS AND RECOMMENDATIONS: JULY 2013 STAKEHOLDER ROUNDTABLES

In July 2013, as a follow up to the initial roundtable meeting in June 2012, the TFSC and the TCJIU hosted a second roundtable meeting of more than sixty forensic science stakeholders representing crime laboratories, certification bodies, accrediting bodies, prosecuting attorneys, defense attorneys, the judiciary, law enforcement, policy makers and policy advocates. The list of attendees is attached as **Exhibit F**.

The findings set forth below do not establish any new rules or regulations, or impose any requirements on members of the forensic science community in Texas. Rather, they suggest a proactive and collaborative path forward for a higher level of certification among forensic examiners. While stakeholders recognize that much work remains to be done at the national level, and that there are formidable challenges involved in an undertaking of this magnitude for a large and diverse state like Texas, the consensus is that Texas should take the lead on certification as it has on many other forensic science issues.

One disclaimer the group felt important to include is that certification, while a desirable tool for measuring examiner ability, is ***not*** a substitute for quality internal training programs, appropriate supervision, and performance monitoring of staff. All of these components must be functioning at an optimal level to ensure the best possible forensic analysis in a crime laboratory.

1. Should the State of Texas Require Certification for all Forensic Examiners?

Texas stakeholders support certification and believe the state should move forward with a plan to encourage a higher percentage of certified forensic examiners. *However, the group believes it will take 7-10 years until most examiners in Texas could be certified.* Texas should start by encouraging a voluntary push toward increased

numbers of certified examiners during the next 5 years. After 5 years, stakeholders should assess whether mandating certification under state law would be practical and beneficial to the goal of achieving 100% certification of examiners.

During the initial 5-year period (and perhaps beyond), the following challenges need to be addressed and resolved. The TFSC should take the lead in addressing the issues to the extent possible, or in updating the forensic community on the status of each item in situations where the actions fall under the purview of external entities:

- As discussed above, certification bodies themselves need to be closer to achieving accreditation under ISO-17024.

- Financial resources must be mobilized to support lab efforts toward certification.

- Training resources (particularly from Texas higher education institutions with FEPAC-accredited programs) must be established to help analysts prepare for certification examinations.

- Because the quality of certification bodies varies significantly from discipline to discipline, a Texas agency with authority (either DPS or TFSC or both) should publish and maintain a list of recognized certification bodies.

- Where necessary, certification bodies should shift their testing requirements to ensure tests are meaningful and include a practical component. Certification should not merely be a measure of an examiner's test-taking skills. Testing should include an assessment of examiner ethics/integrity and a continuing education component.

- Certification bodies should develop various levels of certification based on different levels of experience, responsibility and mastery of a discipline.

- Something must be done to address certification for smaller disciplines that do not have certification bodies. If the assessment of examiner competency in those disciplines is to be handled through accreditation bodies such as ASCLD/LAB, the accreditation bodies will need to develop a plan for handling certification of those smaller disciplines.

- Cost for continuing education must be supported after an examiner accomplishes his or her initial certification.

2. <u>What incentives have been successful to encourage certification? Can they be adopted broadly across the state?</u>

The TFSC should work with members of the forensic science community to mobilize resources in support of some or all of the following: (1) reimbursement for exam fees upon successful passage by the examiner; (2) study time for examiners; (3) a

bonus, pay increase and/or promotion track linked to certification; and (4) recognition of certification status in examiner's title. Stakeholders recognize some organizations will have limitations on their ability to compensate examiners, which will make uniform application of a certification requirement challenging.

Texas universities, especially those with FEPAC-accredited graduate and undergraduate programs (SHSU, Texas A&M, UNTHSC) should create web-based, distance learning test preparation programs. The programs should take advantage of university subject matter strengths (e.g., criminalistics, forensic chemistry and toxicology at SHSU, DNA at UNTHSC, etc.) and offer a full complement of training approaches. The programs should also have a continuing education component.

For all new hires, Texas crime laboratories should set an expectation at the outset that new examiners will achieve certification within 5 years of meeting eligibility requirements. This should help highlight the most serious and diligent candidates during the interview process.

Accreditation bodies should consider requiring continuing education for forensic scientists, which could help labs gain the leverage for additional funding. For example, many feel that DNA receives the funding needed for training (primarily from the federal government) because specific training requirements exist for DNA.

The TFSC should work with the certification bodies to determine what provisions can be made to establish regional testing sites. The TFSC should ensure Texas laboratories are aware of and have access to these regional testing sites.

3. Have laboratories leading the way on certification experienced any pitfalls and what can we learn from them?

Stakeholders need to be clear in articulating the purpose of certification in forensic disciplines; it is more than baseline, novice-level competency. In fact, as discussed above, some certification bodies such as the Association of Firearm and Tool Mark Examiners ("AFTE") do not even allow examiners to be eligible for certification until they have five years of casework experience. This means that any certification requirement must take into account eligibility requirements. For example, a new firearms examiner would not even be eligible for consideration under AFTE's certification regime until he or she had completed at least five years of practical experience in the discipline. These requirements must be taken into account before any mandates are imposed.

Certification examinations should be challenging and meaningful, demonstrating more than simply test-taking ability or a baseline level of competency. Baseline competency should be determined by laboratories through internal assessments and proficiency testing, which is the responsibility of all Texas crime laboratories under their accreditation standards before and after an examiner is released for independent casework. Certification should signify a level of mastery beyond the base level.

Many examiners fail certification examinations the first time because they do not know what to expect. However, second round passage rates are much higher. This indicates that training resources must include a variety of thoughtful and creative educational modalities so that examiners have a greater chance of passing the exam the first time. Independent study-at-home programs are not terribly effective for certification exams; labs must provide study resources and access to effective training or failure rates will remain high.

Finally, stakeholders will need to develop a consensus to the extent possible on the following challenging questions: (1) What should be done with experienced examiners who resist certification? Is a grandfathering mechanism appropriate for these examiners? (2) How many chances should an examiner be given to pass the applicable certification exam before some type of adverse employment action is taken? These issues will require additional attention by stakeholders in the coming months.

4. Should we identify which certification bodies are of acceptable quality? What should we do about disciplines for which no certification body exists?

DPS and the TFSC should post and maintain a list of recognized certification bodies on their websites. Once certification becomes mandatory under state law, DPS should include the list in its administrative rules in the same way it currently does for accreditation bodies. As a first step, DPS and FSC could recognize FSAB-accredited bodies and/or the list already maintained by ASCLD/LAB. The TFSC should also circulate a list of disciplines for which no certification bodies exist so the community knows how many there are and how many examiners are affected.

ASCLD/LAB and other accreditation bodies should consider how to require a rigorous level of competency for disciplines that don't currently have certification bodies. Stakeholders recognize this will be challenging, as the accreditation bodies may be able to achieve the goal with certain more established disciplines, but may have a greater challenge in other disciplines with fewer practitioners.

5. What role should lawyers and judges have in encouraging certification?

Very few attorneys in Texas ask whether examiners are certified during trial. Most attorneys have a difficult enough time understanding accreditation; certification is still an unknown in many jurisdictions. Certification has the potential to increase the faith of attorneys, fact-finders and the public in the forensic analysis used in criminal cases. Both the defense bar and prosecutors should be involved as certification progresses so they may have input in any new legislation, especially legislation mandating certification.

The TFSC should continue to work with the legal community to keep prosecutors, the defense bar and the judiciary informed of progress in the area of certification. Representatives from each of these groups should be encouraged to take an active role in forensic science issues, and the TFSC should not hesitate to call on the groups regularly for consultation as the certification process moves forward.

It is important to note that if resource issues are not addressed in a thoughtful manner, requiring certification could increase backlogs which would have an adverse impact on the entire criminal justice system. Training will be needed for attorneys and judges on this issue as more examiners achieve certification. Judges in particular need to better understand their gatekeeping role when it comes to integrity and reliability of forensic science and competency of forensic examiners. The Texas State Bar and Center for the Judiciary can play a key role in training, in partnership with the Texas Criminal Justice Integrity Unit.

6. What is an acceptable timetable and how will we measure progress?

It will take a total of 7-10 years to roll out mandatory certification statewide, with the first 2-5 years consisting of gear-up/voluntary push initiatives. The mandatory component should be phased in gradually after the fifth year as part of any legislation.[32] The majority of stakeholders believe a generous timeframe is critical because certain disciplines will move forward at a faster rate than others; much of the timeframe is dependent upon the certification bodies' ability to achieve ISO accreditation under 17024.

Some believe a more aggressive timeline is possible for certain fields such as DNA, controlled substance analysis, forensic toxicology and latent prints. Others believe disciplines currently not subject to accreditation under Texas law (e.g., latent prints, digital evidence, etc.) should be the first area of focus in Texas. These issues will need to be explored as the certification initiative moves forward.

7. What action steps should we take to move forward in the near term?

The following action steps should be taken as soon as possible. The Commission is primarily responsible for these steps but should seek assistance from stakeholders wherever possible:

1. The TFSC and TACLD should meet with Texas universities with FEPAC-accredited programs (SHSU, UNTHSC, Texas A&M, etc.) to assess their interest in partnering on certification training and continuing education.

[32] A minority of participants disagreed with the consensus timeline, arguing it is not fast enough and should be closer to 3-5 years.

2. The TFSC and TACLD should communicate with the certification bodies on a regular basis to assess their progress toward ISO-17024 accreditation, and to make suggestions on general testing improvements as appropriate. The TFSC should report back to the larger community regarding these efforts.

3. The TFSC should determine what resources are available to assist laboratories with certification costs and incentives, pursue those resources to the extent possible, and report back to the stakeholder group. Can we get NIJ grants for certification and continuing education of examiners? Can the Governor's Office or Legislature help? The goal should be to establish a reliable source of funding like the CCA has for training of law enforcement, attorneys, etc.

4. The TFSC and DPS should post a list of recognized certification bodies on their respective websites, using the existing FSAB list and/or ASCLD/LAB list as a model.

5. The TACLD should release a position statement on examiner certification well before the next legislative session begins. In the meantime, the TFSC should make public recommendations on certification and the need for support of certification incentives.

6. Stakeholders should begin meeting with key members of the Legislature to educate them on the certification process and the plan to achieve a greater number of certified examiners in Texas.

7. To monitor progress, the TFSC should report at every quarterly meeting and send TACLD and other stakeholders periodic updates. The TFSC and DPS should post a list of recognized certification bodies as soon as possible.

For additional information regarding this white paper, the Texas Forensic Science Commission and/or the Texas Criminal Justice Integrity Unit, please contact the following individuals:

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To download an electronic copy of this white paper or follow the activities of the TFSC and TCJIU, please refer to the following websites:

http://www.fsc.state.tx.us or www.fsc.texas.gov

http://www.cca.courts.state.tx.us/tcjiu/tcjiuhome.asp

EXHIBIT J

DEFENDANT NOTIFICATION AFTER MAJOR FORENSIC NONCONFORMANCE

A Joint White Paper Authored By:

Texas Forensic Science Commission and
Texas Criminal Justice Integrity Unit

November 27, 2013

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EXECUTIVE SUMMARY

On July 11, 2013, the Texas Forensic Science Commission ("TFSC") and the Texas Criminal Justice Integrity Unit ("TCJIU") hosted a stakeholder roundtable meeting on methods for ensuring defendants receive appropriate notification after a major forensic nonconformance, especially in high-volume disciplines where thousands of cases may be affected. Participants in the roundtable included forensic science practitioners and managers, prosecutors, defense attorneys, members of the judiciary, advocacy groups and representatives from various national certification and accreditation bodies. The goal of the roundtables was to bring a diverse group of stakeholders together to create a roadmap for handling future cases.

Though the majority of forensic scientists in Texas produce high quality work, from time to time an analyst may engage in negligence or misconduct with the potential to impact thousands of cases. For example, in one recent case an analyst was struggling to obtain the data required under the lab's policies and procedures to support a positive finding of alprazolam for a pharmaceutical tablet. Instead of asking for help, he used the evidence from another alprazolam case to support a positive finding in the case he was working.

Because of the analyst's misconduct, the reliability of all of his work during his tenure at the laboratory (impacting 36 different counties) was called into question. The laboratory was proactive in notifying the agencies that had submitted evidence. However, because so many different counties were affected, it was extremely challenging to determine whether affected defendants have received notification consistently, or whether notice varies from county to county depending upon local resources and other factors. It is also difficult to assess the extent to which prosecutors themselves understand the nature and scope of the forensic misconduct and potential ramifications.

Roundtable participants identified a number of ideas for improving stakeholder notification statewide. Most of the suggestions involved using existing agencies, in particular the Commission on Indigent Defense, the Forensic Science Commission, Texas District and County Attorney's Association, Texas Criminal Defense Lawyer's Association, the Texas State Bar, local bar associations, and the Attorney General's Office to coordinate responses. Participants recognized that Texas is unlikely to support a statewide public defender's office in the foreseeable future and focused on ways to ensure existing resources are channeled effectively.

The notice protocol suggested by stakeholders consists of nine steps and is presented on page 7 below. Steps 1-2 concern the role of the laboratory; steps 3-6 involve coordination by stakeholders—from state agencies like the TFSC and Commission on Indigent Defense to prosecutors and defense counsel; steps 7-9 suggest methods for marshaling resources to ensure effective representation of affected defendants.

THE AUTHORS

Texas Forensic Science Commission

In May 2005, the Texas Legislature created the Texas Forensic Science Commission ("TFSC") or ("Commission"). Under its enabling legislation, the Commission is required to investigate allegations of negligence or misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by an accredited laboratory, facility or entity.[1] The Legislature also required the Commission to develop and implement a reporting system through which accredited laboratories, facilities, or entities may report professional negligence or misconduct.[2]

In May 2013, the Legislature expanded the scope of the Commission's jurisdiction by passing SB-1238.[3] Under the new legislation, the Commission may investigate complaints involving forensic disciplines that are not subject to accreditation under Texas law, with the exception of autopsies.[4] The Commission may also affirmatively initiate an investigation of a forensic analysis for educational purposes without receiving a complaint if the Commission determines by majority vote that the investigation would advance the integrity and reliability of forensic science in Texas.[5]

The TFSC has nine members, all of whom are appointed by the Governor of Texas. Seven of the members are scientists and two are attorneys (one prosecutor and one defense attorney).[6] The TFSC's presiding officer is designated by the Governor.[7] Following are the current members of the Commission:

- Vincent Di Maio, MD, Former Chief Medical Examiner of Bexar County (Presiding Officer).
- Sarah Kerrigan, PhD, Chair, Department of Forensic Science, College of Criminal Justice, Sam Houston State University (Vice Chair).
- Richard Alpert, JD, Chief of Misdemeanor Division, Tarrant County DA's Office.
- Jeffrey Barnard, MD, Chief Medical Examiner of Dallas County.
- Arthur Eisenberg, PhD, Chairman of Department of Forensic and Investigative Genetics, University of North Texas Health Science Center.
- Jean Hampton, PhD, Chairman of Department of Health Sciences, Texas Southern University.
- Brent Hutson, PhD, Forensic Odontologist and Director of Department of Clinical Fixed Prosthodontics, Texas A&M University Health Science Center, Baylor College of Dentistry.

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[1] TEX. CODE CRIM. PROC. § 38.01(4)(a)(3).
[2] *Id.* at (4)(a)(1)-(2).
[3] Tex. S.B. 1238, 83rd Leg., R.S. (2013)
[4] *Id.* at 3(b-1).
[5] *Id.* at 3(a-1).
[6] *Id.* at 2(a).
[7] TEX. CODE CRIM. PROC. § 38.013(c).

- Bobby Lerma, JD, Criminal Defense Attorney, Brownsville, and Past President of Texas Criminal Defense Lawyer's Association.
- Nizam Peerwani, MD, Chief Medical Examiner of Tarrant, Parker, Denton and Johnson Counties.

In the years since the Commission was established, Commissioners have committed significant time and resources to improving forensic policy and practice in Texas. In addition to handling complaints, self-disclosures and related investigations, the Commission is actively engaged in promoting the development of professional standards and training and recommending legislative improvements. The Commission is also committed to ensuring that lessons learned from investigations are used to improve communication and coordination among stakeholders in the criminal justice system. It is for this reason that the Commission partnered with the Criminal Justice Integrity Unit to host a roundtable on notification.

Texas Criminal Justice Integrity Unit

The Texas Criminal Justice Integrity Unit ("TCJIU") is an ad hoc committee created by Judge Barbara Hervey of the Texas Court of Criminal Appeals ("CCA").[8] The TCJIU was established in June 2008 and held its first formal meeting in August 2008. The TCJIU was created to review the strengths and weaknesses of the Texas criminal justice system. The TCJIU's purpose is to bring about meaningful reform through education, training, and legislative recommendations. The TCJIU meets periodically as needed, and meetings are called by the Chair.

Members of the TCJIU include a diverse group of policymakers and stakeholders in the criminal justice community in Texas. Current members include:

- Judge Barbara Hervey, Texas Court of Criminal Appeals (Chair)
- Judge Sid Harle, District Judge, San Antonio
- Senator Rodney Ellis, Texas Senate
- Senator Carlos Uresti, Texas Senate
- Senator Jose Rodriguez, Texas Senate
- Jaime Esparza, District Attorney, El Paso
- Pat Johnson, Director, Texas Department of Public Safety Crime Lab
- James McLaughlin, Executive Director, Texas Police Chiefs Association
- Mary Anne Wiley, Deputy General Counsel to Governor Rick Perry
- Russell Wilson, Special Fields Bureau Chief, Dallas County District Attorney
- Jim Bethke, Director, Texas Indigent Defense Commission
- Bill Allison, Clinical Professor of Law and Director, University of Texas Criminal Defense Clinic
- Gary Udashen, Criminal Defense Attorney, Dallas
- Edwin Colfax, Project Manager, Texas Indigent Defense Commission

[8] The CCA is the highest level appellate court for criminal cases in Texas. The TCJIU website may be accessed at: http://www.cca.courts.state.tx.us/tcjiu/tcjiuhome.asp

Shared Collaborative Mission

Over the past two years, the TFSC and TCJIU have worked together to develop training and educational programs for attorneys, judges, and law enforcement entities in Texas. Both organizations are committed to working collaboratively to encourage stakeholder participation and provide cost-efficient training and educational programs.

The purpose of this white paper and suggested notice protocol is not to impose any requirements or rules on Texas stakeholders. Rather, the paper provides suggestions for ensuring effective notification statewide after a major forensic issue is discovered with the potential to impact thousands of cases. The goal is to ensure parties receive effective notice regardless of whether they live in a large urban county or a smaller rural county with less financial and human resources available.

OBSERVATIONS AND RECOMMENDATIONS

This section sets forth the observations made by stakeholders during the roundtable session on July 11, 2013. Each numbered subject area corresponds to a series of questions posed to participants. At the end of the session, we outline a suggested notice protocol based on the observations.

1. The Role of the Texas District and County Attorney's Association and the Importance of Notice Redundancy

The first actor within the criminal justice system to receive notice after a forensic nonconformance is typically the prosecutor. The laboratories are obligated to notify submitting law enforcement agencies and affected prosecutors when a problem with forensic analysis is discovered.

The Texas District and County Attorney's Association ("TDCAA") is one of the largest associations of prosecuting attorneys in the world. The organization has an active blog with current news followed closely by many of its members. As a result, TDCAA has been very efficient and effective at posting notice of forensic failures on its website and suggesting proactive steps for its members to follow.

However, participants recognized that TDCAA cannot force its membership to check its blog regularly or to follow its recommendations. Stakeholders concluded that we should continue to involve TDCAA and incorporate their communication methods. Though they are not guaranteed to reach 100% of prosecutors, we know through experience they are effective for a meaningful percentage of prosecuting attorneys in the state. TDCAA should consider designating someone whose job is to assist with member communication in the wake of a forensic non-conformance.

Participants emphasized the importance of notice redundancy—making several layers of contact with various affected parties is critical. The response protocol should include a technical briefing by the laboratory that identified the nonconformance so

stakeholders may ask questions, and so they may understand the scope of the problem accurately. Participants noted that affected parties sometimes get their news from the media which is not always the most accurate or complete source.

Participants also suggested that the TFSC send individual letters to affected prosecutors after receiving a laboratory self-disclosure. The Commission should consider sending those letters via certified mail in situations where it is unclear whether the prosecutor received the notice or not.

Participants also noted that The Texas Criminal Defense Lawyer's Association ("TCDLA") should receive the same notification as TDCAA. If the Commission needs to facilitate that process, then it should do so. The TCDLA should appoint a forensic contact who is a counterpart to the contact at TDCAA.

The Texas Center for the Judiciary should be among the entities that receives notice when a major forensic failure occurs, as well as the regional presiding judges through the Office of Court Administration.

The Commission and other stakeholders should consider providing education on defendant notification at seminars, CLEs, etc. Updates on nonconformances should be included in organizational publications. The Commission should also provide notice to state and local bar associations.

The State Attorney General's office should also be notified about forensic non-conformances as they occur, especially the prosecutorial assistance unit.

Though this may be a logistical challenge given current resources, recordkeeping at the county level should include attorney identification by State Bar number so attorneys may be notified of forensic issues more easily.

2. Do prosecutors understand their obligation to provide notice to defendants when a major forensic nonconformance occurs?

Stakeholders believe that most prosecutors in Texas do understand their obligation. However, prosecutors can always use more training on *Brady* issues because it is sometimes challenging to determine when something is exculpatory. Training needs to be precise and include concrete examples of forensic nonconformances. Participants noted that the state's new discovery law (Michael Morton Act) may help to clarify obligations; TDCAA is in the process of providing regional training on this legislation for its members.

Participants noted that extra assistance should be available to guide prosecutors in rural counties. The Attorney General's office provides this service to some extent but the Commission should make an extra effort to ensure rural prosecutors are kept up-to-speed on forensic issues as they develop.

The TFSC should consider establishing a centralized Internet-based repository accessible to everyone in the state with basic information on pending forensic complaints and disclosures, including a FAQ section and other guidance. Other stakeholders (TCDLA, TDCAA, Texas State Bar, etc.) could post similar information on their sites. The Commission will work to make this one of the features on its new website.

3. Scope of Prosecutor Notice

Stakeholders recognized that prosecutors have an obligation to make a good faith effort to contact defendants. However, they cannot track individuals beyond their last known address. Letters sent by prosecutors should be clear in describing the issue identified by the lab, and refer the defendants to an available resource (public defender, court-appointed counsel, etc.) whenever possible. Prosecutors are encouraged to attend the technical briefing hosted by the laboratory and to contact their local defense bar for help in addressing the notice question. They are also encouraged to communicate with responsible local judges so they understand the scope and potential ramifications of the forensic nonconformance.

The State of Texas (*e.g.,* Attorney General's office) has an obligation to assist prosecutors with notice in these cases, especially counties with limited resources. The TFSC should maintain open lines of communication with the AG's office whenever a forensic nonconformance occurs with the potential to affect many cases. A representative from the Attorney General's office should be designated as the point person for forensic nonconformance cases.

4. After the prosecutors have notified affected defendants, who should be responsible for following up on the notice? Absent a statewide public defender system, which agencies should be responsible for ensuring defendants (especially indigent defendants) receive notice and have access to counsel in these cases?

The majority of stakeholders felt the Commission on Indigent Defense should be responsible for these cases by appointing attorneys on a temporary basis to address the claims. The Commission on Indigent Defense should work with the State Bar, TCDLA and Texas law schools to obtain effective and targeted representation where possible. The attorney group would be appointed only for the purposes of dealing with the forensic nonconformance at issue and would be disbanded when the cases have made their way through the appeals process. Absent a statewide solution, local counties should consider creating "consortiums" with their neighboring counties so that attorneys capable of handling appeals and writs may represent defendants in these cases across multiple counties. The Commission on Indigent Defense could in turn fund the local consortiums. Form pleadings should be created and distributed to help attorneys represent clients efficiently in these cases.

If laws need to be changed to permit the Commission on Indigent Defense to fulfill this role, they should be changed during the next legislative session. The Governor's office and/or the Attorney General's office should be consulted regarding access to emergency funds for these cases.

Finally, the State Bar should consider developing guidelines for professional responsibility in cases where a defense attorney who no longer represents a defendant receives notice from the prosecutor. Some further action should be taken by the attorney so the notice does not fall through the cracks.

5. How can we ensure counsel has the appropriate experience to work defendants through re-testing and/or the writ process? Is there a streamlined protocol we can offer despite the localized nature of criminal defense work? Which agencies can help with this effort?

Stakeholders felt the Commission on Indigent Defense (in partnership with the State Bar) is the best organization to handle this (*see* explanation in #4 above). Absent their assistance, stakeholders will continue to rely on TCDLA, the Innocence Project of Texas and a county-by-county approach. This approach is inefficient and creates unequal results depending on what county a person lives in.

The State Bar really should consider elevating the professional standards for court-appointed attorneys in criminal cases. There should also be training available specifically focusing on these issues so attorneys have guidance for future cases.

Absent a state solution, counties must make the effort to appoint one or two competent and experienced appellate attorneys depending on the volume to handle all affected cases through the writ process. This allows for consistency and efficiency in representation for all affected cases in the county and should be the norm in all cases.

The State could consider amending the post-conviction writ rules to make these types of cases more streamlined for all parties.

SUGGESTED NOTICE PROTOCOL FOR CASES INVOLVING FORENSIC NONCONFORMANCE IN HIGH VOLUME DISCIPLINE

In sum, the following notice protocol should be followed in future cases involving high volume forensic disciplines:

STEP ONE: Laboratory identifies forensic nonconformance and assesses potential scope of problem. Laboratory discloses issue to the TFSC, DPS and the national accrediting body responsible for the laboratory's accreditation.

STEP TWO: Laboratory determines which law enforcement agencies submitted evidence in potentially affected cases and notifies those agencies and responsible prosecuting authorities. Assuming a large number of cases are affected, laboratory creates and maintains list of cases. Laboratory updates list of cases with results of any re-testing performed and notifies prosecuting authority of results as necessary.

STEP THREE: Once the TFSC recognizes that a large number of cases may be affected, staff should begin outreach effort by contacting representatives from the following agencies and notifying them of the nonconformance: Texas District and County Attorney's Association; Texas Criminal Defense Lawyer's Association; Commission on Indigent Defense; Office of Court Administration (including presiding judges); Texas Center for the Judiciary; State Bar of Texas and local Bar associations; Office of the Attorney General (prosecutor assistance division); and Innocence Project of Texas. Stakeholders publish information in appropriate online forums, newsletters etc. For example, TDCAA would publish the information on its blog, etc.

STEP FOUR: TFSC contacts all affected district attorneys, using a variety of communication methods (phone, email, etc.). TFSC should use certified mail as necessary for those who are difficult to contact.

STEP FIVE: Laboratory offers a technical briefing for affected agencies, prosecutors, and local defense counsel to describe forensic nonconformance, re-testing process and corrective action taken.

STEP SIX: TFSC publishes summary of facts and investigation on website including a Frequently Asked Questions section. This information will not concern the details of the TFSC's pending investigation but will provide resource information for affected parties.

STEP SEVEN: TFSC will meet with stakeholders listed in Step Three above to determine whether counsel need to be identified to represent affected defendants. TFSC will work with representatives from stakeholder groups, especially the Commission on Indigent Defense, to develop a plan using the resources of existing agencies. TFSC will maintain continuous communication with affected prosecutors, especially those in small and rural counties. TFSC will alert Attorney General's office and the Commission on Indigent Defense with a list of counties in which further assistance may be needed.

STEP EIGHT: Stakeholders will work together to assess what additional financial resources (if any) will be needed to ensure effective notice and representation. To the extent possible, the Commission on Indigent Defense will provide attorneys to work on forensic nonconformance cases on a temporary basis. The Commission may also be effective in marshaling local resources, possibly through county consortiums where smaller counties can work together to provide qualified appointed attorneys familiar with the writ process and forensic issues. The leadership of the Commission on Indigent Defense should explore the extent to which this is possible under its current statute. If legislative changes are needed to make such support possible in the future, the agency should consider whether such changes would be feasible. Other potential sources of human resources and possibly funding for representation include TCDLA, the Texas State Bar, the Attorney General's Office and the Governor's Office. The TFSC should work together with the Commission on Indigent Defense to determine which agencies might provide resources.

STEP NINE: After working with the stakeholder representative group listed in Step Three, the TFSC should provide periodic updates on its website and at quarterly meetings. Any gaps in notice or representation should be addressed by the stakeholder group to the extent possible.

In addition to these steps, stakeholders identified the following key points:

EDUCATION AND TRAINING: The TFSC should work with the TCJIU and the Texas State Bar to provide training for attorneys in writ processing and forensic issues in particular. It is important that attorneys appointed to assist defendants in these cases have the skills and competency level to do so effectively. Training and education should include CLE programs and other communication methods designed to reach broad audiences.

CONTENT OF NOTICE TO DEFENDANTS: When notifying defendants of the forensic nonconformance, prosecutors should provide a resource for defendants to inquire about any re-testing or potential writ process. This prevents prosecutors from being placed in the impossible position of advising defendants who contact their office with inquiries. It also gives the defendant access to information and possible representation independent from the prosecuting authority. The parties responsible for assisting defendants should be identified through a collaborative effort by the stakeholders listed in Step Three above, in collaboration with local courts and defense bar associations.

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To download an electronic copy of this white paper or follow the activities of the TFSC and TCJIU, please refer to the following websites:

http://www.fsc.state.tx.us or www.fsc.texas.gov

http://www.cca.courts.state.tx.us/tcjiu/tcjiuhome.asp