



Texas Forensic Science Commission

Justice Through Science

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OPINION COMMITTEE

January 28, 2011

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VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

The Honorable Greg Abbott
Attorney General
P. O. Box 12548
Austin, TX 78711-2548

RQ-0943-GA

Re: Texas Forensic Science Commission Request for Attorney General Opinion

Dear Attorney General Abbott:

Pursuant to Section 402.042 of the Texas Government Code, I submit this request for an opinion regarding the jurisdictional scope of the Texas Forensic Science Commission ("FSC"). The FSC voted unanimously to approve this request. There is no litigation pending regarding the matters for which this opinion is requested.

In May 2005, the Texas Legislature passed House Bill 1068 (the "Act") which created the FSC by amending the Code of Criminal Procedure to add Article 38.01. See Act of May 30, 2005, 79th Leg., R.S., ch. 1224, § 1, 2005. In three pages, Article 38.01 sets forth the composition and authority of the FSC. The Act took effect on September 1, 2005. *Id.* at § 23. No changes have been made to Article 38.01 since that date.

The following statutory language is critical to the opinion request set forth below:

1. Effective Date Provision

The Act contains an effective date clause, which provides that changes made by the Act apply to:

John M. Bradley
Presiding Officer

(1) **evidence tested or offered in evidence on or after the effective date of this Act; and**

Commission Office
Leigh Tomlin
Commission Coordinator

(2) **an individual who, on or after the effective date of this Act:**

Texas Forensic Science Commission
Sam Houston State University
College of Criminal Justice
Box 2296
816 17th Street
Huntsville, TX 77341-2296

A. **is confined in a penal institution operated by or under contract with the Texas Department of Criminal Justice....;**

Phone: 1 (888) 296-4232
Fax: 1 (888) 305-2432

- B. is confined in a facility operated by or under contract with the Texas Youth Commission....;
- C. voluntarily submits or causes to be submitted a DNA sample as described in....; or
- D. is ordered by a magistrate or court to provide a DNA sample under subsection G, Chapter 411, Government Code.

Id. at §22 (emphasis added).

2. Accredited Laboratory

Under Article 38.01(4)(a)(3) of the Act, the Commission 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** (emphasis added).

3. Forensic Analysis

Article 38.01(2) refers to Article 38.35(a) for the meaning of the term “forensic analysis.” Article 38.35(a) defines the term as follows:

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

Article 38.35 also expressly excludes certain types of analysis from the “forensic analysis” definition. For purposes of this opinion request, the most relevant exclusion is found in Article 38.35(a)(4)(D):

an examination or test **excluded by rule** under Section 411.0205(c), Government Code (emphasis added).

Under Section 411.0205(b) of the Government Code, the Texas Department of Public Safety ("DPS") is responsible for accrediting crime laboratories and other entities that conduct forensic analysis in Texas. DPS is also authorized to designate certain forensic disciplines that are exempt from accreditation. *Id.* at §411.0205(c). Pursuant to its rulemaking authority, DPS maintains two lists of forensic disciplines, one including those that are subject to accreditation, and the other including disciplines that are exempt from accreditation. *See* 37 TEX. ADMIN. CODE §§ 28.145-28.147 (2010). There are, however, numerous categories of forensic analysis that do not appear on either list.

The questions for which the FSC requests an opinion are as follows:

1. Impact of Effective Date Provision: Does the Act's effective date provision restrict the FSC's investigative authority to cases in which the requirements set forth in that provision are met?
2. Meaning of "Accredited Laboratory": Does the Act limit the investigative scope of the FSC to allegations of negligence and misconduct involving forensic analyses conducted only by laboratories, facilities or entities that were accredited by the Department of Public Safety ("DPS") when the analyses took place?
3. Scope of the Term "Forensic Analysis": Does the Act prohibit the FSC from investigating fields of forensic analysis that have been expressly excluded by DPS pursuant to its rulemaking authority under Section 411.0205(c) of the Texas Government Code? When the FSC receives a complaint involving forensic analysis that is *neither* expressly included *nor* expressly excluded by the Act or DPS rule, does the FSC have authority to investigate such a complaint?

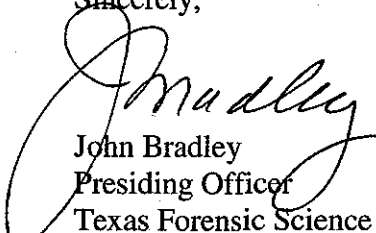
Since its creation in September 2005, the FSC has received numerous investigative requests from the public (referred to herein as "complaints"). Some complaints involve cases in which the evidence underlying the forensic analysis was tested or offered into evidence years (and sometimes decades) before the Act's effective date. In other complaints, the laboratory in question was not accredited at the time the analysis in question was performed. The FSC has also received complaints in which the forensic analysis is not expressly excluded from accreditation by statute or DPS rule, but also does not expressly appear on the inclusion list promulgated by DPS under its rulemaking authority.

In many of these cases, the FSC has struggled to determine the scope of its jurisdiction, while remaining responsive to concerns of the public and the laboratories and agencies under investigation. There is no established administrative construction for the questions set forth in this request. An Attorney General opinion regarding the FSC's jurisdictional and investigative scope would provide clarity to the public and other state agencies, while protecting the FSC and its members from potential liability for exceeding

statutory authority. The opinion would also assist the Legislature in deciding whether to amend the FSC's investigative authority.

The FSC respectfully requests a response to the questions set forth above as soon as possible. Please feel free to contact me if we may provide additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Bradley", written in a cursive style. The signature is positioned above the printed name and title.

John Bradley
Presiding Officer
Texas Forensic Science Commission

Arson panel seeks AG input

Willingham inquiry may be out of forensic board's jurisdiction

By Chuck Lindell

AMERICAN-STATESMAN STAFF

Adding an unexpected twist to its investigation of the science used to convict and execute Cameron Todd Willingham for arson murder, the Texas Forensic Science Commission voted Friday to seek an attorney general opinion on the limits of its jurisdiction.

The commission is examining allegations, made by fire scientists and the Innocence Project of New York, that investigators relied on bad science and poor techniques to conclude that Willingham intentionally set fire to his Corsicana home in 1991, killing his three young daughters.

The City of Corsicana and the state fire marshal's office, however, have long complained that the commission lacks the authority to examine their investigators' actions and conclusions.

On Friday, as they contemplated drafting a final report in the Willingham matter, the nine commission members voted unanimously to ask Attorney General Greg Abbott's office to determine whether Corsicana and the fire marshal are correct.

"It's been the elephant in the room the entire time," Commissioner Lance Evans said after the meeting in downtown Austin. Evans made the motion to seek Abbott's opinion.

In the meantime, commissioners vowed to continue working toward a final report.

"I certainly think we could make findings ... on the state of fire investigation back at that time, the evolution of fire investigation up to the present day and where mistakes might have been made," said Evans, a Fort Worth defense lawyer.

However, two of the most contentious questions will have to wait for Abbott's written opinion before they can be addressed:

■ Did Willingham's investigators act negligently?

■ Did the fire marshal's office have an obligation to correct old arson find-

ings based on evidence now discredited by scientific advancements?

Corsicana and state Fire Marshal Paul Maldonado contend that the 2005 law creating the commission also limited its investigations to forensic analyses conducted since 2005 by a laboratory or facility that is accredited by the Department of Public Safety — conditions that do not apply to the 1991 Willingham fire.

Panel Chairman John Bradley, Williamson County's district attorney, made similar arguments in a memo he submitted for commission consideration last summer.

At the time, Willingham supporters accused Bradley, who has labeled Willingham a "guilty monster," of trying to derail the investigation. Bradley replied that his memo would not apply to ongoing inquiries.

Commissioners, however, declined to act on the memo after several legislators who were instrumental in creating the agency rebutted Bradley's analysis, saying the law was not intended to limit investigations to accredited labs or to post-2005 cases.

Willingham was executed in 2004, and the science commission began its investigation four years later.

Death penalty opponents are hoping for findings that would erode support for capital punishment by bolstering arguments that Texas executed an innocent man.

Execution supporters say other evidence, such as a jailhouse informant's testimony that Willingham confessed, shows he was guilty despite questions about the scientific validity of arson evidence used to convict him.

Two weeks ago, the panel heard from two nationally known fire experts who said the Willingham investigators should be considered negligent for conducting an incomplete investigation and for jumping to an arson conclusion that lacked scientific backing and ignored some witness accounts. A representative of the state fire marshal's office disputed their conclusions and said the agency stands by the arson finding.

In related action Friday, commissioners changed how the Willingham report will be written.

Originally, a four-member subcommittee was to draft a report during a public meeting and then present it to the full committee of seven forensic scientists, a defense lawyer and a prosecutor.

Now, commissioners will submit suggestions to the agency's general counsel, who will compile a draft report. Final language will be hashed out by the full commission in a future open meeting, Evans said.

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American-Statesman

Hammond eyes rainy day fund

The Texas Association of Business does not want the Legislature to raise taxes, but the president of the state's largest business group, Bill Hammond, says the Legislature can avoid drastic cuts. He suggests three options: tapping into the state's rainy day fund, deferring some payments to state agencies to the first day of the next biennium — and allowing slot machines at existing Texas racetracks and Ameri-

can Indian reservations.

Hammond said he will push for several programs to be kept at current spending levels, provided that some reforms are implemented. For instance, he said funding for Texas Grants should be kept level but that students who perform best in high school should get priority when the grants are handed out.

Similarly, he said funding for higher education should be kept level, but 10 percent of that funding should be in incentive programs based on the schools' completion rates.

As for tapping the rainy day fund, he said: "We think that it's raining, and the money has been put aside for just this situation. Let's man up and take the hard vote."