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October 1, 2013
Via C.M.R.R.R. # 7011 1570 0002 8136 8222

Office of the Attorney General
Attention Opinion Committee
P.O. Box 12548
Austin, TX 78711-2548

FILE # ML-47407-13
I.D. # 47407

RQ-1154-GA

REQUEST FOR OPINION FROM THE OFFICE OF THE ATTORNEY GENERAL
REGARDING THE AUTHORITY OF THE SCIENCE ADVISORY WORKGROUP OF THE
STATE FIRE MARSHALS OFFICE

To The Opinion Committee:

COMES NOW the State of Texas, by and through the 83rd District Attorney, Rod Ponton, and files this its Request for Opinion from the Office of the Attorney General Regarding the Authority of the Science Advisory Workgroup of the State Fire Marshal's Office, and respectfully shows the following:

I

In 2009, the Innocence Project of Texas sought to have the Texas Forensic Science Commission (FSC) conduct a review of prior arson investigations, including a review of the Willingham and Cacy cases. In 2011, the FSC asked the Office of the Texas Attorney General to issue an opinion regarding the authority and jurisdiction of the FSC to review specific old criminal

cases. (Bradley letter dated January 28, 2011). On July 29, 2011, the Office of the Texas Attorney General issued opinion No. GA- 0866, determining that the FSC does NOT have jurisdiction or authority to review cases older than 2005, the date of enactment of the law authorizing the FSC.

Thereafter, the FSC dismissed the complaint filed by the Innocence Project requesting a review of the Willingham and Cacy cases. However, determined to have a state finding on the innocence issues, the Innocence Project of Texas then requested that the State Fire Marshal institute a "Science Advisory Workgroup" (SAW), in coordination with the Innocence Project of Texas, in order to obtain the state findings which the FSC was precluded from making, due to GA- 0866. The SAW was instituted by TDI/SFM in 2013, and met on April 9, 2013. A letter dated August 20, 2013, from the State Fire Marshal to my office (attached), states:

On April 9, 2013, with support of administrative and investigative personnel of the Texas State Fire Marshal's office and a representative from the Innocence project of Texas, the SAW reviewed the [Sonia Cacy case]. The prosecution of this case was handled by [the office of 83rd District Attorney].

The objective of the case review was to examine whether the prosecution of this case would withstand the scrutiny of present-day forensic fire science and engineering issues involving fire investigation.

August 20, 2013 letter (attached).

This letter from TDI/SFM reflects that the SFM was requested by the Innocence Project of Texas, to conduct the very same review which the Innocence Project had previously requested from the FSC, in 2009. The review was conducted by the SFM and the Innocence Project of Texas in 2013. No representative of the 83rd District Attorney's office was requested to participate, nor was participation sought from the Office of the Texas Attorney General. The review included an *Ad Hoc* finding by the SAW (TDI/SFM), regarding a pending criminal case in Pecos County, Texas. The *Ad Hoc* letter dated August 20, 2013 has been attached to an amended Writ of Habeas Corpus in the Cacy case in Pecos County.

II.

On July 29, 2011, the Office of the Attorney General of the State of Texas issued Opinion No. GA-0866, in which it stated that the Texas Forensic Science Commission (FSC) was restricted from considering evidence that was tested or offered into evidence prior to September 1, 2005, and that its investigative authority is limited to those laboratories, facilities, or entities that were accredited by the Department of Public Safety at the time the forensic analyses took place. (Copy of Opinion Attached).

At that time, The Innocence Project of Texas was seeking findings from the FSC to the effect that the fire science used in a 1993 murder conviction in Fort Stockton, *State v. Sonia Cacy*, Cause No. 2037, in the 83rd Judicial District Court, Pecos County, Texas,¹ was not supportable under the present-day scientific standards of care for conducting a fire investigation.

A Writ of Habeas Corpus action is pending in *Ex Parte Cacy*, Writ No. 2037-B, in the 83rd Judicial District of Pecos County, Texas.

An opinion on the Cacy case is not sought from the Texas Attorney General.

Upon release of Opinion No. GA-0866, the FSC on September 21, 2011 wrote a letter to The Innocence Project informing it that the Innocence Project's complaint had been dismissed by the Commission in light of the Opinion. (Letter attached).

III.

Texas Code of Criminal Procedure, Art. 38.01(4)(c) states that "The commission by contract may delegate the duties described by Subsections(a) (1) and (3) to any person the commission determines to be qualified to assume those duties." As of this writing it is not clear to our office

¹ Defendant was found guilty and initially received a 50-year sentence. The case was remanded for a new punishment hearing, which occurred in 1996, resulting in a 99-year sentence. A few years after beginning her sentence, Ms. Cacy was paroled.

whether the FSC has delegated arson investigations generally, or the *Cacy* case in particular, to the Science Advisory Workgroup of the State Fire Marshal's Office.

However, there are strong indications that this has happened. Subsequent to the FSC's dismissal of the complaint, The Innocence Project worked on the *Cacy* matter with the Science Advisory Workgroup of the State Fire Marshal's Office. In addition, certain news articles say that the FSC did delegate arson controversies to the Fire Marshal's Workgroup. (See Grissom, Brandi, "Forensic Panel Calls for Review of Past Arson Cases," *The Texas Tribune*, September 9, 2011; Gioja, Zoe, "Chris Connealy: The TT Interview," *The Texas Tribune*, August 16, 2012, both attached).

Finally, The Texas Department of Insurance itself states that "The Texas State Fire Marshal's Office is collaborating with the Texas Forensic Science Commission (FSC) to improve fire investigations in the state. Based on recommendations from the 2011 FSC Annual Report, the SFMO has assembled the Science Advisory Workgroup (SAW) to review previous arson cases and to provide feedback and expertise on current cases. The cases under review by the SAW are limited to SFMO-internal cases and cases submitted by the Innocence Project of Texas. The SAW will meet with SFMO investigators at quarterly Fire Investigation Forums." (Texas Department of Insurance document attached).

If, in fact, the FSC has delegated arson investigations to the Fire Marshal's Workgroup, then the Workgroup must be subject to the same restrictions as would guide the jurisdiction of the FSC, as detailed in Opinion No. GA-0866. As the delegate of the FSC, the Workgroup is prohibited "from considering evidence that was tested or offered into evidence prior to" September 1, 2005, and its investigative authority is limited to "those laboratories, facilities, or entities that were accredited by the Department of Public Safety at the time the forensic analyses took place."

On the other hand, it does not appear that the Office of the State Fire Marshal's Office has any independent legal authority to investigate or make findings on long-ago arson cases. See Texas Government Code, §417.001 (et seq.).

The office of the state Fire Marshal should determine scientific standards for fire investigations. It has no authority to make sweeping legal pronouncements on 20 year old criminal cases.

IV

The five questions asked in the Request for Opinion from the Office of the Texas Attorney General Regarding the Authority of the Science Advisory Workgroup of the State Fire Marshal's Office seek legal clarity on these points.

I write asking for an Attorney General's Opinion on the following questions:

1. In light of Opinion No. GA-0866 of the Office of the Attorney General of the State of Texas, does the "effective date" provision in Texas Code of Criminal Procedure, Art. 38.01 which restricts the Texas Forensic Science Commission from investigating "evidence tested or offered into evidence" before September 1, 2005, also restrict the Science Advisory Workgroup of the State Fire Marshal's Office from making findings on evidence tested or offered into evidence before September 1, 2005?

2. In light of Opinion No. GA-0866 of the Office of the Attorney General of the State of Texas, is the Science Advisory Workgroup of the State Fire Marshal's Office restricted from investigating and making findings regarding laboratories, facilities or entities that were not accredited State laboratories, facilities or entities when the forensic analyses took place?


3. In light of Opinion No. GA-0866 of the Office of the Attorney General of the State of Texas, does the Science Advisory Workgroup of the State Fire Marshal's Office have authority from the State of Texas to consider evidence that the Texas Forensic Science Commission is prohibited from considering, and, if so, does it have authority to make findings based on such evidence, where the Texas Forensic Science Commission would be prohibited from doing so?

4. There are strong indications that the Science Advisory Workgroup of the State Fire Marshal's Office has been delegated by the Texas Forensic Science Commission the duties of arson investigations and findings, pursuant to Texas Code of Criminal Procedure, Art. 38.01(4)(c). Assuming this is the case, is the Science Advisory Workgroup of the State Fire Marshal's Office subject to the jurisdictional restrictions delineated in Opinion No. GA-0866?

5. Does the State Fire Marshals Office have any independent statutory, or other authority, to investigate and make findings on old, closed arson cases, particularly arsons whose forensic analysis took place before September 1, 2005?

Respectfully submitted,

OFFICE OF THE 83RD DISTRICT ATTORNEY



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October 10, 2013

Via C.M.R.R.R. # 7001 0320 0001 9054 4697

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RQ-1154-GA

**SUPPLEMENTAL REQUEST FOR OPINION FROM THE OFFICE
OF THE ATTORNEY GENERAL REGARDING THE AUTHORITY
OF THE SCIENCE ADVISORY WORKGROUP OF THE STATE FIRE MARSHAL'S OFFICE**

To The Opinion Committee:

COMES NOW the State of Texas, by and through the 83rd District Attorney, Rod Ponton, and files this its Supplemental Request for Opinion from the Office of the Attorney General Regarding the Authority of the Science Advisory Workgroup of the State Fire Marshal's Office, and respectfully shows the following:

I.

The 83rd District Attorney's October 1, 2013 Request for Opinion of the Attorney General Regarding the Authority of the Science Advisory Workgroup of the State Fire Marshal's Office is hereby incorporated by reference into this Request, for all purposes.

II.

The Texas Code of Criminal Procedure, Article 38.01(11) states that "A written report prepared by the commission under this article is not admissible in a civil or criminal action." This is a new section, and its effective date was June 14, 2013. Another new section, Article 38.01(4)(g), states that "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."

As seems apparent from news articles and a document from the Texas Department of Insurance (which oversees the Fire Marshal), which were attached to the prior Request for Opinion of the Attorney General Regarding the Authority of the Science Advisory Workgroup of the State Fire Marshal's Office, the Texas Forensic Science Commission (FSC) has delegated to the Office of the State Fire Marshal the making of findings regarding pre-2005 arson cases, which the FSC is prohibited from undertaking, in accordance with Texas Attorney General Opinion No. GA – 0866. The State Fire Marshal's Office also appears to have been delegated by the FSC the review of work of laboratories not accredited by the Department of Public Safety, for which task the FSC was also prohibited by the Opinion.¹

The Fire Marshal in turn relies upon a Science Advisory Committee to help make findings and opinions upon these old cases. In this Request, the apparent relationship between the FSC and the Science Advisory Committee is referred to as one of

¹ The amended Article 38.01 which took effect June 14, 2013, appears to allow the FSC to conduct investigations of a non-accredited crime laboratories, as of the effective date, but the FSC's delegation of authority to the Fire Marshall to conduct investigations that included review of non-accredited labs occurred during a period when the FSC was prevented by The Attorney General's Opinion from reviewing the work of non-accredited labs.

delegation. The above-referenced document from the TDI uses the word "collaborating." In either sense, it appears that the Science Advisory Workgroup is filling in for the FSC. A *Los Angeles Times* article entitled "Texas Arson Conviction Reviews," January 11, 2013, indicates that the work of the Fire Marshal's Workgroup is in response to recommendations made by the FSC (article attached). A *Texas Tribune* article attached to our main Request, "Forensic Panel Calls for Review of Past Arson Cases," September 9, 2011, indicates that the FSC agreed to not issue a finding of negligence or professional misconduct against the State Fire Marshal (not the current Fire Marshal), in exchange for an agreement that the Fire Marshal's Office would conduct reviews of old arson cases. The agreement between the State Fire Marshal's Office and the Forensic Science Commission, for the Science Advisory Workgroup to perform the work prohibited to be conducted by the FSC, appears to have been made in September 2011, and was in response to Texas Attorney General's Opinion No. GA-0866.

On August 20, 2013, the Science Advisory Workgroup of the State Fire Marshal's Office issued a report in regard to a 1993 murder conviction against Sonia Cacy. The report said in part: "It is the finding of the Science Advisory Workgroup that the conclusions regarding the cause of the fire by the Fort Stockton Fire and Police Department and the Texas State Fire Marshal's office are not supportable under the present-day scientific standards of care for conducting a fire investigation. The interpretations of the gas chromatographic data regarding the alleged identification of gasoline by the Bexar County Forensic Science Center are not supported by present day laboratory analytical standards."

(This August 20, 2013 report was included as an attachment to the main Request and is also attached herein for ease of reference). As noted above, section 11 of Article 38.01 of the Texas Code of Criminal Procedure took effect June 14, 2013.

In light of this delegation of responsibility in the arson arena by the FSC to the Science Advisory Workgroup of the State Fire Marshal's Office (or "collaboration" between the two panels), the undersigned requests an opinion on:

- (1) Whether written reports prepared by the Science Advisory Committee of the State Fire Marshal's Office made by delegation from, or in collaboration with, the Forensic Science Commission are inadmissible in a civil or criminal action, pursuant to Texas Code of Criminal Procedure, Article 38.01(11), and Texas Attorney General Opinion GA- 0866.
- (2) Whether written reports prepared by the Science Advisory Committee of the State Fire Marshal's Office made by delegation from, or in collaboration with, the Forensic Science Commission are subject to the constraints of Article 38.01(4)(g).

Respectfully submitted,

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