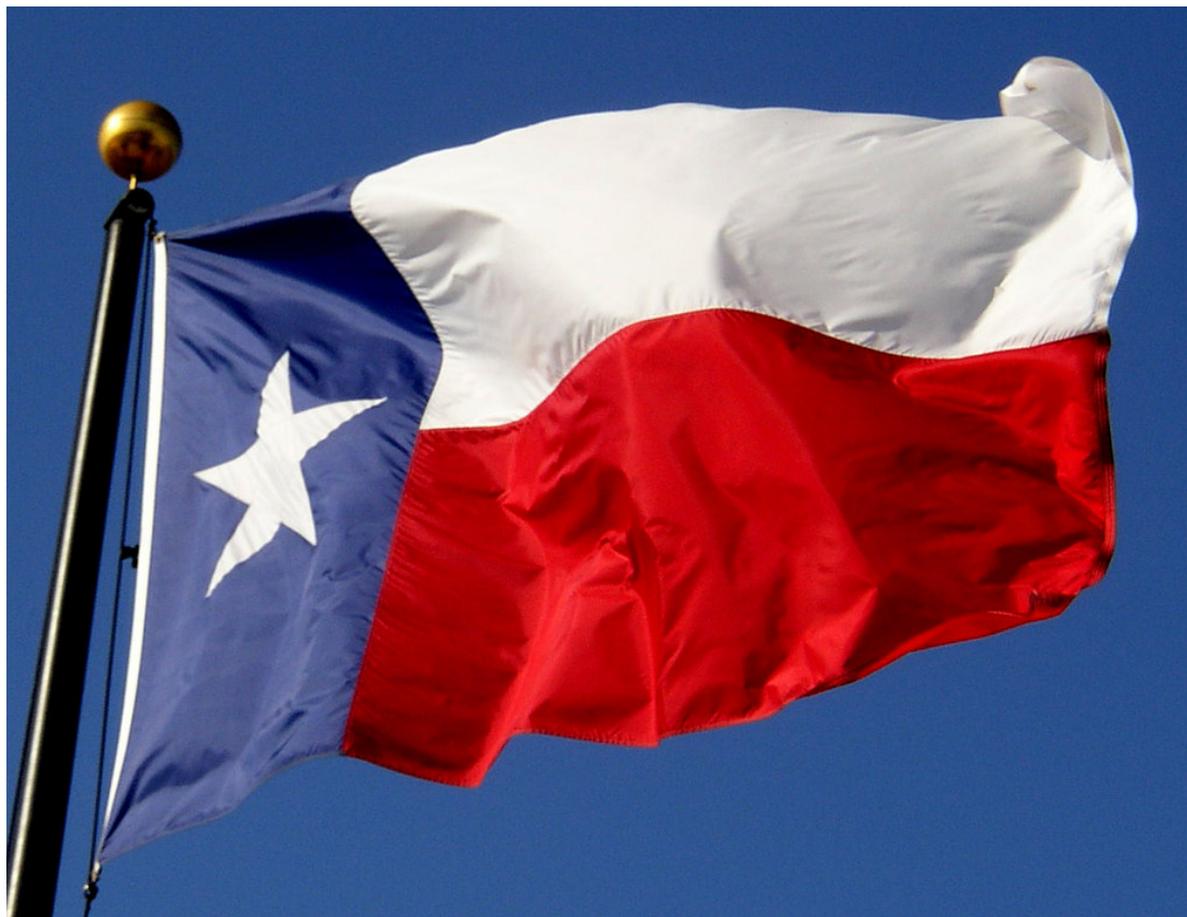




# Texas Forensic Science Commission

*Justice Through Science*



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## GOALS FOR WEBINAR

- What is the Texas Forensic Science Commission?
- Why and how was it created?
- What kind of investigations does the TFSC conduct?
- What are the limitations of the Commission's work?
- How was the Willingham/Willis arson case resolved?
- What lessons has the community learned?
- What is the future likely to bring?



## HISTORY

- In May **2005**, the Texas Legislature created the TFSC by passing HB 1068, which amended the Texas Code of Criminal Procedure to add Article 38.01.
- TFSC was created in response to **serious problems** in the Houston PD crime lab, as well as broader concerns regarding the **integrity and reliability** of forensic science in the wake of emerging DNA exonerations.



## HISTORY

- Also created in response to requirements of the Paul Coverdell grant program (that there be an independent entity to investigate allegations of negligence and misconduct).
- TFSC's budget since first allocation in 2007: \$250,000 per year. TFSC has two full-time staff members.



## NATIONAL PERSPECTIVE

- Texas is among a small group of states with forensic commissions.
- New York is another state with an active commission, though make-up and scope is different than Texas.
- Other states have forensic oversight bodies but operate at varying levels.



## NATIONAL PERSPECTIVE

- Other states with forensic bodies:
  - Arizona Forensic Sciences Advisory Committee
  - Illinois Laboratory Advisory Committee
  - Maryland Forensic Laboratory Advisory Committee
  - Minnesota Forensic Laboratory Advisory Board
  - Missouri Crime Laboratory Review Commission
  - Virginia Forensic Science Board/Scientific Advisory Committee
  - Washington Forensic Laboratory Services Board
- Significant variation in governance, scope of authority, infrastructure and fiscal support.



## MEMBERSHIP

- Four appointments by Governor Perry including: **prosecutor** and **defense counsel** recommended by statewide associations; **two other forensic science** experts (currently, both are medical examiners).
- Three **appointments** by Lt. Gov. Dewhurst from: University of Texas; Texas A&M; and Texas Southern.



# Texas Forensic Science Commission

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- Two appointments by **Attorney General** Abbott, currently they are from FEPAC-accredited programs: University of Texas Health Science Center and Sam Houston State University.
- The **TFSC's Presiding Officer** is selected by the Governor for a period of the Governor's choosing. The TFSC's current Presiding Officer is Dr. Vincent Di Maio.



## PURPOSE

- Under Art. 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.



## ACCREDITATION REQUIRED

Texas law since 2003:

- Forensic analysis and related expert testimony are **not admissible** in a criminal case if, at the time of the analysis, the laboratory was **not accredited**.



- “Forensic analysis” means 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. (*see art. 38.35*)



## Exclusions (by statute):

- Latent print examination;
- Breath alcohol testing;
- Digital evidence;
- Forensic testing in connection with parole compliance;
- Civil litigation, scientific research, medical practice;
- Portion of autopsy conducted by medical examiner.



## Exclusions (by DPS rule):

### ○ Examples:

- Crime scene;
- Screening conducted in the field;
- Sexual assault exams;
- Forensic anthropology;
- Environmental testing;
- Facial or accident reconstruction;



## Exclusions (by DPS rule):

### ○ Examples:

- Forensic photography;
- Serial number restoration;
- Polygraph examination;
- Voice analysis and statement analysis;
- Forensic hypnosis;
- Profiling;
- Paternity testing (human or animal).



## TFSC COMMITTEES/PANELS

- Complaint Screening
- One Investigative Panel per Case
- Legislative
- Forensic Development



## COMPLAINT PROCESS

- TFSC complaint form received.
- Initial **notification letter** sent to complainant and lab.
- **First reviewed and summarized by staff.** General counsel **prepares analysis**; may request information from lab or complainant.



## COMPLAINT PROCESS

- Complaint screening committee reviews complaints and **recommends to full TFSC** whether to accept or deny.
- **Full TFSC considers** committee's recommendation, deliberates and votes in open meeting.



## INVESTIGATIVE PROCESS

- Complainant and subject of complaint notified.
- Panel established (typically 3 members).
- Collaboration initiated with lab's accrediting body.



## INVESTIGATIVE PROCESS

- Stakeholders consulted (*e.g.*, affected prosecutors, courts, city/county officials, and defense bar.)
- Investigation conducted (extensive documents, interviews, hiring of subject matter expert, re-testing if needed.)
- Report drafted and reviewed.



o Report discussed extensively, revised and approved by full TFSC during public meeting. Public may also comment during and between meetings.



# TFSC REPORT REQUIREMENT

Each investigation must include a **written report** that:

1. Describes **whether negligence or misconduct occurred.**
2. Identifies **methods and procedures used to make the determination** regarding negligence or misconduct.



## TFSC REPORT REQUIREMENT

3. **Recommends any corrective** action required of the laboratory.
4. Requires, if necessary, **retrospective re-examination** of other casework that may involve same kind of negligence or misconduct.
5. Requires, as necessary, **follow-up evaluations** of the lab to ensure implementation of corrective action.



## IMPORTANT LIMITATIONS:

- No finding constitutes a comment on the guilt or innocence of any person.
- Final report is not prima facie evidence of the findings contained in the report.
- Information received is dependent upon willingness of parties to submit documents and respond to questions.



## IMPORTANT LIMITATIONS:

- Information not subjected to standards for admission of evidence in a courtroom.
- Commission does not have ability to subpoena. No one testifies under oath, and testimony is not limited by Texas or Federal Rules of Evidence.
- Primary purpose of the report is to encourage development of forensic science in Texas.



## RECENT INVESTIGATIONS

- El Paso: Requested by IP
- Tarrant County: Self-disclosure
- Austin: Former employee
- DPS Houston: Self-disclosure



## RECENT INVESTIGATIONS: EL PASO PD

- Complaint filed by the National Innocence Project & accepted for investigation by TFSC in Sept. 2011.
- Complaint stemmed from an ASCLD-LAB June 2011 ISO assessment exposing deficiencies in drug section.
- Investigative panel (chaired by Dr. Sarah Kerrigan) reviewed thousands of documents and interviewed laboratory employees, PD leadership and DA's office on site.



## RECENT INVESTIGATIONS: EL PASO PD

No misconduct found. However, TFSC expressed concerns:

1. Flawed analysis, failure to identify possible switched sample and poor tech review in August 2010 proficiency exam;
2. Poor scientific leadership and misplaced emphasis on police chain of command; and
3. Concerns regarding sufficiency of spectral data, technical review and analyst competence.



## RECENT INVESTIGATIONS: EL PASO PD

- Investigation was *independent* from ASCLD-LAB, though ASCLD-LAB process informed discussion.
- Re-testing ordered on every non-marijuana case worked by one analyst during her tenure. (Results confirmed initial reports.)



## RECENT INVESTIGATIONS: EL PASO PD

- Scientifically competent director retained and required to perform 100% of tech and admin review.
- QA/QC manager given appropriate decision-making authority.
- Extensive training and revisions to lab procedures.



## RECENT INVESTIGATIONS: EL PASO PD

- Additional audits of spectral data and case files performed by Texas DPS in collaboration with TFSC.
- Periodic follow-up reports required.
- Participation of district attorney's office, county/city officials, Texas DPS, ASCLD-LAB, defense bar were all key components.



## RECENT INVESTIGATIONS: TARRANT CO.

- Investigation a result of voluntary self-disclosure by Tarrant County ME Office's crime lab.
- Chief Medical Examiner for Tarrant County (Dr. Nizam Peerwani) also a member of TFSC; recused himself for all aspects of investigation.



## RECENT INVESTIGATIONS: TARRANT CO.

- In pulling rape kit from evidence room for further testing, DNA supervisor noticed that serologist had not opened all evidence (some envelopes still closed) but nevertheless had reported negative screening results.
- Lab management immediately notified ASCLD-LAB and TFSC of deviation.



## RECENT INVESTIGATIONS: TARRANT CO.

- Lab opened every case analyst had worked for which evidence was still in possession of lab (> 1,000 cases).
- During review, lab found 4 additional cases with unopened envelopes.
- Lab notified all affected law enforcement agencies and prosecutors and offered re-testing for an unlimited period.



## RECENT INVESTIGATIONS: TARRANT CO.

- Lab re-tested hundreds of cases for the six-month time period surrounding the date of the failure. Results confirmed initial reports in all cases.
- Lab created QA process requiring random pulling of evidence periodically to ensure all envelopes opened by analysts.
- Analyst dismissed from employment.



## TARRANT COUNTY REPORT

- Investigative panel (chaired by Dr. Art Eisenberg) reviewed hundreds of pages of documents, conducted interviews with lab management, consulted with ASCLD-LAB and DPS.
- TFSC voted unanimously to issue a finding of professional misconduct against the analyst.



## TARRANT COUNTY REPORT

- TFSC commended laboratory for prompt and aggressive reporting and corrective action.
- TFSC requested a copy of the report with misconduct finding be included in analyst's personnel file.
- Six-month follow-up on re-testing status requested from laboratory by TFSC and ASCLD-LAB.



## RECENT INVESTIGATIONS: AUSTIN PD

- Complaint filed by former employee alleging that drug analysts released preliminary results to officers in rush cases that were not adequately supported by data.
- Also made allegations regarding violations of lab security policy and proficiency testing policy.



## RECENT INVESTIGATIONS: AUSTIN PD

- During same time period, a private accredited lab in Texas that had reviewed APD cases for defense counsel raised concerns regarding discrepancies in marijuana reporting, questions regarding reporting of degraded crack cocaine, and compliance with a court order regarding re-weighing of MDMA tablets.



## RECENT INVESTIGATIONS: AUSTIN PD

- TFSC reviewed thousands of pages of documents, performed joint interviews/on-site audit for two days at lab in collaboration with ASCLD-LAB case manager.
- TFSC worked closely with Travis County DA, who posted notice of issues on defense bar blog and kept in close contact to ensure compliance with any possible obligations under *Brady*.



## RECENT INVESTIGATIONS: AUSTIN PD

- TFSC ordered re-testing of all cases identified in complaint. NMS labs in Pennsylvania performed testing, and all re-testing confirmed initial identifications.
- TFSC and ASCLD-LAB ultimately concluded (independently from one another) that there was no evidence of negligence or misconduct.
- However, both agencies made recommendations regarding areas for improvement at the laboratory.



## RECENT INVESTIGATIONS: DPS HOUSTON

- TFSC received a self-disclosure from DPS (Houston) describing a major non-conformance in drug section.
- DPS Analyst (Jonathan Salvador) used the pharmaceutical evidence (alprazolam) in one case to support the findings in another alprazolam case he was struggling with.
- Misconduct was discovered by a colleague in the lab. Salvador was immediately removed from casework. Suspended by DPS one week later.



## IMPACT

- Salvador worked 4,944 cases during his six-year tenure.
- Cases involved 36 counties in large region around Houston.
- Criminal investigation first: DPS leadership contacted Texas Rangers and OIG to conduct criminal investigation.



## FINDINGS

- Analyst committed misconduct. Had a history of marginal performance.
- Evaluations need to better reflect performance.
- Perceived bureaucratic hurdles should not impede management ability to take action.
- Defendant notice protocol is crucial.
- Management training planned.



## LAB & PROSECUTOR ACTION

- DPS alerted TFSC to issue by email; followed later with formal disclosure.
- Informed prosecutors and submitting LE agencies; sent case list by county. Offered re-testing on all 4,944 cases.
- TDCAA posted key guidance on its website to inform membership.



## TFSC NOTICE PROTOCOL

- TFSC recognized early that effective notice would be challenging.
- Decided the case could provide a model for notice in future cases.
- Called stakeholders together:  
TCDLA, IPOT, TDCAA, Commission on Indigent Defense, Court Admin.



## THE PLAN

- Create sample letters for notification to defendants.
- Provide sample letters to DA's. Ask for feedback on their notice process.
- Ensure defense counsel point of contact and outreach to defendants customized by county.



## TFSC NOTICE PROTOCOL

- Share notification letters with responsible judges.
- Provide list of defendants to IPOT.
- IPOT works collaboratively with TCDLA in support of defense.
- IPOT maintains data on defendant outreach and follow up with counsel.



## COURT WEIGHS IN

- In published opinion, Texas Court of Criminal Appeals overturned conviction, even where evidence available for re-test.
- One case challenging out of Harris County; decision not yet rendered.
- Potential impact: thousands of overturned convictions.
- (See e.g., *Ex Parte Sereal*, No. 76,972 (Tex. Crim. App. 2013), *Ex Parte Hobbs*, No. AP-76,980 (Tex. Crim. App. 2013).)



## WILLINGHAM/WILLIS ARSON

- National Innocence Project alleged that the arson investigations were scientifically flawed, and that those flaws led to the wrongful convictions of both men.
- Under an Attorney General opinion, the TFSC was limited in its ability to address the Willingham/Willis complaint. The events in those cases occurred in the early 1990's and did not involve accredited crime laboratories.



## WILLINGHAM/WILLIS ARSON

- Before receiving the AG's opinion, the TFSC issued a report that contained the following:
  - A discussion of the evolution in the scientific community's understanding of fire science principles between the early 1990's and the present.
  - A review of the most significant incendiary indicators relied upon at trial.
  - Seventeen recommendations intended to improve the discipline of fire/arson investigation in Texas.



## ARSON REVIEW: SFMO/IPOT

- The new State Fire Marshal has teamed up with the Innocence Project of Texas to conduct an arson review that will identify all cases for which an individual is in prison for arson or murder with an arson component.
- The cases are currently being screened by the agencies. Any cases in which flawed fire science may have materially contributed to a conviction will be reviewed by a panel of neutral experts.



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- The State Fire Marshal has also created a Scientific Working Group with state and national experts to ensure Texas is leading the nation in fire/arson investigation.
- He has also committed to implementing and/or exceeding all TFSC recommendations for improving the discipline.



## FUTURE DIRECTION

- Under pending bill, TFSC would be authorized to hear complaints involving forensic disciplines not subject to accreditation, but its reports in those cases would be limited to observations, best practices & recommendations.
- TFSC would also be permitted to initiate its own inquiry into certain unaccredited disciplines for educational purposes.



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- Should all examiners be certified?
- Proactive initiatives focused on forensic development.
- Continued enhancement of laboratory self-disclosure program.
- More efforts to encourage collaboration among various stakeholders, including periodic meetings and conferences.



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- Involvement with other states, national and international efforts to improve forensic science.
- Possible establishment of statewide center for forensic training and research.
- Enhanced training/continuing education opportunities and requirements.



# QUESTIONS?

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