

Statement Regarding –

“Memorandum on the Jurisdiction of the Forensic Science Commission (FSC)”

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To All Interested Individuals:

I am writing in my capacity as a Former Presiding Officer regarding the important question of the jurisdictional authority of the FSC. Mr. Bradley advanced me a copy of this memorandum approximately ten days ago. The Memorandum attempts to analyze the scope of authority of the FSC to investigate complaints of forensic science malfeasance in Texas.

I. Article 38.01 – Code of Criminal Procedure

The statute, when interpreted using accepted standards of statutory interpretation, is supportive of the position that the FSC has jurisdiction to investigate entities other than “accredited laboratories.” Clearly, these questions are best answered by Legislators to obtain clarification. *Legislative direction on these important issues is critical given the important issues facing forensic science in Texas.* With that qualification, it is my opinion that the jurisdiction of the FSC to investigate extends beyond “accredited” entities as set forth in the Memorandum provided to me by Mr. Bradley.

Article 38.01, Section 4(2) and 4(3) describes the essence of the FSC’s investigative power:

Section 4 (a)(2) states: [The Commission shall] require all laboratories, facilities, or entities that conduct forensic analyses to report professional negligence or misconduct to the commission; and

Section 4 (a)(3) states: [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.

Article 38.01, Section 4 (b) discusses how the results of investigations shall be reported, how corrective action may be recommended and also discusses that the scope of the investigation(s):

Section 4(b)(2) states: [An investigation under Subsection (a)(3)] 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 . . .

Additionally, Article 38.01, Section 4(d) states:

The Commission may require that a laboratory, facility or entity investigated under this section pay any costs incurred to ensure compliance with Subsection (b)(1).

Finally, as the Memorandum correctly points out, the definition of “Forensic Analysis” is contained in Article 38.35 of the Code of Criminal Procedure. This definition does not contain any limitation on the entity conducting any analysis but clearly excludes latent fingerprints, breath test specimens, autopsies conducted by a medical examiner or physician, digital evidence, scientific research evidence, presumptive testing for probationers/parolees from the definition. The Legislature was clear that the above types of testing were not to be within the purview of “forensic analysis” for purposes of the Code of Criminal Procedure.

II. Legislative Intent

The issue of interpreting legislative intent arises in the context of litigation, when an appellate court is attempting to interpret what might be argued to be a vague or equivocal provision of a statute. This is a common issue in the appeals of criminal convictions. As cited in the memorandum and as stated in Boykin v. State, 818 S.W.2d 782 (Tex.Crim.App. 1991), the literal text is the foundation of interpreting statutes in the context of an appeal. In that case, the Court states:

When we [the appellate court] interpret statutes. . . we seek to effectuate the “collective” intent or purpose of the legislators who enacted the legislation. . .

When attempting to discern this collective legislative intent or purpose, we necessarily focus on the literal text of the statute in question and attempt to discern the fair, objective meaning of that text . . . We focus on the literal text also because the text is the only definitive evidence of what the legislators had in mind when the statute was enacted. . . 818 S.W.2d at 785.

A cardinal rule of statutory interpretation is that every word in a legislative enactment is presumed to have meaning. If normal rules of grammar are applied, the modifier “accredited” in Section 4(a)(3) applies only to the first noun in a series of nouns separated by commas. Any other interpretation would make the phrase “laboratory, facility, or entity” internally redundant. Under the interpretation of the Memorandum, all “accredited laboratories” and “accredited facilities” would necessarily be included within the even broader term “accredited entity.”

Had the legislature meant the phrase “accredited laboratory, facility or entity,” as is suggested in the Memorandum, why did they choose not to use the term “criminal laboratory” which they had just defined in Article 38.35 of the Code? (“Crime laboratory” includes a public or private laboratory or other entity that conducts a forensic analysis subject to this article.)

It is important to note that the interpretation of Article 38.01 of the Code of Criminal Procedure, as proposed in the Memorandum, is not made in the context of litigation. It may not be appropriate to apply statutory interpretation principles created for litigation when determining legislative intent regarding a statute dealing with the Commission. The legislative purpose of the statutory scheme creating the Texas Forensic Science Commission was to comprehensively regulate the practice of forensic science in the Texas criminal justice system following the Houston P.D. Crime Lab problems in the early 2000's. Article 38.35 of the Code of Criminal Procedure tightly restricted admissibility into evidence in court. Article 38.35 was designed to restrict the criteria for admission of forensic science evidence in court by requiring that the sponsoring laboratory be accredited by the Texas Department of Public Safety. On the other hand, the Texas Forensic Science Commission's reach extends beyond the courtroom. The Commission's creation and definition of its powers are in a different series of Articles in Chapter 38 of the Code. The Commission was granted the power to investigate as another branch of the regulatory mechanism of forensic science in Texas. Article 38.01 addresses professional negligence or misconduct committed at any point in the criminal justice process. Such professional negligence or misconduct can have serious consequences even when there is no actual use of the evidence in court (i.e. destruction of evidence, misinterpretation of data, misrepresentation of data).

From a more practical perspective, it should be noted that efforts were made to obtain feedback from the office of Senator John Whitmire in 2009 when this issue was raised by General Counsel for Governor Perry. Senator Whitmire was one of the original authors of the statute creating the Forensic Science Commission. In February 2009, when questions concerning the authority of the FSC to conduct the investigations on the Willingham and Moon case were raised by members of Governor's staff, the undersigned personally contacted Senator Whitmire's office to ensure that the FSC was not overstepping its authority. On February 26, 2009, Larance Coleman, who advises the Senator on criminal justice issues, stated to the FSC Chair that the Senator felt that the FSC "was doing what it was supposed to be doing."

The Memorandum states the following with regard to the Legislative intent of Article 38.01 of the Code of Criminal Procedure and the role of the FSC:

By applying the same restrictive definition in the legislation creating and describing the role of the FSC, the Legislature clearly intended that the FSC focus only on those forensic disciplines identified as appropriate for accreditation by the DPS.

The text of Article 38.01 of the Code, as described above, does not make it "clear" that only accredited laboratories, facilities or entities are subject to investigation by the FSC. If the legislature intended such a restrictive scope, why would the statute state that "all laboratories, facilities or entities" must report professional negligence or misconduct if there could be no investigation of "all laboratories, facilities or entities?" Additionally, the reference to "accredited laboratories, facilities or entities" in Article 38.01 goes on to state that the FSC shall investigate "accredited laboratories, facilities or entities" discusses entities *substantially affected* by professional negligence or misconduct. It is plausible that the legislature realized that reports of

professional negligence or misconduct reported against a “laboratory, facility or entity” prior to 2003 might substantially affect future analyses by “accredited laboratories, facilities or entities.” If we adopt the Memorandum’s view of FSC jurisdiction, all forensic analysis prior to the mid-2000’s is wholly exempt from investigation. Additionally, the statute clearly contemplated that investigations might involve “retrospective re-examinations” and “follow up evaluations of the laboratory, facility or entity” in Section 4(b)(2).

III. Definition of “Professional Negligence and Misconduct”

The Memorandum correctly states that the FSC, prior to 2010, did not adopt definitions of “professional negligence” or “misconduct.” This was not haphazard. The Commission discussed this issue. The 2007-2009 Commission lacked the authority to define what the legislature had failed to define. Further, the author was informed by members of the Commission with expertise in DNA analysis and policy that a recognized accreditation body for DNA laboratories (“ASCLD/LAB”) also did not define those terms. Thus, it was the collective conclusion that the FSC would be overstepping its authority to act as a legislative and/or accrediting body by creating a definition of “professional negligence” or “misconduct.” The Commission contemplated that it would use its collective expertise to deal with the meaning of such terms on a case-by-case basis.

IV. Relevant Policy Considerations

If jurisdictional limitations on FSC’s ability to investigate are adopted, there are important policy considerations to be addressed by the Texas Legislature. Those include:

- 1) There will be no investigations for acts of professional negligence or misconduct which occur prior to 2003. Therefore, any acts of professional negligence or misconduct which occurred prior to 2003 are excluded from investigation, even if an investigation might improve forensic science practices in the future;
- 2) It is possible that the Willingham and Moon investigations could be stopped, depending upon the application of the new jurisdictional restrictions to cases already adopted unanimously by the Commission for investigation in 2008; and
- 3) The independence of the FSC will be compromised and the FSC will be inextricably linked to the DPS accreditation program. Questionable scientific practices by unaccredited facilities or entities would be exempt from investigation by the FSC.

A note regarding the independence of the Forensic Science Commission: In 2007, the Legislature approved funding for the FSC independent of the funding of the Department of Public Safety. The FSC was funded through Sam Houston State University. During the legislative consideration of how to fund FSC, there was a proposal that the FSC be funded within the DPS budget. At that time, a Commission member appropriately expressed a concern that the FSC should not simply be a “complaint desk” under the umbrella of the DPS but should retain independence from law enforcement. This author is concerned that linking the jurisdiction of the FSC to the accreditation program of the DPS will diminish the independence of the FSC. Many, if not most, accredited labs in Texas are operated by DPS, the same entity charged with “accreditation” of the labs in Texas. This view seems consistent with the 2009 report from the National Academy of Sciences, which stressed the essential need for an *independent system* of forensic laboratories in the U.S.

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