THE TEXAS FORENSIC SCIENCE COMMISSION

Oversight and the road map to admissibility of forensic evidence in Texas.

BY LYNN GARCIA AND LEIGH SAVAGE

From time to time, the Texas Court of Criminal Appeals issues a decision that causes stakeholders in the criminal justice system to take a collective pause. Michael Morton's case is a good example of this.[1] The San Antonio Four case is another.[2] More recently, the Court of Criminal Appeals issued a landmark decision in *Ex Parte Chaney*, a bite mark case with national significance.[3] All of these cases involved convictions for which certain scientific evidence and related testimony was offered at trial. At trial, attorneys and judges believed the testifying scientists or medical experts based their analysis on sound scientific principles. But when viewed today with a better understanding of the limitations of certain forensic disciplines, the testimony offered at trial is unsupportable. In all of these cases, key scientific experts subsequently recanted critical testimony, admitting what they originally said at trial is invalid. Combined, the defendants in these three cases spent more than 100 years incarcerated.

These cases raise important questions for all of us. How can our criminal justice system separate quality scientific evidence and related testimony from subjective speculation, and how can we prevent unreliable and/or invalid evidence from being introduced in the first instance? The answers to these questions are complex, but the Texas Legislature has taken significant steps over the past decade or so—more than any other state in the country—to address these questions proactively. The 79th Texas Legislature took one of its first significant steps with the creation of an oversight body—the Texas Forensic Science Commission—tasked with ensuring the integrity and reliability of forensic science in Texas criminal courts.

The commission is a nine-member panel consisting of seven scientists and two lawyers (one defense attorney and one prosecutor) appointed by the governor that investigates allegations of negligence and misconduct in Texas crime laboratories. The commission also accredits crime laboratories, licenses forensic analysts, and adopts administrative rules with regard to the admissibility of certain forensic analyses. Through its investigative work and administrative rulemaking authority, the commission has addressed many areas of concern and responded to questions about the reliability of certain forensic analyses. The following describes how the commission's activities affect the admissibility of certain forensic evidence by providing a road map for navigating applicable statutes and caselaw in combination with the administrative rules promulgated by the commission, and further describes the efforts underway both locally and nationally to continue ensuring the integrity and reliability of forensic science in our courts.

Road Map to Forensic Admissibility in Texas

In Texas, we entrust trial attorneys with the responsibility of proffering expert testimony on scientific issues through "… careful and strategic navigation of statutory mandates, caselaw, and rules of evidence …" in the "… oftentimes difficult but crucial world of ever-changing forensic science."[4] Judges are then expected to be the final arbiters of admissibility. But most judges and lawyers do not have a staff of trusted scientific advisers waiting in the wings to whom they can turn for questions regarding the current state of any given forensic discipline. The sub-disciplines of forensic science are diverse and involve various scientific concepts, from

chemistry to biology, fluid dynamics, physics, statistics, and beyond. Separating the wheat from the chaff is a challenging process, especially for non-scientists.

Threshold Question: Does Article 38.35 TCCP Apply to the Evidence?

Texas law requires that certain types of forensic analysis be performed in an accredited laboratory for it to be admissible in a criminal action.[5] Accordingly, attorneys and judges should first ask whether the forensic science in question is considered forensic analysis under Texas law. Forensic analysis is "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"[6]—if the answer to this threshold question is no, admissibility is determined under Texas Rules of Evidence Rule 702 and related caselaw.[7] If the answer is yes, the parties should check for statutory exemptions and administrative rule-based exemptions by the commission.

Texas Code of Criminal Procedure Article 38.35 sets forth certain exemptions to the forensic analysis definition.[8] Examples of forensic disciplines exempt from the definition of forensic analysis by statute include latent print examination, tests on breath specimens, and digital evidence.[9] The commission also exempts certain types of forensic analyses from the accreditation requirement through administrative rulemaking.[10] Examples of disciplines exempt from accreditation oversight through the commission's administrative rulemaking authority include sexual assault nurse exams, forensic anthropology, crime scene reconstruction, fire scene investigation, and voice analysis.[11] A complete list of forensic disciplines subject to and exempt from accreditation requirements, either by the statutory definition of forensic analysis or by administrative authority of the commission, can be found in Texas Administrative Code §§ 651.5, 651.6, and 651.7.[12]

If there is an exemption for a particular type of forensic analysis, admissibility is assessed under Texas Rules of Evidence Rule 702 and related caselaw. If there is no exemption, the parties should ensure the entity performing the forensic analysis was accredited at the time the analysis was performed.

The following is a quick reference list of disciplines that must be performed in an accredited laboratory. However, note that disciplines may be added to this list over time through administrative rulemaking or statutory changes. Parties should check the commission's website, txcourts.gov/fsc/, before retaining an expert to perform forensic analysis.

- seized drugs
- toxicology (includes blood alcohol)
- firearms/toolmarks
- forensic biology
- materials (trace)

Crime Laboratory Accreditation

The commission recognizes accreditation for crime laboratories already accredited by certain national accrediting bodies.[13] A complete list of Texas-recognized accrediting bodies may be found in Texas Administrative Code Chapter 651.4.[14] The commission publishes lists of accredited crime laboratories both in Texas and outside of Texas on its website at txcourts.gov/fsc/accreditation/, including the particular forensic disciplines each laboratory is accredited to perform.

Forensic Analyst Licensing

As of January 1, 2019, Texas law requires forensic analysts performing forensic analysis in accredited crime laboratories to be licensed by the commission.[15] If a forensic analyst is performing a forensic analysis in a discipline subject to accreditation, the forensic analyst must be licensed by the commission to perform the type of forensic analysis in question.[16] A complete list of licensed forensic analysts and their license status, including licensed disciplines, may be found by visiting the commission's website at txcourts.gov/fsc/licensing/licensees.

Recent CCA Decision: Rhomer v. State

In its January 30, 2019, opinion in *Rhomer v. State*, the Court of Criminal Appeals discussed the admissibility of certain forensic evidence.[17] Specifically, the court considered whether a particular type of accident reconstruction expert could testify about a specific type of accident reconstruction in which he had no formal training and whether accident reconstruction should be governed by tests in *Kelly v. State* or *Nenno v. State*.[18] Ultimately, the Court of Criminal Appeals affirmed the 4th Court of Appeals in San Antonio decision applying the *Nenno* test in its evaluation to determine that (1) the field of accident reconstruction was a legitimate one, (2) the subject matter of the expert's testimony was within the scope of that field, and (3) the expert's testimony properly relied upon and utilized the appropriate principles in the field.[19]

In a concurring opinion, Judge Barbara Hervey emphasized the importance of Texas' exclusionary rule for forensic evidence pursuant to Texas Code of Criminal Procedure Article 38.35 as a first step in any forensic admissibility determination.[20] This concurring opinion is extremely helpful to stakeholders in describing the various issues that should be considered when admitting forensic evidence.

Rules of Evidence and Related Caselaw

The Texas Rules of Evidence and related caselaw *still* apply in admissibility determinations with regard to forensic issues. When a type of test is not considered a forensic analysis under Texas law but there is still expert testimony, *Kelly* applies for the "hard sciences" and *Nenno* applies for the "soft sciences."[21] When a forensic discipline has an exemption, either by statute or administrative rule of the commission, *Kelly* and/or *Nenno* must be applied depending upon the type of analysis. Indeed, even where there is an accredited discipline and a licensed analyst, admissibility hearings may still be necessary for cases in which a certain forensic method is new or has not been

addressed by courts, or where other legitimate admissibility issues are raised by the parties.

National Forensic Science Initiative

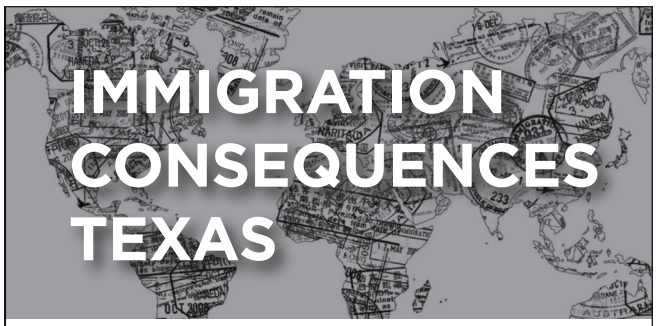
The National Institute for Standards and Technology, or NIST, has gathered a group of forensic practitioners, attorneys, judges, statisticians, and other professionals to develop consensus-based standards in the area of forensic science. Texas has many representatives from law enforcement, crime laboratories, and other areas of forensic science. To date, 22 forensic science standards have been posted to the national registry of standards. Recently, the commission partnered with NIST to review and adopt the Organization of Scientific Area Committees for Forensic Sciences, or OSAC, standards and guidelines. Some may be adopted as is and others may be modified as needed to suit the needs of Texas stakeholders. OSAC standards may be found by visiting the registry at nist.gov/topics/organization-scientific-area-committees-forensic-science/osac-registry.

Local Forensic Science Initiative

The commission is dedicated to assisting members of the criminal justice community with the challenging forensic issues that arise in criminal cases. Currently, commission staff is beginning to work with subject matter experts on a forensic bench book that will be updated regularly and available to judges and attorneys. By offering this resource, the commission hopes to assist the criminal justice community in: (1) understanding foundational scientific principles, (2) identifying unsettled areas/areas of debate within a discipline, and (3) identifying red flags in an evaluation of scientific evidence that may come before the court.

As lawyers, navigating the ever-changing world of forensic science as it collides with our legal system is understandably daunting. The commission and its staff are committed to serving the legal community by ensuring it is equipped with the right resources to prevent the unreliable or invalid forensic evidence that leads to wrongful convictions from entering Texas courtrooms.

Commission staff is always available to help. Please feel free to contact us at lynn.garcia@fsc.texas.gov or leigh.savage@fsc.texas.gov or 512-936-0770. **TBJ**



New Guide for Criminal Defense Attorneys

A Road Map on SCOTUS finding *Padilla v. Kentucky*

Latest Developments at the Intersection of Immigration & Criminal Law

Free Resource:
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Notes

1. *Ex parte Morton*, (Tex. Crim. App. 2011).
2. *Ex parte Mayhugh*, (Tex. Crim. App. 2016).
3. Hannah Wiley, *Texas court throws out 1987 murder conviction; declares North Texas man "actually innocent,"* Texas Tribune (Dec. 19, 2018, 10 AM), https://www.texastribune.org/2018/12/19/steven-mark-chaney-murder-conviction-overturned/.
4. *Rhomer v. State*, 569 S.W.3d 664, 672 (Tex. Crim. App. 2019) (Hervey, J., concurring).
5. Tex. Code Crim. Pro. art. 38.35(d)(1).
6. Tex. Code Crim. Pro. art. 38.35(a)(4).
7. Tex. R. Evid. 702; *Kelly v. State*, 824 S.W.2d 568, 572-573 (Tex. Crim. App. 1992) (stating that the threshold issue for a trial court when dealing with the admission of expert testimony is whether the proponent has shown by clear and convincing proof that the testimony will assist the trier of fact in understanding the evidence or determining a factual issue); *Nenno v. State*, 970 S.W.2d 549, 560-61 (Tex. Crim. App. 1998) (later set forth a framework for evaluating the reliability of expert testimony in fields of study outside the hard sciences).
8. Tex. Code Crim. Pro. art. 38.35 § (4)(A)-(F).
9. Tex. Code Crim. Pro. art. 38.35 § (4)(A)-(C).
10. Tex. Code Crim. Pro. art. 38.01 § 4-d.
11. 37 Tex. Admin. Code § 651.7 (2010) (Tex. Forensic Sci. Comm'n, Accreditation).
12. *Id.*
13. *Id.*
14. 37 Tex. Admin. Code § 651.4 (2010) (Tex. Forensic Sci. Comm'n, Accreditation).
15. Tex. Code Crim. Pro. art. 38.01 §4-a(b).
16. *Id.*
17. *Rhomer v. State*, 569 S.W.3d 664 (Tex. Crim. App. 2019).
18. *Id.* at 667.
19. *Id.* at 672.
20. *Id.*
21. *Rhomer v. State*, 569 S.W.3d 664, 671 (Tex. Crim. App. 2019).

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