Texas Forensic Science Commission

Justice Through Science

FINAL REPORT ON HOUSTON FORENSIC SCIENCE CENTER SELF-DISCLOSURE NO. 22.18, FORENSIC BIOLOGY/DNA; TRIAL TESTIMONY OF STEPHEN ADAM VINSON

PUBLISHED NOVEMBER 15, 2022

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I. COMMISSION BACKGROUND

A. History and Mission of the Texas Forensic Science Commission

The Texas Forensic Science Commission ("Commission") was created during the 79th Legislative Session in 2005 with the passage of HB-1068. The Act amended the Code of Criminal Procedure to add Article 38.01, which describes the composition and authority of the Commission.[1] During subsequent legislative sessions, the Texas Legislature further amended the Code of Criminal Procedure to clarify and expand the Commission's jurisdictional responsibilities and authority.[2]

The Commission has nine members appointed by the Governor of Texas.[3] Seven of the nine commissioners are scientists or medical doctors and two are attorneys (one prosecutor nominated by the Texas District and County Attorney's Association and one criminal defense attorney nominated by the Texas Criminal Defense Lawyer's Association).[4] The Commission's Presiding Officer is Jeffrey Barnard, MD. Dr. Barnard is the Chief Medical Examiner of Dallas County and Director of the Southwestern Institute of Forensic Sciences in Dallas.

B. Commission Jurisdiction

1. Investigations of Professional Negligence and Professional Misconduct Resulting from Laboratory Self-Disclosures

Texas law requires the Commission to "investigate in a timely manner, any allegation of professional negligence or professional misconduct that would substantially affect the integrity of:

(A) the results of a forensic analysis conducted by a crime laboratory;

(B) an examination or test that is conducted by a crime laboratory and that is a forensic examination or test not subject to accreditation; or

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[1] TEX. CODE CRIM. PROC. art. 38.01.
[2] *See e.g.*, Acts 2013, 83rd Leg. ch. 782 (S.B. 1238) §§ 1-4 (2013); Acts 2015, 84th Leg. ch. 1276 (S.B. 1287) §§ 1-7 (2015); TEX. CODE CRIM. PROC. art 38.01 § 4-a(b).
[3] TEX. CODE CRIM. PROC. art. 38.01 § 3.
[4] *Id.*

(C) testimony related to an analysis, examination, or test described by paragraph (A) or (B)."[5]

The term "forensic analysis" is defined as 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.[6]

Crime laboratories must report professional negligence or professional misconduct to the Commission.[7] The statute does not define the terms "professional negligence" and "professional misconduct." The Commission defined those terms in its administrative rules.[8]

> "Professional misconduct" means the forensic analyst or crime laboratory, through a material act or omission, deliberately failed to follow the standard of practice that an ordinary forensic analyst or crime laboratory would have followed, and the deliberate act or omission would substantially affect the integrity of the results of a forensic analysis. An act or omission was deliberate if the forensic analyst or crime laboratory was aware of and consciously disregarded an accepted standard of practice required for a forensic analysis.
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> "Professional negligence" means the forensic analyst or crime laboratory, through a material act or omission, negligently failed to follow the standard of practice that an ordinary forensic analyst or crime laboratory would have followed, and the negligent act or omission would substantially affect the integrity of the results of a forensic analysis. An act or omission was negligent if the forensic analyst or crime laboratory should have been but was not aware of an accepted standard of practice.

2. Accreditation Jurisdiction

The Commission is charged with accrediting crime laboratories and other entities that conduct forensic analyses of physical evidence.[9] The term "crime laboratory" includes a public or

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[5] TEX. CODE CRIM. PROC. art. 38.01 § 4(a)(3).
[6] TEX. CODE CRIM. PROC. art. 38.35(a)(4).
[7] *Id.* at § 4(a)(1)-(2) (2019). (*Pursuant to the Forensic Analyst Licensing Program Code of Professional Responsibility, members of crime lab management shall make timely and full disclosure to the Texas Forensic Science Commission of any non-conformance that may rise to the level of professional negligence or professional misconduct.*) *See*, 37 Tex. Admin. Code § 651.219(c)(5) (2018).
[8] 37 Tex. Admin. Code § 651.302 (7) and (8) (2020).
[9] TEX. CODE CRIM. PROC. art. 38.01 § 4-d(b).

private laboratory or other entity that conducts a forensic analysis subject to article 38.35 of the Code of Criminal Procedure.[10]

Though this report does not directly address accreditation matters, it is the first report that will be included in the TFSC-specific checklist against which all accredited laboratories will be assessed beginning in 2023. Of the ten recommendations issued in **Section IX** of this report, three have application across all laboratories subject to the Commission's jurisdiction. To facilitate implementation of those with broad impact, a link to a proposed accreditation checklist for the universally applicable recommendations is attached as **Exhibit A**. The intent of the checklist is to enable members of the quality division in laboratories to easily evaluate the recommendations in this report and make policy or procedural changes, if needed.

3. Licensing Jurisdiction

Under Texas law, a person may not act or offer to act as a forensic analyst unless the person holds a forensic analyst license issued by the Commission.[11] While accreditation is granted to entities that perform forensic analysis, licensing is a credential obtained by individuals who practice forensic analysis. The licensing program took effect on January 1, 2019. It had not yet been implemented at the time of the criminal trial that is the subject of this report, but it was in effect during the post-conviction deposition discussed in this report.

The law defines the term "forensic analyst" as "a person who on behalf of a crime laboratory [accredited by the Commission] technically reviews or performs a forensic analysis or draws conclusions from or interprets a forensic analysis for a court or crime laboratory."[12]

[10] *Id.* at art. 38.35(a)(1).
[11] *Id.* at art. 38.01 § 4-a(b); 37 Tex. Admin. Code § 651.201(c) (2018).
[12] *Id.* at art. 38.01 § 4-a(a)(2).

Pursuant to its licensing authority, the Commission may take disciplinary action against a license holder or applicant for a license on a determination by the Commission that a license holder or applicant for a license committed professional misconduct or violated Texas Code of Criminal Procedure Article 38.01 or an administrative rule or other order by the Commission.[13] If the Commission determines a license holder committed professional misconduct or violated an administrative rule or order by the Commission, the Commission may: (1) revoke or suspend the person's license; (2) refuse to renew the person's license; (3) reprimand the license holder; or (4) deny the person a license.[14] The Commission may place on probation a person whose license is suspended.[15] Disciplinary proceedings and the process for appealing a disciplinary action by the Commission are governed by the Judicial Branch Certification Commission.[16]

4. Jurisdiction Applicable to the Disclosures

Testimony related to the accredited discipline of forensic biology is subject to the investigative authority of the Commission.[17] The two disclosing crime laboratories (Houston Forensic Science Center ("HFSC") and Texas Department of Public Safety ("DPS") are accredited by the Commission and the ANSI-ASQ National Accreditation Board ("ANAB") under International Organization for Standardization ("ISO") standard 17025: 2017, and are subject to the Commission's authority.[18] The analyst involved in the disclosures, Stephen Adam Vinson, is a current forensic DNA analyst license holder, licensed by the Commission since December 6, 2018. Mr. Vinson's license was renewed in 2020 and expires on December 5, 2022.

[13] *Id.* at art. 38.01 § 4-c; 37 Tex. Admin Code § 651.216(b) (2019).
[14] 37 Tex. Admin Code § 651.216(b)(1)-(4) (2019).
[15] *Id.* at (c).
[16] TEX. CODE CRIM. PROC. art. 38.01 § 4-c(e); 37 Tex. Admin. Code § 651.216(d) (2019).
[17] TEX. CODE CRIM. PROC. art. 38.01 § 4(a)(3).
[18] *See*, https://www.txcourts.gov/fsc/accreditation/for a list of accredited laboratories.

C. Investigative Process

The Commission's administrative rules set forth the process by which it determines whether to accept a self-disclosure for investigation as well as the process used to conduct the investigation.[19] The Commission's rules also describe the process for appealing final investigative reports by the Commission and, separately, disciplinary actions by the Commission against a license holder or applicant.[20]

In investigating this complaint, the Commission reviewed numerous documents including trial and deposition transcripts, affidavits, relevant standard operating procedures, bench notes and related information. Commission staff had telephone conferences with the leaders of HFSC, the DPS laboratory system, and the Office of Capital and Forensic Writs ("OCFW"). The investigative panel conducted an interview with Mr. Vinson on July 1, 2022.[21]

D. Limitations of this Report

The Commission's authority contains important limitations. For example, no finding by the Commission constitutes a comment upon the guilt or innocence of any individual.[22] The Commission's written reports are not admissible in civil or criminal actions.[23] The Commission does not have the authority to subpoena documents or testimony; information received during any investigation is dependent on the willingness of affected parties to submit relevant documents and respond to questions posed. Information gathered in this report was not subject to standards for the admission of evidence in a courtroom. For example, no individual testified under oath, was limited

[19] 37 Tex. Admin. Code § 651.304-307 (2019).
[20] 37 Tex. Admin. Code § 651.309 (2019); *Id.* at § 651.216 (2019).
[21] *Interview decisions depend on various factors. In this case, the Commission limited witness interviews due to the pendency of litigation.*
[22] TEX. CODE CRIM. PROC. art. 38.01 § 4(g).
[23] *Id*. at § 11.

by either the Texas or Federal Rules of Evidence (*e.g.*, against the admission of hearsay) or was subject to cross-examination under a judge's supervision.

II. SUMMARY OF THE SELF-DISCLOSURE(S)

This report concerns a series of three laboratory self-disclosures, the first of which was filed on April 7, 2022 by HFSC regarding trial testimony, post-conviction deposition testimony, and other official statements made by forensic analyst Stephen Adam Vinson ("Vinson"). The statements relate to the analysis of physical evidence performed in 2013 when Vinson was employed as a forensic biology screener at DPS in Houston. By the time Vinson was asked to testify in the case, he had left DPS and was employed as a DNA analyst with HFSC.

HFSC reviewed Vinson's 2017 trial testimony, his 2019 voluntary statement, and his September 22, 2020 post-conviction deposition testimony, and expressed concerns related to Vinson's "stated practice to testify solely from his laboratory report without reviewing his bench notes," as well as his candor at trial and during post-conviction proceedings.

DPS reviewed HFSC's self-disclosure and submitted its own Quality Incident Report (QIR) on June 7, 2022. The June QIR described evidence storage anomalies, provided a cause analysis and risk analysis, and described re-training related to proper storage conditions as well as the evolution of DPS's quality management program. On September 6, 2022, DPS submitted a supplemental QIR addressing concerns related to possible DNA degradation or contamination. The September QIR clarified and amended earlier representations regarding possible DNA degradation and contamination made by DPS in response to Colone's post-conviction writ.

III. CRIMINAL CASE FACTS AND RECEIPT OF EVIDENCE AT DPS HOUSTON

In May of 2017, defendant Joseph Colone was convicted and sentenced to death for the 2010 murder of more than one person during the same criminal transaction. On March 2, 2022, the Texas Court of Criminal Appeals granted Colone post-conviction habeas relief.[24]

On July 31, 2010, a masked gunman killed Mary Goodman and her 16-year-old daughter, Briana. When police arrived at Mary Goodman's home, they found her body in the front doorway and Briana Goodman's body in the backyard. They also found a dark knit glove lying outside the doorway to the bathroom and a towel outside the home.

The glove, towel, and other items of physical evidence from the crime scene were initially sent to a private laboratory (Orchid Cellmark) and were subsequently returned and stored in a freezer at the Jefferson County Regional Crime Laboratory from 2010 until 2013.

On October 1, 2013, the items were transported in a Styrofoam cooler from Jefferson County to the DPS regional crime laboratory in Houston. The cooler had an external sticker marked "refrigerate upon arrival." DPS employees received the evidence, reviewed the submission form and stored the evidence at room temperature based on the description of clothing items listed on the submission form. The cooler also contained extracts requiring refrigeration, but they were not listed on the form. Evidence handling personnel did not open the cooler, but rather placed it in storage at room temperature. On October 31, 2013, forensic biology screening analyst Adam Vinson opened the cooler and began screening the items.

Inside the Styrofoam cooler, Vinson observed a FedEx envelope containing four 9x12 paper envelopes, one 6x9 paper envelope, and one clear plastic bag. At the bottom of the container were four melted ice packs and foul-smelling liquid. Among other things, Vinson unpacked the

[24] *Ex parte Colone*, 2022 Tex. Crim. App. LEXIS 134 (Tex. Crim. App. 2022).

evidence, performed certain presumptive tests and collected swabs for subsequent DNA analysis. Vinson documented his observations about the liquid in the cooler and the screening process in his bench notes. He issued a report documenting the biology screening activities in November 2013. DNA analyst Tanya Dean then performed DNA analysis and issued a report indicating that Joseph Colone could not be excluded as a contributor to the DNA mixture profiles obtained from the glove and blue towel.

IV. TESTIMONY AND POST-CONVICTION PROCEEDINGS

A. Vinson's Trial Testimony

When Vinson was called to testify in Colone's capital murder trial in May 2017, he no longer worked for DPS Houston and was employed as a DNA analyst for HFSC. After some preliminary discussions, the following colloquy about the evidence occurred at trial:

> Q. When you received all of the items in this case, did they come to you in a sealed condition?
>
> A. I believe so. If they were not sealed, it would have been noted in my laboratory notes.
>
> Q: Okay. And just for the jury's knowledge, in State's Exhibit 115, right here we see just a white cardboard box. We have previously referred to this last week as a convenience container, basically something that's large enough to hold all of the evidence that an agency may be submitting.
>
> A. Yes, ma'am.
>
> Q. And did you come into contact with this item as is designated by your unique initials, the cause number and the item number?
>
> A. Yes.
>
> Q. And if there had been something awry with it, had it not been sealed or something like that, you would have noted that, but you did not in this case?
>
> A. The Houston DPS laboratory has an evidence-receiving department. So, before any analyst upstairs in the laboratory actually sees the evidence, they

verify that it has been shipped correctly and it's in a proper sealed state or else they don't admit it to the laboratory.

Q. Okay. And, again, just for purposes of the record, in State's Exhibit 93, the same with this convenience container, which is a Styrofoam cooler. Do you see there your markings and the date, as well?

A. Yes. Yes.

Q. Same principle applies to this piece of evidence?

A. Yes, ma'am.

Vinson then described his biology screening duties including presumptive testing on various items of evidence. The prosecutor asked him if he had an opportunity to review his report and Vinson responded, "I have not seen my report in a while." The prosecutor responded "Gosh, so, you're doing this completely off memory." The prosecutor then offered Vinson a copy for his use in refreshing his memory. Vinson testified to the presumptive testing he performed, DNA collection activities, and trace evidence collection activities on a few additional pieces of evidence. The State then passed him as a witness.

On cross-examination, Vinson testified that he would have to reference the case file with his notes to answer questions about the total amount of time he spent on the serology work he performed in the case. When asked if there were "some notes somewhere" that would show what work he performed on what actual day, Vinson replied that it would be in the case file, "[b]ut I'm no longer an employee of the State, so I do not have access to that information." [25]

In a post-conviction affidavit, Assistant District Attorney (ADA) Ashley Molfino stated the following regarding preparation for trial:

> In preparation for trial, I relied upon my historically common practice of relying upon the issued report and a pretrial conference. As Mr. Vinson was no longer with DPS at the time of the trial, I provided him a copy of his report in advance. As a chain of custody and serology witness his testimony was not complicated, nor was

[25] *See*, **Exhibit B**: **Trial Testimony of Vinson** dated 5.1.17.

> his preparation. I did not request a copy of the DPS file, nor did Mr. Vinson ask that I make it available to him.[26]

B. Post-Conviction Discovery of Bench Notes

On May 8, 2019, Colone's conviction and death sentence were affirmed on direct appeal.[27] The trial court appointed the Office of Capital and Forensic Writs ("OCFW") to represent Colone for the purpose of investigating and preparing an application for writ of habeas corpus. OCFW is a judicial agency that serves as the Texas post-conviction public defender. OCFW subpoenaed the DPS Houston case record. DPS's response to OCFW's discovery request was the first time any attorney for Colone requested or obtained the DPS case file, including bench notes.[28]

OCFW discovered that Vinson created 47 pages of detailed bench notes documenting his 2013 examination and testing of the evidence, including notes regarding the packaging of the evidence as received in the laboratory. The first page of his notes documents the condition of the Styrofoam cooler containing various items of evidence, viz:

> Note: Despite stickers indicating to "refrigerate on arrival", I pulled this item from a regular shelf in the vault. The packs were room temperature, the FedEx envelope is damp and soggy, and there is a foul-smelling water/liquid along the bottom of the container. I will inquire as to why the storage instructions clearly indicated on the outside of [the Styrofoam cooler] were ignored. The liquid will be soaked up with paper towels and discarded."

Vinson's notes further document that the "damp and soggy" FedEx envelope contained, among other things, the black glove from the hallway, part of the blue towel from outside of the house, and a portion of a black sleeveless undershirt collar "from suspect" Colone, all packaged in separate paper envelopes.

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[26] *See*, **Exhibit C**: **Affidavit of Ashley Chase Molfino** dated 10.23.19
[27] *Colone v. State,* 573 S.W.3d 249 (Tex. Crim. App. 2019).
[28] Post-conviction affidavits from the trial prosecutors and the trial defense attorneys all contain statements indicating the bench notes were **not** discovered, reviewed, or produced prior to the trial.

Vinson did not take any contemporaneous photographs of the Styrofoam cooler, the FedEx envelope, or individual envelopes containing items of evidence. During interviews, he explained that at that time, photographs were at the discretion of the analyst and would not have been taken in a situation like this. He also did not initiate a quality incident regarding the storage of the Styrofoam cooler and its contents, though he asserted during his deposition and interview with the Commission that he recalls having spoken with someone in the DNA section about the melted ice packs. He does not recall with whom he spoke but believes the conversation likely would have been in person and not documented in the case record.

C. Post-Conviction Affidavits and Vinson's Post-Conviction Deposition Testimony

OCFW filed a post-conviction writ on behalf of Colone. The State responded to the writ and attached affidavits from various trial participants, including Vinson and Houston DPS DNA Technical Leader Andrew McWhorter.

1. Post-Conviction Affidavit of DNA Technical Leader McWhorter

On October 2, 2019, McWhorter executed a post-conviction affidavit on behalf of DPS.[29] Relevant portions of his affidavit will be discussed later in this report.

2. Post-Conviction Affidavit of Vinson

On October 10, 2019, Vinson executed a post-conviction affidavit addressing his trial testimony.[30] He met with representatives from the Jefferson County District Attorney's Office during the course of preparing his affidavit. He did not speak with anyone from DPS. In response to a question during his Commission interview, Vinson stated that based on his conversations with the Jefferson County DA's office, he understood that McWhorter's affidavit would be consistent with his own affidavit in the following respects: (1) the storage conditions at DPS did not violate

[29] **Exhibit D: Affidavit of Andrew McWhorter** dated 10.2.19.
[30] **Exhibit E: Affidavit of Stephen Adam Vinson** dated 10.10.19.

any DPS policies; and (2) there was no concern regarding the impact of the liquid at the bottom of the cooler on the DNA analysis (e.g., degradation and/or contamination) because while the FedEx envelope was soggy, the inner envelopes containing the evidence were dry.

In his affidavit, Vinson explained he testified at trial based only on his report, and he did not review his notes before testifying. He maintained that it was common practice for him to testify from his report and to only reference notes if specifically instructed to do so by the prosecution or the defense. Vinson stated he reviewed the "specific case note" regarding the state of the evidence and that it accurately reflects the condition of the outer packaging for the evidence. Vinson also stated it was common practice for him to note any irregularities in his bench notes and recounted that he testified at Colone's trial that irregularities would have been captured in his notes. Vinson averred that "the noted irregularity does not reflect a quality issue with the evidence itself, only the outer packaging in which it came to the laboratory." Vinson further maintained that even if he had reviewed the bench note prior to his testimony he would not have raised the note to the prosecutor's attention as it "does not affect the evidence that I screened and pertains only to the outer packaging…."

Vinson acknowledged he may have failed to directly answer the prosecutor's question about any irregularities on the outer packaging. However, because he noted an irregularity in his bench notes, Vinson maintained that he did not testify falsely. Vinson stated his belief that the irregularity did not affect the evidence he was screening, so it was not noted in his report or otherwise addressed. Vinson took the position that had the liquid in the cooler damaged any evidence, he would have noted it as unsuitable for testing in his bench notes and laboratory report. He did not discuss the bench notes with any of the attorneys before testifying.

3. Vinson's Post-Conviction Deposition Testimony

On September 20, 2020, OCFW took the post-conviction deposition of Vinson pursuant to a trial court order designating several controverted and unresolved factual issues raised in Colone's writ of habeas corpus. Vinson was questioned about many aspects of his trial testimony, DPS policies, and issues surrounding improper storage of the evidence.[31]

Vinson conceded the Styrofoam cooler, and the cuttings contained therein, were not stored in a refrigerated environment or protected from freezer moisture by a layer of plastic. When questioned about the standard operating procedure requiring an analyst to note instances where packaging or handling of the evidence creates a potential for contamination, he disagreed that the FedEx envelope presented potential for contamination because "the inner items were dry in the FedEx envelope, and there was no mold growth on the evidence to suggest moisture had affected the evidence in any such way." Vinson acknowledged his assertions during testimony that contents of the FedEx envelope were dry was based solely on the *absence* of any notes describing the opposite, *i.e.,* moisture on the items. Vinson disagreed there was any potential for contamination based on what he observed. When questioned about the portion of DPS's standard operating procedure stating instances of potential contamination "should be brought to the attention of the supervisor, other involved examiners and the investigator," Vinson maintained the procedure did not apply to the contents of the FedEx envelope in this case.

Vinson was also questioned about the DPS Laboratory Operations Guide in effect at the time of his analysis dealing with a Quality Action Plan procedure for a "nonconforming event".[32]

> Nonconforming event is when one or more characteristics or conditions are observed that do not conform to required specifications, procedure, or policies. Examples of nonconforming events may include contamination, failed control,

[31] *See*, **Exhibit F: Deposition Testimony of Stephen Adam Vinson** dated 9.20.20.
[32] *See*, **Exhibit G: DPS Laboratory Operations Guide Quality Action Plan** DRN:LOG-MDL Version 32, effective 9.16.13.

> observations recorded inaccurately, incorrect conclusions/interpretations, sample switch, sample preparation error, and unsupported conclusions.

Colone's attorney asked Vinson to agree with the basic premise that evidence labeled with an instruction to refrigerate should not be left unrefrigerated. Vinson asserted the question should be directed to the evidence receiving department.

Vinson did not include information regarding the storage condition of the Styrofoam cooler in his report. When questioned about the portion of the DPS Laboratory Operations Guide dealing with Laboratory Case Reports that "communicates to law enforcement, to attorneys, prosecutors and other a description of the items received and tested," Vinson maintained his report did describe the items received, the outer packaging, and the item of evidence that was tested. However, the report did not note the FedEx envelope was damp or soggy or that there was an unidentified foul-smelling liquid present. Vinson stated, "[w]e do not report on the condition of our outer packaging, inner packaging on our laboratory reports." Vinson further testified that including that information would have been inconsistent with DPS procedures.

Vinson was asked whether it would have been prudent for the prosecutors to have him review his bench notes prior to trial. Vinson declined to answer the question because he is not a prosecutor.

When asked by Colone's attorney whether DPS would have provided the bench notes to him for review before trial, Vinson stated that he had testified many times while working for HFSC and has had folders and notes requested and provided to him for testimony. "While I don't have *personal access* to it, I believe DPS would absolutely provide materials to me if I needed them." He added, "that should have been included in a discovery request."

Colone's attorney asked Vinson to review his trial testimony regarding the packaging of the evidence as received. The prosecutor first asked him about the cardboard box, stating: "[h]ad

there been something awry with it, had it not been sealed or something like that, you would have noted that**, but you did not in this case, correct?"** The prosecutor then switched subjects to the Styrofoam cooler and asked, "the same principle applies to this piece of evidence, correct?" The following colloquy occurred between Colone's attorney and Vinson regarding this discussion at trial:

> Q. Did you understand the prosecutor to be asking whether anything was awry with the cooler at all or just that you noted it?
>
> A. Just that I noted it.
>
> Q. So, you're saying she only cared about whether or not the irregularities were noted, not whether any actually existed?
>
> A. Well, if they are noted, then they did exist. So those two are the same thing, I believe. …
>
> Q. Is it your understanding she only cared whether or not you noted any irregularities?
>
> A. Yes, I believe so.
>
> Q. You didn't think she wanted to discuss any of those irregularities in front of the jury?
>
> A. No. And we had not discussed any irregularities, as I think I made clear, I did not review my bench notes before testimony.

The court described this interaction as an example of Vinson parsing "his trial testimony in a way that ignored it's obvious significance."[33]

Colone's attorneys questioned Vinson about certain provisions of the Texas Code of Professional Responsibility for Forensic Analysts and Crime Laboratory Management. The Commission had not yet adopted the Code at the time of Colone's 2017 trial, but it was applicable when Vinson provided deposition testimony in 2020. Vinson denied violating any Code provision.

[33] *See*, **Exhibit H** *infra* at n. 36 **– Trial Court Agreed Findings of Fact and Conclusions of Law Relating to Article 11.071 Writ Application** at p. 29 at Paragraph 57.

Ultimately, Vinson acknowledged the jury never heard about the cooler being left unrefrigerated for a month despite the label that said, "refrigerate upon arrival." The jury also never heard about the damp and soggy FedEx envelope, or the unidentified foul-smelling liquid in the bottom of the cooler. Of critical importance, OCFW asked Vinson whether, ***if*** he had reviewed his bench notes prior to testimony, the jury ***could*** have been provided the most complete and accurate testimony about the condition of the evidence. Vinson replied:

> A. Had I reviewed my case notes before, I don't believe I would have any reason to mention the outer packaging in my testimony as it didn't reflect or affect the results of the items that were packaged in the inner envelopes. I don't believe I would have mentioned it at all.
> ….
>
> A. No, because that—again, this is not the evidence. This is the outer packaging – layered outer packaging for the evidence; and the evidence itself was preserved in a dry state, clearly packaged and separated with no apparent mold growth. I would have no reason to note that out of context.
>
> And had I had any concern for contamination, mold growth, again, there would have been a quality report filed; and I would not have released results for these items.

Vinson was shown the post-conviction affidavit executed by DPS Houston DNA Technical leader Andrew McWhorter. McWhorter also testified at Colone's trial, but his testimony was limited to DNA interpretation (particularly STRmix) and not the forensic biology screening portion of the casework.[34] McWhorter stated in his affidavit that "Because Vinson did not ask for a copy of the case notes, he was not able to provide the most complete and accurate testimony regarding the condition of the evidence." When asked by Colone's attorney, Vinson stated he disagreed with this statement by McWhorter, commenting that "Perhaps Mr. McWhorter testifies from his case notes. I testify from my laboratory report."

[34] While some DNA laboratories issue a single report covering the biology screening work and the DNA analysis, Texas DPS issues separate reports: one or more for screening and one or more for DNA results.

When questioned by a prosecutor during his deposition, Vinson maintained that he did not testify falsely. He explained that the FedEx envelope "was there to protect the inner envelopes," which are paper and contained the evidence items. It is common for multiple items of evidence to be submitted together in an outer package because they are then packaged separately in inner packages. Vinson agreed with the statement that the cooler was nothing more than a convenience-type package containing the FedEx envelope. He explained that the FedEx envelope has a waxy outside to protect it from environmental conditions, and that it was properly sealed with evidence tape. The prosecutor posed the following questions:

> Q: Is there any indication that the FedEx envelope with the actual evidence in it had any integrity issues that would have impacted, in your professional opinion, the testing that was to follow?
>
> A: No, sir.
>
> Q: No signs that it had been penetrated at all with sogginess or mold, correct?
>
> A: No. And again – I didn't observe any mold: and you know, had mold been present on some of the items, I would have expected it to simply degrade the DNA – or any possible DNA that could have been on those items. So, if anything, that would have helped to, perhaps, weaken the DNA.

The prosecutor then asked Vinson whether he agreed with an assertion made in a post-conviction affidavit by McWhorter. The assertion, as recounted by the prosecutor, was that degradation, if any, "can cause a contributor's DNA to not be detected in a mixture profile; however, it will not cause the opposite: a person's profile to appear in a mixture." Vinson agreed. When asked, "there was no contamination of those inner items inside that cooler, was there?" Vinson replied that he had no cause to believe that a contamination event had occurred. The prosecutor then asked:

> Q. Did you find – would it be safe to say that you considered the condition of the cooler and the lack of contamination penetration of the inner contents, envelopes scientifically irrelevant to any test results, then?

A. Oh yes. Absolutely.

…

A. Yes. If I felt otherwise, there would have been a quality incident associated with this case: and I would not have proceeded with testing the evidence.

Colone's attorney challenged Vinson about his assertion that the FedEx envelope had a waxy exterior. He explained that this was a generalization based on prior experience, not an actual recollection in this particular case. Vinson reiterated that he believed the FedEx envelope in the Colone case was damp and soggy on the outside, but the inner contents were dry because he did not note otherwise in the bench notes.

D. Trial Court Findings of Fact and Conclusions of Law

On July 12, 2021, the trial court issued agreed findings of fact and conclusions of law relating to Colone's Article 11.071 Writ of Habeas Corpus. The trial court recommended Colone's conviction be vacated, and his case be remanded for a new trial. On March 2, 2022, the Court of Criminal Appeals issued a published opinion granting relief and set aside Colone's conviction.[35]

In a scathing and detailed 54-page Agreed Findings of Fact and Conclusions of Law Relating to Article 11.071 Writ Application, the trial court examined both the trial testimony and post-conviction testimony of Vinson.[36] In sum, the trial court found that the glove and towel found at the scene of the murders were the centerpiece of the State's case and the bench notes discovered after trial revealed that Vinson's trial testimony was misleading, evasive, not candid and was false.

[35] *Ex parte Colone*, 134 LEXIS 1 (Tex. Crim. App. 2022).

[36] (*See*, **Exhibit H – Trial Court Agreed Findings of Fact and Conclusions of Law Relating to Article 11.071 Writ Application,** *Ex parte Joseph Colone,* Cause No 10-10213-A*,* In the 252nd District Court of Jefferson County, Texas, dated 7.12.21).

V. COMMISSION INVESTIGATION

At its April 22, 2022, quarterly meeting, the Commission voted to form an investigative panel ("Panel") to assist in determining whether information contained in the disclosures are supported by the facts and circumstances, available data, and related documentation. The Panel included Bruce Budowle, Ph.D.,[37] Nancy Downing, Ph.D., and Elected District Attorney Jarvis Parsons.

A. Investigative Notice and Interview Request

The Commission notified Vinson it accepted the complaint for investigation on April 29, 2022.[38] On June 1, 2022, the Commission extended Vinson an opportunity to interview with the Panel.[39] Vinson accepted the interview request and was interviewed on July 1, 2022.

B. Information Gathering and Document Review

During the investigation, Commission staff spoke with Chief of the Crime Laboratory Division Brady Mills (DPS) and President and CEO Peter Stout (HFSC) regarding the disclosures and follow-up questions and/or information requests. The Commission restricted collateral witness interviews due to the pendency of litigation. Staff also reviewed the following materials:

- Trial Court Findings and Facts and Conclusions of Law
- Court of Criminal Appeals Opinion in Colone case
- Trial Transcripts Related to Biology/DNA testing in the Colone case.
- Post-Conviction Affidavits by Vinson and various other witnesses
- Post-Conviction Deposition Testimony of Vinson and various other witnesses
- Relevant DPS and HFSC Standard Operating Procedures

[37] *Dr. Budowle retired from his position at UNTHSC/CHI and relocated to another state. Due to changed residency, his appointment, which expired on September 1, 2022, could not be extended by Governor Abbott.*
[38] **Exhibit I: Investigative Notice to Vinson** dated 4.29.22.
[39] **Exhibit J: Interview Request to Vinson** dated 6.1.22.

- DPS casefile related to Colone criminal case
- Quality documents associated with the original error and subsequent testimony
- Additional unrelated testimony provided by Vinson while employed with HFSC.
- Training materials on Commission report issued re: *State of Texas v. Criner*.

C. Interview of Stephen Adam Vinson

The Panel interviewed Vinson on July 1, 2022. His demeanor was cooperative. He expressed an increased capacity for introspection and a greater willingness to concede error than he had during his deposition.

VI. COMMISSION FINDINGS AND OBSERVATIONS

Following are the Commission's observations regarding Vinson's actions and inactions at trial and during post-conviction proceedings.

A. Vinson was professionally negligent when he appeared at trial unprepared.

Vinson appeared at trial without a copy of his laboratory report. When asked, he admitted, "I have not seen my report in a while." The prosecutor responded "Gosh, so, you're doing this completely off memory," and offered Vinson a copy for use in refreshing his recollection. Vinson also did not review the case record in preparation for trial, and he defended his decision not to review the record all the way through the post-conviction deposition.

At the time of Colone's trial, there was no standard expressly stating that adequate preparation for trial required a forensic biology screening analyst to review his report recently enough to be able to speak about it in an informed manner, nor was there a standard expressly stating that a forensic biology screening analyst needed to review a case record before testifying. However, there was an expectation in the accrediting body's guiding principles that analysts present accurate and complete information in testimony. HFSC's "Conduct Expectations"

provided a similar expectation: "Staff members have a moral obligation to see to it that others in the criminal justice system understand the evidence as it exists and to present it in an impartial manner."[40]

The Commission believes most, if not all, forensic analysts in Texas would consider it self-evident that one cannot possibly comply with the expectations articulated by ANAB and HFSC without basic preparation. Vinson was aware the case was a capital murder in which a mother and her young daughter were killed. The State sought the death penalty. It is hard to imagine more serious stakes in any criminal proceeding than those present in this case.

The Commission understands there is a range of what may constitute adequate preparation depending on the case, the forensic discipline, and the role of the analyst who performed the work. However, under no circumstances should an analyst walk into a courtroom without reviewing their report and without making every effort to review the case file. The Commission recognizes that Vinson met with the trial prosecutor at some point before trial, but the discussion during trial revealed that time had passed between that meeting and Vinson's testimony—so much so that he was "speaking from memory" until the prosecutor handed him her copy of his report.

Extensive experience testifying may cause an analyst to become complacent in pre-trial preparation. It is also possible that individuals whose role is limited to biology screening may perceive the more "important" aspects of the case to sit with the DNA analysis itself. In this case, Vinson appears to have underestimated the importance of his role as a screening analyst. It is imperative that analysts have full command of the work performed regardless of where they fall within the analytical process. It is also imperative that everyone (including the attorneys)

[40] *See*, **Exhibit K**: **HFSC Conduct Expectations Policy**, Document ID 8340, issued 2.9.17.

appreciate that the forensic biology screening component of a case is *no less important* than the DNA analysis.

The Commission finds Vinson committed professional negligence in failing to prepare adequately for trial. The fact that he walked into the courtroom without a timely review of his laboratory report or the case record demonstrates a failure to treat the proceedings with the solemnity they deserved. To ensure there is no ambiguity regarding expectations for trial preparation in Texas laboratories going forward, the Commission provides a specific recommendation regarding this issue in **Section IX** below.

B. Vinson was professionally negligent in failing to acknowledge during trial that he had not reviewed the bench notes in response to the prosecutor's question regarding what he would have done had something been "awry."

The compound questions posed by the prosecutor at trial regarding the condition of the evidence were not ideal, but Vinson's trial testimony regarding the Styrofoam cooler was incomplete and therefore misleading. He testified that "the same principle applies" to the cooler that applied to a white cardboard box convenience container, namely: "had there been something awry with it" he would have documented in it his case notes but he "did not in this case." The truth is Vinson had not reviewed his case notes and did not remember the condition of the evidence. Offering the statement anyway was careless and misleading because, as the court concluded, a juror could have easily understood his testimony to mean that he did not document anything awry in his bench notes when in fact the opposite is true.[41] Once Vinson realized that he did not have actual knowledge sufficient to respond to the prosecutor's inquiries in a complete and

[41] The term "false testimony" used by the court and the CCA in this case has legal significance that falls within the court's sole province; Vinson's overall credibility during testimony as characterized by the court and the CCA, are beyond the scope of this report.

straightforward manner, it was his obligation to inform the parties he just did not know because he had not reviewed the file, instead of offering incomplete and misleading testimony.

Vinson was asked a question on cross-examination regarding whether there were "some notes somewhere" that would detail what work he did on a particular day. He answered: "Yes. It would be in our case file." Vinson then added, "But I'm no longer an employee of the State, so I do not have access to that information." This statement by Vinson was factually inaccurate. DPS would have given a copy of the case file to Vinson had he asked for it, a fact he later admitted during his post-conviction deposition. Advising the parties to essentially "check his notes" is insufficient and inconsistent with his duties as a forensic analyst.

During his interview, Vinson indicated that he believed someone in the case (other than him) would have looked at the case record and raised concerns had they been present, such as the attorneys for either side. He was disturbed that Colone's defense counsel either never sought or never received discovery of the case record. "The defense has every right to question everything I do, and if I could do it differently, I would want to make sure they had that opportunity." The Commission is unsure why it took until OCFW's post-conviction appointment for the case file to finally be reviewed by the state or the defense. But this gap in lawyering, however disappointing, does not relieve Vinson of the duty to admit that what he was saying was not based on actual knowledge but rather a series of "check my notes" assumptions.

C. Vinson committed professional misconduct and violated the Code of Professional Responsibility by refusing to acknowledge the impact of his failure to prepare when given the opportunity to do so.

Between the Colone trial and Vinson's September 2020 post-conviction deposition, expectations for forensic analysts evolved significantly. By the time Vinson was deposed, he was licensed as a DNA analyst and the Code of Professional Responsibility for Forensic Analysts and

Crime Laboratory Management was adopted by the Commission.[42] In addition to these developments, in August 2019 (for the Forensic Biology Section) and again in September 2019 (for the entire laboratory) HFSC provided specific training to analysts, including Vinson,[43] on a Commission report in *State of Texas v. Criner* that concerned a DNA analyst's inadequate trial preparation and associated failure to take responsibility.[44]

On September 30, 2022, HFSC provided the Commission with a video link to the September training, which included many admonitions directly relevant to this case. Following are examples of statements made by laboratory leadership:

By Chief Executive Officer Dr. Peter Stout: It's not the mistake that creates the problem; it's the reaction to the mistake. Owning the mistake, being forthcoming…that makes all the difference.

By DNA Technical Leader Robin Guidry: She [the analyst in *Criner*] couldn't be sure of her answer to a question by the prosecutor. And instead of saying, "I don't know," she answered it, "I think it was two swabs…." It is not okay to give an answer even if you say you're unsure,

[42] 37 Tex. Admin. Code § 651.219 (2019), *(The Code of Professional Responsibility for Forensic Analysts and Crime Laboratory Management took effect January 1, 2019).*

[43] HFSC provided an attendance sheet for the August 27, 2019 FBIO section meeting showing Vinson signed into the meeting. The FBIO meeting included a longer and more in-depth discussion of the *Criner* report than the September meeting. IT audit logs also show Vinson was on-site during the September "company" meeting, though company meetings did not have attendance sign-in sheets. Management also emailed the slide deck for the *Criner* presentation to FBIO staff, and IT logs show that Vinson opened both the meeting agenda email and the follow-up email with the slides. HFSC also provided an April 25, 2019 testimony training with documentation that Vinson attended, during which the importance of reviewing case notes before trial and offering clear and unambiguous testimony were both discussed.

[44] *See*, Texas Forensic Science Commission Final Report dated August 16, 2019 on Self-Disclosure by The Texas Department of Public Safety (Austin) regarding testimony of D. Jody Koehler (Forensic Biology/DNA) concerning her testimony in *State of Texas v. Criner*. The *Criner* report was of particular interest to the DNA community in Texas and nationally because it was one of the first STRmix admissibility hearings in Texas. It was also the only time in modern DPS history that a trial court excluded DNA analysis and related testimony on scientific grounds. The only other time a trial court excluded DPS DNA analysis was on Sixth Amendment grounds (*i.e.,* the fact that the analyst was unavailable to testify led to Confrontation Clause concerns).

because the jury will hear the answer anyway. If you cannot answer a question accurately, don't answer the question."

Guidry also recognized that, "It is one thing when you say something on the stand, that's a very difficult position to be in." But the analyst in *Criner* would not accept responsibility even after having time to reflect. Guidry further noted that the analyst in *Criner* did not review the full case record before testifying, which resulted in her being unprepared. "The lesson here is—you need to be familiar with your case file before you go to testify."

HFSC's General Counsel Akilah Mance: "Once you go into court, everybody in there is relying on you as an expert." "Once you know something is wrong…you didn't prepare...it is incumbent upon you as the expert to stop the show." "The Commission is saying that as an expert, you need to be able to do that, even if you're on the stand."

"Control what you can. You can't control how prepared or competent the lawyers are, or how they pose the questions. But what you can control is how *you* prepare. We are needing you to look in your case record and anticipate, *this* could be an issue." Ms. Mance summarized her guidance by encouraging analysts to "be active listeners," and to "take the role seriously." She also made clear that "if it is beyond what you can accurately testify to…then don't."

The HFSC training also called special attention to the following observations made in the Commission's 2019 report in *Criner*:

> As one witness the panel interviewed observed: You don't have forensic science without testimony." The panel believes that it is imperative that [the analyst] and all analysts involved in the criminal justice system, prepare and approach his or her role with the solemnity demanded by the task being performed and recognize the impact that an analyst's work can have on the crucial and life-altering matters being resolved by the criminal justice system.
>
> The panel is concerned whether the analyst can rise above her defensiveness in this instance and truly be self-reflective. Her continued shifting of blame and deflecting responsibility is troubling.

During his 2020 deposition which was *one year after HFSC's* training on the *Criner* report, Vinson attempted to justify his lack of pre-trial preparation by referencing his common practice of testifying from his report and only referencing his notes "if instructed to do so by the prosecution or defense." While conceding his memory of the 2013 analytical work was not fresh when he testified in 2017, he doggedly maintained "I do not testify from bench notes." This statement missed the point about the need for preparation by at least reviewing the notes, and resulted in the following circular post-trial contention by Vinson: (1) had there been a quality event it would be in the lab report; (2) since there was nothing in the lab report there was no quality event; and (3) since there was nothing in the lab report regarding a quality event, he did not find it necessary to review his notes. It also begs the question of whether he was paying *any attention at all* during the August and/or September 2019 post-*Criner* report presentations given to employees at HFSC.

Vinson's failure to take responsibility during post-conviction testimony violated three provisions of the Code of Professional Responsibility. First, he did not present accurate and complete data during testimony. Because the Commission does not define the term "data" in its administrative rules, we look to the common definition. Merriam-Webster defines "data" as "factual information used as a basis for reasoning, discussion, or calculation."[45] The factual information missing from his presentation to the court was that he had not actually reviewed his notes in preparation for trial and thus could not answer a number of questions posed based on his actual knowledge. Vinson also failed to testify in a manner which is clear, straightforward and objective, and avoid phrasing testimony in an ambiguous, biased or misleading manner. As the court explained, a candid response would have been either that he could not recall the actual condition of the evidence containers or that he had no memory of what his notes said.

[45] *Data*, MERRIAM-WEBSTER (11th *online-only* ed. 2022).

Vinson also failed to communicate honestly and fully with all parties as required by the Code of Professional Responsibility. During his statement to HFSC during the course of their internal investigation, he wrote, "I did **not** testify that I had **not** noted anything awry with the cooler, and I did in fact make bench notes discussing what I observed at the time of testing." Yet he went to great lengths to argue during his post-conviction deposition testimony that there actually was nothing awry with the cooler as far as he was concerned. He made the following claim in his sworn affidavit:

> Had I reviewed my case file prior to testimony, I would not have brought up the note to ADA Molfino, as the note does not affect the evidence that I screened and pertains only to the outer packaging in which the evidence was received.

Vinson cannot have it both ways, and his perpetual attempts to do just that raise serious concerns about his ability to accept responsibility for his part when errors or omissions occur in the laboratory or at trial. Because forensic science is a human endeavor, things will go wrong from time to time whether in the laboratory or at trial. Perfection is not expected, but what is expected is a transparent and open-minded acknowledgment of issues when they are raised by criminal justice partners whose perspectives and responsibilities vary.

The Commission acknowledges there is a layer of complexity to assessing the testimony of a witness later determined to have offered incomplete or misleading statements. Analysts are rarely deposed, and they have little control over the clarity (or lack thereof) of courtroom or post-conviction proceedings. Questioning occurs in real time in an adversarial setting; the Commission recognizes a retrospective transcript review is fertile ground for criticism after-the-fact and may not capture various contributing factors during trial.

Notwithstanding these complexities, the Commission concludes Vinson deliberately failed to follow the standard of practice that an ordinary forensic analyst or crime laboratory would have

followed when he refused to admit, during post-conviction proceedings, that his failure to review the case record before trial led to an incomplete picture being provided to the jury. The HFSC training was crystal clear in setting expectations for analysts after the *Criner* report was issued. This leads the Commission to conclude that aggravating factors are present in this case; Vinson's defensive posturing during the deposition was deliberate. Not only should he have known better, he *did* know better.

As McWhorter stated in his affidavit, "because Mr. Vinson did not ask for a copy of the case notes, he was unable to provide the most complete and accurate testimony regarding the condition of the evidence." This should not be a controversial statement. Yet, even when Colone's attorney offered an easy question, asking Vinson to concede that ***if*** he had reviewed his bench notes prior to testimony, the jury ***could*** have been provided the most complete and accurate testimony about the condition of the evidence, he refused to acknowledge this as a possibility. His persistent reticence to recognize such a basic concept displays a lack of candor and defensive bias, and remarkably, it was wholly unnecessary. His posturing was a deliberate choice to place his own self-interest over the needs of the criminal justice system. It substantially affected the integrity of the results because it was one of the bases for the court's adverse credibility findings, and those findings contributed to the court's conclusion that Colone's constitutional rights were violated at trial.

D. Vinson was professionally negligent in asserting conclusively there was no possible risk of contamination given the microclimate created by the pooled liquid at the bottom of the cooler; DPS clarified and amended prior assertions regarding potential impact of storage conditions in its September 2022 QIR.

Forensic science service providers must be independent and refrain from making *ipse dixit* representations that exceed the limits of science. In this case, for example, it would have been reasonable and appropriate for a DNA analyst or biology screener to:

- Explain the basis for proceeding with biology screening, DNA analysis and interpretation despite the presence of liquid at the bottom of the cooler (*e.g.,* it did not appear at least visually, that the inner envelopes were impacted by the liquid); and

- Explain what specific indicators of carryover contamination or degradation analysts looked for in the data generated and explain why they did or did not observe those indicators.

What is not reasonable or scientifically supportable, however, is for an analyst or laboratory to make the following assertions given the specific facts of the cooler conditions in this case:

- DPS handled the glove, towel, and swabs in a manner that would prevent degradation and contamination;

- The evidence storage at DPS was compliant with the Biological Evidence Preservation Handbook: Best Practices for Evidence Handlers (NISTIR 7928);

- A reagent blank contamination check is sufficient in itself to detect carryover contamination;

- Sample degradation leading to loss of DNA can be assumed to benefit the defendant (this would *not* be true when sample degradation leads to the loss of a foreign minor contributor); and

- Sample degradation could not impact the assessment of number of contributors in a way that could also adversely impact the defendant in a case.

Given the facts of this case, and accurate and candid statement would include one or more of the following:

- DPS evidence handling personnel did not follow the instructions written on the outside of the cooler based on a mistaken assumption that the external instructions were not informative because coolers are reused by agencies and often have old stickers affixed to them;

- DPS evidence handling personnel relied on the evidence submission form which was incomplete because it listed only the type of items stored at room temperature and did not specify there were extracts in the cooler;

- No one in evidence handling opened the cooler to check whether the instruction on the cooler applied to its contents or to check for ice packs that needed removal (note: this is not a policy violation; evidence handling personnel do not typically open packages for safety reasons and to reduce contamination risk);

- No one in evidence handling contacted the submitting agency to inquire about the cooler or its contents; and

- While there are no red flags in the profile data to raise concerns about carryover contamination, it is not scientifically possible to know *conclusively* whether the storage conditions at DPS resulted in *either* degradation *or* contamination.

The September 2022 supplemental disclosure by DPS recognizes each of the assertions listed above. First, the laboratory failed to handle the evidence properly when staff placed the Styrofoam cooler on a shelf in an unrefrigerated vault despite the refrigeration instructions on the outside of the container. The storage conditions at DPS introduced risks of contamination and degradation of the DNA evidence that could not conclusively be dispelled. DPS acknowledged that quality control procedures designed to detect contamination from samples in other cases in the same batch are not dispositive of questions regarding contamination that may be present due to improper storage conditions of evidence. There is no existing technology to determine whether any degradation was the result of storage conditions or of normal environmental insults that degrade DNA from the time of deposit to collection and analysis.

The Commission commends DPS for the candor displayed in its supplemental disclosure in September 2022. The supplemental disclosure is signed by McWhorter in his capacity as the Houston laboratory's DNA technical leader. Because aspects of the QIR contradict McWhorter's post-conviction affidavit, the Commission encourages DPS to work with the parties in the criminal case to revise the contents of McWhorter's post-conviction affidavit which was filed on behalf of the agency, so that the case record contains the most accurate and up-to-date information. This is especially important if the case is to be re-tried.

E. Vinson violated the Code of Professional Responsibility by asserting conclusively there was no risk of contamination, and oversimplifying the possible impact of degradation on the analytical results.

During Vinson's deposition, Colone's attorney asked him the following question:

> Q: So you agree, though, that based on your opinion that it wasn't necessary, you did not note in your notes any potential for contamination?
>
> A: *No, and I still do not believe there was*. [emphasis added]

The only scientifically supportable claim is that one cannot say conclusively whether contamination or degradation occurred given the storage conditions at DPS. It would be appropriate and reasonable for an analyst or laboratory to list the factors that weigh against contamination having occurred, such as an apparent lack of moisture or staining of the internal envelopes, a lack of low-level contributor in the evidentiary data, or other fact-based observations. It is not scientifically supportable, however, to state there was no potential at all.

Commission staff forwarded both DPS QIR documents to Vinson on September 12, 2022; staff did not receive a response regarding the information contained in those documents. As of this writing, his position remains that there was no potential for contamination. This position does not allow room for the uncertainty introduced by storage conditions and thus exceeds the limits of science. The Commission finds Vinson violated the Code of Professional Responsibility standard requiring analysts to present accurate and complete data based on good scientific practices and valid methods. The fact that DPS stored biological evidence in a humid microclimate—even if done inadvertently—is not good scientific practice, and Vinson had an obligation to be honest about this fact.

F. Vinson and DPS should have initiated a quality incident related to the 2013 evidence handling conditions.

In 2013, when Vinson first examined the Styrofoam cooler, he should have alerted management who should have initiated a quality incident. The cooler was stored at room

temperature for approximately one month despite instructions to refrigerate, had a foul-smelling liquid inside, and a damp, soggy FedEx envelope contained the evidentiary items. The failure to initiate a quality incident led directly to the downstream consequences that ensued. Had a quality incident been initiated, it would have been reflected in the laboratory report, which would have prompted Vinson to review the issue and (presumably) offer more complete and accurate testimony at trial.

The 2013 DPS Laboratory Operations SOPs contained specific guidance to address the process for initiating a quality action plan when a nonconforming event was identified.

> "When a non-conforming event[46] has been identified, the individual responsible for the work must halt testing and/or calibration (and withhold test or calibration reports as necessary) until the scope of the incident has been determined."[47]

The condition of the cooler when initially examined by Vinson should have been considered a nonconforming event. Proper storage of biological evidence is critical to preserving it for future analysis, protecting it from contamination, and maintaining its integrity.[48] Under DPS policy at the time, analysts were instructed to "note instances where packaging or handling of the evidence creates a potential for contamination" and instructed that "instances of potential contamination should be brought to the attention of the supervisor, other involved examiners and the investigator."[49] Analysts were instructed to evaluate the evidence to consider, among other things, "whether the evidence is moldy and/or putrefied," and the "possibility and effect of cross-

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[46] *A nonconforming event is when one or more characteristic(s) or condition(s) are observed that do not conform to required specifications in standards, procedures, or policies. Examples of nonconforming events may include contamination, failed control, observations recorded inaccurately, incorrect conclusions/interpretations, sample switch, sample preparation error, and unsupported conclusions.* (*See*, **Exhibit G - DPS Lab Operations Guide QAP provisions**). *Note: QAP and QIR are two acronyms for the same document—Quality Action Plan was the predecessor to the current Quality Incident Report.*

[47] *Id.*

[48] *See*, **Exhibit L – DPS Standard Operating Procedures DNA-Evidence Handling**, effective 7.1.09.

[49] *See*, **Exhibit M – DPS Standard Operating Procedures DNA- Physical Evidence Examination,** effective 10.16.12.

contamination."[50] Analysts were also directed to visually examine the evidence and document as appropriate "a description of the outer evidence packaging and condition of the evidence, especially relevant factors to the preservation of the biological material."[51]

The contention by both Vinson and McWhorter in their post-conviction affidavits that the evidence storage conditions did not violate DPS policy was fundamentally flawed because, even if the evidentiary items were dry in their individual breathable paper envelopes contained in the damp and soggy FedEx package, the evidence was stored in a container that was not temperature controlled and which created a microclimate of humidity and condensation as the ice packs thawed. The liquid in the cooler smelled foul, an indication that some undesirable chemical process had occurred inside the container. There is no way an analyst could have known, based on a visual examination alone, that the humid microclimate created in the cooler had no degrading or contaminating effect on the DNA evidence contained inside the container. Contamination and degradation are not visible to the naked eye.

Vinson recalls having discussions about the condition of the cooler with other members of the laboratory, but the discussions were not documented. Because they were not documented, there is no way to know whether they actually occurred. DPS's QIR "sought to address the laboratory's failure to recognize and document the issues." Giving Vinson the benefit of the doubt that he raised the issue with individuals in his section, the Commission declines to issue a negligence finding here, instead directing the reader to the formal corrections made by DPS in its QIR documents, attached as **Exhibits O** and **P** to this report.

[50] *See*, **Exhibit N – DPS Standard Operating Procedures DNA – Physical Evidence Examination – Case/Evidence Evaluation,** effective 10.16.12.
[51] *Id*.

VII. DISCIPLINARY ACTION

On a determination by the Commission that a license holder violated a rule or order of the Commission under Article 38.01, Code of Criminal Procedure, the Commission may: (1) revoke or suspend the person's license; (2) refuse to renew the person's license; (3) reprimand the license holder; or (4) deny the person a license.

Factors considered in determining the appropriate disciplinary action against a license holder may include: (1) the seriousness of the violation; (2) the prevalence of misconduct by the individual; (3) the person's conduct history, including any investigative history by the Commission; (4) the harm or potential harm to the laboratory or criminal justice system as a whole; (5) attempts to conceal the act by the individual; and (6) any other relevant factors.

The Commission also may decide one or more of the following factors warrants less severe or less restrictive disciplinary action in a particular investigation: (1) candor in addressing the violation, including self-reported and voluntary admissions of the misconduct or violation; (2) acknowledgement of wrongdoing and willingness to cooperate with the Commission; (3) changes made by the individual to ensure compliance and prevent future misconduct; (4) rehabilitative potential; (5) other relevant circumstances reducing the seriousness of the misconduct; or (6) other relevant circumstances lessening responsibility for the misconduct.

Vinson's failure to acknowledge the impact of his trial testimony post-conviction and his failure to acknowledge valid scientific questions regarding the potential impact of evidence storage conditions was serious because it caused a trial judge to question his credibility as a witness. There was harm to the criminal justice system because Vinson's lack of preparation and candor contributed to the parties failing to consider the potential impact of the storage conditions at trial, which may have affected the jury's assessment of guilt or innocence had they heard the

information. It also contributed to the trial judge's findings and conclusions that the defendant's constitutional rights were violated and thus he was entitled to relief, a result which was subsequently adopted by the Court of Criminal Appeals.

Mitigating Factors: Vinson is an experienced analyst with no other conduct history. By the time of his Commission interview, he was cooperative and self-reflective, and recognized the defendant had a constitutional right to *Brady* information. During his interview, Vinson stated that this experience has taught him to be hyper-aware of questions asked on the stand. He offered an apology for any harm caused by his testimony, however, the fact is there were multiple points at which Vinson could have acknowledged these the issues earlier in the case, yet he did not take that opportunity until his interview.

Other relevant circumstances that may tend to lessen Vinson's responsibility for his post-conviction stance are: (1) During the process of preparing his post-conviction affidavit, Vinson received information from the DA's office that DPS supported the position that evidence storage policies were followed and there was no concern for contamination or degradation of the evidence; (2) Vinson's education of disclosure requirements related to exculpatory and impeaching information and the significance of bench notes evolved over time; and (3) DPS could have been more proactive by: (a) reviewing the forensic biology portion of the case file knowing Vinson was no longer employed at the laboratory; or (b) sending the materials to Vinson knowing he was set to testify in the case; or (c) both.

Vinson's forensic analyst license expires on December 5, 2022. In light of the observations and findings contained in this report and the fact that Vinson's license status is currently undesignated due to his separation from HFSC, the Commission hereby suspends Vinson's license for a period of sixty (60) days, until the day after license expiration on December 6, 2022. Were

Vinson to obtain new employment as a DNA analyst in Texas and seek to renew his license, the Commission may deny or adopt conditions on licensure at that time.

VIII. OTHER IMPORTANT ISSUES OBSERVED DURING THIS INVESTIGATION

A. Implications of Undisclosed Information: Michael Morton Implementation Challenges for Forensic Laboratories

The Court of Criminal Appeals reversed Colone's conviction based, in part, on a claim that "the State suppressed material evidence showing that the DPS Crime Laboratory had mishandled the glove and towel prior to their being subjected to DNA testing." The trial court found that information regarding storage conditions of the evidence was not disclosed to the defense, was favorable to the defense, and was material.

Under a Texas law known as the Michel Morton Act,[52] discovery shall be produced to a defendant as soon as practicable "after receiving a timely request from the defendant."[53] However, notwithstanding any other provision of the discovery statute, "the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document item or information in the possession, custody, or control of the state…"[54] Exculpatory, mitigating, and impeaching evidence is commonly referred to as *Brady* information.[55] The government has a duty to disclose *Brady* material even in the absence of a request by the defense.[56]

The facts of the Colone case demonstrate a real and recurring risk for crime laboratories and analysts testifying in any case where discovery was not requested by the defense or produced by the State *and* the laboratory has possession of exculpatory, impeachment or mitigating

[52] *Since January 1, 2019, the Commission has provided training to forensic analysts on the Michael Morton Act in connection with analyst licensing both through its general forensic exam which covers the topics Brady v. Maryland and the Michael Morton Act and through its licensing requirement for completion of legal and professional responsibility training each license renewal cycle*.
[53] TEX. CODE CRIM. PROC. art. 39.14(a).
[54] *Id*. at (h).
[55] *Brady v. Maryland*, 373 U.S. 83 (1963).
[56] *Strickler v. Greene*, 527 U.S. 263, 279 (1999).

information that a defendant is entitled to know. What makes the risk particularly acute is the fact that the decision about whether information in the possession of the laboratory may be exculpatory, impeachment or mitigating falls within the province of the court, not the crime laboratory in possession of the information. Indeed, crime laboratories may not even be aware of case facts or legal theories that may have a bearing on whether information would be classified as exculpatory, impeachment or mitigating.

For example, the court dismissed Vinson and McWhorter's position (which was later amended) regarding the insignificance of the bench notes as follows:

> "…Mr. Vinson and Mr. McWhorter's opinions did not definitively dispel the issues raised by the bench note. Thus, this Court finds that the issues raised by the bench note should have been resolved by the jury in its role as the ultimate fact finder at trial."[57]

The court is sending analysts and laboratories a clear message here, which is that forensic analysts and forensic laboratories should not substitute their own judgment of what may be "significant" for *Brady* purposes for the judgment of the court and/or jury. The Commission acknowledges that forensic analysts and laboratories often must make judgment calls to perform their work. But when a fundamental question is raised in a bench note, such as "I will inquire as to why the storage instructions clearly indicated on the outside of Item 01 were ignored," and when the note includes a description of "foul-smelling water/liquid," it is not difficult to understand why a court would object strongly to any forensic analyst or laboratory glossing over this anomalous storage condition as "insignificant." The Commission does not take a position about whether it was actually significant, but rather alerts laboratories that the decision must be left to the court and the jury in its role as factfinder.

[57]*See,* **Exhibit H: Trial Court Agreed Findings of Fact and Conclusions of Law** at p. 26.

B. The Importance of Proactive Outreach to Former Employees

There are two important issues laboratories should consider with respect to actions they need to take when an employee leaves the laboratory. There are few professions where an individual departs employment and even after leaving, may be required to perform a serious and solemn duty on behalf of the former employer. Because crime laboratory departure is not necessarily a full and permanent departure due to the need for testimony, laboratory management should endeavor to promote proactive and cooperative relations with departing employees to the extent possible. Laboratories should adopt clear policies about steps they are committed to taking to ensure a former employee has direct and secure access to any material he or she may need for post-departure testimony. The need for this is highlighted in the Colone case by the remarkable fact that the case folder was sitting in the hallway outside the courtroom with DPS representatives while Vinson was testifying.

Additionally, laboratories should consider the extent to which they need to review case records pertaining to the work of former employees, so that potential issues of concern may be flagged early. Efforts on this front may help mitigate an unfortunate scenario where a departed employee is less inclined to take pre-trial preparation and testimony as seriously as he or she otherwise would. The Commission feels this issue is especially important for laboratories to consider because we have seen this problematic post-departure dynamic produce serious consequences in two capital murder cases (*Criner* and *Colone*).

IX. RECOMMENDATIONS

The following four recommendations are specific to the analysts and laboratories discussed in this report:

1. To the extent Vinson remains involved in any Colone-related proceedings as a witness, he should participate with candor and issue any corrections the parties may deem necessary;

2. DPS should amend the biology screening report in the case to indicate there was an evidence-handling irregularity. DPS should also work with appropriate stakeholders to amend or update McWhorter's post-conviction affidavit if needed to address inconsistencies in the record;

3. DPS should continue its work in evaluating how to flag evidence-handling and other irregularities in the body of the laboratory's reports so that stakeholders are alerted that further information regarding the irregularity is contained within the case record;

4. DPS and HFSC should work collaboratively with the Harris County Public Defender's Office in vetting Vinson's past cases (in Harris and surrounding counties) to the extent such a review is requested by legal stakeholders.

The following recommendations have universal applicability:

5. All analysts should prepare adequately for testimony. Preparation should include, at a minimum, review of relevant case records including analytical data and bench notes associated with the analyses. Expectations regarding other items for pre-trial review should be set in clear terms by laboratory policy. Laboratories should regularly check OSAC Registry standards to determine whether they may help provide a framework for this assessment.

   Assessment Checklist Item: Accredited laboratories should assess the extent to which their existing policies set clear and specific expectations about what constitutes adequate preparation for trial. Subject areas and specific items should be described on a discipline-by-discipline basis. For reference, one example of a detailed set of expectations for forensic biology screeners and DNA analysts developed by Texas DPS is attached as **Exhibit Q**.[58]

6. Laboratories should adopt policies stating expectations for departing employees[59] who may need to testify regarding a case they analyzed while previously employed, and this should include specific proactive steps by the laboratory to provide case records in a secure manner regardless of whether the former employee requested them;

   Assessment Checklist Item: Accredited laboratories should review their policies and entry/exit interview documentation to assess whether expectations are clearly stated and acknowledged. Expectations should include the level of review of the case records the discipline determines should be undertaken, and approaches for when the departed employee may no longer be competent to provide adequate testimony due to the passage of time or other factors.

[58] This guidance was developed after the Commission issued its report in the Criner investigation.
[59] The Commission understands that laboratories have little leverage over individuals who have departed but requiring acknowledgment at the exit interview stage at least ensures the laboratory made a reasonable effort.

7. Laboratories should adopt policies that make it as easy as possible for new employees to prepare adequately and testify appropriately regarding analyses performed on behalf of their previous employer;
   Assessment Checklist Item: Accredited laboratories should review their policy documentation and ensure managers understand the importance of allowing employees flexibility to attend to pre-trial preparation and related testimony regarding analytical work performed on behalf of a previous employer, to the extent permitted by local rules.

8. The Texas Association of Crime Laboratory Directors (TACLD) should consider whether it is possible for Texas laboratories to agree to a cooperative approach/set of expectations for supporting analysts when they leave to a new laboratory but are still required to testify in cases worked while employed at their prior employer. If the TACLD is able to accomplish this, the agreement can be reflected in laboratory policy;

9. DPS submitted a legislative appropriation request for a statewide lab portal that gives authorized attorneys access to case records and related material that would typically be obtained through discovery. If the Legislature supports DPS's request, incorporation of this advanced technology will help ensure crime laboratory compliance with the letter and spirit of the Michael Morton Act in every case; and

10. The Texas Forensic Science Commission will host an online training to discuss the trial court's *Brady* and Michael Morton Act-related findings in this case and their potential implications for forensic laboratories. Continuing forensic education credits will be available for licensees who attend the training.

EXHIBIT A

Click here to go to TFSC's "Other Reports" web page, then click on "TFSC-Specific Accreditation Checklist" for the latest version of the list.

EXHIBIT B

MRS. CHASE: Thank you, Your Honor. The State calls Adam Vinson.

(WITNESS ENTERS COURTROOM)

THE COURT: Good morning, sir. How are you?

THE WITNESS: Good.

THE COURT: If you'll please raise your right hand.

(WITNESS SWORN)

THE COURT: Thank you. You may have a seat.

You may proceed.

MRS. CHASE: Thank you, Your Honor.

STEVEN ADAM VINSON,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MRS. CHASE:

Q. Good morning, Adam. Would you please introduce yourself to the jury.

A. Good morning. My name is Steven Adam Vinson, and I am a forensic DNA analyst with the Houston Forensic Science Center.

Q. Can you briefly describe a little bit about your education and training that led you to being a forensic scientist?

A. Yes. I have my Bachelor's of Science degree in forensic science from Baylor University, Waco, Texas; and I have extensive training from Orchid Cellmark, a Dallas laboratory that is no longer operating, but in forensic serology and in data basing. I went on to be an employee of the Texas Department of Public Safety's crime laboratory out of Houston, Texas, where I received further training in forensic serology, as well as forensic DNA analysis.

Q. You are currently employed with the?

A. Houston Forensic Science Center. I am a DNA analyst, a quality designee for the department, and I am the principle laboratory trainer for the downtown lab.

Q. Okay. Back in September, October of 2013, were you employed in your position as a forensic analysis -- analyst, I'm sorry, with Texas Department of Public Safety?

A. Yes, sir.

Q. And that's a laboratory located on West Road in Houston; correct?

A. Yes.

Q. Did you have an opportunity to have some involvement in a laboratory case HOU-1310-09111?

A. I believe so.

Q. Okay. Just so that we can be on the same page,

at some point in time, did the lab change over from designating cause numbers as an L2H number to a HOU number?

A. Yes.

Q. Okay. So, if I showed you a piece of evidence --

MRS. CHASE: If I may, Your Honor.

Q. (BY MRS. CHASE) -- State's 106, you see here that it originally had an L2H-213609 cause number?

A. Yes.

Q. And that was received back in March of 2011. When you handled this item, you then designated the updated laboratory number HOU-1310-9111?

A. Yes, ma'am.

Q. Those numbers basically to all the rest of us are the same number. It's just a different way -- the lab changed the designation of the same items?

A. Yes.

Q. When you received all of the items in this case, did they come to you in a sealed condition?

A. I believe so. If they were not sealed, it would have been noted in my laboratory notes.

Q. Okay. And just for the jury's knowledge, in State's Exhibit 115, right here we see just a white cardboard box. We have previously referred to this last

week as a convenience container, basically something that's large enough to hold all of the evidence that an agency may be submitting?

A. Yes, ma'am.

Q. And did you come into contact with this item, as is designated by your unique initials, the cause number and the item number?

A. Yes.

Q. And had there been something awry with it, had it not been sealed or something like that, you would have noted that, but you did not in this case?

A. The Houston DPS laboratory has an evidence receiving department. So, before any analyst upstairs in the laboratory actually sees the evidence, they verify that it has shipped correctly and it's in a proper sealed state or else they don't admit it to the laboratory.

Q. Okay. And, again, just for purposes of the record, in State's Exhibit 93, the same with this convenience container, which is a Styrofoam cooler. Do you see there your markings and the date, as well?

A. Yes. Yes.

Q. Same principle applies to this piece of evidence?

A. Yes, ma'am.

Q. Or this convenience container.

Okay. Can you describe to the jury briefly what your role was in processing this case, specifically L2H-213609, that then became also designated HOU-1310-09111?

A. Yes. My principle duties in this case are forensic serology, and that is the identification of what could possibly be human blood or human semen, the collection of hairs and fibers or any sort of touch evidence that gets left behind when your skin cells come in contact with an item.

Q. There has been previous testimony, Mr. Vinson, that both a phenolphthalein test and a KM test are used in presumptive testing for blood. Which one of those tests would you use at DPS?

A. I actually use both of those tests at DPS Houston. We use TMB and PHT, and those tests can be referred to as the Kastle-Meyer test, as well.

MRS. CHASE: Okay. May I approach, again, Your Honor?

THE COURT: Sure.

Q. (BY MRS. CHASE) In State's Exhibit No. 95, which has been admitted into evidence, do you recognize, again, your unique initials and the date on this packaging?

A. Yes, ma'am.

Q. And if I submit to you that this -- included in this packaging is a black glove, did you have an opportunity to process a black glove in this case for the presence of blood? In other words, did you conduct a presumptive test on this item?

A. I believe I did.

Q. Okay. Do you recall -- have you had an opportunity to review your report?

A. I have not seen my report in a while.

Q. Gosh. So, you're doing this completely off memory. Okay. If I allowed you to take a quick look at your report, would that help refresh your memory?

A. Yes, ma'am.

MRS. CHASE: May I, Your Honor?

THE COURT: Sure.

Q. (BY MRS. CHASE) I'm sorry. This is a copy with my notes on it.

A. Yes. So, I did process a black glove for the screening of presumptive blood.

Q. And did you locate any?

A. I did not.

Q. Okay. And would you find this to be uncommon, Adam, if there had been testimony that in previous tests of this item, say, in the year 2010, 2011, there were

some areas where presumptive blood was detected, but then, yet, when you tested it in 2013, there was no presumptive blood detected? Does that surprise you?

A. It doesn't surprise me. This evidence has been tested multiple times by different laboratories. As you test evidence and collect it with moistened swabs, if there is any blood or touch DNA present, it's collected by the swabs. The more you swab it, the less there is of the original stain there.

So, by the time it got to me, I wasn't surprised that I didn't find anything. But, again, this is a presumptive test. It tells you what an item could be, not a confirmatory test, which tells you what an item is. And our presumptive testing chemicals are only sensitive to very strong amounts of blood. So, it doesn't surprise me that I didn't find anything.

Q. So, if the sample size, for instance, would have been diminished in this item, Exhibit No. 95, that could be a reasoning for why you were able to -- not able to find anything with a presumptive test; correct?

A. Yes, ma'am.

Q. In your opinion, based on your experience as a forensic serologist, would that negate any previous test that did show presumptive blood and any confirmatory test that may have been conducted and previously

testified to?

A. No.

Q. Okay. I'm gonna show you, also, for your identification what I've marked as State's Exhibit No. 91 and ask if you recognize your initials and labeling on there (tendering)?

A. Yes. I have the case number, my initials, the date that I handled it and the item number, as well as my evidence tape sealing it back.

Q. Okay. And, again, on State's Exhibit No. 91A (tendering)?

A. I also have my label and my seal on this item.

Q. I'll just let you keep this if you don't mind. I will refer -- did you do any conducting on these -- conduct any testing on these items, which I believe are marked as item No. 15 from the Jefferson County Regional Crime Lab? It'd be the next page (indicating).

A. Yes. On this item, I didn't observe any stains having any appearance of blood, so I didn't test for anything. But I simply collected samples for DNA analysis.

Q. Okay. Can you explain to the jury how you go about collecting a sample for DNA?

A. When I collect a sample for DNA analysis, I take a sterile swab, like a little Q-tip swab, something

similar to what you might see when you go to your doctor's office, and I moisten that with sterilized water. And once I do that, I pass it over an item, and that moistened cotton actually helps to absorb cells or possible blood, any sort of touch DNA that could be present, and it takes it from the item that you're swabbing and it collects it onto that cotton swab so we can process it for DNA analysis down the line.

MRS. CHASE: Your Honor, at this time, I would tender State's Exhibit No. 91 and its content, which is State's Exhibit 91A.

MR. LOPER: Judge, I have no objection.

THE COURT: Thank you. It's admitted.

(STATE'S EXHIBITS NO. 91 AND 91A ADMITTED)

Q. (BY MRS. CHASE) Again, Adam, just so that the jury can be clear, this is a pocket knife that was contained within this box. You did not find any apparent blood detected on this item, but you did swab it for DNA so that an analyst down the line could process that; correct?

A. Yes, ma'am.

Q. Did you also have an opportunity to observe what I have marked as State's Exhibit No. 114 (tendering)?

A. Yes. My label and my seal is on this item.

Q. Okay. And how did -- this relates to Jefferson County Regional Crime Lab number -- Item 16. Can you inform the jury what type of testing you conducted on that item?

A. I did blood testing on this item. Apparent blood was detected on this item. I collected samples of this for DNA analysis, and I did not observe any trace material on it. So, I simply tested for the presence of blood and then collected the positive stains.

Q. And, again, you collected them in the same fashion, and then they were then available for the next analyst to perform DNA on them; correct?

A. For an item such as a tissue, I likely took -- instead of a swab of a tissue since it would tear the tissue apart with something like that, we can take a small cutting and just cut out the tissue paper and test that sample directly for DNA analysis.

Q. Okay. And that would make sense, because if you put a wet Q-tip on a Kleenex, it's gonna dissolve it or --

A. Yes. Yes.

MRS. CHASE: Your Honor, at this time, I would tender State's 114 and its contents.

MR. LOPER: No objection, Your Honor.

THE COURT: It's admitted.

(STATE'S EXHIBIT NO. 114 AND CONTENTS ADMITTED)

Q. (BY MRS. CHASE) And in State's Exhibit No. 126, which would be Jefferson County Crime Lab No -- - Exhibit No. 20, ask you, again, to take a look at that (tendering) and ask if you recognize it with your use identifiers?

A. Yes. My label is on the back, and my tape is on the side.

Q. Okay. Can you describe for the jury the type of testing you conducted on this item?

A. Which was this again?

Q. No. 20.

A. 20. I examined this item for bloodstains, but I did not observe any. I collected some trace evidence from this item. This simply gets packaged with the evidence. I'm not a trace analyst, so I can't test it any further from there. And I collected a few items from this -- a few samples from this item for DNA analysis.

MRS. CHASE: At this time, Your Honor, I tender State's Exhibit 126 and its contents.

MR. LOPER: No objection, Judge.

THE COURT: It's admitted.

(STATE'S EXHIBIT NO. 126 AND CONTENTS ADMITTED)

Q. (BY MRS. CHASE) Lastly, Adam, I think it's

been testified in this case previously, and you're probably aware just based on the number of reports, several items of evidence were processed through Orchid Cellmark, also through DPS in 2012, and then, again, returned to DPS in 2013.

Specifically, on October 1st of 2013, did you have an opportunity, then subsequently on November the 1st of 2013, to examine what I have marked as State's Exhibit No. 106?

THE COURT: What was the number?

MRS. CHASE: 106.

THE WITNESS: Yes. And my label is on the back of this. I think my tape has been cut off.

Q. (BY MRS. CHASE) Well, we see your markings here (indicating).

A. Yes.

Q. Correct?

A. I see, yes.

Q. If -- from inspection of this item, it appears that it has both been handled by Ms. Dean from Texas Department of Public Safety, as well as submitted by Jefferson County. Is it possible based on the second submission of this item that you simply took a look at it and made sure that it was in a sealed condition, marked it then with the new HOU-1310 number and

forwarded it on down the line for processing?

A. Yes, which explains why my tape is not present on it.

MRS. CHASE: Okay. Your Honor, at this time, the State will tender --

Q. (BY MRS. CHASE) Sorry. One more question. Best of your recollection, Adam, you did not involve yourself with items included herein. Did you, in fact, note everything on the outside of the packaging and note that it was in a sealed condition and then transfer it down the line for additional processing, if need be?

A. Yes. Yes.

MRS. CHASE: Your Honor, at this time, I would tender State's Exhibit 106 and its contents, which I will recite for the record if there's no objection.

MR. LOPER: Judge, we'd just renew our previously stated objections.

THE COURT: What is --

MR. LOPER: 106.

MRS. CHASE: Would you like me to recite?

MR. LOPER: Would you like me to approach?

MRS. CHASE: I think it may help, Your Honor, if I recite the contents to you.

THE COURT: Yes.

MRS. CHASE: State's Exhibit 106 would be

what we have marked as State's Exhibit No. 141, which was testified to by Ms. Altamirano as her Exhibit 13.9; State's Exhibit 142, again testified to by Ms. Altamirano as Exhibit 13.6B. I believe these were items, Your Honor, that would be coming out of the white cloth. State's Exhibit No. 143, which would be lab item No. 13.8.

THE COURT: I just need the exhibit numbers.

MRS. CHASE: Okay. State's Exhibit 144, 146, 147, 148 and 145. They're out of order. I'm sorry.

THE COURT: The objection is overruled. State's 106 and its contents, which include 141, 142, 143, 144, 145, 146, 147 and 148 are all admitted.

(STATE'S EXHIBITS NO. 106 AND CONTENTS, 141-148, ADMITTED)

Q. (BY MRS. CHASE) After completing these additional presumptive tests and collecting DNA from various items of this evidence in this case, Mr. Vinson, did you have any opportunity to further conduct analysis in this particular case number?

A. I didn't do any other analysis in this case.

Q. Thank you so much for coming. I appreciate it.

MRS. CHASE: I pass the witness, Your

Honor.

THE COURT: Thank you, Mrs. Chase.

Mr. Loper?

MR. LOPER: Thank you, Judge.

CROSS-EXAMINATION

BY MR. LOPER:

Q. Hi, Mr. Vinson.

A. Good morning.

Q. My name is Bob Loper. I don't think we've ever met, have we?

A. No, sir.

Q. Okay. You've testified in other courts on these types of cases, have you not?

A. Yes, sir.

Q. I just don't recognize you.

Now, you still have the report that you were looking at a minute ago?

A. Yes, sir.

Q. You're at the Houston Forensic Science Center now; correct?

A. Yes, sir.

Q. How long have you been there?

A. About a year and a half.

Q. Before that, you were working at DPS?

A. Yes, sir.

Q. Okay. What I've just done, just so you know, is I was gonna have a few questions for you.

A. Okay.

Q. But I was gonna get a copy that didn't have any of the lawyer's notes on it to ask you from. But before I get started, and if I come back up here to ask you questions, does this appear to be the report that reflects the work that you did in this case?

A. Yes. And my electronic signature's on the back, as well.

Q. Okay. Good. Very good.

So, back to being at DPS in September and October of 2013. At that time, were you a forensic analyst or were you a serologist? What were you doing?

A. I've been a forensic analyst the entire time. So, at DPS Houston, we break our cases up. Some people do serology testing. Some people do DNA testing. Some people take a whole case all the way through. Others just do a part of it. So, this is just the part that I was assigned during this case.

Q. Okay. Is -- when they do those types of assignments, is it -- does it have to do with the case itself, does it have to do with you and the amount of workload that you have, or do you know how it's done?

A. We're randomly assigned cases by our

supervisor.

Q. Okay. So, you could have been assigned to do this entire case all the way through; is that right?

A. Yes, sir.

Q. And it could have been assigned to someone else in the lab to do the serology part of it, and you might have been assigned to do the DNA analysis part?

A. Yes. We're all accredited scientists, so we all do the same work. So, for DPS, it doesn't actually matter who does the work.

Q. Okay. And of the work that you did in this case, which I understand was for the most part the serology part; correct?

A. Yes, sir.

Q. Because you said you did not do any of the DNA analysis?

A. No, sir.

Q. Someone else would have done that?

A. Yes.

Q. Okay. All of the work you did then that is in this report that's dated in 2013, what -- give the jury some idea of the amount of time that it would take to do that work.

A. I'm not sure the amount of time on that. I'd have to reference the case file with my lab notes. But

looking at the amount of evidence, I'm thinking it would have taken me several days to get through that work.

Q. Okay. There's some notes somewhere that would show what actual -- what actual work you did on what actual day, I would guess; correct?

A. Yes, it would be in our case file. But I'm no longer an employee of the State, so I do not have access to that information.

Q. Okay. Now, you talked a little bit about State's Exhibit 95. And that is this, which, again, as you stated earlier, you agree was the --

A. The glove.

Q. -- a glove; correct?

A. Yes, sir.

Q. All right. When -- when evidence like this is brought to you, to your lab, you don't necessarily have the benefit of any evidence or testimony or witness statements or anything like that, do you?

A. No, sir.

Q. In fact, you probably specifically don't have access to that type of information, do you?

A. It's -- the testing we do is mainly a sort of blind testing. It's unbiassed testing. I don't see anyone else's notes to guide me. I just know what type of offense it is and whether I'm looking for blood or

semen or both, and I process the evidence based on what I'm looking for.

Q. Okay. And, so, it would never occur, I would guess, either back there on even now -- and you're with Houston Science Center -- that evidence would come in with a note that would say a detective says we sure hope you find something on this piece of evidence; right?

A. Well, get requests like that all the time. It's not like they hope you would find something on it. But we're looking for blood in this case, specifically test these items for blood. And it's a contract the State does with a police department, so we -- we'll test for or look for items that the detectives want us to look for.

Q. Right. There might be a note asking you to look; correct?

A. Yes, sir.

Q. But there's not a note instructing you that you better find it on this piece of evidence; right?

A. No.

Q. Because they're the detectives and they do their part -- or the agency does their part -- the police agency does their part, and you're the forensic scientist who's doing your part; correct?

A. Yes, sir.

Q. And, so, whether you find it or you don't find it, it's based upon your strict protocols and your training; correct?

A. Yes, sir.

Q. Okay. Likewise, on the back end after you've done the serology work and you find blood or you don't find blood -- and there's lots of explanations there on that -- you don't necessarily opine or give some opinion as to, Well, this solves this crime. We know who did it; right?

A. No.

Q. Okay. Now, talking about that presumptive test that was on State's 95, I understood your testimony to be that you did not find any blood in 2013 when you looked; correct?

A. Correct.

Q. Using presumptive testing?

A. Yes, sir.

Q. Okay. And you also admitted that that may have been contrary to what a previous analyst might have -- a previous serologist might have found; correct?

A. Yes.

Q. Okay. Would you have been the person that would have been involved in authoring this report that would have gone back to the police agency?

A. Yes. My electronic signature is on the back.
Q. So, this literally is your report?
A. Yes, sir.
Q. And, so, the person that you would have sent it back to -- don't know if you know that person personally or not -- would be Memling Altamirano?
A. Yes. The Jefferson County Regional Crime Lab.
Q. Okay. And you also said you wouldn't be surprised if previous testing showed blood and then your testing showed no blood; correct?
A. Yes, sir. And it has to do with the size of -- size of the stains that you're looking for. Say if you have a shirt soaked with blood, it would be easy to test for blood hundreds of times and get a positive result. If it's a very small area, then once that item is collected, we might not find anymore.
Q. And it's because you said the more that you test for blood with a presumptive test, the sample size diminished; correct?
A. Yes.
Q. Sample size diminishes; correct?
A. When you swab something, you consume a part of that stain for testing. So, the more you test it, the more labs that test it, there's fewer and fewer stain size remaining.

Q. So, if you reach the point in 2013, I guess October, because your report's dated November -- October or so, in 2013, that you were not able to find blood on State's Exhibit 95 -- which is the glove --

A. Yes, sir.

Q. -- is because the sample size had diminished, is it logical to say that any testing after November, 2013 would also probably not find blood?

A. Yes. I wouldn't expect to find blood on the item afterwards.

Q. You also had State's Exhibit 91, and now that it's in evidence, this is -- 91 is a knife box, correct, or what we call a knife box?

A. Yes, sir.

Q. And 91A would -- is labeled "pocket knife"; correct?

A. Yes, sir.

Q. And, so, I understood you to say you actually pulled this knife out of whatever packaging it was in -- this packaging and tested it; correct?

A. Yes, sir.

Q. And you did or did not find any evidence of blood?

A. I'd have to reference my report one more time. I don't believe I did. What was the number -- I'm on

it --

Q. Well, we go by court exhibit number, but you'd probably find the number on here.

A. 2-12, pocket knife. I didn't observe any bloodstains on this item.

Q. Okay. And because you didn't observe any --

A. I didn't test.

Q. -- you didn't test any?

A. Yes, sir.

Q. I'm sorry.

But you did obtain samples from it to be passed on for someone else to look to see if any DNA was present; correct?

A. Yes, sir.

Q. And would that also indicate -- would further testing indicate from the samples you obtained from 91A, which is the knife itself, whether there was any blood on it, as well?

A. It wouldn't -- further testing wouldn't show if there's blood or not. The DNA analysis would simply show if there's human DNA present. So, that could be blood, it could be contact, it could be sweat, skin cells. It could be any of that. It won't tell you what it was, but it will tell you if it was human or not.

Q. So, if you have biological evidence or DNA

evidence or touch DNA present on an item or an exhibit, that does not necessarily mean that it's blood then; is that right?

A. It doesn't mean that it's blood. If we don't test it, it doesn't mean that it wasn't blood. If blood is present in a strong enough concentration, our chemicals can't detect it anyway. So, there could have been a small amount of blood there, but I would never be able to tell you one way or the other. I could just say that I didn't observe it.

Q. But stated another way, DNA could come from other things -- from things other than blood; is that right?

A. Oh, yes, sir. Yes, sir.

Q. Where else can DNA come from if not from blood?

A. Like I just said. It comes from your skin. It comes from saliva. It can come from semen. It can come from your hair. We're -- humans are constantly shedding skin cells and hair. Your sweat has DNA in it. Anything you touch, you can leave behind your DNA evidence.

Q. Okay. And then just moving forward, State's Exhibit 114 was the one that contained the tissue; correct?

A. Yes, sir.

Q. And I believe you said that you did detect blood on it and that you did obtain samples to forward for the next person to do any analysis, if any; correct?

A. Yes, sir.

Q. And do you know -- would you know at the time in 2013 if that analysis would have been done at or near the time just after you finished your work, would that have been done later, or would you know?

A. It's commonly done later. With the Houston crime lab, there's a backlog of DNA testing because there's only so many analysts in the state, and there's too much evidence for us to work. So, it's not uncommon for the serology testing to be done, and then a year, maybe even two years later for the DNA analysis to be done.

Q. When you said the Houston crime lab, are you talking about DPS's Houston Crime Lab --

A. The DPS --

Q. -- or the crime lab where you work now?

A. The DPS Crime Lab.

Q. Okay. And, so, you wouldn't then necessarily know, and I don't think this report could tell us, when that next level of analysis would have been done; is that right?

A. No, sir. My -- my report is purely for the

serology, and it doesn't reference anything in the future.

Q. And, likewise, unless you actually spoke to one of the DNA analysts who did the work -- and I believe they're here. Unless you spoke to one of them, you wouldn't necessarily know of your own personal knowledge what the findings were, would you?

A. Exactly.

Q. And that's done for a purpose, isn't it?

A. Yes, sir.

Q. Because you do the serology, and the next person does the analysis --

A. Unless --

Q. I'm sorry. I'm interrupting you. Unless you do the whole case through?

A. Yes, sir.

Q. Okay. And then we have State's Exhibit No. 126, which is marked "white cloth"; correct?

A. Yes, sir.

Q. And that's one of the items that you looked at; correct?

A. Yes, sir.

Q. And my understanding is that you did not detect any blood; is that right?

A. I believe so.

Q. I'm sorry (tendering).
A. Yes. I didn't observe any blood. I didn't test, but I did not observe any blood.
Q. Okay. But you did obtain some samples for further testing, if any; correct?
A. Yes, sir.
Q. And then this is State's Exhibit No. 106, and there are a lot of smaller containers inside of it. I wanted to make sure that I was clear on what you did.
Did you look at the contents, or did I understand you to say that you didn't even open the container?
A. So, I didn't even open the container. My label is on it, so I acknowledged the presence of this container, but you'll see my evidence tape isn't on this so I didn't actually seal this back. So, I never actually opened this container.
Q. Okay. So, this came to you along with some other items. What would you have actually done with this then?
A. I would have documented that it was probably sealed and left it with the rest of the evidence.
Q. This writing that's on the back would not be your writing?
A. No, sir, it's not.

Q. Would that writing have been there when it came to you?
A. Yes, sir.
Q. Okay. But when you said you didn't examine it, you didn't -- I think what you just said is open it and make sure what's written on the outside is also on the inside?
A. I didn't open this.
Q. Thank you, Mr. Vinson.
MR. LOPER: Pass the witness.
THE COURT: Thank you, Mr. Loper.
Mrs. Chase?
MRS. CHASE: I have nothing further, Your Honor. May he be excused to return to Houston?
MR. LOPER: No objection.
THE COURT: Thank you, Mr. Vinson. You are excused.
THE WITNESS: Thank you.
(WITNESS EXITS COURTROOM)
THE COURT: You may call your next witness.
MR. LONG: Andrew McWhorter.
(WITNESS ENTERS COURTROOM)
THE COURT: Good morning.
THE WITNESS: Good morning.
THE COURT: Please raise your right hand.

EXHIBIT C

IN THE 252ND DISTRICT COURT
JEFFERSON COUNTY, TEXAS

	)	**TRIAL CAUSE NO.**
EX PARTE	)	**10-10213-A**
JOSEPH COLONE,	)	
APPLICANT	)	**WRIT CAUSE NO. WR-89,538-01**

AFFIDAVIT

My name is Ashley Chase Molfino. I have been a licensed attorney since May 2000. I have spent my entire career as a prosecutor with the Jefferson County District Attorney's Office. I am dedicated to public service, fairness and justice. I have been a continual member in good standing with both the State Bar of Texas and the Jefferson County Bar. I have practiced in each of the criminal courts in Jefferson County, in front of many judges, both misdemeanor and felony. I believe I have an excellent working relationship with the courts, staff and defense bar. My integrity is of the utmost importance to me and I take pride in the oath that it is my duty to see that justice is done rather than to secure convictions.

I was a member of the prosecution team that tried the capital murder styled State of Texas v. Joseph Colone. I am giving this affidavit in response to the claims asserted by the Office of Capital Writs. One of my primary roles in preparing the case was to gain a solid working knowledge of the physical and forensic evidence. The fact that the case was prosecuted almost seven years after the date of the offense naturally led to the evidence being subjected to the continual updating of DNA technology and reporting methods. As such, multiple reports were issued by both the Orchid Cellmark and Texas Department of Public Safety Crime Laboratories.

The offense occurred on July 31, 2010, with numerous items of evidence collected, including both physical evidence and swabbings of physical evidence. On August 26, 2010, in order to expedite results, ten items of evidence were sent to Orchid Cellmark. Among these items were a black glove (Ex.2), known samples from the victims and defendant (Ex.6A,7A,9), a blue towel (Ex. 10), a cutting from a black sleeveless undershirt (Ex. 11.3A) and swabs collected from a white dodge charger believed to be associated with the offense (Ex. 13.3,13.5,13.6A,13.7 with multiple swabs taken at each of these noted locations). Orchid Cellmark conduced both "rush" and normal turnaround testing, and issued reports on August 31, 2010 and September 30, 2010. The items of evidence, the unanalyzed swabbings, and the extracts generated as part of the analysis were packaged separately, placed into a large Federal Express envelope, and then placed into a styrofoam cooler. The sealed cooler and its contents were returned via Federal

Express to the Jefferson County Regional Crime Lab, with an arrival date of February 18, 2011. Although the only items that would require refrigeration were the analyzed extracts, the styrofoam cooler and all of the items within were stored in the Jefferson County Regional Crime Laboratory freezer.

With respect to the styrofoam cooler, it is important to understand the packaging of the contents. The cooler itself is considered the outside packaging or convenience container. Contained within the styrofoam cooler were a ziplock bag containing Orchid paperwork and a large sealed Federal Express envelope. Inside of the Federal Express envelope were four (4) 9x12 envelopes, one (1) 6x9 envelope, and a sealed ziplock bag containing the following:

1. 9x12 envelope containing Exhibit 2 (glove)

2. 9 x12 envelope containing Exhibit 10 (towel)

3. 9x 12 envelope containing:
   Exhibit 6A inside of a coin envelope that was inside of a 6x9 envelope
   Exhibit 7A inside of a coin envelope that was inside of a 6x9 envelope
   Exhibit 9 inside of a coin envelope that was inside of a 9x12 folded envelope
   Exhibit 13.6A inside of a coin envelope that was inside of a 6x9 envelope

4. 9x12 envelope containing:
   Exhibit 13.3 inside of a coin envelope
   Exhibit 13.5 inside of a coin envelope
   Exhibit 13.7 inside of a coin envelope

5. 6x9 envelope containing:
   Exhibit 11.3A inside of a coin envelope

6. Sealed ziplock bag containing the Orchid analyzed extracts

Pursuant to the ordinary course of the investigation the DPS crime lab was also utilized for forensic testing. On March 4, 2011 the known samples (listed above 6A,7A, 9) along with additional evidence, including cuttings and swabbings that were not previously submitted to Orchid Cellmark, were submitted to DPS. (Note at this point Exhibit 13.6A remained in the packaging described above within the styrofoam cooler at the JCRCL).Results of this submission are detailed in the September 20, 2011 serology/DNA report of Tanya Dean.

On September 18, 2013 the Court ordered that all items of evidence in this case that had not been *previously tested* by an accredited crime lab be submitted for biological testing. On October 1, 2013 the cooler along with an additional box of evidence was submitted in person to the DPS Houston lab by Jefferson County Regional Crime Laboratory

personnel. The labeling instruction indicated that the cooler be refrigerated. On October 31, 2013 S. Adam Vinson, at the time a forensic scientist with DPS, came into the testing process in the role of forensic serologist. Despite the aforementioned instruction, the cooler had not been refrigerated. This information was not noted within the official laboratory report authored and issued by Vinson. The fact was documented in working lab notes ("bench notes") taken by Vinson. My first knowledge of this bench note was upon my review of the OCW writ. The bench note was never in the possession of the prosecution, nor did I have any knowledge of it. Clearly this is regrettable, but by no means was it intentional. Had I known of this bench note I would have certainly made it available to defense counsel. I would have questioned Mr. Vinson about it on direct examination, and the jury would have been made aware that the lack of refrigeration was of no concern to Vinson as it affected only the Federal Express envelope packaging and not the evidence (packaged as detailed above) that he went on to screen for presumptive blood, trace, and collect for possible DNA analysis. There would be no reason to intentionally "hide" or suppress such a note as its contents were clearly not harmful and could have been very easily explained.

In preparing Mr. Vinson for trial I relied upon my historically common practice of relying upon the issued report and a pre-trial conference. As Mr. Vinson was no longer with DPS at the time of trial, I provided him with a copy of his report in advance. As a chain of custody and serology witness his testimony was not complicated, nor was his preparation. I did not request a copy of the DPS file, nor did Mr. Vinson ask that I make it available to him. This fact was not unusual. He states that had he reviewed his notes prior to his testimony he would not have brought up the note, as the note did not affect the evidence that he screened and pertained only to the Federal Express envelope within the cooler and not the packaging within that envelope (detailed above).

The OCW associates the bench note with *in part* the claim that Mr. Vinson testified falsely.

Mr. Vinson did not testify falsely. I asked a poorly phrased question that was directed at the condition of the seals on the packaging. This is common when questioning a chain of custody witness. Generally the questions are about the sealed condition of the evidence upon the lab receiving it, and about the unique identifiers such as initials, lab numbers and colors of evidence tape. See excerpt below:

> (RR pg. 33)
> Q: And did you come into contact with this item, as is designated by your unique initials, the cause number and the item number?
> A: Yes
> Q: And had there been something awry with it, had it not been sealed or something like that, you would have noted that, but you did not do so in this case?

A: The Houston DPS laboratory has an evidence receiving department. So, before any analyst upstairs in the laboratory actually sees the evidence, they verify that it has shipped correctly and its' in a proper sealed state or else they don't admit it to the laboratory.
Q: Okay. And, again just for purposes of the record, in State's exhibit 93, the same with this convenience container, which is a Styrofoam cooler. Do you see there your markings and the date, as well?
A: Yes. Yes.
Q: Same principle applies to this piece of evidence?
A: Yes ma'am.

In a review of the transcript it is clear that my question was directed at the seals and identifying markings. Had I known of the bench note I would have NOT stated in the question "but you did not do so in this case?" I would have addressed the "something awry" (ie: lack of refrigeration and ensuing liquid at the bottom of the container) with the witness directly. I take offense to the OCW's position that this leading question infers that I had "previously investigated the topic...and had knowledge of the analyst's notes". I did not. Mr. Vinson was testifying from memory. He had not reviewed his lab notes nor had the subject of the bench note come up in any conversation. When the question was asked he clearly did not recall that in fact he had documented that "something awry" in the note.

The OCW claims that the prosecution suppressed exculpatory information that the crime scene evidence had been mishandled and was potentially altered by degradation or contamination. The defense did not make an issue of the DNA and the findings issued in multiple reports from 2010 to 2014 (Minifiler) to 2017 (STRmx). With respect to contamination, Mr. Vinson states the noted irregularity (bench note) does not reflect a quality issue with the evidence itself but only the Federal Express envelope packaging. He states that he takes quality seriously and would not issue results for items damaged by water or mold. Had there been contamination, the testing (serology/trace) and collections (for possible DNA analysis) conducted at this stage of the process would not have been forwarded down the line for DNA analysis. The contamination would have been documented and the process halted. It is common to see in serology reports that an item may be "unsuitable for DNA testing", yet this <u>not</u> found in the November 14, 2013 report with respect to the glove, towel or swabbings. Additionally the extracts collected and tested by Orchid were NOT used by DPS therefore any contamination or degradation of those extracts is moot.

According to Andrew McWhorter, DNA Section Supervisor with DPS Houston, DPS handled the glove, towel, and swabs in a manner that would prevent degradation and contamination, and no indications of contamination were observed using the quality

control steps during processing. McWhorter goes on to note that degradation can cause a contributor's DNA to not be detected in a mixture profile; however, it will not cause the opposite: a person's profile to appear in a mixture. This information suggests that if in fact there was any degradation in the evidence in the cooler, that would fact have benefited the defendant as the reported inclusion numbers would have actually been lower.

I understand that it is my responsibility as a prosecutor to have knowledge of and disclose potentially exculpatory information to the defense. I take this seriously. I was not informed by Mr. Vinson of the existence of this bench note. I am confident in the conclusion of DPS that the evidence in this case was analyzed appropriately and that the conclusions drawn appear to be scientifically sound and aligned with current national guidelines and standard operating procedures. I am also confident that at all times during the preparation and prosecution of the case that I conducted myself with the ethics and integrity that is required of all members of the Texas Bar.

ASHLEY CHASE MOLFINO
Affiant

SWORN AND SUBSCRIBED to before on this the 23rd day of October, 2019.

NOTARY PUBLIC in and for
The State of Texas

STEPHANIE MONK
Notary Public, State of Texas
Comm. Expires 08-17-2022
Notary ID# 614518-3

EXHIBIT D

STATE OF TEXAS §

§ **AFFIDAVIT**

JOSEPH COLONE §

My name is Andrew P. McWhorter. I am 42 years old and of sound mind. I am a DNA Section Supervisor/Technical Leader and have been employed with the Texas Department of Public Safety for approximately 15 years. I am trained and qualified in Forensic DNA analysis. I am providing this affidavit (with supporting attachments) on behalf of the Texas Department of Public Safety Crime Lab in response at the request of the Jefferson County District Attorney's Office to the capital murder writ filed in connection with Ex parte Joseph Colone, Writ Cause No. WR-89,538-01 (Trial Cause No. 10-10213-A).

Andrew P. McWhorter
DNA Section Supervisor/Technical Leader

Sworn to before me on this 2nd day of October, 2019.

NOTARY PUBLIC: Carol-Pz

CAROLINA PEREZ
NOTARY PUBLIC
ID# 126427883
State of Texas
Comm. Exp. 10-30-2020
NOTARY WITHOUT BOND

EXHIBIT
tabbies
RE # 13

1. The Office of Forensic and Capital Writs asserts that improper storage of the glove, towel, and swabs from the suspect's girlfriend's car led to potential DNA degradation and contamination of the samples.

DPS can only speak to the integrity of the evidence while it was under the control of the laboratory. Degradation and contamination could have occurred prior to submission to the laboratory. DPS handled the glove, towel, and swabs in a manner that would prevent degradation and contamination and no indications of contamination were observed using the required quality control steps during processing. The physical evidence was listed as a glove, towel, and swabs from the car of the suspect's girlfriend, all of which were in separate envelopes within the FedEx envelope and would not require refrigeration in accordance with the Biological Evidence Preservation Handbook: Best Practices for Evidence Handlers (NISTIR 7928) and DPS policy. The analyst noted that the FedEx envelope was soggy but made no notation about moisture or liquid coming into contact with the inner envelopes. Additionally, the cooler contained DNA extracts from Orchid Cellmark and these extracts were in sealed plastic tubes that were sealed into a plastic baggie within the FedEx envelope, making them impermeable to any liquid from the outside. This layer of packaging would have also prevented any liquid contained in the extract tubes from leaking onto any other evidence within the FedEx envelope. Additionally, DPS did not use the DNA extracts from Orchid Cellmark to make any reported conclusions in this case but they should have been stored refrigerated or frozen for preservation if liquid was present for preservation for future testing if needed.

Regarding the false testimony allegation and the excerpt of testimony provided, the questions appear to be directed to the exterior container and the status of the seals, not the state of the inner contents. A review of the transcript of the testimony of Mr. Vinson regarding the exterior container and the status of the seals revealed that Mr. Vinson was testifying from memory. He was no longer employed by DPS at the time of his testimony, and he did not request or receive a copy of his notes for this case. He instead told the court that he no longer had access to the notes. Had DPS been asked, they would have provided Mr. Vinson with a copy of his notes prior to testimony. The questions asked by the prosecutor were focused on the presence or absence of seals on the container. Mr. Vinson correctly responded that DPS has an evidence receiving department, and this department would not let the evidence into the laboratory without a proper seal. He then responded later on to the prosecutors vague question concerning "had there been something awry with it, had it not been sealed or something like that" that he would have noted this in the case record. This testimony is true because he did in fact note that something was awry with the evidence in his case notes. However, because Mr. Vinson did not ask for a copy of the case notes, he was unable to provide the most complete and accurate testimony regarding the condition of the evidence.

There was no documented follow up by Mr. Vinson on the note in the case record concerning the damaged envelope.

Tanya Dean and Andrew McWhorter testified in this trial on the same day as Mr. Vinson. They were in possession of the hard copy of the case record at that time and would have provided the case record to Mr. Vinson had he asked for it. However, Mr. Vinson did not ask to review the contents of the folder at any time prior to or during the trial.

2. The Office of Forensic and Capital Writs asserts the following regarding misinterpretation of number of contributors: the effect of adding more contributors into the mixture would make it a 5-person mixture and this would have caused DPS to not analyze the sample. Degradation could cause DPS to incorrectly identify the number of contributors in a mixture and could mean that additional, unknown people could have contributed to the mixtures.

DNA analysts can never know for certain the true number of contributors in a mixture; however, the number of contributors is assessed by a qualified DNA analyst based on characteristics in the DNA profile. Overestimating the number of contributors in a mixture increases the risk of a false inclusion and underestimating the number of contributors increases the risk of a false exclusion.

Degradation can cause a contributor's DNA to not be detected in a mixture profile; however, it will not cause the opposite: a person's profile to appear in a mixture.

Assigning a number of contributors in a mixture is a necessary step in DNA interpretation. An analyst can never definitively know how many individuals contributed DNA to evidence samples so they must make an assumption during interpretation about number of contributors that is based on characteristics observed in the DNA profile and the assumption is documented in the case record. DNA analysts performed validation studies and analysts continue to perform studies during training to learn how DNA mixture profiles behave; this is a way of limiting subjectivity in assigning the number of contributors. The DNA report communicates that the profile is interpreted as a single source or interpreted as a mixture of 2, 3, or 4 people; the report includes the assumptions used to report a conclusion.

Changing the number of contributors can change whether the mixture is interpreted with or without the use of probabilistic genotyping software such as STRmix. Studies have shown that overestimating the number of contributors (adding more contributors than what there actually are in the sample) will increase the risk of falsely including a person's DNA in the profile. This happens because assuming extra potential contributors allows the interpretation to consider more possible allele combinations that result in more possible profile contributions. (Reference 1: Biedermann et al, Inference about the number of contributors to a DNA mixture: Comparative analyses of a Bayesian network approach and the maximum allele count method. FSI: Genetics 6 (2012), 689-696. Also Reference 2: Buckleton et al, Towards understanding the effect of uncertainty in the number of contributors to DNA stains. FSI: Genetics 1(2007) 20-28.) DPS has restricted interpretation for complex mixture profiles so that if a manual interpretation is done, a mixture of 4 or more people is not interpreted. If a STRmix interpretation is done, a mixture of 5 or more people is not interpreted; in the case of STRmix interpretations, the limitation is due to the power of the computers in use and not due to limitations of the software.

3. The Office of Forensic and Capital Writs asserts the following regarding a mismatch between DNA data and STRmix software: lowering AT allowed potential noise or artifacts to be included in consideration of the DNA, and DPS programmed STRmix so that it could not distinguish between noise and actual DNA.

This assertion is inaccurate. DPS did not program STRmix so that it could not distinguish between noise and actual DNA. Artifacts commonly occur in PCR-based DNA analysis. DNA analysts are trained to

recognize artifacts and remove them. If they are not removed, STRmix diagnostics can indicate that artifacts are present.

In response to recommendations in the forensic community regarding interpretation of DNA mixtures, DPS began an evaluation of the analytical threshold (AT) and a second threshold called the stochastic threshold in 2013. In 2015 after numerous validation studies, it was determined that the AT in use at the time filtered out information that was actual DNA rather than noise or artifacts. The study supported lowering the AT from 100 RFU to 50 RFU (See Reference 3: Summary of Evaluation of Dual Threshold for Use in Casework Houston.) The AT was lowered to 50 RFU and an additional stochastic threshold was implemented along with updated mixture interpretation policies; this occurred prior to and independent of DPS purchasing STRmix software. The determination of an analytical threshold appears in the Scientific Working Group for DNA Analysis Methods (SWGDAM) guidelines independently of probabilistic genotyping requirements. This document cautions against setting the AT too high because it will cause loss of allelic data (See Reference 4: Scientific Working Group on DNA Analysis Methods Interpretation Guidelines for Autosomal STR Typing by Forensic DNA Testing Laboratories p 9). The guidelines also point out that the AT should be set using empirical data that will help the lab determine what is signal from DNA and what is noise. Additionally, one of the first steps to validating STRmix software in the guide from the manufacturer is to determine an AT; the number for the AT is then input into the software for future studies (Reference 5: STRmix V2.4 Implementation and Validation Guide p 10). The AT is evaluated for each amplification kit used and with each new instrument model purchased to account for differences in chemistry and instrument sensitivity.

In order for STRmix to function properly, the analyst has to remove artifacts and noise peaks prior to entering the data into the software (Reference 6: STRmix V2.3 User's manual p 11). Extensive validation work and training has been undertaken in order for DPS to identify artifacts and noise. If artifacts and noise are not properly removed from the profile prior to STRmix entry, the software has post-run diagnostics that indicate issues within the run. A common cause of post-run diagnostic problems is failure to remove artifacts and noise from the profile (Reference 6: STRmix V2.3 User's manual p 112-114). Profiles and post-run diagnostics are reviewed by the analyst and a technical reviewer for every run in every case. There was no "mismatch between DNA data and STRmix software;" DPS validation studies support lowering the AT to allow the use of more data. Additionally, the validation studies led to development of standard operating procedures that ensure removal of any artifacts and noise from the data (Reference 7: Texas DPS Standard Operating Procedures Manual Autosomal STR Interpretation Guidelines p 1-6. Also Reference 8: Texas DPS Standard Operating Procedures STRmix Autosomal STR Interpretation Guidelines p 1-3 and 10-12. Also Reference 9: Texas DPS DNA Training Manual Capillary Electrophoresis (CE) Instrument Operation, Analysis, and Troubleshooting p 4-8.)

4. The Office of Forensic and Capital Writs asserts that DPS did not provide a study indicating that they had tested whether analysts could obtain reliable results when they applied a lower threshold to data generated prior to lowering AT.

This assertion is accurate, DPS did not provide this study; there was no documented discovery request received the laboratory.

The laboratory was not requested at the time to provide this study. The validation for the lowering of the AT and the manual mixture deconvolution validation was done independently of the STRmix validation. This study along with the competency tests that analysts were required to take in order to

use the method demonstrate that the analysts are able to obtain reliable results when they apply a lower AT to data irrespective of when the data was generated. (See Reference 3: Summary of Evaluation of Dual Threshold for Use in Casework Houston, p 63-91 for a comparison of the same data analyzed using a 100 RFU AT and then a 50 RFU AT.)

5. The Office of Forensic and Capital Writs asserts that this was the first time STRmix was used on the Minifiler kit

STRmix was used in State v Skinner which occurred prior to the trial of Joseph Colone; therefore, this assertion is inaccurate.

This was not the first time STRmix was used on the Minifiler kit, and the application of STRmix to DNA results generated by this kit was not unprecedented. DPS fully validated the interpretation of Minifiler data with the STRmix software prior to using it on casework samples. Additionally, STRmix software was used to interpret Minifiler DNA data in State of Texas v Skinner. This is a death penalty case where the conviction and death sentence were upheld on appeal in 2016. Part of the evidence presented during the appeal was developed using the Minifiler amplification kit and interpreted using STRmix by Texas DPS (Reference 10: Henry Watkins Skinner, Appellant, v The State of Texas June 8, 2016).

6. The Office of Forensic and Capital Writs asserts that DPS does not appear to have tested and confirmed that STRmix would get reliable results if used with DNA data generated when the analytic threshold was 100 RFU.

While this assertion is accurate, it was unnecessary for DPS to test and confirm that STRmix would get reliable results if used with DNA data generated when the analytical threshold was 100 RFU because DPS had already validated and was using a lowered threshold to interpret samples before DPS ever started using STRmix.

DPS did not test or confirm that STRmix would get reliable results if used with DNA data generated when the analytic threshold was 100 RFU. This is because DPS had previously determined through validation work that an analytical threshold of 100 RFU was high resulting in some allelic DNA to be ignored (See Reference 3: Summary of Evaluation of Dual Threshold for Use in Casework Houston). DPS demonstrated through extensive validation that STRmix provides reliable results if used with DNA data generated when the analytical threshold was 50 RFU. The validation work used what is known as "ground-truth samples." These samples are single donor and mixture samples of varying concentrations and proportions that are made in the laboratory from various body fluids. Because the body fluids were collected from known donors and used in the laboratory by analysts to make samples of differing concentrations and proportions, the correct answer is known. DPS used these samples to test the STRmix software including the precision, sensitivity, reproducibility, and ability to separate mixture proportions. The software performed as expected and was shown to be reliable (Reference 11: Laboratory System Validation Report Internal Validation of STRmix v2.3.07 for the Minifiler Kit and the 3130-Series Genetic Analyzer).

7. The Office of Forensic and Capital Writs asserts that if the source code were examined, defense could have established that STRmix is not sufficiently reliable to be admitted in court.

The source code for STRmix was available at the time of Mr. Colone's trial; the process involves a request to see the source code via the STRmix website.

STRmix developers give instructions on how to request access to the source code for the software; this access has been available since 2016. (http://strmix.esr.cri.nz/assets/Uploads/Defence-Access-to-STRmix-April-2016.pdf) STRmix is reliable and had already been admitted in court several times prior to Colone's trial. Examples of cases are found as follows:

Reference 12: State of Texas v Smith, 2016 (appeal 2017)
Reference 10: State of Texas v Skinner, appeal 2016
Reference 13: State of Texas v Clack, 2016
Reference 14: State of Texas v. Crawford, 2016

8. The Office of Forensic and Capital Writs asserts: Relatedness calculations would show that Mr. Colone's uncle is included in the mixture on the glove

DPS has not validated the relatedness calculations for STRmix; therefore, DPS cannot comment on this point.

9. The Office of Forensic and Capital Writs asserts in regards the PCAST report: probabilistic genotyping requires "careful scrutiny" to determine reliability and limitations of program.

This is accurate. Careful scrutiny of any technique is necessary prior to its use in Forensic DNA testing and the references below show that DPS applied this scrutiny to the STRmix software prior to use.

Any technology/method used in a forensic laboratory requires "careful scrutiny" to determine reliability and limitations. This is why the FBI Quality Assurance Standards and the SWGDAM guidelines require that a technology/method that is newly implemented in a forensic laboratory be subjected to validation studies prior to use in casework (See Reference 15: Scientific Working Group on DNA Analysis Methods Guidelines for the Validation of Probabilistic Genotyping Systems. Also see Reference 16: The FBI Quality Assurance Standards Audit for Forensic DNA Testing Laboratories p 49-55). Validation generally consists of using samples and conditions similar to those found in casework in order to determine if the technology/method is functioning correctly in the laboratory. This involves studies to determine precision, accuracy, reproducibility, contamination assessment, sensitivity, and establishment of operating parameters. DPS performed extensive validation of STRmix with multiple amplification kits prior to using it on casework samples (See Reference 11: Laboratory System Validation Report Internal Validation of STRmix v2.3.07 for the Minifiler Kit and the 3130-Series Genetic Analyzer). Additionally, some of this validation data was used in a publication in a forensic journal that compiled STRmix validation data from multiple user labs to show that the software is reliable. (See Reference 17: Internal validation of STRmix – A multi laboratory response to PCAST. Also Reference 18: The Probabilistic Genotyping Software STRmix: Utility and Evidence for its Validity. Journal of Forensic Sciences).

10. The Office of Forensic and Capital Writs asserts that STRmix did much of the interpreting for DPS's analysts

STRmix is a tool that each Forensic Analyst uses to help with mathematical calculations; given the amount of calculations needed to interpret some of the more complex DNA profiles, it would be impractical to perform these calculations by hand.

The purpose of STRmix software is to aid the analyst when performing DNA interpretation. The value of the software is that it uses biological modeling to test multiple allele combinations throughout the profile and determine which ones are most representative of the DNA profile data. The software is capable of testing possible combinations much quicker and more thoroughly than a human analyst can process. However, even though STRmix is testing these combinations and proposing an interpretation, the analyst is still involved with the software. The analyst must evaluate the software output including post-run diagnostics, mixture proportions, and allele combinations in relation to the profile data in order to determine that the software ran properly. The analyst also has to have extensive knowledge of how the software performs its interpretation and be able to apply that knowledge to case analysis. In this regard, the analyst is still responsible for interpretation of the data because they have the ability to decide if a run by the software was not optimal and might need to be repeated (See Reference 8: Texas DPS Standard Operating Procedures STRmix Autosomal STR Interpretation Guidelines p 5 and 10-12).

11. The Office of Forensic and Capital Writs asserts that DPS failed to adequately validate STRmix's use in this case.

DPS thoroughly and adequately validated STRmix software prior to using it in casework; therefore, the assertion is inaccurate.

DPS adequately validated STRmix's use in this case as evidenced by the validation studies performed prior to using STRmix on casework samples (See Reference 11: Laboratory System Validation Report Internal Validation of STRmix v2.3.07 for the Minifiler Kit and the 3130-Series Genetic Analyzer). Additionally, DPS mixture interpretation and probabilistic genotyping protocols and validations have been reviewed by the Forensic Science Commission.

Conclusion: The evidence in this case was analyzed appropriately and the conclusions drawn appear to be scientifically sound and aligned with current national guidelines and standard operating procedures.

EXHIBIT E

STATE OF TEXAS §
COUNTY OF JEFFERSON §

Case # 10-10213

VOLUNTARY STATEMENT

Before me, the undersigned authority, on this day personally appeared, Stephen Adam Vinson, who after being by me first duly sworn on his oath, deposes and says:

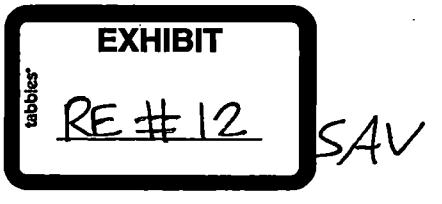
My name is Stephen Adam Vinson. I am thirty-two years old. I came to the Jefferson County Criminal District Attorney's Office on Thursday, October 10, 2019, to meet with Investigator Lauren Kemp regarding my testimony during the Joseph Colone trial. I am providing this statement to Investigator Kemp freely and voluntarily.

I have my Bachelors of Science Degree in Forensic Science from Baylor University in Waco, Texas. I have extensive on-the-job training from Orchid Cellmark in Dallas, Texas, The Texas Department of Public Safety Crime Laboratory in Houston, Texas, and the Houston Forensic Science Center in Houston, Texas. I am currently employed as a Forensic Analyst with HFSC, where my main role is DNA interpretation.

On October 01, 2013, the DPS Houston Laboratory received evidence for the Joseph Colone case. I performed serology testing on that evidence, the findings of which are summarized in my Laboratory Report dated November 14, 2013.

I was recently contacted by Assistant District Attorney, Ashley Molfino of the Jefferson County Criminal District Attorney's Office who indicated that she needed to meet with me regarding my testimony in this case. She advised me that this case was being appealed and that she needed to discuss some information brought up in the appeal. My testimony during the trial was brief, and I testified based on my report only. At the time of my testimony, I was no longer employed by Texas DPS, and I testified to the information in my Laboratory Report that was generated during the normal course of business at DPS. I did not testify from my lab notes, and I did not review them prior to my testimony. The Laboratory Report sums up my findings in the case, and it is Technically Reviewed as well as Administratively Reviewed by two other qualified Forensic Scientists before being released as an official record of my serology findings. It is common practice for me to testify from my report alone, and only reference notes if specifically instructed to do so by the prosecution or the defense. It was brought to my attention when discussing this case recently with ADA Molfino that one of my notes in the case file was mentioned in the Writ Application. I have reviewed that specific case note, and it appropriately reflects the condition of the outer packaging for the evidence. It was my common practice while I screened at DPS to note any irregularities in my bench notes. I appropriately testified that any irregularities would have been captured in my notes. However, the noted irregularity does not reflect a quality issue with the evidence itself, only the outer packaging in which it came to the laboratory. Although there was mention of liquid being in the evidence packaging, a complete review on my bench notes did not reveal any mention of mold being on the other items that I examined. Had there been any quality concern with the actual items of evidence that I examined, I would have explicitly mentioned that in my bench notes. Had I reviewed my case file prior to testimony, I would not have brought up the note to ADA Molfino, as the note does not affect the evidence that I screened and pertains only to the outer packaging in which the evidence was received.

I take quality seriously, and would not issue results for items damaged by water or mold. My bench notes were thorough because as a forensic scientist, I note all details that I observe in every case. On review of my transcript, I may have failed to directly answer ADA Molfino's question about any irregularities on the outer packaging. However, I did in fact note an irregularity in my bench notes. I did not testify falsely. That irregularity was not reported or addressed otherwise as it did not affect the evidence that I was screening. If the liquid in the cooler had in fact damaged any evidence, it would not have been taken forward to DNA analysis



and it would have been noted as not suitable for testing in my bench notes and my laboratory report. The note is not a technical issue, and I testified truthfully to my process. To my knowledge, my bench notes were not subject to review by the prosecution or the defense, nor did I discuss my bench notes with either party prior to my testimony. I can say with certainty, if this specific bench note was brought to my attention prior to testimony, I would have explained the insignificance of this bench note to both parties. This explanation would have surely eliminated any concern regarding the integrity of the evidence.

I have read each page of this statement consisting of page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I affirm that the facts contained herein are true and correct. I will testify to these facts in court.

Signature of Affiant

Sworn to and subscribed before me this 10 day of, Oct 2019 .

Notary Public

LAUREN ANN KEMP
Notary Public, State of Texas
Comm. Expires 11-28-2021
Notary ID# 12243495

EXHIBIT F

REPORTER'S RECORD

VOLUME 24 OF 37

CAUSE NO. 10-10213-A

CCA NO. WR-89,538-01

EX PARTE	*	IN THE DISTRICT COURT OF
JOSEPH KENNETH COLONE, APPLICANT	*	JEFFERSON COUNTY, TEXAS
	*	252ND JUDICIAL DISTRICT

ORAL DEPOSITION OF STEPHEN ADAM VINSON

SEPTEMBER 22, 2020

(Reported Remotely)

ORAL DEPOSITION OF STEPHEN ADAM VINSON, produced as a witness at the instance of the Office of Capital & Forensic Writs, and duly sworn, was taken in the above-styled and numbered cause on the 22nd day of September, 2020, from 9:36 a.m. to 11:28 a.m., via Zoom, before Cristy Burnett Smith, CSR, RPR, in and for the State of Texas, reported by machine shorthand, at the offices of the Jefferson County Courthouse, 1085 Pearl Street, Beaumont, Texas, pursuant to the Texas Rules of Civil Procedure, the Emergency Order regarding the COVID-19 State of Disaster, and the provisions, if any, stated on the record or attached hereto.

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EXHIBITS

THE REPORTER: Any stipulations on the record, please?

MR. ROBBINS: There are no stipulations.

THE REPORTER: What about signature?

MR. ROBBINS: Oh, right. Let me just jump in. Mr. Vinson?

THE WITNESS: Yes.

MR. ROBBINS: Just because -- my name is Maro Robbins. I'm one of the lawyers representing Mr. Colone.

THE WITNESS: Yes, sir.

MR. ROBBINS: Mr. Sundermeir is actually going to be doing the questioning, but let me just tell you this formality about -- because we're proceeding by depositions instead of in a live court evidentiary hearing, the rules let witnesses have -- can receive a copy of the transcript, once it's prepared, and, you know, check is for any mis- -- like errors or that things were transcribed wrong, something like that.

THE WITNESS: Okay.

MR. ROBBINS: And -- or you know, sign on -- certifying that it's correct; or you can just waive that process and not get the copy of it and just let the process go forward. So, it's up to you what you wanted to do.

THE WITNESS: I'll definitely take a copy.

STEPHEN ADAM VINSON,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. SUNDERMEIR:

Q. Good morning, Mr. Vinson. How are you today?

A. Good. How are you?

Q. Doing well, thank you.

You understand you are under oath, correct?

A. Yes, sir.

Q. And you understand that your testimony today is just as important as if you were testifying in court, correct?

A. Yes, sir.

Q. So, you understand you must give truthful, accurate and complete testimony, right?

A. Yes, sir.

Q. And of course, you'll do that, right?

A. Yes.

Q. Is there any reason, medical or otherwise, that you cannot give truthful and accurate testimony?

A. No.

Q. If that changes for any reason, you must let

me know immediately. All right?

A. Perfect. Will do.

Q. I want to start with some background, if you don't mind. Where do you currently work?

A. I currently work at the Houston Forensic Science Center?

Q. And what is your job title?

A. I am a forensic DNA analyst.

Q. And you used to work as a forensic analyst at the Department of Public Safety in Houston; is that right?

A. Yes, sir.

Q. When was that?

A. That was from 2011, the Fall, to 2015, the Fall. About four years in total.

Q. Why did you leave?

A. I left for a better job opportunity.

Q. In your time at DPS, did you have any other job titles besides forensic analyst?

A. I don't believe my DPS title was forensic analyst. I believe there were Forensic Scientist 1, Forensic Scientist 2; and when I left, i just hit the Forensic Scientist 3 mark.

Q. You started as a Forensic Scientist 1?

A. Yes.

Q. What's your job description as a forensic scientist?

A. As a forensic scientist for DPS, you're -- the job description is to screen evidence for the presence of biological material; and not just screen the evidence but you are also collecting evidence -- such as, trace hairs and fibers that I can't test because I'm not a trace analyst but also swabbing things for the presence of contact DNA -- skin cells that get left behind, saliva, things that we don't test for at DPS, per se, but things that carry biological material.

Q. Okay. And how many items of evidence do you think you handled in an average day when you were at DPS?

A. That depends. If it's a -- it could be anywhere from a comforter that could take you a whole week to work, or it could be multiple sexual assault kits a day. It just depends on the case and the complexity of the case. I worked a lot of cases at DPS.

Q. Did anyone report to you as a forensic scientist?

A. No, sir.

Q. And who did you report to?

A. My direct supervisor was Kristi -- oh, gosh.

I'm trying to think of -- I can't remember Kristi's last name. It's been awhile. She was my -- she is the current supervisor at DPS right now. And then over her was our technical leader, Andrew McWhorter.

Q. Now, within the lab at DPS, who is responsible for quality assurance?

A. Everybody, really. I mean, quality is the -- quality is the basis behind what we do for collecting evidence in forensic cases.

Q. So, if you had a quality issue, you would take that to Cindy (sic) first?

A. That would be directly to Andrew McWhorter. He's our technical leader. So, he -- he responds to technical issues within the DNA section. So, any quality event would be -- would have gone through him.

Q. Now, while you were working at DPS, you were asked to conduct serology testing for evidence in a case involving Joseph Colone; is that right?

A. Yes, sir.

Q. That was around October of 2013?

A. Yes, it was.

Q. And you summarize that testing in a laboratory report; is that right?

A. I did.

MR. SUNDERMEIR: And am I able to share

my screen with files, or do you have to do that?

THE REPORTER: Yes. I would much prefer you do it.

Q. (BY MR. SUNDERMEIR) Can you see my screen?

A. Yes, sir.

Q. Mr. Vinson, do you recognize this document?

A. I believe that's my laboratory report for this case.

Q. This is the one you submitted November 14th of 2013?

A. Yes, sir.

Q. It's a fair and accurate copy of your laboratory report?

A. From the page that I can see, yes, sir.

Q. Okay.

A. I should have a digital signature on my report on close to the last page. Yeah, there it is.

Q. Okay. So, this is your signature on Page 6?

A. Yes, sir.

MR. SUNDERMEIR: I would like to move to admit what's been marked as Exhibit 158.

(APPLICANT'S EXHIBIT NO. 158 OFFERED)

MR. THOMPSON: No objection.

MR. SUNDERMEIR: And also, I think it's Exhibit 23A.

Q. (BY MR. SUNDERMEIR) All right. On the first page on the top right, do you see where it says laboratory number?

A. Yes.

Q. And this is the case number for Mr. Colone's case; is that right?

A. Yes.

Q. And with respect to the evidence you tested under Submission Information, in the center of the page, it describes, 1, a large Styrofoam container and, 2, a white box; is that right?

A. Yes, sir.

Q. And both of these were delivered to DPS on October 1st, 2013; is that right?

A. Yes, sir.

Q. So, about one month before your report?

A. Yes, sir.

Q. And under Evidence Description on the same page, Results of Analysis and Interpretation, the first item listed is a Styrofoam container, right?

A. Yes, sir.

Q. So, is it right that every item that begins with this 01 indicates that it was contained within the large Styrofoam container?

A. Yes.

Q. And so, looking at this list under the large Styrofoam container, that means the black glove, 01-01-AA-01, was in the Styrofoam cooler?

A. Yes, sir.

Q. And the part of the baby blue towel from the crime scene was also in the Styrofoam cooler?

A. Yes, sir.

Q. And a cutting of a black sleeveless undershirt from the suspect was also in the Styrofoam cooler?

A. Yes, sir.

Q. And it's true that you testified in Mr. Colone's trial about the contents of your report; is that right?

A. Yes, sir.

Q. And that was in May of 2017?

A. You would have to refresh me on the exact date, but that sounds right to me.

Q. Okay. And that would have been about three years since you wrote the report; is that right?

A. You said May 2017?

Q. Yes, sir.

A. Yeah. That looks like -- when did this report go out?

Q. I can scroll up. November 14, 2013?

A. Perfect.

Q. You've been an analyst those whole three years; is that right?
A. Yes, sir.
Q. And you handled a lot of evidence in that time frame, I bet?
A. I probably did.
Q. Is it fair to say that at the time of your 2013 testimony your memory of the 2013 analysis you performed was not fresh?
A. I could definitely say that it would not have been fresh.
Q. Right. It faded over time. Is that fair?
A. Yes, sir.
Q. So, by the time of your testimony in May of 2017, you were relying on what was written in your laboratory report; is that right?
A. Yes, sir.
Q. Which you reviewed before testifying, correct?
A. Yes.
Q. But apart from what's in your report, it's fair to say you have no independent memory of the analysis you had done three years before?
A. No, sir.
Q. No, that's right; or no, that's not correct?
A. No, that would be correct. I didn't review my

bench notes.

Q. And of course, if you had remembered something that was important to your analyst that wasn't in your report, you would have testified about that during trial, correct?

A. Yes, sir. And could I clarify? If it was important to the analysis, it would be contained in the body of my report or else I would not have released results on an item.

Q. Okay. You mentioned a bench note, I think?

A. Yes.

Q. What is a bench note?

A. Bench notes are my extremely detailed notes of every item of evidence from what I see on the outer packaging, all the way through to the levels of inner packaging with stickers, initials, any kind of labeling condition, as well as all the way down to the evidence items themselves with descriptions of the evidence items, any testing that I did on that item, how an item was collected and stored and if I did biological testing with reagents for blood or semen. Those bench notes also contain my controls that were tested in the laboratory for the day I did the testing.

Q. Okay. And it's safe to say you have a bench note for every piece of evidence you test, correct?

A. Yes, sir.
Q. Do you see my screen?
A. Yes, sir.
Q. I would like to introduce what's been marked as Exhibit 152. I'll note for the record this is also duplicative of Applicant's 1B.
Mr. Vinson, do you recognize this document?
A. Yes. This is my bench note from this case.
Q. And in the top right corner, the lab case number that matches the same number on your report; correct?
A. Yes, sir.
Q. This is a fair and accurate copy of your laboratory information sheets from October 31st of 2013?
A. Yes.
MR. SUNDERMEIR: I move to admit Exhibit 152.
(APPLICANT'S EXHIBIT NO. 152 OFFERED)
MR. THOMPSON: No objection. It's already part of the evidence.
Q. (BY MR. SUNDERMEIR) The first item listed on this first page here is this large Styrofoam container. Do you see that?

A. Yes, sir.
Q. This is the same large Styrofoam container that we were just talking about in your report?
A. Yes, sir.
Q. And under this first paragraph, it says FTC, do you see that?
A. Yes.
Q. What is FTC mean?
A. Found to contain. It's an abbreviation.
Q. So, that means that within this large Styrofoam container there was one white Fed Ex envelope and four Nordic ice cold packs, correct?
A. Yes, sir.
Q. Okay. And at the bottom you have this note here. I know you've probably been over this plenty of times, but I just want to understand some aspects about the cooler.
A. Yes, sir.
Q. So, you note that you pulled it off the shelf in the vault. Do you see that?
A. Yes, sir.
Q. What is the vault?
A. The vault is a secure location where we keep evidence for testing. There is several vaults at DPS for evidence. When it's received, it goes into the

different disciplines for the sections that are going to work the evidence.

So, this is an area where only forensic biology staff and the evidence receiving department have access; and it takes two of us to access the vault so that it is secured at all times.

Q. Okay. You said there were multiple vaults at DPS?

A. Yes. We're a multidiscipline lab at the DPS Houston location. So, in the vault for forensic biology, you wouldn't find drug evidence; or you wouldn't find trace analysis evidence unless it was being tested for biology, for DNA first. But no, our disciplines have separate vaults with separate access.

Q. Okay. And the vaults, they are not refrigerated; is that correct?

A. No. There are refrigerators in the vaults for certain types of evidence. Most evidence that is in the vault is non-refrigerated, and that's usually how it comes to the laboratory.

Q. And so, when you describe in your note that you pulled it from a regular shelf, that's referring to an unrefrigerated area; is that right?

A. Yes, sir.

Q. So, as far as you know, the cooler sat

unrefrigerated from the time it was dropped off, October 1st, 2013, until the time you retrieved it for your analysis at the end of October; is that right?

A. Yes, sir.

Q. And it's fair to say that you have no firsthand knowledge of what exactly happened inside the cooler before you retrieved it for your analysis at the end of October; is that fair?

A. No, I would have no way of knowing that.

Q. But you describe in your note the conditions of the cooler when you found it, right?

A. Yes.

Q. And specifically, you note that the ice packs were at room temperature, right?

A. Yes.

Q. The Fed Ex envelope was damp and soggy?

A. Yes.

Q. And there was a foul-smelling water/liquid at the bottom of the container?

A. Yes, sir.

Q. Move to the next page, Page 2. This top item listed here is the white Fed Ex envelope that was inside the cooler with the ice packs, correct?

A. Yes, sir.

Q. So, following this FTC convention, it's true,

then, that within this white Fed Ex envelope there were four 9 by 12 yellow envelopes, one 6 by 9 yellow envelope and one clear plastic bag; is that right?

A. Yes, sir.

Q. And when you say a yellow envelope, we're talking like a paper envelope?

A. Yes. Like almost -- almost a manila color but a little bit darker. Just a paper envelope.

Q. And if you look at the second piece of evidence on this page, this is one of the 9 by 12 yellow envelopes that was inside of the damp and soggy Fed Ex envelope, correct?

A. Yes, sir.

Q. Now, this 9 by 12 yellow envelope is labeled 01-01-AA, this contained a glove; is that right?

A. Yes, sir.

Q. And if I go to the next page, Page 3, this first piece of evidence, the black glove is the glove that was in that 9 by 12 yellow envelope?

A. Yes, sir.

Q. Let me go to Page 5. The second item on Page 5 is another 9 by 12 yellow envelope labeled A1 -- or excuse me, 01-01-AC. Do you see that?

A. Yes.

Q. And so, this is another one of the 9 by 12

yellow envelopes that was inside the damp and soggy Fed Ex envelope?

A. Yes, sir.

Q. And inside of this 9 by 12 yellow envelope was a cutting of a baby blue towel; is that right?

A. Yes.

Q. And that baby blue towel is described at the top of Page 6; is that right?

A. Yes.

Q. And at the top of Page 7, the top item is a 6 by 9 yellow envelope. Do you see that?

A. Yes, sir.

Q. This is the 6 by 9 yellow envelope that was inside of the damp and soggy Fed Ex envelope, correct?

A. Yes.

Q. It's true that inside of this 6 by 9 yellow envelope there was a 3 1/2 by 6-inch manila envelope?

A. Yes, sir.

Q. And inside of that 3 1/2 by 6-inch manila envelope was a cutting from a black sleeveless undershirt from the suspect; is that right?

A. Yes, sir.

Q. And that cutting of the black sleeveless undershirt is listed here at the bottom of Page 7, correct?

A. Yes, sir.
Q. So, the glove, towel, and the t-shirt cutting, they were all in paper envelopes inside of the Fed Ex envelope inside of the cooler, correct?
A. Yes, sir.
Q. And this Fed Ex envelope, as your note describes, was damp and soggy from an unidentified foul-smelling liquid; is that right?
A. Yes.
Q. If we look at the description for the Fed Ex envelope on Page 2, it doesn't describe for this particular piece of evidence here that the envelope was damp and soggy, does it?
A. That's because it's not.
Q. You are saying the white Fed Ex envelope was not damp and soggy?
A. No, sir, or else it would have been described as such.
Q. But if we look at your note on the first page, you describe the Fed Ex envelope is damp and soggy; isn't that right?
A. Yes, sir.
Q. But it's your testimony today that the white Fed Ex envelope was, in fact, not damp and soggy?
A. Yes. And if you could go back to the outer

packaging for a moment, my description -- if you go up even a little more, this item that I've described is the outside of the envelope that I've described. I'm not describing the inside of the envelope at this time. And I don't know if you're familiar with Fed Ex envelopes; and if we even have a picture of it, that would be -- that would be great. Most of them are -- have a non-porous outside since they get mailed through the mail, various people touching them; and they are lined on the inside.

Now, the items on the inside of this package were not wet. They were not damp. There was no mold observed or else I would have clearly noted that in my bench notes.

Q. Okay. I want to talk a little bit more about that in a moment; but nonetheless, your description here describes that the Fed Ex envelope is damp and soggy. Am I understanding that correctly?

A. Yes, sir.

Q. And is -- I think you noted there's no pictures of the inside of the cooler; is that right?

A. No, sir.

Q. And your recollection of whether or not the interior items were damp and soggy is based solely on the description within your bench notes; is that fair?

A. Yes, sir.
Q. And that's not independent memory you have today, correct?
A. No. And I wouldn't testify off of independent memory. Like, these are -- this is why I take very detailed notes, so I can review them in the future if I need to.
Q. You also noted there was a foul-smelling liquid found in the Styrofoam cooler; is that right?
A. Yes, sir.
Q. And is it fair to say that you noted the liquid was foul-smelling because that's an unusual occurrence?
A. Yes, it really is.
Q. You would expect that evidence that was stored properly would not be soaked in a foul-smelling liquid, right?
A. Yes, sir.
Q. And under normal circumstances, water does not smell foul; is that fair?
A. Yes.
Q. And is it also fair to say that you described it as a water/liquid because you were uncertain exactly what the fluid was?
A. Yes, sir.

Q. Now, you described in the final lines of your note here on Page 1, that you (reading) will inquire as to why the storage instructions clearly indicated on the outside of Item 01 were ignored and the liquid will be soaked up with paper towels and discarded.

Do you see that?

A. Yes, sir.

Q. And did you end up soaking up the liquid with paper towels and discarding those towels?

A. Yes, sir.

Q. You didn't take any photographs first, right?

A. No.

Q. Did you preserve any of the foul-smelling liquid for future analysis?

A. No, and I would not have.

Q. Did you test the foul-smelling liquid to determine if it contained DNA?

A. No, and I would not have.

Q. Your notes didn't say anything about where the foul-smelling liquid came from, correct?

A. No, except for inside of the cooler. And I'll note that this was along the bottom of the container. The Fed Ex envelope was not submerged in this liquid. It was on the bottom of the container.

Q. The Fed Ex envelope was also resting along the

bottom of the container; is that right?

A. No, sir. When these things are packed, people put ice packs on the bottom of a cooler; and the evidence was on top. So, this water was on the bottom of the container. Now, the Fed Ex envelope itself wasn't submerged in this liquid. The envelope was just soggy.

Q. Right. The envelope itself was damp and soggy from the liquid, correct?

A. Yes.

Q. And you never identified the source of that liquid; is that correct?

A. No, sir.

Q. And your notes don't say anything about how it ended up on the bottom of the cooler, correct?

A. No.

Q. And for example, your notes don't describe anything about where the foul-smelling liquid traveled from or what it encountered first before it arrived in the bottom of the cooler; is that correct?

A. No, and I wouldn't have access to that information.

Q. What do you mean, you wouldn't have access to that information?

A. I can only control the testing that I perform

when the evidence gets to me. I can't control how it's packaged by another laboratory. I can't control how it's handled by Fed Ex, UPS or department's personnel, how they transfer evidence; and I can't control how the evidence is stored in our vault. I can simply note what I see and process it accordingly.

Q. Understood.

A. I'm not -- I'm not an expert on these things, but I've definitely used ice packs in coolers before; so, I understand what happens when a cold ice pack goes to room temperature, you know. Moisture is released. So, I could make an educated guess on where the liquid came from being sealed up in a cooler.

Q. But to be fair, educated guesses aside, you didn't ever confirm the source of the liquid, correct?

A. No. No, sir. And I would not have been able to.

Q. At the time that you processed the evidence in this case, DPS lab had policies and procedures in place that govern how evidence should be handled, correct?

A. Yes, sir.

Q. Do you recognize the document that I've shared on my screen?

A. Yes, I do.

Q. And I would like to introduce this as

Exhibit 153. Does this appear to be the standard operating procedures for DNA?

MR. THOMPSON: Objection, by the way.

A. It's a list of the standard operating procedures.

Q. (BY MR. SUNDERMEIR) Do you understand this document to list the standard operating procedures in place at DPS in October, November of 2013?

A. Yes.

Q. To the best of your knowledge, does this appear to be a fair and accurate copy of DPS's standard operator procedures at that time?

A. I believe so.

Q. Okay. I move to admit what's been marked as Exhibit 153?

(APPLICANT'S EXHIBIT NO. 153 OFFERED)

MR. THOMPSON: No objection.

Q. (BY MR. SUNDERMEIR) If you will turn to Page 49 of this document, do you see the heading on this page that says Evidence Handling?

A. Yes.

Q. Are you familiar with this procedure?

A. Yes, sir.

Q. Is this something that you were trained on in your time with DPS?

A. Yes.

Q. And this section concerns collecting and packaging of evidence; is that right?

A. Yes, sir.

Q. Specifically, the standard operating procedure for evidence handling says that (reading) The purpose of collection and packaging of biological evidence is to preserve it for future analysis, protect it from contamination and maintain the integrity of the evidence.

Do you see that?

A. Yes, sir.

Q. And is it also true that DPS' standard operating procedures said that, for temporary storage, cuttings and swabs must be kept cold?

A. Yes, and they are.

Q. If we look at the heading 3 here, Storage of Evidence in the middle of the page, the first item, A, states that (reading) Biological evidence must be preserved -- excuse me -- must be properly stored to preserve biological constituents.

Do you see that?

A. Yes, sir.

Q. What does that mean?

A. That could mean various different things. A

lot of our evidence is stored at room temperature and in paper items because paper is a breathable material and does not foster mold growth. So, it depends on what the item is. Say, a -- a vial of blood that you are trying to preserve that you are trying to keep cold would not be appropriate to store on a shelf, it would be appropriate to store in a refrigerator.

And I'll refer to cuttings or swabs. These are items that the analyst collects. So, while I can't control how it is submitted to the laboratory, my cuttings of the evidence that get processed through the DPS laboratory are stored in our walk-in freezer until DNA analysis is performed on those items.

So, again, I can control how I handle the evidence once it gets to me; but I can't control the process of how it got to me.

Q. No. I understand. And we'll focus on the cuttings and swabs for a moment. If you look at 3F on that same page, it says, (reading) For temporary storage, the evidence must be stored frozen and protected from freezer moisture by a layer of plastic.

Do you see that?

A. Yes.

Q. And it's fair to say that the cooler with the cuttings that contained a cutting of the blood

undershirt from the suspect, that was not stored in a refrigerated environment? Is that fair?

A. Yes, sir.

Q. And it wasn't protected from a -- from freezer moisture by a layer of plastic either; is that right?

A. I did not see a layer of plastic, no, sir.

Q. If you had, it would have been in your bench note; is that correct?

A. Yes.

Q. Turn to Page 54 of this document. Do you see the heading, 6.2 Evidence Examination?

A. Yes.

Q. No. 8 on this page describes, (reading) Note instances where packaging or handling of the evidence creates a potential for contamination.

Do you see that?

A. Yes, sir.

Q. You would agree that an evidence envelope that is damp and soggy from a foul-smelling liquid does not appear to have been kept free of contamination?

A. I would disagree with you. While the outer evidence was soggy, was damp, the inner items were dry in the Fed Ex envelope; and there was no mold growth on the evidence to suggest that moisture had affected the evidence in any such way. Again, this was just the

outer packaging. This is not the evidence itself.

Q. Okay. I want to talk about mold in a moment. But as far as the interior contents are concerned, your testimony today that those contents were dry is based solely on the fact that your lab notes do not describe any moisture on those items; is that fair?

A. Yes, sir. Yes, sir. And had they not been dry, it would have been documented as such.

Q. Certainly, though, for the packaging to be soaked in a foul-smelling unidentified liquid, that at least indicates the potential for contamination; isn't that fair?

A. I disagree. This is the outer packaging, not the inner packaging of this item.

Q. So, you agree, though, that based on your opinion that it wasn't necessary, you did not note in your notes any potential for contamination?

A. No, and I still do not believe there was.

Q. No. 8 on that same page further states that instances of potential contamination (reading) should be brought to the attention of the supervisor, other involved examiners and the investigator.

Do you see that?

A. Yes, sir.

Q. And you didn't make any record of having

brought the foul-smelling liquid or the soggy envelope to the attention of the supervisor, correct?

A. No, sir.

Q. Because you didn't bring it to the attention of the supervisor, correct?

A. No, sir.

Q. No, you didn't; or no, that's wrong?

A. No, I didn't.

Q. There's no record of an incident report regarding the foul-smelling liquid or the soggy envelope, right?

A. No.

Q. And that's because you didn't file an incident report; is that correct?

A. That's correct.

Q. And there's also no record of an incident report that the cooler had been stored contrary to the specific instructions to refrigerate; is that fair?

A. Yes, sir.

Q. And that's because you did not file an incident report that the cooler was stored improperly, correct?

A. No, sir.

Q. I would like to introduce what's been marked as Exhibit 155. Mr. Vinson, do you recognize this

document?

A. I believe so.

Q. Are these the Laboratory Operations Guide for DPS?

A. Yes, sir.

Q. And these were the procedures in place at DPS in October and November of 2013; is that fair?

A. Could you scroll down to the bottom of your page?

Yes.

Q. And to the best of your knowledge, does this appear to be a fair and accurate copy of those procedures?

A. Yes, sir.

MR. SUNDERMEIR: I would move to admit Applicant's Exhibit 155.

(APPLICANT'S EXHIBIT NO. 155 OFFERED)

MR. THOMPSON: No objection.

Q. (BY MR. SUNDERMEIR) Turn to Page 65 of this document. Do you see the heading, Quality Action Plan?

A. Yes, sir.

Q. Are you familiar with this procedure?

A. Yes, sir.

Q. Is this saying you were trained on at your time at DPS?

A. That's not really something I'm trained on but something I'm familiar with.

Q. Do you see where it says "nonconforming event"?

A. Yes, sir.

Q. It defines the nonconforming event (reading) is when one or more characteristics or conditions are observed that do not conform to required specifications and standards, procedures or policies.

A. Yes, sir.

Q. They provide some examples, including contamination or sample preparation error or unsupported conclusions.

Do you see that?

A. Yes, sir.

Q. Would you agree that it was not DPS's policy that coolers of evidence should be left unrefrigerated when the labels instruct to refrigerate?

A. You would really have to ask that to our evidence receiving department. If I was in charge of receiving the evidence, I would have refrigerated an item that said to refrigerate; but I was -- I was not.

Q. But it would be fair to say that it would not be DPS policy to store an item unrefrigerated when it should be refrigerated; is that fair?

A. Yes.

Q. Under Heading 2.1 on the same page, it states that (reading) When a nonconforming event has been identified, the individual responsible for the work must halt testing and/or calibration until the scope of the incident has been determined.

Do you see that?

A. Yes.

Q. Am I correct that when you encountered the cooler and the foul-swelling unidentified liquid, you did not take any further steps to determine the scope of the incident?

A. No, I did not.

Q. And the second item under the same heading states to (reading) briefly describe the event and initiate a quality action plan.

Do you see that?

A. Yes.

Q. And am I correct that when you found the foul-smelling liquid in the unrefrigerated cooler, you did not initiate a quality action plan?

A. No, sir. And again, that is not the evidence items themselves. This is talking about outer packaging. This is not talking about a scope of my testing. Just how the evidence was received at the

laboratory.

Q. To be clear, you are saying that this policy in Section 2.1 only pertains to outer packaging?

A. No, sir. This would pertain to my work that I am performing in this case, which myself and the technical reviewer who reviewed my work did not believe that this was a quality action plan. There would have been no reason for me to pursue this further.

Q. Did you discuss with others whether or not to initiate a quality action plan?

A. No, and I would not have.

Q. I understand that it was not your responsibility that the cooler was left unrefrigerated; but again, it's fair to say that when you encountered the unrefrigerated cooler, you did not initiate a quality action plan?

A. No, and I -- again, I would not have.

Q. It's also correct that you didn't provide the details to the technical or quality management chain of command?

A. No, sir, because this is not a contamination event.

Q. You didn't start a quality action plan to note the potential for contamination, correct?

A. No, and I believe that there is no potential

for contamination here.

Q. It's true you did not include in your report the presence of a foul-smelling liquid; is that right?

A. Yes, sir; and I would not have included that in my report.

Q. Because, in your opinion, it didn't present a quality issue; correct?

A. Yes, sir.

Q. But you didn't take any photographs of the cooler?

A. No, sir.

Q. You didn't discuss this with anybody else?

A. No, sir.

Q. You didn't include in your report that the Fed Ex envelope was damp or soggy either?

A. No, and I would not have. Again, these are items contained in my bench notes and do not pertain to the technical nature of my report.

Q. Even understanding that your opinion is that it was not necessary to include that information, you certainly could have included that information in your report under DPS policy; isn't that correct?

A. I do not report on the nature of outer packaging items in my report. Now, had there been a quality incident and I deemed that there was potential

for contamination, none of these items would have proceeded through analysis. And there would be a quality report, and there wouldn't be any biological screening results associated with these items.

Q. I understand it's your opinion that it was not necessary to take these steps, but certainly DPS policy would have allowed you to include that information in your report; is that fair?

A. I don't believe we ever would have included that information in my report. My report is a summary of the testing performed, and this is not testing. This is simply a description of the item. I've issued a lot of reports through DPS, and we don't include bench notes for the outer packaging on our reports. Simply a description of the item.

Q. But to be clear, that information never actually made it into your report, correct?

A. No, sir.

Q. No, it didn't; or no, that's not correct?

A. No, it did not.

Q. I'll go to Page 90 of the same document. Do you see the heading, Laboratory Case Reports?

A. Yes, sir.

Q. And this is the procedure for laboratory case reports, correct?

A. Yes, sir.

Q. And it's true that the report communicates to law enforcement officers, to attorneys, prosecutors, others a description of the items received and tested; correct?

A. Yes, sir.

Q. But as we just discussed, your report did not include a description of the items received; is that correct?

A. Actually, it did involve description of the items received. There is the outer packaging, the heading, and then the item of evidence that was tested. And that is standard for the laboratory reports in our section.

Q. And the description of the outer packaging in your laboratory report did not note that the Fed Ex envelope was damp or soggy, correct?

A. Correct.

Q. And it did not note that there was an unidentified foul-smelling liquid, correct?

A. Correct.

Q. And so, if the DPS procedure for laboratory case reports includes descriptions of the outer packaging, it is fair to say that it would have been consistent with DPS procedure had you included that

description in your laboratory report?

A. No, that is incorrect. We do not report on the condition of our outer packaging, inner packaging on our laboratory reports.

Q. So, do you think including that information would have been inconsistent with DPS procedure?

A. Yes, sir.

Q. If I turn to the second page here, do you see Item 2 on this page, states (reading) The following elements may be included in the report but are not required to be (sic)?

A. Yes, sir.

Q. And C of that same section states (reading) deviations from, additions to, or exclusions from the procedures.

Do you see that?

A. Yes, sir.

Q. Would you agree that the failure to refrigerate the cooler where the instructions specifically state to refrigerate it, would be a deviation from procedure?

A. Well, that depends on -- it depends on the nature of that question. Had the evidence been compromised and moldy, wet in any sort of way, then I would have said yes; but as it stands in my report, I

would say no.

Q. But my question is a little more focused on the actual condition of the cooler in terms of how it should have been stored. And my question is: Wouldn't you agree that a failure to refrigerate the cooler when the instructions say to refrigerate it, that would be a deviation from procedure?

A. Again, you would have to ask the people who take in this evidence and who store it routinely as to why it would have been done that way. And perhaps this isn't an isolated incident. Perhaps this is something that happens. I'm not sure. I don't work for the evidence receiving department, and I never did when I was at DPS.

Q. Right. I understand you weren't responsible for maintaining the evidence before you accessed it for your analysis; but you wouldn't expect that storing evidence contrary to the instructions on it would be consistent with DPS procedure, would you?

A. No, I don't believe so.

Q. That would be a deviation from what was required; is that fair?

A. Perhaps.

Q. And I know that you were not the one responsible for not refrigerating the cooler, but it's

true that your report did not note that the evidence was stored contrary to its instruction; is that fair?

A. Yes, sir.

Q. We discussed before that you had testified in Mr. Colone's trial, correct?

A. Yes, sir.

Q. And we said that was around May 1st, 2017; is that right?

A. Yes, sir, I believe, if that's what you said.

Q. How many times have you testified before?

A. Many. I can't -- I can't recall the exact number of times. I've testified many times in court.

Q. How many times have you been deposed before?

A. Never. This is a first for me.

Q. In your testimony during Mr. Colone's trial, you were asked about the evidence you handled and sampled in this case, including the contents of the cooler; is that right?

A. Yes, sir.

Q. I'm going to introduce what's been marked as Exhibit 156. This is also Respondent's Exhibit 12.

Mr. Vinson, do you recognize this document?

A. Yes.

Q. This is your affidavit from October 10, 2019;

is that right?

A. Yes, sir.

Q. In this second paragraph, you state that you came to the Jefferson County criminal DA's office on October 10th, 2019, to meet with Investigator Kemp about your testimony in the Joseph Colone trial; correct?

A. Yes, sir.

Q. Was this your first meeting with Investigator Kemp about your testimony at Mr. Colone's trial?

A. Yes. This is the first time I ever met her.

Q. Had you previously met with anyone else from the Jefferson County criminal DA's office about your testimony during the Joseph Colone trial?

A. I think through brief calls. I was aware that -- I was aware that this was happening; but other than that, no.

Q. And if we look at the second page here, this is your signature; is that correct?

A. Yes, sir.

Q. And this is dated the same day as your meeting with Investigator Kemp, correct?

A. Yes, sir.

Q. Did you write this voluntary statement, or was it provided to you during your meeting with

Investigator Kemp?

A. I wrote this voluntary statement.

Q. Did anyone else help you to write it?

A. No. I spoke with Investigator Kemp to make sure that I covered the -- the points that I needed to; otherwise, I wouldn't have made this statement at all. But the statement is mine.

Q. And had you discussed the contents of this statement with anyone at the Jefferson County criminal DA's office at any time before you met with them on October 10th to sign it?

A. No. This is -- this is my words. So, it's my statement.

Q. All right. Now, if you look at this large paragraph in the middle -- this is the fifth paragraph -- you state that you were recently contacted by Ashley Molfino in the Jefferson County DA's office and indicated she wanted to meet with you about your testimony; is that right?

A. Yes, sir.

Q. And was that before or after you spoke with Investigator Kemp on October 10th?

A. Well, I typed this in the presence of Investigator Kemp but this -- I was contacted by her before.

Q. Was ADA Molfino in your meeting with Investigator Kemp?

A. No, she was not. I did see her that day. She works -- she works in the building.

Q. And what specifically about your testimony did they want to discuss?

A. They wanted to discuss this bench note about the cooler.

Q. Now, your affidavit says that for your testimony you testified just based on your report; correct?

A. Yes, sir.

Q. And by that statement, you mean you did not testify from your -- from your bench notes, right?

A. No. I do not testify from bench notes. My report is the summary of the testings that I performed in the case. I can always be asked questions about my bench notes, which I gladly answer. I have many times on the stand but it's also fair to say that I can testify directly from my report and it summarizes all the testing performed in the case.

Q. It summarizes the testing you performed, correct?

A. Yes, sir.

Q. But as we discussed previously, it doesn't

necessarily summarize the conditions of the packaging of the evidence, correct?

A. No, sir.

Q. Before you testified in Mr. Colone's case, were you provided your bench notes to review?

A. No, sir; and I did not think to ask for them.

Q. So, it's safe to say that before you testified in Mr. Colone's case, you had not reviewed the bench note that we talked about before that noted the foul-smelling liquid in the cooler --

A. No, sir.

Q. -- Is that correct? And as we also talked about, it had been three years at the time of your testimony, and even more, since your original analysis in this case; right?

A. Yes, sir.

Q. And understandably, your memory of that analysis after three plus years was not as fresh?

A. Yes, sir.

Q. Under those circumstances, wouldn't it have been prudent for the prosecutors to have you review your bench notes?

A. I'm not a prosecutor, and I can't answer that statement.

Q. You're aware that this was a death penalty

case at that time, correct?

A. I'm not sure that I was aware it was a death penalty case; but that, honestly, doesn't matter to me. I'm there to talk about a testing of the evidence. Not what happens after I test it.

Q. But I believe that you said a moment ago it didn't occur to you to even request your bench notes; is that right?

A. No, sir. Now, had there been a quality report, if there was some sort of cause for concern of contamination, that would have been expressed in my laboratory report; and then, of course, I would have requested something to review because I would have wanted to make sure I knew what was going on. There is nothing of that in this case.

Q. But because none of that information made it into your laboratory report, you didn't think it necessary to request your bench note; is that fair?

A. Yes, sir. And again, it wouldn't have made it into my laboratory report because there was no cause for concern of contamination.

Q. But we don't have any photographs of the inside of the cooler --

A. No, sir.

Q. -- correct? We never learned where the liquid

came from, correct?

A. No, sir.

Q. We don't know why it was foul smelling?

A. No, sir.

Q. Did you test the interior envelopes for water?

A. I believe I stated earlier, if I noted damp envelopes, if I noted mold, any sort of staining, that would be clearly detailed in my bench notes, which I did not.

Q. But you never determined why the liquid was foul smelling, correct?

A. Again, I can -- I can extrapolate to that based on liquid being contained in a closed container for a long period of time. I can't imagine that would smell good. I've worked a lot of very nasty evidence in my time from decomp to other things. I'm sure this was not as bad as a dead body.

Q. Did you test any of the interior envelopes for DNA?

A. No, and that's not something that I would ever do at DPS.

Q. You said you didn't note the presence of mold, correct?

A. Yes, sir.

Q. Did you test for mold beyond just a visual

inspection?

A. No, and we don't have a test for mold at DPS. It is purely visual.

Q. Would you agree that DNA contamination or degradation is not necessarily visible to the naked eye?

A. Yes, sir.

Q. If the prosecutors had asked for your bench notes from DPS, do you have any reason to think that DPS wouldn't have provided them?

A. Oh, no. I've testified many times as I worked at the Houston Forensic Science Center and I have had folders and notes requested and those have been provided to me for testimony. While I don't have personal access to it, I believe DPS would absolutely provide materials to me if I needed them. And I've testified enough to know that most materials are provided to the prosecutor and the defense upon discovery. So, that should have been included in a discovery request.

Q. Okay. So, it's your understanding that if you or the prosecutors had wanted to review your bench notes, you simply could have asked, correct?

A. Oh, absolutely. DPS is -- they don't have anything to -- anything to hide. I mean, they are

very -- very transparent. As you can see, we take very detailed notes of what we do. All that is -- all that would have been provided.

Q. In the next paragraph in your affidavit, you state that (reading) On review of my transcript, I may have failed to directly answer ADA Molfino's questioning about irregularity in the outer packaging.

A. Yes.

Q. Do you see that?

A. Yes, sir.

Q. What are you referring to here?

A. I believe she asked something to the effect of in the testimony, if I had noted anything irregular in the case, would I have noted it, which I believe I testified yes. And I believe that is an accurate statement, as I did note an irregularity in the case.

Q. And the irregularity that you are referring to there is the fact that the cooler wasn't stored according to the instructions, correct?

A. Well, it's not that the cooler wasn't stored according to the instructions. I'm not -- I'm not entirely sure how that cooler was meant to be stored. It clearly states on the outer -- outer on the package to store refrigerated; but again, I don't know where all that cooler had been and, perhaps, it had

previously been unrefrigerated, which would, perhaps, not make sense to put it back into the refrigerator after it was already at room temp. These are things that I don't know because I wasn't involved in.

Q. Right. You have no firsthand knowledge of what happened to the cooler before you accessed it at the end of October, 2013?

A. No, sir. All can I do is describe what I see and go from there.

Q. But you would expect that if the cooler had instructions explicit labeled on it to refrigerate, that the cooler should be refrigerated; correct?

A. Most likely.

Q. And so, the irregularities you are referring to in your affidavit, this is the fact that there is a foul-smelling unidentified liquid in the cooler; correct?

A. I'm not entirely sure. I'd have to see my word for word on what she asked in my testimony, and I can go over that with you.

Q. I'm going to introduce what has been marked as Exhibit 154. Do you recognize this document, Mr. Vinson?

A. Yes, sir.

Q. And we turn to Page 30 of this document. This

is the beginning of your testimony in Mr. Colone's case?

A. Yes, sir.

Q. And this is the transcript -- have you reviewed this transcript before?

A. Yes, sir.

Q. You reviewed it in your October 19th meeting with Investigator Kemp; is that correct?

A. Yes, sir.

Q. I'm going to turn to Page 32. Do you see the beginning of the question here regarding the white cardboard box?

A. Yes.

Q. And if we turn to the following page, I'll give you a moment to review this page. Just let me know when you've had a chance.

A. Yes.

Q. Is this the testimony you are referring to in your affidavit where you state that you may have failed to directly answer ADA Molfino's questions about irregularities in the outer packaging?

A. Yes, because she asked (reading) Had there been something awry with it, had it not been sealed or something like that, would you have noted that, you did not in the case?

I don't believe I ever answered that question clearly.

Q. Okay. So, the part you are referring to begins at Line 9 on this page, correct, where she says, (reading) Had there been something awry with it, had it not been sealed or something like that, you would have noted that, but you did not in this case; correct?

A. Yes. That was the question asked of me.

Q. And then starting in Line 18 through 24 here, she switches to the Styrofoam cooler and says the same principle applies to this piece of evidence; correct?

A. Yes.

Q. Did you understand Mrs. Chase to only be asking, with respect to this Styrofoam cooler, whether you would have noted any irregularities?

A. No. My line before went over that it was a properly sealed state when it was admitted to the laboratory.

Q. Did you understand Mrs. Chase to be asking that you did not note anything awry with the Styrofoam cooler in this case?

A. No, sir.

Q. No, you did not understand her question to be whether anything was awry with the cooler?

A. I mean, just from this transcript, it's hard

to say exactly what I was thinking at the time. That was years ago. But no, I -- I don't believe so.

Q. Did you only think she was asking you whether you would have noted irregularities?

A. Yes.

Q. And you --

A. Which I did note irregularities.

Q. You noted irregularities in your bench note; correct?

A. Yes, sir. They are clearly noted in this case.

Q. But you hadn't seen your bench notes in preparing for this testimony, correct?

A. No, sir.

Q. Did you -- you didn't recall from your own memory that you had made a note about the cooler and the foul-smelling liquid, correct?

A. No, sir.

Q. Did you understand Mrs. Chase to be asking whether anything was awry with the cooler at all or just that you noted it?

A. Just that I noted it.

Q. So, you are saying she only cared about whether or not irregularities were noted, not whether any actually existed?

A. Well, if they are noted, then they did exist. So, those two are the same things, I believe. Maybe I'm not understanding your question.

Q. Is it your understanding she only cared whether or not you noted irregularities?

A. Yes, I believe so.

Q. You didn't think she wanted to discuss any of those irregularities in front of the jury?

A. No. And we had not discussed any irregularities, as I think I made it clear, I did not review my bench notes before testimony.

Q. Right. You didn't review your bench notes, and you didn't remember the foul-smelling liquid in the cooler?

A. No. And again, that didn't affect the body of my report for which I was testifying from.

Q. And I understand it's your opinion that it didn't affect the condition of the evidence but I'm focusing now on what you remembered at that time and you didn't remember there was a foul-smelling liquid in the cooler when you testified, correct?

A. No, sir.

Q. And you didn't remember that the Fed Ex envelope was damp and soggy at the time, correct?

A. No, sir.

Q. And so, we can agree that during your testimony in Mr. Colone's trial, you did not testify about the irregularities that you noted; correct?

A. No, I did not testify about any of my bench notes.

Q. Are you aware of the Texas Code of Professional Responsibility for forensic analysts and crime laboratory management?

A. Yes, sir.

Q. I'm going to introduce what's been marked as Exhibit 159. Outside of, perhaps, preparing for your deposition today, have you seen this section before?

A. Briefly.

Q. And you're aware that under this code, (reading) Each forensic analyst shall -- I'm looking at Part B here.

A. Yes.

Q. And then Nos. 12 and 13, (reading) present accurate and complete data and reports, oral and written presentations and testimony based on good scientific principles -- practices and valid methods. Excuse me.

A. Yes. And my scientific practices and methods were valid. They are accurately and completely expressed in my report for the testing that I conducted

in this case.

Q. And it also states that (reading) Analyst shall testify in a manner which is clear, straightforward and objective and avoid phrasing testimony in an ambiguous, bias or misleading manner; correct?

A. Yes, sir. And I believe I appropriately answered that if something was awry, I would have noted it, which I believe I did in my notes.

Q. You noted something awry in your bench notes specifically, correct?

A. Yes, sir. And again, this was the outer packaging. This was not the evidence items that I was testifying to themselves.

Q. And before you mentioned that the bench notes should have been provided along with other lab materials during discovery, correct?

A. Well, I don't know if I can say they should have been provided; but they could have been provided.

Q. If they had been requested, correct?

A. If they had been requested.

Q. Is it fair to say that when you testified at trial, you had assumed the prosecutors and defense lawyers had access to your bench notes and other lab records?

A. I don't believe I assume anything when I testify. It's -- that's outside of the scope of my expertise, to prepare the defense or the prosecution.

Q. Would you understand that laboratory case files are commonly produced in discovery to prosecutors and defense lawyers?

A. I believe so. It's been -- for the testimonies that I've given, my case files -- entire case records have usually been subpoenaed.

Q. In addition to the statute that we're discussing now --

A. Yes.

Q. -- would you agree it's also DPS policy that requires analysts to testify in a manner that's clear and straightforward?

A. Yes, sir.

Q. Did you address these standards anywhere in your affidavit?

A. I don't believe so, and I don't believe that I would have.

Q. Right. Your affidavit doesn't acknowledge the professional standards that require analysts to present accurate and complete data in their testimony; correct?

A. No, because I believe I did present accurate data in my testimony.

Q. And your affidavit doesn't acknowledge the professional standards that require analysts to avoid ambiguous or misleading statements when they testify in court, correct?

A. No, I did not note that.

Q. And we can agree that your testimony did not clearly communicate that there had been, in fact, something awry that you noted with the cooler; correct?

A. Could you rephrase that?

Q. Of course.

We can agree that when you testified in Mr. Colone's trial, your testimony did not include that you noted something awry with the cooler; correct?

A. Correct.

Q. And any --

A. -- it did include, I would have noted that, if it was there, which I did.

Q. And it was -- it was there in your notes, correct?

A. Yes, sir. It was in my notes.

Q. Well, based on your testimony at trial, it's fair to say that the jury never heard about the cooler being left unrefrigerated for 30 days, despite the label that says "refrigerate upon arrival"; correct?

A. Correct.

Q. And you would agree that the jury never heard about the evidence being found in an unidentified liquid, correct?

A. No. The evidence wasn't in the liquid. The evidence itself was dry.

Q. The evidence itself was inside of a Fed Ex envelope that was damp and soggy from this unidentified liquid, correct?

A. Yes. Yes.

Q. And the jury never heard that that liquid was foul-smelling, correct?

A. No, sir.

Q. The jury never heard about the soggy envelope at all, right?

A. No, sir.

Q. And because you didn't test the envelopes inside the Fed Ex envelope for DNA, the jury didn't hear that you tested for DNA; correct?

A. No. And I didn't test them for DNA, and that's not something that I have been trained to do at DPS. We don't test inner packaging for the presence of DNA. It's simply to preserve the evidence.

Q. And the jury never heard that you tested the liquid in the cooler to identify what it was; correct?

A. No. And again, that would not have been

performed at DPS.

Q. The jury never saw photographs of the cooler. That's fair, correct?

A. Correct.

Q. Because none exist?

A. No, and we don't commonly photograph evidence at DPS.

Q. The jury never heard that within the damp and soggy envelope, items of evidence were maintained in paper envelopes; correct?

A. I don't believe so.

Q. Would you agree that if you had reviewed a copy of your case notes prior to your testimony, the jury could have been provided the most complete and accurate testimony about the condition of the evidence?

MR. THOMPSON: Objection, calls for speculation.

A. Had I reviewed my case notes before, I don't believe I would have any reason to mention the outer packaging in my testimony as it didn't reflect or affect the results of the items that were packaged in the inner envelopes. I don't believe I would have mentioned it at all.

Q. (BY MR. SUNDERMEIR) So, it's your understanding that when Mrs. Chase asked you if

anything was awry with the evidence that you encountered, you would not have mentioned that there was a foul unidentified -- foul-smelling unidentified liquid in the cooler?

A. No, because that -- again, this is not the evidence. This is the outer packaging -- layered outer packaging for the evidence; and the evidence itself was preserved in a dry state, clearly packaged and separated with no apparent mold growth. I would have had no reason to note that out of context.

And had I had any concern for contamination, mold growth, again, there would have been a quality report filed; and I would not have released results for these items.

Q. I understand it's your opinion that there wasn't a quality issue or that you didn't visually observe mold with the naked eye. But when Mrs. Chase asked you if anything was awry, there was something awry with the cooler; isn't that correct?

A. With the cooler, yes. And I believe I was very clear that I noted it in my bench notes -- or I would have noted it if something existed.

Q. And the jury never heard the contents of your bench notes at trial, correct?

A. No, sir. And again, I don't testify from my

bench notes; and I have no reason to.

Q. So, it's your understanding -- I'll rephrase. But you would still agree with me that if you had reviewed a copy of your bench notes, the jury could have been provided the most complete and accurate testimony about the condition of the evidence; is that fair?

A. I would disagree with you. You are talking about packaging, not the evidence that I actually testified to. There is nothing in my notes that noted something wrong with the evidence itself.

Q. I would like to introduce what's been marked as Exhibit 157. Mr. Vinson, have you seen this document before?

A. Briefly, it was emailed to me the other day.

Q. And you understand this is a declaration from Andrew McWhorter?

A. Yes, sir.

Q. And you said he was a technical supervisor that you reported to in your time at DPS, correct?

A. Yes, sir.

Q. If we look at the second page, the second full paragraph here, the final line, do you see where Mr. McWhorter states, (reading) However, because Mr. Vinson did not ask for a copy of the case notes, he

was not able to provide the most complete and accurate testimony regarding the condition of the evidence?

A. Yes, I see that.

Q. Do you disagree with Mr. McWhorter's statement?

A. I do, and that is Mr. McWhorter's statement to make. Perhaps, Mr. McWhorter testifies from his case notes. I testify from my laboratory report. All of which my laboratory report and case notes have been technically reviewed.

Q. And setting aside the technical review of those case notes, you agree the jury never heard about the contents of your bench notes; correct?

A. Correct.

Q. And as we discussed and as I believe you would agree with Mr. McWhorter's next statement here, (reading) There is no documented follow-up by Mr. Vinson on the note in the case record concerning the damaged envelope.

Correct?

A. No, I didn't document a follow-up on the case record.

Q. Okay. With that --

A. I had a personal conversation. We don't record personal conversations at DPS, and I would have

no way to track down what may or may not have been said years ago.

Q. Because it's -- it's fair to say you wouldn't remember now, correct?

A. Exactly. Correct.

Q. And there's no documented record of any of those conversations now?

A. No.

MR. SUNDERMEIR: Okay, with that, I have no further questions.

MR. THOMPSON: Want to take a bathroom break, guys?

THE WITNESS: Yeah, that will be great.

THE REPORTER: That sounds good. We'll take ten minutes?

MR. THOMPSON: Sounds good to me.

(RECESS FROM 10:53 A.M. TO 11:10 A.M.)

EXAMINATION

BY MR. THOMPSON:

Q. All right. I'm going to be pretty brief with you.

A. Okay.

Q. I'm just trying to find a good starting point.

You didn't testify falsely, did you?

A. No, sir.

Q. The -- the way Mr. Grayson asked you some of the questions, he kept talking about the internal packaging as being paper envelopes, right? Do you remember that?

A. Yes, sir.

Q. We're not talking here -- and I think you even clarified that at one time, you weren't talking about just paper envelopes but Fed Ex type envelopes; correct?

A. Yes, sir.

Q. That's a very different creature, isn't it?

A. Now, that was the -- the outer envelope. Inside the envelope were just regular paper envelopes and that's -- that's what most forensic evidence is packaged in that I worked over my time at DPS but --

Q. Okay. But those paper envelopes were --

THE REPORTER: Hold on. I missed the last of your question -- the zoom or something messed up -- The last of your answer. I'm sorry.

MR. THOMPSON: I think she's talking to you, Adam.

A. Oh. Sorry.

Yes. So, the Fed Ex envelope was there to protect the inner envelopes, which are paper envelopes. Those paper envelopes contained the

evidence items, and it's common for multiple items of evidence to be submitted together in an outer package because they're packaged in inner packages. So, the evidence doesn't touch itself; and it's just simply to contain it all together.

Q. (BY MR. THOMPSON) That cooler is nothing more than a convenience type packaging in order to get everything together and send it over to the lab, right?

A. Yes, sir.

Q. Inside that is the Fed Ex envelope, right?

A. Yes, sir.

Q. And the Fed Ex envelope is very different from just the simple paper envelope; correct?

A. Yes, sir.

Q. I don't think you had an opportunity, when you were being questioned, to elaborate maybe a little more on the difference between a paper envelope and these Fed Ex packaging.

A. Yes.

Q. Could you elaborate a little bit more?

A. Yes. Fed Ex packaging, which I'm sure most of y'all are aware of or have seen, that I've encountered in the laboratory has almost like a waxy outside, may or may not be paper on the inside. But we're talking about two different materials, and usually things are

sent in those to protect it from the rain. Those are things that I've encountered in the past.

And again, that envelope that I noted was properly sealed with tape, evidence tape. I think I might have even noted some staples on it, but the item was sealed up pretty good.

Q. Is there any indication that the Fed Ex envelope with the actual evidence inside of it had any integrity issues that would have impacted, in your professional opinion, the testing that was to follow?

A. No, sir.

Q. No signs that it had been penetrated at all with sogginess or mold, correct?

A. No. And again, I didn't observe -- I didn't observe any mold; and you know, had mold been present on some of the items, I would have expected it to simply degrade the DNA -- or any possible DNA that could have been on those items. So, if anything, that would have helped to, perhaps, weaken the DNA.

Q. Which brings me to -- Mr. Sundermeir was asking you to reference something from Andrew McWhorter's affidavit. You read that thing, didn't you?

A. Yes, sir.

Q. Do you agree with Mr. McWhorter's assertion in

that affidavit that degradation, if there were any at all -- not saying that there is --

A. I'm not saying that there is.

Q. And even if there had been, degradation, he said, (reading) can cause a contributor's DNA to not be detected in a mixture profile; but it would not cause the opposite, a person's profile, to appear in a mixture.

Do you agree with that?

A. I 100 percent agree.

Q. And do you agree when he says that degradation, if any, (reading) would only have benefitted the defendant as the reported inclusion numbers would have actually been lower?

A. I absolutely agree.

Q. But nevertheless, there was no contamination of those inner items inside that cooler, was there?

A. No, sir. There was no cause to believe that a contamination event had occurred.

Q. So, I think what I'm trying to ask you is: In your professional opinion, the condition of the cooler -- well, let me back up a minute. You examine the cooler, and you have to decide whether or not this evidence goes on for testing; correct?

A. Yes, sir.

Q. Okay. And that's what you did, right?
A. Yes, sir.
Q. Did you find -- would it be safe to say that you considered the condition of the cooler and the lack of contamination penetration of the inner contents, envelopes scientifically irrelevant to any test results, then?
A. Oh, yes. Absolutely.
Q. And if you felt otherwise, you would have noted that; and it would not have gone on for further testing because it has to get through you first, right?
A. Yes. If I felt otherwise, there would have been a quality incident associated with this case; and I would not have proceeded with testing the evidence.
Q. Was refrigeration, in your professional opinion, even necessary for preservation of these particular exhibits?
MR. SUNDERMEIR: Objection, calls for speculation.
MR. THOMPSON: It's his professional opinion.
A. In my professional opinion, I don't believe so.
Q. (BY MR. THOMPSON) Can you tell us why?
A. Almost all items of clothing, particularly the

things submitted in this case -- it was cloth items that I believe I screened and these items -- those are items that are not commonly refrigerated.

Now, I believe what was contained in that cooler were some DNA extracts that were also in a sealed condition; but those were not used for testing. Those were not a part of my testing. If memory is serving me correct, those were included in the same cooler, which may be why the evidence was refrigerated in the first place.

Q. Would I be correct in -- if the prosecutors assert, would I be correct in saying that the bench note was not necessarily a part of the discussions with the DA's office pretrial regarding your role in the handling of evidence?

A. No, it was not.

Q. It was not discussed?

A. No.

Q. With the prosecutor?

A. No, sir.

Q. Is that because you did not believe that it was scientifically significant to the test results themselves?

A. Well, to that point, I didn't review my notes before the testimony. But during the testimony, I

reviewed my report, testified directly from my report. So, had there been a contamination concern in this case, it would have been referenced on the body of my report.

Q. But you don't recall ever having conversations with Ms. Molfino or any other members of the prosecution team about the bench note itself and the condition of the cooler, do you?

A. No, sir.

MR. THOMPSON: I pass the witness.

MR. SUNDERMEIR: Just a few questions, Mr. Vinson.

THE WITNESS: Yes, sir.

RE-EXAMINATION

BY MR. SUNDERMEIR:

Q. Mr. Thompson was talking with you about the nature of the Fed Ex envelope in the cooler.

A. Yes.

Q. Do you recall that?

And today you are describing the nature of that Fed Ex envelope, specifically, how it's made; correct?

A. Yes.

Q. You note that there is a waxy outside, today in your testimony?

A. Yes, and I'm making a generalization. That item is not in front of me. And again, if we would like to recall these items, we can open it all up; and I can tell you exactly the finish of that envelope.

Q. But sitting here today, you don't recall, from your own memory, the finish of that envelope; correct?

A. No, just speaking in generalizations.

Q. And we don't have any photographs of that envelope to refer to today, correct?

A. No, sir.

Q. And Fed Ex makes multiple types of envelopes; isn't that true?

A. Yes, sir.

Q. And in your bench notes about the envelope, you don't describe a waxy outside, correct?

A. No.

Q. In your bench notes you didn't describe what that Fed Ex envelope was made of, correct?

A. No.

Q. All we know about the Fed Ex envelope that was in the cooler was that it was damp and soggy from an unidentified foul-smelling liquid, correct?

A. Yes, sir.

Q. Now, Mr. Thompson asked you whether the contents of that cooler required refrigeration; and I

believe you said there were some items that required refrigeration inside the cooler, correct?

A. Yes, sir.

Q. And we agreed that the cooler was specifically labeled that it should be refrigerated, correct?

A. Yes, sir.

Q. And there were ice packs in the cooler at one point, correct?

A. Yes, sir.

Q. Now, it's your opinion, as you've said today, that there were no integrity issues with the envelope, correct?

A. Yes, sir, just the outside of the envelope. The envelope was in a sealed condition, as noted by my bench notes, had not been opened; and the evidence inside was dry.

Q. Setting aside the envelope was sealed, we agree that the envelope was still damp and soggy; correct?

A. Yes, sir.

Q. Doesn't that indicate that some level of moisture had been absorbed into that envelope?

A. From the outside, yes. But again, not necessarily from the inside; and I didn't describe the inside of the packaging, just that the inner contents

were dry.

Q. Right. We have no description of what the interior of the Fed Ex envelope looked like in your bench notes, correct?

A. Yes. If it would help, I would love to have that evidence; and we can go over it.

Q. Unfortunately, we don't have that today; but we also don't have any photographs to work off of today, correct?

MR. THOMPSON: Asked and answered and repetitive. Just becoming argumentative, Grayson, please.

Q. (BY MR. SUNDERMEIR) Is that correct?

A. No, I don't have the evidence.

Q. Your bench notes don't describe the interior contents as being dry, correct?

A. No, and it wouldn't. That's the normal state of evidence, is dry.

Q. Now, I believe Mr. Thompson had asked you whether or not mold would degrade a DNA sample, and you answered that it would; is that right?

A. I believe it would.

Q. Now, your inspection for mold in this particular case was just a visual inspection; correct?

A. Yes, sir.

Q. And you didn't do any other procedures to test for the presence of mold?

A. No, and I wouldn't have.

Q. And we agree that during your testimony at trial the jury never heard about the damp and soggy Fed Ex envelope, correct?

A. No, they did not.

Q. And they never heard that the cooler wasn't refrigerated when it shouldn't have been, correct?

MR. THOMPSON: Asked and answered.

A. They did not hear that. It was not brought up in trial.

Q. (BY MR. SUNDERMEIR) In your role as a forensic analyst, do you actually test DNA?

A. Yes, I do.

Q. You perform testing on DNA mixtures, as well?

A. Yes, I do.

Q. Okay.

A. But not in this case.

Q. And finally, the interior envelopes that we've been discussing inside of the Fed Ex envelope --

A. Yes, sir.

Q. -- those were, indeed, paper envelopes; correct?

A. Yes. And I think I described that evidence

should be packaged in paper envelopes. That allows breathability while keeping the evidence items separate from one another.

Q. And what do you mean by "breathability"?

A. When an item can breathe, when it gets air, that does not foster mold growth. That's why evidence is usually packaged in paper materials.

Q. So, paper envelopes are permeable; is that fair?

A. It depends on what you are asking.

Q. Liquid is capable of seeping through a paper envelope; is that correct?

A. Absolutely correct.

MR. SUNDERMEIR: All right. I have no further questions. Thank you.

RE-EXAMINATION

BY MR. THOMPSON:

Q. Mr. Vinson, you testified that -- when I asked you a few minutes ago -- that only the extracts which were not tested would required refrigeration. Do you recall that?

A. Yes, sir.

Q. The glove was not an extract, was it?

A. No, sir.

Q. If that Fed Ex envelope was compromised in any

way, you testified that it's not getting past you. Do you remember that?

A. Yes, sir.

Q. But it was secure and intact and wasn't compromised in any way, was it?

A. No, sir.

Q. Nor were the contents inside, correct?

A. No.

Q. There was no sign of any mold or wetness to the exhibits inside the Fed Ex envelope that were found inside the cooler, regardless of the condition of the cooler itself?

A. Yes, sir.

MR. THOMPSON: I pass the witness.

FURTHER RE-EXAMINATION

BY MR. SUNDERMEIR:

Q. Just to be clear, Mr. Vinson, your testimony that there was no mold inside of any of the interior envelopes is based solely on your visual inspection, correct?

A. Yes. And as a forensic analyst, that's the only tool I have to assess for mold. We don't test for molds; and I can't see mold if it's microscopic, of course. But if it's enough to be visual, that's something I can note; and a visual exam is part of my

screening.

Q. And you would agree that there is a difference -- if we're speaking about the Fed Ex envelope, there is a difference between being wet and being soggy; correct?

A. Yes, sir.

Q. Thank you.

MR. SUNDERMEIR: No further questions.

FURTHER RE-EXAMINATION

BY MR. THOMPSON:

Q. Were they wet? If we're going to play with the word "soggy" and "wet," were the contents inside that Fed Ex envelope wet?

A. The contents inside the envelope were not wet; and if they were, that would have been clearly noted in my bench notes.

Q. Okay. And you've been doing this how long?

A. I'm coming up on 11 years.

Q. And you are not blind, are you?

A. No. No, sir.

Q. You've seen wet things before, right?

A. Yes, I have.

Q. And you've seen soggy things before, right?

A. Yes, sir.

Q. And you've seen moldy things before, right?

A. Yes, sir.
Q. But not in this case, right?
A. No, sir. The evidence packages inside that envelope were not visually moldy. They were not wet to the touch.
Q. In your professional opinion, based upon your visual observations and the fact that you passed it along for further testing, the scientific integrity of those items of evidence remained intact, correct?
A. Absolutely, yes.

MR. THOMPSON: I pass the witness.

FURTHER RE-EXAMINATION

BY MR. SUNDERMEIR:

Q. It is just your opinion that the evidence inside of the Fed Ex envelope were -- were not contaminated, correct?
A. Yes, sir. That is my opinion.
Q. We have no record documentation to -- for any testing of the liquid, correct?
A. No, sir.
Q. And you have no personal understanding of what happened inside that cooler in the 30 days before you opened it before your analysis, correct?
A. No, sir. And that cooler was sealed. So, nobody does.

MR. SUNDERMEIR: No further questions. Thank you.

MR. THOMPSON: No questions. Thank you Mr. Vinson.

(THE DEPOSITION CONCLUDED AT 11:28 A.M.)

EXHIBIT G

QUALITY ACTION PLAN (QAP)

1 Scope

This document addresses the process for initiating, implementing, and checking the effectiveness of corrective actions or quality improvements of laboratory nonconformance, deficiencies, and/or work product of an unacceptable quality.

Nonconforming event is when one or more characteristic(s) or condition(s) are observed that do not conform to required specifications in standards, procedures, or policies. Examples of nonconforming events may include: contamination, failed control, observations recorded inaccurately, incorrect conclusions/interpretations, sample switch, sample preparation error, and unsupported conclusions.

Corrective Action is an quality assurance activity or response to bring about continuous improvement; immediate resolution of incorrect results; remediation of nonconforming event(s) in similar work, as appropriate; and minimize recurrence. The intent is to prevent unintended delivery or use of nonconforming work.

Preventive Action is a proactive approach to preventing possible problems or potential nonconformity, preventing the recurrence of problems, managing risk, and improvement.

The Quality Action Plan may also serve as documentation of Preventive Action (PA).

2 Practice

2.1 Quality Action Plan Process

A. Incident Description

1. When a nonconforming event has been identified, the individual responsible for the work must halt testing and/or calibration (and withhold test or calibration reports as necessary) until the scope of the incident has been determined. The Technical Point of Contact, Technical Leader, supervisor, manager, and/or Quality Manager also have the responsibility to identify nonconformance and halt testing.
2. Briefly describe the event and initiate a **Quality Action Plan** (LAB-QA-04), and provide details to the technical and quality management chain of command about the unsatisfactory condition that needs to be corrected including:
   - *a) Related policy/procedure/specification*
   - *b) Time-frame of the condition*
   - *c) Area(s) of impact*
   - *d) Affected work (case, batch, and/or instrument numbers)*
   - *e) If laboratory data/results could have been compromised*

B. Evaluation and/or Root Cause

1. **Evaluate and define the scope and significance of the potential nonconforming event** (e.g. nature of incident, risk, significance, impact to completed and in-progress work). Identify the potential stake holders and assess the potential impact to them. Determine to what extent casework must cease.

a) ***Suspend the procedure/method/process in the laboratory.*** *The Technical Point of Contact, Technical Leader, supervisor, manager, and/or Quality Manager has the authority to suspend work in the laboratory if the event appears broader than the immediate event.*

b) ***Temporarily limit work duties of individual(s) in the laboratory.*** *The Technical Leader, supervisor, manager, and/or Quality Manager have the authority to limit the duties of individual(s) if the event was determined to be a result of unacceptable performance by the scientist/technician.*

c) *Other items that should be documented as part of the evaluation, as applicable:*

i. *If customer was notified to recall evidence or results;*

ii. *If results may be conditionally accepted;*

iii. *If nonconforming event could recur; or*

iv. *If there is concern about compliance to standards/policies/procedures.*

2. **Root Cause Investigation** should go beyond the symptoms to the underlying events or problems. Investigate and identify the potential root cause(s) for the nonconformity. The investigation should seek to detect and correct systemic problems.

C. Action Plan

1. **Procedures Resumed or Resumption of Work.** If work was halted or limited for the laboratory or scientists, authorization to resume testing activities must be given by the Quality Manager, and/or Director.

2. **Consider recall of previous work.** A review and evaluation should be conducted of previous work to determine if any work needs to be recalled or reworked.

3. **Notify customer(s)** as applicable to the following conditions. Documentation of the customer's notification shall be included in the record.

a) *If reexamination of work in progress is necessary and no results have been released to the customer, then it is not necessary to notify the submitting agency of the additional work or technical issue, so long as it has been fully resolved.*

b) *If reexamination occurs and the results of analysis for those samples are different than what has already been released to the submitting agency, an amended report must be issued, which identifies the affected samples, results, and opinions.*

c) *If reexamination of evidence is not possible because the evidence had been lost, consumed by analysis, or returned to the customer, then it is necessary to notify the submitting agency of the issue.*

4. **Correction to the Nonconforming Work.** Rework, regrade (revise or re-state acceptable specifications or conditions for results), or repair of nonconforming work should be taken immediately and documented.

5. **Remedial Actions.** The remedial actions taken and plan should be listed, including who is to perform the action and the associated milestones for

completion, in order to correct the issue and ensure that the issue is not recurring. It is expected that the action plan and supporting documentation will be reviewed to provide both immediate containment of the problem, and to resolve the issue. When individuals are identified as participants to the action plan, they should specifically sign the action plan item(s) to acknowledge their responsibility for them. If an amended or supplemental report was a required action, then include the report as supporting documentation.

Note: Supporting documentation of the completion of action items and relevant communications should be included. Communications such as email and minutes of meetings are objective documentation of when discussions occurred with key stakeholders and what was discussed.

6. The Quality Manager shall approve the Quality Action Plan and any supporting documentation, and submit it to System Quality Assurance for review and approval.

7. New action items or progress/completion of action items after the submission of the original Quality Action Plan should be submitted on a Quality Action Plan Supplement form (LAB-QA-04A) and include relevant milestones towards remediation of the nonconformity.

D. System Quality Assurance Review

1. Review the Quality Action Plan for completeness and assignment of final level of concern. A determination of the status of the Quality Action Plan will be made (e.g. closed vs. open). Additional reviews may be required by management and the respective advisory boards to achieve satisfactory resolution. Additional documentation or information may be requested to clarify or support the plan and it will be documented with a Quality Action Plan Supplement form (LAB-QA-04A).

2. Determine which action plans will require monitoring for effectiveness and direct the review and its documentation. The extent and nature of the monitoring will be based on the likelihood the nonconforming event could recur or that there is doubt about the compliance of the laboratory's operations with its own policies and procedures. Corrective actions require monitoring such as those related to audits, inspections, assessments, or complaints, and those that involve restrictions to examiner(s)/technician(s)/procedure(s).

2.2 Levels of Concern for Nonconforming Work

1. **Level 1** – The nature or cause of the nonconformance directly affects and has a fundamental impact on the work product of the laboratory; **or** there is a concern that if the nonconformance continues for an extended period, the work product of the laboratory or integrity of evidence/test item/calibration item could be negatively affected.

a) ***Examples:***

i. Inaccuracy was a result of information entered on the report by the laboratory and is significant to the test result (technical amended or supplemental report issued, level 1 or 2 depending on significance to outcome);

ii. *The information contained within the report is accurate and complete but is inadequately supported by documentation in the records (level 1 or 2 depending on significance to policy/standards);*

iii. *Compromised evidence, sample, or calibration instrument integrity (level 1 or 2 depending on significance to outcome);*

b) *Such instances require that the Quality Assurance Coordinator and Quality Manager be notified of the potential nonconforming event immediately upon its discovery.*

c) *Subsequent notification of the nonconforming event must be issued to the relevant customers as appropriate.*

d) *Requires disclosure of such occurrences in writing within 30 calendar days to the accrediting body and must include a summary of the occurrence(s) and a statement of actions taken or being taken by the laboratory to:*

i. *Determine the root cause of the problem*

ii. *Determine who may have been impacted by the occurrence(s)*

iii. *Notify those who are potentially impacted by the occurrence(s), and*

iv. *Appropriately correct and/or eliminate the cause of the occurrence(s).*

2. **Level 2** – The nature or cause of the nonconformance does not, to any significant degree, affect the fundamental reliability of the work product of the laboratory or the integrity of evidence, and does not appear to be a persistent issue.

a) ***Examples:***

i. *Isolated contamination event, instrument inefficiency, failed controls, failed process (depends on the severity of the departure)*

ii. *Inaccuracy as a result of information entered on the report by the laboratory significant to the test result (technical amended report issued, level 1 or 2 depending on significance to outcome);*

iii. *Compromised evidence, sample, or calibration instrument integrity (level 1 or 2 depending on significance to outcome);*

iv. *The information contained within the report is accurate and complete but is inadequately supported by documentation in the records (level 1 or 2 depending on significance to policy/standards);*

v. *Incomplete or incorrect analytical work, which may impact other cases (depends on its nature and significance to outcome)*

b) *Such instances require that the Quality Assurance Coordinator/Quality Assurance Specialist/Quality Manager be notified of the event within 30 days from the date of discovery of the potential non-conformity.*

3. **Level 3** Situation, condition, and/or discrepancy have minimal effect or significance and do not significantly affect the fundamental reliability of the laboratory's work.

a) ***Examples:***

i. *A typographical or transcriptional error depending on its relationship to the test/calibration results;*

ii. *Inaccuracy was a result of information reported by the laboratory insignificant to the test result (technical amended report issued, insignificant to the outcome such as insignificant misspelled words, omission of a disposition, and other insignificant clerical oversights)*

b) *Such instances require that the Quality Assurance Coordinator/Quality Assurance Specialist/Quality Manager be notified of the event within 30 days from the date of discovery of the potential non-conformity.*

4. **Level 4** does not constitute a significant concern to the quality system. Typically does not require either a Quality Action Plan or notification. Exception: corrective actions related to systemic, pervasive or recurring issues.

a) ***Examples:***

i. *Non-substantive transcriptional mistakes in the examination record that have been corrected;*

ii. *Correction of notes or draft reports as a result of the review process;*

iii. *Non-technical amended report issued where inaccuracy was a result of incorrect information provided by customer and had no bearing on laboratory conclusions.*

3 Records

Quality Action Plan (LAB-QA-04)

Quality Action Plan Supplement (LAB-QA-04A)

QAP/Customer Complaint LOG (LAB-QA-19)

Preparer

Heather Greco Date: 03/07/2013
Quality Assurance Specialist

Concurrence

Forrest W. Davis Date: 03/07/2013
Quality Assurance Coordinator

Version #	Effective Date	Brief Description of Change(s)
00	12/01/2002	Original Problem; Renamed from Technical Problems, Material taken from LOG 3.6
01	07/01/2003	Minor revision with respect to reference of Quality Assurance Coordinator Modification Section 2 with respect to Technical Leader responsibility given same responsibility as Quality Manager
02	05/01/2005	Major Revision; Title change to Quality Action Plan; Entire document modifications
03	05/29/2012	Major revision – Sections 1, 2, 3, 4, and 5 Minor revision - Title
04	03/11/2013	Major revision

EXHIBIT H

CAUSE NO. 10-10213-A
CCA CAUSE NO. WR-89,538-01

EX PARTE	§	**IN THE 252ND**
	§	
JOSEPH COLONE	§	**DISTRICT COURT OF**
	§	
APPLICANT	§	**JEFFERSON COUNTY, TEXAS**

AGREED FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO ARTICLE 11.071 WRIT APPLICATION

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PROCEDURAL HISTORY

A. Trial Court Proceedings

1. Joseph Colone, Jr. is a person confined under a sentence of death for capital murder pursuant to the judgment of the 252nd District Court of Jefferson County, Texas, in cause number 10-10213. (50 RR: 218; 7 CR: 1146). The Hon. Layne Walker presided over the pretrial proceedings until January 2015, at which point the Hon. Raquel West became the presiding judge in the 252nd District Court. Judge West presided over the remaining pretrial proceedings, as well as the trial, and rendered the judgment on May 8, 2017. (50 RR: 218; 7 CR: 1146).

2. Mr. Colone was charged by indictment with capital murder under Penal Code Section 19.03(a)(6)(A), on September 30, 2010. (1 CR: 2). Mr. Colone requested counsel on August 12, 2010, and Mr. Douglas Barlow was verbally appointed as counsel of record, alongside Mr. Robert Morrow, who was appointed co-counsel. (1 CR: 53). On November 29, 2010, Mr. Joa Sherman was appointed as the attorney of record and Mr. Barlow and Mr. Morrow were relieved by Judge Layne Walker. (2 RR: 6). On July 13, 2011, Mr. Sherman filed a Motion to Withdraw, (6 RR: 1), and on August 15, 2011, the trial court reappointed Mr. Barlow and Mr. Morrow as counsel. (2 CR: 264). Mr. Barlow and Mr. Morrow withdrew from the case on October 27, 2014. (3 CR: 422–23). Subsequently, Mr. Robert Loper was appointed by the Court on October 29, 2014. (*Id.* at 425). Mr. Gerald Bourque was appointed by the Court on January 6, 2015. (Initial Appl. for Writ of Habeas Corpus ("Application"), Appl. Ex. 121, June 10, 2019) (Order Appointing Gerald Bourque); Deposition Transcript of Gerald Bourque ("Bourque Tr.", Sept. 14–15, 2020, at 10:00).

3. General voir dire began on March 20, 2017. (22 RR: 1). Jury selection concluded on April 18, 2017. (40 RR: 137). The guilt-innocence stage of the trial began on April 25, 2017. (42 RR: 1). The indictment alleged that Mr. Colone shot and killed Mary Goodman and Briana Goodman in the same transaction on July 31, 2010. (1 CR: 2).

4. At trial, the State's theory was that Mr. Colone killed Mary Goodman because weeks earlier she had identified him to police as the perpetrator of a robbery and that he shot Briana Goodman because she witnessed her mother's slaying. (43 RR: 85; 48 RR: 143). Mary Goodman's boyfriend Robert Fontenot and Briana Goodman's boyfriend Roy Reed III both testified that they were present at Ms. Goodman's home on the morning of the shooting. Both men, as well as a neighbor David Piert, described the gunman as being a black man dressed in black, including a black hoodie and black mask. (43 RR: 147, 175, 237; 44 RR: 103, 157, 159, 196, 242, 259). Mr. Fontenot said the gunman had a towel wrapped around his gun and wore black gloves. (44 RR: 194, 243). While Mr. Reed and Mr. Piert could not identify the shooter, (44 RR: 103, 114, 136, 141, 162–63), Mr. Fontenot claimed that he could identify the perpetrator based on the perpetrator's eyes alone. (43 RR: 126–27, 152; 44 RR: 212–14). As a result, when he viewed a photo array and identified Mr. Colone's picture, he covered the top and bottom of the faces in the photographs with index cards so that he only looked at the suspects' eyes. (43 RR: 126–27; 44 RR: 212–14).

5. The State also presented evidence that police found a blue towel outside Ms. Goodman's home and a glove by the entrance to a bathroom that appeared to have been the scene of a struggle. (43 RR: 75–77, 203–04, 207). A DNA analyst from the Texas Department of Public Safety (DPS)'s crime laboratory in Houston testified that Mr. Colone could not be excluded as a contributor to mixtures of DNA found

on the towel and glove based on likelihood ratios calculated by the probabilistic genotyping program STRmix™. (47 RR: 107–112, 123–25, 126–27, 131).

6. Eleven days after the charged offense, Mr. Colone was arrested in Houston with a woman named Ebony Andrews. (43 RR: 220; 44 RR: 69–71). That same day, police seized Ms. Andrews' car, a white Dodge Charger, in a Beaumont parking lot. (43 RR: 223–24, 262). After seizing the car, crime laboratory technicians retrieved a pair of eyeglasses and collected swabs and cuttings from the car's interior. (46 RR: 20–26). According to the DNA analysts, Ms. Goodman was identified as being the source or contributor to DNA material found in Ms. Andrews' vehicle, (46 RR: 126, 129–30), and Mr. Colone was identified as being the source of DNA on the eyeglasses, (47 RR: 106).

7. The State rested on May 1, 2017. (47 RR: 159). The Defense rested the following day. (48 RR: 1). After closing arguments, the jury retired for deliberations. *Id.* at 164. Two days later, on May 4, 2017, the jury found Mr. Colone guilty of capital murder. (49 RR: 6). The punishment phase of the trial began the same day and the State presented nine witnesses before resting. (49 RR: 210).

8. On May 8, 2017, the Defense presented eight witnesses–three correctional officers from the county jail, two parole officers, and three of Mr. Colone's family members, before resting. (50 RR: 169). The jury returned a verdict of "Yes" on the first special issue and "No" on the second special issue. (*Id.* at 217–218). Judge West formally sentenced Mr. Colone to death. (*Id.* at 218).

B. State Appellate Court Proceedings

9. Pat McCann was appointed as appellate counsel on May 17, 2017. (7 CR: 1154). Mr. Colone's appellate brief was filed with the Court of Criminal Appeals on September 24, 2018. The State filed its reply on January 23, 2019. On May 8, 2019,

the Court affirmed the trial court's judgment. *Colone v. State*, 573 S.W.3d 249 (Tex. Crim. App. 2019).

C. State Postconviction Proceedings

10. On May 17, 2017, the trial court appointed the Office of Capital and Forensic Writs ("OCFW") to represent Mr. Colone for the purposes of investigating and preparing an application for writ of habeas corpus. (7 CR: 1155). On June 10, 2019, Mr. Colone filed his application for habeas relief along with supporting exhibits. *See* Application.

11. On July 12, 2019, Mr. Colone filed a motion to recuse the trial judge from the postconviction proceedings. Mot. to Recuse the Trial Judge from Presiding Over Postconviction Proceedings, July 12, 2019. The Hon. Raquel West then voluntarily recused herself from the proceedings on July 17, 2019. Order on Mot. to Recuse and to Refer to Presiding Judge, July 17, 2019. In her place, the Hon. K. Michael Mayes, Senior District Judge, 410th District Court, was appointed to sit in the 252nd District Court for the purposes of presiding over the postconviction proceedings in Mr. Colone's case. Order of Assignment by the Presiding Judge, July 23, 2019.

12. The State filed its reply to Mr. Colone's Application and related exhibits on December 6, 2019. State's Answer to Writ of Habeas Corpus Filed Under Article 11.071 ("State's Answer", Dec. 6, 2019).

13. On December 26, 2019, the Court issued an order designating several controverted and previously unresolved factual issues for resolution. (Designation of Controverted, Previously Unresolved Factual Issues Material to the Legality of Applicant's Confinement, Dec. 26, 2019). The Order scheduled an initial evidentiary hearing for January 24, 2020, (*id.* at 7), however that proceeding was rescheduled to begin on February 24, 2020. (Unopposed Mot. to Continue Hr'g., Jan. 3, 2020).

14. On February 24, 2020, the initial evidentiary hearing began. On that date, twelve (12) members of the jury panel testified in the Court's chambers. (Tr. of Hearing in Chambers, Feb. 24, 2020 (Sealed)). During the lunch break, the Court advised the parties that testimony from any remaining witnesses would occur in depositions that would be scheduled at a later time.

15. Weeks later, an outbreak of the novel coronavirus COVID-19 swept across the country. On March 13, 2020, Governor Abbott declared a state of disaster for Texas. Thereafter, the Texas Court of Criminal Appeals and the Texas Supreme Court issued an order permitting Texas courts to "[m]odify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than 30 days after the Governor's state of disaster has been lifted," and *requiring* courts to do so in order "to avoid risk to court staff, parties, attorneys, jurors, and the public." (*See* First Emergency Order Regarding the COVID-19 State of Disaster, Tex. Crim. App. Misc. Docket No. 20-007, Tex. Misc. Docket No. 20-9042 (March 13, 2020)).

16. On March 27, 2020, Mr. Colone filed a motion requesting court reporting and transcription services for the planned depositions. (Mot. for Ct. Rep. Services, Mar. 27, 2020). In response, the Court issued an order addressing logistical and procedural matters relating to the depositions. (Order on Applicant's Mot. for Ct. Rep. Services, April 17, 2020). In that Order, the Court ruled that the depositions would proceed remotely using Zoom videoconferencing services. *Id.*[1]

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[1] Beginning in April 2020, the OCFW, on Mr. Colone's behalf, also served various subpoenas duces tecum and records requests seeking potential *Brady* material and related information about the State's witness Robert Fontenot. This resulted in additional litigation. *See* City of Beaumont's Obj. to Appl. For Subpoena Duces Tecum and, If Needed, Mot. to Quash and Mot. for Protective Order, May 22, 2020; City of Beaumont's Obj. and Mot. to Quash Appl. For Subpoena Duces Tecum and, If Necessary, Request for an In Camera Inspection and Protective Order, June 1, 2020; Mot. to Enforce Subpoena Duces Tecum, June 8, 2020; Order on City of Beaumont's Obj. to Appl. for Subpoena Duces Tecum and, If Needed, Mot. to Quash and Mot. for Protective Order and Applicant's Mot. to Enforce Subpoena Duces Tecum, June 9, 2020; City of Beaumont's Resp. to

17. Depositions then occurred using Zoom videoconferencing services for the following witnesses in *Ex parte Colone*, No. 10-10213-A: Jefferson County Sheriff's Office Lt. Shaun Miller (Aug. 10, 2020); Jefferson County Sheriff's Office Deputy Sharon Bill-Williams (Aug. 10, 2020); Margaret Kovera, Ph.D. (Tr. of Margaret Kovera, Aug. 11, 2020); Beaumont Police Dept. Officer David Apple (Aug. 17, 2020); Beaumont Police Dept. Officer Jeffery Busby (Aug. 17, 2020); Beaumont Police Dept. Sgt. John Kenna (Aug. 17, 2020); Robert Loper, Esq. (Sept. 1–2, 2020); Gerald Bourque, Esq. (Sept. 14–15, 2020); Stephen Adam Vinson (Sept. 22, 2020); William Watson, Ph.D. (Sept. 23, 2020); Jefferson County Sheriff's Office Det. Brigette Morse (Sept. 29, 2020); Jefferson County Sheriff's Office Capt. Reginald Boykin, Sr. (Sept. 29, 2020); Jefferson County Sheriff's Office Sgt. Larry Gilder (Oct. 1, 2020); Dan Krane, Ph.D. (Oct. 5, 2020); Nathan Adams (Oct. 7, 2020). The parties have not concluded evidentiary development of all the issues designated by the Court.

18. Objections raised during the depositions were subsequently litigated. Mr. Colone filed written pleadings supporting objections in each deposition, and the

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the Office of Writ Counsel's Mot. to Enforce Subpoena Duces Tecum Pertaining to the Police Officers' Personnel Records, June 26, 2020; Order on City of Beaumont's Obj. and Mot. to Quash Appl. for Subpoena Duces Tecum and, If Necessary, Request for an In Camera Inspection and Protective Order, June 29, 2020; Order Following in Camera Inspection of Personnel and Civil Service Files of Beaumont Police Department, July 8, 2020; City of Beaumont's Mot. for Protective Order as to Beaumont Police Officers Dep., and, in the Alternative, Obj. and Mot. to Quash Said Dep., July 24, 2020; Reply to City of Beaumont's Opp'n, Obj., and Mot. for a Protective Order Regarding Beaumont Police Officer Video Dep., July 29, 2020; Order Following in Camera Inspection of Subpoenaed Records and Case Files of Beaumont Police Department, July 29, 2020; Mot. for Disclosure of Evid. in the Possession of the State, Sept. 6, 2020; Mot. to Compel Release of Texas Dep't of Family and Protective Services and Child Protective Services Records, Sept. 15, 2020; Order on Colone's Mot. to Compel Release of DFPS and CPS Records, Sept. 24, 2020; Mot. to Enforce Subpoena Duces Tecum, Oct. 13, 2020 (Sealed); Notice of Filing, Oct. 13, 2020 (Sealed); Order on Applicant's Mot. to Enforce Subpoena Duces Tecum, Oct. 20, 2020 (Sealed).

State filed responses to those objections. Ultimately, the Court overruled all objections.

19. Dr. Krane, Dr. Watson, Mr. Vinson, and Mr. Adams testified about the DNA evidence in this case, as did Mr. Colone's trial lawyers, Mr. Bourque and Mr. Loper. After this testimony, the State reconsidered its previous opposition to the *Brady* claim presented in Claim One, Parts D-E, regarding undisclosed information about the DNA evidence, as well as the related *Chabot* claim in Parts J-L of Claim One. Thereafter, both parties resolved to jointly submit agreed findings of fact and conclusions of law as to certain limited facts recommending relief on those parts of Claim One. In doing so, the parties agreed that it was appropriate to defer further development and litigation of additional facts underlying those claims as well as all other Claims, since their resolution would needlessly consume significant additional resources and the existing record already indicated that relief was warranted on the basis of limited facts agreed to under the *Brady* and *Chabot* issues in Claim One, Parts D-E and J-L. Because the record supports this conclusion, the parties are in agreement, and the Court approves same, that additional development and findings of fact and conclusions of law with respect to the above Parts of Claim One and all other Claims in the Application are unnecessary and reserved at this time. Therefore, in the interest of judicial economy and consistent with each party's respective assessment of the record, this Court makes the following limited findings of fact and conclusions of law with respect to Claim One, Parts D-E and J-L.[2]

II.
MATERIALS CONSIDERED

[2] Because of the agreement of the parties, that is approved by this Habeas Court, that the Applicant is not waiving any additional findings and conclusions that might be issued by this Court on Claim One, including Parts D-E and J-L, or on any of his remaining Claims, or his right to pursue and present additional evidence in support of same, this Court respectfully requests that if the Court of Criminal Appeals does not grant relief on the limited grounds submitted, it remand this case for further development and consideration of all Parts of all Claims.

20. This Court took judicial notice of all records, filings, testimony and depositions in this proceeding, and the Clerk and Reporters will be instructed to file all of said materials with the Court of Criminal Appeals. All exhibits attached to Mr. Colone's Application and the State's Answer are admitted, as are the exhibits offered during the evidentiary hearing and depositions. (Tr. of Hearing in Chambers, at 291–92). The Court accepted the exhibits, including affidavits and declarations, as substantive evidence and has considered all testimonial and documentary evidence received during the depositions. The Court visually observed all the testimony except for the deposition of the trial lawyers' DNA expert, Dr. William J. Watson.

III.
FINDINGS OF FACT

21. Because Parts D-E and J-L of Claim One involve either the same or interconnected events, the Court has combined its findings of fact relevant to both issues within this one section.

A. The Glove and Towel Found at the Scene of the Crime and the DNA Results Obtained from Them Were the Centerpiece of the State's Case

22. The Court finds that DNA analysis was central to the State's case during the guilt-innocence phase of Mr. Colone's trial. Of this analysis, the most prominent results were the opinions offered by a forensic analyst from the Texas Department of Public Safety (DPS) that Mr. Colone could not be excluded as a contributor to mixtures of DNA found inside a glove and on a towel. The DNA on the glove and towel were the only items of physical evidence that appeared to place Mr. Colone at the scene at the time of the crime, and the prosecution highlighted them repeatedly throughout the trial. (E.g., 42 RR: 24, 26, 29, 30, 31, 34, 37, 41, 42).

23. The prosecution's theory was that the shooter used the towel to conceal his gun and removed the glove to open a bathroom door when Ms. Goodman sought to hide in there. (42 RR: 42); (44 RR: 194); (48 RR: 139–40). At the State's request, two laboratories analyzed the glove and towel, but only one—the DPS laboratory—was able to draw any conclusions about the DNA mixtures on the glove and towel. (Appl. Ex. 183 at 66–69, 89–91); (9 RR: 5); (42 RR: 42); (44 RR: 13); (46 RR: 143, 156–57); (47 RR: 109, 112, 124, 126, 131). Relying on the probabilistic genotyping software STRmix™, DPS reported that Mr. Colone could not be excluded as a possible contributor to DNA mixtures found inside the glove and on the towel. (47 RR: 112, 124, 126, 131).[3]

24. Because the DNA results were central to the State's case, the prosecutors made efforts throughout the trial to assure the jury that nothing had compromised the DNA on the physical evidence in the years between their collection at the scene by police in 2010 and their examination by DPS for DNA in 2014. During jury selection, the State made a point of determining which panelists were familiar with DNA, (22 RR: 50–51; 23 RR: 35), and introducing the idea that the testimony would show that the DNA evidence had been carefully preserved:

> If and when y'all hear DNA, you're gonna hear about a chain going from – you know, we found the evidence from point A and it's to point B and point B to point C, and it goes all the way to point Z. And, finally, Z, they tell you, well, that is what that means. And then all – from point

[3] Using an Identifiler Kit to amplify the DNA mixture inside the glove, DPS identified a partial DNA profile that appeared to come from two people. (47 RR: 124). According to the STRmix™ software, obtaining that mixture profile would be 691,000 times more likely if the DNA came from Joseph Colone and one unknown individual than if the DNA came from two unrelated, unknown individuals. *Id.* When amplified with a MiniFiler Kit, the mixture appeared to come from three people. (*Id.* at 131). According to the software, obtaining that mixture profile would be 33.3 million times more likely if the DNA came from Joseph Colone and two unknown individuals than if the DNA came from three unrelated, unknown individuals. (*Id.* at 131). On the towel, DPS identified a four-person mixture and reported that obtaining that mixture profile would be 7.94 million times more likely if the DNA came from Joseph Colone and three unknown individuals than if the DNA came from four unrelated, unknown individuals. (*Id.* at 126).

A to point Z is boring but the Z finally gets you. Does that make sense? *It's designed to make sure there's integrity to the system.*

(23 RR: 32) (emphasis added). Then, in opening statements, the prosecution touted its DNA evidence as "cutting edge" and assured the jury that testimony from the laboratory staff was "necessary" because "[i]t shows you the integrity of the system and how everything is maintained in a very orderly fashion." (42 RR: 40, 42).

B. The State Elicited and Relied on Critical Testimony About the Preservation of DNA Evidence at Trial

25. During the State's case-in-chief, prosecutors elicited testimony from multiple witnesses about the glove and the towel being found at the scene of the crime, collected, and placed into secure evidence storage. (42 RR: 68–69, 74, 79–82, 84, 212–13); (43 RR: 76, 204, 207–08). The State next elicited testimony that the glove, towel, and other items of physical evidence had been sent to a private laboratory and then returned and stored in a freezer at the Jefferson County Regional Crime Laboratory until 2013 when they were delivered in a sealed Styrofoam cooler to the DPS Crime Laboratory in Houston. (45 RR: 43–46, 148–49); (46 RR: 42–43); (47 RR: 32–34). This testimony included the following direct examination of the DPS analyst Stephen Adam Vinson about what he found when he first came into contact with both the Styrofoam cooler and a cardboard box that also contained physical evidence from Mr. Colone's case:

Q. When you received all of the items in this case, did they come to you in a sealed condition?

A. I believe so. If they were not sealed, it would have been noted in my laboratory notes.

Q. Okay. And just for the jury's knowledge, in State's Exhibit 115, right here we see just a white cardboard box. We have previously referred to this last week as a convenience container, basically something that's large enough to hold all of the evidence that an agency may be submitting?

A. Yes, ma'am.

Q. And did you come into contact with this item, as is designated by your unique initials, the cause number and the item number?

A. Yes.

Q. And had there been something awry with it, had it not been sealed or something like that, you would have noted that, but you did not in this case?

A. The Houston DPS laboratory has an evidence receiving department. So, before any analyst upstairs in the laboratory actually sees the evidence, they verify that it has shipped correctly and it's in a proper sealed state or else they don't admit it to the laboratory.

Q. Okay. And, again, just for purposes of the record, in State's Exhibit 93, the same with this convenience container, which is a Styrofoam cooler. Do you see there your markings and the date, as well?

A. Yes. Yes.

Q. Same principle applies to this piece of evidence?

A. Yes, ma'am.

(47 RR: 32-33).

26. With this foundation in place, the prosecution highlighted the glove, towel, and the DNA results at least twenty times during closing arguments. (48 RR: 138, 139, 140, 141, 142, 143, 146, 151, 155, 156; *see, e.g.*, 48 RR: 140) ("They can't explain away the DNA."); (*id.* at 141) ("Everywhere we go, his DNA."); (*id.* at 141) ("He's on a glove with Mary Goodman's blood on the outside, his on the inside, by where she's shot. Think [about] it."); (*id.* at 146) ("His DNA's on the inside of the glove outside the door where Mary Goodman is killed."); (*id.* at 155) ("[T]he DNA nails him."); (*id.* at 140) ("Notice–I don't think they said one thing about" the likelihood that Mr. Colone could not be excluded as a contributor to the mixture of DNA found on the glove).

27. During jury deliberations, jurors requested the crime scene diagram that showed where evidence was found in the house and around the property, as well as photos of the towel and evidence in the house, which would have included State's

Exhibits 15-18, and 21, depicting the glove. (7 CR: 1124, 1127, 1128). They also asked to see the State's DNA exhibits again on the day they returned their verdict. 7 CR: 1130 (Question 22).

C. After Trial, Mr. Colone Discovered a Bench Note that Documented Issues with the Storage of Important Items of Physical Evidence, Including the Glove, Towel, and Other Physical Evidence

28. After being appointed to investigate postconviction claims, the OCFW served a subpoena seeking DPS's laboratory case files from the DNA testing and analysis that had been performed for the State prior to trial but had not been provided in discovery or independently obtained by Mr. Colone's trial counsel. (Appl. Ex. 231, at 1-7) (OCFW subpoena to DPS); (Tr. of Gerald Bourque ("Bourque Tr.") at 19); (Tr. of Robert Loper ("Loper Tr.") at 23–25); (Tr. of William Joseph Watson, Ph.D. ("Watson Tr.") at 90, 114–15). When DPS complied with the subpoena, (Appl. Ex. 231, at 8-9) (DPS letter in response to OCFW subpoena), Mr. Colone received the DPS case files, including bench notes, for the first time.

29. Although Mr. Vinson's trial testimony did not indicate it, the case file obtained by the OCFW revealed that something was awry when Mr. Vinson first examined the Styrofoam cooler, and he had in fact noted it. (Transcript of Stephen Adam Vinson ("Vinson Tr.") Sept. 22, 2020, at 12:54). In his bench notes, Mr. Vinson wrote:

Note: Despite stickers indicating to "refrigerate upon arrival", I pulled this item from a regular shelf in the vault. The packs are room temperature, the FedEx envelope is damp and soggy, and there is foul-smelling water/liquid along the bottom of the container. I will inquire as to why the storage instructions clearly indicated on the outside of Item 01 were ignored. The liquid will be soaked up with paper towels and discarded.

(Appl. Ex. 1); (Appl. Ex. 1b); (Appl. Ex. 183 at 403); (Vinson Tr. at 17).

30. As the bench note documented, contrary to the instructions on the cooler and the manner that Jefferson County's crime lab had maintained it, DPS had not refrigerated the cooler. (45 RR: 50, 52); (46 RR: 42–43); (Appl. Ex. 1); (Vinson Tr. at 16–17). Instead, the cooler went unrefrigerated for thirty days before it was examined by Mr. Vinson. By then, the cold packs had thawed. (Appl. Ex. 1; Vinson Tr. at 17). An unidentified "foul-smelling" fluid coated the bottom of the cooler. (Appl. Ex. 1); (Vinson Tr. at 17). And the FedEx envelope containing, among other items, the glove, towel, and a cutting from one of Mr. Colone's shirts, each packaged in separate breathable paper envelopes, was "damp and soggy." (*Id.*)

31. The note indicated that the only items of physical evidence that potentially linked Mr. Colone to the crime scene were left unattended for thirty days in a warm, wet, dark, and foul-smelling container before DPS obtained DNA material from the evidence. (*Id.*); (Tr. of Dr. Dan Krane ("Krane Tr.") at 137). This neglect

contradicted the State's narrative that the forensic evidence had been "maintained in a very orderly fashion." (*See* 42 RR: 40); (45 RR: 43–46); (47 RR: 32–33). Instead, as addressed *infra* in Section E, the mishap in the cooler potentially compromised the reliability of this important evidence in more ways than one. (Krane Tr. at 138, 14, 144, 147); (Tr. of William Joseph Watson, Ph.D. ("Watson Tr."), Sept. 23, 2020, at 92–93, 121–24); (Bourque Tr. at 231).

D. The Bench Note Revealed that the Analyst's Testimony Was Misleading and Evasive, Was Not Candid, and Was False

32. In postconviction proceedings, the DPS analyst Vinson testified that he had not reviewed his notes and had forgotten about the cooler's condition by the time he testified in Mr. Colone's trial. (Vinson Tr. at 12-13). He had appeared at the trial on the same day as two other DPS witnesses, the DNA section's technical leader Andrew McWhorter and the DNA analyst Tanya Dean. (47 RR 31, 58, 93). At that time, Mr. McWhorter and Ms. Dean "were in possession of the hard copy" of DPS's case file, including Mr. Vinson's report and notes (Resp't Ex. 13, at 2), and "would have provided the case record to Mr. Vinson had he asked for it." (Id.). During the postconviction proceedings, Mr. Vinson claimed that he would not typically review bench notes before testifying unless he was specifically asked to do so by prosecutors or he was aware of a problem that affected the evidence's quality. (Vinson Tr. at 44, 46). Mr. Vinson no longer worked for the DPS lab at the time of his trial testimony. (*Id.* at 6-8). At no time before or during trial did McWhorter or Dean produce the Vinson bench notes to the defense attorneys, or advise the defense attorneys of the existence of the Vinson bench notes or that they had brought them to trial.

33. At trial, the prosecutor first asked Mr. Vinson if "all the items in this case" arrived at the laboratory "in a sealed condition." (47 RR 32). The analyst, after saying that he believed the items all had arrived in sealed containers, added that, "[i]f

they were not sealed, it would have been noted in my laboratory notes." (*Id.*) He did not state that he had not reviewed those notes and had no memory of what those notes said. Nor did he say anything that would have warned the defense or jury that he did not know the answer to the prosecutor's question. Indeed, based upon his answer, a juror could reasonably have understood the opposite to be true, namely that the analyst had reviewed his notes before testifying and had confirmed that there was nothing in those notes about evidence containers being unsealed.

34. Next, the prosecutor asked the analyst to confirm that he had not noted anything awry when he first encountered the evidence. (*Id.* at 33). Instead of answering the question by addressing his own experience, as the question asked him to do, the analyst focused attention on the laboratory staff who were supposed to make sure packages of evidence were properly shipped and sealed when they arrived at the DPS lab. (*Id.*). If the analyst did not remember and had not reviewed his notes, a candid response would have been either that he could not recall the actual condition of the evidence containers or that he had no memory of what his notes said. Regardless of whether his testimony was an attempt to feign or hide his lack of knowledge and preparation, or to hide the substance of the bench notes, the Court finds that his answers to the prosecutor's questions at trial about the condition of the evidence containers were misleading and evasive, were not candid responses to the questions posed, and in fact were false.[4]

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[4] The trial prosecutor later asked a similar question about what the analyst had noted in regard to a different evidence container. (47 RR 42) ("Did you, in fact, note everything on the outside of the packaging and note that it was in a sealed condition and then transfer it down the line for additional processing, if need be?"). The analyst answered, yes. (*Id.*) Again, nothing in the analyst's answer indicated that he had not reviewed his notes or could not remember what he had noted therein. In contrast, when the analyst was cross-examined by Mr. Colone's trial counsel, he volunteered that he did not know the answer to the defense's question and would need to check for the relevant details in his notes. (47 RR 46-47). The fact that the analyst asserted that he could not remember information in his notes when the defense asked, but not when the prosecution asked, supports the Court's conclusion that the analyst's answers were misleading, evasive, less than candid, and false.

E. The Bench Note Was Favorable to the Defense Because It Documented the Potential for Degradation and Contamination in the DNA Results

35. By failing to follow the instructions on the cooler, the laboratory staff deviated from recommended laboratory practices that call for DNA evidence to be kept cool and dry. (Krane Tr. at 133–37); (Appl. Ex. 198 at 3–4) (John M. Butler, Forensic DNA Typing 38–39) (Mark Listewnik et al. eds., 2nd ed. 2005) ("Carelessness or ignorance of proper handling procedures during storage and transport of DNA from the crime scene to the laboratory can result in a specimen unfit for analysis. . . Most biological evidence is best preserved when stored dry and cold."); (Appl. Ex. 200 at 6) (William C. Thompson et al., *Evaluating Forensic DNA Evidence: Essential Elements of a Competent Defense Review*, THE CHAMPION, April 2003, at 21) (stating that degradation of DNA "can occur rapidly when the samples are exposed for even a short time to unfavorable conditions, such as warmth [or] moisture."). While not all DNA evidence must be refrigerated, no witness recommended refrigerating or freezing DNA material and then thawing and storing that evidence for thirty days in moist conditions like those found inside the cooler. (Krane Tr. at 175–76, 187); (Watson Tr. at 122).

36. In response to these concerns, Andrew McWhorter, the DPS Crime Laboratory–DNA Section Supervisor/Technical Leader, submitted an unsworn report. (Resp't Ex. 13).[5] Mr. McWhorter's report observed that, while DPS could

[5] Mr. McWhorter's report was attached to a one-paragraph "affidavit" from Mr. McWhorter. (Resp't Ex. 13 at 1). The "affidavit" did not swear to or otherwise address the truth or accuracy of the report's contents. Combined with his failure to produce to counsel the Vinson bench notes that he had in his possession when he, Tanya Dean and Mr. Vinson testified at trial, this Court finds that Mr. McWhorter's unsworn report has questionable persuasive value. On that point, since the parties' joint request for relief is limited to and based on other facts, and Mr. McWhorter, Ms. Dean and other "members of the DPS DNA lab" have not yet been deposed (see Resp't. Ex. 16) (Aff. of Rachel Grove at 1, 3), this Habeas Court makes no additional Findings or Conclusions at this time as to McWhorter's credibility on all the issues he addressed. In the event Mr. Colone is not granted relief as is jointly requested herein, and this matter is remanded, this Court will allow

only speak to the integrity of the evidence while it was under the laboratory's control, the laboratory's case file did not indicate that the evidence necessarily came into contact with moisture or liquid. (*Id.* at 2). He stated that the glove, towel, and swabs in the cooler would not have required refrigeration pursuant to DPS policy or the Biological Evidence Preservation Handbook: Best Practices for Evidence Handlers (NISTIR 7928). (*Id.*) Although he conceded that the DNA extracts in the cooler should have been refrigerated, he observed that they were sealed in a plastic baggie and were ultimately not used by the lab for testing. (*Id.*)

1. The Issue of DNA Degradation

37. The expert testimony presented by the OCFW at the very least contradicted DPS's assurances and explained that, as the cooler thawed, the conditions inside became moist, warm, and conducive to the destruction or degradation of DNA evidence. (Krane Tr. at 52, 136–39); (Watson Tr. at 93, 121–23); (Appl. Ex. 200 at 6). Because the cooler's contents were initially frozen, chilled by cold packs, and then left unrefrigerated, condensation from the warming cold packs may have introduced moisture into that closed environment. (Krane Tr. at 139, 187–88). Combining moisture and warmth was "especially problematic," according to Dr. Krane, as each factor alone could degrade DNA. (*Id.* at 139).[6]

38. This potential for degradation undermines the reliability of DNA results in multiple ways, according to the testimony from Drs. Krane and Watson. In evidence

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further development of the case and make further Findings and Conclusions in that regard and on all those issues. *See* footnote 13, *infra*.

[6] Any suggestion that the FedEx envelope might have been impermeable did not negate concerns because impermeable bags trap moisture and increase the likelihood of DNA material within them being destroyed by degradation. (Watson Tr. at 120). For this reason, experts advise that laboratories avoid storing DNA material in plastic bags. *Id.* ("[I]f they said that they received all their dried stains in sealed plastic containers that are impermeable, then there would be a big problem because that's not appropriate evidence storage."); (Appl. Ex. 198 at 3) (Butler, Forensic DNA Typing) ("Plastic bags should be avoided because water condenses in them, especially in areas of high humidity and water can speed the degradation of DNA molecules.").

samples that contain DNA from multiple sources—such as the mixtures found on the glove and towel—degradation of DNA skews or distorts the data, and this in turn can confound analysts' ability to draw firm conclusions about the individual sources of the remaining DNA. (Krane Tr. at 53–54, 139–41); (Watson Tr. 123–24). As stated in the article *Evaluating Forensic DNA Evidence*:

> Degraded samples can be difficult to type. . . In mixed samples, it may be impossible to determine whether the alleles of one or more contributors have become undetectable at some loci. Often analysts simply guess whether all alleles have been detected or not, which renders their conclusions speculative and leaves the results. . . open to a variety of alternative interpretations.

(Appl. Ex. 200 at 7). While all the DNA experts agreed with Mr. McWhorter's statement that degradation would not cause a suspect's DNA to appear in a mixture, (Resp't Ex. 13 at 2), in Dr. Krane's view, degradation added a critical caveat to the DNA analysis: the loss of DNA evidence could deprive a suspect of the ability to prove that someone else's DNA, and not his, was present in the mixture. (Krane Tr. at 140, 188). Dr. Watson similarly testified that degradation could destroy evidence that might exculpate a suspect and inculpate another person. (Watson Tr. at 124) ("He may not be the one that did it. It might be the person that's at the lower level of that mixture. That's the reason we want to preserve the evidence.").

39. Dr. Krane testified that the degradation of DNA in a mixture could be particularly prejudicial in a case such as Mr. Colone's where an eyewitness initially named Mr. Colone's uncle as a suspect. (43 RR: 152, 165; 48 RR: 103; Krane Tr. at 106, 139–41). That is because relatives typically share some portions of their DNA profiles. (Krane Tr. at 106–07) ("[T]o the extent to which individuals are related to each other, we expect that allele sharing to be increasingly common, increasingly prevalent."); (Watson Tr. at 37) ("Relatives share . . . more genetic information than random individuals do. . . and that does impact statistics when you include that in

the mix."). If degradation destroyed part of the DNA material in a DNA mixture, the remaining incomplete DNA profile, when combined with the DNA from other unidentified contributors to the mixture, could appear to belong to a relative of the actual source of the DNA. (Krane Tr. at 106–07, 140–41). In other words, incomplete DNA would make it more difficult to determine which of two related suspects was the source of the remaining DNA since those suspects would share at least some of the same DNA—especially when DNA contributed by other sources further muddied the picture by adding DNA material that could be wrongly attributed to one of the related suspects. (*Id.* at 106–07, 141).

40. The issue of degradation also weakened the State's reliance on DPS's results in another way. In Mr. Colone's case, DPS relied on the probabilistic genotyping software STRmix™ to analyze DNA mixtures. (24 RR: 11, 16); (47 RR: 68). However, DPS could not use STRmix™ to analyze DNA mixtures involving more than four contributors because of limitations with DPS's computers. (47 RR: 75–76). As a result, DPS could not assess whether or not STRmix™ produced reliable results when it examined mixtures containing DNA from more than four people. (Krane Tr. at 83). Degradation would complicate matters because the loss of DNA material through degradation could cause an analyst to undercount the number of contributors to a DNA mixture. (Watson Tr. at 124) ("Now you might only see a two-person mixture when it's actually supposed to be a three-person mixture."); (Krane Tr. at 53) (Degradation "can certainly confound our ability to determine the number of contributors to a sample"). In other words, degradation could cause DPS to unknowingly undercount the number of contributors to a mixture containing DNA from five or more people and unintentionally use STRmix™ on that mixture. In so doing, DPS would have unknowingly exceeded the software's reliable limits. As Dr. Krane explained:

> The extent to which there is a concern that the black glove or the blue

> towel are mixtures of five or more individuals, I think we need to be more than cautious. I think we need to simply say that the laboratory has failed to demonstrate that STRmix generates reliable results in those circumstances.

(Krane Tr. at 105).

41. Dr. Krane testified that, while no analyst could know with certainty, the samples at issue appeared degraded. (Krane Tr. at 167–68) ("I think it would be consistent with any expert's opinion that we are looking at DNA samples that have undergone degradation."). With regard to the towel, Dr. Krane observed signs in the data that the DNA mixture on the towel could have come from five different people. (Krane Tr. at 95). This was less likely but also a possibility with the DNA mixture found on the glove. (*Id.* at 95–98, 101–04). At minimum, the foul odor indicated that mold or fungus had grown in the unidentified liquid during the thirty days the cooler sat unrefrigerated and unattended, and mold or fungus would be expected to destroy DNA. (Watson Tr. at 93, 121); (Krane Tr. at 52, 136, 167).

2. The Issue of DNA Contamination

42. The storage of DNA evidence in the cooler deviated from recommended practices in another way unrelated to the risks of degradation. (Krane Tr. at 132). The FedEx envelope contained both evidence from the crime scene in Beaumont and evidence seized from Mr. Colone at time of his arrest in Houston. (Krane Tr. at 128–53); (Appl. Ex. 1b at 207); (Appl. Ex. 199 at 4–7); (Appl. Ex. 230). Storing Mr. Colone's property in close proximity to crime-scene evidence created the risk that, during the thirty days that the cooler sat unmonitored with an unidentified, foul-smelling liquid condensing or seeping from an unknown source, the moisture could have leached through the envelopes, cross-contaminating or transferring DNA from one item to another. (Watson Tr. at 92–93, 120–22); (Krane Tr. at 54–55, 131–33, 141–44).

43. Dr. Krane testified that "it's just generally bad practice to have rich sources of a person of interest['s] DNA in any proximity to evidence samples which may not have much DNA associated with them, like, the towel and, like, the inside of the black glove." (Krane Tr. at 132, 141–42) ("[At] [t]he very least it raises the possibility that DNA was carried from one evidence sample to other evidence samples that it was being stored with."). This risk was not alleviated by the fact that the glove, t-shirt cutting, and other items were each stored separately inside the FedEx envelope in a breathable paper envelope. (Vinson Tr. at 18, 75–76); (Watson Tr. at 91–92, 120–22); (Krane Tr. at 128–33, 147, 174, 176). Storing crime scene evidence near a suspect's property poses such a significant risk because even tiny quantities of DNA invisible to the naked eye can significantly contaminate evidence. (Krane Tr. at 54, 144).

F. Trial Counsel Could Have and Would Have Used the Bench Note to Challenge the Reliability of the State's DNA Results and, by Extension, Its Investigation

44. This Court finds that the trial would have been significantly altered had the bench note been disclosed to the defense. Dr. Watson testified that he "absolutely" would have called the bench note to the attention of Mr. Colone's lawyers and recommended they pursue the issues it implicitly raised, such as degradation or contamination, if the note had been disclosed to him before trial. (Watson Tr. at 93). Mr. Colone's trial counsel testified that they wanted to discredit the DNA results as much as possible and would have wanted to exclude the State's DNA results if they could. (Loper Tr. at 137–44, 152–53). Had they known about the wet, foul-smelling conditions inside the cooler, they would have sought to exclude the related DNA results. (Bourque Tr. at 22, 226); (Loper Tr. at 143–44, 344, 354–55, 417). *See also Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992) (for scientific evidence to be reliable, the technique applying the underlying scientific theory must have been

properly applied on the occasion in question).

45. Had the DNA bench note evidence been admitted, Mr. Colone's lawyers would have focused the jury's attention on the bench note. (Loper Tr. at 27); (Bourque Tr. at 76–77). During the trial, in addition to explaining that there were innocent explanations for Mr. Colone's DNA to be present at Ms. Goodman's home, defense counsel had sought to discredit the State's DNA evidence through cross-examination. (Loper Tr. at 152–53); (46 RR: 86, 149–150); (8 RR: 108–109). Had the bench note been disclosed, those efforts would have been a focus of the defense, and, while it is uncertain exactly how the note's disclosure would have affected the rest of the defense strategy and which witnesses the defense lawyers would or would not have called as a result, it is reasonably clear that the note would have led to an overall reconsideration of their plan. Mr. Bourque was emphatic that the bench note would have dramatically changed the defense strategy and that it could have been used effectively to cast doubts on the State's case. (Bourque Tr. at 20) ("It would have changed the entire focus of our defense."); (*id.* at 21) ("Had we seen that note, there would have been a fight between . . . Mr. Loper and me about who got to do this because . . . in this kind of trial work, you are looking for game changers."); (*id.* at 22) ("That note is a game changer for your entire trial, the whole trial."); (*id.* at 66) ("[A]ll of [our] approach would have changed dramatically had we known the contamination and degradation issues that existed."); (*id.* at 226–27) ("This tells you right off the bat there's transfer issues, there's degradation issues, there's incompetence issues in the lab. . . . [A]ny defense could have spent a couple of days explaining to the jury how . . . the trustworthiness of these results are not what they appear."); (*id.* at 231–32) ("[O]nce you find something that significant, it spreads through every single solitary lab result that exists because it now puts everything in question.").

46. This Court finds that the bench note and its implications for contamination

and degradation of the DNA evidence would have provided the defense with a potent tool for rebutting both the reliability of the State's DNA evidence and the prosecutors' assurances that there was an adequate system in place to ensure the integrity of the DNA results. (*See* Sections E-F, *supra*); (Krane Tr. at 74, 82, 126–27, 139–47); (Watson Tr. at 91–93, 121–24). The Court further finds that, based on the laboratory's wet, warm storage of the evidence, the relevant DNA results would have been subject to a credible reliability challenge. If nothing else, the bench note undercut the State's premise that the integrity of the evidence had been maintained in an orderly fashion and that the DNA results were objective, reliable evidence of guilt. Introduction of this evidence that DPS failed to preserve the glove, towel, and other items of evidence with the utmost care would have therefore significantly altered the evidentiary picture at trial.

G. DPS's Assertions that Nothing Compromised the Integrity of the DNA Evidence Are Not Determinative and Should Have Been Assessed by the Jury in the Context of the Bench Note

1. DPS's Assertions Do Not Conclusively Settle the Question

47. The DPS analyst, Mr. Vinson, did not photograph the cooler or otherwise document the conditions inside the cooler beyond writing the bench note in October 2013. (Vinson Tr. at 23, 31, 34, 46, 60). By the time he testified at trial approximately four years later and in the postconviction proceedings seven years later, he had no independent memory of the cooler. (*Id.* at 12, 22, 53, 72). Although Mr. Vinson speculated that the foul-smelling liquid came from the cold packs, he never determined its source. (*Id.* at 25, 46–47).

48. Mr. Vinson's notes were silent as to the condition of the breathable paper envelopes inside the damp and soggy FedEx envelope, but, based on the fact that his notes did not affirmatively indicate that anything inside the FedEx envelope appeared wet or moldy, he opined that the integrity of the evidence had not been

compromised during the thirty days it sat unrefrigerated in the cooler. (*Id.* at 21, 30, 58, 46–47, 67).[7] At the same time, Mr. Vinson acknowledged that DNA contamination is not necessarily visible to the eye and that he did not conduct testing that might determine whether the foul-smelling liquid seeped into the evidence envelopes, carrying DNA molecules from one item to another as it traveled. (*Id.* at 23, 47, 48). Mr. Vinson also noted that his own practice was to store cuttings of evidence in a walk-in freezer until they were analyzed for DNA, not to leave them unrefrigerated as the items in the cooler had been. (*Id.* at 28).

49. The unsworn report submitted by the DPS lab's technical leader Mr. McWhorter merely echoed Mr. Vinson's defense of DPS's handling of the cooler. (Resp't Ex. 13 at 2).[8] While the report did not indicate that Mr. McWhorter possessed any first-hand knowledge of the cooler's conditions, the report simply relied on Mr. Vinson's assurances that no signs of contamination were observed when Mr. Vinson processed the evidence in the cooler. *Id.* The report however did not address whether contamination or degradation might in fact have occurred as a result of the warm and wet conditions in the cooler.

50. Contamination is impossible to detect with ordinary DNA testing of the evidence sample in question. (Krane Tr. at 55) ("[I]n DNA test results it's not possible to distinguish between DNA that arose as the result of contamination or DNA that was present in the sample when it was originally collected."). Contamination could have occurred even if individual pieces of evidence did not appear visibly wet when they were inspected by the analyst. (*Id.* at 144, 176);

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[7] Mr. Vinson also claimed that his testimony at Mr. Colone's trial had been accurate and complete even though he did not mention the foul-smelling liquid or other issues recorded in his bench note when he was asked about the condition of the cooler. (Vinson Tr. at 62–63). As discussed above and below, the Court finds that his trial testimony lacked credibility, was evasive, created a misleading impression and was false. (*See* Part III(D), *supra* and Part IV(B), *infra*).

[8] See footnote 6, *supra*.

(Watson Tr. at 121) ("[I]t's not necessarily something that would be obvious visually"). Additionally, Dr. Krane testified that normal laboratory safeguards would not necessarily detect all instances of contamination. (*Id.* at 142–43, 174). Similarly, Dr. Watson testified that it would be impossible to discern whether contamination occurred by simply looking at the packaging or envelopes, as Mr. Vinson did when he discovered the cooler:

> The indication of moisture being present or not doesn't necessarily mean that moisture couldn't have transferred . . . . [T]hat's the point of evaluating it. You can look at it and say it's fine, and you may be right. But you don't know. And that's the reason why – you know, when evidence comes in and it's improperly stored, that's the reason why you want to evaluate that. It's a nonconforming situation. Nonconforming work is something you should evaluate to determine whether or not it had an impact on your end results, and the only way to do that would be to evaluate whether or not there was contamination.

(Watson Tr. at 122; *id.* at 121, 130). Dr. Watson, who serves as an auditor of laboratory quality-assurance procedures for two accreditation agencies, criticized DPS for failing to adequately examine whether the wet conditions inside the cooler compromised the integrity of the evidence. (Watson Tr. at 15–16, 91) ("I believe that what was done was insufficient to address the issue."). Beyond simply looking at the evidence, Dr. Watson said the DPS analyst could and should have tested for the presence of DNA on the outside of the envelopes to determine whether the moisture breached them and carried DNA in the process. (*Id.* at 91–92).

51. Because no one tested the evidence envelopes or documented their condition at the time Mr. Vinson discovered the issues with the cooler, it is impossible to definitively determine whether the DNA on the glove or towel was tainted by contamination. (Krane Tr. at 55, 188); (Watson Tr. at 121–22). It similarly appears impossible to rule out degradation. (Krane Tr. at 53–54, 139–41); (Watson Tr. at 123–24); (Appl. Ex. 200 at 7). Mr. McWhorter implicitly acknowledged in his report

the impossibility of ruling out these consequences when he conceded that degradation and contamination could have occurred before the evidence reached the laboratory. (Resp't Ex. 13 at 2).

52. Given Mr. Vinson's lack of memory and Mr. McWhorter's lack of opportunity to observe the cooler's actual conditions, their opinions—that both the lab's failure to refrigerate the cooler after it left the freezer in Jefferson County and the resulting foul-smelling, damp and soggy conditions in the cooler were inconsequential—were neither indisputable nor conclusive. They also appeared inconsistent with best practices. (*See* Appl. Ex. 198, at 3–4) ("Most biological evidence is best preserved when stored dry and cold."); (Appl. Ex. 200 at 6) ("[DNA degradation] can occur rapidly when the samples are exposed for even a short time to unfavorable conditions, such as warmth [or] moisture."); (45 RR: 52).[9] This Court finds that Mr. Vinson and McWhorter's opinions did not negate the concerns of Drs. Krane and Watson, who possessed extensive DNA experience, relevant doctoral degrees, and who both voiced credible concerns about the risks of degradation and contamination created by the damp, smelly conditions in the cooler. In other words, Mr. Vinson and Mr. McWhorter's opinions did not definitively dispel the issues raised by the bench note. Thus, this Court finds that the issues raised by the bench note should have been resolved by the jury in its role as the ultimate fact finder at trial.

2. The Analyst's Postconviction Testimony Lacked Credibility, and was Evasive, Misleading and False

53. During the postconviction proceedings, DPS analyst Vinson contended that his trial testimony was accurate, appropriate, and sufficiently complete. (*E.g.*, Vinson Tr. at 49, 56, 57, 63). The Court finds that this testimony was not credible

[9] Indeed, the storage of the glove and cuttings from the t-shirt and towel appears inconsistent with Mr. Vinson's own practices of storing cuttings in a freezer. (Vinson Tr. at 28).

and in fact was evasive, misleading and false for multiple reasons. Overall, during the postconviction proceedings, the analyst appeared determined to deny that that there was anything problematic about his trial testimony. At times his testimony was at odds with other evidence or lacked reliable basis. The Court was further troubled during the postconviction deposition by the analyst's overall demeanor, his frequent offhanded responsiveness and his inappropriate and unconvincing wordplay, all of which significantly undercut his credibility.

54. To begin with, the analyst at times mischaracterized the record. As stated *supra*, at trial, the analyst was asked whether he had noted anything awry when he examined the box and cooler, and his response failed to provide any indication that he had noted something awry with the cooler. (47 RR 33). Nonetheless, the analyst claimed nonsensically during the postconviction proceedings that his trial testimony was accurate. (Vinson Tr. at 49) ("I believe she asked something to the effect of . . . if I had noted anything irregular in the case, would I have noted it, which I believe I testified yes. And I believe that is an accurate statement, as I did note an irregularity in the case."); (*id.* at 56) ("I believe I appropriately answered that if something was awry, I would have noted it, which I believe I did in my notes."). But the record shows that the prosecutor did not ask the question the analyst described; nor did the analyst answer in the way that he described as accurate. Instead, the prosecutor's leading question asked the analyst to confirm that he had *not* noted anything awry, and the analyst did nothing to disclaim that premise. (47 RR 33). Simply put, the analyst's characterization of his trial testimony lacked support in the record.

55. At times, the analyst's claims exceeded his knowledge. He conceded, for example, that neither he nor anyone else at the laboratory had tested for DNA contamination when he processed the evidence in the cooler. (Vinson Tr. at 47). He also acknowledged that neither contamination nor degradation would necessarily have been visible to his naked eye when he looked at the cooler and its contents. (*Id.*

at 48). Yet, the analyst repeatedly insisted that no contamination or degradation had occurred despite the fact that he had no way of determining with any certainty whether the evidence had actually been compromised by the warm, wet, and foul-smelling conditions in the cooler. (*Id.* at 30, 68, 79). He similarly insisted that there was no evidence of mold in the wet, warm cooler, (*id.* at 21, 29, 67, 75, 77), even though the foul smell documented in his bench note suggested the presence of mold or fungus. (Watson Tr. at 93.) Given the admitted limits of his inspection, the analyst's certainty that the evidence had not been compromised was unsupported and further eroded his credibility.

56. At other times, the analyst testified to details that had no apparent basis in the record or his memory. By the time he testified in Mr. Colone's trial, more than three years had passed, and the analyst claimed he had forgotten about the conditions in the cooler. (Vinson Tr. at 12, 54). As a result, he purportedly based his trial testimony on the limited information in his report. (*Id.*). By the time of his postconviction testimony, seven years had elapsed since he inspected the cooler. Yet, the analyst at times testified during the postconviction proceedings to details not documented in his notes even though he claimed he had no independent memory of the cooler and its circumstances. (*Id.* at 12, 22, 53, 54, 64, 72). For example, he claimed that the FedEx envelope that he described in his note as being "damp and soggy" had a "non-porous" or "waxy" exterior that would protect its contents from rain.[10] (*Id.* at 21, 66-67). He also claimed that his description of the envelope as "damp and soggy" only applied to the envelope's exterior and that the envelope had been dry on the inside, details not documented in his notes. (*Id.* at 21-22). This tendency to add self-serving details not documented in the record additionally undermined the Court's confidence in the analyst's testimony.

[10] Only on cross-examination did he acknowledge that he had no actual memory of the envelope's composition and was instead just describing FedEx envelopes generally. *Id.* at 72.

57. The analyst also parsed his trial testimony in a way that ignored its obvious significance. At one point, he suggested that the prosecutor had only been interested in learning whether he had noted any irregularities with the evidence and that she had been unconcerned with the substance or details of any irregularities. (Vinson Tr. at 53-54). ("Q. You didn't think she wanted to discuss any of those irregularities in front of the jury? A. No. . . ."). This purported premise ignored the relevance of the prosecutor's questioning. She was asking him to confirm that he had not observed any issues with the evidence's packaging, and the significance of this subject should have been reasonably apparent to an analyst trained to preserve the integrity of forensic evidence. To suggest that the actual condition of the evidence was not the prosecutor's focus, as the analyst suggested, made little sense.

58. The credibility of the analyst's postconviction testimony was further diminished by his inability or unwillingness to acknowledge the obvious discrepancy between his trial testimony and the bench note. He dismissed the notion that his testimony departed in any way from the professional guidelines that call on forensic analysts testify in a manner that is "clear, straightforward and objective and avoid phrasing testimony in an ambiguous, biased or misleading manner." (*Id.* at 56); (*id.* at 57) ("I believe I did present accurate data in my testimony."). The analyst similarly shrugged off one of his former supervisors' conclusion that he had failed to "provide the most complete and accurate testimony" because he did not review his notes before testifying. (*Id.* at 63). Mr. Vinson's stubborn refusal to concede that his trial testimony had been incomplete, evasive and even untruthful raised serious questions about the analyst's ability to objectively evaluate his conduct and the veracity of his trial testimony.

59. Moreover, this Court finds that Mr. Vinson's admission in his affidavit and deposition that even if he "[had] reviewed my case file prior to testimony, I would not have brought up the note...." reflects more than an inadvertent parapraxis.

(Resp't Ex. 12 at 1) (Vinson Tr. at 60-61). This statement evidences surreptitious motives of the State's expert to obtain a conviction through the use of false testimony. *See Ex parte Robbins*, 560 S.W.3d 130 (Tex. Crim. App. 2016) (Alcala, concurring); *Ex parte Robbins*, 360 S.W.3d 446, 469, 476 (Tex. Crim. App. 2011) (Cochran and Alcala, dissenting).[11]

60. For these reasons, the Court gives no credence to the analyst's postconviction assertions that his trial testimony was accurate and sufficiently complete, and the Court finds that his habeas testimony, like his trial testimony, lacked credibility, was evasive, misleading and false.

H. The Bench Note Was Not Disclosed Before or During Mr. Colone's Trial

61. Before trial, Mr. Colone's lawyers filed multiple requests for favorable information consistent with *Brady v. Maryland*, 373 U.S. 83 (1963). (*See* 1 CR: 38) (Mot. for Evidence Favorable to the Defendant, undated); (1 CR: 73–77) (Mot. for Produc. of Evidence Favorable to the Accused, Nov. 1, 2010); (1 CR: 102–05) (Mot. for Disc. of Exculpatory and Mitigating Evidence, Nov. 1, 2010); (1 CR: 137–39) (Mot. for Disc. of Exculpatory and Mitigating Evidence, June 29, 2011); (2 CR: 195) (Mot. for Produc. of Evidence Favorable to the Accused, June 29, 2011); (2 CR: 290) (Mot. for Evidence Favorable to the Defendant, undated).[12] (*See also* Bourque Tr. at 18); (Loper Tr. at 22–23). The *Brady* motion filed on November 1, 2010

[11] In this vein, Mr. Vinson's bench notes also stated that "The liquid will be soaked-up with paper towels and discarded." Because Applicant has not presented a Claim relating specifically to this conduct, and the parties have limited their joint request for relief to other facts, this Court makes no independent Findings or Conclusions whether Vinson's conduct spoliated "favorable and material" evidence or "potentially useful" evidence "where the interests of justice most clearly require it," or whether his conduct in this regard constituted "bad faith." *Ex Parte Napper*, 322 S.W.3d 202 (Tex. Crim. App. 2010), discussing *California v. Trombetta*, 467 U.S. 479 (1984), *Arizona v Youngblood*, 488 U.S. 51 (1988) and *Illinois v. Fisher*, 540 U.S. 544 (2004).

[12] Before trial, Mr. Colone additionally filed a motion requesting an *in-camera* inspection for exculpatory information in the State's entire file, which was denied. (5 CR: 757) (Mot. for In Camera Inspections of State's Entire File, Feb. 23, 2016); (5 CR: 759) (Order, Mar. 22, 2016).

specifically requested exculpatory "information within the possession, custody or control of the State of Texas, or any of its agencies." (1 CR: 73). Another motion filed on June 29, 2011 likewise requested exculpatory information in the possession of the State's agents. (2 CR: 195). Mr. Colone's counsel relied on these requests for the State to produce favorable information. (Bourque Tr. at 45–46); (Loper Tr. at 22–23, 32).

62. From early on in the proceedings, the Court ordered the State to comply with its *Brady* obligations on a continuing basis. On July 5, 2011, the Court granted Mr. Colone's Motion for Production of Evidence Favorable to the Accused. (5 RR: 14). At that hearing, Judge Walker repeatedly emphasized this requirement:

> THE COURT: Here's what we are going to do. Again, in keeping with case law, any exculpatory information is – the State is ordered to immediately turn it over. Everything you have in your possession right now that is exculpatory, give it to him. Anything that you run across between now and the time we finish this trial, the second it comes to the State's attention, you will be ordered to hand that over to Mr. [Colone's counsel] . . .. Again, all exculpatory information will be provided to the defendant. Motion for Discovery of Exculpatory and Mitigating Evidence. By law all *Brady* material, again, will be handed to Mr. Colone.

(*Id.* at 41); (*see also id.* at 18, 43).

63. Repeatedly, in response to Mr. Colone's requests for information, the State assured the Court and Mr. Colone's lawyers that it had opened its files to defense counsel. At a July 5, 2011 hearing, the prosecutor told the Court and Mr. Colone's counsel:

> [T]o respond to *any sort of possible discovery request*, I have made a complete copy of the entire State's file with the exception of the TCIC NCIC history because I believe I'm precluded from doing so. I've also made a copy of all of the photographs, audio and everything and put them on disk format and presented them here and I have them here in the courtroom today. Additionally, I've had all of the physical evidence brought up to my office,

it's sitting in my investigator's suite if the defense attorney wishes to view it after the hearing here today.

(5 RR: 13–14) (emphasis added); (*id.* at 18, 30, 40, 69); (9 RR: 10); (15 RR: 20, 65–66).

64. During the postconviction litigation, the State continued to emphasize that it had maintained an open file in an effort to provide the defense with all unprivileged discoverable and favorable information relevant to the trial:

> Even though this case predated Michael Morton and the current version of 39.14 of the [Texas Code of Criminal Procedure], the State provided a copy of its ENTIRE file (excluding privileged attorney notes) to each of the Defendant's counsel . . . . Additionally, the State supplemented numerous times in an effort to provide the defense a complete copy of the State's file.

(Resp't Ex. 17) (Aff. of Patrick Knauth, at 1, 3, Oct. 14, 2019).

65. During the course of the pretrial proceedings, State counsel also indicated that they were aware of and complying with their *Brady* obligations. For example, at a 2016 pretrial hearing, while discussing a request that the Court conduct an in-camera inspection of materials not provided by the State for *Brady* material, counsel for the State acknowledged their duty to provide favorable material held by both the State and its agents. (15 RR: 52) ("[W]ell, I agree with any material that's held by the State or its agencies that are *Brady* material,"); (*see also id.* at 69) (Discussing the production of recorded jail calls, counsel for the State said, "I would agree that anything we intend to use I would provide to the Defense . . . or that includes exculpatory or mitigating or *Brady* material.").

66. Notably, when the State learned of *Brady* information that related to the DNA analysis conducted by the laboratories, the State disclosed that information to defense counsel. As one prosecutor observed, when the State became aware that the laboratories' existing DNA results rested upon flawed analytical methods and would need to be re-examined, "[w]e . . . immediately notified the defense attorneys and

the court pursuant to our continuing obligation under *Brady*." (Resp't Ex. 15 at 2) (Aff. of Lance Long, Nov. 1, 2019); (*see also* 16 RR: 28). Likewise, when the State learned that one of the laboratory technicians who had tested the physical evidence in Mr. Colone's case for DNA material had subsequently been fired for failing to adhere to laboratory procedures:

> [I]mmediately upon finding out, we put it in a letter, and we sent it to the Defense. I want to make sure we – you know, that we did provide that. Whether we believe it's *Brady* or not, we wanted it to be, out of an abundance of caution, provided.

(24 RR: 9); (*see also* 6 CR: 1000) (Letter from the District Att'y's Office dated Mar. 22, 2017, citing the Michael Morton Act).

67. Despite these efforts, the State acknowledged during the postconviction litigation that it did not at any time provide Mr. Colone with a copy of the laboratory bench note. (State's Answer at 41). In this regard, the State has maintained during these proceedings that its prosecutors never obtained the laboratory's case file that contained the bench note and, as a result, they did not provide a copy to the defense. (State's Answer at 41-42); (Resp't Ex. 14) (Aff. Of Ashley Chase Molfino at 3); (Resp't. Ex. 15) (Long Aff. At 2); (Resp't Ex. 17) (Knauth Aff. At 2).[13]

68. For their part, Mr. Colone's trial counsel reasonably relied on the prosecution to comply with the defense's *Brady* requests. (Loper Tr. at 31); (Bourque Tr. at 18,

[13] Since the parties' joint request for relief is limited to and based on other facts, and depositions have not yet been taken of the State's attorneys or of McWhorter, Dean and the other "members of the DPS DNA lab" who were present during "several meetings" with State's counsel in "preparation for trial," this Court makes no independent Findings or Conclusions at this time as to, e.g., what the prosecution knew, if anything, of the existence or substance of Vinson's bench notes, and the reason that "during one of th[o]se meetings" one prosecutor "recorded a page of hand written notes" with "an annotation of 'bench notes' and includes the words ['ct orders' and] 'no issues.' " (Resp't. Ex. 16) (Aff. of Rachel Grove at 1, 3); (see also 47 RR: 59) (McWhorter trial testimony). In the event Mr. Colone is not granted relief as jointly requested herein, and this matter is remanded, this Court will allow further development of the case and make further Findings and Conclusions on these and all related issues. See also footnotes 5, *supra* and 14, *infra*.

45–46). The trial lawyers examined the prosecution's open file before trial, including viewing the actual cooler after it had been returned by DPS to Jefferson County. (Loper Tr. at 308–309, 345); (Resp't Ex. 17). Mr. Bourque and Mr. Loper testified that the bench note had not been disclosed to them before or during trial. (Bourque Tr. At 19-20); (Loper Tr. At 23- 27). They also testified that they did not receive any information about potential issues with the evidence's handling, storage or preservation. (Id.) Their trial DNA expert, Dr. Watson, likewise testified that he had not seen or been aware of the cooler or any issues with the evidence's handling. (Watson Tr. at 90, 114–15).

IV.
CONCLUSIONS OF LAW

A. Conclusions of Law for Claim One (D-E) (*Brady* Violation): Mr. Colone's Conviction Violates Due Process Because Neither the Defense Nor the Jury Learned That Crucial Sources of DNA Evidence Had Been Stored in Conditions Potentially Conducive to Contamination and Degradation

69. Under *Brady v. Maryland* and its progeny, the State has a duty to disclose favorable evidence to defense counsel. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Favorable evidence includes both exculpatory and impeachment evidence. *See, e.g.*, *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154 (1972). And evidence that would have some weight and tend to support the defense is favorable. *Kyles v. Whitley*, 514 U.S. 419, 451 (1995).

70. The failure to disclose favorable evidence "violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. A prosecutor's obligation to comply with this requirement does not hinge upon a prosecutor's actual knowledge of the favorable information. *Giglio*, 405 U.S. at 153–54. Instead, knowledge will be imputed to a prosecutor where the favorable information is possessed by those working on the prosecution's behalf. *Id.*; *Kyles*, 514 U.S. at 437. The duty to disclose

favorable evidence applies, moreover, even when the accused fails to specifically request such evidence. *See, e.g.*, *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *see also Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process"). This is because an inadvertent failure to disclose favorable evidence is as damaging to the fairness of a trial as a deliberate concealment. *Strickler*, 527 U.S. at 288 (citing *United States v. Agurs*, 427 U.S. 97, 110 (1976)).

71. A due process violation occurs where (1) the evidence at issue is favorable to the defense; (2) the State or persons acting on behalf of the State failed to disclose this evidence to the defense; and (3) the evidence was "material" to guilt or punishment. *See, e.g.*,, *Mahler v. Kaylo*, 537 F.3d 494, 500 (5th Cir. 2008); *Ex Parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012).

1. The Undisclosed Evidence Was Favorable and Admissible

72. The Court concludes that the bench note was favorable within the meaning of *Brady*. Ultimately, the questions of whether contamination or degradation did in fact compromise the DNA on the glove or towel are not questions this Court needs to resolve as those are, in essence, questions about the credibility and weight of the DNA evidence that should have been decided by the jury. This Court does however find that, as detailed *supra*, in Part III(E) and (F), the bench note provided a credible, tangible basis for challenging the reliability of the DNA results which the State heavily relied upon to place Mr. Colone at the scene at the time of the crime and potentially for also doubting the laboratory's other results. (*See* Krane Tr. at 51–55, 74); (*id.* at 127, 147); (Bourque Tr. at 22, 226–27, 231–32). As a result, the Court finds by a preponderance of the evidence that the bench note was favorable to the defense.

73. Information about the risks of degradation or contamination arising from the

mishandling of DNA evidence would have been readily available to Mr. Colone's lawyers, as evidenced by the publications Dr. Krane referenced, which highlighted these issues more than a decade before Mr. Colone's trial. (Krane Tr. at 133-37, 147); (Appl. Ex. 198) (Butler, 2005); (Appl. Ex. 200, at 6-7) (Thompson, Part 1, 2003); (Appl. ex. 201, at 2) (Thompson, Part 2, 2003).

74. The bench note also would have been admissible at trial in various ways. To begin with, the bench note would have provided Mr. Colone's counsel with classic impeachment evidence, as the State noted during the postconviction proceedings. (Loper Tr. at 343) ("I think we can both agree that that bench note would have been fair game for cross-examination."); *see, e.g., Bagley*, 473 U.S. at 676. Because Mr. Vinson's trial testimony indicated that he would have noted anything awry with the cooler but that he had not done so, (47 RR: 33), the contents of his bench note served as a prior inconsistent statement. Tex. R. Evid. 613(a). Thus, the bench note would have been admissible on the cross-examination of Mr. Vinson if he failed to unequivocally admit to having made the statements recorded in the bench note.

75. Mr. Colone's counsel also would have been permitted to cross-examine DPS Crime Lab-DNA Section Supervisor/Technical Leader Mr. McWhorter and the DNA analyst Tonya Dean about the contents of the bench note because the handling of the evidence would have been relevant to the reliability of their conclusions and opinions about the Lab's procedures and the DNA on that evidence. *See* Tex. R. Evid. 611(b).

76. Additionally, the note would have been admissible as a recorded recollection, *see* Tex. R. Evid. 803(5), because, according to Mr. Vinson, the note accurately recorded matters he no longer recalled at the time of trial but was made when the matters were fresh in his mind. (Vinson Tr. at 12–14, 21–22).

77. Moreover, had the note been disclosed, Mr. Colone's lawyers would have been able to elicit admissible testimony from experts such as Dr. Watson and Dr.

Krane during the defense case that the storage of the cooler had fallen short of recommended practices, that the conditions described by the bench note were conducive to contamination and/or degradation of the DNA evidence, and that the laboratory's response to the problem had been inadequate. *See* Tex. R. Evid. 702; (Krane Tr. at 132–33, 136–38); (Watson Tr. at 91–92, 121–22).

78. Finally, this information could have been marshalled by Mr. Colone to challenge the reliability of the State's DNA results during the guilt-innocence phase, as well as before trial in a motion seeking to exclude the results because the relevant scientific method had not been properly applied. *See Kelly*, 824 S.W.2d at 573. As noted by Mr. Colone's counsel, the note also tended to impeach the overall reliability of the prosecution's investigation. (Bourque Tr. at 231–32). For the foregoing reasons, the bench note was admissible and favorable.

2. The Favorable Evidence Was Not Disclosed

79. Intentional suppression is not necessary for a *Brady* violation to occur. The law is clear that the State is charged with constructive knowledge of favorable information known to those acting on the State's behalf. *Kyles*, 514 U.S. at 437-38.[14] Mr. Colone has met his burden of establishing that the bench note should have been disclosed but was not provided to him before or during trial.

80. Before trial, Mr. Colone's lawyers filed several requests for favorable information. (1 CR: 38, 73–77, 102–05, 137–39); (2 CR: 195, 290). In response, the Court ordered the State to disclose *Brady* information on a continuing basis. (5 RR: 14, 18, 41, 43). And the State acknowledged its obligation and willingness to do so.

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[14] "This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see Brady, 373 U.S. at 87), the prosecution's responsibility for failing to disclose known favorable evidence rising to a material level of importance is inescapable." Id.

(15 RR: 52, 69); (Resp't Ex. 17 at 1). In an effort to comply with its *Brady* obligations, the State maintained an open file, which Mr. Colone's lawyers inspected. (5 RR: 13–14, 18, 30, 40, 69; 9 RR: 10; 15 RR: 20, 65–66; Resp't Ex. 17 at 3). The prosecutors also advised Mr. Colone's lawyers when they received information from their laboratories that would be favorable to the defense—specifically that problems with the initial DNA analysis required the results to be reanalyzed and that a laboratory technician had subsequently been fired for violating laboratory procedures. (Resp't Ex. 15 at 2); (6 CR: 1000).

81. Because DPS (a state agency) examined the physical evidence on behalf of the police and prosecutors in connection with this case, the State was responsible for disclosure of favorable information learned by DPS during the investigation, including the information recorded in the bench note. *See Kyles*, 514 U.S. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case"); *Miles*, 359 S.W.3d at 665; (42 RR: 42); (Appl. Ex. 199 at 7); (Appl. Ex. 230). Mr. Colone's lawyers do not recall ever seeing the bench note or being made aware of its contents before or during trial. (Bourque Tr. at 19–20, 66, 72, 219–20); (Loper Tr. at 23–26). Likewise, the trial lawyers' DNA expert does not have any memory of receiving the bench note before being shown a copy by Mr. Colone's postconviction counsel. (Watson Tr. at 90–93). For these reasons, the Court finds by a preponderance of the evidence that the bench note was not disclosed to Mr. Colone by the State or its agents before or during Mr. Colone's trial.

3. The Undisclosed Favorable Evidence Was Material

82. Evidence is "material" within the meaning of *Brady* when there is "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith v. Cain*, 565 U.S. 73, 75 (2012). A defendant need not show that "more likely than not" he would have been acquitted

had the suppressed evidence been admitted at trial. *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (citing *Smith*, 565 U.S. at 73–77). He must only show that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial. *Smith*, 565 U.S. at 75; *accord Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008). In other words, a due process violation may occur "even if . . . the undisclosed information may not have affected the jury's verdict." *Wearry*, 136 S. Ct. at 1006 n.6; *Kyles*, 514 U.S. at 434–35 ("It is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.").

83. Courts have also applied a more stringent standard for materiality when the failure to disclose favorable evidence is compounded by false testimony from a member of the prosecutor's team. *See Agurs*, 427 U.S. at 103 (where undisclosed evidence demonstrates the falsity of testimony that the prosecution should have known was false, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's judgment); *Ex parte Adams*, 768 S.W.2d 281, 290 (Tex. Crim. App. 1989); *Ex parte Espada*, 565 S.W.3d 326, 335 (Tex. Ct. App. – San Antonio 2018) (recognizing that many Texas courts follow *Agurs* when a *Brady* violation demonstrates the falsity of testimony that the State should have known was false); *see also United States v. Vozzella,* 124 F.3d 389, 392-93 (2nd Cir. 1997) ("[W]e believe that where undisclosed *Brady* material undermines the credibility of specific evidence that the government . . . should have known to be false, the standard of materiality applicable to the first *Brady* category [in *Agurs*] applies. In such circumstances, the failure to disclose is part and parcel of the presentation of false evidence to the jury[.]"); *People v. Harris*, 794 N.E.2d 314, 345 (Ill. 2002) ("In situations such as the case at bar that involve both the use of perjured testimony and the failure to disclose *Brady* material, the test for materiality

is . . . whether there is any reasonable likelihood that the false testimony could have affected the judgment.").

84. Additionally, in light of *Watkins v. State*, No. PD-1015-18 (Tex. Crim. App. March 3, 2021), the word "material" means "having a logical connection to a consequential fact" and is synonymous with "relevant" in light of the context in which it is used regarding discovery. The information contained in the bench note was material under this standard as well as under the *Brady* standard.

a. The Undisclosed Favorable Evidence Would Have Substantially Altered the Evidentiary Picture

85. As detailed *supra*, in Part III(E)–(F), the Court finds that the reliability and accuracy of the DNA results from the glove and towel that the State relied upon to place Mr. Colone at the scene of the crime would have been significantly undermined by disclosure of the problems flagged by the bench note, either through cross-examination of the State's witnesses and/or through the testimony of a defense expert. The contents of the bench note were relevant and material in that the contents have a logical connection to a consequential fact—the condition and significance of the DNA results. A juror could reasonably be skeptical about DNA results obtained from a glove and towel that had been left for thirty days, contrary to instructions, in a dark, warm cooler that contained a free-ranging foul-smelling liquid from an unknown source, particularly as those conditions created the risks of both degradation and contamination of DNA. (*See, e.g.*, Krane Tr. at 51–55, 74, 126–27, 131–44, 167–68, 174–76); (Watson Tr. at 91–92, 121–22); *see also Dist. Att'y Off. for the Third Jud. Dist. v. Osborne*, 557 U.S. 52, 82 (2009) (Alito, J., concurring) ("[M]odern DNA testing technology is so powerful that it actually increases the risks associated with mishandling evidence. . . . Any test that is sensitive enough to pick up such trace amounts of DNA will be able to detect even the slightest, unintentional mishandling of evidence."). It is also reasonably probable that Mr. Colone's counsel

could have effectively used the neglect of the cooler to cast doubt upon the State's other DNA results as well. (*See* Bourque Tr. at 231–32).

86. This favorable evidence would have significantly altered the evidentiary picture presented to the jury. This is so for essentially two reasons. First, the glove and towel were crucial to the prosecution. (*See* Part III(A)–(B), *supra*). Their prominence reflects both the inherently persuasive power of scientific evidence and the fact that the DNA was the only objective, physical evidence that purportedly placed Mr. Colone at the scene at the time of the crime.[15] Second, the State's remaining evidence was controverted, so that there was a reasonable probability of a different outcome if the jury had been able to evaluate the DNA results in light of the conditions described by the bench note. (*See* Part IV(A)(3)(b), *infra*).

87. In addition to substantially weakening the strength of the State's case, there is a reasonable probability that the bench note would have significantly affected defense counsel's preparations and presentation of their case. *See Thomas v. State*, 841 S.W.2d 399, 405 (Tex. Crim. App. 1992). Without consulting an expert, Mr. Loper was unsure how exactly the defense would have made use of the bench note, but he testified that he and Mr. Bourque would have wanted to exclude and/or challenge the DNA results if they could have. (Loper Tr. at 27, 72–73, 143–44). Mr. Loper testified that he would have wanted to use the note as a basis for excluding the DNA results if possible and he would have wanted the jury to know about the problems flagged by the bench note. (Loper Tr. at 27, 72). Mr. Loper also acknowledged that the questions of contamination and degradation raised by the bench note were consistent with the defense strategy at trial because the defense attempted, where possible, to probe, question, and challenge the reliability of the laboratory's DNA results. (*See* Part III(F), *supra*); (46 RR: 86, 149–150); (48 RR:

[15] *See, e.g., E.I. du Pont de Nemours*, 923 S.W.2d at 553 ("Because expert evidence can be hard to evaluate, it can be both powerful and misleading.") (internal citations omitted).

108, 109); (Loper Tr. at 137–43, 152–53). For his part, Mr. Bourque was adamant that the bench note would have dramatically altered the presentation of their case and would have proved an effective cudgel—or in his words, an anchor that could have been used to sink the prosecution's case. (Bourque Tr. at 20–22, 66, 226–27, 231–32).

b. The Remaining Evidence Relied Upon by the State Was Circumstantial, Controverted, or Equivocal

88. The Court finds that the DNA evidence potentially placing Mr. Colone at the scene of the crime played a prominent role at trial. Apart from the glove and towel, no other items of physical evidence recovered from the crime scene were linked by forensic testing to Mr. Colone. The remaining evidence was controverted.

89. Although DNA analysts also examined a black t-shirt and eyeglasses that were either not stored in the cooler or were examined before being stored in the cooler, (46 RR: 157–58); (47 RR: 122); (47 RR: 127), neither item added much to the prosecution's case because neither item came from the crime scene. The glasses were retrieved after Mr. Colone's arrest and approximately eleven days after the shooting from a Dodge Charger that was alleged to be the getaway vehicle and belonged to Mr. Colone's girlfriend. (43 RR: 223–24); (46 RR: 24); (Appl. Ex. 199 at 6). But, because laboratory analysis cannot pinpoint the time or date when or how DNA material was deposited in the place where it was found, there was nothing particularly damning about evidence that, at some unidentified time, Mr. Colone left or touched eyeglasses in his girlfriend's car, particularly as no witness described the perpetrator as wearing glasses.

90. The black t-shirt was one of several articles of clothing recovered from a hotel room in Houston where Mr. Colone was arrested eleven days after the shooting in Beaumont. (Appl. Ex. 199 at 6–7); (Appl. Ex. 230); (43 RR: 221–223). Because neither of the decedents were identified as possible contributors to DNA on the t-

shirt, (46 RR: 157–58); (47 RR: 126–27), the DNA on the shirt tended only to show that Mr. Colone possessed a black t-shirt, and this detail had limited evidentiary value since black t-shirts are common and, while witnesses described the shooter as wearing "all black" or a "black hoodie," no witness said anything about a t-shirt under the hoodie. (*See, e.g.*, 42 RR: 192); (43 RR: 147, 175, 237); (44 RR: 157, 163, 195).

91. A second laboratory, Bode Cellmark ("Bode"), conducted additional DNA testing that was unaffected by DPS's mishandling of the cooler, but Bode did not identify Mr. Colone as being a potential contributor to any of the items it examined, except for the black t-shirt found among Mr. Colone's belongings at the time of his arrest in Houston. (43 RR: 221–23); (46 RR: 157–58). Bode's strongest results came from swabs or cuttings taken from the Dodge Charger that was not seized by police until eleven days after the shooting. (43 RR: 262). While Bode identified Ms. Goodman as a source of or contributor to the DNA material obtained from inside the Dodge Charger, (46 RR: 126, 129–30), those results were potentially explained by the trial testimony of witnesses who said Ms. Goodman, her daughter, and Mr. Colone had been friends, including the defense witness Thaddeus Thomas, who testified that he saw Ms. Goodman riding in a car with Mr. Colone sometime before the shooting, (47 RR: 21, 236); (48 RR: 8–13). Although the prosecution claimed the DNA derived from Ms. Goodman's blood, the prosecution's own expert testified that the DNA could have come from a lot of other potential sources, including Ms. Goodman's saliva or sweat. (47 RR: 145–46). This Court finds that the DNA from the Dodge Charger, although potentially significant, did not constitute irrefutable evidence of guilt or make a conviction inevitable because a jury also could have found innocent explanations for its presence based on the existing record.

92. The defense could have argued that none of the prosecution's remaining evidence, viewed separately or collectively, compelled a conviction. One eyewitness

identified Mr. Colone as being the hooded, masked shooter. (44 RR: 213–14). But it is undisputed by the parties that this witness, Robert Fontenot, lacked credibility when he testified at trial. The fact that, prior to trial, Mr. Fontenot signed a statement recanting his identification of Mr. Colone provided jurors a basis to reasonably doubt his testimony, as did other inconsistencies in the multiple statements he provided about the shooting over time. (44 RR: 238–39, 256–63); (52 RR: 288) (Def. Ex. 11, Aff. of Robert Fontenot) ("Not only was I uncomfortable I was also pressured in to making a positive I.D. of Joseph Colone Jr."). Mr. Fontenot's claim that he could identify Mr. Colone as being the masked gunman by looking at his eyes alone—even though he said he did not know Mr. Colone—further strained credulity.[16] (43 RR: 125–27, 152); (44 RR: 214, 217, 272–73). The State acknowledged during the postconviction proceedings that Mr. Fontenot had proved ineffective as a witness for the prosecution. (State's Answer at 22, 69, 72) ("[Mr.] Bourque destroyed Fontenot's credibility as a prosecution witness during cross-examination, effectively in the end making Fontenot a better witness for the defense than he was for the State.").

93. Neither of the other eyewitnesses identified Mr. Colone as being the perpetrator. (44 RR: 114, 162–63). The neighbor David Piert's trial testimony provided unanticipated details about the shooting, but his limited description of the gunman was of a black man with a goatee wearing a black hoodie, mask, and gloves. (*Id.* at 159–60, 162–63).[17]

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[16] Neither Mr. Fontenot nor any other witness described the shooter's eyes or Mr. Colone's eyes as having any distinctive features.

[17] While trial counsel remembered Mr. Piert as identifying Mr. Colone or providing incriminating details about the gunman's identity such as hair or teeth, (Bourque Tr. at 193); (Loper Tr. at 329). the trial record contradicts this memory. The record instead shows that Mr. Piert's description of the shooter was limited to the few details listed above. (44 RR: 162) ("I can't identify him"); (id. at 163) ("I can't give you a good description").

94. Although the prosecution presented surveillance video recordings from streets around the crime scene, no witness claimed they could identify the images as clearly depicting Mr. Colone or the Dodge Charger. To the contrary, during closing arguments, the prosecution described the video images as a "white dot" and "black stick figure." (48 RR: 137) ("I know it's hard to see."). Mr. Colone's alleged motive, in turn, did not prove any elements of the offense and was insufficient alone to establish guilt, particularly as the only evidence that Ms. Goodman was slain in retaliation for incriminating Mr. Colone came from Mr. Fontenot, (44 RR: 201), who was effectively discredited. (*See* State's Answer at 22, 69, 72). Additionally, the presence of crack cocaine on the porch near where Ms. Goodman was found, (42 RR: 95, 133), and testimony that Ms. Goodman used crack cocaine, (47 RR: 22), opened the door to an inference that the shooting could have been over drug use or a drug deal unrelated to Mr. Colone. (48 RR: 112, 118, 128).

c. The Bench Note is Material Under the Reasonable-Probability Standard

95. This Court finds that the bench note tended to undermine confidence in the only physical evidence that appeared to link Mr. Colone to the crime scene. Had that information been disclosed, the prosecution's DNA evidence could potentially have been significantly diminished in the minds of the jury. The fact that the glove and towel had been stored, contrary to instructions, for thirty days in a wet, warm, and foul-smelling cooler, along with a cutting from one of Mr. Colone's t-shirts, provided a potentially significant avenue for impeachment of the State's DNA results. With the DNA evidence that placed Mr. Colone at the crime scene undercut by its arguable mishandling, the jury could have considered the State to be without strong evidence of guilt because its remaining evidence was either controverted or limited in its probity. For the reasons stated above, the Court finds that the lack of knowledge of the existence of the DPS bench note, and the failure of the prosecutors

to disclose its existence to the defense, sufficiently undermines confidence in the verdict against Mr. Colone.

96. Accordingly, based on the totality of the record and the factual findings previously made in Part III(A)-(H), the Court finds, by a preponderance of the evidence, that the bench note and its favorable contents had a logical connection to a fact of consequence in the trial and therefore should have been available to the defense at trial. Additionally, had the note been disclosed, the preponderance of the evidence establishes that there would have been a reasonable probability of a different outcome at trial. "Confrontation is one means of assuring accurate forensic analysis," *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009), and, in this case, the adversarial scrutiny that courts depend upon for fair proceedings was undermined by the omission of any information about the evidence's apparent mishandling. *See also Hinton v. Alabama*, 571 U.S. 263, 276 (2014) ("Prosecution experts . . . sometimes make mistakes."). In the absence of that significant evidence, the Court lacks confidence in both the fairness and the outcome of the trial. The Court therefore finds that Mr. Colone's due process rights under the Fifth and Fourteenth Amendments were violated by the nondisclosure of favorable and material evidence, namely, the bench note. *See Kyles*, 514 U.S. at 434–35.

d. The Bench Note is Also Material Under the Reasonable-Likelihood Standard Recognized in *Agurs*

97. As discussed *infra*, the undisclosed evidence in this case also demonstrates the falsity of testimony provided by a state laboratory analyst who was working on behalf of the prosecution. *See* Part IV(B). Therefore, the Court also analyzes the effect of the undisclosed evidence in this context by applying the materiality standard that assesses whether there was "any reasonable likelihood" that the false testimony, evidenced by the bench note, "could have affected the judgment of the

jury." *See Agurs*, 427 U.S. at 103.[18] Under this standard, undisclosed evidence that demonstrates the falsity of trial testimony is material unless the failure to disclose the evidence would be harmless beyond a reasonable doubt. *See United States v. Bagley*, 473 U.S. 667, 678-80 (1985) (discussing the reasonable-likelihood standard established by *Agurs*).

98. In regard to this case, the same analysis of the record discussed *supra*, in Part IV(A)(3), applies in this context. Because the Court finds the bench note was material under the more-stringent reasonable-probability standard, it necessarily follows that the record here satisfies the reasonable-likelihood standard. *See, e.g., Ex parte Ghahremani*, 332 S.W.3d 470, 480 (Tex. Crim. App. 2011) (recognizing that, where a court finds that undisclosed evidence reveals the falsity of testimony and undermines confidence in the trial's outcome, the court has necessarily found that the undisclosed evidence also satisfies the reasonable likelihood standard of materiality). The Court therefore finds that a preponderance of the evidence establishes a reasonable likelihood that the failure to disclose the bench note affected the jury's judgment.

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[18] As discussed *infra* in Section IV(B), this Court's understanding of the term 'perjury' in this context is guided by the relatively broad definition recognized in the due process analysis of false testimony. *See, e.g., Ex parte Napper*, 322 S.W.3d 202, 243 (Tex. Crim. App. 2010) (acknowledging the Fifth Circuit's recognition of perjury beyond its strict statutory definition); *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011) ("Though the case law in this area frequently refers to 'perjured' testimony, there is no requirement that the offending testimony be criminally perjurious"); *see also United States. v. Boyd*, 55 F.3d 239, 243 (7th Cir. 1995) (Posner, J.) (noting the use of 'perjury' as equivalent to false in the context of due process analysis and citing to *Agurs* as an example of such).

B. Conclusions of Law for Claim One (J-L) (*Chabot* Violation): Mr. Colone's Conviction Violates Due Process Because It Resulted from Materially Misleading Testimony that Falsely Assured the Jury that the State Laboratory Had Preserved Key Items of Evidence Without Mishap

99. A conviction procured with false testimony is a denial of the due process guaranteed by the Federal Constitution. *Ghahremani*, 332 S.W.3d at 477. When false testimony is raised postconviction, a due process violation is established by a preponderance of evidence that (1) false evidence was presented at trial and (2) the false evidence was material to the jury's verdict of guilt. *Ex parte De La Cruz*, 466 S.W.3d 855, 866 (2015) (citations omitted).

100. In this context, false testimony violates due process regardless of whether the testimony qualifies as perjury or was simply false. *Id.* at 867; *Ghahremani*, 332 S.W.3d at 477-78 ("These rules are not aimed at preventing the crime of perjury—which is punishable in its own right—but are designed to ensure that the defendant is convicted and sentenced on truthful testimony.") (citation omitted). The relevant question is whether the testimony, taken as a whole, gives the jury a false impression. *De La Cruz*, 466 S.W.3d at 866; *see also Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (finding that the witness testified falsely when he omitted relevant information); *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988) (death sentence based on "materially inaccurate" information violates Eighth Amendment).

100. In determining whether testimony has been demonstrated to be false, the relevant question is whether the testimony, taken as a whole, gives the jury an incorrect or misleading impression. *Ukwuachu v. State*, 613 S.W.3d 149, 156 (Tex. Crim. App. 2020) (quoting *Ex parte Chaney*, 563 S.W.3d 239, 263 (Tex. Crim. App. 2018)) ("Whether evidence is false turns on whether the jury was left with a misleading or false impression after considering the evidence in its entirety.").

1. The DPS Analyst's Testimony Created a False and Misleading Impression About the Evidence's Preservation

101. In this case, the Court finds that a preponderance of the evidence establishes that the analyst's testimony was false because it omitted relevant information and gave the jury a false impression about the conditions in which important items of physical evidence had been stored by the laboratory. *See, e.g., Alcorta*, 355 U.S. at 31; *Ghahremani*, 332 S.W.3d at 479 (finding that "the gap" between the witness' testimony and information documented in police reports created a "misleading impression of the facts").

102. At trial, Mr. Vinson was asked about the condition of the evidence containers, including a leading question that specifically asked him to confirm that he "did not" note anything awry. (47 RR 32-33). His answers did not in any way reflect the reality he had documented years earlier in his bench note, namely that, when he opened the cooler that contained the glove, towel and other items, he found multiple things awry. The instructions to refrigerate the cooler of evidence had been "ignored," the cold packs inside it had thawed, a "foul-smelling" liquid had emerged from an unknown source and pooled at the bottom of the cooler, and the FedEx envelope that held the evidence in breathable paper envelopes was "damp and soggy." (Appl. Ex. 1); (Appl. Ex. 1b); (Appl. Ex. 152). To the contrary, the analyst's testimony suggested that his notes did not indicate that any of the evidence containers had been unsealed, that he did not note anything awry, and that the laboratory had safeguards in place that would have detected any improperly stored evidence. (47 RR 32-33).

103. As discussed *supra*, this testimony was not only evasive and false in fact, it gave the jury a false impression that the evidence had been maintained without issue. (See Part III(D) and Part III(G)(2)). In other words, the gap between the analyst's testimony and the conditions recorded in his bench note created a misleading impression. *See Ex Parte Weinstein*, 421 S.W.3d 656, 666 (Tex. Crim. App. 2014);

Ghahremani, 332 S.W.3d at 479.

2. Knowledge of the Analyst's False and Evasive Testimony Is Imputed to the Prosecution Because the Analyst Was a State Actor and Member of the Prosecution Team

104. Regardless of whether the testimony is characterized as perjurious or simply false, it is irrelevant whether prosecutors knew that their witness offered misleading testimony. *De La Cruz*, 466 S.W.3d at 866 ("A conviction based on . . . materially false evidence results in a due-process violation, regardless of whether the falsity of the evidence is known to the State at the time of trial.") (citations omitted). But, when state action is implicated because the witness is a state employee or part of the prosecution team, knowledge will be imputed to the prosecution. *Ex parte Lalonde*, 570 S.W.3d 716, 722 (Tex. Crim. App. 2019) ("Even if no one contends that the prosecutors were aware that they were offering perjured testimony, 'we treat perjured testimony as knowingly used if the witness was a member of the 'prosecution team.'"") (quoting *Ex parte Napper*, 322 S.W.3d 202, 243 (Tex. Crim. App. 2010)); *see also Estrada v. State,* 313 S.W.3d 274, 287–88 (Tex. Crim. App. 2010) (setting aside death sentence due to unintentionally false testimony provided by a State witness who worked as an investigator with the agency that prosecutes crimes occurring in Texas prisons).

105. Although the distinction between perjury and unknowingly false testimony is immaterial when knowledge is imputed to the prosecution, *Ghahremani*, 332 S.W.3d at 477-78, false testimony may qualify as perjury, for purposes of a due process violation, when the witness answers evasively and fails to candidly respond to questioning under oath. *See Napper*, 322 S.W.3d at 243 (recognizing that, "The Fifth Circuit . . . has eschewed 'the strict legal definition of perjury' and found 'perjury' within the meaning of the prohibition against its knowing use when witnesses 'did

not candidly respond to the defense counsel's questions.'") (citing *United States v. Carter*, 566 F.2d 1265, 1270 (5th Cir. 1978)).

106. In this case, knowledge of the analyst's false, misleading and evasive testimony is imputed to the prosecution because state action was involved. *See Lalonde*, 570 S.W.3d at 722. The Court finds by a preponderance of the evidence that the analyst was testifying about forensic work he performed as a state employee and that this work was performed at the prosecution's request, making the analyst a member of the prosecution's team. *See Napper*, 322 S.W.3d at 243; *Estrada*, 313 S.W.3d at 287.

107. The Court also finds by a preponderance of the evidence that the analyst's testimony was evasive and not candid for the reasons discussed *supra*. (*See* Part III(D); Part III(G)(2); Part IV(B)(1). Therefore, consistent with the Fifth Circuit's recognition that evasive and uncandid testimony from agents of the prosecution may qualify as perjury in the context of a due process violation, the Court finds and concludes that the analyst's testimony in this case fits within that description. *See Napper*, 322 S.W.3d at 243.

108. For the foregoing reasons, the analyst's testimony qualifies as knowing false and perjurious testimony for purposes of a due process violation.

3. The False Testimony Was Material

109. Where the false-testimony claim could not have reasonably been presented before, "[t]he standard of materiality for a prosecutor's knowing use of perjured testimony is the well-known harmless error standard of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), i.e., that 'the evidence is material (and harmful) unless it can be determined beyond a reasonable doubt that the testimony made no contribution to the defendant's conviction or punishment.'" *Lalonde*, 570 S.W.3d at 722 (citing *Napper*, 322 S.W.3d at 241). In essence, the burden shifts to the prosecution to prove beyond a reasonable doubt that the false testimony did not

contribute to the verdict. *Ghahremani*, 332 S.W.3d at 478. In other circumstances, false testimony is material when the evidence establishes by a preponderance of the evidence a reasonable likelihood that the false testimony affected the jury's judgment. *Weinstein*, 421 S.W.3d at 665 n.23 (quoting *Ex parte Chavez*, 371 S.W.3d 200, 206-07 (Tex. Crim. App. 2012)); *Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009).

110. In this case, the Court finds by a preponderance of the evidence that Mr. Colone did not have an earlier opportunity to challenge the analyst's false testimony. As discussed *supra*, the trial court ordered the State to produce favorable information on an ongoing basis, and the trial prosecutors assured the court and defense that they were aware of their duty to produce favorable information, including favorable information in the hands of their agents. (*See* Part III(H)). Mr. Colone's trial counsel availed themselves of the prosecution's open file. (*Id.*). Yet, neither the bench note nor the information recorded in the bench note were disclosed before or during trial. (*Id.*). Instead, the bench note was discovered by Mr. Colone's postconviction counsel when they subpoenaed the laboratory's records. (*See* Part III(C)). Therefore, Mr. Colone could not reasonably have been expected to challenge the analyst's false testimony before these postconviction proceedings. *See Ghahremani*, 332 S.W.3d at 482 (finding habeas applicant did not have an opportunity to challenge false testimony before his habeas counsel obtained through the Public Information Act a document that contradicted the witness' testimony); *Estrada*, 313 S.W.3d at 288 (finding appellant could not reasonably have been expected to know that the testimony offered by the witness, a government employee and member of the prosecution team, was false at the time it was made).

111. Further, the Court finds that a preponderance of the evidence establishes a reasonable likelihood that the incomplete, and therefore misleadingly false, testimony affected the jury's verdict. As discussed *supra*, the analyst's testimony

indicated that the laboratory had preserved the physical evidence without issue and, in so doing, it laid the necessary foundation for the jury to rely on the DNA results that purported to link Mr. Colone to the glove and towel—items that were recovered at the scene of the crime and portrayed as being instruments of the crime. (*See* Part III(A)–(B)). No other physical evidence was offered to link Mr. Colone directly to the offense, and the rest of the prosecution's evidence was controverted or limited in its probity. (*See id.*; Part IV(A)(3)(b)). In closing arguments, the prosecution repeatedly urged the jury to accept the DNA results from the glove and towel as evidence of guilt. And the jury, during its deliberations, asked to review both the DNA results as well as the photos and diagrams depicting where the glove, towel and other items were recovered at the scene. (7 CR: 1130).

112. In addition, the Court finds that the State has not proven beyond a reasonable doubt that the false testimony did not contribute to the verdict. Under these circumstances, the Court cannot and does not find beyond a reasonable doubt that the false testimony did not affect the jury's judgment. In other words, there is a fair probability or a reasonable possibility that the outcome would have been different had the analyst not testified falsely. *See Ghahremani*, 332 S.W.3d at 481; *Estrada*, 313 S.W.3d at 287; *Chaney*, 563 S.W.3d at 265 (finding expert's false testimony to be material where it helped place the applicant at the scene of the crime at the time of the murders). The Court also finds by a preponderance of the evidence that there is a reasonable likelihood that the false testimony affected the jury's judgment and contributed to the verdict. *See Chabot*, 300 S.W.3d at 771-72. Regardless of which standard is applied, the Court finds that the false testimony was material to the jury's judgment because it effectively assured jurors that they could rely on the prosecution's most potent evidence, DNA results from physical evidence that appeared directly connected to the crime.

V.
CONCLUSION

113. Having found sufficient facts and conclusions warrant the granting of Mr. Colone's claims of error raised in Claim One, Parts D-E and Parts J-L, of his Application, this Court determines that Mr. Colone's constitutional rights were violated at trial and he is entitled to relief consistent with the United States Constitution and well-established Supreme Court case law. Accordingly, the Court recommends, in conjunction with the recommendations of all parties, vacating Mr. Colone's conviction and remanding his case for a new trial.

SIGNED THE 15 DAY OF July, 2021.

HONORABLE K. MICHAEL MAYES
SITTING BY ASSIGNMENT
AS THE 252D JUDICIAL DISTRICT COURT

APPROVED AS TO FORM AND SUBSTANCE AND ENTRY REQUESTED:

SIGNED THE 12TH DAY OF July, 2021.

Wayln Thompson (No. 19959725)
thompson@co.jefferson.tx.us
Asst. District Attorney, Jefferson County
1085 Pearl Street
Beaumont, Texas 77701
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(512) 463-8600 (phone)
(512) 463-8590 (fax)

COUNSEL FOR MR. COLONE

7/8/21

EXHIBIT I

TEXAS FORENSIC
SCIENCE COMMISSION
Justice Through Science
1700 North Congress Ave., Suite 445
Austin, Texas 78701

April 29, 2022

Via e-mail to adam_vinson@alumni.baylor.edu and via Federal Express No. 7767 2045 7792

Mr. Stephen Adam Vinson
5121 Elysian Street
Houston, Texas 77009

Re: FSC Self-disclosure No. 22.18 – Houston Forensic Science Center (Forensic Biology/DNA)

Dear Mr. Vinson,

At its April 22, 2022, quarterly meeting, the Commission voted to investigate the referenced self-disclosure filed by the Houston Forensic Science Center. The investigation will address whether you committed professional negligence or professional misconduct with respect to testimony regarding forensic biology screening you performed as a Texas Department of Public Safety (DPS) Houston Regional Crime Laboratory employee during Joseph Colone's capital murder trial and post-trial proceedings. The Commission will also review related issues with respect to evidence handling and quality assurance at DPS. The Commission's review will include an assessment of whether any of the issues raised by the self-disclosure constitute violations of the Texas Code of Professional Responsibility for Forensic Analysts and Crime Laboratory Management.[1] A copy of the self-disclosure is enclosed with this letter. (**Exhibit A**).

Dr. Bruce Budowle, Dr. Nancy Downing, and Brazos County District Attorney Jarvis Parsons are the members of the Commission appointed to the investigative panel that will evaluate the referenced self-disclosure. Commission investigations of laboratory self-disclosures may include collection and review of documents, case records, review by subject matter experts, interviews with individuals involved and other action as appropriate.[2]

The investigative panel may request to interview you regarding the events and circumstances described in the laboratory self-disclosure. Commission staff will contact you regarding this request in the upcoming weeks. You may also submit written information electronically or via regular mail to the address on this letterhead.

The Commission's investigative process will take several months to complete. A final written report will be published on the Commission's website at www.fsc.texas.gov after conclusion of the investigation. **Please be advised the outcome of the**

[1] 37 Tex. Admin. Code § 651.219 (2018).

investigation may impact the status of your forensic analyst license, as described in the Disciplinary Action section of the Commission's enabling statute.[2]

Thank you and please feel free to contact the Commission's office with any questions or concerns you may have about the investigative process.

Sincerely,

Leigh M. Tomlin

Leigh M. Tomlin
Associate General Counsel

encl.

[2] TEX. CODE CRIM. PROC. art. 38.01 § 4-c.

1. PERSON COMPLETING THIS FORM

Name: Peter Stout
Laboratory: Houston Forensic Science Center
Address: 500 Jefferson Street, 13th floor
City: Houston
State: TX Zip Code: 77002
Home Phone:
Work Phone: 713-929-6760
Email Address *(if any)*: pstout@hfsctx.gov

2. SUBJECT OF DISCLOSURE

List the full name, address of the laboratory, facility or individual that is the subject of this disclosure:

Individual/Laboratory: Stephen Adam Vinson
Address: 500 Jefferson Street, 13th floor
City: Houston
State: TX Zip Code: 77002
Year Laboratory Accreditation Obtained: 2014
Name of National Accrediting Agency: ANAB
Date of Examination, Analysis, or Report: multiple
Type of Forensic Analysis: DNA
Laboratory Case Number *(if known)*: N/A

Is the forensic analysis associated with any law enforcement investigation, prosecution or criminal litigation?
Yes ☒ No ☐

* If you answered "Yes" above, provide the following information *(if possible)*:

* Name of Defendant: Joseph Kenneth Colone Jr.

* Case Number/Cause Number: 10-10213/AP-77,073
(if unknown, leave blank)

* Nature of Case: Capital Murder
(e.g burglary, murder, etc.)

* The county where case was investigated, prosecuted or filed: Jefferson County

* The Court: 252nd District Court

* The Outcome of Case:

The defendant was sentenced to death for capital murder.

* Names of attorneys in case on both sides *(if known)*:

Prosecution: Pat Knauth, Ashley Chase Molfino, Lance Long and Rachel Grove Defense: Robert Loper and Gerald Bourque

3. WITNESSES

Provide the following about any person with factual knowledge or expertise regarding the facts of the disclosure. Attach separate sheet(s), if necessary.

First Witness *(if any)*:
Name: Stephen Adam Vinson
Address: N/A
Daytime Phone: 817-773-6865 (personal)
Evening Phone: 817-773-6865 (personal)
Fax: N/A
Email Address: Adam_Vinson@alumni.baylor.edu (personal)

Second Witness *(if any)*:
Name:
Address:
Daytime Phone:
Evening Phone:
Fax:
Email Address:

Third Witness *(if any)*:
Name:
Address:
Daytime Phone:
Evening Phone:
Fax:
Email Address:

4. DESCRIPTION OF DISCLOSURE

Please write a brief statement of the event(s), acts or omissions that are the subject of the disclosure. See Page 6 of this form for guidance on what information should be disclosed to the Commission.

While employed at the Houston Forensic Science Center Stephen Adam Vinson provided testimony for a Texas Department of Public Safety case (cause# 10-10213) that he had screened in 2013 while he was still an employee of Texas DPS. During the review of his testimony, affidavit and deposition, HFSC identified concerns regarding testimony given by Stephen Adam Vinson as it pertains to his stated practice to testify solely from his lab report without reviewing his bench notes.

During his 2017 testimony Mr. Vinson is asked "Do you recall - - have you had an opportunity to review your report?" to which he responds "I have not seen my report in a while." Later in the testimony, when told to "give the jury some idea of the amount of time that it would take to do that work" Mr. Vinson replies "I'm not sure the amount of time on that. I'd have to reference the case file with my lab notes." When asked "There's some notes somewhere that would show what actual - - what actual work you did on what actual day?" Mr. Vinson replies "Yes, it would be in our case file. But I'm no longer an employee of the State, so I do not have access to that information".

In his 2019 voluntary statement Mr. Vinson states "It is common practice for me to testify from my report alone, and only reference notes if specifically instructed to do so by the prosecution or the defense." In reference to a specific bench note from this case he states "I appropriately testified that any irregularities would have been captured in my notes" and further states "Had I reviewed my case file prior to testimony, I would not have brought up the note to ADA Molfino, as the note does not affect the evidence that I screened and pertains only to the outer packaging in which the evidence was received". He also states "I can say with certainty, if this specific bench note was brought to my attention prior to testimony, I would have explained the insignificance of this bench note to both parties. This explanation would have surely eliminated any concern regarding the integrity of the evidence".

In the September 2020 deposition Mr. Vinson states "I do not testify from bench notes. My report is the summary of the testings that I performed in the case. I can always be asked questions about my bench notes, which I gladly answer. I have many times on the stand but it's also fair to say that I can testify directly from my report and it summarizes all the testing performed in the case." When Mr. Vinson is asked "Did you understand Mrs. Chase to be asking whether anything was awry with the cooler at all or just that you noted it?" he responds "Just that I noted it". And later he is asked "Is it your understanding she only cared whether or not you noted the irregularities" to which Mr. Vinson responds "Yes, I believe so." He is then asked "You didn't think she wanted to discuss any of those irregularities in front of the jury?" to which Mr. Vinson replies "No. And we had not discussed any irregularities, as I think I made clear, I did not review my bench notes before testimony". He is later asked "And it also states that (reading) Analyst shall testify in a manner which is clear, straightforward and objective and avoid phrasing testimony in an ambiguous, bias or misleading manner, correct?" to which Mr. Vinson replies "Yes, sir. And I believe I appropriately answered that if something was awry, I would have noted it, which I believe I did in my notes".

5. DESCRIPTION OF CORRECTIVE ACTION TAKEN

Please describe any corrective actions or corrective action plans the laboratory has developed to address the issues discussed in this disclosure. Please attach copies of the actions taken and/or future corrective plan to this disclosure form.

Please let the Commission know if any other agencies (e.g., Texas Rangers, local district attorney, Inspector General's Office, etc.) are also conducting an investigation of the matter in question. If possible, provide a contact name and phone number for the individual responsible for any other investigation(s).

This matter is also being evaluated by the Texas Department of Public Safety. The following information was provided by Texas DPS: In October 2013, a cooler labeled "refrigerate upon arrival" was submitted to the laboratory containing evidence for DNA analysis and was subsequently place into a non-refrigerated section of the DNA vault. When the case was retrieved for biological screening approximately one month later, the analyst noted the contents of the cooler included one Fed-Ex envelope (containing 5 yellow envelopes and one clear plastic baggie each containing evidence) and four ice packs. It was further noted that the ice packs inside the cooler were at room temperature, the Fed-Ex envelope inside was damp and soggy, and there was foul smelling water/liquid at bottom of container. All of this information was recorded in the case notes by the analyst. The analyst then proceeded with biological screening of the evidence. There is no further indication in the case notes that the Technical Leader, Section Supervisor, Laboratory Manager, or Quality Assurance Specialist were made aware of the condition of the cooler.

6. EXHIBITS AND ATTACHMENT(S)

Whenever possible, disclosures should be accompanied by readable copies **(NO ORIGINALS)** of any laboratory reports, relevant witness testimony, affidavits of experts about the forensic analysis, or other documents related to your disclosure. Please list and attach any documents that might assist the Commission in evaluating the disclosure. Documents provided will **NOT** be returned. List of attachments:

- Reporter's Record Volume 47 of 52 for Trial Court Cause No. 10-10213 for The State of Texas vs Joseph Kenneth Colone Jr.
- Reporter's Record Volume 24 of 37 Cause No 10-10213A CCA No. WR-89,538-01 (including Applicant's Exhibit No 156 Voluntary Statement of Stephen Adam Vinson)
- Cause No 10-10213-A CCA Cause No WR-89,538-01 Agreed Findings of Fact and Conclusions of Law Relating to Article 11.071 Writ Application
- No WR-89,538-01 On Application for Writ of Habeas Corpus in Cause No 10-10213-A in the 252nd District Court Jefferson County
- Personal statement provided by Stephen Adam Vinson on March 21, 2022

7. YOUR SIGNATURE AND VERIFICATION

By signing below, I certify that the statements made by me in this disclosure are true. I also certify that any documents or exhibits attached are true and correct copies, to the best of my knowledge.

Signature: [signature]

Date Signed: 4/7/2022

EXHIBIT J

TEXAS FORENSIC SCIENCE COMMISSION
Justice Through Science
1700 North Congress Ave., Suite 445
Austin, Texas 78701

June 1, 2022

Via email to adam_vinson@alumni.baylor.edu and via First Class Mail

Mr. Stephen Adam Vinson
5121 Elysian Street
Houston, Texas 77009

Re: FSC Disclosure No. 22.18 – Houston Forensic Science Center (Forensic Biology/DNA)

Dear Mr. Vinson,

As you know, pursuant to Article 38.01 §4(a)(2) and (3) of the Texas Code of Criminal Procedure, the Commission is investigating a self-disclosure filed by the Houston Forensic Science Center concerning possible professional negligence or misconduct with respect to your testimony in the Joseph Colone capital murder trial and post-trial proceedings.

The investigative panel requests an opportunity to interview you with respect to the events and circumstances described in the disclosure. Currently the Commission has access to your trial testimony, your post-conviction affidavit in the Colone matter dated October 10, 2019, your post-conviction deposition testimony, and an undated personal statement executed by you in connection with the internal HFSC investigation. The Commission has also reviewed the findings of fact and conclusions of law entered by the trial judge in the Colone matter dated July 12, 2021.

Absent other information, the Commission may accept the laboratory's findings which may result in disciplinary action by the Commission, up to and including disciplinary action against your forensic analyst license. If you wish to respond, in writing or otherwise, the Commission requests that you do so by June 17, 2022.

To schedule an interview, you may reach me directly at (512) 936-0729 or via email at Robert.smith@fsc.texas.gov. You may submit written responses to me electronically or via regular mail to the address on this letterhead.

Sincerely,
Robert Smith
Robert Smith
Staff Attorney
Texas Forensic Science Commission

EXHIBIT K

CONDUCT EXPECTATIONS

Policy Statement

Houston Forensic Science Center (HFSC) has certain workplace conduct expectations of its staff members. The Conduct Expectations Policy summarizes the most critical of those expectations. The list of conduct requirements in the policy should not be considered all-inclusive. All staff members must use critical thinking skills when deciding appropriate workplace conduct. If clarification is needed, staff members are expected to discuss concerns with their supervisor or a member of the Human Resources department.

Purpose

The purpose of the Conduct Expectations Policy is to summarize practices and guidelines that promote professional workplace conduct for all staff members. Although each individual case may vary, and no set of guides or rules will precisely fit every occasion, these practices and guidelines represent general standards which each staff member is expected to follow. Critical conduct requirements are addressed in more detail in specific HFSC policies such as Code of Ethics, Workplace Discrimination and Harassment, Prevention of Workplace Violence, Drug Free Workplace, Electronic Communications, Gifts to Staff Members and Financial Conflict of Interest. If there is a conflict between the Conduct Expectations Policy and a policy providing details of the issue, the detailed policy prevails.

Applicability

This policy applies to all staff members of HFSC. Student interns, temporary employees, independent contractors and vendors are also expected to follow the procedures set out in this policy.

Definitions

Civilian -- a person providing services under the management responsibility of HFSC but employed by the City of Houston in a job classification other than a sworn peace officer.

Classified -- a person providing services under the management responsibility of HFSC but employed by the City of Houston in a sworn peace officer job classification.

Disparate Treatment -- discrimination in which one individual is treated less favorably than another in the workplace because of their gender, race, color, national origin, religion, age, sexual orientation, or disability.

Employee -- a person directly employed by and on the payroll of HFSC.

Human Resources and Human Resources Director -- refers to the Human Resources Division and the Human Resources Director of HFSC.

Misconduct -- workplace behavior that is not in keeping with HFSC expectations, policies and practices. (For specific requirements and practices related to unlawful workplace conduct; i.e. disparate treatment, workplace harassment, sexual harassment, and retaliation, see *Workplace Discrimination and Harassment Policy*.)

Sexual Harassment -- includes, but is not limited to, unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome verbal comments of a sexual nature, unwelcome physical contact or touching, or unwelcome displays or distribution of sexually-oriented material.

Staff Member -- any person who is a *Civilian*, *Classified*, or *Employee*.

Supervisor -- any staff member with responsibilities that include supervision and management of other staff members.

Workplace Discrimination -- includes, but is not limited to, decisions regarding employment that adversely impact a staff member's pay, status, position, or assignment, including decisions regarding recruitment, appointment, compensation, promotion, corrective action, transfer, termination and training opportunities; opportunities for overtime pay and advancement may also be included.

Workplace Harassment -- consists of unwelcome conduct, whether verbal, physical or visual, that is based on a person's gender, race, color, national origin, religion, age, sexual orientation, or disability. Workplace harassment may include derogatory remarks, epithets, offensive jokes, the display or circulation of offensive printed, visual or electronic material; or offensive physical actions.

Responsibilities

A. Staff Members – All staff members are responsible for ensuring personal behavior that supports a professional scientific workplace environment and prevents retaliation for reporting perceived misconduct. A staff member who perceives he/she is being subjected to violation of this policy or a staff member who witnesses a perceived violation of this policy is expected to report the misconduct at the earliest possible stage so that HFSC may take appropriate action. Delay in reporting may impair the ability of HFSC to conduct a thorough investigation or take appropriate action.

B. Supervisors -- All supervisors are accountable for timely, fair and consistent administration of this policy. Any supervisor who receives a complaint of perceived misconduct or who observes perceived misconduct shall take prompt and appropriate action reasonably necessary to ensure compliance with the policy. At a minimum, the supervisor shall report the perceived misconduct to Human Resources as soon as possible. No supervisor has the authority to agree to not report an allegation or observation of perceived misconduct or to delay a report.

C. Human Resources –The Human Resources Director and/or Human Resources Generalist are responsible to provide advice and counsel to staff members and supervisors regarding this policy and any perceived violation of the policy. Human Resources may also be responsible to investigate allegations of misconduct.

Procedures

General Conduct

A. To maintain public confidence, it is important that all staff members adhere to the highest standards of professionalism in their dealings with members of the public, stakeholders, and one another.
B. Staff members shall not discriminate or engage in disparate treatment toward any current or prospective employee.
C. Workplace harassment in any form is strictly prohibited and will not be tolerated in the workplace.
D. Any intentional act of intimidation, threat of violence, act of violence or other interference with the job performance of co-workers or visitors is prohibited.
E. HFSC electronic media is intended for business related matters only.
F. Staff members are expected to understand their individual job duties, and to ask for clarification as needed. *(Please note that the supervisor has the discretion to change a staff member's job duties based upon business needs.)*
G. Staff members are expected to report to work as scheduled or to notify their supervisor in a timely manner when unable to do so.
H. Staff members shall not misrepresent expertise or credentials in any professional capacity.
I. Any conflict of interest concerns and/or any situation that may adversely affect the quality of the work shall be brought to the attention of the staff member's supervisor immediately. (See HFSC Quality Manual: Section 9 - Conflict of Interest/Undue Influence.)
J. Staff members are to treat clients or prospective clients professionally, with respect and dignity.
K. Staff members are expected to clearly distinguish HFSC statements from those that are statements of personal opinion when interacting with the media or the general public. Only authorized staff members may officially represent Houston Forensic Science Center.
L. Staff members shall not report to work under the influence of alcohol, illegal drugs or other illegal substances; in addition, they shall not report to work under the influence of legally prescribed or over-the-counter drugs which may impair alertness, motor function or the ability to perform the job or create a situation that may adversely affect the safety of others.
M. Staff members are expected to disclose personal relationships with customers to their supervisor so that the supervisor may determine the appropriateness of such relationships, seeking advice from corporate administration or the Legal Department as needed.
N. Staff members are expected to disclose personal relationships with other staff members to their supervisor or a member of Human Resources so that the impact, if any, on the work relationship may be determined.
O. Staff members shall not steal, intentionally destroy the personal or professional property of the corporation or co-workers, or engage in any conduct that may be considered criminal conduct at a Class B Misdemeanor or above.
P. Staff members shall inform their supervisor or a member of Human Resources of any pending litigation that may impact the staff member's ability to do his/her job effectively or of any arrest.
Q. Staff members are expected to dress professionally, with specific requirements determined by the section/department on the basis of job responsibilities.
R. Staff members who smoke must do so only in designated areas.
S. Willful or flagrant violation of workplace rules, policies or conduct expectations of HFSC may be so serious that removal from service with HFSC is warranted.

Opinions and Conclusions

A. Tests are designed to disclose true facts and all interpretations by staff members shall be consistent with that purpose and staff members shall not knowingly distort conclusions/interpretations.
B. Where test results are capable of being interpreted to the advantage of either side of a case, test results and opinions shall be reported in an objective and scientific manner, without regard to the fact that one side of the case has requested the test.

Court Presentation

A. Staff members shall not offer opinions or conclusions in testimony which are untrue or are not supported by scientific data.
B. Staff members shall avoid the use of terms and opinions which could be assigned greater weight than are due them. Where an opinion requires qualification or explanation, it is not only proper but incumbent upon the staff member to attempt to offer such qualification or explanation.
C. Staff members have a moral obligation to see to it that others in the criminal justice system understand the evidence as it exists and to present it in an impartial manner.
D. Staff members testifying as expert witnesses shall make every effort to use understandable language in their explanations and demonstrations in order that the jury/judge will obtain a true and valid concept of the testimony. The use of unclear, misleading, circuitous, or ambiguous language with a view of confusing an issue in the minds of the court or jury is unethical and prohibited.
E. Staff members shall answer all questions asked in a clear, straight-forward manner and shall refuse to extend themselves beyond their field of competence.

Compliance

A. Compliance with this policy is an on-going requirement; each staff member shall ensure his/her compliance with the policy.
B. Perceived misconduct may be reported to a member of Human Resources who will facilitate an informal or formal resolution process. Allegations by civilians or classified officers may be referred to the appropriate facilitator for the City of Houston.
C. Allegations of disparate treatment, workplace harassment, sexual harassment, and/or retaliation shall be addressed following the procedures outlines in the Workplace Harassment and Discrimination Policy.
D. Retaliation against anyone for making a complaint of misconduct based upon an honest perception of the events or for cooperating in the investigation of such a complaint is strictly prohibited.
E. A violation of this policy may result in progressive corrective action, up to and including removal from service with HFSC. The progressive corrective action followed shall be appropriate to the staff member's classification as employee, civilian or classified.

EXHIBIT L

EVIDENCE HANDLING

1 Scope

The purpose of collection and packaging of biological evidence is to preserve it for future analysis, protect it from contamination, and maintain the integrity of the evidence.

2 Collection and packaging

A. Dry evidence items must be kept dry. This may be accomplished by packaging the evidence in breathable containers, e.g., paper envelopes or sacks. The DPS Crime Lab Service *Physical Evidence Handbook* details specific collection techniques.

B. Wet evidence items should be dried at the crime scene when practical. Wet items should not be folded in such a way as to transfer stains to other areas of the item.

C. Collected items should be packaged separately.

D. The evidence package must be marked with the case number and properly sealed.

E. Special information should be written on the evidence package or outer container to ensure safety of the handler or integrity of the evidence.

F. Any external evidence container knowingly containing biohazard materials must be marked with a universal biohazard sticker or placed into an appropriately labeled storage area/container.

3 Storage of evidence

A. Biological evidence must be properly stored to preserve biological constituents.

B. Store sexual assault kits in the refrigerator or at room temperature. If the sexual assault kit is stored at room temperature, the liquid blood specimen must be removed and stored in the refrigerator, or a sample of the specimen must be dried on FTA paper or cloth substrate. Blood and urine specimens requiring toxicological screening will be stored in the refrigerator.

C. Small, dried evidentiary items may be stored frozen depending on available space.

D. Refrigerate, do not freeze, liquid whole blood specimens.

E. Store larger items such as clothing, bedding, weapons, and other physical evidence containing stains at room temperature until examined.

F. Collected cuttings or swabs are considered evidence. For temporary storage, this evidence should be stored frozen and protected from freezer moisture by a layer of plastic. For long-term storage, this evidence may be stored at room temperature. A portion of collected cuttings and swabs and DNA extracts will be retained by the laboratory whenever possible.

G. DNA extracts are considered evidence and will be retained by the laboratory whenever possible.

H. Amplification products and/or slides prepared by the laboratory are considered work product and not considered evidence unless it is the only remaining

sample from that piece of evidence. Amplification products should be properly discarded after analysis has been completed.

I. All items considered evidence by the laboratory will be handled according to LOG-05-01.

4 Intra-agency transfer

A. Reference LOG-05-01 for intra-agency transfer procedures.

B. If screening and evaluation of the evidence has been performed, the evidence will be forwarded according to these procedures:

1. All known and evidentiary samples should be submitted as dried stains. Known blood standards should be spotted onto FTA paper.
2. Select a sufficient portion of the evidentiary stain for submission.
3. All probative swabs and stains should be submitted.
4. In the event that hairs, bone, teeth, muscle, or other tissues are required for DNA analysis, arrangements should be made between laboratories before transfer. Mounted hairs should remain mounted until transfer to the laboratory to prevent possible contamination. Soft tissues should be transferred frozen.

EXHIBIT M

14. Possibility and effect of cross-contamination.

6.2 Evidence Examination

1. For cases with a large volume of evidence (excluding sexual assault kits), a maximum of ten probative items of evidence should be screened.
2. It may be necessary to consult with another qualified examiner, the Technical Leader, and/or the supervisor to determine the appropriate analytical approach. How far the examiner proceeds in a particular case will depend on the available sample and what is necessary to answer the question(s) posed.
3. Retrieve evidence from evidence storage, evidence custodian or another examiner. Verify that the LAB-06 Laboratory Submission Form is appropriately completed and a chain of custody maintained. Any changes or additions to the form should be initialed and dated. Identify the pertinent forensic question(s). Plan the approach to the case. Evaluate the potential value of evidence relative to the items of evidence submitted for examination.
4. Wear a lab coat, disposable gloves, and mask as appropriate and change as necessary to insure safety and to avoid contamination of evidentiary items.
5. Clean and then cover the work surface with clean, unused paper.
6. At all times during the examination, items from any suspect(s) are kept separate from those of associated victim(s). Whenever possible, items from suspect(s) and items from associated victim(s) are examined in different locations and/or times. Always keep known materials separated from the questioned materials to be searched.
7. No more than one item of evidence in an unpackaged state is allowed on an examination table at one time unless the items were submitted in the same package.
8. Note instances where packaging or handling of the evidence creates a potential for contamination. These instances should be brought to the attention of the supervisor, other involved examiners and the investigator. Such instances may preclude the examination of the evidence.
9. The case number, item number and examiner initials should be labeled on the packaging. Open the container (avoid breaking previous seals, if possible). Mark inner evidence packages as encountered.
10. Label or tag each item with unique case number and examiner initials. If the evidence is too small to mark, place the evidence in a package then seal and mark the package. Any markings and notations on the evidence should not interfere or obstruct forensically significant areas (e.g. bloodstains).
11. Document the individual items of evidence. Note whether other items were packaged together with the selected item. Visually examine the evidence and document as appropriate:
    a) *A description of the outer evidence packaging and condition of the evidence, especially relevant factors to the preservation of the biological material*

b) Physical description such as color, size, material, holes and tears, broken parts, missing parts, or other modifications that make the item appear unusual

c) Manufacturer's identification, serial numbers, or other marks

d) The collection of trace evidence

e) Significant stains, patterned marks, or impressions should be documented in a manner which clearly indicates the location, physical characteristics, relationship to other stains, and results of screening tests

f) Use of microscopes or alternate light sources

12. Perform and record results of presumptive tests conducted based on the respective Analytical Approaches as described below.
13. A sufficient number of samples should be collected from an item to represent stains of probative value.
14. Collected samples must be protected from loss or contamination by individually packaging and labeling with case number, item number, unique identifier as applicable, and initials.
15. Any collected trace evidence may be packaged separately or with the original item, as long as it is uniquely labeled, sealed, initialed and dated. All original exhibits will be re-packaged in the original container, if possible. The evidence is re-sealed in a manner that would detect tampering.
16. Upon completion of screening, the evidence should be transferred to the submitting agency, evidence storage area, evidence custodian or appropriate examiner.

6.3 Analytical Approaches

The analyst will evaluate the case synopsis, scene, and collected evidence to determine the appropriate course of analysis that should be taken to address the request. The most probative evidence items will be examined first.

A. Body fluid identification – Blood Examinations

1. A typical analysis scheme for a bloodstain may include:

a) visual examination

b) presumptive testing

c) presumptive human origin testing

d) preserve the stain, cutting or swab

e) test for other body fluids if indicated

2. How far the examiner proceeds in a particular case will depend on the available sample and on what is necessary to answer the question(s) posed.

B. Body fluid identification – Semen Examinations

1. When screening evidence for semen, an alternate light source can be helpful, especially for larger items of clothing or bedding. An alternate light source also

EXHIBIT N

Tweezers, scalpel, scissors, probe and other implements as necessary

Plastic bags, paper envelopes, or appropriate evidence containers

5 Standards and Controls

Respective positive and negative controls will be conducted and documented as required by specific analytical procedures.

6 Procedure

6.1 Case/Evidence evaluation

A. The results of the examinations may either implicate or exonerate a suspect from involvement in a crime. Because each case is different, only guidelines can be prescribed; the case evaluation should include consultation with the investigator/prosecutor as necessary.

B. An offense report is very helpful in assessing the probative value of the evidentiary material.

C. All communications pertinent to the case evaluation must be documented.

D. Cases should be evaluated to:

1. Determine the quality and quantity of the evidence to be analyzed,
2. Prevent the loss of potentially valuable information,
3. Maximize the meaningful information obtained from the evidence, and
4. Determine if the requested examinations can be performed with the submitted evidence and with the available resources.

E. Some considerations in evaluating the evidence should include:

1. The age of the evidence/case,
2. The storage conditions of the samples prior to submission,
3. Whether stain/smear samples, such as blood, semen, saliva were dried before submission,
4. Whether the evidence is moldy and/or putrefied,
5. Possible dilution of the samples,
6. Whether weapons or other objects require fingerprinting or have been fingerprinted,
7. Whether all pertinent evidence has been submitted,
8. Whether the victim(s), suspect(s), or potential witnesses were injured,
9. The relationship between victim(s), suspect(s), and potential witnesses,
10. The availability and adequacy of suspect and/or victim known samples,
11. The extent of screening required to obtain a search warrant for suspect known samples,
12. The analyses that should be run if sample is limited,
13. Possibility of sample remaining after analysis, and

14. Possibility and effect of cross-contamination.

6.2 Evidence Examination

1. For cases with a large volume of evidence (excluding sexual assault kits), a maximum of ten probative items of evidence should be screened.
2. It may be necessary to consult with another qualified examiner, the Technical Leader, and/or the supervisor to determine the appropriate analytical approach. How far the examiner proceeds in a particular case will depend on the available sample and what is necessary to answer the question(s) posed.
3. Retrieve evidence from evidence storage, evidence custodian or another examiner. Verify that the LAB-06 Laboratory Submission Form is appropriately completed and a chain of custody maintained. Any changes or additions to the form should be initialed and dated. Identify the pertinent forensic question(s). Plan the approach to the case. Evaluate the potential value of evidence relative to the items of evidence submitted for examination.
4. Wear a lab coat, disposable gloves, and mask as appropriate and change as necessary to insure safety and to avoid contamination of evidentiary items.
5. Clean and then cover the work surface with clean, unused paper.
6. At all times during the examination, items from any suspect(s) are kept separate from those of associated victim(s). Whenever possible, items from suspect(s) and items from associated victim(s) are examined in different locations and/or times. Always keep known materials separated from the questioned materials to be searched.
7. No more than one item of evidence in an unpackaged state is allowed on an examination table at one time unless the items were submitted in the same package.
8. Note instances where packaging or handling of the evidence creates a potential for contamination. These instances should be brought to the attention of the supervisor, other involved examiners and the investigator. Such instances may preclude the examination of the evidence.
9. The case number, item number and examiner initials should be labeled on the packaging. Open the container (avoid breaking previous seals, if possible). Mark inner evidence packages as encountered.
10. Label or tag each item with unique case number and examiner initials. If the evidence is too small to mark, place the evidence in a package then seal and mark the package. Any markings and notations on the evidence should not interfere or obstruct forensically significant areas (e.g. bloodstains).
11. Document the individual items of evidence. Note whether other items were packaged together with the selected item. Visually examine the evidence and document as appropriate:
    a) *A description of the outer evidence packaging and condition of the evidence, especially relevant factors to the preservation of the biological material*

EXHIBIT O

TEXAS DEPARTMENT OF PUBLIC SAFETY
CRIME LABORATORY

Quality Incident Report

LAB-510 Rev.01 (03/2020) p.1 Issued by: SQM

Tracking ID
QI-HOU-2022-0321-DNA

Lab	Houston	Discipline	DNA	Date Discovered	03/21/2022	Page 1 of 2

Date of Incident	03/04/2011	End Date of Incident (if applicable)	03/21/2022
Related Policy/Procedure/Specification	DNA-03-02 6.2.11 (2013-2014); DNA-03-02-8B (2013-2014)		
Related Work # (case/batch/instrument#)	L2H-213609; HOU-1310-09111		

Incident Description:

In October 2013, a cooler labeled "refrigerate upon arrival" was submitted to the laboratory containing evidence for DNA analysis. The case was received by one evidence technician and was subsequently placed into a non-refrigerated section of the DNA vault by another separate technician. When the case was retrieved for biological screening approximately one month later, the analyst noted the contents of the cooler included one Fed-Ex envelope (containing 5 yellow envelopes and one clear plastic baggie each containing evidence) and four ice packs. It was further noted by the analyst that the ice packs inside the cooler were at room temperature, the Fed-Ex envelope inside was damp and soggy, and there was foul smelling water/liquid at bottom of container. The analyst also included in his notes that he would inquire with evidence receiving as to why the Styrofoam container was not stored refrigerated as per the label instructions on the outside of the container. There are no further indications in the case notes or case activities that the forensic scientist questioned evidence receiving about the storage location. In March 2019, the Laboratory received a subpoena duces tecum for all records which included the forensic scientist's bench notes. In June 2019, an initial application for a Writ of Habeas Corpus was filed in the 252nd district court in Jefferson County, Texas. At that time a decision was made to only respond to the specific questions in the writ. Therefore, the Laboratory did not initiate a quality incident (QI) for the 2013 incident addressing the improper evidence storage. In March 2022, the Laboratory was notified by Houston Forensic Science Center (HFSC) regarding issues with testimony given by the original analyst on this case. Top Management and QA from both DPS and HFSC as well as representatives from the Texas Forensic Science Commission met to discuss the agreed findings of fact and conclusions of law relating to article 11.071 writ application regarding the overturned conviction as a result of this analyst's testimony. DPS provided HFSC with background information on the case and collaborated on the disclosure to the Texas Forensic Science Commission.

Cause Analysis:

The Styrofoam container was received along with the laboratory submission form by one evidence technician and placed in the vault later that same day by another evidence technician. Even though there was a label on the outside of the container "refrigerate upon arrival", the evidence technician did not refrigerate. At the time, agencies would often re-use conveyance containers and labeling on the outside was not always related to the contents inside. It is believed that the evidence technician made the assumption that this was the case for the Styrofoam container since the submission form did not indicate that items inside would require refrigeration or specify that it contained extracts. The items that were listed on the submission form did not require refrigeration per any laboratory policies. The Laboratory believes that the cooler was not opened to inspect the evidence and there is no indication of follow up with the submitting agency to clarify storage requirements. From reviewing the submission form only, there is no indication that the Styrofoam container contained cold packs or extracts which would have necessitated refrigeration. When the evidence was retrieved from the vault by the forensic scientist for analysis and the storage discrepancy was noted, there were no subsequent conversations documented as to why the Styrofoam container was not stored refrigerated. The forensic scientist did notate concerns with the integrity and condition of the evidence but did not bring his concerns to the DNA Technical leader, the DNA section supervisor, the Quality Assurance Specialist, or the Laboratory Manager. The analyst also did not take photographic documentation of the condition of the evidence. At the time, DNA policy required the analyst to document a description of the condition of the evidence, especially relevant factors to the preservation of the biological material. While the condition of the outer Fed-Ex envelope was documented as "damp and soggy", the condition of the evidence inside that envelope is not described (neither the inner manila envelopes or the evidence itself). The lack of documentation as well as the fact that the analyst did not bring the condition of the evidence to the attention of management contributed to this issue. In 2019, the Laboratory decided to address the questions brought forth in the writ. At the time, the consensus amongst management was to address what was determined to be the most impactful and not issue a quality incident since so much time had passed.

Risk Assessment:

Risk has been assessed to be medium. Based on the lack of documentation and the issues surrounding the testimony provided by the analyst, the severity of this incident has caused a major impact to the reliability of the work performed. Subsequently, all cases worked by the analyst have now come into question which will cause major adverse impacts to the adversarial system. Much of the risk associated with case documentation and evidence receiving seen in this incident has been addressed over time and is documented under the corrections. At the time of analysis, the DNA Manual did require refrigeration of extract samples. The risk to storing these at room temperature is low because DNA can still be recovered from extracts stored at room temperature. Additionally, no analysis was needed on the extracts in this case. The Laboratory

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recognizes that while the risk of this incident recurring is low, if the root cause(s) identified in this incident were to occur again, there would be the potential for another quality incident associated with a significant risk. In order to mitigate that risk, the laboratory will be evaluating evidence receiving and documentation processes in regards to DNA evidence (See Action Plan). Based on analyst testimony regarding the condition of the evidence, the case was overturned on appeal.

Risk Level: Medium

Correction(s) to the Original Work (Indicate if not performed at this time): **Corrected Report?** NA

The Lab Manager and the Quality Manager met with the Houston Laboratory section supervisors to discuss the writ and the agreed findings of fact and conclusions. During this meeting, supervisors were asked to speak to their sections about the importance of communicating issues and/or concerns they may have in regards to evidence integrity or perceived improper storage conditions. The Lab Manager met with the evidence technicians to discuss the importance of attention to detail related to proper storage conditions. Since 2013 the quality culture at DPS has continued to mature, including growth of the program, analyst outreach to educate on quality topics, and improvements to policies and procedures. The Laboratory has incorporated more well-defined practices regards the handling and receipt of compromised evidence. More clear-cut language has been added to policy regard expectations for documentation. The laboratory has added dedicated Quality Managers for each laboratory location to oversee the implementation and daily management of quality in those labs. More training and outreach to staff, including analysts, regarding how to handle quality issues is occurring at all levels.

Customer Notification (Indicate if not performed at this time or not applicable):

DPS has been notified that the Harris County DA's office will no longer sponsor the analyst going forward. HFSC will be sending notification on the cases the analyst worked while employed by them. DPS has also provided a list of cases worked while the analyst was employed at DPS to the Harris County DA.

Corrective Action Necessary? Yes **Significant Disclosure?** Yes **Inclusion on Disclosure Form?** Yes

Approval

Requestor(s)/Collaborator(s) *Zalekian, Somiyeh, McWhorter, Andrew (electronically signed)*

Subject Matter Expert(s) *McWhorter, Andrew (electronically signed)*

Lab QA *Zalekian, Somiyeh (electronically signed)*

Management *Wimsatt, Kristi , McWhorter, Andrew , Greco, Heather (electronically signed)*

System QA *Richardson, Kayla (electronically signed)*

Date of Final Approval *06/07/2022*

EXHIBIT P

TEXAS DEPARTMENT OF PUBLIC SAFETY
CRIME LABORATORY

Action Plan/Supplement

LAB-512 Rev.00a (09/2019) p.1 Issued by: SQM

Tracking ID
QI-HOU-2022-0321-DNA

Lab	Houston	Discipline	DNA	Date Discovered	3/21/2022

Summary Corrected Report Issued ☒ **NA** ☐ **Yes**

The original Quality Incident (QI-HOU-2022-0321-DNA) sought to address two areas: documentation and risk assessment of the original issues regarding the storage of DNA evidence received in 2013 as well as the laboratory's failure to recognize and document the issues as a quality incident at the time it was observed. This supplement to the original QI seeks to address additional concerns related to degradation of DNA and the writ response submitted October 2019.

In the writ response, DPS asserted that the glove, towel, and swabs were handled in a manner that would prevent degradation and contamination. Jefferson County Crime Lab submitted the evidence in a cooler with a sticker labeled "refrigerate upon arrival" visible on the outside, yet DPS incorrectly placed the cooler on a shelf in an unrefrigerated vault without inventory (in order to preserve the seals) and without discussing or confirming the required storage conditions with the submitting agency. As soon as this decision was made, the laboratory failed to handle the evidence appropriately. This decision ultimately led to the evidence and the DNA extracts being stored in a way that introduced risks of contamination and degradation of the DNA evidence. At the time the writ response was drafted in 2019, the laboratory should have taken the opportunity to address the breakdown in communication within the evidence receiving section and the subsequent failure of the analyst and DPS quality system to identify, document, and properly evaluate accountability, risk, and overall impact. DPS cannot state conclusively that the storage conditions of the evidence had no overall impact on degradation and contamination of the samples.

DNA degradation can occur when samples are exposed to unfavorable conditions, such as warmth or moisture, and that most biological evidence of the type submitted in this case is best preserved when stored dry (stains) or cold (extracts). In this case, regardless of whether the liquid breached the envelopes, the evidence sat in a non-refrigerated and moist environment for 30 days. Furthermore, the analyst noted a foul-smelling odor which could have been indicative of possible mold/fungal growth. These factors posed a risk of contamination and/or degradation of any possible DNA present on the items upon submission.

Contamination is most noticeably, but not always, indicated by the presence of a mixture or of a profile in a reagent blank. During the DNA batch processing of the samples from the items contained within the Styrofoam container, the laboratory followed approved procedures such as positive and negative controls, reagent blanks throughout extraction, quantitation, amplification and capillary electrophoresis. These quality control procedures ensure that mixtures observed are not the result of contamination from samples in other cases in the same batch. It is difficult, and sometimes impossible, to ascertain if the mixtures observed in the samples from this case are present due to contamination between the items in the cooler following the improper storage conditions or if the mixtures were already present on the items when they arrived at the lab. The extracts contained within the clear plastic bag inside the Styrofoam container originated at Orchid Cellmark and were not analyzed for DNA in the Houston DPS Laboratory, nor was any of the liquid found in the bottom of the container. The extracts in this case were stored in plastic tubes inside a plastic bag. Storage of the extracts in plastic created a physical barrier to prevent any liquid contained in the extract tubes from leaking onto other evidence as well as prevent any liquid from the cooler from penetrating into the tubes.

Due to lack of documentation by the original analyst, the laboratory cannot definitively conclude whether the liquid in the cooler originating from the cold packs breached the FedEx envelope, further increasing the risk of contamination occurring on the remaining items of evidence (those not in the tubes). Therefore, the mixtures developed in the evidentiary samples in this case could be true mixtures or could be a result of inappropriate evidence storage. No technology currently exists that would be able to distinguish between the two.

Higher levels of degradation can be likely in compromised samples or those that have been exposed to unfavorable conditions. The more severe the exposure, the more severe the degradation can be, and the more difficult it becomes to assign number of contributors. When viewing a DNA profile in electropherogram (epg) format, degradation typically resembles a ski slope pattern with the top of the ski slope beginning on the left side of the epg (smaller molecular weight loci) and ending on the right side of the epg (larger molecular weight loci) and manifests in the observation of lower peak heights, imbalance of sister alleles and allelic and/or complete locus dropout. For example, what appears to be a 3-person mixture on the left side of the epg could appear as a single source on the right side of the profile due to sample degradation. Stochastic effects, i.e., random sampling of the template during the Polymerase Chain Reaction (PCR) process are also taken into consideration during number of contributor assessment. Stochastic effects increase as the template of the donor or donors decreases, resulting in sister allele dropout or complete genotypic dropout of a contributor or contributors. Stochastic thresholds are calculated during validation to aid in interpretation of such peaks in questioned profiles and can help assess whether or not sister allele dropout might be occurring. Careful evaluation of each locus and the profile as a whole is taken into consideration when the number of contributors is assigned. As the amount of degradation increases, confidence in assigning number of contributors becomes

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increasingly difficult and may lead to a profile being deemed uninterpretable. In this case, of the items from the Styrofoam container, one of the profiles developed was deemed uninterpretable by the original analyst (Cutting of collar from black undershirt) and no profile was developed from another (swab from Dodge Charger).

It is also normal and expected to observe some degree of degradation in evidence samples, regardless of storage conditions, and probabilistic genotyping is utilized for modeling that degradation. For this case, there are indications of degradation in the profiles from the samples in the container in question; however, there is no scientific way to determine if the degradation was a result of the storage conditions or if it was a result of the normal environmental insults that degrade DNA from the time of deposit to the time of collection and subsequent analysis. Degradation and dropout was observed in all of the profiles obtained. There were alleles present that could not be attributed to either of the two victims or to the suspect. Overall, six interpretable DNA profiles were obtained and interpreted by the original analyst as follows:

- Swab – glove outside – Full three-person mixture
- Swab – glove inside – Partial two-person mixture
- Swabs – gray plastic portion from Dodge Charger – Partial single source
- Swabs – blue towel – Full four-person mixture
- Swab – door from Dodge Charger – Partial two-person mixture
- Swab – chair frame from Dodge Charger – Partial two-person mixture

Since the date of the original incident, the Laboratory has incorporated more well-defined practices regarding the handling and receipt of compromised evidence, including expectations regarding documentation and notification of quality issues. The Laboratory has added dedicated Quality Managers for each laboratory location to oversee the implementation, training, and daily management of quality related activities. In addition, the Houston Laboratory Manager has met with evidence technicians to reiterate the importance of attention to detail related to proper evidence storage conditions. The Evidence Program Coordinator has been consulted in order to facilitate system wide communication between the evidence coordination teams across the state to discuss this issue and related process improvements.

In summary, human error resulted in improper storage conditions of the submitted container until it was retrieved by the forensic scientist thirty days later. Personnel additionally did not act upon the observation of improper storage conditions at the time it was noted by the forensic scientist or in 2019 during subsequent review of the case record. At least three individuals were aware during the serology process– the forensic scientist processing the evidence, the technical reviewer, and the administrative reviewer. The DNA Technical Leader did not perform any of the serology reviews.

Requestor(s) *Somiyeh Zalekian,* Date: 8/24/2022

Approval **Status:** ☐OPEN ☐ CLOSED

TL/TPOC Andrew P. McWhorter Date: 09/01/22

Quality Manager Somiyeh Zalekian Somiyeh Zalekian Date: 9/01/2022

Comments:

EXHIBIT Q

DNA-03-06 GUIDELINES FOR WORK AND TESTIMONY PREPARATION

1 Scope

This chapter provides guidelines for how an analyst or technician can prepare to work supplemental requests for analysis and requests for expedited analysis, as well as how to prepare for court testimony either directly or on behalf of another analyst/technician. It is recognized that not every situation can be anticipated or addressed; however, general guidelines are set forth here to assist analysts and technicians with preparation prior to beginning a supplemental analysis, a request for expedited analysis or for testifying in court.

2 Related Chapters

Guidelines for Technical Review

Physical Evidence Examination

3 Practices

3.1 Preparation to Work Supplemental Requests and Expedited Requests for Analysis

A. Review the request to determine:

1. Has new evidence been submitted for analysis that was not previously submitted to the laboratory;
2. Is the request for reinterpretation or recalculation of statistics;
3. Does the request include evidence that was previously analyzed by the laboratory using old technology;
4. Is the request related to a request for post-conviction analysis;
    a) *When possible, cases with requests for post-conviction analysis should be worked by personnel other than the analyst or analysts that originally worked the case.*

B. Review of the case record should occur prior to the start of supplemental analysis or expedited requests for analysis in order to determine:

1. What previous testing (if any) was performed in the case and what methods were used;
    a) *At a minimum, this review should include previous testing done in biological evidence screening, male screening, and DNA analysis.*
    b) *It is not necessary to repeat previous testing on items of evidence if previous testing was performed using current technology (e.g. if testing for blood was previously performed using TMB/LMG/or PHT, it is not necessary to repeat this testing).*
2. If there have been updates to procedures since the previous testing that could be applied to the current testing request;
3. If it is possible to make comparisons between the previous testing and the current testing or if it is necessary to retest previous evidence outside of the current request
    a) *Determine if known DNA samples should be reamplified*
    b) *Determine if evidentiary samples should be reamplified so that probabilistic genotyping can be used*
    c) *Determine if reinterpretation is sufficient without reamplification of samples*

d) Determine if the original reporting analyst is qualified to interpret the data or if another analyst will need to work the case.

4. If all necessary evidence has been submitted to the laboratory.
5. If all necessary information has been communicated to the laboratory so that evidence processing may proceed.

C. Based on the assessment of the request for supplemental analysis or expedited analysts request and the review of the case record, a plan for analysis should be developed.

1. It may be necessary to consult with another qualified analyst, the Technical Leader, and/or the Section Supervisor to determine the appropriate approach to the case.

D. When developing an approach to case analysis an analyst should consider:

1. How much evidence is left for testing;
2. What evidence will be tested;
3. Prioritization of tests (what order testing will occur and which tests precede others is especially important when there is limited sample);
4. How previous testing may affect the ability to perform new tests;
5. Laboratory capabilities to perform the testing needed;
6. The need to retest evidence unrelated to the current request;
7. Who will perform what types of tests;
8. The time needed to complete testing, reporting, and technical review;
9. Considerations for DNA analysis such as:
   a) Conditioning
   b) Reamplification of knowns or evidence samples
   c) Co-contributors
   d) Number of contributors
   e) Updating reporting for inconclusives
   f) Updating reporting for mixture interpretation
   g) Updating statistics

E. Once testing and reporting is complete, both the analyst and technical reviewer should compare the results from any previous testing to the results from current testing so that they are aware of any gaps in analysis or potentially conflicting results.

1. This comparison should include review of any previously entered CODIS profiles to determine if they need to be updated or removed based on additional results and information.

F. Regular communication with the customer is recommended to apprise them of progress of analysis and any additional laboratory needs that may be encountered as analysis proceeds.

G. Quality analysis is paramount and is prioritized over all other considerations.

3.2 Preparation for Court Testimony

A. It is not expected or advised that an analyst/technician testify from memory. Preparation for court testimony is a necessity and time must be provided to allow for this type of preparation.

B. The analyst/technician must obtain a copy of the case record pertaining to any biological evidence screening, male screening, or DNA analysis performed in the case including the following documentation as applicable:

1. Submission forms
2. Chain of custody
3. Case activities (phone logs, emails)
4. Information regarding case milestones (dates and names of reviewers)
5. Any Quality Incidents, Quality Action Plans, or Contamination Logs related to the analysis
6. Copy of SOP and any deviations that were in use during the range of analysis for the case
7. Notes and report from biological evidence screening including photos or diagrams even if the analysis was performed by another employee
8. Notes and report from male screening even if the analysis was performed by another employee
9. Notes and report from DNA including electropherograms, PopStats/statistical reports, and STRmix results even if the analysis was performed by another employee

C. The analyst/technician should review the case record as relates to the DNA discipline in its entirety. The focus of the review should include the following information as relates to their testimony:

1. What items were screened and how were these items chosen for screening;
2. What screening exams were used;
3. Any results for screening of items;
4. Condition of items that might impact the results (e.g. were the items moldy or packaged improperly);
5. What items were forwarded to DNA analysis and how were these items chosen;
6. What extraction methods, quantification methods, and amplification methods were used;
7. Were robotics used and if so at what steps in the process;
8. Were there indications of inhibition or contamination and if so, what was done to remedy the situation;
9. How were known samples processed in relation to evidence samples;
10. Any results for DNA analysis of items;
11. What statistics were calculated and what programs/databases were used in the calculations;

12. Was the quality of the DNA profile expected based on the quantification results (i.e. was inhibition present or low quantity of DNA that resulted in a partial or no profile);
13. What types of assumptions were made during analysis to include known contributors, conditioning, and co-contributors and do these assumptions make sense;
14. If any type of reinterpretation or reanalysis was done in the case and if so why it was done;
15. How the results compare between different analyses and explanations for any difference noted;
16. Any service notices issued by laboratory management that might have an impact on the case;
17. If a team approach is used, which staff performed which parts of the analysis;
18. Were there any deviations in place that affected the analysis of the case;
19. Have there been any changes in interpretation protocol since the case report was issued and would they affect the case outcome?

D. The analyst/technician should complete a review of the scientific basis for any methods used in the case relevant to their testimony.
   1. They should be able to explain how these methods work, how the methods were tested during validation prior to use by DPS, and how they were used in the analysis of the case. The explanation should be in a manner that could be understood by a jury of laypersons.
   2. Suggested sources of information that can be used in completion of this review include:
      a) Exams or notes taken during training on the method
      b) Textbooks and scientific papers related to the method
      c) Validation studies performed using the method
      d) Manufacturer manuals about the method
      e) Standard Operating Procedures and any deviations related to the method

E. The analyst/technician must complete a review of any Quality Incidents, Quality Action Plans, or Contamination logs associated with the case relevant to their testimony. They must be able to explain what happened, how it impacted the case, and actions taken to remedy the situation.

F. It is suggested that the analyst/technician prepare a court notebook to take with them to court. The court notebook is an aide that can be used to study prior to testimony or during testimony to assist in answering questions that may be asked by the court. The notebook should be reviewed and updated periodically if it is used.

1. Be aware that if a court notebook is prepared and taken to court, it may be examined by the officers of the court during trial.

2. The following items may be included in a court notebook:

a) Current Statement of Qualifications and or Curriculum Vitae

b) Disclosure Form and any related documents

c) College transcripts

d) Certificates of Attendance from Continuing Education/Training

e) Copy of current License and any Certifications

f) Copy of Authorizations to conduct work (memos, LAB-309, congratulatory emails, etcetera)

g) Scientific papers relevant to methods that the analyst/technician will testify about (suggest having a copy of any developmental validation papers)

h) Analyst/technician notes regarding any methods on which they will testify (e.g. the chemical formula for TMB and how the test works)