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Draft Minutes
Forensic Science Board Meeting
May 12, 2010
Department of Forensic Science, Central Laboratory, Classroom 1

Board Members Present

Steven D. Benjamin
Leah Bush, M.D.
Dale Carpenter, Ph.D.
John Colligan (Designee for Garth L. Wheeler)
Colonel W. Steven Flaherty
Jo Ann Given
Katya Herndon (Designee for Karl R. Hade)
Kristen Howard (Designee for Senator Howell)
Alan Katz (Designee for Attorney General Cuccinelli)
Senator Henry L. Marsh III
Raymond F. Morrogh
Elizabeth S. Russell
Ramona Thiss (Designee for Robert Jensen)

Board Members Absent

Delegate William R. Janis (Designee for Delegate Albo)
Sheriff A.A. Lippa Jr.

Legal Counsel for the Forensic Science Board

Amy Dilworth

Staff Members Present

Wanda Adkins, Office Manager
Jeffrey Ban, Central Laboratory Director
David Barron, Ph.D. Technical Services Director
Henry Bosman, Senior Accountant, Finance
Donna Carter, Finance Manager
Guinevere Cassidy, Legal Assistant
Doug Chandler, IT Manager
Ann Davis, Physical Evidence Program Manager
Leslie Ellis, Human Resources Director
Linda Jackson, Chemistry Program Manager
Gail Jaspen, Chief Deputy Director
George Li, Section Supervisor, Forensic Biology
Alka Lohmann, Training and Calibration Program Manager
Pete Marone, Department Director

47 Stephanie Merritt, Department Counsel
48 Kevin Patrick, Western Laboratory Director
49 Lisa Schiermeier-Wood, Section Supervisor, Forensic Biology
50 Steven Sigel, Deputy Director
51 Amy Wong, Northern Laboratory Director

52

53 **Call to Order by Chairman Raymond Morrogh**

54

55 Chairman Morrogh called the meeting of the Forensic Science Board (“Board”) to order at 9:07
56 a.m.

57

58 **Adoption of Agenda**

59

60 Chairman Morrogh asked if there were any additions or changes to the draft agenda for the
61 meeting. Being none, Mr. Benjamin moved to adopt the agenda which was seconded by Ms.
62 Howard and adopted by unanimous vote of the Board.

63

64 **Approval of Draft Minutes of January 6, 2010 Meeting**

65

66 Chairman Morrogh asked if there were any changes or corrections to the draft minutes from the
67 January 6, 2010 meeting. Ms. Howard requested a correction to Line 15, stating that she is the
68 designee for Senator Howell. Mr. Benjamin moved to adopt the minutes of the January 6, 2010
69 meeting with the correction to Line 15. Ms. Howard seconded the motion which was adopted by
70 unanimous vote of the Board.

71

72 **DFS Director’s Report – State of the Agency**

73

74 Regarding facilities, DFS Director Pete Marone informed the Board that the Department of
75 Forensic Science (“DFS”) Eastern Laboratory’s expansion is progressing. The first phase of the
76 expansion, which increases the size of the laboratory by 6,000 square feet, is 85% complete.
77 This phase relocates the Administrative offices and the Latent Prints section, expands case file
78 storage and the Firearms section and creates a multi-discipline office area which increases lab
79 space utilization. The next phase of the expansion is in the drawing stage which is 60%
80 complete. This phase relocates the Controlled Substance and Toxicology sections and allows for
81 future expansion of the 4th floor labs. The Northern Laboratory was awarded a Silver LEED
82 designation for the use of “green” technologies and materials in the construction of the Northern
83 Laboratory.

84

85 Regarding the workload/backlog, Director Marone informed the Board that the backlog has
86 decreased in the Firearms, Forensic Biology and Latent Prints Sections. On December 31, 2009
87 the Firearms Section’s backlog was 410; on April 30, 2010 it was 377. Likewise, on December
88 31, 2009, the Latent Prints Section’s backlog was 907; on April 30, 2010 it was 673. On
89 December 31, 2009 the Forensic Biology Section’s backlog was 1379; on April 30, 2010 1143.
90 Director Marone reminded the Board that the statistics for the Forensic Biology Section’s 90-day
91 backlog is not an accurate reflection of that section’s backlog because the cases from the Post

92 Conviction DNA Project (“PC-DNA”) are included in the numbers, along with the
93 Mitochondrial DNA cases. Mitochondrial DNA examination is a lengthy process.

94
95 Regarding grants, Director Marone informed the Board that the Chairman and Vice Chairman of
96 the Board have approved DFS’ application for the following grants:

- 97 • FY 2010 Solving Cold Cases with DNA – Chair/Vice Chair approved 3/8/2010,
98 application submitted 3/12/2010. Amount requested: \$482,971; to defray costs associated
99 with cold case DNA resting and expand the Department’s cold case processing
100 capability. To pay the salaries and benefits for three full time qualified DNA examiners
101 to process cold cases that are eligible for funding under this solicitation, for testing
102 supplies and a computer station and for eligible DNA profiles to be searched and
103 uploaded to DOCIS. It is estimated that this funding will allow for DNA testing of
104 approximately 150 cold cases.
- 105 • 2011 Highway Safety Grant Program – Chair/Vice Chair approved 2/23/2010,
106 application submitted 3/15/2010, amount requested: \$223,962. DFS will use funding
107 under this program to reimburse law enforcement and affiliated personnel for travel costs
108 (lodging and per diem) associate with Breath Alcohol training. Funding also will be used
109 for related supplies and equipment.
- 110 • FY 2010 Using DNA Technology to Identify the Missing – Chair/Vice Chair approved
111 3/19/2010; application submitted 4/19/2010, amount requested: \$468,640. DFS will
112 continue to pay the salaries and benefits for a mitochondrial DNA examiner, and for
113 chemistries and equipment needed for testing. The OCME will continue to pay the part-
114 time salaries and benefits for a Forensic Pathologist and two Medicolegal Death
115 Investigators and for case file upload into NamUs of new unidentified skeletal remains
116 cases and to continue follow up on NamUs hits from previously loaded cases. The
117 OCME will contract with an Anthropologist for pre-DNA examination of all new
118 unidentified skeletal remains cases to determine suitability for testing.

119
120 Col. Flaherty moved that the Board confirm the Chair and Vice Chair’s approval to allow DFS to
121 submit applications for the presented grants and that DFS accept the awards if granted. Ms.
122 Given seconded the motion, which passed by unanimous vote of the Board.

123
124 Director Marone further informed the Board that the Chairman and Vice Chairman of the Board
125 have approved for DFS to apply for the FY 2010 Forensic DNA Backlog Reduction Program
126 Grant – Chair/Vice Chair approved 4/19/2010, application due on 5/14/2010. Formula grant –
127 Virginia’s estimated amount: \$920,520. DFS proposes to use funding under this grant to
128 continue to pay the salaries and benefits of four full-time Forensic Scientists and one full-time
129 Forensic Laboratory Specialist hired under the FY 09 Backlog Reduction grant. These positions
130 are critical to the Section but are not funded under the DFS operating budget. In addition,
131 supplies and equipment will be purchased under the grant in order to increase the Section’s
132 throughput and reduce the current backlog and case turn-around time.

133
134 Dr. Bush moved that the Board confirm the Chair and Vice Chair’s approval to allow DFS to
135 submit an application for the presented grant and that DFS accept the award if granted. Col.
136 Flaherty seconded the motion, which passed by unanimous vote of the Board.

137

138 Director Marone further informed the Board that DFS seeks the Board's approval to apply for
139 the following grants:

- 140 • Forensic Science Training Development and Delivery Program – application due on
141 5/17/2010. DFS proposes to utilize funding under this program to: (i) reimburse law
142 enforcement and affiliated personnel for travel costs associated with Breath Alcohol
143 training, as well as for related supplies and equipment; (ii) provide Breath Alcohol
144 training to members of the Virginia State Bar; (iii) reimburse law enforcement and
145 affiliated personnel for travel costs associate with Forensic Science Academy (“FSA”)
146 training, as well as for related supplies, equipment and personal certification
147 training/testing for FSA graduates and attendees, and (iv) to hire a fill-time trainer to
148 develop and deliver training to new forensic scientists in the areas of policy, standards of
149 conduct, legal issues and communication.
- 150 • FY 2010 Paul Coverdell Forensic Science Improvement Program – application due on
151 5/17/2010, DFS proposes to use funding under this program to provide training and to
152 purchase supplies and equipment for both the Chemical Analysis and Physical Evidence
153 program areas.

154
155 Col. Flaherty moved that the Board approve the request from DFS to submit applications for the
156 presented grants and that DFS accept the awards if granted. Ms. Given seconded the motion,
157 which passed by unanimous vote of the Board.

158
159 Regarding resources, Director Marone informed the Board that DFS information technology
160 resources are subject to a transformation process through on going discussions with VITA/NG.
161 Regarding the budget, there are 2010-2012 biennium budget changes from the FY 2010 budget.
162 This includes an increase each year of the biennium of \$789,175 to address the effects of the
163 *Melendez-Diaz* decision, and a decrease of \$271,983 for FY 2011 and a decrease of \$282,728 for
164 FY 2012, and reduction of two full-time positions from Administrative Services.

165
166 Director Marone directed the Board's attention to the handout entitled *Preliminary Outline of*
167 *Draft Forensic Reform Legislation*. Director Marone informed the Board that the U.S. Senate
168 Judiciary Committee has developed this draft legislation for distribution and solicitation of
169 public comment and feedback. Some of the areas addressed in the draft legislation are
170 accreditation, certification, research, standards/best practices and oversight and coordination.

171
172 Discussion by the Board ensued. Mr. Benjamin informed the Board that a national organization
173 of criminal defense attorneys supports the position that validation studies much be completed for
174 all forensic science disciplines before they can be used in Court. Mr. Benjamin does not support
175 this position.

176 177 **Old Business**

178
179 Discussion Draft – Regulations for Obtaining Information from the DNA Data Bank and
180 Procedures for Verification and Authorization of Persons Requesting Information from the DNA
181 Data Bank

182 Stephanie Merritt, DFS Department Counsel led the discussion regarding the draft DNA Data
183 Bank Regulations for obtaining information for the data bank and procedures for verification and

184 authorization of persons requesting information from the data bank, 6VAC 40-60. Ms. Merritt
185 directed the Board's attention to the Discussion Draft in their meeting packet and stated that the
186 document was drafted by DFS staff which was then circulated to the Attorney General's Office
187 and Mr. Benjamin upon his request. Section "B" of Va Code § 19.2-310.5 is the section of Code
188 which requires the promulgation of Regulations for the state DNA index system.

189
190 Ms. Merritt presented section 6VAC40-60-10 – Definitions -- to the Board for discussion. She
191 informed the Board that an earlier draft of the regulation defined persons other than "Law
192 enforcement agency" but staff decided to delete those definitions.

193
194 Discussion by the Board ensued regarding the definition of "law enforcement officer" and if
195 there needed to be an amendment of Va Code § 19.2-310.5 to include persons other than law
196 enforcement officers.

197
198 Ms. Merritt presented section 6VAC40-60-20 -- Request for information from a law enforcement
199 officer regarding whether an individual's DNA profile is in the DNA data bank -- to the Board
200 for discussion.

201
202 Discussion by the Board ensued regarding whether there is currently a form that is used by law
203 enforcement to request information. George Li, DFS Forensic Biology Section Supervisor and
204 DNA Data Bank Administrator, informed the Board that a format that is available for making a
205 request that must be placed on the law enforcement agency's letter head.

206
207 Further discussion by the Board ensued. Ms. Russell moved that the word "must" be replaced
208 with "shall" throughout the draft regulation. Ms. Herndon seconded the motion, which passed
209 by unanimous vote of the Board.

210
211 Ms. Merritt presented section 6VAC40-60-30 -- Request for DNA data bank information relating
212 to specific Virginia forensic laboratory examinations involving the analysis and comparison of
213 two or more samples -- to the Board for discussion.

214
215 Discussion by the Board ensued regarding the listing of the DFS website address and fax number
216 in the language of the regulation. Ms. Russell moved that the DFS fax number and the DFS
217 website address be replaced with "which is available on the Department of Forensic Science's
218 website," throughout the draft regulation. Ms. Herndon seconded the motion, which passed by
219 unanimous vote of the Board. Further discussion by the Board ensued.

220
221 Ms. Merritt presented the following sections to the Board for discussion: 6VAC40-60-40 --
222 Request for DNA data bank information relating to out-of-state forensic laboratory examination;
223 6VAC40-60-50 -- Provision of DNA data bank information to the Virginia Department of
224 Corrections and Department of Juvenile Justice; and 6VAC40-60-60 -- Department employee
225 access to the DNA data bank.

226
227 Discussion by the Board ensued. Ms. Russell moved that DFS proceed with the Regulatory
228 process with the current draft in its revised form with the edits agreed upon by the Board. Dr.
229 Bush seconded the motion which passed by unanimous vote of the Board.

230 Ms. Given moved that DFS coordinate with law enforcement and Commonwealth's Attorneys
231 regarding a proposal for an amendment to Va Code § 19.2-310.5 to include person other than law
232 enforcement officers. The motion was seconded by Ms. Russell which passed by unanimous
233 vote of the Board.

234
235 Post Conviction DNA Notification and Testing Program
236 Regarding the notification portion of PC-DNA, Notification Subcommittee Chair Kristen
237 Howard informed the Board that case assignments continue to be made with 110 cases assigned
238 to pro bono attorneys and 26 to University of Virginia ("UVA") law students since the last
239 meeting of the Board. To date, 152 case assignments have been made and 37 notifications have
240 been completed. It is anticipated that the results from the UVA student case assignments will be
241 provided this month. Ms. Howard asked the Board if there should be thank you letters sent to all
242 the pro bono attorneys and law students who participated in the Notification Program. The
243 Board decided that DFS would draft the thank you letter which would be printed on Board
244 letterhead, under the Chairman's signature to be distributed to the participants in the Notification
245 Program.

246
247 Regarding the 2008 NIJ Post-Conviction DNA Testing Assistance Grant, Chief Deputy Director
248 Gail Jaspen informed the Board that DFS has initiated the process of amending the grant. The
249 proposed adjustment to the grant includes a change in the grant's scope to provide support for
250 the continuing roles of the VSCC and MAIP in the Testing and Notification Project through
251 March 31, 2011. NIJ has provided a preliminary review of the request and proposed budget
252 adjustments. It is not unusual to request an amendment to a grant and is a part of the ongoing
253 administrative process of a grant. DFS is awaiting a decision from NIJ on the request to provide
254 grant funds to VSCC and MAIP.

255
256 Regarding notification and testing updates, Ms Jaspen informed the Board that DFS's
257 notification numbers remained essentially the same because the Department's focus has shifted
258 to testing while the notification process has been reassigned to the Notification Subcommittee.
259 To date, the total number of convicted suspects eligible to be notified under 2008 budget
260 language is 1,088; of that 207 have been determined to be deceased. 338 confirmed suspects
261 Notifications have been received by DFS, 107 additional green certified mail return receipts
262 signed by addressee has been received by DFS, and 543 are undelivered and unconfirmed
263 notifications.

264
265 Ms. Jaspen further informed the Board that to date, the total number of case files found with
266 evidence suitable for DNA testing is 3,053 of which 2,208 cases contain a named suspect and
267 799 cases contain a named suspect known to have been convicted in the case. 642 cases meeting
268 the NIJ grant criteria (murder, rape and non-negligent manslaughter) have been sent to the
269 contracting laboratory for DNA testing. There are 106 additional cases meeting the State criteria
270 for testing (other violent crimes against a person). Preliminary case results have returned in 188
271 cases. The final completed case results were returned in 465 cases and 198 cases await contactor
272 testing. Certificates of Analysis have been issued in 312 cases. Certificates of Analysis have
273 been issued for all convicted suspects who were known to be incarcerated. The following are the
274 case test results regarding listed suspects meeting NIJ criteria: 38 convicted suspects were not
275 indicated/eliminated; 121 convicted suspects were not eliminated; known samples are needed for

276 34 convicted suspects; and there are 140 convicted suspects whose cases have insufficient
277 scientific data upon which to draw a conclusion. The following are the case test results
278 regarding listed suspects who do not meet NIJ criteria: 22 convicted suspects were not
279 indicated/eliminated; 9 convicted suspects were not eliminated; known samples are needed for
280 51 convicted suspects; and there are 31 convicted suspects whose cases have insufficient
281 scientific data upon which to draw a conclusion.

282
283 Update on Impact of *Melendez-Diaz* Decision

284 Ms. Jaspen informed the Board that the largest impact on DFS continues to be felt in the
285 Toxicology, Drugs and Breath Alcohol sections. Ms. Jaspen presented charts regarding the
286 marked increase of receipt of witness subpoenas for DFS examiners to appear in court and data
287 regarding appearance and testimony verses appearance only. DFS examiners have risen to this
288 challenge and have been making it to court as subpoenaed. Ms. Jaspen reminded the Board that
289 aside from the amount time documented in the charts presented; there is additional
290 administrative time spent with phone calls, logging in of subpoenas and coordinating
291 appearances when more than one court has subpoenaed an examiner for the same time and day.

292
293 Discussion by the Board ensued regarding the hierarchy of subpoenas when a multiple subpoena
294 for same examiner for the same day and time situation exists. Ms. Merritt informed the Board
295 that it is DFS policy to honor the first lawfully served subpoena.

296
297 Ms. Jaspen further informed the Board that the General Assembly has passed the following
298 legislation in response to the *Melendez-Diaz* Decision:

- 299 • SB 106 (Sen. McDougle) – Clarifies that notification of defendants by the
300 Commonwealth must be provided only if the certificate or affidavit is to be offered into
301 evidence *in lieu* of testimony. It also specifies that the notice of the defendant’s right to
302 object shall be “provided simultaneously with” the certificate of analysis, rather than
303 “attached to “the certificate or affidavit.” The bill defines “certificate of analysis” to
304 include certain documents that reflect laboratory results. It is unlikely to have an impact
305 on the work of DFS or the frequency with which DFS analysis are required to appear in
306 court, but it does clarify the process for prosecutors.
- 307 • SB387 (Sen. Obenshain) – Adds a provision stating that if the Commonwealth’s Attorney
308 intends to present testimony pertaining to a forensic analysis presented by two-way video
309 conferencing, rather than live in the courtroom, that intention must be provided to the
310 defendant in writing, along with the certificate of analysis that the Commonwealth is
311 otherwise required to provide. The defendant must specifically object in writing or he
312 waives his right to object. The bill also specifies procedure relating to video testimony
313 and clarifies that provisions requiring a 28-day notification to the defendant must be
314 followed only if the Commonwealth intends to offer the certificate of analysis into
315 evidence *in lieu* of testimony.
- 316 • HB 500 (Del. Gilbert) – Provides that at preliminary hearing, certificates of analysis and
317 reports prepared by lab analysts, etc., shall be admissible without the testimony of the
318 person preparing such certificate or report. Also provides that when such an analyst
319 appears in court to testify, the certificate of analysis shall be admissible. The bill also
320 requires that a defendant who demands the testimony of the analyst pay \$50 court costs
321 for expenses related to analyst’s appearance if the defendant is convicted.

322 **New Business**

323

324 **2010 Legislative Session Update**

325 Ms. Jaspén informed the Board that the General Assembly considered the following legislation
326 which is relevant to DFS and legislation concerning the Freedom of Information Act (FOIA):

- 327 • HB 314 (Del. McClellan) – Makes technical changes to the DNA Data Bank statute, Va
328 Code §19.2-310.5, providing that instead of “blood, saliva and tissue samples,” “samples
329 of human biological evidence” shall be analyzed. It also clarifies that results of DNA
330 analyses shall be made available to an accused or his attorney under §9.1-1104. This bill
331 passed.
- 332 • HB 1087 (Del. Crockett-Stark) – Provided that in a trial for drug offenses involving
333 cocaine or heroin, a law enforcement officer shall be permitted to testify as to the results
334 of a field test, approved by DFS, regarding whether the substance at issue, as tested, is
335 cocaine or heroin. The bill also provided that a law enforcement officer who performs
336 drug field tests shall be trained as a Drug Recognition Expert by DFSF. After it was
337 explained to the patron that there is no suitable drug field kit for this purpose, the bill was
338 stricken.
- 339 • HB 518 (Del. Rust) – Provides that if a public body transfers possession of public records
340 for storage, maintenance or archiving, the public body initiating the transfer remains the
341 custodian of the records for the purpose of responding to FOIA requests. The bill also
342 adds a definition of “criminal investigative file,” clarifying what records are exempt from
343 FOIA as such. This bill passed.
- 344 • SB 711 (Sen. Edwards) – Bill proposed to limit the exemption for criminal investigative
345 or prosecution records to ongoing investigations or prosecutions. Criminal investigative
346 and prosecution records would be open to the public after the ongoing criminal
347 investigation or prosecution becomes final or is otherwise terminated, unless disclosure
348 jeopardizes another investigation or prosecution. The final consideration of this bill was
349 continued and referred to FOIA Council.

350

351 Discussion by the Board ensued.

352

353 **Public Comment**

354

355 None

356

357 **Next Meeting**

358

359 The next meeting of the Board is set for Wednesday, August 11, 2010 at 9:00 a.m.

360

361 **Adjournment**

362

363 Chairman Morrogh asked if there was a motion to adjourn. Col. Flaherty moved that the meeting
364 of the Board be adjourned which was seconded by Ms. Russell and passed by unanimous vote.

365

366 The meeting adjourned at 11:35 a.m.