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Minutes
Forensic Science Board Meeting
August 8, 2012
Department of Forensic Science, Central Laboratory, Classroom 1

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Board Members Present

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Caroline D. Juran, Chair
Steven D. Benjamin
Leah Bush, M.D.
John Colligan (Designee of Garth Wheeler, Director of Department of Criminal Justice Services)
Lt. Col. Robert Kemmler (Designee of Colonel W. Steven Flaherty)
Karl R. Hade
Kristen Howard (Designee of the Chairman of the Virginia State Crime Commission)
Alan Katz (Designee of Attorney General Kenneth Cuccinelli)
Sheriff A.A. Lipa, Jr.
Raymond F. Morrogh
Jami St. Clair

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Board Members Absent

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Jo Ann Given
Senator Ryan McDougle
Delegate Richard Morris

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Legal Counsel for the Forensic Science Board

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Joshua Lief, Senior Assistant Attorney General

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Staff Members Present

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Wanda Adkins, Office Manager
Jeff Ban, Central Laboratory Director
Dave Barron, Director of Technical Services
Sabrina Cillesen, Physical Evidence Program Manager
Deborah Collard, Laboratory Specialist
Leslie Ellis, Human Resources Director
Gail Jaspen, Chief Deputy Director
Brad Jenkins, Forensic Biology Program Manager
Alka Lohmann, Calibration and Training Program Manager
Pete Marone, Department Director
Stephanie Merritt, Department Counsel
John Przybylski, Controlled Substance Section Supervisor
Lisa Schiermeier-Wood, Section Supervisor, Forensic Biology
Steve Sigel, Deputy Director
Susan Stanitski, Eastern Laboratory Director

47 Carisa Studer, Legal Assistant

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49 **Call to Order by Chairman Caroline Juran**

50

51 Chairman Juran called the meeting of the Forensic Science Board (“Board”) to order at 9:03 a.m.

52

53 **Adoption of Agenda**

54

55 Chairman Juran asked if there were any additions or changes to the draft agenda for the meeting.
56 Being none, Dr. Bush moved to adopt the agenda, which was seconded by Mr. Morrogh and
57 adopted by unanimous vote of the Board.

58

59 **Approval of Draft Minutes of May 9, 2012 Meeting**

60

61 Chairman Juran asked if there were any changes or corrections to the draft minutes from the May
62 9, 2012 meeting. Being none, Mr. Morrogh moved to adopt the minutes of the May 9, 2012
63 meeting, which was seconded by Sheriff Lippa and adopted by unanimous vote of the Board.

64

65 **Chairman’s Report**

66

67 Chairman Juran welcomed the Board, and thanked the members for their attendance. Ms. Juran
68 announced that she had received an invitation to attend a meeting of the White House
69 Subcommittee on Forensic Science. The meeting will be on September 14, 2012. The purpose of
70 the meeting is to share information about work that the Subcommittee on Forensic Science has
71 been doing and to analyze the various processes, implementations, strategies, authorities,
72 enforcement mechanisms, and compliance regulations that are employed by the state and local
73 governments. Ms. Juran has accepted the invitation to attend the meeting.

74

75 **DFS Director’s Report**

76

77 Workload/Backlog: Regarding the 30-60-90-120 day workload summary report, Director
78 Marone summarized average days in systems for several different sections and reported on
79 progress being made on old cases. Director Marone explained that the Toxicology section has
80 the largest amount of cases over 120 days in the backlog because of multiple factors occurring
81 simultaneously. Factors include the U.S., Supreme Court’s *Melendez-Diaz* decision, causing the
82 large amount of time examiners are spending traveling to and from court. The other disciplines
83 in the Department do not have the same backlog issues as Toxicology. The Department is
84 continuing to look at possible solutions to address the problem.

85

86 Dr. Bush asked if the amount of time the Toxicology Section spent on going to court was limited
87 to one jurisdiction or was it happening in multiple jurisdictions.

88

89 Mr. Morrogh commented that the Toxicology section is spending the majority of its time in
90 Fairfax, the jurisdiction for which he is the Commonwealth Attorney. Since the decision in the
91 *Melendez-Diaz* case, the strategy used in his jurisdiction has been to subpoena the Toxicology
92 examiners to Court. Mr. Morrogh explained that he is well aware of the issue the Department is

93 facing with having the Examiners out of the lab and has been working to help solve this issue.
94 Mr. Morrogh has conferred with the Department, Judges, and the local defense bar about a
95 solution that will work for everyone involved.

96
97 Mr. Hade commented that he would also look into the matter and established it involved the
98 General District Court.

99
100 Director Marone further explained other steps taken by the Department to address the
101 Toxicology backlog. The Department's former procedure was to process all DUI/DUID
102 Toxicology examinations at the Central Laboratory. Now it will be decentralized, and
103 DUI/DUID examinations will be preformed at all regional laboratories. Toxicology staff and
104 equipment are being added to the regional laboratories.

105
106 Director Marone informed the Board that he had met with Dr. Bush and her Office of the Chief
107 Medical Examiner (OCME) staff to assure them that the Department would continue to work on
108 Toxicology report turnaround time in their cases. This is important to ensure the OCME
109 maintains their certification.

110
111 Facilities: Director Pete Marone briefly updated the Board on the expansion of the Eastern
112 Laboratory facilities. Contracts are being awarded for the renovation of the remainder of the 5th
113 floor. The parking lot at the Eastern Laboratory will be redone to add in more spaces. There is
114 funding in the Biennial Budget for expansion planning of the Western Laboratory. The
115 Department of General Services Project Manager who has worked on the construction of the
116 Northern Laboratory has been assigned the Western Laboratory construction project. The old
117 School Board building that still stands on the acquired adjoining property will be demolished in
118 order to build the Western Lab expansion. The projected construction time would be 3½ to 6
119 years from now. There is new construction for HDL, Inc. going up across the street from the
120 Central Laboratory and next to the Administration Offices in the Biotech Park.

121
122 Staffing: There will be four Toxicology positions added to the Central Laboratory and two
123 positions added to all the other regional laboratories. Two positions have been posted for the
124 Controlled Substances Section in the Western Laboratory for the new Meth Lab Team that is
125 schedule to start in September 2012.

126
127 Instrumentation: The Toxicology Section will be changing its screening method. The lifecycle
128 of the current instruments is nearing its end, so the Department will be switching to another
129 highly automated and versatile instrument. The new methodology should help decrease the
130 amount of time it takes to do a screening test and should identify drugs faster. All four
131 laboratories will get the new instrumentation. Two GCIR instruments have been added to the
132 Western and Central laboratories to analyze synthetic cannabinoids and research chemicals, also
133 known as "bath salts." Two additional GCIR instruments will be ordered for the other two
134 regional laboratories.

135
136 Budget Outlook: The new fiscal year began on July 1. Equipment purchases were made near the
137 end of the prior fiscal year to ensure there were monies to cover the expenses. The planned
138 update of the LIMS system is progressing. Vendors will be coming to the Department to give

139 demonstrations. Dr. Bush inquired whether the new LIMS system will have the capability to
140 share information between agencies. Director Marone explained that the new system could have
141 that capability but because of IT security and firewalls, the Department is unsure if it would be
142 able to link with other agencies.

143
144 Synthetic Cannabinoids/Bath Salts/Clandestine Meth Labs: Director Marone gave a brief update
145 and informed the Board that two new classes of compounds have been indentified since the 2012
146 legislation has been in effect. The Controlled Substances traditionally sees peaks in submissions
147 during March and April and then again in September and October. The Department is now
148 referring to “Bath Salts” as “Research Chemicals.” The Meth Lab submissions for the current
149 year appear to be essentially on track to meet the number of submissions in 2011, with the
150 majority being in the Western Laboratory. The *Melendez-Diaz* decision has also affected the
151 Controlled Substances Section, and examiners spend a large amount of time away from the lab in
152 Court.

153
154 Grants: Director Marone reviewed grants that DFS has been awarded, grants that will be
155 expiring, and grant applications pending. All grants are listed in the Director’s Report slide
156 presentation. Director Marone noted that the Post-Conviction DNA Testing Assistance Program
157 grant will be coming to an end on September 30, 2012. The Department plans to absorb the
158 costs for any cases that will need to be completed after the grant’s end date. If that poses a
159 problem, DFS will apply for another grant.

160
161 Dr. Bush commented on the continued success of the DNA Technology to Identify the Missing
162 Grant. There have been six to eight people identified. Director Marone pointed out that all the
163 cases listed in the 120-day backlog of the Forensic Biology section are missing person’s cases
164 under this grant.

165
166 Director Marone reminded the Board that the Paul Coverdell Grant fund will be significantly
167 reduced. It is projected to only get \$8 million to distribute throughout the United States. The
168 Department should be notified by the end of the month on all grant applications that are pending.

169
170 Mr. Benjamin then asked if the Board could revisit the discussion about the Toxicology
171 subpoenas in Fairfax. Mr. Benjamin had reviewed the statute and noted that there could be a
172 possible solution in the 14-day period for a defendant to waive the right to have the examiner
173 appear. Mr. Morrogh asked Deputy Fairfax Commonwealth’s Attorney Casey Langan, who was
174 present, to speak to the Board about his work to find a resolution to this issue. Mr. Langan
175 explained the process in Fairfax County relating to having the examiners appear in Court. The
176 prosecution makes an effort at the initial court date to determine with the defense whether a
177 witness is needed or not. It is believed there is currently no way to solve the issue of cases being
178 continued multiple times. The Court rejected video-conference testimony as an alternative to the
179 examiners making personal appearances at the Court. It is difficult to set aside one day as a
180 “DUI” day because of the large size of Fairfax County. The Court runs 5 to 6 traffic courtrooms
181 per day, all with multiple DUI cases, which make it difficult to plan one day a week for these
182 cases. Due to the 6th Amendment Confrontation right, preparation time needed by attorneys, and
183 other factors, a solution to the problem is still not apparent.

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Old Business

Post-Conviction DNA Testing Program and Notification Project: Ms. Jaspen advised that a review of the program database revealed an over-estimation of the number of suspects that needed notification. A revision was made to correct the figure. DFS had previously reported that 1,136 suspect notifications were required, and the corrected number is 946 suspect notifications required. The overestimation of approximately 200 suspects was the result of inadvertently including suspects from a number of program-ineligible cases, *i.e.*, cases in which no named suspect was confirmed as convicted of a state violent felony.

Referring to the revised data, Ms. Jaspen updated the Board on suspects believed to be deceased, notifications confirmed and certificates of analysis issued. Kristen Howard and her staff continue to work with pro-bono attorneys to located conviction information and make notifications. A small number of pro-bono attorneys have recently volunteered to help locate and contact convicted suspects who remain un-notified but whose known samples are needed in order for the Department to complete testing. There are other suspects from whom a known sample is needed that have been notified and have either been offered or provided a copy of their certificate of analysis.

Mr. Morrogh inquired whether any of the 134 suspects have evidence in their cases that would be material to their guilt. Ms. Jaspen explained that the Department does not have all the facts of the cases and is not in a position to make that determination. Mr. Morrogh suggested prioritizing cases by having volunteers contact suspects where the evidence listed on the certificate appears more critical to the cases. Mr. Benjamin remarked that he prefers the volunteers be thorough in contacting all suspects.

Mr. Benjamin inquired about the 453 convicted suspects whose cases have insufficient scientific data upon which to draw a conclusion. Mr. Benjamin asked why the Department can't draw a conclusion in those cases. Brad Jenkins, Forensic Biology Program Manager, answered by explaining that in many of the cases there is a very limited DNA left on the evidence and that what DNA that does remain is usually degraded. The quantity and quality of the DNA is not enough to draw a conclusion. Mr. Jenkins confirmed that certificates of analysis were generated for these cases and sent to law enforcement and Commonwealth's Attorneys.

Ms. Jaspen commented on the report issued by the Urban Institute (UI) on June 18, 2012. The report was sent to each Board member in June after it was released. The UI's report examined the question, "What proportion of convicted offenders in serious person crimes with retained forensic evidence could be exonerated if that evidence were DNA Test?" The UI used observational data from the Virginia Department of Forensic Science's Post-Conviction DNA testing program to identify the rate of wrongful convictions. The report acknowledges the possibility that other non-forensic facts in these cases could affect the conclusions of guilt or innocence of the convicted offenders. The UI performed limited background research on the cases they studied.

230 The Department reviewed the case files identified by UI as those demonstrating “eliminations
231 supportive of exoneration.” It has always been DFS’ position that DNA test results indicating
232 that a suspect’s DNA profile was not indicated on evidence tested suggests that further
233 investigation may be needed. DFS, therefore, has taken extensive measures to provide law
234 enforcement, Commonwealth’s Attorneys, and convicted persons the results of testing in these
235 cases. Ms. Jaspén also reported to the Board that a letter issued by the Executive Director of the
236 NY Innocence Project, on July 5, 2012, cautioned that “evaluating the impact of exclusionary
237 results in DNA testing is extremely complex.”

238
239 The Department continues to have discussions with Commonwealth’s Attorneys about the Post-
240 Conviction DNA Testing Program and elimination reports as a result of this testing.

241
242 Ms. Jaspén concluded her presentation with an update to the Board on recent Freedom of
243 Information Act (FOIA) requests for Post-Conviction DNA Testing Program reports of
244 eliminations. The Budget Bill language requiring release of certain records pursuant to FOIA
245 became effective July 1, 2012. The Department responded to five FOIA requests on July 2, 2012
246 and three additional requests thereafter. Two cases were withdrawn from the program due to the
247 Commonwealth Attorney contacting the Department that no suspect had been convicted in either
248 case. The two cases were deemed program ineligible, and adjustments made to grant accounting
249 for the cost of testing..

250
251 Mr. Benjamin asked if the Department had discretion under FOIA to release certificates. Ms.
252 Jaspén responded that DFS has a long-held position that it will not provide certificates of
253 analysis pursuant to FOIA requests because they are part of a criminal investigation file. Mr.
254 Benjamin then asked if any certificates were withheld under the budget language. Ms. Jaspén
255 answered that some certificates were withheld at the request of the Commonwealth’s Attorney.

256
257 Mr. Benjamin asked if the Department is being sued because of any unanswered FOIA requests.
258 Stephanie Merritt, Department Counsel, replied that she was unaware of any outstanding issues
259 of unanswered FOIA requests. Ms. Merritt commented that the two cases taken out of the
260 program might be considered “cold cases.” Further, the Department has documentation from the
261 Commonwealth’s Attorneys on the cases being withheld.

262
263 Mr. Benjamin asked if any FOIA requestors have disagreed with the Department’s interpretation
264 of the budget language. Ms. Merritt replied that no such disagreements have been articulated to
265 the Department.

266
267 Mr. Benjamin inquired about the cases for which we have samples for which there were no
268 convictions. He asked if these cases could now be solved because the Department had the DNA,
269 and he asked if there is something more that the Department could be doing? Ms. Merritt
270 answered that some law enforcement agencies have made requests to the lab to test some of these
271 cases. The Board discussed what evidence the Department possesses and whether law
272 enforcement is aware that there is evidence that could possibly be tested in some old unsolved
273 cases. Mr. Jenkins explained to the Board that the Department is not blindly testing old
274 evidence, and that in some cases law enforcement has been notified. The Department has tested
275 some of these cases under the Cold Case Project. In some instances, law enforcement has not

276 wanted to pursue testing. The Board discussed if there is something more to be done by the
277 Board or Department to pursue these cases. In some cases the Department does not know the
278 type of crime involved in a case, and it would be up to Commonwealth's Attorney whether there
279 is something to pursue.

280

281 **New Business**

282

283 Ms. Merritt announced that the Regulations for Obtaining Information from the DNA Data Bank
284 and Procedures for Verification and Authorization of Persons Requesting Information from the
285 DNA Data Bank, 6 VAC 40-60 are in effect. The next phase of the regulation process will be
286 the periodic review of Department regulations. The first step will be to post the regulations on
287 Town Hall for public comment.

288

289 Mr. Benjamin asked if there were any regulations for Familial DNA testing. Director Marone
290 answered that there were no regulations for Familial DNA testing. Mr. Benjamin asked if there
291 was Department policy for Familial DNA testing, and Director Marone responded that there are
292 Department policies in place which include a required discussion with the Commonwealth's
293 Attorney and law enforcement head of the requesting locality.

294

295 Ms. Merritt specified the Department has a total of five regulations. The four additional
296 regulations include (i) Breath Alcohol Testing, (ii) Approval of Field Tests for Detection of
297 Drugs, (iii) Implementation of the Law permitting DNA Analysis upon Arrest for all Violent
298 Felonies and Certain Burglaries, and (iv) Approval of Marijuana Field Tests for Detection of
299 Marijuana Plant Material.

300

301 Director Marone informed the Board that there is a vendor of field tests that is advertising on
302 their website that the Department of Forensic Science has approved certain field tests for
303 synthetic cannabinoids and bath salts. The Department in fact as not approved any field tests for
304 synthetic cannabinoids and bath salts and has informed the company of this fact. The company
305 has received a cease and disist letter from the Attorney General's Office to remove their
306 statement about the Department from their website.

307

308 Ms. Jaspén announced the special initiative by the Governor and Secretary of Public Safety to
309 establish a "Community Drug Awareness" initiative. The Department will be partnering with
310 other agencies to launch the program in the fall of 2012.

311

312 **Public Comment**

313

314 None

315

316 **Next Meeting**

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318 The Forensic Science Board will meet next on Wednesday, October 10, 2012 at 9 a.m., and the
319 following meeting will be Thursday, January 3, 2013 at 9 a.m.

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321 **Adjournment**

322

323 Mr. Morrogh moved that the meeting of the Board be adjourned, which was seconded by Dr.
324 Bush and passed by unanimous vote.

325

326 The meeting adjourned at 11:10 a.m.