



U.S. Department of Justice

Channing D. Phillips
Acting United States Attorney

District of Columbia

*Judiciary Center
555 Fourth St., N.W.
Washington, D.C. 20530*

June 11, 2021

Via Email

Steven Kiersh, Esq.
Megan Allburn, Esq.
Brian McDaniel, Esq.
Rachel McCoy, Esq.

**Re: United States v. Rondell McLeod, 2017 CF1 9869
United States v. Joseph Brown, 2016 CF1 14034
United States v. Alicia McCoy, 2017 CF2 21024**

Dear Counsel,

I am enclosing a copy of DFS's formal appeal of ANAB's withdrawal of accreditation of DFS. I am also enclosing a copy of a letter dated June 11, 2021 from Acting United States Attorney Channing D. Phillips to Pamela Sale, Vice President, Forensics, ANAB.

Please feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael P. Spence".

Michael P. Spence
Assistant United States Attorney



U.S. Department of Justice

Channing D. Phillips
Acting United States Attorney

District of Columbia

*Judiciary Center
555 Fourth St., N.W.
Washington, D.C. 20530*

June 11, 2021

Pamela Sale
Vice President, Forensics
ANSI National Accreditation Board
2000 Regency Parkway, Suite 430
Cary, NC 27518

Dear Ms. Sale,

We appreciate the opportunity ANAB provided for the U.S. Attorney's Office for the District of Columbia ("USAO-DC") to submit written comments in response to the D.C. Department of Forensic Sciences ("DFS")'s appeal of ANAB's withdrawal of accreditation ("DFS Appeal" or "the Appeal"). We look forward to working with DFS as it addresses the issues that led to the withdrawal of DFS's accreditation and were identified by the *March 18, 2021 Final Report of Review and Audit of Selected Casework of the Firearms Examination Unit of the Forensic Science Laboratory Division, Department of Forensic Sciences, District of Columbia* ("Audit Report"). However, we are troubled by aspects of the Appeal, particularly DFS's failure to acknowledge significant issues and attempts to justify its withholding of information from our Office and ANAB. Given the detailed background and information provided by the Audit Report, which we endorse, we highlight herein only our most salient concerns.

1. Lack of Transparency

It should be a simple principle that when a forensic lab analyzes evidence in a criminal case, the lab must do so impartially and reliably, and the lab must provide complete and accurate documentation of those examinations to the government. However, in the homicide case at issue in the Audit Report, *United States v. McLeod* ("McLeod"), DFS had multiple examiners examine evidence without documentation, and reach competing and changing conclusions, without ever

informing the government. It appears at least two of the changing conclusions were not based on an examination of the actual evidence. Compounding the issue, DFS did not inform ANAB or its Scientific Advisory Board of these examinations either. In its Appeal, DFS does not explain why multiple analyses were done without documentation or why it did not disclose those analyses to the government or ANAB. To move forward, it will be important for DFS to recognize the impropriety of this approach and ensure it does not happen again.

A. Lack of Transparency with USAO-DC

On May 27, 2020, DFS issued a Reexamination Report of the evidence in *United States v. McLeod*, in which firearms examiner Jonathan Fried reached a finding of “inconclusive,” unlike the 2016 and 2017 DFS reports that had reached a finding of “identification,” and unlike the USAO-DC-commissioned independent examinations that had reached a finding of “exclusion.” When DFS provided USAO-DC with the May 2020 report, DFS failed to tell anyone that the examiners who wrote that report (1) had earlier microscopically analyzed the same evidence but reached a different conclusion (“exclusion”) – one that agreed with USAO-DC’s experts, (2) had provided a presentation to this effect to upper-level DFS management, and (3) had changed their initial conclusion to “inconclusive” after consultation with management as a compromise position, not as a result of examination of the evidence. DFS also did not disclose that one of the original DFS examiners, Michael Mulderig, had again reached an “identification” conclusion before changing his conclusion to “inconclusive” after a conversation with his supervisor. DFS only disclosed that Mulderig had ultimately reached an “inconclusive” determination, which we now know was reached, like Fried’s “inconclusive” finding, without analyzing the evidence.

USAO-DC noticed unexplained initials and dates on the evidence packaging, for which DFS had provided no documentation. When USAO-DC requested additional materials in June 2020, DFS’s General Counsel informed us that the request “includes materials outside the scope of DFS’s discovery duties as outlined in DC Code 5-1501.06(h).” See June 12, 2020 email from Todd Smith to AUSA Michael Spence. After receiving USAO-DC’s discovery request, DFS took the unprecedented step of retaining counsel to oppose its production of documents to the government. In order to get basic answers on who tested the *McLeod* evidence and under what circumstances, USAO-DC was forced to serve a subpoena on DFS and file a motion with the Court to compel DFS to comply. The motion our Office filed in September 2020, four months after Fried issued his “inconclusive” report, articulated our obvious need for the documents that DFS refused to produce:

[W]ere Fried and Rachael provided with any biasing information prior to conducting an examination on May 12, 2020 or were they not informed concerning any prior conclusions like the independent experts retained by the government? Also, why did DFS not document any of Mulderig’s or Bustamante’s work or the conclusions they reached regarding this evidence? . . .

The government has received no documentation concerning Bustamante's analysis, but her initials indicate that she opened the packaging . . . in the first days of May 2020. Finally, firearms examiner Jonathan Fried's initials are also present on the packaging, indicating that he also examined both items in the first few days of May. There is no documentation concerning this examination by Fried.

See Government's Motion to Compel Production of Documents from the District of Columbia Department of Forensic Sciences (Sept. 2, 2020), at pp. 20, 11. Even after this motion was filed, DFS maintained its position that documents were privileged and continued to resist providing them. DFS asserts in its Appeal that it "affirmatively produce[d] [the April 30 PowerPoint] to prosecutors." See DFS Appeal, at p. 11-12. It did not. DFS only disclosed to USAO-DC documents such as the April 30 and May 6 PowerPoints when the Court ordered DFS to do so in November 2020.

Even after the Court ordered DFS to make disclosures to the government in November 2020, DFS still had not revealed to the government or the Court all of the examinations that had been done of the *McLeod* evidence. While USAO-DC had noticed Bustamante's initials on the packaging, and raised the issue with DFS, USAO-DC received no information or documentation from DFS about her analysis. Information that one *other* DFS examiner, Bustamante, had examined the *McLeod* evidence and reached the conflicting conclusion of "identification," only came to light in 2021 through an investigation of DFS conducted by the D.C. Office of the Inspector General. USAO-DC learned from DC-OIG that Bustamante had contemporaneously documented her examination in e-mails that had never been produced to the government in discovery or to the Court during litigation over the subpoena to DFS. The Appeal does not address DFS's failure to provide this information and the e-mails to the government or the Court, or DFS's decision to have multiple examiners examine the evidence without documenting it.

B. Lack of Transparency with ANAB

It appears that DFS took the same approach of selective disclosure with ANAB. DFS's May 6, 2020, letter to ANAB, stated as follows:

At the conclusion of their review of the relevant physical evidence, the FEU Supervisor [Fried] and senior Firearms Examiner [Rachael] concluded that the original identification should have been determined inconclusive. Based on this determination, the FEU manager discussed the matter with the original verifying examiner to review the physical evidence.

DFS May 6, 2020, Letter to ANAB, at p. 2. Left without most of the relevant information, ANAB concluded that DFS had "provided objective evidence that the matter was appropriately investigated," and that "[i]n 2020, a fourth DFS examiner reviewed the case record and evidence and determined the result to be inconclusive based on similarities and differences in the marks on the cartridge cases." See Oct. 2, 2020 Letter from ANAB to USAO-DC, at p. 1. As we know

now, there was a lack of transparency about the various conclusions issued by DFS examiners and the true origins of the “inconclusive” conclusion.

First, it appears that Fried’s change from an “exclusion” finding to an “inconclusive” finding was *not* based on a “review of the relevant physical evidence,” as DFS’s May 6 Letter to ANAB claimed. At the time DFS wrote the letter, Fried had not even begun his examination that resulted in an “inconclusive” finding.¹ To DC-OIG investigators, Fried

*acknowledged his role in writing the letters to ANAB and SAB and **admitted that at that time he had not yet done the re-examination that yielded the “inconclusive.”** Fried called DFS’ representations regarding the findings an “unverified conclusion.”*

March 16, 2021 DC-OIG MOA of Jonathan Fried, at p. 7 (emphasis added). According to Fried:

they did not want an issue. Fried explained that the issue was DFS had disagreements between examiners that they could not explain. Fried acknowledged that in a meeting with Pope and Arendse they both said, “Why put ourselves out there, if inconclusive is an appropriate answer.” Fried acknowledged that the decision to go with inconclusive was based on all of the different conclusions reached by the other examiners, and that he agreed with the decision.

March 16, 2021 DC-OIG MOA of Jonathan Fried, at p. 7. Fried further reported that DFS management “had concerns over the conclusion of elimination reported in Fried and Rachael’s [April 30] PowerPoint and that it showed DFS had made a mistake,” and DFS management engaged in “answer shopping, looking for consensus.” March 16, 2021 DC-OIG MOA of Jonathan Fried, at pp. 4-5.

Second, while the May 6 Letter to ANAB stated that “the original verifying examiner [Mulderig] concluded that the association between the two cartridge casings at issue should be determined inconclusive,” the time period within which Mulderig changed his opinion to “inconclusive” from “elimination” – about 100 minutes – was not sufficient for any examiner to conduct an examination. *See* March 16, 2021 DC-OIG MOA of Jonathan Fried at p. 7. Instead, feeling pressured from his supervisor, he changed his opinion from his supervisor’s office, via his personal email, at a time that the evidence was not in his possession, according to the chain of custody documents. *See* Dec. 7, 2020 MOA of Michael Mulderig, at p.1.

Third, there was no documentary support for DFS’s assertion in the May 6 Letter that DFS had reached an “inconclusive” finding and no mention of the initial conclusions of Rachael and Fried (“elimination”) and Mulderig (“identification”).

¹ Fried told DC-OIG investigators that “if he had to do it over again, he would have quit rather than conduct the re-examination.” March 16, 2021 DC-OIG MOA of Jonathan Fried at 6.

Fourth, DFS also did not include in the May 6 Letter that it had two *additional* examiners (Bustamante and Elder) analyze the evidence without documenting it, and that those two examiners had *also* not reached a conclusion of “inconclusive.”

In summary, the five conclusions omitted from the May 6 Letter to ANAB are as follows:

Examiner	Conclusion	Date Conclusion Reached
1. Jonathan Fried	Exclusion	April 30, 2020
2. Ashley Rachael ²	Exclusion	April 30, 2020
3. Michael Mulderig	Identification	May 1, 2020 (via e-mail to Pope)
4. Elizabeth Bustamante	Identification	May 1, 2020 (via e-mail to Pope)
5. Cody Elder	Looked “pretty good”, indicating some agreement ³	Exact date unknown (<i>see</i> Feb. 12, 2021, DC-OIG MOA of Cody Elder, at p. 4).

USAO-DC received a letter from DFS on May 22, 2020, that contained similar factual misrepresentations. There, DFS told USAO-DC that the error was “administrative” without any mention of the above-mentioned conflicting conclusions or the true origin of the “inconclusive” conclusion.

2. DFS’s Criticisms of the Audit Report Are Unfounded.

Rather than address the serious issues in transparency described above, DFS focuses its Appeal on attacking the Audit Report, USAO-DC, and the USAO-DC/OAG auditors. This approach is unfortunate and does not advance the goal of identifying and remedying the serious

² DFS asserts that examiner Ashley Rachael examined the evidence on May 4, 2020, and produced photographs, *see* ANAB Appeal at 7, but those photographs have never been provided to USAO-DC, USAO-DC has never received documentation of a May 4 examination by Rachael, and the chain of custody records do not indicate the evidence was in Rachael’s possession on that date. *See* Chain of Custody Records for CCNs 15-180-695 & 15-128-515. Additionally, DFS asserts it was Fried, not Rachael, who provided the “inconclusive” language for the May 6 Letter.

³ Per Elder, “Fried casually asked [Elder] to look at the cartridge casings for differences and similarities,” and “did not ask him to reach a conclusion.” Feb. 12, 2021, DC-OIG MOA of Cody Elder, at p. 2.

issues identified in the Audit Report.

By way of example, DFS repeatedly describes as problematic that the independent examiners compared different representative casings from each of the two homicide scenes than DFS. *See* DFS Appeal, at p. 16 (“First, and most importantly, USAO failed to rework the only two pieces of evidence that were the subject of the 2017 NIBIN Confirmation report.”); *id.* at pp. 4, 6 n.18. However, as ANAB is aware, it is routine and scientifically sound for a qualified examiner to pick a representative cartridge casing from each group identified as fired from the same firearm and then compare it against a representative from the second group. In fact, DFS did so here: it initially chose only one fired cartridge casing from each homicide scene (MPD Items 45 and 16) when evaluating whether the fired cartridge casings from both homicide scenes were fired from the same gun. And this is how DFS performs all NIBIN confirmations: a single representative casing from each scene is compared to evaluate whether the two groupings of casings were fired from the same firearm. Once the independent examiner determined that the grouping from each scene was fired by the same firearm (which every independent firearms examiner to examine the evidence in *McLeod* did)⁴, it was scientifically irrelevant which individual casing from each scene an examiner chose to inter-compare. Nevertheless, John Murdock and his verifier did specifically inter-compare these two items of evidence (MPD Items 45 and 16).

DFS claims that the Audit Report was “generated in violation of District of Columbia law.” *See* Appeal, at p. 1. This is incorrect. While there is no statute authorizing an audit by DFS client agencies such as USAO-DC and the D.C. Office of the Attorney General, there is none prohibiting it. Moreover, it is our obligation as prosecutors to ensure that our investigations and prosecutions use forensic evidence and testimony that is reliable and based on sound scientific principles. Indeed, it was a USAO-DC-led audit of DFS in 2015 that revealed errors in the scientific results being issued by DFS’s Forensic Biology Unit.

DFS’s attempts to cast aspersions on two of the three USAO-DC/OAG auditors are also a diversion. The Audit Report in large part merely summarizes DFS documents, so it is unclear why perceived biases of the auditors would even be relevant. In any event, the auditors, whose resumes are included with this letter, were selected by USAO-DC and the D.C. Office of the Attorney General because of their strong credentials and combined wealth of experience in leading and auditing forensic laboratories and in the field of firearms and toolmark examination:

⁴ Oddly, DFS raises for the first time an argument that the dunking process USAO-DC used for casings from one scene had some relevance to DFS’s interpretation of the evidence in *McLeod*. *See* DFS ANAB Appeal, at p. 16. But no DFS firearms examiner (or independent examiner, for that matter) has reported that the dunking process (which occurred before any examination began) had any impact on an examiners’ ability to analyze the casings. In each instance, each DFS firearms examiner was able to identify each grouping of fired cartridge casings as having been fired from the same firearm.

(1) Jim Carroll⁵

- Technical Assessor, ANSI National Accreditation Board (ANAB) Forensic Accreditation Programs
- Assistant Director of the Los Angeles County Sheriff's Department's Crime Laboratory
- Provided testimony as an expert in the field of Firearm and Toolmark Identification and Crime Scene Investigation over one hundred and ninety five (195) times in the Superior Courts of the State of California and the United States District Courts
- Distinguished Individual Service Award, National Institute of Standards and Technology (NIST) – Organization of Scientific Area Committees for Forensic Science (OSAC), 2019

(2) Todd Weller

- Former Chair and current Vice-Chair of the Organization of Scientific Area Committees' Firearm and Toolmark Subcommittee

(3) Bruce Budowle

- Director of the Center for Human Identification and Professor and Vice Chair in the Department of Microbiology, Immunology, and Genetics at the University of North Texas Health Science Center at Fort Worth, Texas
- Most published forensic geneticist in the world
- Member of 2015 USAO-DC-led audit of DFS's Forensic Biology Unit
- Held numerous prestigious positions at the FBI Laboratory, including Senior Scientist – Biology, Laboratory Division, 1998-2009

Furthermore, the Appeal continues to defend DFS making an “inconclusive” determination, even though according to Fried, it was based not on science⁶ but on “disagreements between examiners that they could not explain.” *See* March 16, 2021 DC-OIG MOA of Jonathan Fried, at p. 7. The two sets of cartridge casings collected from the two homicide crime scenes in *McLeod* exhibited fundamentally different breechface marks. These different marks were identified by the independent firearms examiners and USAO/OAG auditors, as well as Fried and Rachael. In the case notes underlying the May report in which the

⁵ DFS does not allege that Mr. Carroll has any conflict.


⁶ Per DFS's protocols, which cite the Department of Justice Uniform Language, an inconclusive determination is reached when “all observed class characteristics are in agreement but there is insufficient quality and/or quantity of corresponding individual characteristics such that the examiner is unable to identify or exclude the two toolmarks as having originated from the same source.” *See* FEU02 7.7.2.3 (issued June 26, 2020).

inconclusive determination officially issued, Fried noted “wavy check marks” on the 10mm casings from one homicide scene, and “parallel lines” on the 10mm casings from the other. *See* 6/4/2020 Addendum to Interim Audit Report, at p. 3. Rachael made similar observations. *See id.* DFS fails to address the fact that the same firearm cannot make both wavy check marks and parallel lines. *See* May 21, 2020 Interim USAO-DC/OAG Audit Report, at p. 3.⁷

* * *

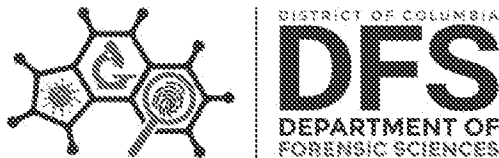
We continue to be deeply troubled by DFS’s lack of transparency and its unwillingness to address its failure to disclose material information to USAO-DC or its own accreditation body. Please let us know if you have any additional questions or require any additional documents or information.

Sincerely,



Channing D. Phillips
Acting United States Attorney

⁷ Additionally, the lack of the firearm is not a scientific basis to find “inconclusive” when faced with different class characteristics. If true, it would mean that a trained examiner could not exclude 9mm and 40 caliber cartridge casings as having been fired from the same firearm because she or he does not have the firearm available. To USAO-DC’s knowledge, DFS routinely makes identifications and eliminations when no firearm is available for test firing.



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**THE DISTRICT OF COLUMBIA DEPARTMENT
OF FORENSIC SCIENCES' FORMAL APPEAL
OF THE MAY 2, 2021 ACCREDITATION WITHDRAWAL
OF THE ANSI NATIONAL ACCREDITATION BOARD**

Pursuant to the ANSI National Accreditation Board (ANAB) Appeal Procedure, PR 1024, the District of Columbia Department of Forensic Sciences (DFS) appeals the May 2, 2021 Accreditation Decision to withdraw all DFS ISO/IEC 17025 accreditation. DFS responds to PR 1024 § 3.2's filing requirements herein, in like numbered paragraphs. In keeping with ANAB's appeals process, this same information has been input into ANAB's online appeal form.

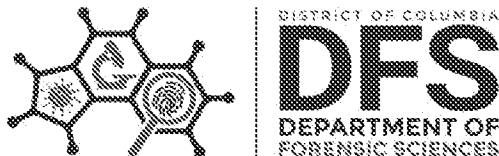
PR 1024 3.2(a): The District of Columbia Department of Forensic Sciences is appealing the Accreditation Decision of the ANSI National Accreditation Board (Forensics).

PR 1024 3.2(b): A May 2, 2021 Accreditation Withdrawal being appealed has been uploaded through the ANAB Appeal Portal.

PR 1024 3.2(c): As elaborated upon more fully in the attached Memorandum in Support of Appeal of the May 2, 2021 DFS Accreditation Withdrawal of the ANSI National Accreditation Board, ANAB's July 2020 failure to comply with ANAB MA 3033 § 3.3's requirement to disclose that the scope of the assessment included investigation of a complaint still withheld from DFS is the cause of any failure on DFS's part adequately to disclose related materials. ANAB's decision to adopt or otherwise incorporate as its own the Final Report of a body with documented, undisclosed, and fatal conflicts of interest is a violation of ANAB PR 1017 § 1.3, and ANAB AG 1008 § 3.4. Finally, ANAB's decision to base the April 2, 2021 Accreditation Suspension and subsequently the May 2, 2021 DFS Accreditation Withdrawal on a third party written 'Final Report' generated in violation of District of Columbia law is so fundamentally improper as to warrant remand.

PR 1024 3.2(d): A copy of relevant documents and other materials that directly support DFS's position, and upon which DFS relies, has been uploaded through the ANAB Appeal Portal.

PR 1024 3.2(e): DFS is coordinating with multiple forensic quality assurance and accreditation resources to help address these concerns. Additionally, DFS is working with other offices within the District of Columbia government to identify whether any of the allegations raised in the Final Report are true.



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**THE DISTRICT OF COLUMBIA DEPARTMENT OF FORENSIC SCIENCES'
MEMORANDUM IN SUPPORT OF APPEAL OF THE MAY 2, 2021 ACCREDITATION
WITHDRAWAL OF THE ANS NATIONAL ACCREDITATION BOARD**

Introduction

DFS and ANAB have a long and mutually beneficial relationship based on trust and committed adherence to quality assurance standards. With ANAB's careful oversight, DFS has been among the first accredited forensic laboratories in the country to implement mixture interpretation using probabilistic genotyping, validate DNA NextGen sequencing, and bring MIDEO virtual latent fingerprint analysis into use. In 2020, through ANAB, DFS became the first digital evidence forensics provider in the District of Columbia to obtain ISO/IEC 17025 (2017) accreditation.

At no time has DFS ever failed to perform a thorough and searching internal investigation of a complaint received from ANAB and, at no time has DFS ever failed to provide ANAB unrestricted access to its records or personnel.

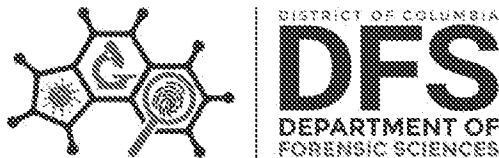
On March 18, 2021, a USAO/OAG audit team (audit team) issued its Final Report on DFS and the DFS Firearms Examinations Unit (FEU).

On April 2, 2020 ANAB suspended and subsequently on May 2, 2020 withdrew DFS's accreditation of forensic testing units without giving DFS an opportunity to respond prior to that withdrawal:¹

ANAB has received credible evidence that the D.C. Department of Forensic Sciences, Forensic Science Laboratory Division, has deliberately concealed information from the ANAB assessment team, violated accreditation requirements, engaged in misrepresentations and fraudulent behavior, and engaged in conduct that brings ANAB into disrepute. This credible evidence is detailed in the "Final Report of Review and Audit of Selected Casework of the Firearms Examination Unit of the Forensic Science Laboratory Division, Department of Forensic Sciences, District of Columbia", the source materials relied upon in this report and ANAB records from the 2020 assessment activities and complaint investigation.

ANAB's international recognition by the International Laboratory Accreditation Cooperation (ILAC) is based on continued conformance with ISO/IEC 17011. That standard, in pertinent part, states in 7.11.2 "where there is evidence of fraudulent behavior, or the conformity assessment body intentionally provides false

¹ Letter from Pamela Sale, Vice President, Forensics, ANAB, April 2, 2021.



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information or conceals information, the accreditation body shall initiate its process for withdrawal of accreditation.”

DFS immediately e-mailed a request for more information to address the basis of the suspension and the allegations that ANAB relied upon. Unfortunately, ANAB declined.

While DFS understands the severity of the April 2, 2021 suspension and the May 2, 2021, withdrawal of accreditation, it is left without the materials to base a substantive response. That said, DFS in this appeal will do its best to address the allegations of ‘*concealment of evidence, violation of accreditation requirements, misrepresentations and fraudulent behavior, and engagement in disreputable conduct.*’

Brief History of DFS

The Department of Forensic Sciences was established by the Department of Forensic Sciences Act of 2011 and became operational on October 1, 2012. Inspired by the National Academies of Sciences² 2009 report, “Strengthening Forensic Science in the United States: A Path Forward,” the District government’s chief aim in creating DFS was to establish a laboratory independent from law enforcement and prosecutors’ offices. In the Committee on the Judiciary’s (“Committee”) own words:³

[B]ill 19-5 transfers the functions and authority for forensic science services from the MPD to the proposed Department of Forensic Sciences to create an agency that is separate and independent from the District’s police and prosecutors.

The Department of Forensic Sciences Act,⁴ reiterates the importance of this independence by creating an independent Science Advisory Board⁵ (“SAB”) entirely distinct from DFS’s Stakeholder Council.⁶ The Committee recognized that scientific oversight and accountability would be the exclusive responsibility of the SAB:⁷

The establishment of a Science Advisory Board in Bill 19-5 is meant to ensure scientific peer review. This would include making certain that the Department is adhering to strict scientific protocols, following best practices, and incorporating new technologies. Thus, the proposed Board would be composed of scientists with

² Specifically the Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council.

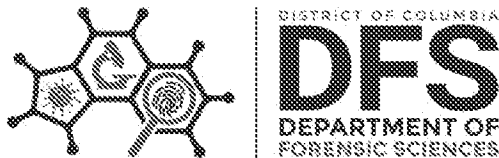
³ Committee on the Judiciary, Report on Bill 19-5, March 29, 2011, at 3.

⁴ DC Official Code §§ 5-1501 *et seq.* (“DFS Act”).

⁵ DC Official Code §§ 5-1501.11 & 5-1501.12.

⁶ DC Official Code §§ 5-1501.13 & 5-1501.14.

⁷ Committee on the Judiciary, 4 –5. (emphasis added).



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experience in general scientific research and methodology, including a statistician and quality assurance expert, as well as forensic scientists. A primary goal of the Board, in addition to promoting the quality assurance of agency procedures and protocols, is **to ensure accountability of the Department by reviewing all reports of allegations of professional negligence, misconduct, or misidentification or other testing error** the Department's provision of services. The testimony of various witnesses before the Committee at the hearing on Bill 19-5 strongly supported an advisory board that maintains a focus on science but that will not be involved with the day to day operations of the agency. The Committee Print for Bill 19-5 aims to strike that balance.

DFS's independence from law enforcement and prosecutors is an affirmative requirement of the DFS Act,⁸ as are the Act's complaint investigation⁹ and audit requirements.¹⁰

*Brief Factual Summary*¹¹

On January 17, 2020, USAO's Michael Ambrosino emailed DFS a letter stating that a USAO contract examiner later determined to have been Travis Spinder, had reworked a DFS 2017 NIBIN Confirmation report generated by Alicia Vallario, and verified by Michael Mulderig, and reached a different conclusion:¹²

On January 5, 2020, the U.S. Attorney's Office obtained a report from an independent firearms examiner concluding that different firearms fired the same two casings examined by Ms. Vallario. A second firearms examiner verified the independent firearms examiner's conclusions.

Given the nature of these conflicting opinions, and a rapidly approaching trial date of next week, the U.S. Attorney's Office sent

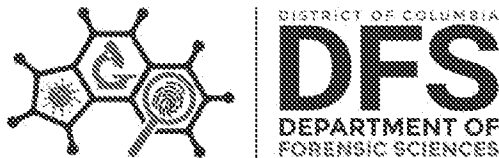
⁸ DC Official Code § 5-1501.02.

⁹ DC Official Code § 5-1501.12.

¹⁰ DC Official Code § 5-1501.06.

¹¹ On April 2, 2021 DFS requested that ANAB identify specifically the conduct alleged to violate ISO/IEC 17025:2017, 7.11.2. DFS explained that it cannot effectively answer an allegation without specific notice of its factual basis. ANAB declined to identify specific conduct, and instead referred generally to the Final Report. As a result, DFS has been forced to review the Final Report and guess what conduct ANAB may have used as the basis for its decision. Toward that end, DFS has tailored this Appeal to the Final Report's allegations around the May 6, 2020 disclosure to ANAB. *See* Final Report at 6 – 7. This appears to be the only direct allegation concerning representations made to ANAB.

¹² Letter from M. Ambrosino to J. Smith, Jan. 17, 2020. (Emphasis added).



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the ballistics evidence from these two homicide cases to a third firearms examiner for further analysis. The two casings at issue will undergo an independent firearms examination by a third examiner along with a number of other pieces of ballistics evidence without any contextually biasing information. A fourth firearms examiner will act as a verifier to this examination.

DFS FEU performed an immediate review of the casefiles associated with the case, and reviewed chain-of-custody records to identify the USAO contract examiner referred to in the letter. A review of the casefiles then-available to DFS showed compelling agreement between the two items photographed in A. Vallario's 2017 NIBIN Confirmation report. DFS FEU then reached out to T. Spinder and learned that he had not compared "the same two casings examined by Ms. Vallario," MPD Item Numbers 16 and 45, but had instead compared MPD Item Numbers 7 and 41.

On January 22, 2020, DFS wrote to M. Ambrosino¹³ to confirm acceptance of the complaint in compliance with DFS DOM15,¹⁴ and to request additional materials. On the morning of January 23, 2020, M. Ambrosino responded by email to DFS to advise that he would follow up with DFS after he received a verified report from the second set of contract examiners.¹⁵ Later, on January 23, 2020, DFS shared an update of its inquiry into the matter to-date, and specifically identified its concern regarding whether T. Spinder really had compared the "same two casings examined by Ms. Vallario":¹⁶

Your letter states that your office has obtained a report from an independent firearms examiner concluding that different firearms fired the same two casings examined by a specific DFS firearms contractor. Your letter attached a copy of that DFS contractor's report. We have confirmed your letter's statement to be erroneous.

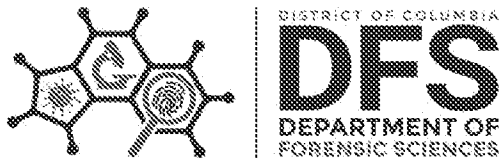
We have reached out to the contract examiner to whom this evidence was submitted and confirmed that he never performed a comparison of the two casings recorded in the report attached to your letter. It appears from the materials currently available to us that the contract examiner your office utilized repeated only two comparisons relevant to this matter, with both confirming DFS's reported conclusions.

¹³ Letter from T. Smith to M. Ambrosino, Jan. 22, 2020.

¹⁴ DFS DOM15.

¹⁵ Email from M. Ambrosino to T. Smith, Jan. 23, 2020.

¹⁶ Letter from T. Smith to M. Ambrosino, Jan. 23, 2020. (Emphasis added).



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Neither USAO nor its audit team has ever offered any explanation for M. Ambrosino’s erroneous claim concerning the “same two casings examined by Ms. Vallario.” And, despite another follow-up request by DFS on January 28, 2020,¹⁷ none of the conflicting reports¹⁸ generated by USAO contract examiners were ever provided to DFS or the SAB.

Without access to the conflicting reports referred to by M. Ambrosino, DFS re-obtained the relevant physical evidence on April 10, 2020, and on April 28, 2020,¹⁹ DFS FEU began an in-depth review of that evidence and the associated casefiles, to determine the basis for disagreement between the *Exclusion/Elimination* conclusion alluded to by M. Ambrosino, and the *Identification* conclusion reached in the 2017 NIBIN Confirmation report.

On April 23, 2020, DFS received a Joint Audit Notice letter from USAO and OAG, identifying an audit team that they selected²⁰ to audit the independent laboratory.²¹ DFS responded by letter, identifying the fundamental impropriety of such a prosecutor-led audit, reminding each of the complaint response and audit authorities already outlined in the DFS Act, identifying multiple serious and undisclosed conflicts of interest in the audit team, and encouraging all parties to instead send their concerns directly to the SAB and ANAB, in compliance with the DFS Act.²²

On April 30, 2020, the FEU Supervisor Jonathan Fried, and FEU firearms examiner Ashley Rachael prepared and delivered a PowerPoint presentation update for Forensic Science Laboratory Division (“FSL”) Director Wayne Arendse,²³ which appears to be an area of central focus for the audit team.²⁴ That April 30, 2020 PowerPoint includes two bullet points that read:²⁵

Based on a microscopic examination conducted by both Jonathan Fried and Ashley Rachael of Items #1(16) and #22.24(45), it was determined to be an **elimination** and not an identification as indicated by Morales and Vallario

This elimination transitively agrees with the conclusion reached by the private examiner

¹⁷ Email from T. Smith to M. Ambrosino, Jan. 28, 2020.

¹⁸ DFS is currently aware of three such reports: A January 4, 2020 T. Spinder report that does not include a comparison of MPD Item Numbers 45 and 16, a February 12, 2020 J. Murdock report that does not include a comparison of MPD Item Numbers 45 and 16, and a June 15, 2020 J. Murdock report that does include a comparison of MPD Item Numbers 45 and 16. May 21, 2020 Interim Report attached hereto as Exhibit 1.

¹⁹ Letter from W. Arendse to A. Yoder, May 6, 2020. (“May 6 ANAB Update”).

²⁰ DFS learned from testimony on April 29, 2021 that USAO selected the team unilaterally.

²¹ Attached hereto as Exhibit 2. On June 15, 2020, PDS echoed these concerns, and raised new ones.

²² Attached hereto as Exhibit 3.

²³ At W. Arendse’s request, the DOM15 Complaint/Inquiry Review Team was present for some or all of the presentation.

²⁴ April 30, 2020 PowerPoint, J. Fried & A. Rachael.

²⁵ *Id.* at 19. (Emphasis in original).



Under the heading “Next Steps,” the April 30, 2020 PowerPoint goes on to recommend:

Assign re-work of NIBIN Verification to another qualified examiner not involved thus far

Report to stakeholders for transparency

Locate photograph of Item #1 (16) and #22.24 (45) taken by Vallario if it exists

Determine root cause of the incorrect photograph being printed, initialed by both examiner and verifier and then making it into case file

The following day,²⁶ FEU Manager Jonathan Pope met with M. Mulderig, who had erroneously verified the 2017 NIBIN Confirmation report.²⁷ After exchanging multiple emails with J. Pope,²⁸ and after forwarding to J. Pope and J. Fried microscopic photographs which appear intended to exhibit points of agreement between ejector port markings on MPD Item Numbers 16 and 45, M. Mulderig changed his earlier conclusion of *Identification* to *Inconclusive*.²⁹

Contrary to the audit team’s statement,³⁰ on May 4, 2020, A. Rachael again examined MPD Item Numbers 45, 41, 16, and 7, producing microscopic photographs.³¹ The following day, J. Fried was asked by J. Pope to provide edits to a draft notice to ANAB to include the outcome of the review performed by J. Fried and A. Rachael. Contrary to the audit team’s characterization that J. Fried was simply “aware of [this] letter,”³² J. Fried was the source of the letter’s representation that he and A. Rachael had reached an *Inconclusive* conclusion, having inserted the term *Inconclusive* in a highlighted blank reading *Inconclusive, an Exclusion*.

In reliance on J. Fried’s representation concerning the outcome of the review, DFS provided ANAB with a disclosure package on May 6, 2020. As elaborated upon more fully in Section (I)(B), below, that May 6, 2020 disclosure package provided ANAB affirmative notice of many of the facts which the audit team alleges were deliberately concealed. In a move completely incompatible with any allegations of deliberate concealment, DFS noted in the May 6, 2020

²⁶ DFS is aware of allegations in the Final Report that FEU examiners Cody Elder and Elizabeth Bustamante at least looked at, and may have performed partial examinations of some items of evidence on May 1, 2020. Because DFS has read of a pending OIG investigation into this matter, DFS is not free to interview either C. Elder or E. Bustamante to further develop the record on these allegations at this time.

²⁷ May 6 ANAB Update.

²⁸ These emails were produced to District of Columbia Superior Court Judge Todd Edelman for *in camera* review.

²⁹ Emails from M. Mulderig to J. Pope, May 1, 2020.

³⁰ Final Report at 7.

³¹ A. Rachael Examination Photographs, Items 45, 41, 16, 7, May 4, 2020.

³² Final Report at 11.



disclosure that it would now be seeking an additional assessor be assigned by ANAB for the then-upcoming interim assessment activity.

Over objections from USAO's Sharon Donovan,³³ DFS proceeded with reworking the 2017 NIBIN Confirmation error. This rework was assigned internally, rather than to a contractor as recommended in the April 30, 2020 PowerPoint, because DFS had dismissed its last contract firearms examiner, M. Mulderig as he had been taken off casework.

J. Fried began his re-examination on May 12, 2020 and issued a Re-examination³⁴ report on May 27, 2020.³⁵ Notably, as DFS formally defines *Blind Examination*,³⁶ and does not anywhere in the May 27, 2020 firearms examination report represent that report as a Blind Examination.

On July 6, 2020, ANAB began its interim assessment activity of DFS FEU. The interim assessment activity included interviews of J. Pope, J. Fried, A. Rachael, and many others, and concluded without incident on July 8, 2020.

On July 15, 2020, USAO's Michael Spence attempted to serve a subpoena on DFS, seeking, *inter alia*, documents related to DFS's complaint investigation. DC OAG, as the statutory representative of DC government agencies in Superior Court refused to provide DFS assistance in responding to the subpoena, so DFS had to obtain outside counsel. DFS leadership and USAO leadership were able to negotiate an agreement in principal which would have provided all documents except those subject to attorney/client privilege to M. Spence, with the only limitation being that the documents could not be shared with the audit team. M. Spence refused, and DFS moved for a protective order.

DFS ultimately won a protective order which forbade USAO from using the relevant documents for any purpose other than that specific criminal case. USAO requested that DFS allow the protective order to be lifted, to better facilitate USAO's satisfaction of its affirmative disclosure duties under *Brady* and related law. DFS leadership offered the same agreement they had offered before, entered into a written discovery agreement with USAO. Of particularly significance, that written agreement expressly bound the "USAO/OAG audit team" never to issue a report on the subpoenaed documents. DFS then allowed the protective order to be lifted, and DFS leadership visited USAO's offices in person to help them review the relevant documents.³⁷

³³ Email from S. Donovan to T. Smith. May 19, 2020.

³⁴ In FEU terminology, a Re-examination is the process of conducting an additional analysis/examination of items examined previously, resulting in a new report of examination, and all accompanying documentation (also called re-work).

³⁵ Attached hereto as Exhibit 4

³⁶ In FEU terminology, a Blind Examination is the process of conducting an additional analysis/examination of items examined previously, resulting in a new report of examination, and all accompanying documentation, where the previous results are not known to the examiner/analyst. FEU Terminology attached hereto as Exhibit 5.

³⁷ These documents included the April 30, 2020 PowerPoint. This meeting focused almost exclusively on this PowerPoint.



Argument

I. The May 6, 2020 ANAB Disclosure was Prepared in Good Faith Reliance on the Representations of the Author of the April 30, 2020 PowerPoint.

DFS believes that ANAB's main concern arises from differences between the April 30, 2020 PowerPoint and the May 6, 2020 ANAB update. In preparing the May 6, 2020 ANAB update, however, DFS relied upon J. Fried's own characterization of the outcome of his review. Because DFS had no evidence upon which to doubt the veracity of J. Fried's characterization—*then or now*—it is difficult to understand how such reliance possibly could constitute deliberate concealment, fraud, or misrepresentation. Nowhere in the materials available to DFS is any evidence of deliberate concealment, fraud, or misrepresentation apparent.

a. The April 30, 2020 PowerPoint was an internal document intended to update management on the process of the error investigation and root cause analysis – not a firearms report.

What seemed cleared to DFS in 2020 remains clear in 2021—the April 30, 2020 PowerPoint presentation was not a firearms examination report reaching a conclusion of *Exclusion/Elimination*, it was an update on the technical portion of an internal error investigation. The work done by J. Fried and A. Rachael in late April and early May 2020, including A. Rachael's May 4, 2020 microscopic examination of items 45, 41, 16, and 7, served to fill the information gap created by USAO's refusal to share its conflicting reports, and allowed DFS to move forward with its internal error investigation and rework.

As J. Fried expressed to J. Pope by email on May 1, 2020, the April 30, 2020 PowerPoint was intended as an update on his and A. Rachael's error investigation and root cause analysis. It is clear from the information that April 30, 2020 PowerPoint contained—and what it did not contain—that it was neither intended as, nor in substance was, a report of firearms examination.

The April 30, 2020 PowerPoint presentation appears to have been prepared after comparing the firing pin aperture shear marks of MPD Item Numbers 45, 41, 16, and 7, in an attempt to recreate the 2017 DFS NIBIN Confirmation examination, which had found *Identification* based exclusively on aperture shear marks.³⁸ The April 30, 2020 PowerPoint offered opinions that are never included in a firearms examination report, including supposition whether prior firearms examination reports examined the correct items of evidence, and the source of photographs erroneously included in the 2017 NIBIN Confirmation Error report. Similarly, the April 30, 2020 PowerPoint lacks a variety of material necessary to any DFS firearms examination report. There is no ANAB seal. There are no technical notes. There is insufficient identifying case information.

³⁸ A. Vallario Report, Aug. 8, 2017. Attached hereto as Exhibit 6.



The project was not assigned through FEU’s case assignment process. And, perhaps most notably, it was prepared in the form of a PowerPoint presentation, rather than DFS’s standard FEU report format.

In keeping with the April 30, 2020 PowerPoint’s recommendation, DFS immediately began preparing external notices for ANAB and SAB. In preparing these letters, on May 5, 2020, J. Pope referred a draft notice letter to J. Fried, asking that J. Fried review for factual accuracy, and that J. Fried indicate the outcome of his error investigation and root cause analysis. J. Fried indicated the outcome of his error investigation was an *Inconclusive*. DFS reasonably relied on this determination in preparing the May 6, 2020 ANAB update and took care to ensure the substance of the error investigation and root cause analysis was reflected in the letter’s final form.

The May 6, 2020 letter affirmatively disclosed that J. Fried³⁹ and a “senior Firearms Examiner performed a review of the relevant physical evidence,” in April 2020. DFS later provided ANAB with a copy of J. Fried’s May 27, 2020 firearms examination report, which affirmatively notes J. Fried as its author, and an “Analysis start date: 5/12/2020.” As a result, it is impossible to conclude that DFS concealed—deliberately or otherwise—that firearms examiners physically examined evidence and offered tentative conclusions outside of the ordinary examination process; that “DFS management notified [ANAB] of an ‘inconclusive’ result prior to initiating a properly documented examination of the evidence and issuing a report of analysis”;⁴⁰ or, that DFS concealed any bias created by J. Fried having served both in the April 2020 error investigation and the May 2020 formal firearms examination and report.

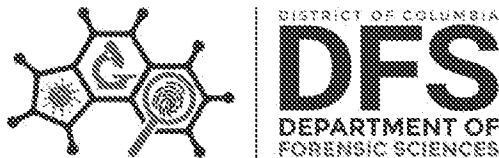
The May 6, 2020 letter discloses that J. Pope met with M. Mulderig to discuss the substance of his three-year-old conclusion, and that their discussion preceded M. Mulderig’s ultimate decision to reverse his erroneous 2017 conclusion. As ANAB is aware, these auditors interviewed M. Mulderig in August 2020 concerning this meeting, and the nature of M. Mulderig’s decision to reverse his erroneous 2017 conclusion. At his August 2020 interview, M. Mulderig accepted that his 2017 *Identification* conclusion was erroneous, and characterized J. Pope’s concerns about that erroneous conclusion as being rooted in an attempt to follow the FBI laboratory’s practice of erring toward *Inconclusive* when a firearm is not available to generate test fires in a laboratory setting.

- b. The Final Report fails to mention the August 2020 M. Mulderig interview and mischaracterizes the DFS May 6, 2020 letter to ANAB

The audit team did not refer to or attach their summaries of the August 2020 M. Mulderig interviews to their Final Report. Instead, the Final Report includes only references to a contradictory December 2020 interview conducted by third parties, wherein M. Mulderig apparently invited the inference that this meeting between J. Pope and M. Mulderig was secret,

³⁹ J. Fried was the only FEU Supervisor employed at DFS during 2020.

⁴⁰ Final Report at 2.



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and in some way improper. No matter which version of M. Mulderig is found credible, or what explanation is offered for the conspicuous absence of the August M. Mulderig interviews in the Final Report, it cannot be argued that DFS concealed—deliberately or otherwise—that J. Pope met with M. Mulderig to discuss his 2017 conclusion shortly before M. Mulderig determined that conclusion to have been erroneous.⁴¹

The May 6, 2020 letter discloses that J. Pope met with M. Mulderig to discuss the substance of his three-year-old conclusion, and that their discussion preceded M. Mulderig’s ultimate decision to reverse his erroneous 2017 conclusion. As ANAB is aware, these auditors interviewed M. Mulderig in August 2020 concerning this meeting, and the nature of M. Mulderig’s decision to reverse his erroneous 2017 conclusion. At his August 2020 interview, M. Mulderig accepted that his 2017 *Identification* conclusion was erroneous, and characterized J. Pope’s concerns about that erroneous conclusion as being rooted in an attempt to follow the FBI laboratory’s practice of erring toward *Inconclusive* when a firearm is not available to generate test fires in a laboratory setting.

The May 6, 2020 letter explicitly discloses the existence of an “apparent administrative error and apparent technical error in this 2017 NIBIN verification.” Given the presence of so direct a statement, the Final Report claims “DFS has maintained the position that the error was administrative in nature (only)” (parenthetical in original). It is a matter of plain fact that the May 6, 2020 letter expressly discloses both an apparent administrative and apparent technical error. There can have been no concealment here.

In addition to the May 6, 2020 W. Arendse letter to ANAB, a PowerPoint was provided to ANAB as part of that same disclosure. The final slide of this PowerPoint disclosed that as of that date, DFS intended to hire an independent contractor to perform the reworks triggered by discovery of the 2017 NIBIN Confirmation error. Again, when ANAB was later provided J. Fried’s May 27, 2020 firearms examination report, ANAB was put on notice of this change from an external to internal rework process. ANAB raised no concern. As a result, it is difficult to understand how ANAB might credit the Final Report’s implication that the decision to switch from an external to internal rework was in any way concealed.⁴²

While it is true that DFS did not provide a copy of the April 30, 2020 PowerPoint in its May 6, 2020 ANAB disclosure, the record available to DFS does not provide any evidence that this omission was an act of concealment—deliberate or otherwise. DFS provided copies of this PowerPoint to District of Columbia Superior Court Judge Todd Edelman, and the USAO, and DFS leadership attended an in-person meeting with USAO leadership to aid in their understanding of it. It is unclear what interest might be served by deliberately concealing the

⁴¹ DFS produced to District of Columbia Superior Court Judge Todd Edelman multiple email exchanges between MM and JP on the day of this meeting as part of a subpoena response to the USAO.

⁴² Final Report at 11



document from ANAB, only to affirmatively produce it to prosecutors that DFS had, itself, given carte blanche to share any and all concerns directly with ANAB.⁴³

Concerning ANAB specifically, the May 6, 2020 PowerPoint requests that ANAB send an additional assessor for its next on-site assessment activity. At that assessment, ANAB was given unfettered access to FEU Staff. FEU's internal quality assurance person B. Bustamante was interviewed by ANAB on July 6, 2020. FEU examiner A. Rachael, who worked on the April 30, 2020 PowerPoint and who verified the May 27, 2020 firearms examination report was interviewed the same day. The following day, J. Pope was interviewed, and J. Fried was interviewed by both ANAB assessors.

DFS's failure to include an internal "update" PowerPoint prepared on April 30, 2020, cannot be interpreted as deliberate concealment on May 6, 2020, when the author of the former provided the working conclusion represented in the latter. It is unclear how the failure to include a working conclusion apparently based alone on review of aperture sheer marks of four pieces of evidence can be interpreted as deliberate concealment, when one of the same reviewers took additional photographs of other regions of the relevant evidence, and viewed microscopic photographs of additional regions, in the time between the two dates. Nothing in the record available to DFS suggests that the working conclusion *Inconclusive*, as represented by J. Fried on May 5, 2020, was represented in anything other than good faith, or was anything other than the most accurate, genuine, and up-to-date characterization of the result of J. Fried's review.

II. ANAB's Decision to Depart From ANAB MA 3033 § 3.3 by not given DFS notice that ANAB was investigating a complaint from USAO while doing its July 2020 interim assessment.

On June 16, 2020, USAO complained to ANAB that multiple DFS examiners made an erroneous identification of two cartridge cases, the laboratory compared incorrect evidence as part of a 2017 NIBIN verification, and that DFS failed to properly investigate the cause of these issues. While, as discussed more fully below, ANAB did not provide DFS notice of the complaint or the opportunity to respond to it, nor did ANAB disturb DFS's accreditation upon receipt of the allegations. Instead, ANAB used its access to DFS during its July 2020 interim assessment activity to investigate the allegations, and apparently found sufficient material to close the complaint as unfounded.

With the Final Report, ANAB has received new allegations of misconduct related to the same case which ANAB investigated on its own during the July 2020 interim assessment activity. Given the opportunity to respond to the complaint, DFS would have been as fulsome and forthright in its response as it has been in every ANAB complaint response it has submitted under its current leadership. Given the opportunity on remand to prepare such a response, DFS is

⁴³ Exhibit 3 at 2.



confident ANAB would find its disclosures more than adequate to resolve any concerns ANAB may have.

The April 30, 2020 PowerPoint presentation was prepared as part of FEU's internal investigation of the cause of the 2017 NIBIN Confirmation error. If DFS had been given notice that ANAB had a special interest in the materials generated as part of its internal investigation into the cause of the 2017 NIBIN Confirmation error, DFS's long and successful history with ANAB suggests DFS would have provided this and other related materials for ANAB's review.

And, though DFS still has not received a copy of that complaint itself, it is clear from ANAB's October 2, 2020 closeout letter that USAO's complaint alleged both that "multiple examiners made an erroneous identification of two cartridge cases," and "DFS failed to properly investigate the cause of these issues."⁴⁴ Had DFS been given the opportunity to respond even to just the latter of these two complaints, the current withdrawal would have been averted.

DFS should not lose agency-wide accreditation for failing to provide materials it plainly would have provided had it been given the notice to which it was entitled under ANAB MA 3033 § 3.3. To remedy the error, the May 2, 2021 withdrawal determination should be remanded.

a. USAO and DFS were working together to resolve disputes related to the materials in the McCleod case

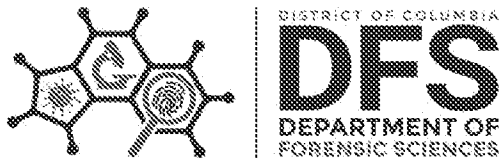
USAO approached DFS to ask that the protective order be lifted in the *McCleod* matter to allow USAO more freedom in meeting its affirmative disclosure duties in other cases.⁴⁵ In the spirit of good will, DFS agreed not to oppose USAO's motion to lift the protective order, in exchange for the following written agreements:⁴⁶

Pursuant to our conversation earlier today, the United States Attorney's Office agrees that the USAO/OAG audit team will not issue any reports concerning the documents produced by the Department of Forensic Services (DFS) to the United States Attorney's Office pursuant to the November 12, 2020 protective order in *United States v. Rondell McCleod*, No. 17 CF1 9869. In exchange, we understand that DFS will inform the Court this afternoon that it does not oppose the government's motion for the vacating of the protective order in the *McCleod* case.

⁴⁴ ANAB Oct 2, 2020 Complaint Closeout Letter from P. Sale to M. Ambrosino. ("Complaint Closeout Letter").

⁴⁵ The protective order is attached hereto as Exhibit 7.

⁴⁶ Letter from K. Kohl to T. Smith, Nov. 20, 2020. (Emphasis added). Attached hereto as Exhibit 8.



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Earlier this past summer, the United States Attorney directed the audit team to stand down on any further audit activity, and not issue any further reports, while we waited for ANAB to complete its recent compliance review of DFS, and in hopes that our office and DFS can work together to resolve the issues highlighted in the correspondence and reports exchanged to date.

DFS relied in good faith on the above written assurances and believes the USAO leadership that offered them did so in good faith as well.

USAO was free to forward any of the relevant documents to ANAB directly. DFS expected as much, as USAO reassured DFS in their July 24, 2020 email that they were sharing materials directly with ANAB.⁴⁷ DFS had encouraged as much, in its May 19, 2020 audit response letter.

On remand, DFS will share with ANAB those materials Judge Todd Edelman reviewed *in camera* and withheld from USAO pursuant to DFS's deliberative process and attorney/client privileges.

III. The Audit Team failed to disclose disqualifying conflicts of interest

ANAB is an impartial body and should not adopt as its own the findings of the audit team that did not disclose conflicts of interest. ANAB's Impartiality Policy provides, in pertinent part:⁴⁸

- 1.3 All ANAB personnel, contractors, and volunteers involved in the delivery of accreditation services:
 - a. Shall act objectively and be free from any undue commercial, financial, or other pressures that could compromise impartiality, and
 - b. Are under a continual obligation to disclose potential conflicts of interest.

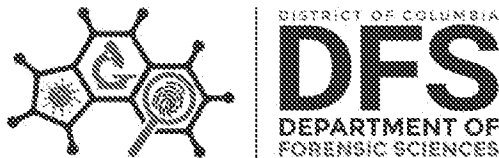
The audit team failed to meet this standard. As DFS and PDS recognized immediately upon learning the identities of this prosecutor-led audit team, the individuals chosen by prosecutors to pass judgment on these independent laboratories had failed to disclose multiple serious conflicts of interest. These conflicts are more thoroughly discussed in DFS's May 19, 2020 audit response letter, PDS's June 15, 2020 letter⁴⁹, and DFS's DOM15 Closeout Report⁵⁰. In brief summary:

⁴⁷ July 24, 2020 email from K. Kohl to T Smith. Attached hereto as Exhibit 12.

⁴⁸ ANAB PR 1017.

⁴⁹ Attached hereto as Exhibit 9.

⁵⁰ Attached hereto as Exhibit 10.



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- Bruce Budowle was a disappointed applicant for the DFS Director position at the time the current DFS Director Jenifer Smith was selected;
- DFS leadership had complained of AUSA M. Ambrosino's decision to use B. Budowle and Todd Weller to the exclusion of DFS FEU members, in losing a firearms *Daubert* motion in 2019;
- T. Weller failed to disclose in the body of the June 4, 2020 Interim Report that he had already served as verifier on a report relating to the same items of evidence as those reviewed in the May 27, 2020 firearms examination report, despite presuming to evaluate the adequacy of the conclusion offered in the May 27, 2020 firearms examination report;
- B. Budowle and T. Weller are regularly hired by USAO as contract examiners in support of prosecutions, and B. Budowle has testified that he is personal friends with AUSA M. Ambrosino.

By contrast, when ANAB performed its interim assessment activity and regularly scheduled audit of DFS in Summer 2020, it used assessors with no personal or professional entanglements with DFS or USAO. Given the care with which ANAB selects disinterested assessors to perform its own audits, it would be a wholly unreasonable for ANAB to adopt as its own the findings of a body that has concealed so many obvious conflicts of interest.

Similarly, ANAB is bound by ANAB AG 1008 § 3.4 to only conduct assessment activities using its own employees, agents, or independent contractors, and to ensure that those individuals have adequate qualifications and adhere to the relevant confidentiality policy:⁵¹

All persons ANAB assigns to conduct the accreditation services under this Agreement will be employees, agents or independent contractors of ANAB that have the skills needed to perform the services and have agreed to maintain the confidentiality of information in accordance with 4.0.

The audit team's B. Budowle, T. Weller, and James Carroll did not prepare their final report as employees, agents, or independent contractors of ANAB. B. Budowle, T. Weller, and J. Carroll have never complied with the ANAB confidentiality rule and have repeatedly circulated their reports in forums available to the public. And, while T. Weller and J. Carroll appear to be firearms examiners, B. Budowle is a DNA scientist with no discernible expertise in the firearms and toolmark discipline. ANAB's April 2, 2021 decision to adopt the reports of this audit team as its own, and to use those materials as a basis for making an Accreditation Determination is a plain violation of ANAB AG 1008 § 3.4.

⁵¹ ANAB AG 1008 § 3.4.



On remand, DFS would welcome the opportunity to supply any materials requested by disinterested ANAB assessors, and would welcome the opportunity to improve any of its practices or policies those assessors found nonconforming

IV. The Final Report is silent on a number of important facts that are relevant to the Final Report's conclusions.

First, and most importantly, USAO failed to rework the only two pieces of evidence that were the subject of the 2017 NIBIN Confirmation report. As DFS explained to USAO on January 23, 2020, USAO's own contractor T. Spinder confirmed that he had not compared MPD Item Numbers 16 and 45 in his January 4, 2020 report. As DFS learned from a June 3, 2020 email⁵² from J. Murdock, Mr. Murdock had not compared MPD Item Numbers 16 and 45 in his February 12, 2020 report. The audit team *must* have been aware that this latter report failed to compare MPD Item Numbers 16 and 45, because the audit team's own T. Weller had temporarily removed his auditor's hat, put on his examiner's hat, and provided the verification for the February 12, 2020 report.

All the same, the audit team failed to disclose the particularly relevant fact that neither of the first two reports requested by USAO actually compared the same two items of evidence as the 2017 NIBIN Confirmation report. It was not until DFS's DOM15 Closeout Report put the matter directly at issue that the audit team responded to the concern at all. Stranger still, the audit team responded to this concern not by admitting that the first two USAO reworks had failed to rework the only two items examined in the 2017 NIBIN Confirmation report, but chose instead simply to note that J. Murdock finally did compare the correct two pieces of evidence on June 15, 2020.

The audit team failed to address the fact that several pieces of evidence were changed before being sent to DFS in 2015, both before and after DFS put the matter at issue in its DOM15 Closeout Report. MPD Item Number 16 was the only cartridge casing associated with one of the two linked cases that USAO's M. Ambrosino did not divert away from DFS in 2015 for DNA dunking through an outside contractor. As a result, for half a year, the audit team relied transitively on the disagreement between comparisons of dunked casings, to attack a comparison involving an un-dunked casing—without ever disclosing the fact. And while this reliance may simply have been less than ideal *prior* to DFS's DOM15 Closeout Report's having put the dunking matter at issue, the audit team's decision not to address it in their subsequent Final Report is concerning.

Second, the audit team offered multiple conflicting interpretations of just what might have caused A. Vallario's initial error, or M. Mulderig's verification of that error in 2017. In their first interim report, the audit team completely missed the fact that A. Vallario had examined and photographed the correct evidence, only to accidentally incorporate the wrong photograph into her report.

⁵² Attached hereto as Exhibit 11.



When the audit team finally became aware that A. Vallario had photographed the correct evidence, and only accidentally attached the wrong photograph, they did not disclose that their initial conclusion had been wrong, and that their subsequent suspicion had been misplaced. They provided no explanation for how they had arrived at their erroneous conclusion, or what changes they had made to their process to prevent similar errors.

Third, whatever complaints the audit team may have about the processes leading up to the May 27, 2020 firearms examination report, both DFS and ANAB have made clear that the report's notes support its conclusions.⁵³ Nevertheless, the audit team continues to maintain that DFS and ANAB are wrong.⁵⁴ This is unsurprising. Because T. Weller switched out of his auditor role and into a verifier's role and back again, his audit team will never be free to admit the obvious fact that the points of agreement and disagreement noted in the May 27, 2020 firearms examination report support a conclusion of *Inconclusive*. Based on the audit team's own interview of M. Mulderig, and the fact that no firearm is available to produce test fires, it appears that even the FBI laboratory would reach the same conclusion as DFS, and ANAB, regarding the relationship between J. Fried's notes and conclusion.

Fourth, the Final Report fails to explain how it is "untenable" for J. Fried to perform a May 2020 examination of the same materials he reviewed in April 2020, while it is at the same time perfectly acceptable for J. Murdock to offer a formal firearms examination report on February 12, 2020 then be told to go back and do additional comparisons of the same evidence on June 15, 2020. The Final Report goes to great lengths to explain how improper it was for J. Fried to see the same evidence again, knowing that he had already determined it to be *Inconclusive*, but offers no explanation why J. Murdock and his verifier T. Weller were not hopelessly tainted when they examined the same evidence again in June 2020. This is particularly strange, given that T. Weller had notice of all the conflicting reports, and had actually helped to author two interim audit reports on this very case, when on June 15, 2020, he verified J. Murdock's second examination of the same volume of evidence.⁵⁵

Perhaps the most important distinction between the taint alleged against J. Fried by the audit team, and the taint concealed by that same team, is the fact that J. Murdock *claimed* to have performed "comparisons blind,"⁵⁶ while J. Fried did not. DFS defines in its published FEU Terminology both Blind Examination, and Re-examination.

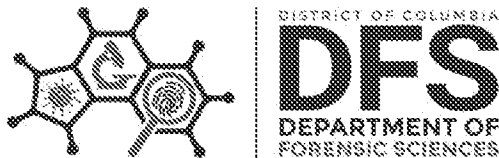
Blind Examination: The process of conducting an additional analysis/examination of items examined previously, resulting in a

⁵³ Complaint Closeout Letter.

⁵⁴ Final Report at 16-17.

⁵⁵ Note 5 of Final Report.

⁵⁶ Note 7 of Final Report. For some reason not disclosed in the Final Report, J. Murdock apparently made this blind comparison claim on May 11, 2020, rather than on the dates he issued reports of which DFS is aware—February 12, 2020 and June 15, 2020.



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new report of examination, and all accompanying documentation, where the previous results are not known to the examiner/analyst.

Re-examination: The process of conducting an additional analysis/examination of items examined previously, resulting in a new report of examination, and all accompanying documentation (also called re-work).

The May 27, 2020 firearms examination report does *not* claim to be a Blind Examination. The report claims to be what it was—a Re-Examination. While it is possible that J. Murdock’s second examination of the evidence in this case was indeed blind—though the Final Report does nothing to make the case—it strains credulity to suggest that T. Weller’s subsequent verification was.

Conclusion

For the foregoing reasons, DFS respectfully asks that ANAB remand the May 2, 2020 withdrawal for reconsideration. And given the opportunity to respond to any complained of activity. DFS is confident it will be able to provide as fulsome a response as it has in the past. DFS remains dedicated to working with ANAB to fully address any nonconformities discovered as a result.