

TEXAS FORENSIC SCIENCE COMMISSION

**FINAL REPORT ON COMPLAINT NO. 24.58;
KEVIN SCHUETTE (DPS TYLER, SEIZED DRUGS)**

April 11, 2025



Table of Contents

<i>I. BACKGROUND</i>	<i>1</i>
A. History and Mission of the Texas Forensic Science Commission	1
B. Jurisdiction	1
1. Investigations of Complaints Regarding Professional Negligence and Professional Misconduct	1
2. Accreditation Jurisdiction	2
3. Jurisdiction Applicable to the Complaint	2
C. Investigative Process	3
D. Limitations of this Report	4
<i>II. SUMMARY OF COMPLAINT AND INVESTIGATION</i>	<i>4</i>
A. Case Facts	4
B. Staff Investigation	5
<i>III. OBSERVATIONS</i>	<i>6</i>
<i>IV. RECOMMENDATIONS</i>	<i>7</i>
A. Clarity in Reporting	7
B. Notification and Option for Amended Reporting	8
<i>V. REFERRAL TO OCFW</i>	<i>8</i>

TABLE OF EXHIBITS

Exhibit A	Complaint
Exhibit B	DPS Quality Incident QI-SYS-2025-0103-SD-211073-1
Exhibit C	10-23-24 Testimony of DPS Analyst Kathryn Orton

I. BACKGROUND

A. History and Mission of the Texas Forensic Science Commission

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

The Commission has nine members appointed by the Governor of Texas.² Seven of the nine commissioners are scientists or medical doctors and two are attorneys (one prosecutor nominated by the Texas District and County Attorney’s Association and one criminal defense attorney nominated by the Texas Criminal Defense Lawyer’s Association).³ The Commission’s Presiding Officer is Jeffrey Barnard, MD.

B. Jurisdiction

1. Investigations of Complaints Regarding Professional Negligence and Professional Misconduct

Texas law requires the Commission to “investigate in a timely manner, any allegation of professional negligence or professional misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by a crime laboratory.”⁴ The term “forensic analysis” is defined as a medical, chemical, toxicological, ballistic, or other examination or test performed

¹ See e.g., Acts 2013, 83rd Leg. ch. 782 (S.B. 1238) §§ 1-4 (2013); Acts 2015, 84th Leg. ch. 1276 (S.B. 1287) §§ 1-7 (2015), Acts 2023, 88th Leg. ch. 742 (H.B. 3506) §§ 1-2 (2023), Acts 2023, 88th Leg. ch. 1149 (S.B. 0991) § 1 (2023).

² TEX. CODE CRIM. PROC. art. 38.01 § 3.

³ *Id.*

⁴ TEX. CODE CRIM. PROC. art. 38.01 § 4(a)(3)(A).

on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action.⁵

The statute does not define the terms “professional negligence” and “professional misconduct.” The Commission defined those terms in its administrative rules.⁶

“Professional misconduct” means the forensic analyst or crime laboratory, through a material act or omission, deliberately failed to follow the standard of practice that an ordinary forensic analyst or crime laboratory would have followed, and the deliberate act or omission would substantially affect the integrity of the results of a forensic analysis. An act or omission was deliberate if the forensic analyst or crime laboratory was aware of and consciously disregarded an accepted standard of practice required for a forensic analysis.

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

2. Accreditation Jurisdiction

The Commission is charged with accrediting crime laboratories and other entities that conduct forensic analyses of physical evidence.⁷ The term “crime laboratory” includes a public or private laboratory or other entity that conducts a forensic analysis subject to article 38.35 of the Code of Criminal Procedure.⁸

3. Jurisdiction Applicable to the Complaint

The discipline of Seized Drugs analysis is subject to the investigative authority of the Commission.⁹ The Texas Department of Public Safety Crime Laboratory (DPS) is accredited by the Commission and the ANSI National Accreditation Board (ANAB) under International

⁵ TEX. CODE CRIM. PROC. art. 38.35(a)(4).

⁶ 37 Tex. Admin. Code § 651.302 (7) and (8) (2020).

⁷ TEX. CODE CRIM. PROC. art. 38.01 § 4-d(b).

⁸ *Id.* at art. 38.35(a)(1).

⁹ TEX. CODE CRIM. PROC. art. 38.01 § 4(a)(3).

Organization for Standardization (ISO) standard 17025: 2017 and falls within the Commission's jurisdiction.¹⁰

C. Investigative Process

The Commission's administrative rules set forth the process by which it determines whether to accept a complaint for investigation.¹¹ At its January 31, 2025, meeting, the Commission voted to dismiss this complaint, instructing staff to advise the complainant that his case would only be reviewed if independent testing could demonstrate a different result than what DPS had reported.

After the meeting and during the process of writing the dismissal letter, Commission staff realized that Commissioners had misunderstood certain components of the complaint. Commissioners were under the impression the complaint concerned the conversion of cannabidiol (CBD) to tetrahydrocannabinol (THC) during laboratory testing, when it was actually focused on the conversion of tetrahydrocannabinol acid (THCA) to THC. The Preventive Action Report submitted by DPS in response to the complaint addressed the conversion of CBD to THC, not THCA to THC.¹² Knowing DPS and other Texas laboratories worked extensively to validate an analytical method for plants utilizing a decision-point threshold that incorporates risk mitigation for CBD-to-THC conversion, the Commission voted to dismiss the complaint absent contradictory independent test results. However, once staff realized the complaint's focus was on conversion of THCA to THC and *not* CBD to THC, staff determined the complaint was ripe for re-consideration

¹⁰ See, <https://fsc.txcourts.gov/AccreditedLabPublic#> for a list of accredited laboratories.

¹¹ 37 Tex. Admin. Code § 651.304-307 (2019).

¹² THC is psychoactive and responsible for the "high" associated with cannabis. THCA is non-psychoactive unless it is converted to THC through a process called decarboxylation, which occurs when the product is heated or exposed to UV light.

under Texas Administrative Code § 651.305(h).¹³ Commissioners voted to re-consider and accept the complaint on April 11, 2025.

D. Limitations of this Report

The Commission’s authority contains important limitations. For example, no finding by the Commission constitutes a comment upon the guilt or innocence of any individual.¹⁴ The Commission’s written reports are not admissible in civil or criminal actions.¹⁵ The Commission does not have the authority to subpoena documents or testimony; information received during any investigation is dependent on the willingness of affected parties to submit relevant documents and respond to questions posed. Information gathered in this report was not subjected to standards for the admission of evidence in a courtroom. For example, no individual testified under oath, was limited by either the Texas or Federal Rules of Evidence (*e.g.*, against the admission of hearsay) or was subject to cross-examination under a judge’s supervision.

II. SUMMARY OF COMPLAINT AND INVESTIGATION

A. Case Facts

On December 21, 2024, Kevin Schuette filed a complaint with the Commission alleging that he “would not have been convicted” of felony possession of THC if the DPS regional laboratory in Tyler had used high performance liquid chromatography to analyze the vape cartridge in his case, rather than gas chromatography. (*See, Exhibit A.*) He alleges that he “bought a THCA pen legally” at a public establishment in Lindale, Texas, and claims the cashier who sold it to him

¹³ 37 Tex. Admin. Code § 651.305(h) (stating that a Commission member may, by formal motion, request that the full Commission reconsider a dismissed complaint or disclosure if the member identifies new evidence of professional negligence or professional misconduct that was not previously considered by the Commission. The new evidence may be derived from either: (1) information in the existing record that the complainant believes was not considered by the Commission previously; or (2) new information brought to the Commission's attention that was not previously considered by the Commission).

¹⁴ TEX. CODE CRIM. PROC. art. 38.01 § 4(g).

¹⁵ *Id.* at § 11.

testified to the sale at his trial. The complaint alleges that “legal THCA” becomes “illegal Delta non (sic) THC” when it is heated via gas chromatography.

The complainant does not allege professional negligence or misconduct with respect to the testing DPS performed using gas chromatography-mass spectroscopy (GC-MS). Rather, he argues the GC-MS method is not fit for the purpose of distinguishing THCA from THC. He further claims he would not have been convicted if liquid chromatography (LC) had been used to analyze the evidence, because this method is capable of distinguishing THCA from THC.¹⁶ The Commission is neither a court nor a legislative body.¹⁷ Whether complainant would have been convicted or not is a legal issue that falls within the sole province of a court with competent jurisdiction. The focus of this report, therefore, is on the scientific methods utilized in this case and the need for clarity in the reporting of results for the benefit of all end-users.

B. Staff Investigation

Staff obtained the laboratory case record from DPS. The report states Item 01-01-AA (vape cartridge containing amber liquid) contains delta 8-THC and delta 9-THC in the amount of .60 grams (+/- 0.09 grams) net weight. The report further notes that “The concentration of delta-9-tetrahydrocannabinol (THC) was determined to be above the laboratory’s administrative threshold of 1% THC. The laboratory is unable to determine if the reported tetrahydrocannabinol is derived from marihuana, hemp, or was synthetically produced.” Staff spoke with the complainant, reviewed case materials provided by DPS, and engaged in extensive conversations

¹⁶ The October 23, 2024, transcript shows that the DPS seized drug analyst was not questioned on this issue during trial. (See, **Exhibit C.**)

¹⁷ Significant efforts are currently underway at the Texas Legislature to ban intoxicating THC products. See, e.g., <https://www.ltgov.texas.gov/2025/03/19/lt-gov-dan-patrick-statement-on-the-bipartisan-passage-of-senate-bill-3-banning-thc-in-texas/>

with DPS management and subject matter experts as well as representatives from the Texas Association of Crime Laboratory Directors (TACLD) and ANAB.

During the course of the review, Commission staff recognized that the reporting issue described herein is not limited to DPS. While some laboratories have validated analytical procedures that are capable of distinguishing THC from THCA in non-plant materials, not all laboratories have done so. Where a method is incapable of distinguishing THC from THCA, the following discussion applies.

III. OBSERVATIONS

As a threshold matter, these observations are limited to non-plant cannabinoid products (e.g., liquids, oils, edibles, etc.). The Commission observes the following:

- Testing using GC-MS produces “total” THC (THC plus tetrahydrocannabinolic acid (e.g., THCA-A or THCA-B)).
- GC-MS is appropriate for plants because the United States Department of Agriculture (USDA) clarified the 0.3% threshold for hemp/marijuana determination was *total* THC (combined THC and carboxylated/acidic forms) in plant material. Therefore, although the conversion is not complete (*i.e.*, <100%) under most GC conditions, it is acceptable to use GC-MS for plant material.
- Unlike hemp and marijuana, a vape liquid could contain only the acidic form (THCA) which decarboxylates at high temperatures to deliver THC.
- The clarification regarding total THC for plants does not yet exist for products (e.g., non-plant liquids, edibles, etc.).
- Not all crime laboratories may use analytical techniques that are able to distinguish THCA (carboxylated (acid form)) from THC (non-carboxylated (neutral form)). However, LC-based methods and GC-MS in combination with a derivatization agent, are routinely used for this purpose.
- The GC-MS method DPS used in this case did not incorporate a derivatization agent. This method is known to cause decarboxylation and convert tetrahydrocannabinolic acids (THCA) into their neutral tetrahydrocannabinol form (THC). Although the conversion is not 100% complete, the “total” THC identified by the laboratory may have originated from THCA in the evidential item.

IV. RECOMMENDATIONS

A. Clarity in Reporting

The Commission has jurisdiction over reporting of results by Texas crime laboratories. It is undeniably in the public interest that crime laboratories be transparent and clear in their reporting statements with respect to both the results themselves and the limitations of the test methods they use. Indeed, governing accreditation standard ISO 17025: 2017 clause 7.8.1.2 requires results to be provided “accurately, clearly, unambiguously and objectively.” Similarly, the Texas Code of Professional Responsibility requires all analysts to: “Prepare reports in clear terms, distinguishing data from interpretations and opinions, and disclosing any relevant limitations to guard against making invalid inferences or misleading the judge or jury.”¹⁸

To ensure these requirements are met, the Commission recommends that all laboratories utilizing methods that cannot differentiate THCA from THC in non-plant material take the following steps with respect to reporting their results to end-users:

1. Report that the product contains THC and/or THCA;¹⁹ and
2. Include a note expressing the limitation of the method, such as²⁰:

“Exhibit was tested using a method that causes decarboxylation and converts tetrahydrocannabinolic acids into their neutral tetrahydrocannabinol form.”

Additionally, laboratories that have not validated a method to distinguish THC from THCA (for non-plants) may report the presence or absence of THC using language that a particular

¹⁸ 37 Tex. Admin. Code § 651.219(b)(10) (2024).

¹⁹ The specific reporting language in any given case should specify the isomer identified (delta-9, delta-8, etc.) per the laboratory’s standard operating procedure. The point of this recommendation is for the laboratory to express clearly that it could be a tetrahydrocannabinolic acid, tetrahydrocannabinol isomer, or both.

²⁰ The Commission offers this language as an example to assist laboratories, but any similar language that is accurate, clear, unambiguous, and objective would be acceptable.

administrative cutoff was exceeded but *only if* the decision-point cutoff method was properly validated.²¹

B. Notification and Option for Amended Reporting

The Commission recommends that all laboratories using analytical techniques (*e.g.*, GC-MS without derivatization) on non-plant materials that are known to decarboxylate tetrahydrocannabinolic acids during the analysis provide general notice to their end-user community clarifying that the method does not allow the laboratory to distinguish between THC and THCA and offering to issue amended reports upon request.²² Where laboratories have issued quality incidents with corrective actions (*See e.g.*, **Exhibit B**) regarding the issues discussed in this report, relevant quality incident documentation should be provided with the notifications.

V. REFERRAL TO OCFW

The Commission directs staff to refer the complainant in this case (as well as any subsequent complaints regarding the same issue) to the Office of Capital and Forensic Writs (OCFW) pursuant to Article 38.01 Section 4 (h) and Texas Admin. Code Section 651.307 (2024).

²¹ A decision-point cutoff method for (non-plant) products that cannot differentiate THC from THCA is difficult to validate robustly due to the significant range of variables that would need to be incorporated during validation.

²² This recommendation applies to cases reported after the effective date of HB-1325 (June 10, 2019).

EXHIBIT A

Complaint Details

Completed by Public via online submission on 12/21/2024

Complaint Type

Complaint

FSC Case #

C24.58

Status

Assigned

[Status History/Document\(s\)](#) ▼

Completed By

Complainant/On Behalf of

Kevin schuette

Subject of Complaint Details

Forensic Analyst Name

N/A

Laboratory/Other Entity

Texas Department of Public Safety - System Wide

City/State

Tyler/Texas

Type(s) of Forensic Analysis

Seized Drugs; Gas chromatography

Approximate Date of Examination, Analysis, or Report

Have you ever filed a complaint with the commission involving the same criminal matter(s)?

No

Known Defendant(s) Associated With the Forensic Analysis

Defendant	Relationship	
Kevin schuette	Self	Criminal Case Details ▼

Person(s) With Factual Knowledge or Expertise Regarding the Facts of the Disclosure

Witness

Haylee Craze
Tobacco junction

Complaint

Complaint Description

Put simply legal thca becomes illegal delta non thc, when it is heated. In Texas, the most common way criminal labs test canbinoids. Is gas chromatography heating and vaporizing is sample is a necessary step in gas chromatography. When thca is exposed to heat it undergoes a chemical reaction known as decarboxtlation where it loses a carboxylic group add carbon dioxide and water.This transformation changes t a c.A into illegal delta nine thc. If high performance liquid chromatography had been used then i would not have been convicted and I have hard time believing I'm the only one that knows this

[History.](#)

Contact Us

For Technical Assistance: support@txcourts.gov For General Assistance: info@fsc.texas.gov

© 2025 – Office of Court Administration



Complaint Details

Completed by Public via online submission on 12/24/2024

Complaint Type
Complaint

Completed By

Complainant/On Behalf of
Kevin schuette

Subject of Complaint Details

Forensic Analyst Name	Laboratory/Other Entity	City/State
N/A	Texas Department of Public Safety Tyler Laboratory	Tyler/Texas

Type(s) of Forensic Analysis
Seized Drugs

Approximate Date of Examination, Analysis, or Report

09/28/2023

Laboratory Case Number(s)

2218654

Have you ever filed a complaint with the commission involving the same criminal matter(s)?

Yes

Previous FSC complaint number

Na

Known Defendant(s) Associated With the Forensic Analysis

Defendant	Relationship	
Kevin schuette	Self	Criminal Case Details ▼

Person(s) With Factual Knowledge or Expertise Regarding the Facts of the Disclosure

Witness

Haylee Craze
Tobacco junction

Complaint

Complaint Description

I bought a thca pen legally at tobacco junction in lindale tx. The cashier who sold it to me even took the stand saying I bought it there and it still didn't hold up due the the damning lab report from dps crime lab analyst. Due to gas chromatography being used on my thca pen im now a felon

Exhibits and Attachments

Exhibits and Attachments

File Description	File Name
Lab results	Screenshot_20241223_215907_Gmail.jpg

Contact Us

For Technical Assistance: support@txcourts.gov For General Assistance: info@fsc.texas.gov

© 2025 - Office of Court Administration



EXHIBIT B



TEXAS DEPARTMENT OF PUBLIC SAFETY
CRIME LABORATORY

Quality Incident Report

LAB-510 Rev.01 (04/2023) p.1 Issued by: SQM

Tracking ID

QI-SYS-2025-0103-SD

Lab	System	Discipline	SD	Date Discovered	01/03/2025	Page 1 of 2
-----	--------	------------	----	-----------------	------------	-------------

Date of Incident	04/19/2022	End Date of Incident (if applicable)	03/13/2025
------------------	------------	--------------------------------------	------------

Related Policy/Procedure/Specification	ISO 17025: 7.8.1.2 and ANAB AR 3125: 7.8.1.2.1
--	--

Related Work # (case/batch/instrument#)	TYL-2309-10090
---	----------------

Incident Description:

On January 3, 2025, the Laboratory was forwarded a complaint filed with the Texas Forensic Science Commission. The complaint alleges because the Laboratory uses a GC/MS method which involves heating and vaporizing a sample, that "legal THCA" converts to "illegal delta-9-THC" via decarboxylation during the testing process. The complainant states that if another method such as HPLC had been used, they do not believe they would have been convicted. For the purposes of this Quality Incident, any reference to THC or THCA is specific to the delta-9 isomer but could include other isomers depending on the case.

Cause Analysis:

The Laboratory developed and validated an analytical method for vape cartridges and oils based on the method currently in use for testing for the 1% threshold in cannabis plants. For other non-plant evidence, such as edibles, the Laboratory identifies THC qualitatively for DPS customers only upon written request of the prosecutor. The Laboratory has interpreted Texas Agriculture Code Section 122.153 to require that hemp sample testing should be performed utilizing a post decarboxylation method that reflects the total available THC derived from the combined THC and THCA content. This testing method requires that THCA present in the plant sample be converted to THC before or during analysis. Section 122.153 proscribes preharvest testing but does not speak to forensic laboratory testing of vapes and oils. A United States Department of Agriculture ("USDA") Rule clarified that for plant samples, the 0.3% threshold for determination of hemp versus marijuana was intended to be total THC (THC plus THCA). However, no such clarification has been made for non-plant evidence, such as vapes or oils. Unlike hemp and marijuana, a vape liquid could contain only the acidic form (THCA). The Laboratory currently uses the following reporting statement: Vapes/oils - Contains delta-9-THC (per HSC Chapter 481.103: delta-1-tetrahydrocannabinol). The concentration of delta-9-tetrahydrocannabinol (THC) was determined to be [ABOVE/BELOW] the laboratory's administrative threshold of 1% THC. The laboratory is unable to determine if the reported tetrahydrocannabinol is derived from marijuana, hemp, or was synthetically produced. If other components are in the sample preventing the threshold method from being utilized and testing supports the qualitative identification, the Laboratory reports: Contains delta-9-THC (per HSC Chapter 481.103: delta-1-tetrahydrocannabinol). An inference to the concentration of delta-9-THC is unable to be provided due to interfering compounds in the sample. Edibles are qualitatively identified and reported as follows: Contains delta-9-THC (per HSC Chapter 481.103: delta-1-tetrahydrocannabinol). The concentration of delta-9-tetrahydrocannabinol (THC) was not determined. The Laboratory is unable to determine if the reported tetrahydrocannabinol is derived from marijuana, hemp, or was synthetically produced. The Laboratory believed the above reporting language was sufficient but recognized after conversations with the Commission (which in turn consulted with ANAB), that additional clarity is needed with respect to THC/THCA, i.e., that the Laboratory's results are being reported as total THC, which may include THC, THCA or both.

Risk Assessment:

Without clarifying that the THC being reported is total THC, there is a risk that the customer (courts and/or law enforcement) may misinterpret the results. The Laboratory has been reporting on cases containing vapes and oils since April 2022, so the likelihood of occurrence is considered frequent. The severity is considered to be moderate as the testing method has been validated and concerns center around accurate reporting language. The overall risk level is considered to be medium.

Risk Level: Medium

Correction(s) to the Original Work (Indicate if not performed at this time):

Corrected Report? Yes

For liquids/oils, where the total THC may not apply, it must be clear to the customer that the Laboratory is reporting a total THC amount, which may include THCA, THC, or both. To meet ISO 7.8.1.2 requirements, an additional result note will be provided on relevant reports going forward. The Laboratory proposes using the following result note when suspected THC products are analyzed; however, will defer to any consensus recommendations made by the Texas Forensic Science Commission: "Exhibit was tested using a method which can convert tetrahydrocannabinolic acids present in the sample into their neutral tetrahydrocannabinol form." Additionally, the Laboratory paused analysis on any unopened cases containing vape pens on March 13, 2025, until the outcome of the next Forensic Science Commission quarterly meeting during which consensus reporting statements will be addressed. The report in the case related to the original complaint (TYL-2309-10090) will be amended to include the consensus result note. The Laboratory will also outsource the case associated with the complaint for reanalysis by a different accredited laboratory using a different method.



TEXAS DEPARTMENT OF PUBLIC SAFETY
CRIME LABORATORY

Quality Incident Report

LAB-510 Rev.01 (04/2023) p.1 Issued by: SQM

Tracking ID

QI-SYS-2025-0103-SD

Lab	System	Discipline	SD	Date Discovered	01/03/2025	Page 2 of 2
-----	--------	------------	----	-----------------	------------	-------------

Customer Notification (Indicate if not performed at this time or not applicable):

The Laboratory notified the relevant prosecutor about the proposed case amendment. Customer notification on the changes to reporting will be distributed and posted on the DPS Public website. The Laboratory will provide an amended report if needed by the legal community, upon request.

Corrective Action Necessary? No **Significant Disclosure?** Yes **Inclusion on Disclosure Form?** NA

Approval

Collaborator(s) Ruzicka, Melanie, Hatch, Jennifer (awareness only)

Subject Matter Expert(s) Cline, Charles (electronically signed)

Lab QA Greco, Heather (electronically signed)

Management Greco, Heather, Cline, Charles (electronically signed)

System QA Favela, Stephen (electronically signed)

Date of Final Approval 04/10/2025

EXHIBIT C

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME
TRIAL COURT CAUSE NO. 007-2122-23
TWELFTH COURT OF APPEALS CAUSE NO. 12-24-00337-CR

THE STATE OF TEXAS * IN THE DISTRICT COURT
 *
V. * 7th JUDICIAL DISTRICT
 *
KEVIN CHRISTOPHER SCHUETTE * SMITH COUNTY, TEXAS

TESTIMONY OF KATHRYN ORTON

On the 23rd day of October, 2024, the following
proceedings came on to be heard in the above-entitled
and -numbered cause before the HONORABLE JUDGE KERRY L.
RUSSELL, Judge presiding, held in Tyler, Smith County,
Texas.

Proceedings reported by Computerized Stenotype
Machine.

A P P E A R A N C E S

FOR THE STATE:

MR. HEATH CHAMNESS
STATE BAR NO. 24040667
ASSISTANT DISTRICT ATTORNEY
MR. JUAN TOBIAS
STATE BAR NO. 24096779
ASSISTANT DISTRICT ATTORNEY
MS. ALEXIS SMITH
STATE BAR NO. 24131777
ASSISTANT DISTRICT ATTORNEY
SMITH COUNTY DISTRICT ATTORNEY'S OFFICE
100 N. BROADWAY AVENUE
TYLER, TEXAS 75702
(903) 535-0520

FOR THE DEFENDANT:

MR. CHRISTIAN K. JOHNSON
STATE BAR NO. 24078742
LAW OFFICE OF CHRISTIAN JOHNSON
305 SOUTH BROADWAY, SUITE 406
TYLER, TEXAS 75702
(903) 522-4122
ckj@lawfirm.tx.com

REPORTER'S NOTE

Uh-huh = Yes - Affirmative Response
Huh-uh = No - Negative Response
Quotation marks are used for clarity and do
not necessarily indicate a direct quote.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

VOLUME 1				
OCTOBER 23, 2024			PAGE	VOL
STATE'S WITNESSES	Direct	Cross	Voir Dire	Vol
KATHRYN ORTON				
By Mr. Chamness	5, 27			1
	33			1
By Mr. Johnson		23, 32		1
End of requested excerpt.....			38	1
Court reporter's certificate.....			39	1

INDEX OF EXHIBITS - STATE'S

Use is indicated as follows:

J - Jury R - Record Only D - Demonstrative
H - Hearing Only B - Bill of Exceptions
C - Conditional W - Withdrawn E - Excluded
F - File only

NO.	DESCRIPTION	OFFRD	ADMTD	USE	VOL
1	Vape pens	19	20	J	1
4	Lab report	21	21	J	1

P R O C E E D I N G S

(October 23, 2024)

(Beginning of requested excerpt.)

KATHRYN ORTON,

having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CHAMNESS:

Q Ms. Orton, if you would, introduce yourself to the ladies and gentlemen of the jury.

A My name is Kathryn Orton.

Q And who is it that you work for?

A I work for the Department of Public Safety Tyler crime lab.

Q All right. And in what capacity do you work for the crime lab?

A I'm employed as a forensic scientist.

Q Let's talk a little bit about that. Obviously, *forensic scientist* sounds official and so we're going to talk about how you become a forensic scientist. What type of educational background did you have prior to going to work for the DPS crime lab?

A I have a bachelor's of science in chemistry from University of North Texas and a master's of science from Virginia Commonwealth University.

Q And once you obtained your master's, did you

1 work at any other crime labs or laboratory science
2 businesses before you went to the DPS?

3 A No, I came directly to DPS from the master's
4 program.

5 Q And once you obtained your master's and went
6 to work for the DPS, can you tell the ladies and
7 gentlemen of the jury, what do you do when you first go
8 to work for the DPS crime lab in order to become a
9 forensic scientist?

10 A When I came to work for the lab, I underwent a
11 year of testing, training. This includes general lab
12 training, as well as specific discipline training,
13 including a period of supervised case work and
14 competency tests.

15 Q And I want to talk about that specialized case
16 work. Is it fair to say the DPS crime lab, if you
17 consider the crime lab as a big umbrella, there's a
18 bunch of smaller umbrellas under the big umbrella that
19 might be subspecialties. For instance, alcohol
20 detection, controlled substances detection. There's a
21 toolmarking department, DNA, things along those lines;
22 is that fair?

23 A Yes, we have different disciplines.

24 Q Right. And, specifically, when you came to
25 work for the DPS, what discipline were you hired in

1 under?

2 A Seized drugs.

3 Q Okay. All right. And that first year of
4 training, was it in seized drugs?

5 A Yes.

6 Q And do you still work in that department?

7 A Yes, I do.

8 Q Okay. Let's talk a little bit about the lab
9 in general. Is the lab an accredited lab?

10 A Yes.

11 Q Who is it accredited by?

12 A They're accredited by the Texas Forensic
13 Science Commission and ANAB.

14 Q And I know that it's a pretty detailed answer,
15 but in layman's terms, why is it important that the
16 laboratory which is conducting this testing be
17 accredited?

18 A Accreditation means that we are complying with
19 all the most up-to-date standards in the scientific
20 community. It means that our policies are validated and
21 that we're doing everything in a correct and scientific
22 way.

23 Q And that's kind of where I was going next. So
24 when you say *scientific way*, there is methodology, there
25 are policies, there are procedures for doing certain

1 things in the scientific community; is that correct?

2 A Yes.

3 Q And those types of policies, procedures,
4 methodology, a lot of times we say that they've been
5 peer-reviewed, in the sense that there are other
6 laboratories that are doing things the same way and the
7 scientific community as a whole accepts that to be good
8 clean science; is that fair?

9 A Yes.

10 Q And so when you say that, "We are an
11 accredited lab," you are using the same methodology, the
12 same policies, the same procedures as what the other
13 peers the DPS crime lab have and that have been widely
14 accepted as being valid scientific methods or valid
15 scientific protocols for testing seized drugs or
16 detecting alcohol. Those are just two examples; is that
17 fair?

18 A Yes.

19 Q Okay. Now, outside of the undergrad training
20 and then the training that you first received, are you
21 required to do any continuing education?

22 A Yes.

23 Q Can you briefly tell us what that is?

24 A I'm required to do a certain amount of
25 continuing education hours in order to renew my license

1 every two years. Some of those can be general
2 scientific training, but a certain required number have
3 to be specific to seized drugs.

4 Q All right. And since you first went to work
5 for the crime lab, have you maintained your
6 certification?

7 A My license, yes.

8 Q All right. Now, what I want to talk to you
9 about is actually what you do in the seized drug
10 department. Is there equipment/machinery that is used
11 in ascertaining whether or not something that was seized
12 by law enforcement is, in fact, a controlled substance?

13 A Yes, there is.

14 Q And this particular case, which you did the
15 analysis for, is for tetrahydrocannabinol. So let's
16 talk specifically about that. What type of machinery
17 and/or equipment is used to detect the presence of THC?

18 A We use a gas chromatograph mass spectrometer.
19 GCS for short.

20 Q Okay. Now, I don't know -- well, you may not
21 have seen the show. Have you ever seen *My Cousin Vinny*?

22 A No.

23 Q Well, in that show there's this scene where
24 the guy's talking about the tire marks that are left.
25 And the prosecutor -- or the guy playing the

1 prosecutor -- says, "What kind of machine told you
2 that?" and he says it's a gas chromatograph.

3 It's funny if you've seen the show, but you
4 haven't.

5 So tell me about this gas chromatograph. What
6 does it do?

7 A A gas chromatograph mass spectrometer is
8 composed of two parts. The gas chromatograph is a
9 separation instrument. So you can inject a compound in
10 there and it will take a certain amount of time to go
11 through the column based on things like the size of the
12 compound and how it interacts.

13 So using that, we're able to separate
14 different components in the mixture because it will take
15 different amounts of time to go through.

16 At the end they -- (unintelligible) -- the
17 detector and mass spectrometer, we fire a barrage of
18 charged particles at them -- at each one -- and it
19 breaks apart in a wave called a fragmentation pattern
20 that is unique and characteristic to every compound.

21 Q All right. And so, first, you've got to
22 separate, and then you make a determination as to
23 whether or not -- in this instance, whether or not that
24 THC compound is present; is that fair?

25 A Yes.

1 Q Now, first question I have is, because you are
2 using a piece of equipment or a piece of machinery,
3 would you agree with me that it is, in fact, important
4 to make sure that the equipment or the machinery is
5 working correctly?

6 A Yes.

7 Q Does the DPS regularly test and maintain those
8 gas chromatographs?

9 A Yes.

10 Q Does the DPS crime lab have individuals who
11 are trained to work on those in the event that something
12 appears off?

13 A Yes.

14 Q And when I say *appears off*, isn't it, in fact,
15 true that in order to check things with the gas
16 chromatograph, y'all use what are called control
17 samples?

18 A Yes, we have a monthly standard mix that is
19 run.

20 Q Right. And there's a variance that's allowed
21 in that, I guess, monthly test. And as long as it's
22 within that, then you know that it's operating
23 correctly. But if you get something way out one
24 direction, that is indicative or a red flag of there
25 might be something wrong or we need to perform

1 maintenance?

2 A That would be more -- (unintelligible) -- than
3 monthly statements, but, yes.

4 Q Okay. And so when you were asked to perform
5 the examination that you performed in this case or the
6 analysis, obviously, the equipment -- the gas
7 chromatograph -- had been properly checked, vetted, and
8 it was working correctly; fair?

9 A Yes.

10 Q All right. So let's talk a little bit about
11 testing for THC. Fifteen, 20 years ago -- long before
12 you were a forensic scientist -- we didn't have vape
13 pens that had THC in them. We didn't have -- I'm not
14 going to say we didn't have any gummies, but they
15 weren't as prevalent as they are today. Pretty much, if
16 people wanted to consume marijuana, they either smoked a
17 joint or they ate weed brownies.

18 And so as things have changed, has the DPS
19 crime lab had to figure out a way to test for
20 concentrations involving THC?

21 A Yes. We have a method that -- a qualitative
22 method that tests for concentration.

23 Q Okay. And, obviously, when you are testing
24 for the potency or concentration of THC found in a vial
25 or a gummy or something along those lines, do you have

1 an understanding that, at least in the State of Texas,
2 there is a law that says that if the THC concentration
3 is below a .03, it's not illegal?

4 A The Texas Health and Safety Code sets the
5 threshold at 0.3 percent. Below that it is considered
6 hemp and is legal. Above that it is illegal.

7 Q All right. Now, let's talk about that number.
8 When you actually test, what is the threshold that
9 you're testing at?

10 A We have a 1 percent decision threshold.

11 Q Okay. And so I made the mistake of using the
12 wrong numbers by saying 3 percent versus 10 percent --
13 that it's three-and-a-half times stronger yesterday.
14 The three-and-a-half or three-and-a-third times
15 stronger, that's not an incorrect statement; is that
16 correct? That's actually correct compared to what's
17 legal versus what's not legal?

18 A Our decision threshold is more than three
19 times stronger than the legal threshold, yes.

20 Q Right. And if someone currently had a THC
21 vape pen that was a .04, that's illegal under the law,
22 right?

23 A Technically, yes.

24 Q But DPS doesn't test down to that low of a
25 threshold?

1 A No.

2 Q So that person, at least for the eyes of the
3 law, your test would come back negative or not
4 containing THC because it's below that 1 percent
5 threshold?

6 A No. We would record it as below 1 percent but
7 containing Delta-9 THC.

8 Q Okay. But it would be below 1 percent?

9 A Yes.

10 Q And on .05 would be the same thing, right?

11 A Yes.

12 Q And if it's above 1 percent, do you also
13 report it as being above 1 percent?

14 A Yes, we do.

15 Q So when we're talking about this 1 percent
16 threshold, just because we say it's 1 percent doesn't
17 necessarily mean it's only 1 percent, right? It can be
18 above that?

19 A Yes.

20 Q But if it's at least at 1 percent, we know
21 that that's at least three-and-one-third times more
22 concentrated than what's legal?

23 A Yes.

24 Q Now, were you asked to perform an analysis on
25 some vape cartridges that were brought over by the Smith

1 County Sheriff's Department back in -- well, the arrest
2 was in August of '22, and it looks like the lab received
3 the substance back in April -- in August of '22, as
4 well. I'm sorry. September of '23.

5 A May I consult my notes?

6 Q Absolutely.

7 A Yes, I was asked to do the analysis.

8 Q All right.

9 MR. CHAMNESS: May I approach, Your
10 Honor?

11 THE COURT: You may, sir.

12 Q (By Mr. Chamness) Do you have some (indicating
13 gloves)?

14 (Witness holds up gloves.)

15 Q (By Mr. Chamness) Okay. I'm going to hand you
16 what I've marked as State's Exhibit 5 and ask you if you
17 can identify that?

18 A Yes.

19 Q Okay. And what is it?

20 A It is a yellow envelope marked with the
21 laboratory case number TYL-2009-10090.

22 Q Let's talk about that TYL number. What is the
23 significance of a TYL number?

24 A Whenever a piece of evidence enters the
25 laboratory, it is assigned a unique case number and a

1 bar code. This is used to track every time the evidence
2 is transferred, where it is stored, and where it is at
3 all times.

4 Q Okay.

5 A While it's in the lab.

6 Q And is it safe to say that these TYL numbers,
7 are they unique?

8 A Yes.

9 Q So if something is tagged with a TYL number,
10 that's going to be the TYL number that applies only to
11 that piece of evidence?

12 A To that case.

13 Q To that case.

14 And when the material in this case -- we're
15 talking about seized drugs -- arrives at the lab, is
16 that when it's first given that TYL number?

17 A Yes.

18 Q So it would be given a TYL number immediately
19 upon receipt, long before a forensic scientist performs
20 any analysis; is that fair?

21 A Yes, that is part of the intake process.

22 Q Okay. And, obviously, when they bring it
23 over, they don't immediately bring it to you as a
24 forensic scientist. It's checked in. There's an
25 evidence locker. And then you would check it out when

1 you are basically going to test it?

2 A No, I request it and a member of
3 evidence-receiving -- two people -- have to go into the
4 secure vault and retrieve it for me.

5 Q You said it much more eloquently than I did.
6 Point is, you make a request -- like, it doesn't just --
7 they don't just walk over and go, "Hey, we've got some
8 drugs we need you to test."

9 They don't directly hand it to you and you
10 just immediately start testing them, right? They check
11 it in. It's kept in the property department at the
12 crime lab until a forensic scientist needs it for
13 testing?

14 A Yes.

15 Q Okay. Now, can you tell me, other than the
16 TYL number, is there anything else about that packaging
17 that helps you or allows you to identify what it is?

18 A Yes, I can see my handwritten date and
19 initials from when I sealed it.

20 Q Okay. And, obviously, it's open now. But
21 it's open because the officer who took it off of the
22 defendant was looking at it to verify, yes, these are
23 the vials that -- obviously, when you had it, other than
24 for purposes of testing, you didn't do anything to
25 tamper with it, did you?

1 A I moved it into a lab vial, but other than
2 that, no.

3 Q Okay. And, obviously, the vials themselves,
4 are they inside the envelope?

5 A Yes.

6 Q And is there anything on that that lets you
7 know that, yes, that is, in fact, what I tested?

8 A Yes. Again, the laboratory case number's on
9 there and my handwritten date and initials.

10 Q Okay. And when you tested this, you used the
11 gas chromatograph like we talked about; is that correct?

12 A Yes.

13 Q You followed all of the
14 scientifically-accepted protocols, procedures, and
15 methodology to test these vials?

16 A I only tested one of them, yes.

17 Q Well, and -- yes, there were two vials. You
18 tested one. When you tested the one, what did the test
19 determine?

20 A It determined that the liquid in the cartridge
21 contained Delta-9 THC above 1 percent THC and Delta-8
22 THC.

23 Q Okay. And so you said it contained Delta-9
24 THC above 1 percent?

25 A Yes.

1 Q It could be 2 percent. You tested it to see
2 whether or not it was above or below 1 percent; is that
3 correct?

4 A That is correct.

5 Q And it's above?

6 A Yes.

7 Q So at a minimum, we know that what was in the
8 vial you tested is at least three-and-one-third times
9 more concentrated than what is legally allowed in the
10 State of Texas?

11 A Yes.

12 MR. CHAMNESS: Your Honor, at this time,
13 I would offer State's 5 (sic) for all purposes.

14 MR. JOHNSON: No objection to State's 5,
15 Your Honor.

16 THE COURT: State's 5 is admitted.

17 THE COURT REPORTER: Wait. Is that the
18 same thing that was State's 1 yesterday?

19 THE COURT: That's a question I had too.
20 Was it State's 1 that was marked earlier?

21 MR. CHAMNESS: Oh, it was. I'm sorry.
22 State's 1.

23 THE COURT REPORTER: So there is no
24 State's 5.

25 MR. CHAMNESS: There is no State's 5.

1 THE COURT: So while we've been talking
2 about State's 5, it's actually State's 1.

3 MR. CHAMNESS: It's State's 1. I didn't
4 see the sticker on the other side.

5 THE COURT: All right. State's 1, with
6 that clarification, any objections, Mr. Johnson?

7 MR. JOHNSON: No, sir, Judge.

8 THE COURT: State's 1 is fully admitted
9 at this point.

10 Q (By Mr. Chamness) And, Ms. Orton, I'm going to
11 hand you what I've marked as State's Exhibit Number 4
12 and ask you if you can identify that?

13 A Yes.

14 Q What is that?

15 A It is a copy of the report that I prepared in
16 this case.

17 Q Does it appear to be a complete copy of your
18 report?

19 A Yes.

20 Q And, obviously, that was a report that you
21 made back at the time that you did the analysis on
22 State's 1?

23 A Yes.

24 Q And that is something that you, as the
25 forensic scientist, that you maintain as well as the DPS

1 crime lab; they maintain those as well?

2 A Can you rephrase the question?

3 Q Their -- the DPS crime lab keeps reports done
4 by the forensic scientist for the substances that are
5 tested at the DPS crime lab?

6 A Yes.

7 Q And that particular report was done at that
8 time. It was done by you. You are familiar with the
9 contents of that report?

10 A Yes.

11 Q And the copy that I've given you, although
12 it's a copy, it appears to be an accurate and complete
13 copy?

14 A Yes.

15 MR. CHAMNESS: Your Honor, at this time,
16 we would offer State's 4.

17 MR. JOHNSON: No objections to State's 4,
18 Your Honor.

19 THE COURT: State's 4 is admitted.

20 MR. CHAMNESS: Permission to publish?

21 THE COURT: You may.

22 Is the light on, Mr. Chamness?

23 MR. CHAMNESS: It is on, Judge.

24 THE COURT: All right. Should be
25 coming -- there it comes.

1 Q (By Mr. Chamness) So this is your report. I'm
2 going to zoom in a little. Up here at the top we see
3 this laboratory case number. That's the TYL number that
4 we talked about earlier, correct?

5 A Yes.

6 Q That's the same TYL number that is found on
7 the actual evidence that was analyzed?

8 A Yes.

9 Q And then when we get down here, we see how it
10 was submitted. The jury has already heard from
11 Deputy Atchison that he brought it over.

12 But then when we get down here under the
13 *Evidence Description Results and Analysis*, you said that
14 when you tested the one vial, it came back -- and,
15 obviously, it's pretty clear -- in that you are
16 looking -- because of the threshold being the 1 percent,
17 you're looking for it to be either above or below that
18 number?

19 A Yes.

20 Q If it's below -- because we don't test all the
21 way down to a .09, a .08, a .07 -- then once we know
22 that it's below, that's not going to support charges
23 being filed against someone. I mean, they may have been
24 arrested, but we're not going to move forward on that
25 case because there's no way for us to know whether -- I

1 mean, it could be a .02. We can't get down to that
2 number, correct?

3 A No, I cannot.

4 Q Okay. But when we test it and we see that
5 it's above 1 percent, well, in that circumstance we know
6 it's not legal?

7 A Yes.

8 Q Okay.

9 MR. CHAMNESS: Your Honor, I'll pass the
10 witness.

11 THE COURT: Mr. Johnson?

12 MR. JOHNSON: Thank you, Judge.

13 CROSS-EXAMINATION

14 BY MR. JOHNSON:

15 Q I'm sorry, is it Ms. Orton?

16 A Yes.

17 Q Good morning, Ms. Orton. You are a scientist,
18 correct?

19 A Yes.

20 Q The substance that you found or the substance
21 that you evaluated in those vials came back to be an
22 illegal substance, correct?

23 A Yes.

24 Q And could you tell what the process was that
25 you went through, again, to find out whether it was

1 illegal?

2 A Would you like it from when I first received
3 the evidence or --

4 Q Yes, ma'am.

5 A Okay. When I first receive the evidence, the
6 first thing I will do is I will conduct an inventory,
7 make sure I have the right evidence. Then I'll take the
8 weight of just the substance, which is also called a net
9 weight.

10 I will -- because it was suspected THC, I
11 performed a color test. That color test came back with
12 a positive result, so I was able to continue into my
13 instrumental analysis.

14 I ran the sample on a GC-MS against a
15 1 percent standard, and it came back higher than that
16 1 percent standard, which was able -- which let me
17 determine that the sample was higher than 1 percent.

18 Q And how much training did you have to take in
19 order to be able to do that? How much training did you
20 have to have as a scientist?

21 A I had a year of training when I first came to
22 the DPS. And this method is more recent, so I was
23 trained on that. I had to pass a test and several
24 competency samples before I was allowed to do case work
25 on it.

1 Q So needless to say, you have to be educated in
2 this area in order to come up with those types of
3 results, correct?

4 A Yes.

5 Q So could the average person look at what you
6 looked at and determine whether or not there was THC in
7 it or not?

8 A Probably not.

9 Q Could you look at it, as a scientist, and
10 determine what the contents are, just by sight?

11 A Just looking at the liquid?

12 Q Yes, ma'am.

13 A No.

14 Q So you have to do extensive testing in order
15 to determine exactly what's in those vials; is that
16 correct?

17 A Yes.

18 Q Okay. And there were two vials, right?

19 A Correct.

20 Q Okay. Why didn't you test the second vial?

21 A The second vial only contained a residue. And
22 it is the policy of the DPS to work to the highest
23 penalty and stop, as that is the best use of state
24 resources.

25 Q And what's the type of machine that you use to

1 determine what the contents of the vial was?

2 A I used a gas chromatograph mass spectrometer.

3 Q Okay. And is that a machine that is a common
4 machine or is that just normally used by scientists?

5 A It is a common scientific instrument.

6 Q But normal people don't have those types of
7 machines?

8 A No, not that I'm aware of.

9 Q So the only way you can determine whether or
10 not -- what the contents are of those vials is to do
11 some type of scientific evaluation and then produce the
12 report that you produced here today, correct?

13 A Yes.

14 Q So a person like Kevin Schuette wouldn't be
15 able to do what you did and make a determination as to
16 what's in the vial, would he?

17 A I am unfamiliar with his background and
18 scientific capabilities.

19 Q But he would have to have a background that
20 contained scientific capabilities in order to do that,
21 wouldn't he?

22 A Yes.

23 MR. JOHNSON: We'll pass the witness,
24 Your Honor.

25 THE COURT: Mr. Chamness?

1 REDIRECT EXAMINATION

2 BY MR. CHAMNESS:

3 Q One question. I don't care how much stuff you
4 smoke -- you can smoke for 24 hours straight -- if it
5 doesn't have something illegal in it, are you going to
6 get high?

7 MR. JOHNSON: I'm going to object to
8 leading, Your Honor.

9 THE COURT: Overruled.

10 A Can you restate the question?

11 Q (By Mr. Chamness) Sure. If it doesn't have
12 something that is a controlled substance in it, does it
13 matter how much you smoke, are you going to get high?

14 MR. JOHNSON: Judge, I'm going to object.
15 This is outside her professional responsibility. She's
16 here to testify as to what the contents are in the vial,
17 not whether somebody -- or how they feel as a high
18 person.

19 MR. CHAMNESS: Judge, this is in direct
20 line of his questioning about whether or not the
21 defendant would be able to know what was in the content.

22 THE COURT: I'll overrule the objection
23 and she can answer if you have a -- did you understand
24 his question?

25 Q (By Mr. Chamness) Let me rephrase it.

1 THE COURT: Repeat it.

2 Q (By Mr. Chamness) Okay. People smoke vapes,
3 right?

4 A I suppose so.

5 Q Okay. And, obviously, not all vapes contain
6 THC. Some of them contain nicotine, right?

7 A Correct.

8 Q But my question is -- and this -- I don't
9 think it takes a forensic scientist to answer this, but
10 if you are smoking something that is not a controlled
11 substance, it doesn't matter how much you smoke; you're
12 not going to get high or intoxicated if it's not an
13 illegal controlled substance, right?

14 A No. Wait -- there are legal substances which
15 can affect brain chemistry, get you intoxicated or high.

16 Q Yeah, to the point that someone's passed out
17 in the middle of the road?

18 MR. JOHNSON: Judge, I'm going to object
19 to speculation.

20 THE COURT: Overruled. If she has an
21 opinion.

22 A Can you rephrase the question?

23 Q (By Mr. Chamness) Yeah. The legal substances
24 that you're talking about, are they so potent and legal
25 that when someone smokes them they pass out in the

1 middle of a highway?

2 A That is outside my field of expertise. I'm
3 not a toxicologist.

4 Q How many of these vapes have you tested?

5 A Dozens.

6 Q And you would agree with me that some of the
7 vape cartridges that you likely end up testing come from
8 other states where THC is completely unregulated?

9 A I don't know. They come to us from highway
10 patrol, sheriff's offices, the DPS, police
11 departments -- the 32 counties that my section services.

12 Q Sure. I guess the reason I'm asking that --
13 this question is because you understand that drugs can
14 cross state lines, and some of these THC vape cartridges
15 may come from jurisdictions where they don't prohibit
16 the use of marijuana at all?

17 A That is theoretically possible.

18 Q Okay. And these hundreds that you've tested,
19 safe to say that some of them come in below the
20 1 percent threshold?

21 A I do not believe I have tested more than a
22 hundred yet. But, yes, some of them have been below the
23 threshold.

24 Q Okay. And, again, we don't know whether those
25 are truly legal or not. We just know that because

1 they're below 1 percent and we can't test any lower than
2 that, it goes back to the law enforcement agency as
3 being below 1 percent?

4 A That is the result reported, yes.

5 Q Okay. And when you were talking about the
6 Health and Safety Code earlier, it's not legal for
7 anyplace in the State of Texas -- whether it's a gas
8 station, a tobacco shop or whatever -- to sell any
9 products that contain THC that is above 1 percent?

10 A Correct.

11 Q Okay. Now, are you familiar with the term
12 *individual susceptibility*?

13 A I have heard the words before.

14 Q Okay. In your training, your experience, your
15 undergraduate work in science, have you dealt with the
16 issue of -- and I'll just use a hypothetical. And I'm
17 not even suggesting that you drink. But let's just say
18 that you and the court reporter -- have you dealt with
19 the idea that both of you can drink the exact same
20 thing, both of you can drink the exact same amount of
21 that thing, and yet the way it affects each of you can
22 be different?

23 MR. JOHNSON: Judge, I'm going to object.
24 The witness has already testified that she's not a
25 toxicologist. This goes directly into toxicology, Your

1 Honor.

2 MR. CHAMNESS: Actually, it doesn't.
3 It's the scientific theory called individual
4 susceptibility that I just asked her about and she's
5 familiar with.

6 THE COURT: I'll overrule the objection
7 if she has an answer.

8 A I'm familiar with the concept, yes.

9 Q (By Mr. Chamness) Right. And that would be
10 true for anything that can impair, as you mentioned, the
11 mind, right? Whether it's alcohol -- it could be
12 methamphetamines. It can be cocaine. It can be a vape
13 pen. Fair enough? A certain person -- you can give two
14 people the same thing and it's going to affect them
15 differently?

16 A Theoretically, yes.

17 Q Theoretically.

18 And some things -- the only thing you're going
19 to be able to tell is, is the person intoxicated versus
20 is the person not intoxicated, correct?

21 A I do not have training in determining that.

22 Q I understand that. But that's really going to
23 be about the only thing you can determine, is whether or
24 not -- you're not going to be able to ascertain the
25 level of intoxication unless we're talking about

1 alcohol.

2 Like, for instance, you know we could test
3 blood for the presence of pills. It's not going to come
4 back -- it's just going to say detected/not detected.

5 Where, with a blood alcohol test, it will come
6 back .06, .102, or whatever; and you're aware of that,
7 right?

8 A Yes.

9 Q Okay. So the only reason I'm asking this
10 question is, as someone who regularly uses a product, if
11 something is exponentially more concentrated or potent,
12 you would expect that person to know; would you not?

13 A I don't know.

14 MR. CHAMNESS: Pass the witness.

15 THE COURT: Mr. Johnson?

16 MR. JOHNSON: Briefly, Your Honor.

17 RE CROSS-EXAMINATION

18 BY MR. JOHNSON:

19 Q Ms. Orton, are you aware that my client,
20 Kevin Schuette, is accused of possessing
21 tetrahydrocannabinol? Are you aware of that?

22 A Yes.

23 Q And in your training as a scientist, can you
24 determine, by looking at a vial, whether it contains
25 tetrahydrocannabinol?

1 A Not by looking at it, no. By testing it, yes.

2 Q So is that the only way that you can
3 determine?

4 A Yes.

5 Q So if a person were to purchase a vial, could
6 he determine whether or not that vial contained
7 tetrahydrocannabinol just by looking at it?

8 A No.

9 Q How would he have to determine what it
10 contained?

11 A He would have to test it in some way.

12 MR. JOHNSON: We'll pass the witness,
13 Judge.

14 THE COURT: Mr. Chamness?

15 MR. CHAMNESS: Very brief.

16 FURTHER REDIRECT EXAMINATION

17 BY MR. CHAMNESS:

18 Q Mr. Johnson is asking you a question that
19 could very well be true. The problem is it implies that
20 you're buying this vape pen from a street vendor.

21 MR. JOHNSON: I'm going to object to
22 counsel testifying, Your Honor.

23 MR. CHAMNESS: I'm not.

24 MR. JOHNSON: Leading.

25 MR. CHAMNESS: I'm asking a question.

1 THE COURT: All right. But you need to
2 rephrase your question.

3 Q (By Mr. Chamness) Tetrahydrocannabinol in the
4 State of Texas, if it is contained in a product that is
5 legally sold, is it not required that it state on the
6 packaging that it contains THC?

7 A I believe so, but I'm not very familiar with
8 the packaging requirements.

9 Q Right. So the idea that you go into a vape
10 shop and you buy a vape pen that you think is nicotine
11 that's loaded with THC, that ain't happening, is it? If
12 it has THC in it, it's required to be on the packaging.

13 A I believe so.

14 Q And in order for Tobacco Junction or the vape
15 shop or whatever you want to call it, to sell it, not
16 only does it have to be on the packaging but it also has
17 to be below that 1 percent threshold. Actually, it has
18 to be below .03 to technically be legal, but we can't
19 test down that low.

20 A It would have to be below 0.3 in order to be
21 legal.

22 Q Thank you.

23 And so if he's buying -- or we don't even have
24 to talk about this defendant, just anybody. If they're
25 buying these vape pens from John on the street corner,

1 he doesn't know whether or not it's THC or nicotine,
2 does he?

3 A That would be reasonable to assume.

4 Q Right. But if he's a regular user, he's going
5 to know the difference in nicotine and THC; is he not?

6 MR. JOHNSON: Judge, I'm going to have to
7 object to relevance. This witness has come here to
8 testify about the contents of the vials and this is
9 outside her scope.

10 MR. CHAMNESS: Judge, he's basing his
11 entire defense off of the defendant not knowing.

12 THE COURT: Approach. Approach.

13 (At the bench, on the record.)

14 THE COURT: You're getting out of her
15 area of expertise. Sounds like it would be more law
16 enforcement, in a lot of ways, than her.

17 Do you have anyone that can come and
18 testify about packaging requirements? I mean, I'm not
19 familiar with them.

20 MR. CHAMNESS: No. I mean, the Health
21 and Safety Code just says that it has to be. And she's
22 already testified to the Health and Safety Code. I'll
23 move on.

24 THE COURT: All right.

25 (Open court, on the record.)

1 THE COURT: All right. You may continue,
2 Counsel.

3 Q (By Mr. Chamness) I guess, going back to where
4 we were, if you're buying something from a store, it's
5 going to come in packaging; is it not?

6 A I would assume so, yes.

7 Q Well, let me ask you this: Have you ever been
8 into a gas station or any shop that just has loose vape
9 cartridges sitting around that aren't prepackaged in
10 some type of --

11 MR. JOHNSON: Judge, I'm going to object
12 to this line of questioning. Again, outside the scope
13 of this witness's testimony.

14 MR. CHAMNESS: I'm asking her if she's
15 ever personally bought --

16 THE COURT: Overruled as to her personal
17 experience.

18 A Can you restate the question?

19 Q (By Mr. Chamness) Yeah, have you ever went
20 into a gas station, tobacco shop, or anyplace like that
21 where you've just seen loose vials sitting around not
22 packaged?

23 A No, I have not.

24 Q You would agree with me that if you are buying
25 those vials from an individual on a street corner,

1 perhaps, they very well may not be in packaging?

2 A I suppose so.

3 Q Okay. And if you are getting vials that came
4 from, say, Colorado or California or Michigan or some
5 other state where THC is not regulated at all, and
6 you're receiving those in the mail, they may not be in
7 any kind of packaging either?

8 MR. JOHNSON: Judge, I'm going to object
9 to leading. I'm going to object to speculation. And
10 I'm going to object to improper --

11 THE COURT: Sustained.

12 Q (By Mr. Chamness) If the vials came from a
13 state where it was legal and they were not bought in
14 that state by a particular person, they very well may
15 not be in prepackaged containers either?

16 A They could have been taken out of the
17 packaging.

18 Q Right.

19 A I suppose.

20 Q And that would be my point is, if they're not
21 with the original packaging that they came in, we don't
22 know where they came from, do we?

23 A No.

24 MR. CHAMNESS: Pass the witness.

25 THE COURT: Mr. Johnson?

1 MR. JOHNSON: Judge, I have no further
2 questions. Thank you.

3 THE COURT: Ms. Orton need to be subject
4 to recall?

5 MR. CHAMNESS: We do not need her subject
6 to recall.

7 MR. JOHNSON: No, sir, Your Honor.

8 THE COURT: All right. Thank you,
9 Ms. Orton. You're free to go. Hope you get to feeling
10 better.

11 THE WITNESS: Thank you.

12 (End of requested excerpt.)

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE STATE OF TEXAS)


2 COUNTY OF SMITH)

3 I, Jennifer Lowrance, Official Court Reporter in
4 and for the District Court of Smith County, State of
5 Texas, do hereby certify that the above and foregoing
6 contains a true and correct transcription of all
7 portions of evidence and other proceedings requested in
8 writing by counsel for the parties to be included in
9 this volume of the Reporter's Record, in the
10 above-styled and -numbered cause, all of which occurred
11 in open court or in chambers and were reported by me.

12 I further certify that this Reporter's Record of
13 the proceedings truly and correctly reflects the
14 exhibits, if any, admitted by the respective parties.

15 I further certify that the total cost for the
16 preparation of this Reporter's Record is \$65.13 and will
17 be paid by Texas Forensic Science Commission.

18 WITNESS MY OFFICIAL HAND this the 13th day of
19 March, 2025.

20 

21 JENNIFER LOWRANCE
22 Texas CSR No. 8227
23 Expiration Date: 5/31/25
24 Official Court Reporter
25 7th District Court
Smith County Courthouse
100 North Broadway
Tyler, Texas 75702
(903) 590-1647