

**National Commission on the Future of DNA Evidence
Proceeding
Meeting X**

**Grand Hyatt Hotel
Washington, DC
July 9 - 10, 2000**

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Agenda and Members

The meeting in the above-entitled matter was convened, pursuant to notice, at 1:00 p.m.

COMMISSION MEMBERS:

The Honorable Shirley S. Abrahamson, Chair

Christopher H. Asplen, Co-Chair

Dwight Adams

Jan Bashinski

George W. Clarke

James Crow

Paul B. Ferrara

Norman Gahn

Terrance W. Gainer

Terry Hillard

The Honorable Ronald S. Reinstein

Darrell Sanders

Barry C. Sheck

Jeffrey Thoma

Kathryn M. Turman

William Webster

James R. Wooley

Agenda

Sunday, July 9, 2000

- 1:00 p.m. - 1:10 p.m. Remarks by the Chair
The Honorable Shirley S. Abrahamson
Chief Justice, Wisconsin Supreme Court
- 1:10 p.m. - 1:20 p.m. Update on Commission Business
Christopher H. Asplen, AUSA
Executive Director
- 1:20 p.m. - 3:15 p.m. Crime Scene Investigation Working Group Report
- "What Every Law Enforcement Officer Should
Know About DNA Evidence" Beginning Level
Training
- Law Enforcement Summit update
- Proposed Recommendation regarding Law
Enforcement Training and Education
- 3:15 p.m. - 3:30 p.m. **Break**
- 3:30 p.m. - 4:00 p.m. Postconviction Issues Report
Postconviction DNA Case Review, Commissioner
George W. Clarke
Pending Federal Legislation Update

4:00 p.m. - 4:30 p.m. DNA Bulletin for Victim Advocates
A joint publication of the Office for Victims of
Crime and the Commission

4:30 p.m. - 5:00 p.m. Public Comment

5:00 p.m. **Adjourn**

Meeting in the above-captioned matter was taken on Monday, July 10, 2000, at the Grand Hyatt Hotel, 1000 H Street, N.W., Washington, D.C., commencing at 9:15 a.m. and recorded stenographically by Carol T. Lucic, Notary Public.

Monday, July 10, 2000

9:00 a.m. - 9:15 p.m. Opening Remarks
Chief Justice Shirley Abrahamson
Chair

9:15 a.m. - 10:15 a.m. Behavioral Genetics Issues
Dr. J. Raymond DePaulo, Professor of
Psychology
The Johns Hopkins University School of
Medicine

10:15 a.m. - 11:00 a.m. Research & Development Working Group Report
Chair, James F. Crow
Final Report Review and Approval

11:00 a.m. - 11:15 a.m. **Break**

11:15 a.m. - 12:00 a.m. Laboratory Funding Working Group Report
Dr. Paul Ferrara
*Criminal Histories of Sex Offenders Identified
Through DNA "Cold Hits"*

12:00 p.m. - 1:00 p.m. Working Lunch
Mr. David Lazer, Assistant Professor of Public
Policy
Center for Business and Government
Harvard University, John F. Kennedy School of
Government

1:00 p.m. - 2:00 p.m. Racial Profiling
Associate Professor Paul Butler
George Washington University Law School

2:00 p.m. - 2:30 p.m. Discussion

2:30 p.m. - 2:45 p.m.	Break
2:45 p.m. - 3:45 p.m.	Discussion of Final Report to the Attorney General
3:45 p.m. - 4:00 p.m.	Public Comment
4:00 p.m.	Adjourn

Remarks by the Chair
The Honorable Shirley S. Abrahamson
Chief Justice, Wisconsin Supreme Court

COMMISSIONER ABRAHAMSON: Good afternoon and welcome to Washington, D.C. to our next to the last, I believe, session; and as usual, we will begin by each of us introducing ourselves. I am Shirley Abrahamson, the Chair of the commission.

Superintendent Hillard?

MR. HILLARD: Terry Hillard, Superintendent of the Chicago Police Department.

MR. CLARKE: George Clarke, Deputy District Attorney, San Diego.

MR. WOOLEY: Jim Wooley, formerly Department of Justice, recently the law firm of Baker and Hostetler.

MR. ADAMS: Dwight Adams, Deputy Assistant Director, FBI Laboratory.

MR. THOMA: Jeff Thoma, Public Defender for Mendocino County, California.

MR. REINSTEIN: Ron Reinstein, Judge, Superior Court of Arizona.

MR. SCHECK: Barry Scheck, Cardozo Law School, New York City.

MS. BASHINSKI: Jan Bashinski, Chief of the Bureau of Forensic Services, California Department of Justice.

MR. GAHN: Norm Gahn, Assistant District Attorney, Milwaukee County, Wisconsin.

MR. FERRARA: Paul Ferrara, Director of Virginia Division of Forensic Science.

MS. TURMAN: Kathryn Turman, Director, Office for Victims of Crime, Department of Justice.

MR. CROW: James Crow, University of Wisconsin.

MR. ASPLEN: Chris Asplen, Executive Director of the commission.

COMMISSIONER ABRAHAMSON: Chief Gainer?

MR. GAINER: Terry Gainer, Assistant Chief of Police, Metropolitan Police Department, Washington, D.C.

COMMISSIONER ABRAHAMSON: And our host.

We will begin the session with Chris Asplen, who will give us an update on commission business including today's meeting and November too.

Update on Commission Business

Christopher H. Asplen, AUSA

Executive Director

COMMISSIONER ASPLEN: As always, thank you folks for being here. If you have been anywhere near a newspaper or a television set over the past two months, you can well imagine that the commission has been pretty busy.

DNA or the issue of DNA, particularly forensic DNA, has been in a lot of different places and, as such, the commission's resources have been tapped to a great extent.

Before I go any further, I am supposed to announce we do have a sign language interpreter here for anyone who may need it. However, in the absence of that at this point, that individual will, I believe, have a seat and rest until we get notified somebody does need her services.

As I said, it has been an extremely busy couple of months, which is a great thing. As I say, the commission's resources, be they previous reports that have come out, previous recommendations that we have issued, or simply individuals that we can put in touch with the press or with representatives in either Congress in Washington or any of the state legislatures, the commission continues to be of great benefit to the national discussion that is going on, be it post-conviction issues, be it investigative issues, et cetera, et cetera.

Today's agenda or this meeting's and today's and tomorrow's agenda is designed to do a couple of things. First of all, the next, I guess, session when I am done speaking will be to introduce to you the final version of the CD ROM that the crime scene working group has put together.

I will talk a little bit more about that later, but our hope is that you will like that; that you think it is well done; and we hope we can distribute that particular CD by mid-August to end of August to police departments across the country.

It has been a long, arduous task, and I will get into that more a little bit later. However, it is only one of two CDs that we will be doing. This is the introductory CD, the beginning level that we will be discussing today.

Between this meeting and the meeting in November, we will put together the second CD ROM which will be more for evidence technicians and collectors of DNA evidence.

We will also talk about the law enforcement summit that is the result of a commission recommendation that the Attorney General approved and is now scheduled for the 27th and 28th. A number of commissioners are actively involved in that particular program.

I would encourage any other commissioners who are not necessarily on the program to attend if you can, although we realize that we already ask a tremendous amount of you. It is not a commission meeting. It is a meeting for law enforcement policymakers, decision-makers, mostly chiefs and assistant chiefs and sheriffs to talk about just law enforcement specific DNA issues.

We will talk about that agenda a little bit more, and we will talk about some proposed recommendations or proposed issues that this commission still needs to consider and what form those considerations should take ultimately, be they the form of a formal recommendation to the AG or final report.

We will also talk about post-conviction issues in the context of Woody Clarke's program in San Diego, and then we will talk -- there has been a slight change in the agenda. At the end of today, we will talk about the victim advocacy pamphlet or I guess bulletin is a more appropriate work; and Paul is going to speak tomorrow during that slot. We will switch those around.

Tomorrow, we are going to have a session on behavioral genetics, and to be very clear as I tried to be with everyone who has called this week, especially from the press, the reason to have the discussion or the presentation on behavioral genetics is really to try to begin to identify what the issues are or, more appropriately, what they may be in the future, especially given the extent to which the time line on this commission is running out.

There won't be an attempt, I think, to delve into the substantive matters of any of the behavioral genetics issues, but to simply identify what the questions are going to be that we need to look out for in the future as they pertain to the criminal justice system and the application of behavioral genetics to that. We will have the final report and review of the research and development working group report.

During the working lunch tomorrow, we will have a representative from the Kennedy School of Government, David Lazer, who is the Kennedy School's, I guess, point of contact and, really, the person organizing what will be the commission's final meeting in November, and that final meeting will be both a final meeting of the commission and a national conference on DNA related issues, legal and privacy considerations in conjunction with the Kennedy School of Government.

That will be a forum event, if you are familiar with the way the Kennedy School does things, and David will be here tomorrow to talk about that.

After lunch tomorrow, we will have a session on, a presentation on racial profiling with the thought being that subsequent to that presentation on general racial profiling, we will have a discussion on the issues that arise in the a context of DNA databases and racial profiling and what those issues may be; again, not necessarily to answer any particular questions or to make any particular recommendations in that regard, but to identify what the issues may be for future consideration.

Then finally and very importantly, at the end of the day tomorrow, what we will be doing is talking about the commission's final report and what that will look like and what issues will be considered and what will be included in that.

It will, for many intents and purposes, be a compilation of what we have already done. The commission's process was designed very specifically that way.

Again, part of that was a request of the Attorney General at our first meeting, you may remember, where she asked us not to wait until the end of the commission process to give her our recommendations, but to do that periodically; but also so that we could essentially put together a final report in a relatively expeditious fashion, given the extent to which we have a, one way or the other, a change of administration at the end of this year.

We will also have to consider, and I will give you an outline -- Robin, have we already given them the proposed outline?

You have, among your materials, which I realize are quite voluminous at this point, a proposed outline for the commission's final report, and the last chapter that is written there addresses issues that need to be listed and identified that need to be continually discussed in some sort of public setting, what issues this commission did not address, perhaps why it didn't address it, and an eye towards the future to what needs to be addressed in the future.

One example would be what we already said about sample retention, recognizing that, that particular issue, while it should remain status quo right now, should be formally looked at in another five years, I think we said.

So, that is why we will have discussions like the behavioral genetics and stuff like that before that final session tomorrow, where we look towards what will be included in that final report. I guess that is all I have at this point in time.

COMMISSIONER ABRAHAMSON: Any questions or comments for Chris before we proceed?

MR. SCHECK: Yes, I have one.

While I think that the work of the commission has been, in many ways, terrific, I think we should wonder really why these issues dealing with behavioral genetics, racial profiling and some of the ethical issues, we are now first getting, you know, almost a preliminary kind of presentation the very last day.

You cannot do everything, but it does seem to me that this was a whole set of issues that we never really grappled with quite the way that maybe we should have and maybe we could not have just because of the composition of the committee; and maybe it is something the Justice Department should think harder about.

The problem is that all these issues, which I really think are vital, they always tend to get put on the back burner while we deal with more immediate bureaucratic concerns, and that is unfortunate because it is a commission on the future.

MR. THOMA: I can speak just to that. I agree with you, Barry, but particularly on the racial profiling issue, and I did get Professor Butler to speak tomorrow, we tried to get a speaker for our January meeting, but unfortunately it happened to be over Dr. King's birthday, so it was pretty difficult to do; but I agree with you with regard to a lot of the other issues that we have not touched on.

COMMISSIONER ASPLEN: Barry, do you include behavioral genetics in that? Are you talking primarily about the racial profiling issue?

MR. SCHECK: No.

I am actually even talking more about the behavioral genetics and the potential ethical issues and the privacy issues in general, which I think both of these questions implicate.

COMMISSIONER ASPLEN: One thing that I would encourage you to do is to pursue that particular issue, actually, either one of those issues or both of them for inclusion in the Kennedy School conference also so it is not excluded from that.

I have mentioned those issues to the Kennedy School very specifically, and I know that --

MR. SCHECK: I look from the very first day we had our planning meetings on this commission, some of the issues that, you know, I wanted to raise and thought we should have addressed more forcefully and was hoping the legal issues workshop would do, has to do with taking elimination samples from people in the course of investigations, issues of informed consent, what we are going to do with the elimination samples, possibilities of racial profiling problems in the collection of samples in those situations; and frankly, I will present something at the Kennedy School on that, but the situation actually has become a more serious one, in my judgment, while we have waited on that.

I mean I am looking at the estimates that our labs in New York have for the number of elimination samples they are going to be getting in burglary cases; as we expand the technology, just elimination samples in sexual assault cases, all of which are collected, all of which are now being stored in the data banks; and I will tell you now, we have a raging debate within our state about whether or not those ought to be searched, how they ought to be preserved, and they are very serious issues.

I had always hoped that we would hit those and come to terms with them sooner rather than later, but I don't mean this in a mean spirited way because I think the work of the commission has been terrific.

I just want to point out it always seems to happen that way, doesn't it, that people that are working every day in the labs, in the trenches, on the streets, they have concerns, and I appreciate them, and they are serious concerns: How I am going to get money? Can we deal with the backlog? What we are going to do about changing techniques?

These are all important questions. I am not saying they were not, but our charge was to look to the future, and I think these issues are not just in the future, they are now. It is just an observation.

COMMISSIONER ABRAHAMSON: And a good one, and Chapter 8 is going to be identification of issues requiring further and continued review, and by the time we do those,

there will be a new set of issues for the future, et cetera. So, I think those are good ones, and I hope you jot them down so we can deal with them.

Any other comments or statements?

(No response.)

COMMISSIONER ABRAHAMSON: We will go to our next item, which is the crime scene investigation working group report.

Chief Gainer?

Crime Scene Investigation Working Group Report

MR. GAINER: My remarks will be brief. I think we are all pretty excited about this. An awful lot of work went into it. Writing the script was a wonderful exercise, I think, and the members of the committee are to be applauded.

Writing anything in a group is difficult. Writing a script like this was exciting and fun. So, I look forward to -- Chris is going to walk through this and share it with us and perhaps we should start at least, Chris, by introducing our subcommittee because they worked very hard on this.

COMMISSIONER ASPLEN: If we could, those members of that working group that are here -- Robin, do we have enough chairs up front for folks?

Chief Gainer is the chair of that particular working group, but we also have as a member of that working work Ms. Susan Ballou, who used to be, at the time, with the Montgomery County Crime Laboratory. However, now, she is a program manager for the Forensic Sciences at the NIST Office of Law Enforcement Standards.

Sue is someone who is not new to NIJ and is a constant valuable source of information and expertise for the institute.

Commissioner Jan Bashinski is also on that particular working group. So in addition to her time spent at commission meetings, she has also flown all over the country for meetings on this particular working group also.

Sue Brown is not here today, but Sue Brown runs the same program out at INOVA Fairfax Hospital. Now, what was originally listed as Commander Tom Cronin of the Chicago Police Department, I am proud to announce is now Chief Tom Cronin of the City of Coeur D'Alene, Idaho, and congratulations to Tom on that.

(Applause.)

COMMISSIONER ASPLEN: I know Superintendent Hillard was not happy to see Tom go, but I know the people of Coeur D'Alene will be as well served as the people of Chicago were.

Also, we have Superintendent Hillard, who was also on that working group. Master Sergeant Mark Johnsey, who you will see more of when you see the actual CD ROM, who is the R and D Program Administrator in the Division of Forensic Sciences for the Illinois State Police Department, has really done an extraordinary amount of work on this particular project, including going to Lexington, Kentucky for a week to supervise and participate in the actual filming of the video that you will see.

We also have Cheryl May, who is not with us today, but she is the Associate Director of the Forensic Science Education Center at the University of Arkansas Criminal Justice Institute.

Bill McIntyre, Atlantic County Prosecutor's Office, Violent Crimes Unit in Hamilton, New Jersey, and I believe recently retired. Congratulations to you for that. Bill's input and interest in educating law enforcement officers goes beyond this.

Dr. Forman and I had the opportunity to participate in a program Bill put together for McGaughlin (phonetic) about a month ago in New Jersey which brought together -- you must have had 150 to 200 people there -- senior investigators from all over the Northeast, and it was an excellent, excellent program. So, I commend his efforts in that regard also.

Chris Plourd of Chris Plourd's law firm is a defense attorney in San Diego, but specializes in forensic evidence cases and criminal defense cases and oftentimes acts as a consultant for other defense attorneys who may not have the particular expertise that Chris has.

We have appreciated Chris' perspective in all of this because we understood early on that having a good defense perspective to these particular issues was crucial to being successful in training officers how to do this.

Chief Sanders -- who I heard a rumor was here, but I don't know where -- was also a member of that particular working group, and again, was good enough to take the time out of his schedule to fly not only to the meetings, to the full commission meetings, but also to the working group meetings.

We also have Mr. Clay Strange, who is an Assistant District Attorney in Travis County, Texas, which contains the city of Austin. Before being Assistant District Attorney there, Clay was the Director of the DNA Unit for the American Prosecutors Research Institute, to which I owe him a great debt of gratitude because if he had not left that particular position, I would not have entered that particular position.

So, I took over for Clay when Clay left. Clay created not only the finest, but really the most significant training opportunity for prosecutors throughout the country, and it stills exists today.

In a world of limited funding and year to year funding, the fact that APRI is still able to provide that training to prosecutors, and they do so now probably five or six times a year between the National Advocacy Center and different conferences they have throughout the country, they are able do that because it is so successful.

It is a week long training which goes from the science all the way through the courtroom presentation, and that has been a great, great benefit to prosecutors' offices throughout the country.

Clay continues to be a marvelous source of inspiration and expertise to folks like myself when press or other folks call me and I can direct them to him for information on things.

I think finally, Anjali Swienton, who is a Senior Analyst at NIJ who, while she worked particularly on this project and was one of our subject matter experts, is also a great value to this commission as kind of utility player as a staffer.

Whenever we are over-worked or, quite frankly, Dr. Forman is out of the office and we need some more specific scientific expertise on issues, Anjali is always there to help us out in that regard too. So, we owe her a great debt of gratitude.

Finally, before we get going with all of this, as I have said before, but it bears repeating, this product would not be before you today in any shape or form were it not for Robin Wilson. I appreciated Chief Gainer's comments on how interesting and fun this was. I am not terribly sure Ms. Wilson shares that sentiment.

It was a good learning experience, but the amount of detail that goes into something like this is rather incredible. If it were not for her hard work and her talent at being able to deal with all the things that needed to be dealt with, we just would not be at this point by any stretch of the imagination.

I am sure the rest of the working group members would agree with me on that. So all of that having been said, I am going to move my seat to the back here so I can work the computer equipment.

If you recall, the training was designed to have a number of different components. One was the initial educational overview portion, but we wanted to provide a real application experience, if you will.

(Video shown.)

COMMISSIONER ASPLEN: That disclaimer at the bottom, which you may not have been able to read from where you are sitting, says essentially -- it is just that; it is a disclaimer.

It says these are recommended ways to proceed in these matters, but it is recognized that different situations require different demands. It is, quite frankly, an attempt to keep this training tool as a training tool and not have it be something that ultimately winds up as a, quite frankly, cross-examination tape.

(Video shown.)

COMMISSIONER ASPLEN: We decided to include a glossary which, as you can see, is printable for any officer who wants to print it out and take it with them; and contains, as you can well imagine, various and sundry definitions as things go on.

The way we designed it was the first three or four times that a word that is in the glossary comes up, it is highlighted in red, I believe, so if the officer gets to it and doesn't know what it is, they can click immediately to the glossary. After the fifth or sixth time, if they don't have it by then, well, they can go to the glossary itself.

We also have a notebook function which is designed so that as -- and it actually requests this throughout out the CD ROM -- but officers can take notes as they are moving along to those particular things that are of interest to them, but also as an exercise in, you know, instead of

walking through these crime scenes, you can just type in all this. As you can see there, it is also printable. We won't go to the test right now.

(Video continued.)

COMMISSIONER ASPLEN: To give you an example of how the glossary works, there, you see it highlighted and then it comes up.

MS. BASHINSKI: Chris, can you turn that voice over off? The reason I ask is when I am trying to read, he is reading more slowly than the eye, and it is distracting. Is it possible to turn that off when reading?

COMMISSIONER ASPLEN: I think probably not, probably not, but we will ask. We cannot build it in at this late stage. However, we can ask if there is a way to do it as it is already programmed.

MS. BASHINSKI: For me, it is just distracting.

PARTICIPANT: You can turn your speaker off.

COMMISSIONER ASPLEN: Bill says that is why Terry is the chief.

(Video continued.)

COMMISSIONER ASPLEN: The executive decision was made to go back and have them repronounce polymerase. It would have been too expensive and time consuming, and we could simply argue the basis of some sort of geographical dialect.

MS. BALLOU: Just so everybody knows, the subgroup was aware of that.

COMMISSIONER ASPLEN: As you go along through this program, there are little testing opportunities, if you will, that we will describe. I will show you how they work.

(Video shown.)

COMMISSIONER ASPLEN: You will notice it did that automatically. It referred, after the wrong answer, it referred directly to the section that the training was on. We call that, in pedagogical terms, that is remediation.

(Video shown.)

COMMISSIONER ASPLEN: Ultimately, these individual questions we are going through now then kind of compile at the end to be the test.

(Video shown.)

COMMISSIONER ASPLEN: I guess one thing to point out is one of the things the group had to do was to walk a fine line between going into all the general responsibilities of a police officer and keeping it limited to this particular function on one the hand; and on the other hand, recognizing what should be included here and what will be included in the subsequent CD, which will be for the evidence technicians themselves.

So, there may be some things that, in the back of your mind, you are saying -- well, what about this and what about that. It was probably considered for one reason or another, and we have tried to stay as focused as we could, recognizing there is going to be a blending of issues, given departments and given particular roles, that is going to take place.

(Video shown.)

COMMISSIONER ASPLEN: We are also clearly just reinforcing what is basic evidence handling procedures.

(Video shown.)

COMMISSIONER ASPLEN: We are seeing if you can click out of those, and apparently, you cannot.

(Video shown.)

COMMISSIONER ASPLEN: You will note the note at the bottom there. This particular issue was one of great discussion -- the idea of wrapping somebody in the clean blanket, sheet, et cetera, et cetera -- and the decision came down on the basis of we recognize that this is the best way to do it, but we recognize that it is oftentimes not done that way due to lack of preparation or resources or whatever.

It was kind of our responsibility to point out what the best method was and essentially raise the bar a little bit. Again, that is why the disclaimer that they could refer to department policy for those particular issues.

What we tried to do was emphasize -- obviously, by the big, bold print -- that whatever you wrap the victim in, make sure that it is clean; i.e., don't take the blanket off the bed or whatever.

So, if you are sitting there saying to yourself that is somewhat of an unrealistic proposition that they cover the victim like that in transportation, we recognize that, and we just kind of fought through it and came up with the best decision we could.

PARTICIPANT: We discussed what clean is quite a bit too.

COMMISSIONER ASPLEN: Yes, we did.

MR. FERRARA: Chris, when you say policy for the introduction of trace evidence, I don't quite understand what you mean by introduction.

Is that to be construed as preventing introduction of trace evidence?

MS. BALLOU: Yes, you are right, Paul.

I mean that was our concern because obviously, if somebody looks at a bed and says that is a clean sheet, they are going to wrap the victim. They are introducing trace evidence.

MR. FERRARA: That is the way you mean the introduction?

MS. BALLOU: Right.

MS. BASHINSKI: I want to know how much does it cost to change the pronunciation of polymerase.

COMMISSIONER ASPLEN: Robin reminds me that we actually sent it back and we had them re-do it and they did it wrong the second time too.

MS. BASHINSKI: Well, then it should not cost you anything. Frankly, it should not cost you anything.

PARTICIPANT: There must be some people who studied Latin in high school and learned how to pronounce the word.

MS. BASHINSKI: I mean that is just awful.

MS. BALLOU: We thought we would put fingernails across a black board instead.

MS. BASHINSKI: I think it is going to, well --

PARTICIPANT: These are policemen. Remember who the audience is.

MS. BASHINSKI: Policemen are not the only people who are going to see this. There are a lot of people who are going to look at this and say who the heck are those people. I am serious.

COMMISSIONER ASPLEN: That would set this project back significantly.

MS. BASHINSKI: How much? How long?

COMMISSIONER ASPLEN: As much time as anything; I don't know how long it would take them to do it specifically, especially since the biggest problem is the extent to which this is the final form.

So, we recognize that, that is -- but the other thing to understand is this is not going to, it is not going to grate on most peoples' nerves who are using this because they don't know.

I mean they are using it because they don't know. It is only going to grate on the nerves of the people who know the correct pronunciation, and this is not going to be used for people like yourself and such. We will certainly make sure it is corrected for the Level Two, where people might understand it.

MS. BALLOU: I would just hate to be corrected in court by a police officer.

(Video shown.)

COMMISSIONER ASPLEN: We have got everything in this. Also, to be clear, you can well imagine, after having done this, you could, and we probably have, come up with, even under wrong answer scenarios, somebody inevitably could go, well, but what about, you know, so things are not always as clear as we would like them to be, but we think we have it pretty much right.

(Video shown.)

MR. FERRARA: Chris, can you back up to that previous --

COMMISSIONER ASPLEN: Sometimes backing is difficult on the test portions. See, this monitors -- does this part monitor as you go along?

PARTICIPANT: No.

COMMISSIONER ASPLEN: What was your question on that, Paul.

MR. FERRARA: Among the other possible answers on the previous questions -- and Barry's remarks reminded me of it -- if we put elimination samples up there as would be a wrong answer in terms of being able to be entered to clarify that elimination samples are not included in the database.

PARTICIPANT: You are asking whether the objective is a wrong answer?

MR. FERRARA: It is a wrong answer.

MS. BALLOU: It is a wrong answer. He is saying add it.

MR. FERRARA: Just to clarify, you know, as we indicate which samples cannot be entered in the data bank --

COMMISSIONER ASPLEN: I see what you are saying.

MR. FERRARA: -- but what was not listed in that category were elimination samples. Perhaps -- again, I don't know how much trouble it would be to add one more choice.

MR. SCHECK: I take it, it is easier to add things to these questions than it would be to add things to what is locked-in audio.

COMMISSIONER ASPLEN: Correct.

Let's skip through the lesson summary. We won't go through all of these, but we will go through the homicide.

(Demonstration continues.)

COMMISSIONER ASPLEN: Your actions will be the determining factor influencing a jury verdict. You will see why we say that at the end.

(Demonstration continues.)

COMMISSIONER ASPLEN: Whose voice is that?

(Demonstration continues.)

COMMISSIONER ASPLEN: For those of you who know that Robin got engaged not too terribly long ago, that is not her boyfriend.

(Laughter and demonstration continues.)

COMMISSIONER ASPLEN: You see when it turns to that arrow, you can click on that, and you go into the next room.

PARTICIPANT: Whose house is this?

(Demonstration continues.)

COMMISSIONER ASPLEN: When it turns into a hand, you click on the hand to get you close ups. So, you can see that, that is how this particular panoramic view works. Then while the officer is doing that, they can, again, you know, take notes here and, again, they can print those out.

MS. BALLOU: Chris, hit on the tutorial there so I can see the --

(Demonstration continues.)

COMMISSIONER ASPLEN: You actually have to get all of them to go forward.

(Demonstration continues.)

COMMISSIONER ASPLEN: Now, if even one of those questions we had marked off a wrong answer, she would have said the jury finds the defendant not guilty.

Rather than go through the next three scenarios, you all have copies, you all received copies of the CDs themselves. That is generally how it works, and then again, there is a test at the end of it which is, again, you just go through that.

MR. GAINER: I had a chance to share this with some of our officers just on a pilot basis, and they were bedazzled by as much as the technology as anything else as were a lot of our people.

Also, this past Wednesday, Chief Ramsey and I had a chance to meet with the Attorney General on a couple of different issues and we talked about this just to keep it doubly on our plate as well as the conference, and I can tell you she is awfully excited about; but you ought to see the officers take a look at this thing.

MS. BALLOU: That word, polymerase --

MR. GAINER: We are going to try to create 3,600 officers who will now be using that word.

COMMISSIONER ASPLEN: A couple of other points about it and things, so that you know, we thought about: First of all, it is recognized that a whole bunch of different machines are going to try to run this CD.

The company that developed it for us assures us it is going to run on a whole lot of ones, a whole lot of machines. They have done a lot of testing on a lot of different machines, but at the same time, you know, we have difficulty getting our police officers in this country bullet-proof vests and things like that.

There are certainly people who are going to say, hey, what good is this to us; we don't have computers; you know, we are still working on 386s, so how can we possibly do this. That is a very real consideration.

Our hope, though, is that if that is the case, number one, you know, cops may have their own computers, to say the least, but also if there is some sort of regionalization of training that could occur, that this would still be very beneficial in a group setting.

This is the kind of thing that can be done not only in an individual department, either on the officers' own time or on their own whatever in-house training, but it something that you can bring people together from a whole bunch of different departments and run through just like we did here.

It is anticipated that this will be utilized in training academies for, you know, officers who are just getting into the business. It is not Internet friendly. We cannot put it out through the Internet. You have to develop something in a completely different fashion to make it Internet friendly also, although originally, that was one of our thoughts, but we cannot do it that way.

We do recognize there will be some limitations from a resource standpoint in that regard. We do plan --

MR. SCHECK: Can you stream it?

COMMISSIONER ASPLEN: I'm sorry.

MR. SCHECK: Can you create that streaming video thing, the digital form of this?

COMMISSIONER ASPLEN: Streaming video, as I understand it, is actually some of the technology they used for the videos here.

How that converts into a broader thing -- what you could possibly do, I suppose, is run this via a teleconferencing mechanism where what you would do is you would be, you know, we would be running it here on this machine, but if that were teleconferenced out over video, you could then do it that way, which would not be much of a problem I would imagine. Obviously, you lose some clarity and things like that. Again, those are considerations we do recognize.

We are not exactly sure how many copies we are going to print or burn as we say. However, we do anticipate burning enough for every department in the country and, hopefully, some excess beyond that.

I don't know if I told you at the last commission meeting that while we printed a million of those little pamphlets upon which this is based, the response to that was so miraculous that we have printed another five hundred thousand because the first million are gone. We have just had a tremendous response to that.

The only other thing, before I ask for questions and comments, would be, number one, acknowledge Eastern Kentucky University and their participation in the development of the product.

This was done through a grant to Eastern Kentucky that, quite frankly, Eastern Kentucky already had, which I think was an excellent example of Federal agencies kind of working together and kind of understanding where money was at the time.

If we had, had to come up with the money to do this out of the blue, we probably would have been able to, but because we spoke to Eastern Kentucky and they recognized the value in doing this also, they changed some of their plans with some of their original money and helped the commission out in that regard. We certainly appreciate that.

That is Dr. Pam Collins and Case Farborough (phonetic), who the commission has seen before. They have presented in front of the commission before. Also, while she was not sitting up here when I kind of gave the initial run through the members of the working group, Dr. Forman has also been to most of those working group meetings and, as always, is an active participant and invaluable contributor to the product that has come out of this.

So with that, I will ask for any questions or comments by either the commissioners or the members of the working group who are here.

MR. THOMA: Great product; actually, it is fascinating. I went to some of the meetings earlier on before you had gotten this far, and it is amazing, since the last meeting I was at, how far the product has come.

COMMISSIONER ABRAHAMSON: The technology is astounding.

COMMISSIONER ASPLEN: You should have seen us the first time we saw that. The first time we saw it, the camera would come in on the animation and then saw that double helix come out of the blood. We were thrilled.

MS. BALLOU: It just made you want to wash your hands.

PARTICIPANT: I appreciated the advertisement for CODIS. I was wondering if we could get copies to The Hill to maybe get Federal convicted offender abilities.

COMMISSIONER ASPLEN: Well, you know, your point is well taken. As you probably picked up, there was a little bit more than just here is how to look for this DNA evidence, and there was a little bit of preaching there.

I mean that was very intentional on our part, that there were some policy issues there also; and quite frankly, yes, we will be sending it to The Hill. It is important that they understand what we are doing and what some of the issues are.

MR. PLOURD: One of the things I wanted to comment on is that this product is going to have a shelf life in the sense that you saw a lot of the descriptions of the technologies and some of things we are doing, but how long will this be really viable?

One of the recommendations I think the commission should at least look at or address is timing this out and saying, you know, in five years, let's update this; let's, you know, put it together again so it continues to be timely and useful. That, I think, would be a fair recommendation.

MR. SCHECK: In that connection, do you have anywhere in the rest of it somebody picks up a hair and does mitochondrial testing on it?

COMMISSIONER ASPLEN: No, not specifically.

MR. PLOURD: I though we did mention mitochondrial somewhere in there. There is an explanation of the two. We don't really get into depth, I think, of the differences other than -- but that is a good example of where is the technology going; what is going to be the viability of it.

COMMISSIONER ASPLEN: Remember, we have a second CD that is coming for evidence collection; and you will notice that most of what we said was simply don't touch it. That is part of that. So when we do get to the actual evidence collection standpoint, that is when we can address that particular issue in more depth.

COMMISSIONER ABRAHAMSON: When is that going to be prepared or finished? Do you know?

COMMISSIONER ASPLEN: The second CD?

COMMISSIONER ABRAHAMSON: Yes.

COMMISSIONER ASPLEN: That is a mean question. We anticipate, well, certainly by the next commission meeting, we will be able to present that you at the next commission meeting.

MR. CLARKE: That is faster than most rock stars put out their next CD.

COMMISSIONER ASPLEN: The only reason I say that --

MR. GAINER: They don't have the trouble with equipment that most rock stars do. It is the video that is causing a little bit of problem.

COMMISSIONER ASPLEN: Actually, most of that is done as I understand it; right? We were wise enough to, when we sent both Robin and Mark to Kentucky to do this, we shot all the video at the same time.

So, the video is done, and that was pretty time consuming. Now, it is the story board work and stuff, and obviously, a lot of the initial stuff that is in this will be contained in the second one also. So, that is the only reason that I say with some confidence that we will have Module Number Two done.

MR. CLARKE: I can see the scenario after about four or five. The last one will be labeled greatest hits or something of that nature.

COMMISSIONER ASPLEN: That is a bad phrase.

(Laughter.)

COMMISSIONER ASPLEN: If we could now turn to the issue of -- let me do this.

COMMISSIONER ABRAHAMSON: We have the law enforcement summit and proposed law enforcement training and education.

COMMISSIONER ASPLEN: You should have contained in, again, the voluminous materials that you were given today, a tentative agenda for the law enforcement summit, National Law Enforcement Summit on DNA Technology which is here in Washington.

Again, this is an outgrowth of a former recommendation by the commission which was approved by the Attorney General. It was approved and then scheduled very shortly after the approval, but the Attorney General -- it is on the Attorney General's schedule to appear on the second day, as you can see from the agenda.

What we did was we decided to bring in 150 police chiefs, assistant chiefs, sheriffs, emphasizing decision-makers, policy-makers from the departments. The way we selected them was actually we had them select themselves.

We identified, first of all, a large number of major law enforcement organizations such as IACP, sheriffs, NICOP (phonetic), a bunch of organizations like that. I think there were probably ten of those.

We sent letters and contacted those organizations and said please nominate, you know, however large your organization was, three, five members of your organization to come to this law enforcement DNA summit. What we also did, though, was we contacted -- Robin, help me out there -- the 50, was it the 50 or the 30 largest police departments, did we do that, by population or just five.

MS. WILSON: 50.

COMMISSIONER ASPLEN: The 50 largest departments and asked them to send their police chief. We also contacted the Institute for Rural Law Enforcement, if I have that name correct, from University of Arkansas, Lee Caldwell's (phonetic) organization there, and asked them for a recommendation for 20 rural law enforcement agency police chiefs.

So, we have got the large; we have got the small, and then we sent letters of invitation to the president of every state chief's association. So, we hopefully also have geographic coverage also. Ultimately, that works out to 150.

We are now working through what is a very arduous task of identifying who is coming because obviously, you know, the people that you send the letter to may not be able to make it, but then they want to send so and so and such and such.

So again, the logistics are daunting, but between Robin, and I also take the opportunity to introduce the commission's new intern for the summer, Amy Garvey. Amy, if you could, stand if you will.

She has been a tremendous help in this process also, and Dr. Forman and Anjali, everybody is working very, very hard to pull this together. We think it will have excellent representation there.

The goal of the summit is several fold, concentrating on these particular issues. The idea is to educate law enforcement so they can essentially take ownership of some of these issues, issues like funding. I am sure I have told a number of you this story before.

When Dr. Forman and I spoke to the National Conference of State Legislators where Dr. Forman and I were talking a lot about these backlogs and we were talking a lot about unfunded mandates and really kind of legislator bashing, if you will, at some point in time, a legislator raised his hand and said hey, wait a minute, let me tell you how this works; we are law and order type people. Our law enforcement agency comes to us and gives us their top five priorities, and we give them their top three based on whatever our resources demand we can.

Until DNA reaches that level and until law enforcement begins to ask for it, they are not going to get it. That was a great bit of information for us because it told us that what we needed to do was really make sure that law enforcement understood the potential of the technology; understood what some of those issues are so they could make real informed decisions.

Nobody is going to tell law enforcement that DNA is more important than bullet proof vests or cars or weapons or anything else, but the most important thing is that they understand what the potential of things like the database is; they understand cost benefit analysis of doing DNA testing and getting database hits as opposed to traditional investigative techniques; understand the value of DNA in a context of cold case investigations now that we have this database. So, we really want to use this opportunity to provide that educational function.

Another really important goal that we want to achieve here is understanding and educating about the importance of the relationship between the laboratories and law enforcement. Now that we are sending out a million and a half copies of this little pamphlet and now that we are going to send out all these CDs and we are really going to turn first responding law enforcement officers on to DNA and everybody else in the department on to DNA more so than they already are right now, we are going to create just a tremendous, tremendous volume for laboratories that are already overworked, backlogged, et cetera.

It is more important now than ever before that law enforcement agencies and departments work together and have good communicative relationship about these things so the right evidence gets tested so we really do utilize our limited resources to the best of our ability.

Then there is the big issue of training and education: How do we train, effectively and efficiently train law enforcement officers for these particular issues given what are very, very limited educational resources in most departments? Again, those are, I guess, the general goals that we hope will be achieved by the schedule that you see there.

As you can see, we have a lot of participation by actual commissioners although it is not a commissioner meeting. It was something that was done as a result of a recommendation, but it is not a commission meeting.

Chief Gainer has agreed to present to those individuals, and Dr. Forman agreed to present data on DNA and how the database works and how to put it in context.

Paul has agreed to come and talk about some of their experience in Virginia. Dwight has agreed to come and talk about the Bureau's perspective on this, and Dave Kaufman (phonetic) from Florida Department of Law Enforcement has agreed to also talk about some stories there also.

Originally, Commissioner Schaffer (phonetic) from New York was going to come and present. However, his offices called and asked if Deputy Commissioner Casey (phonetic) could do that. We certainly had no problem with that.

Chief Sanders is going to help moderate the session on educating law enforcement where we will bring Dr. Caldwell in, again, for the rural perspective of training and education issues, and then Mark Dale from the New York State Police will come in and also help us out in that regard.

What we hope is that these particular sessions are something much more than a couple of panelists speaking and then maybe a few questions afterwards. What we really hope is that we can generate some genuine discussion amongst the attendees. Quite frankly, discussion among them is probably more important than what the particular panelists may have to say.

So, we are going to try very hard, and we are going to come up with particular questions that will facilitate that discussion so we can get that input from them rather than just have a 20 minute presentation and a few questions.

We decided rather recently that it would be important to have a section on post-conviction testing. Oftentimes, post-conviction DNA testing is not thought of as a law enforcement issue as such because they are kind of out of the loop at that point in time; but given the implications of evidence storage now for post-conviction testing issues, it is really important that law enforcement also understand the implications and what this post-conviction testing is all about and how that relates to the storage of evidence.

We will present the CD ROM at the coffee service half hour in the morning. We will also provide copies of the CD to all of the participants. Mary Lou Leery (phonetic), the Acting Assistant Attorney for OJP, will speak, and then we will have the presentation by the Attorney General.

I don't know if this is first time that Mr. Wooley has seen the sequence of events on the second day. That is probably pretty intentional so he could not, not agree to do it; but quite frankly, I think he is the only one who can really pull that off.

What is also critical in encouraging, you know, the effective integration of the technology is an understanding of what the legal implications are for certain actions when using DNA.

One of the concerns that we have talked about before in the context of the commission and some of the working groups is taking particular actions, be it an intelligence screen or be it arrestee testing or elimination sample testing kind of on the spur of the moment because we heard it was a good idea.

We saw the show that Australia or England is doing this, and therefore, hey, we are at this homicide scene and before anybody leaves the building, you know, I want to ask for a sample from anybody who is here, a voluntary sample, but I want to ask for the sample nonetheless.

You know, the general concern is that if that is done incorrectly without a lot of thought into what is legally voluntary according to the jurisprudence in that particular area, you know, that the next day the newspaper reads, you know, the big headline is this is what occurs and then a day or two later, you know, there is a bill introduced in the state legislature that these issues of what can be done in terms of mass screening, intelligence screening, arrestee testing, elimination samples, it is going to be very jurisdictionally specific; and what we need to encourage is that law enforcement work with their prosecutors and attorneys to decide what the best approach to some of these matters is. So Mr. Wooley will be extremely valuable in that context.

Then we have a section on police and prosecutors working together. Superintendent Hillard will moderate that panel. Clay Strange and Norm Gahn -- Clay, who you met earlier; you probably all met before, but who is on the working group here -- and Norm will help participate in that.

Kim Shellberg (phonetic), who was presented to the commission before on legislative issues will give the participants kind of an overview of what the legislative landscape looks like, what the trends are in state legislation in terms of things like post-conviction testing, what the trends are in terms of expansion of the databases, et cetera.

Then there will be a discussion on legislation and the extent to which, if law enforcement chooses to do so, what they can do to help facilitate matters. Charles Bronson (phonetic), the state legislator from Florida has agreed to participate. He was instrumental in some of Florida's legislation.

We are going to have somebody else that we have not heard back from yet who may participate in that session, and David Boyd, the Director of LST. Then finally, we have the section that I talked about -- the importance of laboratories and law enforcement working together to preserve their scarce resources. The to-be-determined and the 3:30 to 3:50 slot will be Master Sergeant Mark Johnsey.

Any questions, comments, concerns?

MR. REINSTEIN: Chris, are these mostly chiefs of police?

COMMISSIONER ASPLEN: Yes.

That is who we invited. We invited all chiefs of police and sheriffs and such. We may get assistant chiefs of police, et cetera, due to the unavailability of particular chiefs.

Everybody okay with that?

COMMISSIONER ABRAHAMSON: No victim representation?

COMMISSIONER ASPLEN: Well actually, we had spoken about that and had a full plenary session on that and realized a couple of things: Number one, that this is not new to police officers, that of all of this, dealing with victims is not a new proposition.

Secondly, we realized that given everything else that needed to be done, that given the extent to which it is not a new proposition from them, that these other issues from a policy standpoint were important to deal with.

COMMISSIONER ABRAHAMSON: What about defense counsel?

MR. THOMA: There is nothing, no presentation from defense in some areas that you might really want to consider.

COMMISSIONER ASPLEN: We have had some discussion about that issue. Chief Gainer and I have discussed that possibility, and that is a possibility that, that could generate some good discussion, some good perspectives, and while it is designed specifically for law enforcement and as such is not intended to reach that scope, there may be a benefit to law enforcement to have someone come in and rattle the sabers, if you will. We are going to talk more about that.

COMMISSIONER ABRAHAMSON: Isn't there a an issue that the crime labs' neutrality is very important in terms of witnesses so that what you do have is a crime lab that, in effect, should be working for inculpatory as well a exculpatory evidence? So, does that raise any issues?

I mean it doesn't for me about law enforcement and crime labs working together, but it does in the sense that I thought the crime labs would want a neutrality issue. I am just raising the questions.

COMMISSIONER ASPLEN: That is a question that comes up a lot in a whole lot of different contexts, and there are a lot of arguments that are made that, you know, forensic laboratories in Virginia, for example, are not part of the law enforcement function.

You ask state police laboratories whether or not they should be, they will tend to disagree with you although recognizing that, by nature, the science itself is neutral. That is a big, broad policy and, to some extent, a philosophical issue as opposed to the more practical.

MR. FERRARA: In a more practical sense, we should address as to whom the laboratories provide their services and who they can particularly in post-conviction cases as well as well as active criminal cases. I mean we are almost more defined by the agencies we serve and can serve than any position that the laboratory has with respect to an organization, whether law enforcement or otherwise.

COMMISSIONER ASPLEN: You have something to say, Tom?

MR. CRONIN: I think one of the things we are going to be talking about in that law enforcement crime laboratory issue is now that we are educating law enforcement, the tendency might be for everybody to go out and pick up anything and everything that is within possible connection to a homicide scene and bag it all up and send it to the lab, and we just overwhelmed them again.

I think one of the things I am going to be talking about is trying to get the detectives and the crime scene technicians working together at the scene and then the detectives also working with the crime lab people just telling them prioritize; we have to prioritize because if you don't, we have sent out a million pamphlets and now there is a whole lot of policemen out there that didn't know what DNA meant last year and now they do and they think that anything and everything that could be possibly in this house that an offender may have touched, I am going to bag it up and send it to the lab, and we have just done another big disservice. That is, I think, what the theme for that section would be.

COMMISSIONER ASPLEN: Any other questions or comments?

Between now and tomorrow, we can talk about, I mean we can talk about all of it, but particularly the defense attorney issue. I would like to have that discussion a little more.

MR. SCHECK: I guess what is very hard for me to get a sense of, looking at this, is that I see all the names of all the people and the general categories, but you know, do you have some specific idea of what people are going to be talking about?

In other words, I can look at this and say are they going to discuss all the rape kits there are be thrown away across the country without testing in unsolved cases? What are you going to do about that? Is that on the agenda here? I assume it is somewhere, I don't know. I can think of a lot of questions you might want to be asking.

COMMISSIONER ASPLEN: Go ahead and fire them off. I mean go ahead and tell us the issues that you think should be addressed.

MR. GAINER: Maybe, Chris, another way you might can do it is to further define the subject of the speakers so that would give a better perspective. I think that is what you were getting at a little bit, too, weren't you, Barry?

MR. SCHECK: Yes.

I mean just looking at this, I cannot figure out what is going to be covered and what is not so I can give you any useful feedback.

MR. GAINER: Similar to what Chief Cronin just did, that there would be some sense of the subject area they are going to do.

MR. SCHECK: I mean I just threw out that whole issue of, I mean if I had all these people in one room, I would immediately say, for example, you know, How many old rape kits do you have in your labs? Do you know where they are? Can you find them? Can you preserve them? Do you have any idea of how to test them? What about your old homicide cases?

I am sure Woody is going to discuss, in his section, his approach to the post-conviction cases, but I mean just as a point, it seems to me that is not an insubstantial one.

Of course, I mean the issue that I raised at the very beginning that you are discussing now, which I think -- I am telling you I said this from day one -- these intelligence screens, unless there is a sensible approach to that, I can see this as a looming disaster.

I will tell you right now, I mean we have been -- and Mr. Wooley is in the audience here, and I noticed he wrote this wonderful article -- how long ago was it?

PARTICIPANT: Twenty five years or so ago.

MR. SCHECK: A while about these intelligence screens that we were looking over the other day, you know, if you were to put your finger on one thing -- that is, you were saying you just tell

people okay, let's go and the look at the video and they go we got to get elimination samples, right, you know, without a written instrument that defines exactly what we are taking this for, what the limited purpose is and what we are going to do with the samples afterwards.

I doubt very much whether, in many of these instances, it really is informed consent, and it is really an issue worthy study and thought. It creates resentments, serious resentments and paranoia if not handled correctly, but as soon as people start understanding the power of the technology, that is the first thing they are going to do, as they should, but if it is done inappropriately it is going to whip up a lot of hysteria, which people should not want.

COMMISSIONER ASPLEN: Which is why I used a couple of those examples in talking about the kinds of things Jim will probably talk about, those kinds of proactive considerations really is what it is; I mean how to be proactive about the utilization that you are going to make of the technology.

MS. BALLOU: Just out of curiosity, being past with Montgomery County Crime Lab in Rockville, Maryland, I know jurisdictionally, they had their own set up for reference samples as to the requirements and what can be done with that. So, I would say assume that what you are stating is not to just open it initially, but to clarify that each agency should have these in place.

MR. SCHECK: Yes, no, I mean my position on this is you should have written informed consent; it should be clear it is for elimination in this case; that the samples will subsequently be destroyed; and people will be notified when that is done; it will not be saved in the local crime lab and accessed as a data bank sample.

MS. BALLOU: Out of curiosity, per CODIS, that is not an allowable assertion into that.

MR. SCHECK: It is not allowed in CODIS, no.

MS. BALLOU: Exactly, which might be a good idea to bring up in the summit that you are having, that people are aware that it will not go into CODIS, which might be an assumption on some parts as well.

MR. SCHECK: Right, but I think that actually what is, in fact, going on is that state and local laboratories, some of them across the country, are creating these data banks. They are in place right now, and that is an issue. It is a debate. There are many people who think we ought to save this, we ought to do that.

MR. GAINER: Probably rather than having proscriptions that you should or should not do something, you would at least raise the issue that one must make the decision about what you are going to do. I mean because maybe some jurisdictions, maybe some states, maybe some legislators will want to say the opposite of saving.

MR. SCHECK: Sure.

COMMISSIONER ABRAHAMSON: Dr. Crow?

MR. CROW: I can see two things, really quite separate things. One is just representation by a defense attorney. It would just have to do with the procedures and whether they have been correctly followed and how important the evidence is.

The other is the privacy consideration that you raised. I can see the need for two more. This is going to be a three day meeting before we are through with this.

MR. THOMA: Figure out the 15 minutes in Phil's schedule.

COMMISSIONER ASPLEN: I do think that a lot of the considerations Barry speaks about can be fit into some of the things we are talking about, like Jim's presentation; and when Chief Gainer, again, defines the issues, you know, it is the kind of thing that, you know, this backlog of rape kits is one of the issues. It is a funding issue.

You know, it is one of those financial considerations that we need to deal with. So, that is why I kind of asked, you know, what are the particulars that you think should be addressed, and then we will find a way to fit them into that structure.

MR. SCHECK: I would be happy if there were somebody in law enforcement who would express the point of view that I just put forward, took that position. It would be much more effective if you could find somebody who would state that point of view who wears a uniform.

COMMISSIONER ASPLEN: I understand that, but I really don't think that is -- I guess it is really what the chief said. The point here is not to tell law enforcement one way or the other what to do. The issue is to educate them as to what the issues are. I think that is the point.

MR. SCHECK: I am not disagreeing with that. I guess what I really am saying is that somebody, you know, I have made this argument many times here. I mean I think it is enlightened self-interest of law enforcement to do this with great respect for the privacy interests of citizens to make sure that the taking of samples and the so-called intelligence screens or DNA dragnets is done with clearly informed consent, and I think that actually is difficult.

I think that is not a trivial issue. I think people feel that if they don't give the sample, that they are immediately a suspect and they have to give it and that people in more difficult circumstances or the more oppressed in society are the least likely to necessarily give informed consent unless it is really spelled out.

So you know, I think it is in the long-term interests of law enforcement to do that and understand exactly the implications of that issue. Then they can choose not to.

MR. ADAMS: Barry, I would like to address one comment you made just for clarification. It does not relate to this topic other than the issue you brought up, and it had to do with your comment of state labs utilizing elimination samples within CODIS.

MR. SCHECK: No; they cannot do that.

MR. ADAMS: I know, but you made the statement that state labs across the country were utilizing these elimination samples within their databases.

MR. SCHECK: No; within their own separate, private data banks.

MR. THOMA: They are creating their own separate, like a parallel database somewhat like CODIS, resembling it, but not the same.

What they are doing is putting different cases together and trying to establish a database with as many different types of offender samples, not necessarily convicted samples, as they can, but absolutely what Barry was talking about is outside of CODIS, and lot of law enforcement agencies are doing it.

I think Rock Harmon (phonetic) spoke to us about a year ago about him establishing such databases in there is Alameda County.

MR. ADAMS: I just didn't want there to be any confusion; that these were not allowed in CODIS; and, in fact, the Office of Inspector General has recently conducted several audits of state laboratories to include Virginia, Florida, and others, and they look at this very thing: What samples are in there and are they the correct samples, and elimination samples are not the correct samples.

MR. SCHECK: Dwight, I could not agree with you more because you and I were there when these rules were first set up in 1992, and there were these definitions of forensic identification purposes, which I think are clear ones and are good ones. The problem is that those are put out. Those are contained, hopefully, in most of the statutes now that authorize DNA data banks; and then there is going to be, I am telling you, this disconnect when all of a sudden it is, quote, discovered that there are 50,000 elimination samples sitting in some lab that are routinely searched.

I am not exaggerating that this is what is contemplated by many state or local laboratories. It is going to come as a surprise.

MR. WOOLEY: Jeffrey, are you saying that, that is actually going; that labs and states are keeping on their own databases of elimination samples?

MR. SCHECK: Of course.

MR. THOMA: Yes.

MR. SCHECK: Rob told us day one he was going do to that.

MR. WOOLEY: Of elimination samples?

MR. SCHECK: Yes.

MR. THOMA: Yes.

In fact, the State of California -- Jan is very familiar with it -- is actually, at the state level, contemplating legislation to allow such a parallel type of database that would be outside of CODIS, which is amazing thing because I had actually thought that there were somewhat limited resources in California for this, but it seems that --

MR. SCHECK: Yes.

In California, they testified in front of the United States Senate that there were going to be 1,000 post-conviction DNA tests at \$7,500 a piece, costing \$7.4 million which, of course, there has not been anything close to that in ten years.

MS. BASHINSKI: Could I speak to what we are talking about?

In California, we are trying to amend our existing data bank law to allow us, when we have a legally obtained sample from a suspect, to search that sample against other cases that were contemporaneous and to retain that sample for a period of time. We are not proposing to create a data bank of elimination samples. So, I think maybe I am --

MR. THOMA: Excuse me; we actually have been working on amending it, but it was open-ended. We have moved it from five years. I think we have moved it down to two years for the keeping of those samples, but that certainly isn't just for a very limited amount of time, and it certainly was over some pretty vehement opposition that we even got it reduced to that level; but we should stop because actually, we should have this dialogue back in Sacramento instead of here.

MS. BASHINSKI: Well, I think it is important. I think it is extremely important for you to understand, though, what we are, in fact, doing in our state, which is to use a, attempting to use a legally obtained sample from a suspect to search against other types of cases, not to retain a file or create a file of elimination samples. That is a different issue.

Right now, we are prohibited from searching a suspect against any other case, any other unsolved case by our data bank law, and we are the only state that has a law like that other than Vermont.

MR. THOMA: We will continue to disagree on that particular --

COMMISSIONER ABRAHAMSON: I think that what the discussion indicates, though, is that there are many legal and privacy issues, as we all know, in this realm; and that is an educational, part of the educational program.

As Chief Gainer indicated, people, the police chiefs should be alerted to them to the extent they are not already alerted, and that would include the elimination samples and informed consent, etcetera. So, the question is who is going to be doing this?

I assume that you will, Mr. Wooley, in part, and then I would -- we have got a lot of lawyers on this program: Norm Gahn.

MR. THOMA: And me, the lawyer on the right side of a law judge.

(Laughter.)

COMMISSIONER ABRAHAMSON: I am not going to take that on. I am the neutral, remember. We have got Ms. Leery and others, so I think these are issues that I would hope would be raised in one form or another.

MR. CLARKE: Actually, it would not -- may they not be important at the November symposium.

COMMISSIONER ABRAHAMSON: That is right. That is another place for them.

COMMISSIONER ASPLEN: We will have the opportunity tomorrow to talk about the commission's input as to what should be on that agenda also.

MR. THOMA: Actually, we have it pretty ironed out.

COMMISSIONER ASPLEN: Right; a number of individuals have, from the commission, have been communicating with David Lazer on that.

COMMISSIONER ABRAHAMSON: I don't know whether that is still prevalent, but for a while there, many police departments had in-house counsel. Still do?

MR. GAINER: Yes.

COMMISSIONER ABRAHAMSON: So, it might be interesting to, perhaps, have one of them on the program who, if he or she has faced these kinds of issues in detail or thought about them, that would be from a perspective inside that would be, perhaps, heard well by the participants.

I just don't know the field as well as I did several years ago, some of the outstanding counsel.

Any other comments about the summit?

(No response.)

COMMISSIONER ABRAHAMSON: Looks good; looks good. I am sure it will work well. Thank all the participants who have participated in the technology today and who have participated in the summit.

Chris tells me we ought to take our break now, so we will be back here at about 3:30 and then we will continue on with the proposed recommendations regarding law enforcement training and post-conviction issues report.

(Recess from 3:15 p.m. to 3:30 p.m.)

Postconviction Issues Report
Postconviction DNA Case Review, Commissioner George W. Clarke
Pending Federal Legislation Update

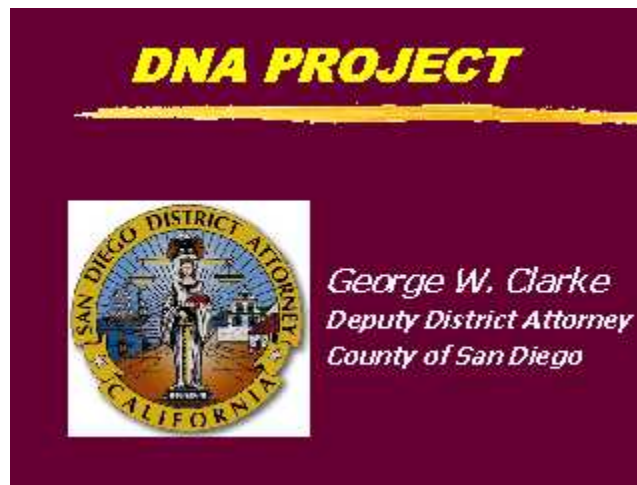
COMMISSIONER ASPLEN: We will move on to Mr. Clarke's presentation on the post-conviction program in San Diego.

We are next going to hear from Woody Clarke about what they are doing in San Diego, and Woody, correct me if I am wrong, I don't think any other DA's office is doing what you are doing.

I know there are a few that are contemplating a certain approach to this, but as far as I know, the San Diego's DA's office is the office that is proactively looking at cases in a post-conviction context. Woody has kindly agreed to talk to us about what it is they are doing in San Diego in that regard.

MR. CLARKE: Yes, Chris.

To my knowledge, we are the only office that has taken quite this proactive an approach, and I have got about a dozen slides I am going to show you and go through this fairly rapidly.



I would encourage, particularly from, obviously, the commission, any questions. Stop me at any time because this is a bit of an unusual project. I thought I would tell you first about its genesis.

Frankly, its genesis was about three months ago when I was updating our administration. We are an office of three hundred prosecutors in a county of three million people, so I would call us one of the larger metropolitan areas, but by no means, obviously, the largest.

I was updating our division chiefs, our policymakers, about not only legislation at the Federal level, but as you will see in a moment -- and I am only going to touch on these very briefly -- legislation at the State of California level as well that would apply or grant to inmates in prison a

right to seek DNA testing under different circumstances; and the pieces of legislation are different, although they are similar in many respects as well.

Well, in the mist of that discussion, the chief of our felony trial division that I actually sit in immediately said well, why don't we do this testing right out of the chute; why are we waiting for an application from an inmate.

There was a little silence for a little while. I was one of the silent people as you can imagine, particularly since this was in the midst of our discussions a few months ago about our model statute and so on. So, I kept waiting for somebody amongst the group of very experienced trial prosecutors to say something, and there still was not much said.

So, we moved on to another topic, and then we took a break. Then the District Attorney of my county came into the room, and he said I just heard about what you were discussing -- he actually was not part of the meeting -- and he said I think that is an excellent idea, and we are going institute that program.

So, I was silent again for a while. Then finally, over the course of the next several weeks, our District Attorney said this is what we are going to do, you work out the details to myself and another prosecutor in our office.

Well, the details, you are going to see in a moment, but I thought what I would do first is just indicate -- and I don't think we want to get into a discussion about the relative merits of any of these bills -- but just to give you very briefly what I think is a summary, in essence, of some of the competing statutes.

At the Federal level, there is the initial bill introduced by Senator Leahy and others, Senate bill 2073, that would grant to Federal inmates; and then basically by potential institution and individual states, both monetarily and, I think, by application of the 14th Amendment, basically seek states to pass similar legislation that would grant to inmates a right to seek DNA testing in their cases when -- and this is common to all the technology that is sought to be used was not available at the time of trial -- but the actual wording of when that testing would be available varies between the statutes.

FEDERAL LEGISLATION

S. 2073 - Leahy et al



*Testing may produce noncumulative, exculpatory evidence **RELEVANT** to the claim that the applicant was **WRONGFULLY CONVICTED OR SENTENCED***

Senator Leahy's bill provides, as you can see here, that in that case, testing, if it proved to be exclusionary, would constitute exculpatory evidence relevant to the claim by the applicant that he or she was wrongly convicted or sentenced. That is one standard.

FEDERAL LEGISLATION

Hatch Bill




*Testing has the potential to produce new, non-cumulative exculpatory evidence that could **ESTABLISH** the defendant's **ACTUAL INNOCENCE***

The alternative legislation introduced by Senator Hatch is worded a little differently. As you can see, there is some similar language about the potential to produce new non-cumulative exculpatory evidence, but the further requirement exists under the Hatch version that it would actually establish the defendant's innocence. So, you can see some differences between those two.

CALIFORNIA LEGISLATION

SB 1342 - Burton



*Noncumulative evidence MATERIAL
AND RELEVANT to the defendant's
assertion of INNOCENCE*

Then lastly, the bill out in California that I mentioned is sort of a hybrid between the two and, I think, more closely mirrors, frankly, the versions in place in, certainly, Illinois, New York, and I think -- I can't remember if there is another one. Barry? New York and Illinois.

MR. SCHECK: Arizona.

MR. CLARKE: Arizona is different. It is the model statute version basically, but in any event, our version in California that I discussed with our administration provides, again, similar language, but a little bit different -- material and relevant, but not necessarily demonstrating actual innocence based on the test itself.

SAN DIEGO DNA PROJECT

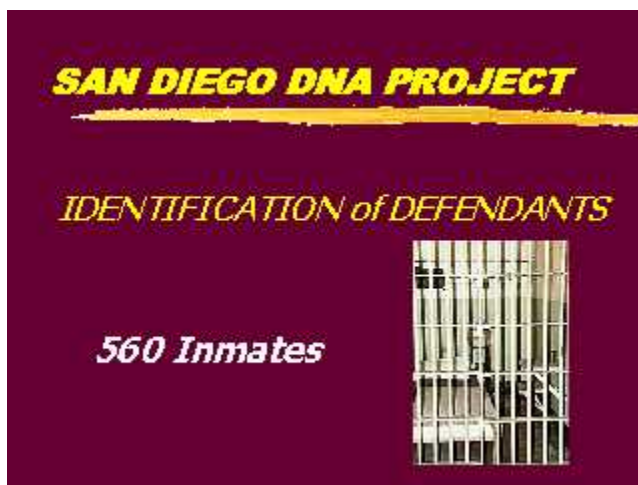
IDENTIFICATION of DEFENDANTS

- *Currently in Prison*
- *Serving original term*
- *Committed prior to 1992*
- *S.D. Police Laboratory Casework*

So then, we turn to our own project and the guidelines that we established in place had a certain series of goals. The first was to only deal with inmates currently in prison. These are inmates who are serving their original term of imprisonment; in other words, still in prison and serving their original term for crimes for which they were committed to prison prior to 1992. We selected that date arbitrarily.

The arbitrariness of the date, well, it was not totally arbitrary; it was somewhat arbitrary, is the fact that, that year, our San Diego Police Department began DNA case work. So, it was a selection based on that, although as you will see, if I forget to mention it, we are certainly not exclusive in that regard. We will take requests from any inmate and look at their cases the same way as we are looking at the cases that we are dealing with.

Through the cooperation of our California Department of Corrections and an actual life inmate unit that we have in our office that very actively follows all of our lifer inmates, the ones who are entitled to parole hearings, not entitled to release necessarily, but they are entitled to parole hearings.



They keep a very close watch on all of those lifer inmates in our county, but also by lists obtained from the California Department of Corrections, we determined that there are 560 inmates in our state prison system committed from San Diego County still serving terms for which they were committed to prison prior to 1992. That is the basic criteria.

We have in place two law students who have just recently begun a review of those cases. They sit in a little cubicle that is getting, as you can imagine, quite full of boxes from cases. In fact, they started giving me a little bit of their inclination that perhaps I should review these cases a little more quickly since they no longer have room to sit in that cubicle.

SAN DIEGO DNA PROJECT

CASE REVIEW

- *2 Law Students*
- *District Attorney Case Files*
- *"A-Z" or Request*
- *Checklist/Court Documents*
- *Review by 2 DDA's*

In any event, they are requesting case files which, as you can imagine, are most often off-site because they are older crimes. We have, fortunately, a good procedure to obtain those case files. They are reviewing these cases on the very scientific basis of starting with the "A"s. Then they will be moving to the "Z"s at some point.

We have, however, let through not only media coverage, but also by meetings with our public defender, what we call our chief alternate public defender, the bar association, and other sources basically trying to get out the information that we will also accept cases by request, and they are not limited to 1991 or before. We will look at any case on request.

The two law students literally open up our case files that, so far, have been in very good condition. We have even found a case, believe it or not, from 1914; but that defendant is no longer alive, so we are not as concerned, obviously, about that case. I want to see that 1914 case, by the way.

The law students fill out a check list. They provide information, identifying information largely, and they are to attach certain court documents like a change of plea form or a probation report -- which is a report, like many jurisdictions, prepared by a probation officer who looks at the case, summarizes the facts, interviews the defendant, perhaps most importantly for our purposes, and then provides a sentence recommendation to The Court -- and other documents such as any appeals, the disposition of those appeals by either our court of appeal or our California Supreme Court.

We are finding some documents hard to find, but thus far, none of the early cases that we have reviewed has the failure to find those documents been anywhere near fatal in my view.

The procedure is those two law students then prepare those short, perhaps two-page documents -- this check list, basically, that they fill out -- and then the cases are reviewed, each and every case reviewed by two deputy district attorneys.

One initial review is by a collaborator with myself who works in our administration who is about a 10 to 12 year deputy in our office that has tried a number of serious homicide cases, and then

myself. I look at them last. Then we basically either indicate on that case that yes, this is a case we should look further at or this is a case that we can set aside.

What are goals are in determining whether or not to proceed further with these cases are has there been a continuous claim of innocence starting from the police, although we are not eliminating cases because a defendant may have said something to the police indicating complicity in the crime, we are not eliminating cases based on that, but what we are looking for is generally, again, a maintenance that I am not the person who committed that crime.



We look at several things: Was there a trial? What was the defendant's testimony at the trial? Was there a change of plea form if it was a plea case, which the majority of our cases, again, in these early stages, are.

What were the statements made to the probation officer that I mentioned earlier? Then lastly, I have mentioned the parole board exception. We, frankly, don't plan on holding it against an inmate that they may have expressed remorse for the crime and otherwise conceded committing it because some of those, as we have learned, may not be totally sincere.

So again, we are not eliminating a case because a defendant is expressing remorse to the parole board or otherwise making comments to the effect that yes, I committed the crime. I saw "The Shawshank Redemption." That is why I have that goal.

SAN DIEGO DNA PROJECT

CASES NOT INCLUDED

- *"3 STRIKES and You're Out"*
- *"1-STRIKE" Sex Cases*

Most importantly, the cases that are not included, and this, I think, is a surprise to some, in California, we have a three strikes and you are out statute, but that statute did not go into effect until 1994.

We have thousands -- well, in San Diego, California, I am not sure how many, but I think it is safe to say now hundreds of inmates serving life terms for three strikes cases. They have nothing to do with our inquiry -- unless, again, an inmate wishes to seek that kind of inquiry -- because these cases are generally not biological evidence cases.

You can go to prison in California now for 25 to life for possessing small amounts of drugs, committing petty thefts out of markets and so forth; and more in the biological evidence arena are one-strike sex cases that you can also receive a term of 25 to life.

Again, it did not begin until 1994. So, they are not in our umbrella of 560 inmates, so I think that helps us to narrow it to not only a more manageable level, but more importantly, the kinds of crimes that DNA can be helpful in.

SAN DIEGO DNA PROJECT

CASE REVIEW GOALS

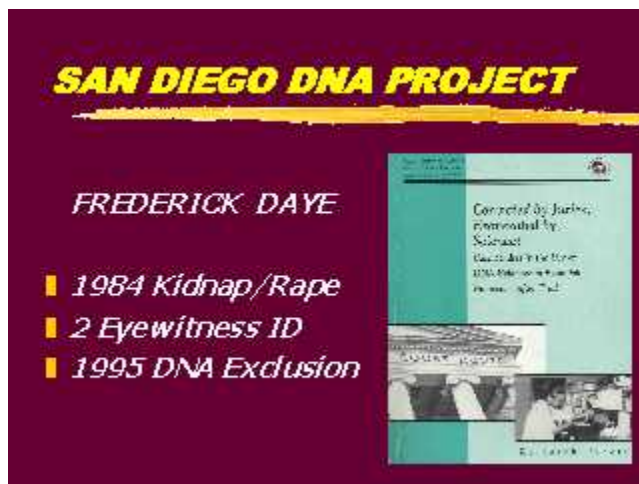
- *Dispositive Physical Evidence*
- *Evidence Preservation*
- *Major Case Review Panel*

What we are looking for, obviously, is dispositive physical evidence. If it is a case where a defendant has maintained, again, his or her innocence, is there physical evidence that can truly dispose, if DNA is used, if there are exclusionary results that can dispose of that claim of innocence and establish whether or not that person committed that crime?

In the evidence preservation realm, again, we are still very early in this process, but what we have noticed in two cases so far is that when they were simply sex cases, not homicide cases, but sex crimes only, the police department appears to have destroyed the evidence pursuant to a policy they had -- this is our major city police department in this instance -- of waiting until all appeals have been exhausted and then evidence destruction occurs.

We are finding just the opposite with homicide cases. Homicide case evidence seems to be intact. Again, this is only out of the barest minimum of cases where we are seeking to determine the presence of that evidence.

Our goal is, if we find an appropriate case, we will then present it to our, what we call our major case review panel. It is a series of about ten, again, highly experienced lawyers who are convened normally to advise the district attorney in capital eligible crimes whether to seek the death penalty or not. So, that is our plan to use those resources when necessary.



Just as an aside, what is guiding us in much of this process, and I know is assisting the other lawyer and myself, is the fact that one of the 26 cases described in the NIJ report in 1996 was a San Diego case involving a defendant named Frederick Rene Day, who was convicted of a kidnap and rape case based on not only eyewitness identification of the victim, but also eyewitness identification by a nearly independent third party. There was some corroborative serology evidence in this trial back in 1985.

He was convicted and sentenced to prison. Ten years after that commitment to prison, he was, in fact, excluded. He was clearly not the attacker, and those exclusionary results actually inculpated another man who an accomplice said was the person who actually committed the crime.

So, I give you that example because that helps us understand that because we have eyewitness identification testimony, that doesn't mean that person did not commit that crime. So, I think it is an important factor that we need to bear in mind in any review, obviously not only in our office, but elsewhere.

Our plan, rather, is if we find an appropriate case where there has been a continuous claim or relatively continuous claim of innocence, that it is the type of case where it was not a change of plea where the defendant admitted committing the crime -- and before I forget, in our change of plea procedures, and I think Jim Wooley described a similar procedure in the Federal Government -- a defendant can admit guilt, plead guilty to a crime, and yet not admit having committed that crime; that is, provide a factual basis.

We have a procedure in California where a defendant can do that, and if, in our review, we see those cases, the fact that there was a change of plea, obviously will not render that case ineligible for further review.



Our plan is, if there is dispositive physical evidence left over that can establish innocence and our major case review panel agrees that we should offer that testing, we plan to offer that to the inmate through counsel, either counsel, if he or she still exists, representing that defendant or through our public defender's office or we have appellate lawyers in San Diego who conduct most of the post-conviction appeals in our state and county that we will offer it through counsel.

The testing will be done in either a government or private laboratory. If we are talking about one or two cases, I may be able to twist the arms of one of our two local crime laboratories to conduct the typing.

If they are able to do that within the confines of their case work and the inmate agrees, then we will do it that way, or if not, then we will seek testing from a private laboratory.

We do plan to give them I have called it a CODIS evidence advisal of our intention that if we are going to type the evidence, not the inmate's known type -- obviously, that is going to happen -- but our plan is if we type the evidence, then we may very well want to compare that evidence to

other evidence cases in our own county and perhaps at the state level as well. Again, this would be a case-to-case comparison, not a case the inmate or inmate to convicted offender case comparison as well.



So far, and again, these are very preliminary as you can see, as of Friday, our law students had looked at 80 cases; that is, 80 inmates. What is interesting to me is 73 of them were murder cases, either first or second degree murder as we use that term in California.

Only seven of them were non-homicide cases, which was very interesting. I mean that is good in the sense that the evidence should still be in existence, in theory anyway.

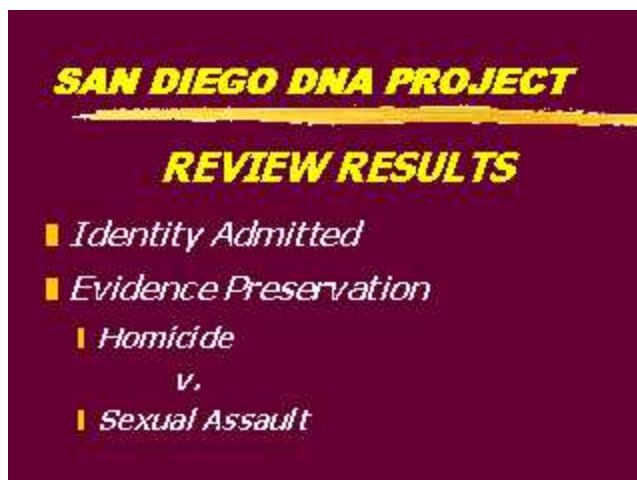
We have, the other lawyer and myself, reviewed 14 of them at this point, and all 14 of them are what I would call clear non-DNA cases. They are generally shootings where the inmate has admitted to being the shooter or aiding and abetting the shooter, claims of self defense and the like and so forth. Now, again, these are obviously at 14, a mere fraction of the number of cases that we have to look at.

I am going to estimate I think it is going to take our law students -- and they will have successors because they will be going back to law school within the next two months -- I think it is going to take us about nine months roughly for the law students to go through their review; and then we are trying to keep up with that so that hopefully, our review will be done in under a year.

Of course, testing, if it is, in fact, offered -- and I expect it will be; I don't think we are going to go through 560 cases and not find an appropriate case -- then obviously, that will take longer as well, but that is our San Diego plan.

PARTICIPANT: How did you fund it?

MR. CLARKE: At this point, with the law students, that is a fairly minimal request at this point at this time, and we are doing that within our own budget at this time, although we will seek funding as well for the work not completed. I forgot one.



PARTICIPANT: Woody?

MR. CLARKE: Yes?

PARTICIPANT: One other thing: When you had 73 homicides and seven others and you said you were surprised, I mean there were not more rape cases, or was that because of the destruction of the evidence?

MR. CLARKE: Yes.

The reason is sentence-based.

PARTICIPANT: Lisa is giving her expert advice that rapists are only after the letter "J."

MR. CLARKE: That is right; they are only of a particular letter.

With our change in law in California, although as of 1991 and before, the only way you could get to a sentence long enough for somebody to still be in prison -- these are inmates from 1991 and before, so they have been in prison nine years -- they would have to have been sentenced to at least 18 years in prison because those inmates all got half off basically for good behavior. So as long as they had an 18 year sentence, they could still be in the mix.

As a practical matter, that requires -- and I am just talking about sex crimes at the moment -- as a practical matter, that requires them to have committed multiple forcible sex crimes and have had a judge decide we are going to stack these sentences on top of each other.

While there are a number of those, they are somewhat limited compared to the homicide cases. So, I think -- again, this is a poor sampling, but not bad at 80 cases -- that we are going to see clearly the majority are murder cases.

MR. THOMA: There is one that is not there.

MR. CLARKE: Pardon?

MR. THOMA: The one I just gave you isn't.

PARTICIPANT: Woody, how detailed is the check off list? I am just wondering what the interns look for, their knowledge base for looking at a case. Is it pretty simple stuff?

MR. CLARKE: Yes, pretty straight-forward: Identifying information; a summary of what the defendant said to the police, but we kind of back that up by looking at the probation report so that we can get a good feel for what have the statements been over the course of the legal system's involvement.

Generally, we are seeing there can be, not denials, but either denials to police or assertions of a privilege not to incriminate; but then we start seeing the statements by way of either a plea or testimony at trial.

Then they tend to be backed up by the statements to the probation officer, so that at least in this small number of cases, they appear to be consistent from either a plea or testimony at trial through the probation report.

MR. THOMA: What was the philosophy and discussion you went through to begin this project?

MR. CLARKE: In what sense?

As I mentioned, the chief of our felony trial division, who none would consider a supporter of criminal defendants, just immediately reacted, saying why aren't we doing this. Again, that created a little silence for a little while, and there was a discussion phase.

I had another prosecutor come down from Northern California to discuss our project and also to compare -- that was Rock Harmon -- what he is doing with basically no resources.

I think we have more resources in our county in looking at older cases and so on and presenting an alternative or at least a simultaneous let's use law students to open up old cases and look at them as well, and we are going to do that as well.

We are actually going to devote attorney resources to looking at our older cases that are sitting over at our police department and our sheriff's department although, like many law enforcement agencies, with a decline in -- if I don't get this correct, correct me -- with a decline in homicide rates, homicide detectives have been able to devote at least some more time to older cases, and in San Diego, they are doing that as well.

MR. SHECK: Woody, how does this relate to what Mike Jacobs is doing in Orange County, looking at the old unsolved homicides? Do you link up with him at all?

MR. CLARKE: Well, this different. This is looking at it from a different, obviously, a different pool of cases, certainly; although, I know --

MR. SCHECK: It looks like a lot of homicides.

MR. CLARKE: Yes; although I know in our state there are at least two to three prosecutor's offices that are beginning to solicit -- well, solicit is a bad word; write letters to inmates directly to allow them if, upon request, they would like, then the prosecutor's offices in those counties will then conduct a review similar to ours, although this is an umbrella review, looking at all of them that we can identify.

We have received a few requests from inmates, having read on the news or in the newspaper, please look at my case.

PARTICIPANT: How many have you received, requests from inmates?

MR. CLARKE: From inmates, three at this point; not very many.

So, it is aggressive, and I think we are going to learn a great deal statistically, frankly, about evidence preservation; about the percentage of cases that go to trial versus plea in a fairly defined group of inmates -- obviously, life inmates in large part; and hopefully, information about, most importantly, any innocent individuals that are still in prison. That is our first and primary goal.

MR. HILLARD: Woody, in the criminal sexual assault case, did you mention earlier that you thought the police department had gotten rid of some of them? What is the percentage?

MR. CLARKE: Well, at this point, I don't know. We have only seen it in a couple of sexual assault cases where they have a policy that after -- and I think it is a retention for seven years, but destruction only upon an approval by the primary investigative detective, and in theory, we are not sure exactly how this works, in theory, a sign-off, for lack of a better term, by our office, although we are having to track that down to see exactly how that process works.

Our office is, and I am in the division that receives these requests, although I do not review them, generally, we will only agree to destruction if an inmate has either served the term or is close to completing the term.

Now, if they have done 15 years out of 16 years, we will probably go along with destruction, but again, until we really narrow this down with more cases, I don't think I have an exact answer to that.

In both of those cases, we went to the court exhibit room, and they still had all the evidence in both of those cases that was introduced at trial and were made exhibits at the trial. So, that is good as well.

In fact, in one of them, I went down to the exhibit room, and fingernail scrapings from a 1989 case, sure enough, had been marked. Barry can obviously provide much more information about that area than I can, but The Court appears, in our jurisdiction, to be hanging on to the evidence pretty reliably.

MR. SCHECK: That is generally the case.

MR. CLARKE: Is it?

MR. SCHECK: Yes.

When a serologist would have testified in California, would they introduce the rape kit itself or just offer the testimony of the serologist?

MR. CLARKE: Well, it varies.

In general, I think the rape kit doesn't make it to the courtroom in general.

MR. SCHECK: They do in Virginia, thank God.

The only other thing I could suggest to you -- I don't mean to mean to make more work -- is I think that what you are doing is fantastic, and we will learn a tremendous amount from it. I am not surprised by the numbers. I mean I think that it is 75 percent. In 75 percent of the cases, the evidence will be lost or destroyed, I think.

MR. CLARKE: Well, I remember your giving us that number, and I am anxious to see.

MR. SCHECK: That is our number. I mean although, obviously, in homicides, that is different. Ordinarily, we are sexual assault cases; you know, with a smaller percentage of homicides. You know, you seem to, because of the number of years people serve, you are looking at a class of cases that are more homicides. So, you will find more evidence preservation, but many of them will be inappropriate, but I would still imagine that 75 percent of the time, people won't even in theory be, you know, they either won't be eligible or there won't be any evidence at least.

The one thing that you might look at in these sexual assault cases that we found that hospitals, when they do the rape kits, save slides, and we have had a lot of success going back to the hospitals after the rape kits are destroyed and finding the slides under the names of the victims in those cases, and we can get the DNA off those slides.

MR. CLARKE: I will bear that in mind. That is a good point, Barry. That is a very good point.

I would have had 20 more cases to give you numbers on, but I was interrupted last night reviewing them by the Mets and the Yankees games. So, I will have to do them on the way home.

MR. THOMA: If you work through the next protocol, if you find a case that fits the bill that needs re-testing, what the lab is going to do and whether you are going to do it on all your own court motions or get a defense attorney for the arrestee involved, just kind of here is what the next step on a find is.

MR. CLARKE: Right; that will be if we find an appropriate case, then we will deal with the inmate through counsel, either an existing counsel or an appointed counsel, and deal with it that way. I expect, again, the numbers may be very low that, that ultimately occurs with, that some inmates may say no; I don't know. They may say yes; they may say no because, again, they do run a risk of losing that claim of innocence if there is further evidence established, and that could impact parole decisions, or they may be concerned about a CODIS search; but I would think most of them would agree to it.

MR. SCHECK: You know, it is interesting because we have been thinking a lot about the people that lie to us lately because, you know, we get -- it runs in funny numbers.

I mean last year, I think it was something on the order of seven out of ten of the people that we tested, the results were favorable. This year, it is three out of ten, and I guess there is an 11th case working. We don't know what is going to happen in Virginia. You know, so far, three out of ten have been innocent and seven have been guilty.

So, it is a small sample, so I cannot give you a, you know, it fluctuates. It used to be that two-thirds of the people we tested, the results were favorable. That does not mean they are all exonerated, but you know, because sometimes, they don't let them out; but now, it is a little bit more than 50 percent, you know.

So, there is a high percentage, and I have often wondered what it is. So, one of the criteria that I think is really terrific that you are using is the continued insistence on innocence because that is always so remarkable to me, that these people are refusing parole. You know, that always impresses me.

Those people have to be -- on the other hand, a lot of, and among the people that lie to us, a, they are, you know, psychopaths, right; otherwise, you know, why am I surprised that somebody that is convicted of a terrible crime is lying to me, you know, but you do get surprised about that in wasting our resources.

I also think that the CODIS advisory is a very good idea because we require that. As you all know from our work on the post-conviction, we just had a case recently of a guy that I was able to persuade the prosecutor to do the test because there were 17 unsolved cases that they always suspected he was related to, and then he said no. Even though I didn't tell him, the statute of limitations might have run out -- I don't know -- on a number of them.

So, I think that those were, you know, I think you have all right things in place.

MR. CLARKE: The over 50 percent, Barry, is which?

MR. SCHECK: Over 50 percent of the time once we do the test, it comes out favorable.

I mean, I don't know how that is going to run because it is such a small data set. You know, we are only, you know, we are under a hundred cases going to the lab, or something like that is the total.

So, that is not, you know, you can't really identify gigantic trends from that because if we get a run of seven in a row that turn out to be guilty, it swings the numbers very drastically. If we get seven in a row that are good, you know, it swings them back.

I mean as far this goes, I mean if by the time you do the testing, if 20 percent or 30 percent of the people that actually you get the test for turn out to be innocent, then the other 70 are, they are definitively guilty, it is a major success. So, it is --

MR. CLARKE: Just instinctively, I have been around our office long enough to have kind of a feel for cases, and -- Chris obviously would as well -- we have not had very many thin who-done-it cases, for lack of a better term, where a case has rested on microscopic hair comparison or very fleeting identification evidence.

Now, that is not to say they are not in there because they could very well, but it is just a little better than speculation.

MR. SHECK: How are you dealing with the hairs? Are you looking for cases that are turning on the hairs in particular?

MR. CLARKE: I have not gotten that far yet. We just have not found a case that fits anywhere near the profile that we are looking for, but again, this is very limited numbers.

MS. BASHINSKI: You are using quite a tight standard for selecting the cases.

MR. CLARKE: Yes.

MS. BASHINSKI: You are saying it would really have to be dispositive.

MR. CLARKE: Yes.

MR. SHECK: What is the standard?

MR. CLARKE: Well, is there, if it is a case, again, that fits the remainder of the criteria, is there biological evidence that still exists that, if tested and exclusionary, would establish innocence -- a Fred Day case, for instance.

MR. SHECK: Is the commission's standard a reasonable probability that he would not be convicted?

MR. CLARKE: Well, I think it is. I think Jan is right. I think it is a little tighter than that. Would it establish innocence if it is exclusionary? In other words, in Fred Day's case, that would be the case.

What surprises us about the Fred Day case is, of course, the other evidence pointing to guilt was fairly strong -- two eyewitness identifications and so on -- but fortunately, the semen stains on

the jeans of the victim could have come from no other incident than this attack in the facts of that case. So, that is what we are looking for.

Now, reasonable minds might differ, and that is why we are adding this additional layering process of review about what constitutes exculpatory evidence or not --

MR. SHECK: I mean in some ways, I don't consider it tighter. I think that the, it sounds like the same criteria we use because you are applying it sensibly. In other words, what you find sometimes, people go, oh, there was a confession, right; or oh, there were five eyewitnesses; or oh, we thought the evidence was very strong; or there were two or three or, you know, five eyewitnesses or whatever; and then if, but if, in theory, a DNA is on, if the evidence itself is so potentially probative, right, then it is innocence.

MR. CLARKE: Yes; in that sense, you are absolutely right, yes.

MR. SHECK: So, that is what is hard for people to, it is hard for people to apply that in a sensible way.

MR. CLARKE: Well, and it is what the post-conviction group has struggled with early on, obviously, was how significant is the evidence; categorization of cases and so forth -- is this a vaginal swab with semen from a two year old victim or is this a semen stain on a hotel bedspread where a rape occurred?

I mean those, to some extent, represent the extremes. The difficulty, of course, is categorizing them in between, and that will be our biggest struggle, I am sure.

PARTICIPANT: Hey, Woody, have you had any response from the victim community or victim advocacy community?

MR. CLARKE: I had one telephone call from an individual who is active in our community expressing concern, but by the time I had phoned her back, her concerns had been allayed by someone else, so no, other than that. Again, we plan to deal with -- again, assuming we find an appropriate case or more -- the very recommendations that are contained in that wonderful volume produced by the post-conviction review committee.

PARTICIPANT: Chris, one of the things we discovered in Arizona this year when we were going through the legislative process, we did have victim representatives at the hearings, and they and law enforcement testified on behalf of the bill, which I think contributed to the way it was passed unanimously both through the House and the Senate and ultimately signed by the Governor, and they took an active role in it. They looked carefully at the bill, and it kind of sailed through because of law enforcement, the labs, and victims' agreement with it.

COMMISSIONER ABRAHAMSON: Is anyone else doing this that you know of?

MR. CLARKE: No.

I have mentioned a few offices are directing letters to inmates; in other words, identifying their county's inmates in prison offering them this, not our resource, but offering the review of their cases by those offices, but not a proactive version like this.

Actually, the collaborator, another deputy in our office that is reviewing the cases with me, will be describing this program at the law enforcement summit as well with better numbers by then too.

MR. SHECK: You know, what it is really important to emphasize about what you are doing is just think how breath-taking this is; that for a comparatively small amount of money in terms of expenditures, you are efficiently going through, in nine months if you meet your projections, what it would take in terms of litigation and requests and everything, you know, probably a decade to take to do in your county. So, it is, you know, it is extremely efficient.

MR. CLARKE: Well, and I am trying to remember since about 1985, to my knowledge, we have only received about three letters from inmates ever about I am innocent; do this; there is a way to show this; and so forth. Now, that may not be uncommon -- I don't know -- but it gives me a little sense of confidence that we are not talking about many cases.

MR. SHECK: I have been insisting for three years now, you know, when you say many, you know, if nationwide, if they passed one of the versions of this bill, if there is, you know, two hundred cases that go to lab within one year -- assuming every state would pass this -- I would be surprised. Now, I could be wrong, you know.

By the time you find, go through all the criteria and find the evidence, and I mean out of those two hundred, you may get a lot of exonerations, which would be very interesting and instructive for the system, but I don't think it is a big number, you know, total I mean just because of the evidence destruction problem.

MR. CLARKE: I was going to say, and in that vein, I should mention the fact, those of you unfamiliar, the Leahy bill and even our California statute would mandate maintenance preservation of evidence. There are important provisions that law enforcement should be familiar with and attuned to.

Now, in Los Angeles, as we heard -- I don't know, was it about a year ago -- they collect and save everything. That is certainly one approach that may be appropriate, although I think their power bill is going up dramatically; but those aspects of these bills will impact law enforcement dramatically.

MR. SHECK: You know, I should mention because Clay is here, and if he did not know it, it is not generally a known fact, and that is, you know, the evidence provision preservation proposal in the Leahy bill is that the evidence be preserved for anyone that is incarcerated. However, law enforcement can move to destroy it and give 90 days for the, you know, upon notice to the inmate, 90 days to respond.

There may be some problems with how that would happen, but some provision like that seems, to me, a sensible solution to this. I am troubled by -- the Hatch bill says you only have to preserve it once the motion is made, you know, which, frankly, I would imagine would have been the law anyhow. You make a motion to preserve something, then they go out and destroy it.

The thing that people should know, and this was very troubling to us, is that when a guy named Kevin Bird (phonetic) was pardoned in the State of Texas in Harris County, which is the county that, if it were a state, would have the third highest number of executions in the United States next to Texas and Virginia -- that is the Houston area -- Bird was exonerated and pardoned by Governor Bush with DNA testing.

Right after that happened -- and it is lawful; I am not saying they did it illegally -- 50 rape kits were destroyed in the Harris County courthouse and then a contract was entered into with a waste disposal firm to get rid of more.

I can just regale you, and a number of them are in our book with story after story of how these samples are destroyed, you know, just bureaucratically. Some of the people that were exonerated, you know, they were exonerated by chance.

You know, Calvin Johnson in Atlanta, Georgia, they had a whole shopping cart throwing away the evidence, and some noise had been made about his case, and somebody just pulled it out and decided to save it. You know, it is just luck until somebody does what you are doing.

COMMISSIONER ABRAHAMSON: Thank you, Woody.

MR. CLARKE: You are welcome.

COMMISSIONER ASPLEN: Aside from what Woody already mentioned regarding the pending Federal legislation, I don't want to get into that too much other than to acknowledge that Barry, Woody, and Jim all testified before the Senate Judiciary Committee regarding those particular bills, and they are still up in the air. I don't think anybody has an idea, a very good idea of what ultimately will happen with those.

MR. SHECK: One day, the Justice Department will take a position.

COMMISSIONER ASPLEN: I'm sorry --

MR. SCHECK: One day, the Justice Department will take a position.

COMMISSIONER ABRAHAMSON: Not here.

COMMISSIONER ASPLEN: Right.

If we could now turn to the victim advocacy --

MR. SCHECK: I thought we were the policy-making --

COMMISSIONER ASPLEN: No, not at all, no.

Let me be very clear about that. This commission is not in any way, shape, or form, the policy-making body for the Department of Justice. We make recommendations on certain issues, but we have absolutely no authority to make policy for the department.

If we could turn to the Victim Advocacy Bulletin --

COMMISSIONER ABRAHAMSON: Which is in your papers too. It is labeled Understanding DNA Evidence, A Guide for Victim Advocates. I think it is your second or third down.

COMMISSIONER ASPLEN: This is a joint effort between the commission, the commission staff, and the Office of Victims of Crime; and as such, we should turn it over to Kathryn Turman for a few minutes to kind of talk about how all of this got started.

DNA Bulletin for Victim Advocates

A joint publication of the Office for Victims of Crime and the Commission

MS. TURMAN: Well first, I think we would like to probably change the title. Instead of victim advocates, use the term victim service providers. This is really envisioned to go to the wide sort of array of people who are involved with victims, particularly sexual assault victims or families of homicide victims.

It would include medical social workers, sexual assault nurse examiners, folks who work at rape crisis centers, prosecutor and law enforcement based victim service people, public health workers who are dealing with rape victims.

So, we really see this as a tool to really educate all of the different professionals who work with crime victims about DNA evidence, what it can mean, and what they should be able to explain to victims and how they should work victims through the process; I mean from the very beginning of a crime all the way to, you know, people who may be involved in post-conviction issues. So, it is pretty straight-forward, I think, and would just serve as a very useful tool, I think, to begin to educate the field.

We know that there are many sexual assault victims that go to rape crisis centers or who go to hospitals or health clinics, but who don't report to police; and we have found, through working with the same programs, that rape victims who have their exam by a trained sexual assault nurse examiner are much more likely to report the crime to law enforcement and to participate and cooperate with an investigation.

So, we figure that the better informed people are who are working with victims about these issues, the better able they are going to be to help victims make good choices and understand all of the processes that are involved in their case.

MR. SCHECK: Besides the suggestion I gave to you about Jennifer Thompson (phonetic), I had just thought of something else. On page 17, where you talk about things that might be told to victims, I think maybe you might want to add that if the result comes out to confirm that the convicted individual was, in fact, the perpetrator, you know, through the use of the data bank, I mean they might be able to link the person to additional crimes.

Although in theory, the person's DNA profile should be the data bank and linked to additional crimes already, but since there is such a backlog, it may very well be that this is the first time the person's sample is put into the system, so that might be a point you want to make.

MS. TURMAN: Sure.

MR. GAINER: Kathryn, would we attribute this to your office? Whose document is this?

MS. TURMAN: It would be joint from OVC and commission, both, and we would send it out. We have a mailing list and a very extensive resource center. We would also post it on our web site as well.

COMMISSIONER ASPLEN: It will obviously take a different form than this. I mean it will be like a, not necessarily like this, but something of this nature.

MR. GAINER: It is going to come out from the commission?

COMMISSIONER ABRAHAMSON: And.

COMMISSIONER ASPLEN: And OVC.

It will have -- as oftentimes, as you saw with the CD ROM, when you do something to the Department of Justice, depending upon where you do it, there is any number of seals that have to go on in various places. So, this will be something which carries the commission seal.

It will carry OVC's seal, maybe OJP, Office of Justice Programs, and ultimately, the Department of Justice, but primarily it will be commission and OVC generated and published and distributed.

MR. THOMA: Where should we forward any suggestions for a modification?

MS. TURMAN: You can send them to me.

MS. BASHINSKI: Do you have a deadline that you want get them by?

MS. TURMAN: I think we are -- you guys, did you finish all of your comments?

COMMISSIONER ASPLEN: We are pretty close, yes.

Do you want to have them send them to us?

MS. TURMAN: Yes.

COMMISSIONER ASPLEN: We have got the resources. Send them to Robin -- everybody knows that drill -- and we will take it from there.

MR. ADAMS: I will like to forward a new definition for the DNA advisory board. As a designated Federal employee for that board, on page 18, I think the definition there is a little bit misguided.

MS. TURMAN: That is great. That is what we need.

MR. REINSTEIN: Kathryn, when some of us do these presentations -- I know Debbie Smith (phonetic) has given her permission before, but is there permission with the publication of this to use Kelly Green and Jennifer Thompson's name as well on your cases?

MS. TURMAN: Yes; well, I would think so.

They understand. I think everybody whose case in here has been informed that this was a training, educational tool for the most part.

COMMISSIONER ASPLEN: We will confirm that.

MS. TURMAN: We will confirm it, yes.

COMMISSIONER ASPLEN: Actually, I --

MR. REINSTEIN: No; I don't mean with this tool, but I mean that you can use if any of us give presentations about the impact of DNA, post-conviction, solving cases, whatever.

COMMISSIONER ASPLEN: That is the case with Debbie. I have not spoken to Kelly on those particular issues, but that is the case with Debbie Smith.

MS. TURMAN: Usually, when we have victims' information or their story, anything the Department of Justice publishes is in the public domain, so it can be used that way.

MR. GAHN: As I read through this, when you put in experiences, you know, with victims, you know, you are preaching to the choir as to who are going to be the recipients of this. I also found this to be quite cumbersome, just the way it is written and all the information in it.

I do know that in Wisconsin, we provided, you know, the little pamphlet. "What Every Law Enforcement Officer Should Know" was given to all the SANs; given to all of our victim advocates. They think it is absolutely terrific. There are a number of modifications that could be done to that, but I think it is different when you send out that card that opens up and has a picture than something like this. This is like a paper, and someone is going to get a look, but why can't you make a card, a fold out card like we did for "What Every Law Enforcement Officer Should Know"?

MS. TURMAN: Well, I think maybe we could do something in the middle, but I think what we have to do with a lot of victim service providers is make the case for why DNA is important. I mean I think probably in your jurisdiction, you have got folks that are fairly sophisticated about these things. You are used to having SAN programs.

It is not that true, not true around the rest of the country; and I think some of the stories, telling the stories, and the way the bulletin would be done, it would be more readable, I think, than this format; and it really, I think, sort of makes the case for why people need to think a little bit differently about DNA evidence.

MS. BASHINSKI: You might want to, in the very first paragraph where you say DNA is currently present in about one percent of all criminal cases, it is likely to be present in 60 percent to 70 percent of in sexual assault cases. So, you may want to add that piece of information so that it becomes clear how valuable and how omnipresent it is in those kinds of cases.

MS. TURMAN: Maybe we can cut this down so it is not quite so complicated.

COMMISSIONER ABRAHAMSON: Maybe you could do both, have a longer version for those that need it, but also a shorter version.

MR. GAHN: If there is any way, though, to do that card like the one we sent out, that has been so well received throughout this country. Even the nurses love it. It is just terrific. It is nice little handy thing that they can just keep at their work station.

It tells them what to look for, and our advocates use it all the time. When the victims ask them, they go to it. It tells CODIS. It tells everything you really need to know, and it is just a nice, handy, convenient tool; and I really suggest that something be put in that format for the nurses and the advocates. It will make the product better and get the information, I think, out more.

COMMISSIONER ASPLEN: We will just change the title to What Anybody Should Ever Know About DNA Evidence.

MS. BASHINSKI: They are not mutually exclusive, though, are they?

MS. TURMAN: We could do a tear out card.

MS. BASHINSKI: Okay.

MS. TURMAN: We have done that before. We have done sample brochures and things you just pull out.

COMMISSIONER ABRAHAMSON: I am going to terminate the discussion for the moment anyway because we have moved into the slot for public comment, which is scheduled for 4:30 to 5:00, and I do want to leave that time open.

If it is not used, we will come back to this and then conclude. So, I am now opening this up for public comment. Anyone interested in commenting can just step to the microphone. Please state your name for the record and state your comment, question, or what have you.

(No response.)

COMMISSIONER ABRAHAMSON: Right now, I am going to continue on with a discussion on the victims advocates pamphlet, and then we will again call for comment in about five or ten minutes. Anyone who feels they want to comment, please interrupt the discussion and do so.

Is there anything else on the victims advocates working paper?

Do you, then, agree that something more simple, shorter plus a longer piece?

MS. TURMAN: We will just do a tear out card and a reference card.

MS. BALLOU: If I could just ask for clarification?

COMMISSIONER ABRAHAMSON: Please state your name.

MS. BALLOU: Susan Ballou with National Institute of Science Technology.

Chris, did you receive all our -- you had our comments on the subgroup for when we looked at this, I think, two meetings ago; is that correct?

COMMISSIONER ASPLEN: Yes.

MS. BALLOU: Were those incorporated already?

COMMISSIONER ASPLEN: Probably so, but was substantially rewritten since the time that you saw it. So, we did receive those. We probably incorporated them, but quite frankly, we should go back and that again because rather than go back and make a whole lot of individual changes, we went back to the beginning and reworked the scientific part particularly.

So, that is a good point, that we should go back and make sure we have included everything once we kind of started over again just on the science aspect of it.

MS. BALLOU: I understand the interest in basically informing everyone as to what is involved when a victim becomes a victim, and I was talking to Clay about page 2, third paragraph, the last sentence there, basically brings up a sore point, which we all know occurs where agencies that are depleted in time do not have the availability to test evidence when a suspect is not identified.

So, I would hate to see this as a false hope preached to a victim that their case will be entered into a system such as CODIS when some agencies are not going to look at those.

I do not know if you wanted to offer more detail in this avenue or just let it go hoping that additional funding from these other bills that are on the horizon might provide additional support to look at suspect less cases.

COMMISSIONER ASPLEN: You are talking about some of the things we pointed out on the CD ROM, some of the limitations of CODIS for example, where we included backlog and, you know, who is in and who is out and stuff?

MS. BALLOU: Right, exactly.

In addressing this, you basically have to decide how detailed you want this particular paper to be, but I would hate to be a victim thinking that my case is going to be looked at when I could get help in any way of a suspect and then come to find out it has been thrown into a locker room someplace and it is just sitting there.

MR. SCHECK: I think you raise a good point, Susan, but it seems to me that -- I think victims should know that. I think it is an outrage that you don't have the money to type these unsolved cases. I absolutely believe that, that is the number one issue. I mean, look, you know, I am just some defense lawyer.

I mean I cannot understand why law enforcement is not typing these unsolved rape kits that are sitting there where people cannot make IDs and DNA could identify people. I mean if I were victims rights groups, I would be banging on the walls of every state house in this country saying why don't you type these things. I mean it is nutty that I am the guy that is pushing this. It is absurd.

MS. BALLOU: In the question I brought this up, Chris, I think we might have addressed this before, which I don't want to go into a long, detailed discussion on it if you already have these comments.

COMMISSIONER ASPLEN: We will take a look them and see if those were included in those and make sure.

COMMISSIONER ABRAHAMSON: I suggest he look at it and then why don't you scan this again for those that are important to you that re-advise them. I gather this has been significantly changed.

Anything else on the service providers guide from the commission?

(No response.)

COMMISSIONER ABRAHAMSON: Any other comments from the public?

(No response.)

COMMISSIONER ABRAHAMSON: Is there any other business before the house today? We will have more time.

Barry?

MR. SCHECK: I just have one announcement. We had a case last week that I think you might want to know about. It didn't -- I don't know. Richard didn't write about it.

It didn't get an enormous amount of attention, but for our purposes, I think the it actually is a pretty significant case. It is a case out of Kentucky.

A gentleman named William Gregory, who did eight years for a crime he didn't commit; but it is the first case where mitochondrial DNA testing was used to exonerate, the only DNA test that was used to exonerate. Every other case has involved DNA analysis, frankly, of semen.

This is the first case where "mito" was used as the sole basis for exclusion, and it is, the case involved -- Gregory was a 45-year-old man living in a housing complex, the Breckinridge (phonetic) Housing complex in Louisville, Kentucky, and a woman was accosted at night.

The perpetrator had a knife in his hand. He was naked, and he had a mask on, but the mask was actually pantyhose that had been taken from the bathroom of the victim recently washed and put over the head of the perpetrator.

He did not ejaculate or rape her. He did take some objects and fled the apartment complex. She gave a description of a man that was five foot six inches tall, muscular, clean shaven African American, and the victim Caucasian.

Mr. Gregory was one of the few residents, a recent resident in that housing complex who was African American. He was 45 years old, six feet tall, and had a full beard.

Pictures were shown to her. She did not pick him out. His picture was shown to her. She did not pick him out, but subsequently, there was a one-on-one show-up in a police precinct, and he was then identified.

He was put out on bail because of the obvious weaknesses in the identification I think, although I don't want to surmise on why he was bailed, but he was bailed. Then subsequently, another woman in that apartment complex was assaulted in the same way by a man wearing a mask. She could make no identification -- he was wearing a mask -- except to say that his eyes were gray. Gregory's eyes are brown.

Nonetheless, he was identified by her based on the eyes, and both cases were consolidated for trial. He was then incarcerated. Yet, when a third incident occurred with the same MO in that housing project, they did not solve it, it appears -- although they are still looking -- the biological evidence from that third case that remained uncharged.

He was convicted. Now, he was convicted primarily the jurors have said, and when you look at the videotape because Kentucky, you might be interested in knowing, does not have written transcripts of trials. They videotape everything, so you look at the videotape of the trial.

Based on the testimony of Dawn Katz (phonetic), the hair analyst who testified that there were six Negroid hairs found in that pantyhose that were used as the mask, and they matched at 16 characteristics.

Now, as I am sure some of you know, hair analysts cannot agree whether you need 23 or 16 or however many microscopic characteristics to declare a so-called match or similarity or whatever you want to call it.

Nonetheless, she said there were these matches at 16 characteristics, and there were also the presence of what were called ovoid bodies in the hair, which the analyst went on to say she had never seen before in humans, but only in animals. Yet, remarkably enough, it was in the hair of Mr. Gregory as a reference sample and some of the hairs that were found in the pantyhose, at which point, he was convicted, the jurors have later said, on the hair evidence.

So the mitochondrial DNA testing was done. The only reason he got out of jail -- if this were under the Hatch bill, he never would have made it because it took six years, and there is a statute

of limitations of 30 months, I believe, isn't that right, on the current version of the Hatch bill -- there was a reverend who knew an inmate in the Kentucky prison system who kept on telling the reverend, this Reverend Edwards, who is, like, 80 years old, that Mr. Gregory was an innocent man wrongly convicted and needed help.

They went around their church, and they raised money because I think it costs, like, five thousand dollars to do one hair for a mito test, although that price is going down, and they had five and ten dollar contributions. They were able to raise the money because we could not provide it at that time.

It took a long time to persuade and get through the court system and everything else, but after five years, we got that hair tested and then an additional. All the other hairs in the stocking mask, they all matched each other, but they, of course, don't match him. So, it was on that basis that his case was dismissed on Wednesday.

I think it is a good lesson in the future of the technology, where we are going with it, and in addition, the lack of reliability of microscopic hair evidence, which I think you all ought to be on the alert you should not rely upon in any matter of significance without doing a mitochondrial DNA test.

COMMISSIONER ABRAHAMSON: Thank you, Barry.

Any other comments?

(No response.)

COMMISSIONER ABRAHAMSON: Well, we should say a word of congratulations to Dr. Adams, who is now Deputy Assistant Director at the lab.

(Applause.)

COMMISSIONER ABRAHAMSON: Thank you.

With that, we can at least release all of you who wish to be released without any DNA evidence today, and you are welcome back at 8:30 in the morning for coffee, et cetera. The meeting will start at nine, but we will stay for an open, continue the open comment, public comment, if there is any.

COMMISSIONER ASPLEN: Folks, you can leave your stuff here if you would like. Take personal belongings, but the rest of your things can stay.

Can I see a show of hands of folks who want to get together for dinner this evening?

MR. SCHECK: What time?

COMMISSIONER ASPLEN: I would say about 6:30. Thank you, folks.

COMMISSIONER ABRAHAMSON: We will stay, and we will not close this until five p.m. (Whereupon, at five o'clock p.m., the proceedings were adjourned, to be reconvened the following day, Monday, July 10, 2000, at nine o'clock a.m.)

Opening Remarks
Chief Justice Shirley Abrahamson
Chair

MS. ABRAMSON: Are we are ready to proceed? If we could have the commissioners and others in their respective seats. This is our second day of meeting. We began, as you know, at 1:00 yesterday and proceeded until adjournment time. We'll start again this morning. You all should have an agenda for this morning and materials that were distributed yesterday.

We will begin by introducing ourselves. I'm Shirley Abramson, chair.

MR. ASPLEN: Chris Asplen, executive director.

MR. CROW: James Crow, University of Wisconsin.

MS. TURMAN: Kathryn Turman, Office for Victims of Crime, Department of Justice.

MR. WEBSTER: William Webster, Milbank, Tweed, Hadley & McCloy.

MR. FERRARA: Paul Ferrara, director of Virginia Division of Forensic Sciences.

MR. GAHN: Norman Gahn, Assistant District Attorney, Milwaukee County.

MS. BASHINSKI: Jan Bashinsky, Chief, Bureau of Forensic Services, California Department of Justice.

MR. SCHECK: Barry Scheck, Cardozo Law School.

MR. REINSTEIN: Ronald Reinstein, Superior Court of Arizona.

MR. THOMA: Jeff Thoma, Public Defender, Mendocino County, California.

MR. ADAMS: Dwight Adams, Deputy Assistant Director, FBI Laboratory.

MR. WOOLEY: Jim Wooley, Baker & Hostetler.

MR. GAINER: Terry Gainer, Assistant Chief, Metropolitan Police Department of Washington.

MR. CLARKE: George Clarke, San Diego County District Attorney's Office.

MS. ABRAMSON: With us also is Lieutenant Terry Hillard, who stepped out of the room for a moment.

Our first order of business will be some announcements and housekeeping matters. Chris?

MR. ASPLEN: For those of you folks who are experiencing difficulty with your pager and cell phones, we're having a house phone brought down outside, and there will be a number that can be called into if you need it. We'll have a specific number that will go directly to that line. Just ask Robin what that number is when they give it to us.

Secondly, for the record we do have a sign language interpreter here for anyone who may need it. When we're finished here, if we don't have any acknowledgment that someone is in need of that particular service, we'll ask her to sit down unless we're notified.

Also I have copies pursuant to a request from a number of individuals of the tentative agenda for the National Conference on Science and the Law the NIJ is sponsoring in San Diego October 11 through 14. I'll put these in the back at the NIJ table. You can also get that information and you can register on line, and the last page of the agenda is the web address for that; however, what that takes you to is the what is new section and then you click through to that particular conference on that matter.

The only other thing I would have at this point is recognizing that yesterday all the members of the working group, the crime scene investigation working group, couldn't make it. Dr. Cheryl May was not here. She was able to make it today, and as such, if you have any comments and more particularly any more praise to be doled out for the quality of the CD ROM, please let Dr. May know that also because she was real instrumental in accomplishing that particular goal of getting that out and getting it out on time.

Behavioral Genetics Issues

*Dr. J. Raymond DePaulo, Professor of Psychology
The Johns Hopkins University School of Medicine*

MR. ASPLEN: Our first speaker today is Dr. Ray DePaulo, and he is a professor of psychiatry at Johns Hopkins University School of Medicine in Baltimore. He's also the director of the mood disorders programs at Johns Hopkins. His clinical and teaching activities focus on clinical depression and bipolar manic depressive illness. His research focuses in the genetics of bipolar disorder and depression, and we asked him to come and speak to the Commission today so that we could get an idea of what some of the issues are or probably more appropriately may be in the future. We've asked for much less than a prediction of what the technology will be more than what are the questions that will be raised as some of the technology progresses, and we hope that after his presentation we can have some discussion about that.

Again, referring back to yesterday's discussion about the final report and references to, what we didn't consider and what needs to continually be considered even after the expiration of the Commission, I think this is one of those class of issues that needs to be considered.

Dr. DePaulo, thank you for coming.

DR. DePAULO: Chris, thank you very much, and thank, I think, the Commission for inviting me to speak this morning.

As a clinical psychiatrist, I really was really quite concerned about what I might bring that would either be helpful or otherwise get me in trouble this morning to this discussion. As I tried to do a little bit of reading on forensics -- first of all, as Chris mentioned, I'm a clinical psychiatrist. I do research in the genetics of major psychiatric disorders; namely, bipolar disorder, and so I don't do the forensic work. I'm not a trained geneticist. Thank God that Dr. Crow is here since I studied out of his textbooks, but I'll reveal later that I've forgotten more than I've remembered.

DR. CROW: So have I.

DR. DePAULO: But as a clinical psychiatrist we do deal with a lot of practical issues around human behavior, and since there is an overlap there, I thought well, okay, I'll give it a shot. I would like my remarks, though, this morning to be seen as more of an orientation to a clinical perspective on some of these issues and to stimulate a discussion from there.

As Chris and I talked on the phone and he tried to relieve some of my anxiety with some supportive psychotherapy, I tried to organize a few -- how my DNA evidence will be used in a useful way in the courtroom in the future with regards to issues like innocence or guilt, sentencing, parole and probation, rehabilitation and treatment. I'm going to try to keep these in mind, although this is probably the last time you'll see these on one of my slides. These are the kinds of issues obviously that from a clinician's point of view that I'm asked to comment on from time to time.

The first and most fundamental point I want to make since all in all the things that I've read go back to one of my favorite topics when I was in college and that is the notion of free will is that genes are crucial in underlying our capacities as well as our constraints, and so that the capacity for choice and, if you will, free will are as much based on genes as genes are also one of the many things that constrain the limits of our ability to make decisions. I think if we keep that first principle in mind, the rest of what I have to say will flow fairly naturally.

An easy example is that intellectual capacity, the ability to analyze problems, obviously is one of those things that contributes in a practical way to free will, to decision making. Clearly there is an important genetic contribution to intelligence. There are many other elements of decision making, of course, but they are similar in form and limited by genetic as well as other influences.

The other element I want to mention is that another way to look at genes, as many of the genes that are going to turn out to be important in brain and in mental functioning, is that they have roles that are permissive as well as constraining, but no doubt about it genes do influence our mental faculties and our behavior. They influence the strength of our interests as well as the objects of our interests. An important factor as well is that it would appear that we act to select our environments based in part on our genetic makeup.

So that's kind of where I start in a general way. Actually this is important to me as a clinician as I work with patients and try to help them work with issues of behavior.

Let me jump to my conclusions, and this allows you to stop me at any time you want, Chris, and my comments -- I think I tried to do it a little bit like a newspaper article, the inverted pyramid, so you can stop me anywhere and I will have gotten into some semblance of a coherent review of what I know and think might happen.

Again, a basic point I would say from the scientific point of view is what we've learned so far from the study of DNA has added little in principle or of practical value for forensic evaluations of those accused or convicted of crimes. I'm reminded of what my colleague and esteemed geneticist, Eric Lander, said about gene therapy just a few weeks ago, and that is that he's happy for people to experiment with gene therapy in various tissues of the body, that is, if they're careful, but that he thinks we ought not to in many ways go around changing genes in germ cells, that is, in the ova or sperm cells since those then would be transmitted for generations to come. He said he has no clue that he could figure out no matter how smart he is what is going to happen over the next 100,000 years. So I wouldn't dare to compete with the powerful forces that have influenced our evolution to date.

I feel the same way about, if you will, the genetics of behavior in the courtroom; that is, that we have a jurisprudence system that has developed over many thousands of years, and what we know about DNA pales in significance to what we have developed over time in our courtrooms. I read articles by judges who say we're in terrible disarray. I'm sure that psychiatrists, behavioral geneticists, and psychologists are going to bail us out and solve our problems for us. Those of us with any sense of modesty whatsoever look at our own shop and say, oh, my God, when is the jurisprudence system going to bail us out of our mess? We're all dealing with relative levels of

ignorance. When you're looking at it every day, what we don't know looks a lot bigger than what we do know.

What we will learn in the future is impossible to say, of course. My guess is that what we learn will have greater value genetically in sentencing and rehabilitation than in adjudicating guilt or innocence, and I'll give a few examples that I think maybe will suggest why that is.

Then finally my third conclusion is that there are significant risks, particularly in the sort of short, intermediate term for the use of behavioral genetic evaluations in the courtroom with errors of commission and omission being equally problematic. Commission and omission are probably poorly chosen words, but I couldn't think of a simple way to say it. We talked about the fact that a number of prosecutors can already see and maybe have already seen people saying that they shouldn't be found guilty and certainly shouldn't be punished for an act that they acknowledge based on their genes, that the genes made me do it kind of argument. At the same time we have seen and certainly will see again at least a few times people lining up on the other side and saying because of your genes you definitely should be committed -- that's a psychiatric term -- should be convicted and incarcerated based on those alone. Those are equally dangerous conclusions in my judgment, and they do have corollaries in sentencing and in parole decisions as well.

So that's kind of how a psychiatrist who works in genetics looks at the overall picture of things. What I want to do next is to do in the briefest and hopefully most painless way possible a brief orientation to how a psychiatrist looks at the different kinds of psychological or psychiatric problems that might impinge upon criminal behavior.

I want to give the two scenarios that I could think of, things that I thought were not very likely at least in the near term future, but at least I can imagine them and you can imagine others, and maybe those will be some of the questions that you pose that might get a discussion going. One is that although it's unlikely to occur, what if by happenstance we discovered a gene variant that led in 95% of its carriers to either sexual offenses or to habitual burglary or violent assault, serial murders, et cetera? What about if that happened?

First off, I want to tell you that's extraordinarily unlikely. The evidence suggests that there is no such gene or even set of genes that would have anything like this kind of predictive value, but there is evidence that there are genetic influences on all of these behaviors. Would such a gene variant be valuable in adjudication, sentencing, and rehabilitation? Would it be ethical to use it or ignore it?

So I raise that -- I would ask your judgment in the legal profession as to what a 95% predictive value would do to your considerations. I don't have that answer. I think it's extraordinarily unlikely that it will come to that, but that's as close to 100% as we would ever get in genetics even for a disorder as simple and as straightforward as Huntington's disease, a rare, but very dominant form of dementia and movement disorder. Even people who carry the mutation only have a 95% likelihood of developing the disease, to say nothing then of how their behavior might be influenced by that disease.

Another issue that might come up that is more realistic, although it may not happen as soon as I would like it, what if we found a single gene form of schizophrenia or bipolar disorder? We have been looking for those for about 12 years now, but we haven't found any. I always say my research group is tied for first. It's nothing to nothing. That would not be by itself terribly powerful since most patients with manic depressive illness or schizophrenia don't commit criminal offenses, at least not ones that are violent or would be the kind of ones that would be of concern here other than things like perhaps loitering if they're severely impaired.

Further research, though, could show how a particular gene say could cause a delusional idea, that is, a fixed false belief upon which a patient or subject may act in a way that was very harmful to somebody else. An example would be that some women, some mothers with delusional postpartum depressions will develop the delusion that their child, for example, has been possessed by the devil, and in fact I have had such cases, and in a terribly tragic way of trying to cleanse their child they literally scald the child to death. I've seen cases like that.

We could obviously discover a gene that would show us how that took place. The question is what would be the implication for adjudication? My sense would be that we already know about that clinically. I've never had a patient in such a state ever convicted of murder, so that I don't think the DNA would be very powerful in adjudication of guilt or innocence there. It would probably be very useful and powerful in educating the public as to how the courts reason to the decision, and certainly the information we have would be very important in terms of helping us both treat the patient and preventing the tragedy.

Those are the kinds of future developments, the first of which is extremely unlikely in any scenario that I can imagine, the second of which is still as of today at least wishful thinking, and to talk about how they might have greater or lesser influence on adjudication in the courtroom, there are four distinct paradigms, if you will, that guide our clinical approach to psychiatric problems, and that is there are four different modes of reasoning, four different ways of understanding the problems the patients present in the clinic.

The first is that we assume patients that we see as psychiatrists have diseases. Schizophrenia and manic depressive illness are diseases in the same way that pneumonia or asthma or epilepsy are diseases. The only difference is that the symptoms are fundamentally psychological symptoms. The causes are clearly related to brain malfunctioning, although we cannot tell you today exactly what the malfunction is.

The second category of problems, if you will, are people vary in their temperament or personality traits, and those in the context of the circumstances people find themselves in create vulnerabilities for patients that often present to the psychiatrist, and so that a person who is very careful and methodical might also be a person who likes routine, but doesn't deal very well with novelty. That would be an advantage in the routine everyday working situation, but would be a vulnerability for that person when they had to change jobs in a disorganized workplace, for example. But this temperament certainly influences patients' behavior, and we see that as a fundamental issue in psychiatry.

The behavior paradigm itself obviously is the one I've got highlighted because that's the paradigm that is of most direct salience here today, and it is -- I'm going to talk about it a little bit more -- the more complex of these four paradigms and has both physiological and social determinants.

Finally, the life story or narrative approach to psychiatric problems perhaps is best known in our culture because of the popularity at least at one time of Freud's theories of development and psychology, but there are many others, all of which, though, basically understand people in terms of where they have been and what their aspirations are and what has happened to them along the way.

Just to flesh these out, one more sentence or two worth. The disease perspective or paradigm uses the logic of categories for qualitative differences; that is, you either have schizophrenia or you don't. It might be difficult to tell, but we understand schizophrenia is something very different than say Alzheimer's disease and that they are not simply points along a curve.

On the other hand, temperament uses the logic of dimensions or quantitative differences, for example, people are more or less extroverted. There is no one that has absence of extroversion. People are more or less agreeable. The logic of behavior is the logic of goal directedness or teleology.

For example, the most simple of behaviors in some ways is eating behavior, and we can talk in terms of hunger and the strength of someone's hunger, but also what they consider food if they're carnivorous and then the logic of the narrative or life story is the logic of empathy. We understand people's losses. We understand aspirations that are either fulfilled like in the Wimbledon or that are frustrated there or anywhere else.

So these are the ways in which psychiatrists try to understand problems that patients present. All patients have personalities and temperaments. All patients have behaviors and all patients have a life story. Some have diseases that affect their mental functioning and some don't.

So at least three of the four perspectives apply to everybody I see to some degree. I guess the most important point is that it takes a synthesis of these really to come to some sort of formulation or understanding of a particular patient. In the courtroom you're often going to see combinations of these issues, and I think it is valuable for us as clinicians. It's probably going to be valuable in terms of also understanding the role of genetics in the courtroom to understand that the role of genetics will be different in these different perspectives.

To go from the bottom up, there is no direct application of genetics to the narrative, the logic of narrative or the narrative of empathy, but there are significant genetic contributions to behavior, temperament, and diseases.

I want to just mention again a little bit about the treatment rationale. It's a kind of short and sweet version of the treatment rationales for the four perspectives because that will get us into the issue of rehabilitation.

Obviously most of us are familiar with the disease construct when we go to a doctor and that the treatment rationale there is to cure, that is, to eradicate the abnormal body part by surgery or reverse the functional or biochemical abnormality and/or to prevent these things. In terms of personality or temperamental variations that cause vulnerabilities or problems, the main logic of treatment is to play your strengths and avoid your weaknesses.

In terms of the logic of treating behavioral problems, getting to the thing that's most salient here, actually the logic is to stop the behavior. That's the first and foremost logic. This is where I think actually a number of judges look to psychiatrists incorrectly perhaps to solve their problems. We do not have a sterling track record in stopping bad behavior. Our theories are probably worse than our practice, but there are complementary roles for social support, stigmatization, and contingencies in stopping behavior. Once a patient stops the problematic behavior, though, then we work with them on all kinds of things that they perceive to be important in helping them sustain that abstinence.

Then lastly what is the logic or the treatment for a problem that we see is derived from either frustrated aspirations or loss or demoralization, and that is to rescript the story, to work with the patient to understand the story in a more constructive and positive light than they are understanding at the time they come to us. All of these again are going to be important to people in the criminal justice system because they're people. That means they will be at some point in their life patients as well and so forth.

The most complex of these is four paradigms is the behavior paradigm, but it's very important to keep in mind that again theorists ranging from Skinner to others and Freud notwithstanding that choice or goal directedness is a defining element of behavior. Behavior is powerfully influenced obviously by environmental factors, and many behaviors I say develop from -- I should say develop in the context of drives or appetites, and they may be natural drives or self-induced drives.

We would call the drive for alcohol consumption in someone who is addicted to alcohol a self-induced drive even though there is a genetic vulnerability that makes some people more likely to develop that self-induced drive than others. In the families, for example, of alcoholics you find also an excess number of teetotalers as well as an excess number of alcoholics, suggesting that a little bit of knowledge about what you're vulnerable to might be useful as well. These drives do have genetic influences, be they influencing your eating, your sleeping, alcohol tolerance, et cetera.

So those top three are kind of the three areas that are very directly related to the behavior itself, but behavior also is influenced strongly by personality traits which have a significant genetic underpinning. For example, again in alcoholism the likelihood that you will drink before age 15 is strongly related to your personality traits. If you're adventure seeking and you're not very risk adverse, you're much more likely to experiment with alcohol at an early age. There are other influences as well such as what other people are doing around you is probably at least as powerful, and that has a significant influence it turns out on developing alcoholism. So it's not directly related to the behavior of consuming alcohol, but it is related to the kinds of behaviors you might experiment with.

Lastly, behavior can be strongly influenced by diseases including genetic ones, bipolar disorder. Again, when my patients are manic, they are very irritable. I have a fair number of manic patients who have either gotten themselves injured, one patient by jumping out of a window with the idea that they could fly. Others, though, because they had ideas that something wrong was going on. I had a patient that was released from a hospital he was in, and immediately he went out and picked a fight with a policeman and got his eye put out. I had another manic patient who when he became manic, felt intoxicated, felt high, and when he came halfway down from the mania, he broke into a drugstore. He thought I want some drugs. That will make me feel that way again. For the first time in his life he breaks into a drugstore, gets caught, gets shot, and is paraplegic.

Those are the stories I remember, but the fact is that this person when he was under the influence of mania was a completely different person than he was at other times, but the behavior was there nonetheless.

So those are the kinds of things that will include behaviors. It's important to keep in mind I want to reemphasize that most people with mania, even though they're very irritable, are not violent. Most people with depression, even though they may feel hopeless and worthless and like they shouldn't be alive, will not attempt or commit suicide. So, therefore, diseases alone and even finding single gene forms of diseases is not by itself going to revolutionize in my opinion our fundamental approach to behaviors in the courtroom.

Let's talk a little bit about again the two ways of looking at behavior. One is the components of driven behaviors, and for our purposes today that is either something that has a physiological underpinning like alcohol induced or alcohol addiction or eating or sleeping or sexual behavior all might be applied here. The point is that there is a physiological drive either naturally present, either developing say at puberty like the sex drive, or present or induced as in alcohol dependence and that it is influenced in these two directional arrow ways by conditioned learning and by choice that many people will have the drive.

Most people through conditioned learning will have socialized that drive and will make choices that are appropriate to the situation, although we're not all equally driven and our choices of what we find attractive or of interest to us are the not the same. That's true, for example, that some people are probably genetically more likely to use one type of drug, whereas others are probably more genetically more likely to use another drug. When it comes to drug use, like alcohol, the main genetic determinant of alcoholism that we know about so far is the ability to tolerate alcohol. If you can't tolerate alcohol, it's harder to become an alcoholic. So again the gene that is associated with this susceptibility to alcoholism may be a permissive, not deterministic gene. So you want to keep that in mind.

So this set of influences operates in many cases right over, on top of, if you will, the next set of influences. This is, if you will, from the behaviorists the operant paradigm or the socially learned components of behavior. I was taught these as the A, B, Cs, and it was antecedents, behaviors, and responses -- I'm sorry -- the antecedents, behaviors, and consequences approach. Basically it's the relationship between responses or choice or action and their consequences that is the powerful element.

Here you all are very familiar with this paradigm, as I think most people in law enforcement are. This is not a medical paradigm, but a social one. It is impossible to say that genetics is more important or that driven behaviors are more important than the socially learned behaviors. They in fact are intertwined and overlap with each other all the time. In this sense probably the one thing that Freud had contributed that will probably stand the test of time, although he might not be given credit for it, is that driven behaviors often have a way of motivating behaviors that are not apparently driven, but are at a distance.

I think of the fact that although shoveling snow is not a driven behavior I guarantee you, but that it might be because if I've got a foot of snow in front of the house, my wife might not offer me any breakfast or lunch if I don't shovel the snow. So that in the service of driven behaviors I might put into place some socially learned behaviors as well.

Just to spend the last two or three seconds of this on the other paradigms as they might have both a genetic influence and affect behavior, the temperamental paradigm or personality paradigm really goes back to actually Dale Myers, who started psychiatry at Johns Hopkins, but seeing personality or temperament as potentially life circumstances, as provocation, and then emotional or behavioral responses as the result is a reasonable way of understanding these.

The point I guess I want to make here for purposes of behavior is that there is an element of constitution and genetics there in our temperament, but it is not simply our temperament in terms of say extroversion or introversion that might be important for behavior like criminal behavior, but our physical constitution.

So again when we talk about the genetic influences on criminal behavior, we might be talking about something as simple as -- we're going to have to grapple with this -- just having an athletic body build may be a very powerful influence. This has been shown in many old studies. People tend not to study it anymore, but in the famous study of the Irish and Italian neighborhoods in Boston -- I forget the neighborhood -- by Glook & Glook in the 1920s temperament, body build, parental supervision, and social and economic status were the four most powerful influences on criminal behavior, and clearly there are important genetic influences on body building.

There are genetic associations that have been reported in the literature. You will see them. You will probably hear about them. With temperamental personality traits there have been variations in the dopamine receptor genes that have been reported to be associated with extroversion or novelty seeking. There have been variations in serotonin transporter genes reported to be in association with introversion, really the opposite side, if you will, of extroversion, but what you really need to know are two things.

One is that for every positive study there are probably three negative studies. Let's assume optimistically that these are right. I mean that optimistically. They would still if true account for a very small effect size each, and if we could put together the effect size of all the genetic factors on such traits, we probably wouldn't exceed much beyond 50% as best we can estimate today. Temperament is not behavior. So we're several steps removed.

The disease paradigm is the simplest for us in medical schools today. It's always nice to remind myself of it is one of the modern constructs, disease. The old construct really comes from the temperamental construct of Hypocrites, but basically when we understand something is a disease -- and again I don't consider alcoholism as a disease; I consider that a metaphor. Using the word "disease" is a metaphor for alcoholism. It is something like Alzheimer's or bipolar disorder or schizophrenia in terms of things that affect psychological functioning, but there is a symptom cluster that is due to some abnormality of a body part or malfunction of a body part, and that the ultimate cause -- there may be various ultimate causes in many cases which may be genetic, as in the case at least in some forms of Alzheimer's disease.

I just take you through Alzheimer's disease. The clinical syndrome is called dementia. That is an acquired loss of cognitive power in a state of clear consciousness. The pathology, the body part is in the brain where you see plaques and tangles, and the causes certainly include genes, but certainly other factors as well. So that's kind of the disease paradigm which can lead certainly to behavioral problems.

The current summary, again, I can't resist at least giving you a summary of where we are on the genetics of disorders like schizophrenia and bipolar disorder. Again, they are ones that you hear about in the courtroom as well as in the newspapers, but what is clear is that the twin studies strongly support a more genetic contribution to these and most major psychiatric diseases, but that genome wide studies to date -- and there have been several of them -- have not located any genes for simple dominant or simple recessive forms of these conditions, and therefore single gene forms of these disorders, if they exist, must be uncommon. That doesn't mean they don't exist, but they will be uncommon, and that most genes contributing to these disorders will turn out to be risk factors as in cancer risk factors or high blood pressure risk factors, not deterministic.

The life story paradigm -- we've talked about this -- is simply that we understand the problems a patient has in terms of setting, sequence of events, and outcome, and that probably the important part of the life story paradigm is to connect those two arrows, which are the personal meanings we attach to these settings and events and outcomes.

As a psychiatrist, I'm particularly sensitive to the fact that one after another over the last 100 years at least a variety of social theories, including ones based on genetics, suggest that the notion of free will is an illusion; that the most prevalent form of that argument today comes from what I consider a naive interpretation of neuroscience including genetic neuroscience.

Clearly the organ of the mind is the brain, but how the brain produces the mind remains a mystery, and as a smart person said, the brain may be more complex than it is smart, so we may never know how it does this, but nonetheless, the real optimists such as Edward Wilson suggest that we have a radical solution to this problem, and he may be right, but if so, if we do come to some radical solution to this brain-mind problem, how the brain produces minds, that it will alter our relationships with each other and our relationships to societies in ways that are difficult, if not impossible, to conceive; thus my conservatism in thinking that we have a lot more to do to revolutionize this.

I will be happy to stop there and take questions.

DR. CROW: One thing you said certainly resonates with me, and that is the role of new knowledge in genetics is much more likely to influence your viewpoints about punishment and rehabilitation than it is about diagnosis or discovery of the identification of who committed the crime. It seems to me that's the place where your subject and mine most intrude on social behavior.

I might add one thing about this. It is my hope that with the discovery of a genetic cause which might lead you to a little bit better biochemical understanding and therefore ultimately better psychiatric understanding, that maybe our society will move one small step in the direction of rehabilitation and prevention rather than punishment as the paradigm.

DR. DePAULO: I understand that. I'm not sure I totally agree with the last part of that statement. I certainly agree we ought to move closer to better rehabilitation.

MR. SCHECK: I guess while I subscribe and take to heart your overall points here, I think it's naive to believe that the judicial system or even others are actually going to believe for a minute that you know as little as you're telling us you know. We have to think very hard I think about our friend Dorothy Nelkin and all that she has written about genetic essentialism and mapping of the genome and what all this means.

I'll give you some examples. I am by no means as sanguine as you are that this will only be used in the sentencing process, although I agree that it will first come in there because the threshold for admissibility of evidence in the sentencing process is lower, and we can easily see its application in terms of narcotics cases and other things where we may know more about serotonin and dopamine and other things.

I gave the example of the cases, and I have been involved in a few of these postpartum depressions and women that, while I'm sure you're right, that everything we would know about that situation would be known clinically, I'll bet you anything that if courts knew that there was some kind of genetic component that was a risk factor, that would be extremely important to a fact finder and probably would even be admissible.

Even today there is this terribly tragic story of young man that was found hanging from a tree in Mississippi. There was an interview with all of his family members, his football coach, everybody saying that he was a happy young man, but he was dating white girls, and so there was some fear in that community -- and they're marching today -- that maybe it was a lynching.

If somehow they took his blood sample and they did some analysis and found that maybe there was some genetic variant that made him more susceptible to depression and they can link it to some other person in his family who had depression, et cetera, all of a sudden that's a huge investigative clue, and it would be regarded as maybe even dispositive in a case like that.

So I don't think you can just say -- I think that there is a feeling out there that this genetic essentialism, that this stuff is really, really important and it will be relied upon very quickly, I think.

DR. DePAULO: I didn't mean to suggest that it won't be influential. What I meant to suggest was that what we actually know is very little. You see it on TV shows already people making these arguments. I can certainly see how they would influence people. The questions I get all the time suggest that there are lots of people that are very ready to believe these things. At the same time I think that how they should work might turn out to be very different than how they will work is your point I think. Is that fair?

MR. SCHECK: Yes.

DR. DePAULO: By the way, I also don't disagree with you that information to support a diagnosis shouldn't be kept out of a courtroom. That's supportive information. I think that would be very helpful. We desperately want for clinical purposes and certainly they would help us in a courtroom as well to have genetic tests to confirm diagnoses in psychiatry.

Diagnoses in psychiatry -- you know, I don't know of any other area of medicine that has a lower reputation for the quality of their diagnoses even though when we do studies and do it properly, it turns out that we can diagnose clinical depression or schizophrenia as well as a doctor can diagnose a heart attack in an emergency room. Still we would like to do better. We're not great in diagnosing heart attacks in emergency rooms either.

So it's not that that information won't be valuable as part of getting as much information as you can, good information to the courtroom. I do think the issue comes to one of the early points I perhaps overly condensed, and that is once it gets in there are people going to construe it narrowly as it's intended, or are they then going to take it and turn it into the whole story, which I can hear you saying that. I can certainly see that.

It's one of those things psychiatrists are the only people in medicine where every patient we see is already a psychiatrist. Nobody comes in and tells their cardiologist it's my left anterior descending artery, but, believe me, everybody knows psychiatry.

MS. BASHINSKI: One issue that concerns me has to do with, forgetting the courtroom for the moment, talking about prevention because saying we know very little and yet seeing how people use that little knowledge and misuse it, what would your comments be or thoughts be about where we're headed or where we might be headed taking inappropriate action and possibly naive reactions to what people misunderstand as being a predisposition to criminal behavior, for example?

DR. DePAULO: You might want to specify that a little more. I can go in 18 different directions on that one.

MS. BASHINSKI: I really don't have the knowledge to say what the trends might be now, but I don't think it takes a great imagination to think that people would misuse or could misuse what they perceive to be predictors in criminal behavior.

DR. DePAULO: We don't have to actually go forward; we can go backwards and find those. It has already happened. There is no reason to believe it won't happen again, especially if we put the old wine in new skeins, if you will.

The XYY situation is a case in point that's in the living memory of most of us where it did turn out there were more people with XYYs in jail than would be expected by chance alone; however, once you look at the predictive power of that, it was terrible, and the simple-minded interpretation of that was very prejudicial.

So we've already had such examples. It's easy for me to see that we will -- to give Barry's point again, not only could it occur again; I think it will happen again at least once or twice.

MS. BASHINSKI: Precisely.

DR. DePAULO: What is it Churchill said about Americans? You can depend on them to do the right thing after they've exhausted all the other possibilities.

MR. ASPLEN: If Phil Reilly were here, I think he would talk about the value of understanding and perception of reality, which I think is a corollary to both what Jan and Barry were saying, and I guess this is an issue that is as important to the Commission. How do we in the criminal justice system deal with that perception as the integration of behavior genetics begin to flow into the courtroom? How do we deal with the fact that because there are allegations that in fact we can determine a thrill seeking gene -- how do we as a society deal with that to separate the reality from the perception?

DR. DePAULO: That's a good question. I would love to hear comments myself on that.

MR. GAHN: I suspect it's going to be dealt with the way we've dealt with it in all our years of jurisprudence, and it's generally going to be weighed as far as what is relative, what is probative, and whether it's going to come in as evidence or not. I don't think there is really anything you have to create that's new. I think what we have in place can handle any type of new evidence coming in.

DR. DePAULO: Again, I think there is no doubt that that's what I certainly believe, but the question is once you get say some small amount of information in, is there anything that you can do in the courtroom to make sure that people construe it correctly, don't take it to mean more than it does?

MR. CLARKE: It has been historically kept out not because it's not relevant. It's highly relevant, but it is considered over the years highly prejudicial because it is. Because someone has committed an act before; therefore, the fear is the fact finder will find it much more likely that the person has committed the same act today. So that's going to be a continuing concern,

although I think legally we see more propensity evidence being allowed in court as time goes on. So this will become a great concern with perhaps what may be as probative of any evidence just on the limited issue of propensity.

MR. WOOLEY: The propensity evidence is usually being proffered by us, the prosecutors, and I think what we're talking about here is a possibility of a world where defense attorneys charged with the zealous advocacy rule in a case where it's an absolute lay-down for the prosecutor actually may be embracing the violence of the crime and saying look how horrible. It only could have happened because of some genetic underlying cause. We live in a system where we're looking to punish people generally for volitional behavior, and this wasn't any more volitional than the fact that this man may get Huntington's disease or something like that.

That's the argument I see. I see it being proffered by defense attorneys in cases where there is nothing else to be said, and that's what I think is going to be the real interesting playing field in which this may be played out in our legal system. I don't know how that's going to play out.

MR. REINSTEIN: We see it right now in capital sentencing. There have been several cases where that has been introduced. The other thing that we see is the defense of the family tree, whether it's in the area of violence or -- I had one case where they developed a family tree regarding sleep disorders and trying to hook that in as far as mitigation in the sleep case incidents.

MR. GAINER: I take a little bit different approach than Barry does in the sense of what this information can provide in the context of historically in the adjudication phases of cases we look at what and how as opposed to the dispositional phase is more why. So I think as least historically I think it will remain that way. Frequently in a case in defending a client you want to get into the why. Sometimes you can and sometimes you can't, and this will be obviously a formative phase if these predictors actually do come about.

MR. SCHECK: As I said before, I think it will start in the sentencing phase for many of the reasons you're saying, but it will very quickly move over to the other phase, and there is no reason to believe that it will not be used in a prosecution trying to prove its case because in so many of the cases mental states are this critical battleground of certainly many violent crimes. That's what we're trying to decide.

MR. WOOLEY: I'll disagree with you on the prediction. I think it's more likely to be used on the other side of it. I really have a hard time envisioning a scenario where people from our side of the room will be proffering it as part of their case in chief to show this person committed the crime. Maybe I'm wrong, but I predict it as more seeing it in a scenario where the case is such a lay-down for the prosecution, it's just so solid and there is just no question of the who and the what and the how, that a defense attorney charged with trying to do what he or she could ethically do to zealously advocate his or her client's interests would be talking about my client's lack in the requisite mental status because this was predetermined. That's where I think these things are going to be discussed.

DR. DePAULO: I would rather see one problem than two, so I hope you're right, but my guess at least at different times and different places there will be influences that will move in both directions.

MR. GAINER: Maybe the prosecutor would want to prove that one didn't have the predisposition.

DR. DePAULO: Actually I should have mentioned that. I think that it is conceivable that somebody will say see, he has schizophrenia, and if you have a set of genes and other things that are sufficient to say the logic that he did it is very small.

MR. WOOLEY: As sort of a rebuttal, but in terms of just laying your case out there, no.

MR. REINSTEIN: The one place we're seeing it as far as the prosecution, the closest is the SEP cases for civil commitments, and that hooks into propensity, but you're seeing that in the state's case in chief to keep somebody in the state hospital after they get out of prison.

MR. SCHECK: Frankly, there is a law now that was approved by the United States Supreme Court in a Kansas case where when you're trying to prove that somebody is a violent sexual predator, the statute had in it that there was genetic inherent characteristics that made somebody a pedophile. Isn't that one of the first areas -- I mean if there is more of a recidivist hardwire defense in our law than pedophilia, I don't know what it is.

In fact, the case went to the United States Supreme Court. At first the Kansas Attorney General was saying we need these laws to permanently commit somebody because there is no cure for pedophilia, but that was not actually helpful to his argument. By the time he got to the Supreme Court he was saying maybe there is a cure for it because it was more helpful for him to say that than otherwise to uphold the constitutionality of the statute. But I'm not sure that many people agree with that.

MR. WOOLEY: I don't think that we're disagreeing. I think that those types of things from a prosecutor's perspective will be dealt with the way Norm talked about it. Prosecutors will want to present it in the states it's available propensity evidence under 404 the way Norm said. I'm just having trouble envisioning a scenario where you can go to the next step and say let me tell you about his genetic predeterminant.

MR. SCHECK: What is so striking about all of this, take the example given about the postpartum depression, perceiving the baby as possessed by the devil. The absence of the genetic factors would be critical for the prosecution to prove that maybe it really is delusional or it's culpable conduct versus bringing it in, and that kind of so-called propensity evidence or risk factor evidence, if you will, don't you think that in cases like that the courts are going to be more eager to adopt the, quote, hard science than they will looking at what we're told is really something we already know clinically?

I think they will. I think they will in a heartbeat because of the frustration that judges and lawyers have with psychiatric testimony. I mean the geneticist is a -- here he or she comes in the

white coat and they're talking about genes. They're talking about something that, you know, it's there or it isn't there. I think this genetic essentialism is extremely powerful and attractive and will find its way in real quick.

MS. BASHINSKI: My point was that it's not just in the courtroom. It's in all aspects of how we behave socially. I fear for the education system, for example. We identify young children we want to target, and that goes back to the history --

MR. WOOLEY: By the way, I need to correct the record. I said we prosecutors. I'm not a prosecutor as of three months ago. I think I'm just genetically predetermined to seeing the world that way.

MS. ABRAMSON: Any other comments? Thank you.

We'll move on to Dr. Crow, who will comment and report on the research and development working group report. Did everyone get a copy of that?

Research & Development Working Group Report

Chair, James F. Crow

Final Report Review and Approval

DR. CROW: I very much appreciate what the latest speaker said. It's very easy to oversell this magic stuff and assume that that will solve all of our problems. It is remarkable to have this kind of depth of knowledge, but I guess I should emphasize just as he did that just knowing the sequence of DNA doesn't tell us very much. It tells a lot, but it doesn't tell us all we really want to know about a person.

DNA is in the news now. Almost every day I pick it up and there is something about it. There is the announcement that the sequencing is now complete. A more correct announcement would be that it's approximately 90% complete, but that it's enough to put to use and it's already yielding interesting information and potentially important information.

It wasn't very many years ago that I had lunch or dinner with Robert Sinzere in Santa Cruz, and he was proposing sequencing the human genome, and I can remember my own thoughts that that's terrible, pie in the sky. It's incredibly expensive. It probably couldn't even be done, but I did think at the time that one or the other of two things would happen. Either it would be so slow and so expensive and so distracting that it would just fall under its own weight, which is what I really thought would happen, or that the techniques would change so fast it became a feasible thing to do. It's not as expensive, and, of course, the latter is what has turned out to be the case.

Right now the sequencing machines, which are really magnificent, can turn out DNA sequence at an enormous rate without any human intervention to speak of. So now the problem is putting these pieces together. It's almost as if you had a 10 foot long rope cut into approximately 1 foot lengths and then you have to put it back together again. This is done by matching the ends, but if you have a million pieces of DNA, that's roughly a million squared of possible matches, and it's just an enormous task to go through all of this. A computer can do it faster than people can, but it's still a major task, and my congratulations certainly go out to the mathematicians who have worked out algorithms for putting these very complicated things together.

It may take some time, and one of the reasons is that a lot of DNA that we have is really highly repetitive, so we have sequences here and there and elsewhere that are very much like others, and putting those together and into the right sequence may mean that finally getting 100% of this thing may take quite a while.

The task of our committee, however, isn't to solve the DNA problem. It's to predict what will happen in the use of DNA for forensics in the next ten years, and we've taken two year and five year and ten year intervals to look at. A few weeks ago I was invited to give a talk and predict what genetics would do in the next century, and in preparation for this I decided to see what people at the turn of this century, that is, the 20th century, what predictions they made.

One of the greatest scientists of the 19th century is Alfred Russell Wallace. He made two predictions -- he made several predictions. I picked the worst ones. He predicted that vaccination would be shown to be the fraud that it really is, and he quoted 50 pages to show how smallpox

vaccination was a terrible scourge. The other thing he predicted was that phrenology would finally come into its own and would be the basis for behavior understanding. I offer that as a suggestion to our psychiatrist. If people as great as Alfred Russell Wallace can be off in their predictions, he gives one little pause before predicting too much.

There are a number of things that we're certain to map and other things that we think are quite probable. At a most recent meeting of this group our report was very severely criticized by Jennifer Smith, who said we should really throw out the population and statistical part of the report. I'm happy to say that I saw her about three weeks later. She gave a talk in Madison, Wisconsin, and I had the pleasure of introducing her. I might say I resisted the temptation to really take advantage of this situation and gave her a nice introduction, but it gave us a chance to talk about this afterward, and I found out that virtually all of her objections are substantive all right, but they're easily taken care of, and I think we have.

To mention a couple of them, the FBI as represented by her and others, too, were very sensitive to the possibility that if we talked too much about the future possibilities that are certainly going to be better than the present possibilities, that that somehow undermines the present.

So we made quite a point in the report to say that the present STR system and the 13 are really very good. That's not to say we won't get better things, but the 13 are institutionalized now, and changing them would be hard for administrative reasons and expense reasons even if something better comes along.

So our report isn't interpreted and we've tried very hard to make it such that it's not interpreted as in any way denigrating the existing procedures. We also made a rather snide remark, which I took out, about the British system. We found a 6 loci match and it was followed up and thrown away, but not by the forensics people I would say, but mostly by the news media. We've taken out any comparison with fingerprinting and we don't use the word "fingerprinting." There is a real question about whether fingerprinting is more or less reliable than DNA. But anyhow these are different subjects, and we've stayed away from it.

I wanted to call your attention to a sentence on Page 7, Paragraph 3, which I'll read in case you don't have it in front of you. Although this comes actually at the instigation of the FBI, I'm delighted to say the FBI did not dictate our report, but we're very glad for the input from that group.

"Although this report looks to the future, we emphasize that current state-of-the-art DNA typing is such that the technology and statistical methods are accurate and reproducible. Nothing in our predictions should be interpreted as casting doubt on the reliability and validity of DNA typing as currently practiced. Our predictions are consistent with the viewpoint that science is always evolving and will seek future improvements and alternative methods that are even better."

I think that takes care of the arguments that were raised at the last meeting, and I think we're ready to go ahead and keep this section of the report intact. There is a big investment of time, money, and energy in these, and they're likely to stay for a considerable length of time, probably

the full ten years that's in our province to look at. It will undoubtedly be supplemented, but we don't expect it to be replaced within that period.

This report, as I've told you before, is not very much changed from what you saw at the last meeting. It's in two parts. The first 37 pages are intended to be user friendly. I've heard different opinions as to how user friendly it is, but I think most of it is that way. At least that's the intention. Then the rest, from Pages 38 to 71, is the more technical part for those who want to read the more technical parts, and then we include references, acronyms, and a glossary. I welcome your detailed comments at this stage, but if you have them, please do it soon. The working group is essentially finished.

What you see before you is the product of the editors from the Department of Justice, and we expect to work with them over the next few days and weeks to get a final version of this. I'm sure that there are many verbal things that can be improved, but I don't expect the content to change appreciably.

The main division of opinion within the committee -- I mentioned this last time -- is among statisticians. Statisticians have been notoriously argumentative for the whole century, and they haven't let up. Many statisticians try for exactness, try for a precise model, and they have preferred the likelihood ratio method of approaching analysis of the situation.

The likelihood ratio has very undesirable mathematical problems, but it's also less transparent that people who are going to use this in a more time honored traditional forensic community procedure, the probability of a match is still in vogue, of course, and I think will remain so, and our report doesn't deter that in the least. But there is a legitimate difference of opinion between those who want to be as precise as possible and those who think rough and ready calculations is perfectly good if you can show it doesn't make that much difference, and this is usually the case.

Before the last session we got a last minute report from the DNA advisory board, DAB, pretty much endorsing the conclusions of the 1996 NRC report as far as dealing with database searching and in other places where the different approaches led to different procedures. I say once again the different procedures perhaps never lead to different conclusions, but they're different ways of approaching them.

Our report actually presents both views. I might call your attention -- I was a little surprised myself to discover that I can use the two different procedures on the same set of data and ask how much difference it makes, and I was somewhat surprised -- it's on Page 67 -- if you look at these numbers at the bottom of the page, if you have it in front of you, what I did was take a 13 loci STR situation simply by assuming that all are equally frequent and putting in an appropriate number of homozygotes as would be predicted. If we have 5 loci at the very bottom line, you'll see that the probability of a match, everyone probably within the population is about 1.4 times 10 to the minus 15, a pretty small number, and if you use the best procedure, condition probability corrected procedure, it's 3.26 times 10 to the minus 15. That's a factor of two difference.

I say who cares? So people from the DAB and elsewhere who suggest we use simple approximations, it doesn't in any case make much difference. If you're dealing with numbers in the order of 10 to the minus 15 , who cares about an error of 10 or even 100 ?

Well, I think I've said enough. The question of individualization, the FBI has a procedure -- of course, there is no way of ascertaining absolute certainty in a problemistic world, and no scientist and no statistician will ever say that something is absolutely certain. I think it would be hard to get a statistician to say that it's absolutely certain that all the air molecules in this room will fly out the door here and we'll suffocate. That's within the realm of probability, but hardly any of us regard it as probable enough to take seriously.

I think we are getting reasonably close with DNA to reaching probabilities that are close enough for practical purposes. One can say it's dispositive. The statement in the report says that individualization can be attained with a high degree of confidence, meaning not that it has a probability of zero, one or two extremes, but it has a high degree of confidence. That's what the DBA would like to say about the report, and it's our committee's viewpoint to go along with that.

The question of a database search, I'll say a little more than I said last time. I want clearly to distinguish it between a database search in which you're searching a database made up of convicted felons and a database made up more or less of a random sampling of the whole population. Among the convicted felons, the recidivism rate is high, and it's high enough to be probable.

So I see no real objection to just using the calculations directly based on the analysis from the database if it comes from the convicted felons. I'm aware -- and you people are in a much better position than I to discuss this -- I had made use of prior information when I made that statement, and yet the courts have been unwilling to take prior probabilities in advance. Whether you do this in your mind and then reach conclusions based on that or not, I believe that is a question for that group to discuss.

Sometime in the future if we reach the stage where our database consists not of convicted felons, but essentially of a random sampling of the population and a very large random sampling, then the prior probability of being guilty of this particular crime becomes very small, and therefore the probability of falsely detaining an innocent person becomes appreciable. A 1996 committee report had a procedure to take care of this, which is to multiply the probability by the size of the database. That usually doesn't change the condition I don't think. If the probability of a match is 10 to the minus 15 power and you have a database of 100 million, still the corrected probability of a match is still 1 in 10 million, again very strong evidence.

So I don't regard that even looking far to the future as a major difficulty, and the DAB has endorsed this particular procedure, but I want to emphasize, as I tried to do earlier, that there is a real distinction because of recidivism, because of a prior probability of there being a match or being the same person if it's gotten out of a database search of convicted felons than if it's gotten out of what may happen in the future, a much larger database. We're not in a position of predicting whether that will ever happen or not, but it might.

A few specific predictions. One I've already said, but I'll repeat is that the 13 are good and they're here to stay for a while, and the second one is -- sorry Barry is not here because this is almost for his benefit -- that the mitochondrial DNA will undoubtedly play an increasing role in the future, much more than it has in the past. It has some very valuable properties. One is that it's exceedingly sensitive in the sense that a very small amount of it can be revealing, but it's going to require some additional steps because whereby you can use a product to get different combination of genes, you can't do that with mitochondrial DNA, so that limits the power just depending on the size of the database, and I think there is every incentive to get a larger and larger database. Nobody can say just how by getting larger and larger databases can make this comparable.

At least one of the nice things about mitochondrial DNA I might say, mitochondrial are inherited from the mother and the Y chromosomes are inherited from the father. Why doesn't mitochondrial DNA and the Y chromosome DNA give you about the same kinds of information about an individual or about groups, and it turns out they're quite different.

Y chromosome inherited shows substantial differences between different parts of the human population within major races. The mitochondrial DNA shows much less. It isn't obvious why that's true, but anthropologists have told us why it's true, and that is in our human past. If we go back a few hundred thousands of years, this is an explanation of a matter of migration, and it's true in the human history that most of the migrations have been done by women.

It sounds like the opposite of what you would think. You would think the men are the explorers and go out, but what they go out for for the most part is to find women and then they bring them back. So the migration is by the women rather than the men. Whether this particular scenario is correct or not, the genetic consequences of such a thing in fact are. So that means mitochondrial DNA is particularly useful for identifying individual differences. We're in the business of picking out group differences. Otherwise we would make much more use of the Y chromosome.

What about twins? Right now DNA by itself can't distinguish identical twins. I don't doubt within the next five or ten years, though, it would be quite possible to identify identical twins. For one thing we have these wonderful things called expression chips that measure not just the genes that are there, but how accurate the genes are, and they've already shown that the same strain of mice, identical mice of different ages show different expression patterns; that two identical twins reared in different homes or even in the same home are certainly going to have different experiences, different infections. They will have all sorts of things that might change the way different genes are expressed.

So I'm sure this will be a way that will work. Another thing is to just pick genes like those that have to do with antibody formation, and they're likely to differ in pairs of twins and probably they differ in their infections by viruses, so maybe virus insertion parts could be used as ways of distinctions. Each of us carries our own different strains of bacteria, and maybe that can be used for identification.

Anyhow, my guess is that even today with a very concerted effort, very expensive, of course, we could in fact distinguish identical twins, but it will probably be routine by the time the ten years

of the report is out. I don't know that I'll live ten years now to be held responsible for this. It might be convenient to get out of the way.

One thing that is predictable, though, and I think that within ten years -- and this is a solid prediction -- certainly sequencing or something equivalent will be so efficient that each person can be easily distinguished to be unique and maybe every high school student will have a DNA sequencing kit. I sort of abhor that possibility, but it's technically a feasible thing to do. Among the scientific advances over the next few years one of -- there are really two classes of them. One is improvements in STRs, and they are certain to come and they're certain to be welcomed. They will keep our same 13 loci, but will make us more efficient at handling them. There can be automation, for example, with less touching of human hands, and there is speeding up of the process.

So I think within the next five or ten years the STRs we will be using will be taking care of much more rapidly and much more efficiently and I hope cheaper than at the present time.

On quite a different level there are kinds of things being discovered under what we call SNPS. They're not likely to displace STRs because they have too few locus for locus. They're more valuable for genetic research right now than they are for forensics, but sooner or later there are so many of them they will undoubtedly come into the picture and they will be used.

Looking a little further into the future, one of the wishes of our committee or at least several members of you are as far as possible to avoid group identification. We're all conscious of the political overtones, social overtones, legal overtones of genetic profiling or racial profiling, so maybe the less we can use of racial statements in connection with that identification of people perhaps the better.

I think it's possible in the future to make DNA identification without too much specification as to what race the person belongs to, what major group a person belongs to. One thing to do is we have several different, five or so, ethnic groups in the state. You can test all five of them without asking which one the person belongs to. Another step which could be done is to have a uniform database cover everybody stratified by regular makeup in the United States and then use a large evaluator corrective factor to take advantage of the fact that there is more substructure in whatever one of the population is treated this way than otherwise.

The third is what I call a sib. method, which is to set your screen such that you could detect a difference if they are brothers and sisters or sibs. There are two rationales for this. One is if you can distinguish brothers, you can distinguish anybody else except twins, of course, and the other, though, is a technicality, but that is the relationship between two brothers is determined entirely by the genetic makeup of their two parents.

This is pretty obvious, and then so therefore we're dealing only with mental rules and no population genetic considerations come into this. That's not strictly correct because they do have an added effect, but the major factor is this factor of one fourth brothers and sisters are alike in their genetic makeup in any particular locust one fourth of the time, and that doesn't depend on any assumptions about the makeup of the population. So people can take some satisfaction in

using this particular written method, the one fourth multiplied to several powers is the major constituent.

What about using DNA to identify the racial origin of a group? You could do pretty well right now with the 13 loci, but there is very little reason to do it. It might help in narrowing the circle of suspects, and that could be done right now. It can be done better with a large number of markers. We're more interested, however, in asking about the detection of particular traits, and right now there are a few traits that could be identified, bald or color blind. I'll soon run out of these because there aren't very many known single traits, but right now there are a few that can be used.

Undoubtedly this wonderful DNA project is going to turn up more genes, and perhaps within ten years it will be possible to make a pretty good description of a person typically from a DNA sample.

One thing that's interesting about this, and that is the defense statement that I didn't do this; it was my brother, and I don't know the brother, the brother is not a friend of mine, but for the reasons that I just said a while ago that's this one fourth similarity that comes in with brothers that doesn't happen elsewhere, and that means if you sample 100 unrelated people and there is one pair of brothers in there, the brothers may make a bigger difference than all the others put together.

So one thing that our report emphasizes is that one should be on the look-out for the possibility that within the people that are identified there are brothers. Usually this could be found out in other ways, but with 13 loci pure DNA analysis can almost always distinguish brothers.

That does have one legal implication, though, and it's going to turn up that one is going to find from a database search the brother of the person that you really want. Then what you do -- and I know that the states differ -- in particular, Virginia has a different procedure than some other states. In New Zealand there was a study of 10,000 people, 10,000 records. There were ten matches found for 6 loci. Of those 10,000 all but two of them were brothers. Some of them were twins actually.

That's all I want to say. I can't stop, though, without thanking two people, Lisa and Robin. They've kept me sane if nothing else.

MS. ABRAMSON: Any comments or questions?

MR. THOMA: I find the report fascinating. As much as I have been involved in this for ten years, I can't tell you how much new information actually is in here that I haven't seriously considered before, but --

DR. CROW: Let me say thank you and then I will prepare for the rest of the question.

MR. THOMA: At Page 23 you're talking about variations from Hardy-Weinberg ratios. It might be worth noting that there are some population subgroups -- you mentioned the major population

subgroups, but smaller subgroups that vary from Hardy-Weinberg and just touch with it with regard to the major subgroup. That isn't that much that we found in specific subgroups. There is a major deviation from Hardy-Weinberg, just a suggestion.

DR. CROW: I absolutely agree, and this is especially true for Native Americans who have a tribal structure and quite different from that of the larger populations. We have made allowances for that. There is a discussion of that in the report.

MR. THOMA: At Pages 28 to 32, which is a difficult section for you to do because you're looking into the future obviously and you can't crystallize it completely, but I would be interested to know when and how you think there will be improvements in STR analysis to eliminate problems such as stutter and things like that. How soon and what is the most likely scenario for that? Obviously that's not an easy thing to do, but I was curious about that.

DR. CROW: We don't see anything very specific for obvious reasons, but I think I can say that I don't think there are going to be any major sudden breakthroughs that suddenly eliminate stutter. This is a matter of attention to detail, doing everything a little bit better, refining all your methods, and it will grow incrementally.

One thing that is true it turns out that if you work with sets of five, repeats of five, they show as stutter, and if we were starting over again, I think we would make STR pentanucleotides rather than the tetranucleotides. That's one more thing that the system is set and I wouldn't want to change it, but if we were to start over, we'll do it.

MR. THOMA: To personalize the comments I'll send you a note on that.

DR. CROW: I urge all of you to do that, and to do it promptly because we would like to get this finished, but please make any suggestions about -- don't tell us to overthrow the whole report, but suggestions for greater clarity, wrong emphasis --

MR. THOMA: Thank you on behalf of the rest of the commissioners for this report. I really mean it's a lot of great information.

MS. ABRAMSON: Any other comments or questions or suggestions?

DR. FORMAN: These are the suggested covers. Everyone should have copies of the proposed covers, and I know that there was some discussion about the pamphlet covers. The group was fairly lively about that, so we wanted to get your input on the proposed covers that we have for the report. The report will be the same as the post-conviction report, and if you would like to discuss these covers, we would like to hear your opinions.

MS. ABRAMSON: First I would like a motion. Jim, why don't you make it instead of me that we approve and adopt this research and development and working group report subject to any editorial changes.

DR. CROW: I'll so move that.

MR. THOMA: I'll second that.

MR. ASPLEN: If I could as a matter of discussion on that matter just kind of the final question of whether or not anyone has anything other than editorial changes, anything that you would believe to be somewhat substantive, and the reason I ask is that pursuant to the Federal Advisory Committee Act we can publish something that are editorial changes from this point on; however, anything that would be of a substantive nature would have to be discussed in a public forum, and I just want to make sure that the changes that any of you are contemplating sending are just that, editorial changes.

MR. THOMA: No, absolutely not anything other than editorial, and I second the draft and I think that we've got a consensus on it.

MS. ABRAMSON: Is there further discussion on the report and we'll get to the cover later? Any further discussion? Then I will ask for a vote. Those in favor of so approving and adopting this working group report signify by saying aye.

(Chorus of ayes.)

MS. ABRAMSON: Those opposed? Then it's unanimous on the adoption of the report.

DR. CROW: Thank you.

MS. ABRAMSON: We say thank you to you.

So now we can get to the easier part maybe.

DR. FORMAN: There should be four choices. We can change anything.

DR. CROW: I don't want to be an art critic here, but I like this one and I like it for two reasons. This one that has the two little insets is all right, but that's more or less DNA of past, and I would like this to reflect DNA of the future. I don't know if anybody knows what this is. It's a chip, but it's not the kind of chip that is being worked at the cutting edge of this particular technology, and if we're going to have a picture of a chip, I suggest -- Lisa knows this -- that you get in touch with the Harvard-MIT group and get a picture of what theirs is. I think they are probably closer to something that would be practical for routine use.

MR. THOMA: My only comment was going to be for the same reason. This particular one I was not as interested in as the others, and basically I would agree with Dr. Crow that this of the other three would probably be the most --

MS. BASHINSKI: My only problem with it is the color is a little --

DR. FORMAN: Boring?

MS. BASHINSKI: Yes. I'm looking for the word.

MR. THOMA: Boring is fine.

MS. BASHINSKI: I don't know if there is another color combination.

DR. FORMAN: Are there colors here that you like better?

MR. THOMA: I like these colors, but I don't like anything about it.

DR. FORMAN: This picture and a better chip.

MS. ABRAMSON: I hear a consensus about this tan and blue, but with the purple and darker color and a different chip. I see a lot of nodding of the heads, those that are artistically inclined. Hearing no other --

MR. REINSTEIN: We really like our colors better on the post-conviction report. They were a little more exciting.

MS. ABRAMSON: Anything else to come up for the research and development working group report?

MR. ASPLEN: If I could just add my thanks also from a staff standpoint, the details of putting something like this together are tremendous, and we've said this before, but one of the many defining moments of this Commission's work in terms of its ultimate success -- and I do consider this to be a large success -- was, quite frankly, the lunch that Dr. Forman had with Dr. Crow where we asked him to participate in this meeting, and he agreed. As soon as that happened I should have seen it coming away from that meeting we were just overjoyed, but as the ones responsible for administering and trying to help this group be successful from the staff we want to thank you. You cannot ask to work for a kinder, easier going person yet as thorough as you can be than Dr. Crow, and we greatly appreciate that.

MS. ABRAMSON: With that we'll take a break from 11:00 to 11:15, and then we're going to hear from Dr. Paul Ferrara from the laboratory funding working group.

(Whereupon a brief break was taken.)

Laboratory Funding Working Group Report Dr. Paul Ferrara

Criminal Histories of Sex Offenders Identified Through DNA "Cold Hits"

MS. ABRAMSON: If the meeting would come to order. We are now going to hear from Dr. Paul Ferrara, who is going to talk about criminal histories of sex offenders identified through DNA cold hits.

DR. FERRARA: This is our tenth meeting of the Commission, and during the course of those ten meetings we spent a lot of time discussing the issues regarding DNA data banks and their usage. We've spent a lot of time discussing the cost associated with development of the data banks and reduction of backlogs of convicted offender samples, crime scene materials, and discussions of who should be included in data banks.

In 1989 Virginia and I believe Florida in that same year created the first DNA data bank laws in the U.S., and, as you know, since then all 50 states have passed DNA data bank laws; however, creating a law and actually developing results from such a program don't occur overnight. As you all know, during the last 14 years that we have been involved in performing DNA analysis the available methodology has evolved and improved. As Jim indicated, we are now at the stage of having a system with the 13 core loci STRs to really start to rock and roll with the establishment of DNA data banks.

In Virginia we have been very fortunate. I have been very fortunate to have funding and support early on in my development of the DNA data bank in Virginia. In 1989 our data bank law required just sex offenders and violent offenders to be included. During that first year of that data bank law Timothy Spencer, the south side strangler that had raped and brutally murdered numerous women all over the Commonwealth of Virginia, was finally apprehended. In fact, he was the first capital murderer convicted and executed on the basis of DNA evidence, and when it became clear to the prosecutors that if we had a DNA data bank law that required persons convicted of property crimes, we would have identified Timothy Spencer of the first rape and murder, and that prompted the Virginia legislature to expand the DNA data bank law after studying it for a full year to all convicted felons in 1990. In 1996 it was further expanded to include juveniles age 14 or older who are convicted of a felony if they were an adult.

What I would like to do today is to bring you some very, very recent information with respect to the developments of our data bank or hits in the Commonwealth of Virginia and the implications of the types of crimes we're solving and the criminal record histories of those individuals committing those crimes.

With that, Robin, could I have that first chart.

This chart shows you quite graphically the development of the DNA data bank in Virginia. The burgundy bars represent the number of hits that we have made each year in Virginia using our DNA data bank. The axis on the left shows the number of hits, but this graph is more important than just showing the number of hits.

As you can see, in 1999 the hits jumped dramatically to I believe it's 74 in 1999. In order to try to give you the most recent data I waited until the 5th of July to take the first full six months of calendar year 2000, and, as you can see, we've already exceeded in the first six months this year the number of hits that we had all of last year. We are getting almost a hit a workday in the laboratory right now.

Now, what I would like to bring your attention to is the blue line. We within the laboratory funding work group have discussed two major factors to make DNA data banks effective. One is a database of appropriate individuals of significant size. In 1998 I was able to get the Virginia General Assembly to give me over \$9 million over three years to contract with a private laboratory to take a backlog of some 180,000 samples that had been collected since 1989 and run the STR profiles at the rate of about 60,000 of them per year.

As you can see, the blue line represents the cumulative number of samples in the database. As we speak that is approaching 120,000 DNA profiles of all convicted felons. Clearly there is a correlation between the size of the database and the number of hits, but it is not just a function of the number of samples and size in the data bank.

The other side of the equation and the reason that we are seeing the success in Virginia is an emphasis and an ability to run DNA on crime scene materials for which there are no suspects. I think the fact of the matter is around most of the country most of the laboratories are doing everything they can struggling just to do those few cases where at least you develop a suspect and the case is going to trial. You can have a DNA bank of a million people, but if you aren't running unsolved crime scene cases, then you might as well save your money.

The next slide demonstrates the other reason for the effectiveness of this DNA data bank. In 1989 we did a total of 37 DNA cases by the old RFLP methodology. So far this year in six months we have run over 1,300 DNA cases in the Commonwealth of Virginia. So clearly there are two pieces of information and two correlators that contribute to this tremendous increase in the number of hits, the number of samples in the database, the type of individuals who are in the database, and the number of case work samples that are being analyzed in the laboratory.

As you can see, we have a capacity to do probably we will be pushing 3,000 cases in the year 2000. I've got 37 DNA examiners and support staff right now doing this work. One of our messages I hope is that this Commission needs to address and the forensic science community needs to address nationally where are the people who are going to be needed to do this kind of work all over the country going to come from, but that's a different story, but it's extremely manpower sensitive. Right now our examiners are doing on average approximately five to six cases per examiner per month.

Total hits up to the end of June, this number has already increased this month with a couple of very interesting cases which I wish I could share with you, but I did not, but we had a total number of 183 hits. 155 of them are case to offender. The remaining 28 case to case hits. 151 obviously in the last 18 months and I believe 77 in the last six months.

I'm trying to give you a snapshot of what is a work in progress. In addition to the majority being in-state hits, not inconsequential is the four interstate hits that we have already participated in

including District of Columbia, Florida, Louisiana, and Georgia, and that's going to really continue to increase. In fact, I should point out that when I'm talking about 120,000 samples in my database right now, those aren't even complete 13 core loci yet. During the next 12 months we hope to round that out so that those are available for searching on a national level, but even in using an ad hoc system the number of in-state hits is apparent.

What I would like to do with the next slide is show you the type of crimes that we have been solving with this database, and some of this data may or may not be surprising to you. As you can see, as we might expect, rape-sexual assaults top the list of the types of crimes that we have been solving. That stands to reason for a variety of reasons. 22 homicides and 11 rape homicides.

We are at the stage now with our laboratory where we're doing a lot of B & E cases. B & E cases are great for DNA data banks because these people cut themselves when they break in. They take a bite out of a honey bun or a drink from a Coke can, leave biological material at the scenes of B & Es, and these kind of cases are really easy relative to sexual assault cases where you have complex mixtures. You have all kinds of problems you're dealing with, but B & E, so often tissue, a little blood, single source, no mixture of epithelial cells and sperm cells, but just simply an easy sample to take a profile of, develop it, and search the data bank.

As a matter of fact, we find that these kinds of cases are good cases for our new examiners to begin their work on because they are relatively straightforward. You can do a lot of B & E cases in a relatively short period of time.

In addition you will see at the bottom of the list there are 15 miscellaneous types of cases that fall into a potpourri of offenses. Among them also is drug possession. A zealous, but determined vice police wanted us to use this technology to establish possession or contact of an individual with a crack pipe. Again, very easily done. So the application of the DNA and the DNA data banks is to all types of crimes. It isn't just for the major crimes.

We certainly have priorities and triage our samples in such a way as to try to get to the most important cases, and we are working our backlog down of crime scene cases. I'm pleased to say that we're below 450 cases backlogged, and we hope by the end of this year to have that backlog of cases eliminated totally, and to us that's very critical.

I'll tell you one reason why it's critical. Intuitively we talk about the impact of DNA data banks on prevention of future crime. It's intuitively obvious, but I want to describe to you a case that brings that point home very poignantly.

Back in October of 1998 when we had about 1,000 cases backlog and a turn-around time in excess of 90 days on an average case, we had a woman raped and stabbed in Norfolk, Virginia. The police in that particular case had somebody they really liked for the crime and actually had sufficient probable cause to get a blood sample eventually from him; however, that was only a few weeks before he came to trial on shoplifting charges. He came to court on the shoplifting charges. Our DNA results were not done. We hadn't completed that examination. He was released on the shoplifting charges. 11 days later he raped and stabbed a woman to death.

When we ran that case as well as the rape -- stabbing case in Norfolk two months earlier, we established that the same man had indeed committed both of those crimes. So in the minds of some, not I, my laboratory is directly responsible for the unnecessary death of a victim, and clearly had that case risen to a top priority among 1,000 other cases, that man would have been arrested, put in jail, and not have committed that murder.

Cases like that are going to happen all the time. That's why in our laboratory turn-around time of crime scene cases is of paramount importance, but first priority still goes to those cases going to trial, sex offenses, violent offenses and such, but you cannot ignore other cases. I get phone calls from legislators on behalf of constituents whose houses have been broken into saying when in the hell are you going to get around to doing these B & Es? Those cases are just as important to those individuals as any other case. We cannot ignore them.

With the last chart what we did is to the best of our ability take a look at the criminal record history or at least the offense for which the individual who we had the blood sample in the data bank was convicted that resulted in his sample being on the data bank. That data ought to surprise you, but it's very real. As you can see, there are almost 47 cases that we're not even able yet to fill out who those individuals are. Many of them we know are the nonsex offenses, but we don't know what their offenses are. As you can see, clearly in this breakdown the vast majority of the people in our data bank that are responsible for the large number of hits are among those convicted for burglary, breaking and entering. There are only 15 identified sex offenders among those 150 or so case to offender hits.

Grand larcenies, people say what have you got paper hangers and white collar crimes in our data bank for? Well, that's why. Druggies? No problem. 18 of the people we've hit on those crimes are there for drug offenses, and only two individuals who had obviously been convicted of homicide, but released and were free to commit others.

This particular data -- I want to emphasize this data is very fresh off the sheet. We're going to study in more depth the criminal record histories of these individuals to the same extent as we did with a much smaller sampling, which the study is included in your handout material, and which are actually reported quite well I might add in today's USA Today where in a nutshell of some 50 rapes or rape-homicide only cases that we made early on with the data bank, only 60% of those individuals we identified had prior sex crimes. The other 40% were almost entirely property crimes.

That's all I have to really say. I will be glad to answer any questions if I can.

MR. REINSTEIN: Do these numbers match pretty much the research in Great Britain as far as the type of crimes as far as criminal histories go?

DR. FERRARA: Only qualitatively that seems to be the trend. They are seeing a much higher percent. I've heard reported as much as 75% of their hits are coming from those with burglary and property crime convictions, but their database is so much different, both their felon database or their database -- it's not necessarily a felon database -- and then their sweeps and such I'm not sure how comparable they are. But I do know that Illinois, Florida, and Virginia have got a fairly

significant number of hits, and I know at least in Florida they are observing that same trend, that property crimes are an early indicator, if you will, are responsible for a large number of future violent crimes.

MR. HILLARD: What is the average turn-around time? What would be the average turn-around time?

DR. FERRARA: If it goes to the top of the heap, we're talking about as little as a week for a full report. I mean the analytical end is 24, 48 hours, but by the time you get the evidence, prepare a report, and such, I usually try to say a week, and, of course, obviously that depends on the type of case.

One of the most difficult problems we have is you get a homicide case, for example, where you've got hundreds of pieces of evidence, many of which have a large -- may have some biological material present that might be of probative value, and cases like that, even if you start may take weeks because of pouring through, looking for the mere presence of a biological material, identifying it, and then dealing with the issues of mixtures and so on. But when a rape case takes place, a relatively straightforward rape kit, we could probably get that case out in a week complete.

(Inaudible question by Mr. Hillard.)

DR. FERRARA: The answer to that is no, and one of the reasons it's no is because in March of last year my examiners got an almost 20% across-the-board increase. What we did is we conducted a salary survey to include federal agencies and other competing private laboratories in the locality, and we were 20% low, and we got that corrected.

Now, that's not going to stop turnover. I mean most of my early DNA examiners are working for Dwight now. That's terrific. As long as they're in the field. I think a couple of years ago in Illinois Susan Johns, who is a good friend, called and asked can I borrow Barbara Llewlyn for a week to help us with some problems we're having in our laboratory. I said sure. About six months later she resigned and accepted a job in Illinois, but she's doing great work.

So I don't have a large turnover, but we do nurture those examiners. They're treated and paid very well, but we also created a laboratory environment that's conducive to keeping them. I mean people don't stay just because of money, although that's a very important factor.

My concern is that laboratories all over the U.S. probably need to expand their DNA staff 10, 20 fold over what they have now, and that means a lot of examiners are going to come from laboratories such as Dwight's and my own and Sue's, and there has got to be someplace where training of those examiners can take place en masse.

We were fortunate in Virginia to be the beneficiaries of a million and a half dollar endowment from crime writer Patricia Cornwall, and she gave that to Virginia, and now the state has picked up the funding for the next two years of that institute. We trained 14 forensic scientists, six of them in the DNA field, two forensic pathologists, two toxicologists, four drug chemists, and

those people are trained by national standards. So, for example, the DNA examiners trained in both platforms I might add could go anywhere and get a job.

Now, this first class, I was able to get ten new positions in Virginia, and so I grabbed them right up and they're working in my laboratory, but I've got six more DNA examiners who have begun their training, and they will be graduating next year, but it needs to be 600. The analysis of the crime scene material and increasing the compensation and the quality of the laboratories that these people are working in is critical, as you well know. You've done that same thing.

MS. BASHINSKI: I had a question about your raises. Were they directed only at the DNA analysts? We were able to get a stipend of \$300 a month directed just at DNA analysts, and, of course, what that creates is a morale problem within our organization because why are these people worth more than someone else who is doing a good job at the bench?

DR. FERRARA: You make a good point, Jan. That could create problems. That 20% went across the board to all forensic scientists, so it was nice for me because those scientists of mine, my firearms examiners, my trace evidence examiners, et cetera, et cetera, who said you always like DNA best, I can point to them and say, well, look, what you have to realize is the DNA scientists are creating an environment that is carrying over to all of the fields.

To this day, Jan, we do not compensate the DNA examiners differently than the other forensic scientists, and I think that's important to do because so unique as DNA analysis is, the unique sets of talents and requirements for firearms examiners and toxicologists, et cetera, et cetera, is the same.

Now, the support staff is more problematic, and I do get a lot more turnover of my support staff, but typically my support staff are -- they have master's degrees in biology, molecular biology, forensic science, but they haven't had an opportunity to get into the institute or get into a trainee position. Those people will jump to another laboratory if another laboratory has an opportunity to train them as examiners.

I think we're starting to see hopefully with the work of this Commission some increased awareness on the parts of the departments to expand the staff of personnel. You just can't do this work. You can't automate crime scene work very well. It's as simple as that. You just can't rush some things. Five, six cases per month is probably generous.

MS. BASHINSKI: Yes, that's good.

DR. FERRARA: I might add that's only recently have we been running the complete 13 core loci on every case, so that's even going to more keep that number of examiners down.

MS. ABRAMSON: Any other questions?

MR. CLARKE: To return to the criminal history chart, what was telling to me -- and I thought you had explained anecdotally over the years the number of burglary cases -- that is, defendants who were matched -- the number of burglary criminal history offenses who ultimately resulted in a match -- I know you've anecdotally described that. To me what is very telling there is what

would be at least apparent to me is a very high percentage of the nontraditional database statute crimes. In other words, the typical database statute in this country is generally the sex crimes plus some murders, homicides, et cetera. In your percentage of hits there are more outside that group than there are inside that group just from judging by the chart, and I think that's very telling on perhaps what direction our states need to consider.

DR. FERRARA: I couldn't have said it better.

MR. CLARKE: I don't know what the number is. Did you calculate a percentage?

DR. FERRARA: No, I haven't. Some of this data got done at 2 o'clock this morning, so much of it -- I probably was too ambitious trying to bring you right up to the first six months of this year, but --

MR. CLARKE: It actually appears to be fairly consistent with you may recall Commissioner Saffer last year described I think the last 100 sex arrests in spots he had pulled, and it was determined a very small percentage of those cases were sex suspects who had any sex priors whatsoever, and this is at least somewhat consistent with that.

DR. FERRARA: That's right. In the study we did of the 50 rape and rape-murder cases you will notice 60% had previous sex offenses and only 40% didn't. When we went in depth into some of the backgrounds and looked at presentence investigation reports and trial transcripts and such, it became apparent that some persons who were convicted of a property crime, there is good reason to believe that the property crime could be part and parcel of an aborted attempt to break and enter into a home and perhaps rape a victim or a rape incidental to a break-in or a break-in to steal a pair of panties, a stalking type.

So there is some of that going on, too. I don't mean to imply and I'm not a position to imply that the burglars and the breaking and entering and the robberies are just strictly financially motivated. I suspect there is some of that or they're bleeding down to some cases. That's what gets really tough to take this kind of data and really capture the correct picture, but I think fundamentally the trend is clear, and the point you is we wouldn't have half of our hits if we didn't have these.

MR. REINSTEIN: What is the status right now on funding for just not the backlog on convicted offenders, but also is there any source for current case work and also nonsuspect case work?

MR. ASPLEN: The story on that is there is a tremendous amount of different legislation -- there has been a flurry of activity on Capitol Hill regarding that. Originally there were three pure funding measures in the House by Representatives Gilman -- one by Gilman, one by Weiner, and one by Kennedy for various and sundry sums of money, and differing in terms of whether or not they were just for convicted offender backlog, although I think two of the three were for both convicted offender and for forensic index backlog lag production; however, since that time on the House side there has been the introduction of a bill by Representative McCollum which proposes to provide \$50 million, and again that is for both convict offender and for forensic index backlog. It's spread out 10 million per year over the next five years.

On the Senate side there was legislation introduced by Senator Hatch on the post conviction issue, but which attached to that proactive funding, and that amount was -- I think it's \$50 million there also. It was a large sum. That is kind of still sitting out there. Senator Leahy's post-conviction legislation did not provide affirmative funding, but rather attached compliance with the post-conviction provisions in that bill for the states to receive any funding that was allocated; i.e., the current \$50 million program that we already have, clip monies, et cetera.

So that's kind of a little snippet of what the legislative landscape looks like. There was testimony at the one Senate hearing on the post-conviction issues. I think it was Senator Schumer who at that point in time said he was going to introduce legislation for \$100 million, to which Senator Biden and Senator Hatch said we will support that. So the discussion is out there.

DR. FORMAN: I'll tell you what is happening with the \$15 million we do have. We had 21 submissions from 21 different states representing about 250,000 convicted offender samples.

MR. ASPLEN: Lisa, just be clear what 15 million you're talking about.

DR. FORMAN: The 15 million for the CODIS backlog we got for the year 2000. Those 21 states are all being funded in their entirety and will take the approximately \$15 million for the CODIS backlog reduction program for fiscal year 2000. I should say that they are in the process of being funded in their entirety. We do not anticipate that there will be anything that will derail any of those particular funding authorizations.

The state match for that program this year was a 1% contribution of unsolved case work, so if we are funding approximately 250,000 convicted offender samples, there will be 2,500 unsolved cases that will be worked to be compared again to those samples at the end of the day.

I should tell you that this year it has been the Administration's task in our department to involve the states in a couple of extra assurances involving both privacy and environmental impact statements, so that has slowed down our ability to get the states' money a little bit because they have to respond to a lot of these environment assessment and privacy human testing issues that have come up for anyone who is receiving a grant, but we expect that those red books will go through pretty quick. Ray is working on them, and that funding will be given out, distributed before the end of this fiscal year.

MR. REINSTEIN: And the goal for Year 2 is also \$15 million?

DR. FORMAN: We expect to have another \$15 million, and it's still in the budget as far as I know for fiscal year 2001. We will at that point consider upping the ante for state contribution to a higher level of unsolved case work that will need to be done. We will also consider in certain circumstances, certain controlled circumstances that states who have the ability to perform their unsolved -- I'm sorry -- their convicted offender case work in house in certain situations will be allowed to do that instead of outsourcing, but we have not made that final decision yet.

MR. REINSTEIN: Of the 21 states that sought funding you didn't have to apply the formula that you were talking about originally which was based upon the backlog?

DR. FORMAN: We have appropriate funding to meet the entire request.

MR. HILLARD: Was Illinois involved in that?

DR. FORMAN: We didn't bring the data with us.

MR. ASPLEN: We can call the office and find out before you leave today.

MS. ABRAMSON: Why don't you get a list of states.

MR. ASPLEN: The other thing that I should probably add to that is the folks responsible for administering this at NIJ, which are primarily Dr. Forman and Ray and John Paul Jones, have worked very hard to try to improve the program next year, and by that I mean we've identified that by a certain voucher system as opposed to the way the money is being allocated right now directly to the states. We have had discussions with legislative staffs regarding how they could change the legislation for next year that will allow for a voucher system, which would increase our volume by a third, that we would get a third more bang for our buck if we could do it this way. So hopefully we will improve upon this year's.

DR. FORMAN: We're hoping for better economies of scale, but at this point we're not dissatisfied with the way the program is. Also it was unfortunate that we were not able to streamline the process better for the states so that each state has to have developed their own RFP with an outsource lab, which is cumbersome. It is cumbersome.

MR. ASPLEN: We tried very hard. We tried to talk the Office of General Counsel into seeing it our way, but ultimately it was decided that the way the legislation was written could not accommodate that scenario this year, which is why we're trying to get the legislation.

MR. REINSTEIN: Are your samples all blood or are you taking the swabs as well?

DR. FERRARA: For the convicted offender samples they're still venous blood samples, Judge, although two years ago I got our legislation changed to allow me to go to saliva or tissue samples. I just simply haven't developed a kit and tested it to make a change. The corrections in the jail sort of like the blood sample because they're already drawing one and they're comfortable with it.

Ultimately I think the safer route, particularly with the issues of transportation of potentially hazardous samples from a high-risk population and taking that liquid blood and allocating it is worrisome to me, so I would like to perhaps goes to swabs or even a finger prick, but I haven't worked that out, and meanwhile their blood tubes are coming in.

MS. BASHINSKI: Have you calculated a hit rate and, if so, how has that changed over time?

DR. FERRARA: Are you talking about the number of hits per number of samples in the database?

MS. BASHINSKI: Number of cases searched. Of cases searched what percentage do you get a cold hit on?

DR. FERRARA: I don't. That's a good question. I'm not sure.

MS. BASHINSKI: You have how many thousand would you say in your forensic index now?

DR. FERRARA: There are approximately 1,400 cases in our forensic index.

MS. BASHINSKI: So you've got over 10% of those.

DR. FERRARA: Yes, that's right if you look at it that way because those are obviously cases in which we didn't make a hit.

What is interesting I might add is our hits occur two ways. You run a crime scene sample and you search your database and you make a hit, but if you don't make a hit, of course, that sample resides in the forensic index. Every two weeks or so when the contract laboratory delivers X number of thousand new profiles, they're entered, and we're making hits that way.

So for those reasons some of these hits could be delayed not just because of the case work, but because of the convicted felon samples. One hit we searched. It was a rape of a coed at the University of Virginia, and we got a really nice profile. Within a week we had searched the database and didn't make a hit. Two weeks later fortuitously that individual sample had been run by the contract laboratory because they're up to about running 1998 convicted felon samples, and he was in there, and, boom, we made the hit that way. That was all within one month of the original offense.

MS. ABRAMSON: Any other comments or discussion? Then thank you. That was very interesting, as you can tell from the reaction here.

The next item of business is having lunch. It's a working lunch, so if you get your food, plan to come back here, and then we will be talking about the November seminar.

Working Lunch

*Mr. David Lazer, Assistant Professor of Public Policy
Center for Business and Government
Harvard University, John F. Kennedy School of Government*

MS. ABRAMSON: We're back in session and we're going to have Mr. David Lazer.

MR. ASPLEN: Actually this relationship began about a year ago when David Lazer came to our meeting in Boston that we held, and David and I met then. We had thought about the idea of some kind of collaborative effort prior to that, and that stuck in my mind, so David and I began to collaborate a little bit more, and I flew up to Cambridge to talk to him one day, and he came down to D.C. one time, and I think we have this ball now officially rolling.

David is an assistant professor of public policy at the Kennedy School of Government. Prior to that he taught for a couple of years at Princeton University. He has a Ph.D. in political science from the University of Michigan. He is here to talk to us a little bit about Kennedy School and then what we're thinking in terms of the Joint Commission meeting/conference on some of the development DNA related issues.

So, David, thank you for coming down to Washington again.

MR. LAZER: Thank you for having me. Let me keep this relatively short and sweet and open it up for discussion as to how to maximize the value added from the conference in November. Let me first just outline briefly the format that I have been talking to Chris about for the conference and then talk about some -- I've spoken with various members of the Commission as well as various faculty at the Kennedy School as to what topics that might be various panel topics to center the conference around. I would like to then open up to discussion as to what would be the best way to format things and what would be the best panel topics for discussion.

So briefly the conference as we've outlined it right now, the format of the conference, a lot of this has to do with the particular capacity at the Kennedy School and the hotel next to the Kennedy School to accommodate conferences.

Right now the dates we settled on are November 19, 20, and 21 of this year with I gather a Commission meeting. There will be a Commission meeting early on the 19th, and then the conference would begin after that with a keynote address and a reception that evening. Then on Tuesday would be the real meat of the conference where there would be a total of six or seven panels, two on the morning of the 20th, two on the afternoon of the 20th, and two on the morning of the 21st, and possibly one in the evening post dinner on the 20th.

There are two issues here. One is basically the substance to be covered, and then the second is how to cover the substance. The way we have been talking about this is that generally the format for each of these panels would be preliminary sessions and that there would be time for the invited speakers to -- let's say three or four speakers per panel to present a certain set of ideas, some time then for discussion and Q and A to the panelists where there would be roughly an hour and 45 minutes per panel. I think it's important especially in terms of the population that we

would be aiming at to allow a generous amount of time for people to interact and discuss with each other as well as with the various panelists afterwards, so there would be generous amounts of time for lunch together, dinner together, coffee breaks, and what have you for people to discuss what they've heard.

I've spoken to various members of the Commission as well as various faculty at the Kennedy School as to what questions we should center the conference around. There have been a few things that have come up a number of times, and I'll throw them out here and let me throw it out to discussion as to what you think would be the best way to maximize the value added from this conference.

First of all, I think it is clear that we should have at least some discussion of exactly what DNA technology enables just so that everyone that is coming to the conference is on board with exactly what does the technology make possible. Then I would say that we need to talk about what the public institutions -- how they might say enable the technology or not. Basically in certain ways you have a sort of standard situation here where there is a new technology that comes along, an innovation which has potentially very powerful uses in the system, and the question is how does the system adapt and adopt or not that technology.

I think that this could be broken down both in talking about the DNA database -- I would say there are separate sets of issues going around database issues and post-conviction relief issues, and I would say that would be useful to have discussions centered around -- to have separate discussions centered around those two sets of issues.

Then clearly the distinguishing characteristic I think of DNA technology is just how powerful it is, just how much it can potentially reveal beyond just identification. So I think there needs to be a decent amount of discussion about the privacy and ethics issues around the utilization of DNA technology in the criminal justice system. Then I think that it would be useful to have some discussion -- and again this is based on my talking with both the Commission and faculty at the Kennedy School -- on just the value of public discourse. I mean the objective in part of both the Commission, but also particularly with the conference is to serve as a sounding board, as a way to spur public discourse on this topic.

In some ways it's striking how little discourse there has been on this topic other than clearly there has been a lot of post-conviction relief issues in recent months, but, for example, on the database issues you don't see a lot of discussion I think in newspapers and debate about these issues, and I think it would be useful to use this as a forum to spur some of that discussion. In many ways I think that's the value added of this conference in general.

I should say, by the way, I'm open to also people contacting me about what would be good -- what you think would be topics that should be covered, voices that should be heard, and so we can sort of continue that conversation right here.

Let me throw it open to questions and discussion.

MR. ASPLEN: If I could just add to what you've already said, one of the things that we talked about was facilitating a discussion by actually having panelists actually write papers ahead of time so this is something more than a conference where folks show up and discuss things. There will be a tremendous amount of thought and effort that goes into it beforehand, and that those papers will be able to stimulate that discussion.

Also subsequent to the conference the Kennedy School, as I understand it, will essentially publish some kind of proceedings. I don't know exactly what format they will take, but there will be kind of a joint publication of the proceedings from the Commission and the Kennedy School that while not included in the final report of the Commission, will be considered part of the Commission's work ultimately whenever it's published.

MR. LAZER: I think the papers are an essential ingredient to get people to come rather than think about what they're going to say on the flight to the conference to actually have to put in a few hours.

MR. ASPLEN: Not that any of us do that.

MR. LAZER: So I think that will help get to a deeper level of discussion on the subject matters.

MR. GAINER: Who is the intended audience?

MR. LAZER: Ideally it would be a combination of practitioners and academics, and what we would like to get in the room -- the guest list would include some mix of the key people from the criminal justice system and as well as academics who have done research on both DNA and as well as more generally on the criminal justice system to come into the room together. In part I think what I really want to happen is to have some dialogue amongst the people who wouldn't normally talk with each other, and there are certain ways of manipulating the conference. You make people sit next to each other in certain ways so that you will get certain conversations arising that I think could be productive for everyone.

MR. ASPLEN: I think at some point in time we also discussed the possibility of bringing in some legislators to the extent that these decisions are ultimately made by legislators, so we could bring those folks in also.

MR. LAZER: I think both on the federal and state level identifying sort of key people who are interested, legislators' staff and so on.

MS. ABRAMSON: By "practitioners" I assume you mean you law enforcement.

MR. LAZER: I have a certain terminology coming out of the Kennedy School, which is basically a practitioner is anyone who has sort of been out there in the real world in any way, shape, or form. The way I was using it is pretty general, which would include both law enforcement as well as legislators and so on. So really everyone who actually does stuff rather than write about it.

MS. ABRAMSON: Have we worked on the list of panelists? It's now July, so if we want something in writing by November --

MR. LAZER: We need to move quite expeditiously. I have been working on coming up with a list of people because we want to start contacting people in the next few weeks or at least identifying the must haves and then sort of move on. Probably for the conference part given that timing, it's difficult to get academics to do anything real quickly, coming from that direction myself. So probably for the conference we'll probably have people come out with various speaking points, but it won't actually be complete papers for the conference, but rather sort of outlines of papers and let's say abbreviated papers just because given July to November, I think that's the best we could expect and let's say completed papers a few months thereafter.

MS. ABRAMSON: The steering committee, as I understand it, Phil Reilly, Barry Scheck, Jeff Thoma, and Chris --

MR. ASPLEN: Correct; and David Kaye.

MR. LAZER: I've spoken to all of the above.

MS. BALLOU: I'm just wondering when you mentioned the added value of public discourse, coming from law enforcement, that means civilians. The statement you said before about how powerful is privacy ethics, I think that would be your discourse right there, those issues, so do you have a little more what you mean by "public discourse"? I would just hate to see you repeat two issues that basically sound like you're going to get the same kind of response.

MR. LAZER: There are various public values at stake here. Partly it's a discourse of how we allocate resources to societal objectives, and so there is a question, as has been discussed today, about allocating money toward application of this technology, and that is one element of a discussion, public discussion, as to how much resources should we devote to this technology as well as how do we want to design institutions to make this happen because obviously there is sort of a lot of awkward governing arrangements involved in making, for example, the database happen because we have so many governing entities involved to have to coordinate with each other.

So a lot of interesting discussions could happen around that. Clearly another set of values is, you know, crime fighting values on the one hand, trying to catch criminals. Another set of issues is privacy issues, and there needs to be some public discussion as to how we best balance and achieve those various types of values. So that's really where I see the value of discussion occurring.

MR. ASPLEN: That's also somewhat generated by a speech that was given by Justice Briar at the recent Whitehead Institute Symposium on Genetics and Society that I sent a copy of to all the Commissioners and I would be happy to get you folks a copy also, but the point that Justice Briar made essentially was that there was a tremendous value to public discourse on these issues to Supreme Court decisions, and that's something that we don't often think about.

We often think about Supreme Court decisions made in the vacuum of purely the legal system and legal construct, but he used two examples, one of which was the right to die debate prior to it being heard at the Supreme Court level, and also some of the issues surrounding the patenting of genes.

As I was listening to this presentation my thought was that is exactly what the Commission is doing. I mean the function of the Commission is to have that discourse, and particular to us, we look at like the arrestee issue where when that first started two years ago, when that discussion started, it started on television really with Commissioner Saffer on TV one night and the ACLU on the TV the next night, and I think the Commission provided a great value to having kind of a level playing field.

So that's where that concept got generated, especially considering the fact that the Commission is going away after this conference. Kind of what next? How do we discuss these issues? What mechanism has that public discussion?

MR. PLOURD: You brought up some subjects about post-conviction and data banking. Another subject area that might be dovetailing post-conviction would be looking at the unsolved old cases very similar to post-conviction cases.

MR. LAZER: There is a whole set of interesting issues. You're talking about how to prioritize resources. With the database if you have a certain set of resources, how do you prioritize them? It's not just simply an issue of how you maximize the number of hits, but sometimes also digging into old wounds, which there was an interesting article last month I think in the Boston Globe about looking to old cases and how many of the victims weren't so happy about having this dug up again.

I mean sort of going back to the issue of public discourse, there are a lot of interesting trade-offs as to what you pursue and how you pursue it, and I think that's where sort of having society mull these things over is a healthy thing.

MR. PLOURD: We're working on some protocols for old case review, and that's a big issue, what are the victims thinking? How do you deal with the victims of a 20-year-old case?

MR. LAZER: Are there other views on how exactly we might format this in terms of getting enough sort of interaction and discussion so as to maximize the value added in terms of this discourse? I'll throw that out to everyone because I've played around with various ideas of how to get people mulling this over and talking about it, and how do you get people coming away from the conference really saying well, you know, these are really tough issues and I think I really gained something here? Do people have views sort of on the nuts and bolts level of how to make that happen?

MR. CLARKE: What other models have been used at the school for similar type symposia?

MR. LAZER: This is a somewhat larger magnitude. There are certain suggestions I've got at the very nuts and bolts level, of, for example, formatting it so, for example, you have a very active

chair of each panel who will act as sort of followup questioner, for example, and take it upon themselves to try to make the panel more coherent, if you will, and having a summarizer, someone picking out someone who will sort of take five minutes at the end of the panel and say listening to this conversation here are what I think are sort of the key issues.

So there are various ideas along those lines which I'll plan on implementing as well as just, for example, at lunch trying to -- when I was talking about getting people to talk to each other, trying to mix tables up at lunchtime so that people -- so you get some mix. People naturally just talk to the people they already know, so you could easily have a conference where people only talk to the people they already know. For example, you might try to get people assigned to tables so they're scrambled up in various ways. These are getting down to the nitty-gritty nuts and bolts, but it matters quite a lot in the end in terms of the success of the conference.

So there are various ideas like those floating around at the Kennedy School. I'm just wondering in particular given that you folks know the populations and the particulars of the issues best, what you might suggest. Is there any particular things you might suggest?

MR. CLARKE: I've seen that active moderator, for lack of a better term, used quite effectively in the past a couple of times.

MR. ASPLEN: David, do you think that on one of these subjects on these panels that it could be formulated in a way that we could pursue the friendly Arthur Miller type discussion, which I think is a little bit different than what you're talking about, where you get more of a kind of a case scenario or whatever, and you've got the participants there, maybe five or six representing different components, maybe prosecutor, defense attorney, civil libertarian type, laboratory over here and have that kind of more immediate interaction amongst them?

MR. LAZER: So, for example, presenting some type of scenario or case scenario and saying let's talk about how you might wrestle with that? That could be quite valuable. In fact, we even have a case that was developed at the Kennedy School around the implementation of the database in Massachusetts, and it might serve as a useful discussion point along those lines because there are again a lot of these trade-offs in there.

MR. ASPLEN: One thing that comes to mind is what we talked about earlier this morning on the behavioral genetics issue. Let's say what are the ethical considerations of you've got -- let's suppose that there has been the identification of a gene for pedophilia and the percentages are 75% or something and play that out. Prosecutor, what is your ethical obligation to use it or not use it? Defense attorney? Maybe that's a good place because I think if you're going to facilitate that, it has to be something where there is going to be a wide divergence of use. Otherwise it gets pretty boring.

MR. THOMA: Chris, one of the things in our discussions we're really looking for almost a debate format where there are different ends of the spectrum in the same panel, so we were looking along those lines, but I think it's a good formula to have an exact discussion, not necessarily a case or something like that, but a given set of facts what would you do or what is your view on this, and I think that's definitely something we should take into account.

MR. LAZER: I think that's a very good idea. More generally where there is a range of opinions, we need to have that on the panel because I think one hopes to get a little heat and enlightenment going on these panels, and particularly that might be something else to work with the panel chairs on. Let's work out certain types of questions to present. It might not be a whole discussion around a particular fact pattern, but let's say let me throw out a scenario to you. There is someone who has this gene, et cetera, et cetera, what do you do? What do you think is the right thing to do? So I think that's a very good idea as a tool to pursue it.

MS. BASHINSKI: I have a thought about how you memorialize the meeting. I think back to a conference that I was at a few years ago, and what they did was to insure that comments, questions, and other things were captured almost verbatim so that you don't lose the dynamic of the conversation. I don't know if that's part of what you would expect to do, but I think it really does memorialize it.

MR. LAZER: I think that's very important. Ideally we will be able to use the web. This is the wonderful thing today in terms of spurring public discourse, but we will get it all recorded, and the objective is to record it and then archive it in essence on the web and ideally simulcast some of it on the web and potentially if there is interest on say CSPAN or what have you where the objective would be that if someone hears that this is a great conference and there is this really great panel on privacy issues, and to have it so someone could click, go to the conference and click go to that panel and then have it in depth so then you could go to particular parts of the panel. I think that would really magnify the impact of the conference.

MS. BASHINSKI: You might even consider with some editing and iteration back and forth putting some of that in the actual proceedings, not the entire transcript, but some of the comments and exchanges.

MR. LAZER: That's a good idea.

MR. GAHN: Just a few thoughts I jotted down here. I think one of the things that you may wish to look at is at what other scenarios of this technology can you present to the public and to law enforcement? What does the public think of a police officer following someone for the purposes of obtaining a genetic sample or even doing something more aggressive or active? What do they think of stringency searches where you're going to look for your databases and perhaps look for relatives? The elimination samples, do police swab everyone on the scene or when a person is identified? What do you do with those? I think victim impact is so important.

The other area that you might want to look at would be the statute of limitations. Is the technology going to cause us to change our statute of limitations? Should we even go back 10, 20 years and identify these individuals and can they be used in our new sex predators even though you can't charge, there is never going to be a conviction? Could other states use it in what they call other acts of crimes evidence even if the statute is past? These are a lot of questions and issues I think come up with technology.

MR. LAZER: I think that's a terrific list, and then the question would be so plugging that in I think into sort of a broader theme and saying now -- and again maybe either you would want to

use those as particular questions in particular panels or they may naturally come up in certain ways as well. If you want to talk about privacy, let's run by this scenario where let's say you search for relatives of close hits, what have you. So I think that we may even want to work on a list of these scenarios in essence sort of as discussion starters.

MR. ASPLEN: I think the way that Norm phrased it is really important, and we don't often phrase it that way is what does the public think about it? We always think about it in the legal context, can we legally do it and is it a good investigative technique, but that phrasing I think is really, really important.

MR. REINSTEIN: When the steering committee decides who is going to be the moderator of this Arthur Miller type presentation, it's really important to put a lot of thought into who that person is because sometimes that person dominates the conversation, which isn't good. Sometimes the person just isn't very effective, and the whole thing falls on its face. I just did one in Arizona on capital punishment, and the moderator was fantastic, and I've done other ones in the past where it was just a bunch of people talking for five minutes and the person didn't generate any discussion.

MR. LAZER: It's a real skill to walk that line spurring discussion without dominating it.

MR. PLOURD: I did a panel with Woody and a couple of judges for a judges' conference. Actually there was a professional person that does it. He really doesn't know the subject matter. He is the facilitator, and that's the type of person you want to get because that would be a big problem to more or less have a keynote speaker.

MR. ASPLEN: There are a couple of people at Harvard who are pretty practiced at that.

MR. LAZER: This is sort of the particular way of teaching at the Kennedy School is around the case method. So the objective is very much along these lines, which is okay, rather than projecting their own views, they just develop a skill at sort of sensing the sort of key points that you have to push and the argument and getting people in essence saying it themselves or pushing the envelope themselves.

MR. REINSTEIN: Also to make sure that one of the people doesn't dominate the conversation other than the moderator.

MR. STRANGE: I think one of the things going forward is going to shift a little bit at least in the national scene to the states. In Texas at least we're going to be trying to increase funding for a variety of DNA things, and it's impossible to recreate at a state level this kind of function that you're talking about. I think it's very important that the product of this be somehow transferable to the state legislators in the form of a presentation of evidence to them at the committee level to make decisions about the extent to which arrestees are entered into the database and that kind of thing. I think it's a great idea, and it's something that's going to be necessary in order to convince legislators one way or the other.

MR. LAZER: Ideally I think we would get some state legislators. There are a lot of state legislators out there, but ideally you would be influencing those particular policy debates at that

level, and I think that has got to be seen as part of the impact of what we're doing here because that is where perhaps you might say most of the action is.

MR. GAINER: Can I simply reaffirm what Chris was mentioning about the unsolved cases. We heard Paul talk about the failed consequences of moving quickly just because of the backlog, but many of us -- and, of course, you heard Barry talk about it -- just think it's criminal that we have not done something with our unsolved cases. I haven't heard much of the police collection end of this law enforcement or criminal justice, so we need to have a portion of several of the panels at that end of the business.

MR. LAZER: Particularly focused around the backlog issue or just sort of the allocation?

MR. GAINER: For David I just hit a couple of them. I think it's the resource allocation from the police perspective and from the criminal justice perspective, whether it's a police lab or the police department, and it's the serendipity aspect that law enforcement can use in deciding how to collect evidence as well as how that ties into the nonsuspect cases. There are just tens of thousands of those nonsuspect cases that we're all shrugging our shoulders at, which means someone else is being victimized.

MS. ABRAMSON: It would seem to me it would start at the scene of the crime and what the officers do and where are you going to put your resources, et cetera.

MR. LAZER: I think that's essential again to talk about societal values of where we target our resources both in terms of just generally do we decide to pour more resources into this particular technology and then looking within say the criminal justice saying you have a particular size pie; how do you allocate it? Part of this is also a question of adaptation. If you have a new technology come along and say we will reallocate some of the money we have doing other stuff to doing this new thing and get more done with the same amount of resources, some organizations don't typically adapt very quickly because they're real institutional states and keep on doing things they way they have been done. I think here is an introspection of what are the organizational barriers to adapting to these new opportunities.

MR. GAINER: I guess in some respects it could be very simple. If there was \$50 million to be suddenly allocated to the future of DNA, should we put the \$50 million in straightening out post-convictions or should we put \$50 million into the prevention of further crimes and working unsolved cases? I mean I just think that's interesting. Which one do I choose?

MS. BALLOU: If you could start a discussion by just giving the whole group you've just been given \$50 million; how would you tackle this problem?

MR. PLOURD: Nobody gets a prescreening of it.

MS. BALLOU: Because I hate to see the hopeless situation you have all of these backlogged cases at your lab. Everybody is shrugging their shoulders. I don't know. It would be nice to have a discussion that people are thinking of some ideas as to where we can go and what we might do as a group.

MR. LAZER: I would agree with that, but I think there are two ways of framing these questions. Well, you get \$50 million, but there is also a question you already have resources allocated to the criminal justice system, and do you reallocate some of what you have and you go to your state legislator and say rather than more of this, we want more DNA? It may not have necessarily been the case that particular law enforcement organizations are asking for that reallocation. So there are a lot of interesting ways of framing that discussion, and I think it really does get down to again sort of as a society do we want to allocate it toward looking at old cases or just new cases? Do we want to do it all, but then at the cost of something else because we don't have unlimited resources? That's why we need to have a discussion like that.

MS. ABRAMSON: I'm going to have to call this to a halt because we're half an hour late. So thank you, Professor Lazer, and I hope the people who do have ideas will communicate with you on them, and I think this has been fruitful.

I did announce the steering committee for a purpose other than to let you know who they are, and that is to encourage anyone else who wants to join them for this to do that. Chief Gainer. Anyone else?

MS. TURMAN: I will be happy to work with you on victim impact. I mean this process isn't driven by victims, but I've got some ideas.

MS. ABRAMSON: It's not closed. We have others that join and join for particular purposes, too. So thank you. We'll see you in November at a great seminar. You have a number of people at the law school that we've heard and worked with. So thank you.

MR. LAZER: I'm just going to put a few business cards so you can easily figure out my contact information, but you can track down anyone on the Internet anyhow. So thank you.

MS. ABRAMSON: Chris has reminded me what we failed to do yesterday was approve the printing of the CD training ROM that we saw. We all gave it great accolades, but we didn't have an official motion approving it and asking that it be appropriately distributed.

MR. THOMA: So moved.

MR. ASPLEN: I second.

MS. ABRAMSON: Is there any discussion?

MS. BASHINSKI: Just one comment. If it's possible to do something -- I'm sorry to say this -- to do something about that word, please do consider that.

MR. THOMA: In fact, Jan was offering to do the entire voice over.

MS. BASHINSKI: I'm just suggesting.

MS. ABRAMSON: If they can, they will make appropriate changes. If they can't, we'll go with whatever it is. Those in favor?

(Chorus of ayes.)

MS. ABRAMSON: Opposed? It's unanimously carried. Any other cleanup? Professor Butler.

Racial Profiling
Associate Professor Paul Butler
George Washington University Law School

MR. ASPLEN: Professor Butler joined the faculty of George Washington Law School in 1993 after years in the Justice Department public integrity section where he was involved in the investigation and prosecution of, among others, members of Congress, several law enforcement officials, and numerous federal agency employees. He also served a term as a Special Assistant U.S. Attorney prosecuting street crimes in D.C. Superior Court.

In 1992 Professor Butler received the Attorney General's special achievement award, and prior to his government service he was associated with the law firm of Williams & Connolly where he practiced in the areas of white collar criminal defense and complex civil litigation.

We've asked Professor Butler to speak to us today about the issue of racial profiling. It's not the issue of racial profiling in DNA databases, as was on an earlier agenda that went out. There are a couple of reasons for that, but one of them is we've, quite frankly, tried for about two years now to find someone to talk about that particular issue, to talk about the marriage of the two, and to talk about any particular instances that we're aware of wherein there has been a racial profiling based on DNA -- the database or an intentional arrest of someone to get them into the database based on race.

We haven't found any of those either speakers or those particular instances; however, the potential is obvious and the issue is obvious, and the point is it occurs elsewhere. We should know and analyze what other contexts in which racial profiling does occur, and then it will be the Commission's I guess function after Professor Butler speaks, but hopefully with his assistance to talk about what the potential issues are in regards to racial profiling in the context of the forensic DNA database.

With that thank you, Professor Butler.

MR. BUTLER: Thank you for inviting me here. It's a pleasure to be here, and I know that you're running a little bit late, so I'm going to make my presentation correspondingly shorter and still try to be done including with the discussion by 2:30. That's not particularly difficult because I think this issue that you have asked me to talk about, racial profiling, is a relatively easy issue, especially relative to some of the issues the Commission has been dealing with especially relative to some of the statistics and quantitative analysis, scientific issues that you're dealing with, even though as we'll see people often use statistics and quantitative analysis to try to justify racial profiling as well. I think that's a misuse, as we'll talk about in a few moments.

When I was invited to speak about racial profiling, I was delighted. I happily agreed with the caveat, as Chris mentioned, I don't know much about DNA. That's not my area of expertise, so I'm hoping to make the formal part of my presentation relatively short so that we can a discussion, the discussion that Chris mentioned about some of the ways that race and criminal justice or racial profiling might impact the future of DNA evidence.

I mentioned that this is a relatively easy issue. I think this is easy because I think in the next 10 to 15 years racial profiling is going to be eradicated most probably from the law, but hopefully from law enforcement practices as well. I'm reasonably optimistic that in that period of time courts will find that it's unconstitutional and also immoral, but I'm also optimistic that more police departments will find that racial profiling is inefficient and expensive. So again maybe the most productive use of this time is to talk about this present and future law than to think about how the future of race and criminal justice relates to the future of DNA.

So I'll start with a story that is going to complicate what I've just described as an easy issue. The story is about racial profiling. I'm the subject of the story. It's about one of the several times that it has happened to me, and the complicating factor is that in addition to being an African American man, I'm also a professor of criminal procedure, and sometimes those two identities seem redundant.

I'm walking about five blocks from here in the most beautiful neighborhood in the District of Columbia. It's the neighborhood where I'm privileged to live, and it's not a walk that I'm familiar with because I usually drive to work. Even though I'm coming home from work and walking in the city, I see raccoons, I see deer, all kind of birds, and even more unusual in the District of Columbia, I see African Americans and white people living next to each other. It's really a wonderful place to live.

I'm a little ashamed that this is an unfamiliar walk. It's occasioned because my car is broken down. It's about 9 o'clock at night. The streets are mostly deserted. I've got on jeans and a tweedy jacket, a law professor look.

When I get about three blocks from my house, a Metropolitan police car passing by slows down. I keep walking, and the car makes a right turn and circles the block and meets me. There are three officers inside the car. They greet me with the words, "Do you live around here?" I have been in this place before. I know that answering that question will be the beginning and not the end of an unpleasant conversation that I don't feel like having. I don't feel like answering after do I live around here, "Where do you live? It's kind of cold to be walking outside. Can I see some ID?"

So I ask a question instead. I answered their question "Do you live around here" with, "Well, why do you want to know?" The three officers exchanged a glance. It's the we've got a smart ass on our hands glance. I get that a lot. "Is it against the law to walk on the sidewalk if I don't live around here" I ask. They don't say anything. I said, "Have a nice day, officers," and I head towards home.

The police then engage in this investigative technique that probably is not called cat and mouse, but that's a more accurate description. They park their car on the side of the road. They turn off their lights and they watch me walk. When I pass out of their range of vision, they move their car to where they can see me, and in this fashion we arrive on the block where I live.

I have a question, and so I stop and wait. For once I have the power to summon the police faster even than the President of the United States, who lives about seven miles from my house. So

sure enough as soon as I pause the car does, too, and the police and I then have I guess you could call it a conversation, but it consists mostly of questions. "Why are you following me? Why don't you tell us where you live? What made you stop me? We don't see a lot of people walking in this neighborhood. Are you following me because I'm black? No. We're black, too."

Now, that last answer was true, but it wasn't responsive. I asked these three black officers have they ever been followed around by a security guard or by the police? They all say yes. In today's New York Times there is an article, a long article about black police officers who are the victims of racial profiling in their undercover assignments. These officers say that stuff has happened to me. The sergeant says it doesn't bother her because she knows that she's not guilty. She's not a thief.

The specific context of the thief remark was I asked them if they knew about the Eddie Bauer case which had occurred recently. This was an instance in which an African American teenager was shopping at that store. He happened to be wearing a jacket that he purchased a couple of weeks before. The security guard at the store made him take off the jacket and go home and get a receipt to prove that he had purchased it.

The case had been in the news because there had been a trial the week before about whether that was a civil rights violation. The kid, an 18-year-old kid, when he testified about how that made him feel, he broke down and cried. It had been in the news because the kid ultimately was awarded quite a bit of money.

The officer said that she hadn't heard of it; the sergeant did, but they said again my neighborhood wasn't one where they usually see people walking, and furthermore, "We know everybody who lives in this neighborhood, and we don't know you." I asked them, "Do you know who lives in that house," pointing to the house where I've lived for the past 14 months. They answered, "Yes, we do."

And so I walked. I walked up my stairs. I sat on my porch and I waited. I waited because I'm a professor of criminal procedure, and I waited because I remembered the last time that I had cooperated I was in a different place and at that place cooperating meant I let them search my car or rather I let one search my car while the other watched me with his hand resting on his gun on 16th Street with cars whizzing by. I pretended like I was invisible.

Now the officers parked their car and they positioned the spotlight in my face. All three of them joined me on my porch. "Do you live here? Yes, I do. Can we see some identification? No, you may not."

During the antebellum period of our nation's history blacks were required to carry proof of their status, slave or free, at all times. Any black who was unsupervised by a white was suspect. In North Carolina to make it easier for law enforcement blacks were required to wear shoulder patches with the word "free."

So at this point the District of Columbia through its three agents sitting on my porch along with me tells me it's too cold to be outside. "Go in the house." I said, "I'm content where I am," and

the police announce that they are, too. They are not going to leave until I produce some ID or enter the house.

This is where the story gets bizarre. Walking home relatively late for a law professor -- 9 o'clock is actually really late because I had been working on a book review for the Harvard Law Review, and the book which I'm carrying in my knapsack is *Race, Crime, and the Law* by Randall Kennedy, a professor at the Harvard Law School.

Since apparently none of us have anything better to do this evening, I take out the book and I show the officers Chapter 4, "Race Law, and Suspicion Using Color as a Proxy for Dangerousness," and this chapter in this book contains several stories just like the one that I've told you. It quotes a professor at Harvard University, Henry Lewis Gates, who says -- and this is what I read to the officers -- "Blacks, in particular black men, swap their experiences of police encounters like war stories, and there are a few who don't have more than one story to tell. Eric McDonald, one of the few prominent blacks in publishing, tells of renting a Jaguar in New Orleans and being stopped by the police simply to show cause why it shouldn't be deemed a problematic Negro in a possibly stolen car. The crime novelist, Walter Mosley, recalls when I was a kid in LA, they used to spot me all the time, beat up on me, follow me around, and tell me I was stealing things. Julius Wilson wonders why he was stopped in a small town by a policeman who wanted to know what he was doing in those parts." There is a moving violation that many African Americans know as DWB, driving while black, but this I tell the officers is the first time I've heard of walking while black.

I've got a big picture window in my house. I pointed to that picture window. It's right across the street from a park. It's a beautiful place to walk, and I tell the officers I see people walking down that street all times of the day or night, white people, and I never see them stopped and asked to produce ID or if they live in the neighborhood, and that's why I'm not going to show them my ID. It's not apartheid South Africa, and I don't need a pass card.

How did it end? The officers weren't interested in my politics or my reading Law Review articles. In fact, they announced that they were getting angry. They were burglaries in this neighborhood and car vandalism, and the police were just doing their job and I'm wasting their time, the taxpayers' money. One officer said I must be homeless. The other one says that I'm on drugs. When they find out who really lives in the house and whose porch I'm on, I'm going to be guilty of unlawfully entry, a misdemeanor.

The sergeant says ultimately that since I was being evasive, she is going to interview my neighbors. The two officers who remained radioed for backup. The officers over the police radio actually gave the wrong address for the house, and I corrected the officers. Soon a second police car arrived with two more officers.

I was cold, but stubborn. Finally my neighbor came out and identified me, and I was free to be left alone, free to walk on a public street, free to sit on my porch even if it was cold.

So that's the story. What is the moral of that story? What happened to me was racial profiling. In the most benign, charitable, legal interpretation racial profiling is when law enforcement uses a

particular racial identity as one of several indicia of suspicion. So what it is is race based stereotyping. So when the police are looking for drug couriers at the railway station in addition to looking at clothing and how you purchase your ticket and how you walk when you get off the bus, they look at whether you are African American or Hispanic.

What racial profiling is not is race based identification. Among the many groups who have problems with race based profiling, I never heard anyone say that police should not be allowed to use race in the description of a suspect or perpetrator.

Why does race based suspicion exist? The most common explanation is that it's rational discrimination. Drug drives is probably for African Americans the most common context of race based suspicion. For whites it's also probably the most common. Whites driving around mostly black neighborhoods, especially a project, are often the victims of race based suspicion. Hispanics also. Racial incongruity, whenever you're not in an area where people of your race should be or usually are, you can be the victim of it. Hispanics also experience it quite frequently at the border.

The explanation again is rational discrimination, and it's justified by the use of statistics. If you think about drug runs, for example, it's true that most of the people -- over half of the people who are convicted of drug crimes in the United States are African American. Since that's true, some police officers say it makes more sense for us to think that you're more likely to commit that crime if you're African American, so that's why we focus on you.

There is an interesting relationship here between looking for things and finding things. What do I mean by that? Well, if we think about drug crimes, for example, according to the Department of Justice African Americans don't use drugs any more than any other groups. African Americans are about 13 percent of people who use drugs according to the DOJ, which has fairly sophisticated ways of tracking these things.

If we look at drug possession, the crime most closely correlated with use of drugs, African Americans are 33 percent of those who are arrested for that crime. A little more than half the people convicted of that crime -- if you look at everybody who is in prison for drug crimes, over 75% are black for drug possession. So 13 percent are users. They're about 75% of the people who are incarcerated for that crime.

So there is a certain amount of self-prophecy when police say that it's rational because you're more likely to be convicted of drugs if you're black; therefore, we're going to look there. The person who made this argument in another context most eloquently about the unfairness of focused suspicion, not race suspicion, was Justice Scalia of all people. Justice Scalia had the occasion to examine this relationship between looking for things and finding things when he was reviewing the independent counsel statute in the case of Morrison versus Olson.

Justice Scalia believed that the Act, the Independent Counsel Act, was unconstitutional for several reasons, so he dissented when even the court found that it was constitutional. He also included a remarkable short passage about why in addition to being unconstitutional, the act was unfair, and his argument was that's it's not fair to look specifically at one person or one group of

people to see whether they've committed a crime. I'll read you what he said, and try to remember that Justice Scalia is talking about not African Americans, but people who are the subject of the Independent Counsel Act.

"If a prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor because he will pick people that he thinks he should get rather than cases that need to be prosecuted. With the law books filled with the greatest assortment of crimes a prosecutor stands a fair chance of finding at least a technical violation of some sort of some act on the part of almost anyone.

"In such a case it's not a question of discovering the commission of a crime and then looking for the man who has committed it. It's a question of picking a man and searching the law books and putting the investigators to work to pin some offense on him. It is in this realm in which the prosecutor picks some person whom he dislikes or desires to embarrass or selects some group of unpopular persons and then looks for an offense that the greatest danger of use of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group."

So that's Scalia on why law enforcement attention focused on one group is wrong, is unfair. Scalia seemed to describe a lot of motives as to why law enforcement would do that. A lot of my police officer friends, African American mainly, admit that they especially enforce the drug laws in African American communities, but they do it for what they consider benign reasons. They think it's in the best interests to those communities. So they admit the selective enforcement, but don't think it's a bad thing.

That's what it is. Again, I believe you have a Law Review article from Professor Harris in which he describes many careful studies about instances in which race profiling has been proven. One fairly well-known study was done on I-95 through Maryland. What all of these studies find, especially in the driving while black context, is that on highways, on interstate highways like I-95 virtually everyone breaks some law, mainly the speeding laws, so the police have wide discretion about who they could stop, and invariably African Americans are stopped much more frequently than others, and then they're asked if they can be searched or the police use the stop as a pretext to look around their car.

So there have been a number of studies that have found this. African Americans don't break the speeding laws more than any other group. On I-95 I think they were about 15% of people who broke the traffic laws, which is consistent with a good percentage of the population, but they were far more than half of the people that were stopped. So again there seems to be fairly compelling evidence that racial profiling exists.

What is the law on this issue? There have been two kinds of challenges, a Fourth Amendment criminal procedure challenge and then a 14th Amendment equal protection challenge. So far the law in most jurisdictions is that racial profiling or based suspicion, that is, the use of race as one indicia of suspicion is perfectly legal. It's perfectly constitutional. The constitutional analysis, the Fourth Amendment analysis, is whether it's reasonable -- is it reasonable for law enforcement to

be focused on African Americans. The majority rule was expressed by the Eighth Circuit in a case called *U.S. versus Weaver*.

Is it reasonable? The Eighth Circuit says: "Facts are not to be ignored simply because they may be unpleasant. Race when coupled with other factors is a lawful factor in the decision to approach and ultimately detain a suspect. We wish it were otherwise, but we take the facts as they are presented to us, not as we would like them to be." Most jurisdictions are in accord with the Eighth Circuit on that. There are a few states and notably in the Federal Circuit, the Ninth Circuit, which does not allow race to be an indicia of suspicion, so in the Ninth Circuit racial profiling is unconstitutional.

The analysis there is in response to what I said, that the police when you're -- this concept of racial incongruity, when you're in an area where members of your race aren't supposed to be, the police can especially focus on you, that's not American is what these jurisdictions have said. The State of Minnesota in a relatively well-known case and now the Ninth Circuit said that's not how we do things in the United States of America. That's not reasonable. The Supreme Court has never directly reviewed this issue. One reason it hasn't is because civil rights advocates who were bringing these cases don't want the Court to consider it now because they're afraid of what the answer would be.

So finally the effects of the law. I think that there are some troubling effects of the current law. These effects have led to groups like the NAACP, the Urban League, the State Black Caucuses instituting reforms designed ultimately to eliminate racial profiling and race based suspicion. One of the most troubling effects is that it makes law enforcement less efficient. Race based suspicion and racial profiling is lazy law enforcement. It's inefficient. If you're focusing on people because they're African American, you're letting a lot of the bad guys go, and the drug context is an especially easy way to see that.

Again, if African Americans are only 13 percent of people who are using drugs, possessing drugs, but they're 75% of the people incarcerated for that, there are a whole lot of people out there who are not African American who are not being treated by the criminal justice system because the police are focused on African Americans. So I think what we all want from our law enforcement is crime control. We all want safer streets, and race based profiling simply doesn't bring us safer streets.

One other troubling effect of race based profiling is the impact that it has on racial disparities in the criminal justice system, and this may be of some use to your work in deciding whether and when DNA should be collected from people who are accused of crimes and especially whether it's at the arrest or conviction level.

In California two-thirds of black and Hispanic men are arrested before they reach the age of 30. In the District of Columbia about 50% of young black men are under criminal justice supervision, that is, awaiting trial, probation, or parole or in prison. A lot of the reason for this, the explanation for that disparity is this race based profiling. There is a federal judge in Massachusetts, Nancy Berger, who has suggested that the specter of race based profiling leads to such a disparate arrest rate among African Americans, that for African Americans it's not fair to

consider their arrest rate in sentencing. So she doesn't consider their arrests because she thinks the race based profiling which has led to a lot of their arrests makes that an inequitable consideration compared with white people.

The last effect I want to talk about before I begin a discussion is I know that in fact race based profiling enhances minority mistrust of the criminal justice system. Everybody wants safe streets. Since virtually every African American man I know and many Hispanic men and many women of color have stories like the one that I told you at the beginning, stories of being stopped by law enforcement we believe because we're African American or Hispanic and we're totally innocent, it makes us doubt both the good faith and efficiency of law enforcement, and it has a really negative effect on psyche as well.

Just for your information, after that experience -- even now I think about how I look when I walk around my own neighborhood, so on a day like today when I would love to be able to take that walk in cut-off shorts and a baseball cap, I won't do it unless I feel like having another experience with police officers. Sometimes I actually prefer to leave criminal procedure at the office. The effect has been discussed by an interesting dialogue between law professors. I'll just read you a sentence from that dialogue.

One of the law professors said -- the issue here was what about when women feel like they're being followed by a black man? It's often a white woman, and they cross the street to avoid that. The one law professor, who was a white woman said, "Well, the calculus there is whose feelings are we going to be concerned about most? Are we going to be concerned about the woman's feelings or the man's feelings? I for one would rather be snubbed than raped." So the calculus is reasonable to cross the street so you won't believe or won't perceive that the black man is following you.

An African American professor named Jodi Longworth responded to that by talking about what he called the microaggression of being subject to that judgment based on race and the toll that it takes, and he says: "From the standpoint of doing justice to the severe dignitary injuries reflected by these microaggressions and the extreme unlikeliness that any one African American person is likely to commit a crime," he says, "a better comparison than I would rather be snubbed than raped would be I would rather have waves of strangers successively spit in my face than run the extremely remote risk that a random anonymous black man might rape me."

I like that because that's what it felt like on my porch. I should say, especially since I know that Officer Gainer is here, that the police were relatively polite to me. I never doubted that they would use excessive force on me, and for most of the time I didn't doubt their good faith. I just thought that they were misguided. In fact, one of the reasons that I was able to engage in this exercise in criminal procedure is that I didn't think they were going to harm me physically. Nonetheless, it did feel like being spat at, just the fact that they were questioning my ability to walk in my neighborhood.

The final claim -- and this I think will relate to some of the Commission's work -- is juries. I think that many jurors are skeptical of law enforcement claims of special expertise in part because of the mistrust that race based profiling engenders. When I was a Special Assistant U.S.

Attorney, some of the black assistants would joke among ourselves about the D.C. juries and their receptiveness to special technology. Here we weren't thinking about DNA, but we were talking about relatively low tech. infrared binoculars.

We had some cases, some buy bust cases, in which we put police officers on the stand who would testify that they had observed a drug transaction in the evening from a distant vantage point using binoculars, and the police would say that these binoculars allowed them to see as well during the evening as they could during the day by virtue of their special technologies.

While a lot of people might accept that claim at face value, D.C. juries often needed proof. They want to see the binoculars. They want a good explanation about whether they really did what the police said they were doing, so often if we could, we would show them the binoculars. We would give them a special demonstration. They wouldn't believe it just because it was technological and some police expert told them that they should.

Think about it from a historical perspective. The skepticism about government claims when it comes from African Americans shouldn't be that surprising, and I think it's especially appropriate, the skepticism in the criminal context, when the government has the heavy burden of proof. So that's another issue that the Commission might want to consider. I think the nexus of racial profiling is that it's in everyone's interest to instill confidence in our criminal justice system.

Professor Scheck in his Innocence project was certainly instrumental in showing how DNA evidence helped make our system more fair for accused persons as well as more efficient law enforcement. So I applaud those efforts, and I wish this Commission well in its task of making recommendations that will gain the support of our diverse nation.

Thanks for your attention. I would love to hear what you think about this, and especially if you want to talk about how this might relate to your work.

MS. ABRAMSON: Thank you, Professor. Comments? Questions?

MR. HILLARD: What I would like to know is you hear the ACLU, the NAACP, and all the different advocates became experts on racial profiling in the last year and a half, and everybody wants every organization, every law enforcement organization to collect statistics. Can you give me a read on that? Is statistics alone going to prove this? We're struggling with it in Chicago. That's one reason I'm asking.

MR. BUTLER: The statistical studies that have been done have proven that race based profiling occurs; that is, it's proven to a lot of people. All the statistics do is collect evidence of who police stop when they make reasonably suspicious stops and the race and the gender of the people who are stopped. They collect a body of data, and that's usually seen by groups like the NAACP and the ACLU as the first step in ultimately eliminating these practices. For a long time police publicly said that race based profiling didn't occur, that they didn't consider race, and these statistics seem to refute that.

In terms of legislation, that's as far as most laws go now. There are laws in some jurisdictions that require police to collect these statistics. The President under executive order has required the police agencies under his control to also collect such statistics. There is a bill pending in the Congress that will require law enforcement nationally to collect these kinds of statistics. That bill doesn't seem to be going anywhere. There is resistance to this among law enforcement.

Again, it seems like a relatively minor step, but it's one that any law enforcement agencies I guess for paperwork reasons, among others, have been reluctant to engage in.

MR. HILLARD: Maybe you didn't get me. What I'm saying is do you think just collecting statistics alone is going to be able to -- we know that racial profiling has no legitimate concern in law enforcement, those of us who want to admit it, but what I'm saying the ACLU, a number of committees, a number of advocate groups that we have in the City of Chicago, they want us to collect just the statistics, not analyze them, not evaluate them, and give them to them. As you know; you're a professor, statistics can be manipulated.

MR. BUTLER: I agree with you that there is no value in simply collecting statistics. I think the collecting of statistics is the first step in either seeking some kind of reform due to the law -- I'm saying this does happen, contrary to what you may believe, so let's do something about it, or do we need some kind of tort reform.

So far the Fourth Amendment challenges haven't been successful. There are also some constitutional challenges and some equal protection constitutional challenges. The idea is that the government according to the constitution isn't supposed to be color conscious with rare exceptions, and this isn't one of those exceptions. It's an argument that some people have made because they think it will appeal to the more conservative members of the Supreme Court. I certainly agree that it's only a first step, and that the real work is in eradicating the practice, not simply acknowledging that it exists.

MR. GAINER: In that regard two issues. The statistical thing Chief Ramsey and I have talked about a lot in Washington, whether we ought to do that, and we haven't exactly worked through the implications, but if in a given district in the city where 90% or 95% of the residents of that neighborhood, that district are African American, what would statistics show you in that neighborhood about who was stopped and who wasn't stopped? I would presume and I know that most of the officers are black and most of the people they would stop in their district where they work all the time would be black. What would we do with those numbers?

MR. BUTLER: When we think about the race of the officers, for example, one thing we're beginning to find is that doesn't much matter. It seems that African American police officers and private security agents are as likely to engage in race based profiling as anyone else. Again, they're certainly subject to the hype that African Americans are more likely to commit crimes, and therefore it's better law enforcement to do that.

I certainly take your point, though. In some areas there is a huge African American population in some segregated areas, and the statistics aren't by themselves going to be that useful, although again it's changing. Having said that, I think in the District of Columbia they still might be useful

for some crimes, for example, the drug possession and distribution crimes. The District is about I think it's 65% African American and 35% non-African American. Even in the District, though, I would imagine there is still racial disparity in terms of arrests and convictions for drug crimes.

When I was a Special Assistant U.S. Attorney, it was rare to see a white person in court. I don't take that to mean that whites rarely use drugs in the District of Columbia, so again even there there seems to be some kind of disparity that collecting statistics might give us an introduction to what is going on.

MR. GAINER: The caveat would always be that thoughtful people would have to look just beyond the numbers because if one published the numbers in a particular area that indicated 95% of the people were African American, then someone would make the conclusion that gee, the police must be prejudiced. So you have to be thoughtful.

The second one really applies to your story, and I think like anybody who would hear it, it's disturbing to know even polite officers were acting incorrectly, but actually what is more disturbing to me is to hear you say this afternoon you wouldn't go out in shorts and a ball cap because you think you might be stopped, which implies that you presume that all police officers would stop you because you have that on.

So sometimes the speakers like yourself might leave me with your impression or others that you're biased against police officers to think that every police officer thinks that every black ought to be stopped. I'm uncomfortable with you saying that, whether that was meant to be provocative or you really feel that about our police officers.

MR. BUTLER: I use that as an illustration of the toll that racial profiling takes on you. I think the term microaggression is a pretty appropriate term, and it leads to some responses that may or may not be rational, but that's the effect. That's the impact. Part of it is just a calculus of risk. I don't know. In fact, I doubt that every single police officer would stop me now in my neighborhood. Some know me. The ones who don't, I think some probably would not stop me. They would assume that I live in the neighborhood, but I had a right to walk on the streets without being questioned about that. Others might stop me.

So when I consider the calculus of risk, if I'm walking with a buddy, if I'm walking with a friend whom I've invited to see the houses they're building around the neighborhood, it has kind of ruined my day in a way that again I don't want to risk happening.

MR. GAINER: In the calculus of risk you ought to consider the fact that as many police officers as there are on the street at this moment versus as many people, I can assure you that very few people are being stopped. In fact, if you go to most community meetings, they will say they don't see police officers and not enough action is being taken. So the calculus of risk is quite low.

MR. BUTLER: Right, and that goes to the issue of efficiency. In my neighborhood you would see police occasionally patrolling the area, which I thought was okay because compared to some other parts of the city we don't have a real high crime rate, but I was always glad to see them patrolling.

What I want again is efficient law enforcement. One of the scary things about what happened to me was in that instance at least when I had the attention of five police officers, that wasn't efficient law enforcement, and that was the concern.

So I think again there is always this tension of African Americans complaining about racial profiling, but at the same time saying we don't see any police in our neighborhoods. How do you explain that? Again, what people want is safer streets. They want efficient, effective law enforcement, and they understand that racial profiling doesn't lead to that. So I don't think that there is necessarily a tension between asking for more police, but you also want the police to do their jobs without using race as a criteria, and they seem to be doing that. That makes you more dubious about the whole system.

MR. THOMA: I wanted to address Superintendent Hillard's questions about the collection of statistics. Just as a matter of fact, it just happens that anything from very unfortunate incidents to genuine tragedies, as the Sports Illustrated article that I showed you regarding the New Jersey incident, have caused the collection of these statistics, and in the Minnesota Law Review article Professor Harris addresses that the Maryland study is based on a series of unfortunate incidents to Ralph Wilkins. Probably the chief is familiar with him. He's with the defender services, an attorney here in Washington, D.C.

The problem with it is and the question you have as to whether we should collect them, I think what it really comes down to is if you do it, at least it may go a step towards raising the consciousness and raising the consciousness towards eliminating the problem, it being raised and everybody realizing it, not just the targets of the racial profiling realizing and recognizing that is prevalent anywhere.

One of the reasons I brought this up is when Commissioner Saffer testified to us, in my jurisdiction Native Americans are stopped an inordinate amount of times and their cases are dismissed. They're kept in custody the 72 hours that they can be kept and the cases are dismissed. Certainly Madison County doesn't have other minorities, particularly the levels of Native Americans, but my reading has shown that it is prevalent in a lot of places, if not everywhere, and what we need to do to raise the consciousness of it is take it into in our deliberations as to whether we do DNA extraction upon conviction of serious crimes for which we have real reasons to do so or we do it on detention and arrest where we have these inherent problems, which will cause an inordinate amount of minority persons who are totally innocent and not convicted of any crimes to be within a database that they have no business being in.

I'm sorry to get long-winded here, but I was trying to address the statistical issue. I think it's a good idea if the resources are available to do it. I realize statistics can lie in some instances. I doubt that it would do so in this particular area. It has been found not to so far.

MR. HILLARD: Jim, I think you need to look at what organization is analyzing statistics as the first thing. The second thing is I don't think that we need to generalize. I heard you make a statement saying it's prevalent. It's happening all over. You're generalizing. If I generalize about lawyers, I'm going to generalize about doctors. Let's not generalize about law enforcement.

MR. THOMA: Terry, I would never generalize, and I'm not trying to say that it's absolutely everywhere. I'm just saying that where the statistical analysis has occurred in these instances, and it has only been caused by instances such as tragedies or in circumstances like this, it has been shown that it is prevalent and it does occur. Other places have not done the statistical analysis, and I haven't seen any statistical analyses in which it has not occurred.

MR. HILLARD: Just like I said.

MR. GAINER: I appreciate your concern about generalizations, though.

MR. HILLARD: I think one of the things when we are talking about statistics, it's incumbent upon the law enforcement executive to get the people training, supervision, counseling, and discipline when necessary when this occurs. On the other hand, if they're really engaging in this type of behavior, this type of attitude, what we need to do just like you do with brutality, excessive force, it won't be condoned. You use the other hand and you go after him.

I think the NAACP and Allstate came out with a very unique video and training program that we not only use in the Chicago Police Department, but we use out in the neighborhoods when it comes down to engaging and disengaging not only with the young folks, but with the people on the street, and those first 30 or 40 seconds can detail whether an engagement is going to be positive or be negative. It just so happened with the good professor it went negative, but I really do think a lot of it has to do with training. There is a certain segment out there that need to be enlightened, too.

MR. BUTLER: When you think about again whether this recording of DNA evidence should occur and what stage in the process it should occur, you should be aware about this extreme disparity. It would be troubling to a lot of people if the DNA of two-thirds of the young black and Hispanic men in California was on record in some law enforcement agencies, and again two-thirds of black and Hispanics in California get arrested before age 30 and a small minority of white men had DNA on record. That would be a troubling disparity.

To the extent that you're concerned about political support for those ideas, again for whatever reasons a lot of civil rights organizations are jumping on this bandwagon about racial profiling, and it has led to some interesting twists in legislative agendas. For example, in Virginia in a jurisdiction there was a mandatory seatbelt law that was being considered by a municipality, and the NAACP and the ACLU came out against that mandatory seatbelt law because they thought the police would use it as a pretext to engage in racial profiling; that is, they would see a focus especially on African Americans who weren't wearing seatbelts and were stopped, so even though that is not an issue that has an obvious racial nexus, there was because of the specter of race based profiling.

DR. ADAMS: I would be interested in any comments you could make regarding a statement that Dr. Crow touched on this morning when he talked about new or future DNA technologies, and that is the potential of DNA being used to predict the racial origin let's say in an unsolved crime, having that DNA in the laboratory being able to predict the racial origin of the individual that left

that body fluid and where you see that falling in the continuum of race based profiling all the way to identifiers that you talked about.

MR. BUTLER: It's a good question. It's not something that I've thought about. Upon hearing it, it sounds like it would be more along the lines of an identification, which again is nothing that civil rights organizations have had problems with. No one has said that race should not be used as part of an identification of a suspect or an accused person.

One of the things you have to think about, though, is again in terms of common sense, the practical analysis, is how useful that would be. There was a case in Upstate New York. I can't remember the town. It was a college town in which an elderly white woman said that she had been robbed by an African American, and somehow due to some blood evidence that had been collected from the accused person, the police then went to all of the African American men in the town and asked for a sample of their blood so they could get the kind of evidence that they wanted to identify the perpetrator. That was appealed.

The scary thing is that the Second Circuit said that it was permissible law enforcement under the Fourth Amendment. There was no equal protection argument, so that was allowed. One of the things you have to think about is how efficient it is if all the DNA is going to give us here is narrowed down to a specific race, sometimes that might be useful; sometimes not. To answer your question, it does sound more like an identification than like a profile.

DR. CROW: It certainly would have uses in the identification of anything. It would usually be a pretty probabilistic and therefore weak identification, sort of like an identification of a perpetrator in the dusk or something like that.

MR. BUTLER: To make the obvious point, race is not a genetic concept. It's what we call a social construct. So I think at most what the DNA will be able to tell you is different physical attributes that are associated with certain racial groups or maybe dark skin or the shape of eyes, but there is obviously no such thing as black or white or Asian DNA. In fact, Africans tend to have more diverse DNA or more diverse genes generally than any other group.

DR. ADAMS: It's much more simple than that. If you think of the ABO blood type, you can take a blood type like AB that might be more prevalent in the black population -- if you've got ABO at the crime scene, the analyst could say the likelihood is that it's more likely from an African American versus any other. DNA is probably getting much more specific than we've seen with ABO blood types or anything else.

MR. BUTLER: That could cut both ways. Again, as Professor Scheck has indicated, there are all kinds of ways that DNA evidence can be used to advance racial equality or racial performance. One of the issues in this case in Upstate New York, it was a small town. Originally all the blackmen who lived in the town were students at this university, and so the police were able to say again it's a fairly limited universe. It didn't seem limited to the people who were the subject of the searches. I think it was about 100.

If DNA is more specific than something like a blood type, that make might the search more focused and less intrusive.

MR. ASPLEN: A couple of questions. First of all, can you point us in the direction of any examples of databases other than the DNA database, for example, the AFIS system, drug fire, or any others that don't come to mind right now -- instances of racial profiling that have occurred for the purpose of getting the blacks into the database, for example, arresting someone for the purpose of getting them into the fingerprint database or whatever so that they could be randomly searched? Is there an example out there of something like that that we could look at and kind of compare what those issues are to the DNA database?

MR. BUTLER: Not that immediately comes to mind, although anecdotally you hear about those practices. Why don't I think about that. If I know of one, especially if there is a good article, I will be happy to share with it you.

MR. ASPLEN: My next question is given the nature of the way that the database hit works in that you find a crime scene sample from the perpetrator at the crime scene, it's an unknown sample, you put it into the database, and you get a hit, there is no racial bias there. The science is racially neutral. That as compared to the scenario wherein the victim gives a vague description of an individual, but it includes race, and the police go through the traditional investigative technique of let's say rounding up the usual suspects part of the process and they identify maybe three or four possibilities, maybe three or four of which were wrong, in that regard the database is a great benefit to taking race out of the whole process. Is that a fair assertion?

MR. BUTLER: Yes.

MR. ASPLEN: My third question is this: Do you feel like -- this relates more to my first question -- that if we did go to an arrestee based database, would that tend to promote racial profiling by attempting to get individuals into the database for the purpose of searching them in the database? I guess is that --

MR. BUTLER: I certainly think that that would be a concern among some civil rights organizations because you do hear about law enforcement in some jurisdictions, not most, but some who are more interested in arrest than they are in convictions because they want to make people part of the system. They want information, not DNA, but the other kinds of booking information to become part of the system.

I had a judge in the Superior Court here who was fun as a prosecutor to try the cases in front of because the rare times I lost he would look at the defendant before or after he gave "you're free to go" speech who would say, "You will be back."

I think a lot of police supervisors think that, too. We know that they are often correct, that there are high rates of recidivism, including among the people who are arrested. So with that ideology there might be that it's a good idea to get this person in the database.

Again, the major issue here, though, is of mistrust of law enforcement concerning that law enforcement would do that and we shouldn't have that kind of mistrust, and that's where I think the political part of what you have to do is so important in terms of getting community support and civil rights organizations support because even when it's more efficient, that doesn't always lead to the idea that a reform should be implemented.

Believe it or not, among civil rights organizations there is actually some controversy about how efficient race based profiling is and whether it's a good idea, and there are some people, including Professor Kennedy, who think that actually race discrimination makes sense in some quantitative way for the police to especially focus on African Americans or Hispanics, but nonetheless they still shouldn't do it because it's unconstitutional maybe or, you know, that the Bill of Rights isn't designed to make things easier for law enforcement. In fact, in most ways the Fourth and Fifth Amendments make things more difficult for law enforcement, and so what you might do if you're not careful is win the imperial efficiency argument with DNA, but not win the political argument because of this mistrust about the criminal justice system, and especially if you're going to be making decisions about arrest versus conviction. There is nothing that's nonrational about arrest rates in the United States, and there is going to be a lot of concern from civil rights organizations if you don't think about the racial implications of what you're doing.

MR. GAINER: In that mistrust area I think it's a confusing message that we are sending I think especially to police officers because over my years I've seen dramatic changes in the way police and minorities interact, and we got to the point where our officers were very race neutral, lifestyle neutral, and some of the practical implications of the statistics is then asking the police to ask the race. It wasn't very long ago that the race was on everybody's driver's side, and as we talk about hate crimes or racial profiling, one assumes that one can tell one's race, and it's obviously a continuum about whether one looks black or white or Indian or anything else and lifestyle issues.

So we've tripped over ourselves to get officers to stop doing that, and now we're beginning to tell officers what I want you to do if we're investigating a hate crime is to say are you gay or lesbian because I can do something different with it than are you black or white, and you talked about the reaction of are you black or white?

MR. BUTLER: It's a tough issue. It comes up in all kinds of civil rights contexts. The argument goes I thought we were supposed not to think about it. Now you're saying we should especially focus on it. The problem is a problem that is racial. There can't be a nonracial solution is the common sentence; that it's not a color blind problem, so you can't have a color blind solution, but it is tough and there is a certain rhetorical inconsistency. We have to move beyond this by focusing on race.

MS. ABRAMSON: We are now scheduled for a break, so let's make it short one.

(Whereupon a brief break was taken.)

Discussion of Final Report to the Attorney General

MS. ABRAMSON: We're at the last part of our conference today, and that is looking at what our final report to the Attorney General will be. We were committed when we started this project to finish timely, and we are going to do that, and it's especially important as there will be a change in the administration in January. Regardless of which party wins there will be a change, so I think it's very important that we get this report to Attorney General Reno before then.

We agreed early in this Commission's life that we would not try and rewrite a report; that what we would try and do is include in the report all of the publications of the Commission and weave them together. Chris Asplen has given us a proposed outline, and you will see that is the goal, and the outline deals with each working group. We'll have an executive summary of the recommendation and then the publications will be attached as an appendix.

We're open now to any discussion of that, but we're especially interested in discussing Chapter 8, which is on the back page, which is the identification of those issues requiring further or continued review and those issues not addressed by the Commission. So any suggestions for that are in order not only at this meeting, but thereafter, and I think that to some extent it's an overlap of the discussion we had with Mr. Lazer in that some of those topics are obviously part of this.

MR. THOMA: Before we get to Chapter 8, with regard to Chapter 4, I had a minority position on several items that I forwarded to Professor Kaye and to Professor Imwinklereid. I don't care whether it gets included in their report or not, but if necessary, if I could just attach it. It's fairly short. It ended up being about two pages with regard to about 15 different items that were included in it. I don't care whether the authorship is even in there, but I would like those areas to be addressed because some of the items were -- and Professor Smith actually agrees with me. Even though he's not here, it's easy for me to say that. Some of them when we ended our working group, just the report only dealt with one aspect of it and we really need to show the other side of it.

MS. ABRAMSON: That report is an attachment, but it was never adopted as such as a Commission's stance as I remember the discussion, and so I would encourage that Attorney Thoma's comments be included in some form.

MR. ASPLEN: Sure. To kind of explain this a little bit further, I think each chapter is going to look a little different based on how each working group kind of performed its function, so it will be a combination of things. Each chapter that is working group specific will have a narrative of sorts also that will introduce kind of what it was all about and such and then the working group membership, the meetings information. By that how many times did we meet, what did the agendas look like, et cetera, what kind of issues did we tackle, and then the particulars depending upon size, for example.

We obviously can't include the entire post-conviction report, but the executive summary is probably a good thing to include in there. A number of things will be put in as appendices, and that may be appropriate. There are two ways to handle a situation like yours, Jeff. One is to

include it in its entirety in the appendices, but also to include it in the discussion in the narrative section, include poignant parts of it in that narrative also.

Also the chief justice and I talked yesterday about we'll have kind of two reports, one of which will really be the official report, I think, and that report, which will probably be contained in binders which will be a collection of just about everything, which will be agendas and meeting minutes and transcripts and things like that of which that will obviously be attached. What we're talking about here is really what will be the published report.

MR. THOMA: I think I understood that, but you've got that article being attached as an appendix already, and I know we have had discussions back and forth, but it really hasn't -- those particular aspects weren't included in the report necessarily. I know they were in our discussion and in our working group discussion. Honestly I don't care about authorship or anything, but I would like those points to be included.

MS. ABRAMSON: A caveat.

MR. THOMA: A separate appendix or part of that appendix or whatever.

MS. ABRAMSON: A reference to it and an inclusion. Do you have that listed?

MR. ASPLEN: I'm sure Robin does.

MS. ABRAMSON: Any other similar caveats or addenda? I can't remember any, but I think we should think about that.

MR. ASPLEN: The process of putting all this together will quite literally be culling through our entire filing system and going through from the beginning and looking through everything that's there. And we have. We've kept every single thing that has come to us.

MR. THOMA: That is a lot.

MR. ASPLEN: It absolutely is.

MS. ABRAMSON: We're now trying to get ideas for I gather writing Chapter 8, which is what are issues requiring further continued review and not addressed by the Commission. I suppose one might be racial profiling, the use of the database.

MR. PLOURD: Is it going to be broken down like sort of like crime scene evidence post conviction? In other words, these are the areas. You know, you should look at this area, this area, this area.

MS. ABRAMSON: It might. That's a good way to do it and stay with the themes or if something else comes through, it might be done that way, but that's a good suggestion.

MR. PLOURD: The second question is is it going to be in the form of recommendations, like we recommend that continued study be done on let's say racial profiles or whatever?

MS. ABRAMSON: Yes, that will be part of it. One of the recommendations that came through at one of our other meetings was that there might be a need for additional study groups or commissions and maybe by subject matter and then they come in, do it, and then get out so that you have new people that may be familiar with an issue, but also people that are not so familiar with the issues so that you don't have too much in group will be part of our suggestion, but that rather than have one commission continuing, a series of commissions or committees all working groups.

MR. ASPLEN: To give you an idea of kind of how I'm thinking about putting that last section together for you folks is, using the racial profiling as an example to talk about it is why I asked the questions that I did -- to talk about racial profiling in the context of there are pretty clearly some advantages to DNA in the context of racial profiling in that it is gender neutral and talk about the scenario that I talked about. Here is why it's a good thing that helps this process; however, here are the concerns that are generated by it. There is a concern that it may exacerbate concerns about promoting the race based arrest, et cetera, et cetera, that kind of discussion, not a lengthy discussion. We haven't heard enough about it, but just to frame issues kind of like that. Obviously it would go out to everyone before the November meeting so that you all feel comfortable with the language.

The time between now and the last Commission meeting will require more interaction amongst us, the staff, and you the commissioners than we have had up to this point. There will necessarily have to be a lot of mailings and phone calls and emails because we will need to try to wrap a lot of these things up before then so that we have really a final product.

MR. CLARKE: Would sample retention also be mentioned there?

MS. ABRAMSON: Yes, I would think.

MR. ASPLEN: Yes. Actually it would probably be mentioned there and would also be mentioned in one of the other working groups as one of the other recommendations as well.

MS. ABRAMSON: And I assume elimination samples; that is, what do you do with --

MS. BASHINSKI: I think if we do that, we need to talk about the definitions, what do we mean when we say an elimination sample, a suspect sample, and an arrestee sample, but I think that whole subject of arrestee sample kind of falls under the data category.

MR. ASPLEN: I spoke to Barry about that exact issue before he left today, about including it in this and also to make sure we're all talking about the same thing, and he acknowledged that perhaps sometimes more things do go into a single definition than perhaps are appropriate.

MR. CLARKE: Suspect samples in particular is used for a variety of different things.

MS. BASHINKI: Exactly.

DR. CROW: Another issue is whether, if at all, databases should be used for any kind of research.

MR. THOMA: Mine was going to be along those lines since Phil isn't with us, and we felt particularly kind of hamstrung on the privacy issue and safeguards against misuse of databases and other DNA, and Phil felt pretty strongly about it, but we didn't really have a context to fully put it in legal issues, and it would necessarily fall I think in this area for writing legislation for safeguards once you have it, things along those lines.

MS. BASHINSKI: Sample retention is actually a subset of that issue, isn't it?

MR. THOMA: Yes.

MR. REINSTEIN: Perhaps in the investigation working group is there enough that can be done on mass screens, about the future of that?

MR. ASPLEN: I think that was handled more in the issues working group, although not to a great extent. I think it would be appropriate certainly falling under the category of things that need to continually be reviewed as more real life examples of that come up and the need to approach that very carefully.

MS. BASHINSKI: Again, that's under elimination samples the way I would think. It's the way in which you use samples from people who are not specifically identified as probable cause.

MR. ASPLEN: We may also get some valuable input into that from the summit meeting perhaps.

MR. REINSTEIN: On the post-conviction group, there were two areas that we touched on, but really never got into it about having continued review on. One of them was the compensation issue. Some states have it; most states don't. Some specifically provide it for limitation. That's one area.

The other area that we talked about is patterning something after what they have in Great Britain as far as the case review commission, and you know, Woody's project in San Diego is a good example to start with that.

MR. THOMA: In fact, the Los Angeles Public Defender's Office is doing -- well, actually Barry is helping them set up kind of a task force like that as well, but obviously from the prosecution end it's even more crucial.

DR. CROW: Is there an issue about having databases for other than criminal investigation? Identification of missing people, discovering who died in airplane accidents, things like that?

MS. BASHINSKI: That's something probably for the future should have been dealt with especially with mitochondrial DNA.

DR. ADAMS: We actually have legislative authority for that, and it's currently being used in CODIS. There is a missing persons index.

DR. CROW: I thought of that as one of the things not addressed by the Commission that could be looked at at some future time. Another one I wondered about and the Commission decided it really wasn't quite correct to discuss, and that's the possibility of court appointed so-called neutral experts on highly technical issues, which DNA is a perfect example.

MR. THOMA: I hope we can find one actually sometime soon.

DR. CROW: Everybody tells me that there is no such thing as a neutral person and I accept that, but I think it's a whole lot easier to be neutral when you're not forced to represent a particular view.

MR. REINSTEIN: Dr. Forman was an excellent neutral expert in a case I had.

MR. PLOURD: Along those same lines, we have used a neutral expert that we think is agreed on both sides get the results equally so forth and it has worked quite well.

DR. CROW: You can get a lot of preliminary discussion out of the way I think and save some time.

MR. PLOURD: When you both agree to the lab, then splitting the cost, we actually have a formal agreement that we sign, a one-page thing.

MR. ASPLEN: There will be a number of issues that I think will be identified that we'll say we didn't address them specifically and here is why we didn't address them specifically. While we may not have said this specifically before, my sense is that a number of issues such as what particular crimes should be included in this scope of the database by the individual states and issues like pending federal legislation were not discussed because either we felt like it was not appropriate to comment on pending federal legislation, which I think is that a fair statement to make?

MR. CLARKE: They also occurred kind of late in the history.

MR. ASPLEN: That's true, and is it fair to say that not considering what should be included in the scope of individual states, DNA databases was a recognition that there are certain functions that are for the discretion of the states and that it was not appropriate for us to get into those particular issues?

MS. ABRAMSON: We might have made recommendations. On the other hand, since there is such a backlog on limited felonies that are included, it seemed like in arrest cases again to go out and get more information when we can't even keep up with what you've got is a little silly, but once you get caught up it would seem to me that then the states have to decide how much further they go on, as Virginia has just indicated.

MR. ASPLEN: Let's assume that the states were caught up and we didn't have these backlogs. Would this Commission then purport to indicate to the states what should or shouldn't be included? We did things like Paul presented his statistics on that and information on it, but I was asked a number of times by press and folks whether or not the Commission would recommend what crimes should be included into the database.

MS. BASHINSKI: We wouldn't do that, but maybe we would want to recommend the data be collected. You have already heard from Paul and you will hear a lot more from this today. A study which demonstrated the utility or lack of it would be valuable. We didn't undertake that because there really hasn't been that much data generated.

MS. ABRAMSON: But I think that's perhaps for the future.

MS. BASHINSKI: And a recommendation you might make.

MS. ABRAMSON: Which Paul's kind of study might indicate the need for it.

Anything else? I would think that we would identify as an issue further and continued education for law enforcement and I guess a need for examiners, educated lab people, and resource allocation.

MR. ASPLEN: Along those lines what comes to mind in terms of communicating I think especially the issue of law enforcement training and education is putting the context of the DNA experience over the past 12 years has provided some significant insight into a number of dynamics, one of which is law enforcement training and education and the extent to which we saw that DNA technology -- we identified rather early on that training and education in DNA was something that was pretty significantly lacking on behalf of law enforcement for one. For two, it's a good example of technology law enforcement and how we're only going to ask law enforcement to do more and more with technology, not less, and as such we need to rethink our commitment to training and education to law enforcement education.

MR. CLARKE: It's actually training and education in a slightly different context. It's prior to becoming involved in law enforcement.

MS. BASHINSKI: The whole system is reacting and not always in sync or rationally to new technology, the courts, everyone.

MS. ABRAMSON: We could include judicial education.

I took notes during the day and one issue that was brought up was statute of limitations, at least thinking that one through.

MR. CLARKE: That was discussed in the legal issues working group, but I don't know how much.

MR. ASPLEN: Would that also kind of fall into the category of that might be something that while we looked at the advantages and disadvantages of and success stories of filing genetic profiles, that ultimately is a state decision to make, and as such it might not be appropriate for us to say yes or no, but just give the advantages and disadvantages?

MR. THOMA: Or maybe why we didn't address it because it is state.

MR. CLARKE: Or there must be a federal crime or set of crimes.

MS. ABRAMSON: Just generally we touched on specifics, but the privacy issues and what about relatives, the brother issue and use of the evidence for investigation?

DR. CROW: I think there is an issue here, though because the practice varies so much from state to state and it's highly predictive, you're going to find lots of brothers in the future or brothers and sisters. I don't want to be sexist.

DR. FORMAN: Full sibs.

MS. ABRAMSON: I just assume that the whole issue of these rape kits that have not been analyzed, the old cases, that's part of resource and backlog.

MS. BASHINSKI: We really didn't go into it because we didn't have the appropriate data. By the time your report is finished there will be data I think both from California and New York. Certainly as it affects police practice is something we might want to think about commenting on and maybe the crime scene.

MR. THOMA: I didn't mean to interrupt, but I actually was taking Tom's thoughts into account regarding the training and education because Tom made a good point of telling them there are limitations to what you should be picking up and doing, not just this is incorrect technology and pick everything up, bring the house in or whatever, but I think it would fit in training and education. But that's the point I was considering, too, the limitations that Tom brought up to train officers on.

MS. ABRAMSON: The whole concept of what other empirical evidence we need or empirical data and we never knew how many were out there.

MS. BASHINSKI: Or how many were destroyed that we thought would have been out there.

MS. ABRAMSON: So I guess it was at dinner last night where you were commenting on California, and there was a comment about a survey going on in New York State --

MS. BASHINSKI: That's correct.

MS. ABRAMSON: -- and Illinois. So one of the things would be make a list of what empirical data might be collected and report on what is being collected now. Anything that has come up, Professor Lazer, in your discussions that fit in here?

MR. LAZER: One issue actually that just occurred to me, actually a colleague of mine, the presentation that we heard earlier, might be equity and access to say to post-conviction relief both in looking at race and class and what have you. I mean I think there is generally a lack of resources in that direction, but there is an interesting question of who is getting the relief, limited as it is. I think otherwise most of those things that you've talked about have come up among the discussions.

MS. ABRAMSON: That's a good point.

MR. PLOURD: Along those lines on the post-conviction and relief statutes, is there any provision for appointment of counsel? Because that's a big fundamental part of access to the effectiveness of that statute.

MR. REINSTEIN: Courts are required to appointment counsel at the time of the application and review. The first thing you do is it is referred to either an agency such as the public defender's office or if there is an Innocence project -- some of the states now I guess under Barry's pushing have gotten together with the state bar association or the MVA in forming these groups around the country.

MR. PLOURD: At what point does the right to counsel attach?

MR. REINSTEIN: Once an application is made and the court does a simple review. Let's say it's a drug case, a guy who was convicted of the sale of narcotic drugs. I'm not going to go through counsel on a DNA case regarding that, but if it's any other type of case and the same type of review, the first thing I always look to is the presentencing report, and that kind of gives me an idea about what the crime was, what the evidence was, and then the appointment of counsel.

MR. THOMA: Chris, it is covered in our model? If you don't have it, I'll get it to you.

MR. LAZER: One more thing is also the international dimension, which is that you have databases being set up across the world and the interfacing among those databases through the international standard.

MS. ABRAMSON: That's very good. Not only that, but we can learn from other countries as to what they're doing. We did bring in Great Britain's experiences.

MR. LAZER: One of the things I would like to do for the conference is to bring in people from Britain, Canada, and Continental Europe to say what procedures have they set up in their countries, both for the international standard setting issue, but also the question as to what can we learn for privacy, for example, to represent those issues.

MS. ABRAMSON: There is an international police association, isn't there?

MR. HILLARD: Yes.

MS. ABRAMSON: That's very helpful.

Anything else? That's a good start.

MR. ASPLEN: It doesn't concern me, but when you get the document and Chapter 8 is longer than Chapters 1 through 7 combined, which it would be, don't be concerned. I mean that seriously. I think it's okay that there are more things perhaps that we can identify that we didn't discuss rather than those things that we did. That's the nature of the beast, and we're in a finite time here.

MS. ABRAMSON: We know a great deal more now than when we started, and I can tell you when I first met with Jeremy Travis, the contours of this were so nebulous and so wide that it was a matter of bringing it to a series of issues and putting it into a format that we could at least take a stab at, and I think that was just very, very important.

We have done that, and each time you open up one of the little envelopes, three more are there, but that's the nature of it, and it will continue that way. Each of these is going to raise a whole series of other issues, many of which we have touched upon, but we'll need more information as we've go forth. I mean just the technology has changed dramatically or at least has changed. I always look at the cup all full, not even half full.

Is there anything to come to the house? If anybody thinks of anything, obviously you can email Chris or Robin, and I bet when we meet again in November, we will hear that he's going to have to revise Chapter 8.

With that happy thought I'm going to adjourn the meeting, but we will have somebody here -- and you all can flip -- we can have public comment now, too, but then we will come back and there will be somebody here who will stay for the time of public comment. Is there any public comment now? Then we'll close the meeting now. We will come back for public comment between 4:00 and 4:30.

(Whereupon a brief break was taken)

Public Comment

DR. CROW: Are there any public comments? I hear none. The meeting is adjourned.

(Whereupon at 4:00 p.m. the meeting was concluded.)