National Commission on the Future of DNA Evidence
P R O C E E D I N G S
Inaugural Meeting

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Introduction - David Boyd, Director, Office of Science and Technology, National Institute of Justice

MR. BOYD: First off, I'd like to welcome everybody here, Madam Chairman and the Commission in particular and those of you who will be here to support the work of the Commission.

The National Institute of Justice, as many of you may know has been involved in DNA work and in DNA research for some time. In fact, the first DNA research grant awarded by the National Institute of Justice was awarded in 1986, which is about the very time that the initial DNA identification work was being undertaken.

What has been most important for us recently, though, is that while we have a long history of developing the science and developing the tools, we have not, however, invested the same level of effort in how we actually move the science out to make it effective in the field, and that's a principle role of this Commission.

The reason this Commission is so central to all of the things we do now and why DNA was the perfect first step is that DNA covers the entire waterfront in the investigative process, all the way from the collection of the evidence all the way into the courtroom and into judicial proceedings which occur even after the trial itself.

That makes this an ideal test of the steps that we'll need to go through to bring the science out of the laboratory and to put it into the world where it will actually work.

I know that this Commission has already been working, thanks to the Honorable Shirley Abrahamson, they've been working now for, I guess, three or four months, and so, what you're going to see now is the first element as they begin to do the serious work here with the Commission of things that actually began some time ago.

So, I thank you for your attendance. I hope that you will provide lots of heavy participation, as you have already, and with that, I'm going to turn it over to the Director of the National Institute of Justice, whose idea this whole thing really was.

Jeremy?

Welcome - Jeremy Travis, Director, National Institute of Justice

MR. TRAVIS: Thank you, David, and good morning to all of you.

It maybe be partial truth that this was my idea, but I want to tell a different story, which is to give some sense of background as to the history of our involvement of the last few years in the issue of DNA and its implications for the criminal justice system, and for me, this story starts with a phone call received from the Attorney General -- I guess we're now saying years ago -- I'm not sure how many years ago this was -- when she called and said that she and Walter Dellinger, who, at the time, headed up the Office of Legal Counsel within the Department of Justice, had been discussing a newspaper article that appeared in a local paper that talked about a particular case where an individual who had been incarcerated, I believe, for 11 years had been released on a, I think, commutation or pardon and that release was occasioned by an analysis that had been done of DNA evidence in a sample that had been retained from his original trial, and that DNA analysis determined that he, in fact, was not the individual who had committed that crime.

So, her question to me was how many cases are there like this, and as is now, we know, typical of Janet Reno, she asked, and what can we learn from this sort of analysis of this and other cases?

This was not an idle conversation, as we've learned, because once this bee was in that particular bonnet, she decided that this was something that really was of intense interest to her to try to understand the implications of DNA technology and science for the workings of the criminal justice system.

So, as you know, part of the inquiry that we pursued following that conversation was, indeed, to answer the first question, which is how many cases are there like this and how can we sort of assemble some knowledge about those cases and that experience, and we published the book that is now, I think, in second or third printing that looks at the 28 cases that were known at the time to us as cases where people had been convicted, as the title says, convicted by juries and exonerated by this particular science.

That was not sufficient for her, because she had a second question, which was what can we learn from this experience, and that learning process has gone off in a number of directions.

She and I talked about and then we subsequently convened a focus group of experts, many of whom are here today, who have been with us through this journey, this exploration, to focus a bit on some of the lessons learned from those 28 cases, and that group that Michael Smith was kind enough to chair for us a day's worth of discussions of scientists and practitioners, both law practitioners and police practitioners, really, for me, helped to open up a much broader discussion which is at the intersection of science and the law: How do we think about the implications of this rapidly emerging area of scientific development for a very broad set of policy questions and area of practice?

And for those of you who were there for that one- day session, you'll recall that Janet Reno came and joined us. This is an unusual attorney general. She came not to talk but to listen, and she sat

and listened for an hour to our deliberations, and then, the next morning, was on the phone with me again saying, and now what do we do?

And that's when David and I put our heads together and said that, I think, for us and for the staff within the Institute, the single largest contribution that we could make, in addition to the investment in the basic science, was to ask some smart and wise people to come together on behalf of the nation and consider some of the very far- ranging implications of the advance -- the rapid advance now -- in the science of DNA.

So, in a very direct way, although, at the end, David and I may have had the idea for forming this Commission, but in a very direct way, the Attorney General, who will come and speak to you this afternoon, is the prime mover that has brought us here today.

So, my telling that history is to give you a sense of the Institute's and the Department of Justice's very strong support for the work that you're doing and the high hopes that we have for your success.

So, I want to add my thanks to David's thanks to Justice Abrahamson, who, one morning over coffee in Madison, Wisconsin, very generously agreed to offer her time and energy, considerable energy, and wisdom to chairing this endeavor, to all of the Commission members who have agreed to serve over the next several months as we undertake this task, and to the staff, particular Chris Asplen, Lisa Forman, and the ever steady light of Dick Rau, who has been, for a long time, the keeper of the flame on DNA issues within the Institute, to the staff also for their work on behalf of the Commission.

I want to broaden the focus a bit before you start your deliberations just to make you aware of a couple other undertakings within the Institute and then to close just by giving my hope for where I think we will end up in this endeavor.

You should know that the -- that initial inquiry from the Attorney General has spawned a number of activities that are sort of first cousins to this effort.

One we call our investigative sciences program, where we have a number of efforts underway to start to develop a stronger body of scientific knowledge in the investigative arena.

Carol Chaski, for example, is here today, who is a visiting fellow within NIJ, who is looking at the issue of questioned documents, very important for those engaged in legal practice.

We're opening up another area of inquiry into the reliability of eye-witness testimony that came directly from the focus group that we had on DNA. A number of you will remember Gary Wells was one of the participants, an academic who looks at reliability of eye-witness testimony.

And we've done -- reached to look at the general questions of the relationship between science and the law, and we'll be hosting another sort of strategic planning session soon to bring together a broader representation of the legal academic community with the physical and forensic science community to think more broadly about some very large questions of science and the law.

And as some of you may know -- and there are copies available -- we recently published the first in what will be a series of guideline publications to help develop firm practice.

This is a guideline on death investigations where we brought together, in a forum similar to this actually, a number of practitioners and researchers and people knowledgeable in this field to help develop a set of standards and guidelines and best principles of practice in conducting death investigations.

This is to say that our hope here is that we will learn from you not just in terms of the substantive work that you're doing on DNA but sort of how we can help carry out some very ambitious undertakings at the intersection of science and the law, and your process and your sort of deliberations will help inform a much wider set of discussions within the Institute.

And then, finally, on DNA in particular, as a number of you are aware, the work of the Institute on DNA issues is not limited to the investment in -- that we've made in the science of DNA.

In fact, we've, with strong support from Congress and the Federal Bureau of Investigations, been involved over the last three years in a ambitious program to support the development of better practices within the DNA labs around the country.

The DNA lab program is something that you should be and I'm sure are aware of, where Congress has appropriated millions of dollars each year that have been administered by the Institute to support DNA lab improvements.

As you know, we have also been commissioned by the Congress to do the proficiency test, and we were pleased and honored to support the work of the Academy of Sciences that re-examined the issue of DNA admissibility.

And the new item that we are now very optimistic about is the inclusion in this year's budget, the President's budget that's now being considered by Congress, of a $5 million item in the NIJ budget which is the first, we hope, of a $5 million-a-year five-year program, some $25 million over the next five years, to invest in the basic science of DNA, to really accelerate what we think is the already rapid advance of science in this area.

The goal that the Attorney General has given us -- in business theory, these are called stretch goals, and I think stretch is an understatement here, but she's given us the following stretch goal, which is to try, if we can do this with the help of the scientific community, to try to bring the cost of DNA from several hundred dollars per test down to tens of dollars per test, to try to bring the time that it takes to get DNA results from the current months -- and that's, in part, because of backlogs -- to virtually immediate, and finally, to bring the DNA capacity itself, the test capacity, from a remote capacity to close as possible to the actual crime scene.

So, our hope is that we can start, as we're doing work, to think about the implications of the science for practice, to also try to make the science more readily available to practitioners around the country.

So, we have very high hopes for the work that you are about to undertake, and the hope and, really, aspiration here is that, at the end of your deliberations and your work, that we will be able to provide a lot of guidance and food for thought to the Congress, to the states, to police departments, to prosecuting attorneys, defense attorneys, judges and others, to those who think about investments in the laboratory infrastructure of the country, that you will be able to give a lot of guidance and recommendations to a very broad community of interested parties who are concerned, as we all are, with the administration of justice and that the end result will be that this very powerful science will be brought to the cause of the search for truth in the criminal justice process.

So, it's a big task, but we're pleased, very pleased, with all of you who have offered to contribute your time and particularly to Justice Abrahamson for her willingness to chair this effort, and I wish you very well, and if there's anything that the Institute can do to make your deliberations and your work proceed along a more fruitful path, please don't hesitate to call.

So, thanks.

[Applause.]

Remarks by Chairperson Hon. Shirley S. Abrahamson, Chief Justice, Wisconsin State Supreme Court

JUSTICE ABRAHAMSON: I'm Shirley Abrahamson, and I'm your third welcome today. I was asked by Mr. Travis to chair this Commission, and I am delighted to do that.

The first issue became exactly what is the Commission going to do and how do you wrap your arms around this important but somewhat amorphous subject?

The interest was to look at DNA in the criminal justice system, and our objective was to determine policies that will maximize the value of DNA in the criminal justice system, improve the use of this technology from investigation through prosecution and post-conviction, and because this is an important but huge topic, we've had two groups that met to attempt to put the topic into a focus that would make it manageable.

In the spring of 1997, the National Institute of Justice gathered a focus group. Michael Smith, who is a Commissioner, led that focus group to discuss DNA and what a commission might do.

It was followed in November of 1997 with a group that further looked at narrowing -- and I don't know that narrowing is the correct word but at least putting into manageable shape this topic, and that group's meeting is at tab -- the trick here is to change the tabs between the preliminary book and the final book.

MR. TRAVIS: G.

JUSTICE ABRAHAMSON: G?

MR. TRAVIS: G.

JUSTICE ABRAHAMSON: Yes. The planning group G.

MR. TRAVIS: Yes.

JUSTICE ABRAHAMSON: Which, when you get an opportunity to read it on your plane trips back home, will give you a more detailed vision of that group as of the November 21 meeting.

A great aid to the Commission and to working out what we might do was bringing on board Christopher Asplen, who is our staff person, who is an Assistant U.S. Attorney, and Lisa Forman, who comes to us from the forensic science end of this, and in preparation for the November meeting, I asked that they think this through and at least have a preliminary agenda of the Commission and for the focus group to gnaw at, and I think it turned out quite well.

They came up with a concept that there be working groups -- subcommittees, if you prefer -- of the Commission in five areas, and that proved a quite acceptable working arrangement, and the task forces, the working groups, the subcommittees were broad enough to encompass everything that was brought up at the table, with some refinements, and that will be the subjects for discussion today.

One of the working groups, which is the post- conviction issue working group -- that group has been formed -- indeed, the chair is Judge Reinstein, who is a Commission members -- and he sends he regrets, he cannot be here today. They've already had two meetings.

Margaret Berger, who is the reporter for that -- Professor Berger will be here and will talk to us about that later in the afternoon, at two o'clock.

A third meeting is scheduled for next week.

The other work groups have not been formed, although we have tentative proposals to make to you all, and those work groups will have as a chair a Commission member, will have a reporter who will be responsible for the writing of what the task force does.

Any Commission member is cordially invited -- indeed, encouraged to be a member of any work force he or she wishes to join. Every task force -- every Commission member will get copies of all of the minutes and other materials, so you are invited to make comments as the task forces proceed.

The work of the task force will also be brought periodically to the Commission for further study and refinement.

So, my message is we have a proposal for you. It is not set in concrete. We encourage everybody to comment on this, change it, develop it, and if these task forces stay in the form in which they are proposed today or even are changed, we also encourage that you submit names of people who might serve on these task forces. The members who serve are not limited to the Commission. They are not. We want others involved.

Which leads me to the next point, which is that NIJ has attempted to gather at this table people from diverse backgrounds, people that may not necessarily agree with each other, people from professions who may have different points of view and perspectives and may not sometimes want to sit at the same table with each other. That's why we're a little separated, but we tried to put people who do agree next to each other, so we can proceed.

But at the table here and at the table in the work groups, people from law enforcement, lawyers -- and they are not a single group either -- we have defense, prosecution, and the academy and judges. We have judges who are trial and appellate.

We have victims advocates at the table. We have lab people, forensic scientists. We have academic scientists, geneticists, like my good friend Jim Crow, and we have ethicists.

If we've missed anybody at the table, at any table, it's your job to point that out and that we bring them in. The point is that, through diversity in the fashion of the courts, one hope to reach the truth and, if not the truth, a close approximation thereto.

It doesn't mean you all have to agree. There will be many parts that we will agree, and where we cannot agree, those points of views and those perspectives should be set forth.

As Mr. Travis told you, we are not alone in the DNA field. We're not even alone in the DNA field in the NIJ or in the Federal Government and clearly not in the state or in the academic area.

This group will not duplicate work of other groups. For example, it will not duplicate the work of the DNA advisory board, and I'm just going to name a few groups it will not duplicate.

It will not duplicate the National Forensic DNA Review Group.

It will not duplicate the various TWIG groups -- that's Technical Working Groups that the NIJ has. We have TWIGLET, if I've got all my names right, which is a Technical Working Group on Law Enforcement. We won't duplicate TWIGI, which is a Technical Working Group on Eye-Witness Identification. And we won't duplicate all the work of the other groups to which Mr. Travis referred.

Now, there are a number of members of this Commission that work with these other groups or are on the other groups, and that's one way we will cross-fertilize.

In addition to that, Chris Asplen and Lisa Forman will be, as part of NIT, alert to these other working groups, will attend meetings, and keep these groups abreast of what they're doing, and will be kept abreast of what they are doing.

Obviously, there's going to be some overlap. They're going to use each other's knowledge and information.

In keeping with Federal requirements -- Chris is responsible for keeping us within Federal requirements, and in keeping with our own state view of open meetings, these meetings will be open, they will be accessible.

We want to benefit from all the wisdom that is not at the table, which is extensive. Christopher will talk to you about a web-site and a bulletin board so that we can benefit from a national and, indeed, an international viewpoint on all of these issues, and nothing, as you know, is going to stay still as we work, everything is going to keep moving, and so, we will continually have a moving target, and we will watch for that.

So, those are my general opening comments, other than to say I've enjoyed it so far, and I look forward to working with you all. Some you I know and have worked with before, and those that I don't know I look forward to knowing better, working with you all, and if it's like some of the other DNA boards that we've worked with, I think you're going to find that it's exciting, educational, and fun.

Did I forget to say anything?

MR. TRAVIS: I don't think so.

JUSTICE ABRAHAMSON: Then we will proceed to introduce to you Christopher Asplen, who will make a few remarks, and then the goal will be to go around the table, have each of you

introduce yourselves, tell us a little bit about not only yourself personally but your interest in DNA and perhaps what you might want this Commission to do in very general terms.

Christopher.

MR. ASPLEN: Thank you.

JUSTICE ABRAHAMSON: I just want to say one other thing.

It was originally planned when I came aboard that I bring on somebody in Madison, should I need that, and I have to say that I decided not to do that, because Christopher Asplen and Lisa Forman have worked so well in Washington and keep me so well informed through E-mail semi-monthly, as needed, written reports and visits to Madison, and I have visited with them in Washington.

So, we have been really in very close communication. I appreciate that and feel very comfortable with the working arrangement, and I want you all to know that and you all to feel comfortable working with a staff which is excellent.

MR. ASPLEN: Thank you very much.

JUSTICE ABRAHAMSON: That's what you told me to say.

[Laughter.]

MR. ASPLEN: You did a fine job, a fine job.

Remarks and Introduction of Commission Members and Commission Staff, Christopher H. Asplen, AUSA, Executive Director, National Commission on the Future of DNA Evidence

MR. ASPLEN: I, too, have enjoyed it so far, and I have every reason to believe that we will continue to enjoy it, for a number of reasons.

First and foremost, because the endeavor that we begin today is of such importance in individual citizens' lives, quite frankly, because of the value of this technology and its application to our criminal justice system, what we will do here has a tremendously tangible effect on victims, on citizens who are accused of crimes, and on the -- for the practitioners in the system itself.

I come to you as a former Assistant District Attorney in Pennsylvania and, then, from there, went to the American Prosecutors Research Institute, where I was the Director of the DNA Legal Assistance Unit, which was the only assistance unit of its kind for prosecutors, and then decided that it was time to go back in the courtroom because I missed it so much, because trying cases was -- is so much fun, and I went to the United States Attorney's office, was there for a week-and-a-half, when I got a phone call from Dr. Richard Rau, who, I would like to point out, was the original grant monitor for APRI's unit and had the vision to understand that prosecutors needed this information, and NIJ provided the original funding for APRI's DNA Legal Assistant Unit, primarily due to Dick's work and effort.

But when Dick called, my comment to him was, but you don't understand, I just got this really great job, I'm going back to the courtroom and this was what I really want to do, but after we sat down, a couple times, in fact, and we talked about it and we talked about the impact that this Commission could have, it was very clear that this was something that I wanted to be a part of.

But the other reason that I am enjoying this so much and will continue to do so and the other reason it's such a privilege for me to be the Executive Director is because I will be the person who will interact with you folks as individuals probably more than anyone else.

You are here because your peers have recommended your membership on this Commission. You're here because, in your individual field of expertise, you are respected and you deserve to be here.

So, I look forward to the personal interaction that we will have, as well as the professional interaction that will occur.

The other thing that I want to do is to give you my own picture of the NIJ staff and communicate to you the commitment that NIJ has to this project.

Jeremy spoke about the numerous things that NIJ is doing in the field of DNA, but as far as this Commission goes, please understand there is a tremendous amount of support at NIJ, and it starts with Jeremy and it goes through David Boyd, through Dick Rau, and to other individuals like Carol Chaski, who is a Ph.D. She is one of our fellows and was involved in the original authorship of the charter for this particular Commission. She and Dick put a tremendous amount of work into getting us where we are today.

Support staff such as Laura Lackey, a recent graduate from Tennessee, who is our administrative assistant and executive administrative assistant --

JUSTICE ABRAHAMSON: You can have them stand up, okay?

MR. ASPLEN: Thank you.

Is Laura here?

Laura Lackey is one of the people that makes Chief Justice Abrahamson happy. It's because of their efficiency.

Anjali Swienton, who is new to NIJ -- she is actually a contractor from Betac Corporation.

Is Anjali here?

Stand up, please.

Anjali is very new to NIJ. However, Anjali has her own Master's in forensic science and was an analyst at Cellmark for quite a while before joining NIJ.

And then there is Dr. Forman. I cannot tell you the value that Dr. Forman adds to this Commission.

As Executive Director but from a purely legal perspective with experience in DNA, but as a lawyer, it is tremendous value to be able to walk down to Lisa's office when I have a question about science and have her be able to give me an answer so clearly and so precisely.

It saves us a tremendous amount of time, and it provides tremendous insight as we do things like try to develop agendas and try to develop what it is we want to talk about and who do we want to bring in so that we get -- so that we have us at the point we're at right now.

So, when you get a phone call from either myself or from Lisa, please understand the amount of commitment that goes behind what it is that we're doing.

As I said to you, I come to as a prosecutor originally, and so, I understand the value of DNA. I understand the difference between having to try a case because I don't have DNA and getting to take a guilty plea because I do have DNA.

Quite honestly, I was one of those individuals, for the laboratory folks here, who would call and say yes, I do want every single spot tested. I know I've got 100 spots of blood, but I want every one of them tested, I need every one of them tested, and yes, I do need you available tomorrow. I was one of those people.

But I understand that education is a terribly powerful tool, and as we educate prosecutors, defense attorneys, and the judiciary more and more, we're going to become much more efficient and effective at what we do, and that's one of our -- obviously, one of our big goals.

In terms of how we've come to this point with the Commission and its structure, our theory really is we wanted to find a way that we could cast our net as far and as wide as possible to provide mechanisms through which we could receive the most information, and that's how we came up with the working group format.

So, what that does is that enables us not only to have Commission membership on the individual working groups, but those working groups will also consist of non-Commission members.

For example, the Post-Conviction Issues Working Group, as we will hear later, consists not only of Judge Reinstein and Kathryn Turman, our victim advocate on that particular working group, who is also a Commission member, but also an elected solicitor from South Carolina, prosecutor from California.

Barry Scheck is also a Commissioner and a member of that working group and has helped us to develop the protocols that we're developing.

We also have a scientist on that work group, Charlotte Word from Cellmark.

So, what we're doing is, again, we're casting our net as far as possible, and then, on top of that, we are bringing individuals in to testify before the Commission about -- to testify before the working groups about different issues.

For example, as you'll hear, we brought a representative of the ABA's death penalty project in to talk to the working group the last meeting that we had.

We look for your input, as the Chair said, as to who should talk to these groups, who should be on these groups, and then who should come and talk to these groups and provide input for the decisions that ultimately need to be made.

If there is a guiding philosophy, if you will, for the staff at NIJ on this particular project, I think that it would best be characterized as this. We believe absolutely that, in this endeavor, days matter. This is so important and the effects are so tangible that, quite literally, days matter.

When we talk about things like laboratory funding and we talk about things like eliminating the database backlogs, there are any number of examples that we'll hear about later that talk about individuals who were about to walk out prison doors but didn't because we happened to have their sample tested.

The bottom line is, as we work through this Commission, you will hear Dr. Forman and I continually push to move and move and move, so that we get things done as quickly as possible

The Post-Conviction Issue Working Group -- it started before we had our first meeting here, and we have already slated to have an interim report finished by September, because we're developing protocols for prosecutors and defense attorneys in the judiciary about how best to handle these matters, how best to narrow the areas of disagreement, find those areas that we can agree on, and let the adversarial process take place where it has to.

That's because there are people who, right now, are sitting in prison who perhaps should not, and again, days matter.

There are victims who are put in a position of tremendous uncertainty, because their case may be in one of these postures, and to them, days matter.

So, you will hear us continue to push and to push and to push, because we believe in the tangible nature of the effects of what this Commission is going to do.

So, we promise that we will continue to do that, also, and we look forward to your assistance in that. There is a tremendous amount of work to be done, but to say that it is important work is to put it entirely too mildly.

We look forward to your aggressive and your active participation, and most importantly, we are here to serve you. We are here to do the work of your Commission. We are here to make sure that you have all the tools and all the resources that you need to accomplish this.

JUSTICE ABRAHAMSON: Thank you, Christopher.

We'll now hear from you.

Why don't we start with you, Ms. Turman, if we can?

MS. TURMAN: Hello. I'm Kathryn Turman. I'm Chief of the Victim Witness Assistance Unit in the U.S. Attorney's Office for the District of Columbia.

We prosecute not only Federal crime that occurs in the District of Columbia but all local crime. So, we really are kind of like a big DA's office. We have a lot of experience with sexual assault victims, both child and adult victims, as well as homicide survivors.

I've worked primarily in child protection most of my life, was Director of the Missing and Exploited Children's Program here in the Department of Justice.

I really believe very strongly in the work of this Commission and the importance. I'm honored to be a part of it.

I deal every day with victims for whom DNA evidence is an issue, primarily pre-conviction, and I think there's a growing interest on the part of victims but also a lot of uncertainty and ignorance about what DNA evidence is going to mean and can mean in their case.

So, I'm really pleased to be a part of this effort.

JUSTICE ABRAHAMSON: And you're on the Post- Conviction --

MS. TURMAN: Post-Conviction, yes.

JUSTICE ABRAHAMSON: Thank you.

Professor Smith.

PROFESSOR SMITH: Judge Abrahamson.

I'm Michael Smith. My name's been abused already today, but I find myself still here on the DNA matters.

I'm now a professor of law at Wisconsin but spent 20 years or so as Director and President of the Dare Institute of Justice.

So, my interests in the past have been in the social sciences, and so I'm lining up, really, for the first time against the physical sciences as they bear on questions of law and fact-finding.

I'll be chairing the legal issues group, and we have -- we're trailing on far in the distance from the post- conviction group, and I'd like to catch up.

Is this the point where you want to talk about what those groups will do, or later?

JUSTICE ABRAHAMSON: No, we're going to wait and do that in the introduction of the working groups, Michael. Thank you.

Barry Scheck.

PROFESSOR. SCHECK: My apologies. We had a tractor- trailer accident on the Brooklyn-Queens Expressway this morning.

I actually serve as a Commissioner of Forensic Science in New York State on what's known as the Forensic Science Review Board, which is a panel that was established basically through legislation that my colleague, Peter Neufeld and I helped draft. It is a regulatory body that governs all crime labs in the State of New York, including our DNA laboratories.

I'm particularly involved in the development of quality assurance standards for the laboratories, including the actual conducting of blind proficiency tests of our laboratories, of our DNA laboratories, which we have successfully done already in the State of New York, actively involved in the development of our DNA data banks and exactly how those will work in conjunction with law enforcement on looking at old, unsolved cases, as well as all incoming cases, and so, I've been doing that for the last -- I guess it's three years since the creation of the Commission.

I work, also, I guess, on the project with Bob Gaensslen and Joe Peterson for the development of quality assurance standards, which is one of the many NIJ glances in this area.

For 21 years, I've been a professor of law at the Benjamin N. Cardozo School of Law, where I teach professional responsibility, criminal law, and trial advocacy.

We also have a clinical program in that law school known as the Innocence Project, and through that organization, we have managed to work on, either as attorneys of record or assisting counsel, 33 cases of individuals who were exonerated with post-conviction DNA testing. That's out of a total of 53.

It's of some interest and I think shows the importance of the work that this Commission is involved in that, when the justice department put together this fine monograph, "Convicted by Juries, Exonerated by Science," case studies in the use of DNA evidence, in June of 1996, there were 28 such cases.

I think it's truly a testament to the development in advance of the technology that, since June of 1996, there have been at least an additional 25 cases.

Now, remember, this report in June of 1996 represented all exonerations through post-conviction DNA testing, really since the advent of forensic testing in 1989 through June of 1996, and the pace of this has increased significantly, although I can assure you that, given the limited resources of our volunteer organization and the money that we don't have to perform testing and the limitations we have in being able to go out and investigate where a sample is, a serious effort in this area is going to yield even more individuals, including the development of databases.

I've tried two pre-trial admissibility hearings with my colleague, Mr. Neufeld, in 1989 and '90-'91, so I've cross-examined Dwight Adams, Lisa Forman, litigated with my esteemed colleagues, Mr. Wooley and Mr. Clark, testified in behalf of funding for Mr. Ferrara's laboratory, where we got a number of people out of jail.

JUSTICE ABRAHAMSON: I explained, Mr. Scheck, that we're sitting at the table in a particular order, so that all adversaries will be across the table.

PROFESSOR SCHECK: Hardly adversaries, more colleagues.

JUSTICE ABRAHAMSON: Right. You said it better than I did in a half-a-sentence.

Mr. Scheck's on the post-conviction committee, task force, and has supplied protocols, the figures.

Those of you who read The New Yorker -- there was a delightful little story about Mr. Scheck representing a jay-walker that did not involve DNA evidence. So, we'll talk about that later.

Mr. Hillard.

PROFESSOR SCHECK: Actually, like most things in the press, that's actually [inaudible]. I'm not representing any of my former students.

JUSTICE ABRAHAMSON: Mr. Hillard.

SUPERINTENDENT HILLARD: Good morning. My name is Terry Hillard. I'm Superintendent Designee for the Chicago Police Department, and unlike Mr. Scheck, I'm just a broken-down 54-year-old street cop who came up through the ranks, and when I was selected for this position, I was the Chief of Detectives, and I tried for two-and-a-half years as Chief of Detectives to initiate the cold case squad to investigate old homicides.

It seemed as if the day that my name appeared in the paper as being one of the forerunners to become superintendent, that authority was given to me. We now have one sergeant and four police officers, and I would figure, by 1 April, we should have probably one sergeant and 12 detectives to go forward and investigate these old homicides.

I was glad to hear you say that training of evidence technicians, detectives, and local crime labs -- there should be some funding for these folks to get training.

I'm a big believer in that, especially crime scene protections Dr. Rau and Darrell Sanders and I talked about for a couple of moments this morning.

You mentioned educate prosecutors and defense attorneys and judges. Please don't forget law enforcement.

JUSTICE ABRAHAMSON: No.

SUPERINTENDENT HILLARD: Okay. Thank you.

I'm very excited to hear about laboratory funding and this backlog in database.

As you know, we go through Director Gainer's laboratory to have our DNA tested, and the turn-around time is one of the things that our detectives are constantly talking about could be expedited a little faster, and so, I'm hoping that happens.

But I'm glad to be here, and any and everything that the Chicago Police Department can offer to this Commission, I promise you and I guarantee you that you will have it.

JUSTICE ABRAHAMSON: Thank you, Mr. Hillard.

SHERIFF KENNARD: I'm Sheriff Aaron Kennard, a 27- year veteran of law enforcement, and I'm honored to be here, Your Honor.

I think Terry is a little -- we didn't quite get the entire story. He was just appointed Chief of Police of Chicago after a three-month search, having gone through a very rigorous selection

process of 80 very qualified applicants, and it was narrowed down to him and two others, and I congratulate him on that effort. I'm not sure why he would want to take on the role, but --

[Laughter.]

SHERIFF KENNARD: I've been elected Sheriff in Salt Lake County for two terms, eight years. I also am Vice President of the National Sheriffs Association, and I represent the 3,500 sheriffs throughout the country.

We have a great deal of interest in the DNA effort, and as I read through the planning group's notes, I'm very much in favor and hope that we address the issue that is mentioned on one of the pages under legal issues and privacy issues.

Should all arrestees, convicted felons, and those on probation be required to provide a DNA sample?

We have a big problem identifying a lot of people in jails. Having the possibility of a national DNA database that is accessible in a timely manner is of great interest to those of us in the country that have jails, and most all your sheriffs are the ones responsible for housing prisoners. Very few city agencies anymore want anything to do with the jails. They leave that to us sheriffs.

So, anything that can be done in this regard, I'm also in favor of making as least intrusive as possible in the collection of these samples, but the sooner the private sector can develop something that is instantaneous, realizing that you watch a TV show and think that everything is instant.

I talked to a couple of vendors during the pre- morning break and suggested to him that we should be able to have a person being arrested stick their finger in a little particular machine and just about have an instant identification base, but we're not going to give up thinking in this regard.

But it's an honor to be here and representing the sheriffs of the country.

JUSTICE ABRAHAMSON: Thank you, Sheriff.

Mr. Gahn?

MR. GAHN: My name is Norman Gahn. I'm an Assistant District Attorney in Milwaukee County. I've been there about 14 years. I'm with the Sexual Assault Unit, and I have prosecuted many homicide and sexual assault cases utilizing this evidence.

In other words, I'm just a guy from Milwaukee here to offer whatever help he can.

JUSTICE ABRAHAMSON: Thanks. You've prosecuted a number of cases with DNA evidence.

DR. DAVIS: I'm Dr. Joseph Davis. I just retired as Chief Medical Examiner, Dade County -- that's Miami -- after 40-some-odd years down there, and for the past -- till I retired -- 20 years, since its inception, I was on the Commission and for a brief time the chairman of the Medical Examiners Commission, which oversaw or oversees, whichever is the correct verb, the Medical Examiners Services of the State of Florida and have served in the past with the National Association of Medical Examiners and the American Academy.

I did serve representing the American Academy of Forensic Sciences on the National Medical Legal Review Panel in the preparation of these national guidelines for death investigation.

One of the major problems we've had in the entire field of the forensic sciences and also in many other areas involving criminal justice is the absence of guidelines.

We've seen the creation of the concept of criminal justice standards and training for policy and then, later, corrections and then, later, probation officers and so forth.

We have nothing like that in the field of forensic pathology, and that is something to come.

Now, from the standpoint of what I can offer this group, I don't know too much about DNA, although I have a medical degree, but DNA is a Ph.D. operation over in the crime lab, not in our operation, but I can bring along a little bit of experience over the years with the problems of the collection, the preservation, the transfer of evidence associated with dead bodies, what's on the body, what's around the body, and what's in the body.

We've seen some remarkable changes in recent years, especially with DNA.

When we built our building in Dade County, which was the very large building in 1988, it was the first building to have in it a holding, drying room for proper preservation of clothing for dead body victims, because they always come in wet and soiled and dirty and they have to be properly dried and prepared for the crime laboratories, and just recently, we've had to completely revise all of our programs there because of DNA, because it's a totally new ballpark we're in, and what I'm looking forward to with this Commission is better improvements in the field of medical/legal death investigation.

We need to get these programs properly performed, we need to get things done properly, and it's going to be a very interesting future, but I think we're right on the brink of improvements in the medical/legal death investigative field, the guidelines certainly the first step.

One more thing I'd like to mention about these guidelines -- these are not cast in stone. This is the first publication, and I'm hoping that, out of the work of this Commission, there will come some very needed and good changes in these guidelines, because I think all guidelines should be subject to fluidity and change, as new knowledge is derived.

CHIEF JUSTICE ABRAHAMSON: Chief Bashinski. I think if I say "Chief", half the people in this room would rise up. Go ahead.

MS. BASHINSKI: My name is Jan Bashinski. I have been a forensic scientist for 33 years and 25 years of that I spent working for the Oakland Police Department in a small crime lab, so I am pretty familiar with the problems that are faced by city crime labs.

In 1989 with the advent of DNA technology I saw a very exciting opportunity. I jumped ship to go to work for the State of California, where I established the DNA program there, and we now have a very active and very large DNA databank.

Given that background, I think you can understand why I was very frustrated with the pace that we have been able to keep up with DNA. The prospect is so great. The rewards are so great for the idea of the databank and for being able to work on cases without suspects and provide investigative information that we could never have provided before to the police.

Unfortunately, because of funding limitations and because of the pace of technology not quite keeping up with our aspirations, we are still sitting -- looking at great backlogs of cases and of databank samples, so I think anything that we can do, that this Commission can do to put that great need into focus and to identify initiatives that we can undertake to improve the capabilities of the laboratories to provide the very badly needed service to the criminal justice system will be very, very important, so I am very honored to be able to be a part of that and hopefully to contribute to it.

CHIEF JUSTICE ABRAHAMSON: Thank you. Dr. Crow.

DR. CROW: I'm a retired Professor of Genetics, in contrast to Dr. Davis, who is recently retired, I have been retired so long that I have forgotten what it's like not to be retired -- actually retirement is a pretty good life --

[Laughter.]

DR. CROW: -- and I recommend it but not the usual cause of retirement.

My specialty was Population Genetics. I am sure I am here because of having served as Chair of the National Research Council second committee on this subject. Why was I named to chair that committee? It's not abundantly clear, but I think I know why. The Academy was looking for a person with sufficient gray hairs to command a certain amount of respect for that reason alone who specialized in Population Genetics and who had no previous commitment -- I started to say no previous knowledge -- but very little previous knowledge of this subject, and one of the things one quickly learned, I did, and that is that knowledge of purely theoretical Population Genetics is not -- it's a requisite but it is not sufficient by any means.

The subject matter is quite complicated and goes beyond what one learns in textbooks and in ordinary research.

I am happy to serve on this, and I think I am here because of having this particular body of experience.

I don't come with a specific agenda. I am glad to do what I can. I am particularly happy to work with Justice Abrahamson -- Shirley to me --

CHIEF JUSTICE ABRAHAMSON: Thanks. We have done this for a number of years.

DR. CROW: Shirley's husband was a post-doc in my lab when both of them -- when all of us were much younger than we are now, and I have always enjoyed working with her and will continue to.

CHIEF JUSTICE ABRAHAMSON: Thanks, Jim.

Dwight?

DR. ADAMS: I am Dwight Adams, currently Chief of the Scientific Analysis section in the FBI Laboratory. In that capacity I manage seven different case-working units, two of which are DNA analysis units -- one, the traditional nuclear DNA testing unit, the other the new mitochondrial DNA testing unit.

In previous assignments, I have been Chief of the DNA Analysis Unit. I have been an Examiner in that unit, testifying as Mr. Scheck said, in trials around the country.

In fact, listening to Barry reminded me of just why the hearing lasted eight weeks.

[Laughter.]

CHIEF JUSTICE ABRAHAMSON: Time out. Go ahead.

[Laughter.]

CHIEF JUSTICE ABRAHAMSON: No response time -- no rebuttal. Go ahead.

DR. ADAMS: In between the time I was Chief of the DNA unit, and now Chief of the Scientific Analysis Section, the FBI Laboratory sent me to Newark, New Jersey to become the supervisor of a Truck Hijack squad, so I spent the last three years chasing truck hijackers all over the country and I guess that is the reason why I am on this Commission now.

I am also the designed Federal employee on the DNA Advisory Board and I am happy to be here. I am happy to work with all the members of this Commission, and I look forward to that.

CHIEF JUSTICE ABRAHAMSON: Thank you.

MR. CLARKE: I'm George Clarke, although many of you know me as Woody Clarke. I have been a Deputy District Attorney in San Diego County since 1982, although I am not sure who my boss was for one year. Barry, maybe you can help me with that.

I come to you with perhaps a little bit of a different perspective. I consider myself, like Norm and Jim Wooley, as end-user of this technology, and to give you an example, I think of where this technology has led to. I spend probably most of my time literally trying to direct traffic in our office.

We have a DNA laboratory in our local police department. That laboratory is unable to keep pace with the requests that we make and so consequently I literally walk down the halls, walk down the floors of our Prosecutor's Office discussing with our lawyers how badly do you need this evidence -- and sometimes decisions are made that our prosecutors don't like, but sometimes they have to be made to get that work done, and I think that is one of the questions that I know this Commission is going to address, which is the explosion of requests for DNA evidence in criminal cases nationwide and, for that matter, worldwide.

In that same vein, and I think as my parting comment, I am well familiar with many individuals here. Lisa Forman, Chris Asplen, Anjali, Richard Rau, and I can assure all of us on the Commission we could not be in any better hands than these particular people, so I am very excited about this opportunity.

CHIEF JUSTICE ABRAHAMSON: Paul Ferrara.

DR. FERRARA: I'm Paul Ferrara. I am Director of Virginia's Division of Forensic Science. The Virginia Division of Forensic Science is somewhat unique in that it serves all law enforcement agencies, all prosecutors, all medical examiners within the Commonwealth of Virginia, and yet is not part of any law enforcement agency, but rather I report to the Secretary of Public Safety in the Governor's Cabinet.

Virginia has been heavily involved in DNA analysis for the last 10 years, and almost all aspects of the technology, beginning 10 years ago with training law enforcement officers on the collection, proper collection techniques of DNA evidence, prosecutors, judges, medical examiners and so on.

I have been involved in the legal aspects. I have been the co-defendant on one of the country's major Constitutional challenges to the development or the implementation of DNA databanks, so I am very familiar with that aspect of the technology.

We have been a beta test site for CODIS since its inception and are very strong advocates and supporters.

Virginia's DNA databank law is the most expansive, I believe, in the country and will soon be the largest repository of DNA profiles and we anticipate -- as Jan indicated, despite having probably one of the largest staffs on a DNA program we still don't have enough resources to keep track of the work that is necessary.

The more we do, the better our technology, the more work, the farther behind we get. We are victims of our own success and I think it is critical -- I think this particular Commission is going

to be a terrific asset to the forensic laboratories to assist us to be able to do a better job for the police and the courts, and I look forward to working with you.

DIRECTOR GAINER: Paul, amen on many of those things.

Good morning. I am Terry Gainer and a visual learner, so that's why I wore my uniform, to let you know that I am the Director of the Illinois State Police.

I spent about 30 years in law enforcement, 20 years on the Chicago Police Department, seven of those as a Homicide Detective, and I can nearly recall the names of the ones we didn't solve, Terry, so -- and I can certainly picture those crime scenes, so I would be anxious to see how the cold cases go -- hopefully not too many of them were my personal cases, but there may be a couple.

[Laughter.]

DIRECTOR GAINER: The Illinois State Police is fortunate to run a unified lab system in Illinois. We have seven labs employing about 400 scientists and we work very closely with the Chicago Police Department -- and it's a fully accredited lab. We process about 120,000 pieces of evidence a year.

The State Police also handles most of the crime scene processing outside of the City of Chicago and some of the surrounding jurisdictions so we try to service about 1100 law enforcement agencies and 102 state's attorneys, and the sheriffs who go along with that, and as Paul mentioned, as we keep developing our systems the response -- or the request for our work is growing, but we have eliminated the backlog in the State of Illinois. We simply have cases in queue, so we have no more backlog. That's a joke -- you'd have to stay with me --

[Laughter.]

DIRECTOR GAINER: -- for some of these things.

I, too, am pleased here. This is a mighty powerful group, some of which we have had a chance to work with before, but I know we have a tremendous amount of work to do, not only on the homicide but particularly I am concerned about the sexual assault cases.

There are thousands of cases being gathered in Illinois alone where there is no suspect and they are just not processing those rape kits, and we have to do something different about that and, Chris, I am one of those guys who wonders how I am going to pay for all the tests you want done and the scientists in court, and I am also concerned how I can keep my 400 scientists from being stolen by Cellmark or the Federal Bureau of Investigation, but we will continue to work on those things. Thanks.

CHIEF JUSTICE ABRAHAMSON: Thank you. Dr. Reilly.

DR. REILLY: Good morning. I guess I am the second person at the table to say that he has not real involvement formally with the forensics community, with the criminal justice system.

I am a physician. My background is in genetics internal medicine, and I am also an attorney.

For the last 20 years or so, I have been thinking hopefully with some clarity, not always, about advances in genetics and what they mean to society.

I am pleased to be part of this panel, also pleased to make this observation to you. I know most states in the United States now have DNA Felon Data Banking laws. The system in one sense is fairly highly developed. I think actually the American public knows very little about it.

I think there will emerge very significant concerns about the privacy of these data. I think we have to attend to those issues, and I think it is very important how both the benefits and the risks of gathering huge amounts of data about individuals are presented to the society at large, and I am sure that is within the scope of this Commission to be concerned about.

CHIEF JUSTICE ABRAHAMSON: Thank you. Sir?

CHIEF SANDERS: Good morning, Your Honor. My name is Darrell Sanders. I am the Chief of Police in Frankfort, Illinois -- a suburb of Chicago.

I am here as a representative of the International Association of Chiefs of Police, as the immediate Past President. We have some 16,000 members in 94 countries that are very, very concerned for this issue of DNA.

Personally I am very proud to be on the Commission as a former homicide investigator and a very casual observer of the O.J. Simpson trial. I have a great personal interest in how we perceive the appendage items -- actually crime scene searches themselves as it affects our profession and our image.

I think that we as a profession were very damaged with the O.J. Simpson trial and therefore I think it's vital that this Commission carries out its work in an expedient manner, because I think a lot of very fine professional police officers that do this stuff, that do things the best way the know how, and there is room for improvement, I'm sure of that, but I think that is something that is important to us, so on a personal level I am very proud to be on the Commission for that reason.

CHIEF JUSTICE ABRAHAMSON: Thank you, Chief. Jeff?

MR. THOMA: Good morning, Your Honor. I am Jeff Thoma. I am the Department Head of the Mendocino County, California, Public Defenders Office. I have been involved in DNA since 1990, working in trials and admissibility hearings on capital and noncapital cases.

I am also a member of the Board of Directors of the California Public Defenders Association, and I have been so for the last four years, and the last six years I have been the hotline advisor

for all DNA cases in the State of California. When defense attorneys have such a case, they generally call me to get advice on it.

I have testified before the California legislature on it. I am a faculty member of the Death Penalty College at Santa Clara University, and lecturer on DNA quite frequently in the Scientific Editor or the California Defender Magazine.

Most importantly regarding my interests here, I am the co-author of a working bibliography on international and national cases and articles on forensic DNA with my colleague Dr. Bill Thompson. We have done that for the last five years, and I am extremely interested hopefully in working with Michael Smith on the Legal Issues Working Group, particularly regarding testing and funding and those issues, and I, too, am very honored to be here.

Thank you, Your Honor.

CHIEF JUSTICE ABRAHAMSON: Thank you, Mr. Thoma. Mr. Wooley.

MR. WOOLEY: Good morning, Your Honor. My name is Jim Wooley. I have been a prosecutor for most of my 16 years as a lawyer, including time with the Manhattan D.A.'s Office in the Sex Crime Unit, and also most recently for the last nine years with the U.S. Attorney's Office in Cleveland where in 1990 I got involved as a prosecutor of a case that was considered pretty significant at the time called the Yee case or the Bonds case that Barry was involved with and Dwight Adams and Bruce Budowle and some other folks. That lasted for a good long time, and as a result of having survived that experience, I was asked and have been asked to at different times do some teaching and a little bit of writing on the topic.

I was involved in the Ohio DNA Advisory Council and the effort to get the database system off the ground there, and like Norm and Woody I am a line prosecutor and I work cases and I am an end-user of it, and I am very pleased to be on this Commission. Thank you.

CHIEF JUSTICE ABRAHAMSON: Well, thank you, and thank you to you all. If you didn't think it was an impressive group before, I think you're persuaded now, but I came in with that viewpoint, and I think each of you has much to contribute individually and to help us locate other people around the country who will work with us.

We are running a bit late, but we will catch up, so we can take 15 minutes now and be back at 10:15. The staff will help you find what you need in the fifteen minutes, but if you could come back promptly -- thank you.

All right. We are going to reconvene.

CODIS/NDIS Presentation, Steve Niezgoda, CODIS Program Manager, Forensic Science Systems Unit, Laboratory Division, FBI, and Dawn Herkenham, Chief, Forensic Science Systems Unit, Laboratory Division, FBI

We are going to have a presentation on CODIS by Steve Niezgoda and Dawn Herkenham. Ready?

I may have to turn our chairs appropriately to clear the way.

[Pause.]

MR. NIEZGODA: Last year in Sarasota, Florida an individual was breaking into home of women.

He would pry open the back door and enter their homes, rape them, and then leave, and as time passed between January and September the nature of these crimes became more and more violent.

He would start binding them up with wire. It got to the point where the Sarasota police actually warned the public on television, just to create that public awareness.

Well, in the meantime, Florida had been working DNA evidence collected at these crime scenes, and was vigorously and actively trying to solve these crimes. What they did was they sent one of these DNA profiles to Richmond, Virginia to search against their database. In fact, what they did was they did sort of a mass mailing to all laboratories doing DNA and say, hey, search your database.

Well, the Virginia database came back with a hit. Could you give me the next slide, please?

Mark Dagell had been in prison in Virginia for larceny, grand theft, failure to pay child support.

He had been out on parole and moved to Florida and based on this DNA hit, the police in Florida and in Virginia matched fingerprints also found at these crime scenes to Mr. Dagell, who was subsequently arrested in November of 1997.

This is an example of the power of CODIS -- forensic DNA -- and how it can positively affect society, make law enforcement's job easier, and just give a general measure of confidence and faith in the public that these types of criminals can be taken off the street.

My name is Steve Niezgoda. I am in the FBI Laboratory. I am the CODIS Program Manager and I am very honored to be here today. I thank Chris and Judge Abrahamson for the chance to speak about CODIS and what we are trying to do, to battle violent crime.

Now with me today is my boss, Dawn Herkenham, and I am going to be talking 20 minutes, 25 minutes and then I am going to hand it over to her to talk about legal issues that might be of interest to the Legal Committee -- you know, Working Group that you have on this Commission.

A couple things. First of all, I have got way too many slides, and many of you I have spoken with before. You know, we can talk about this stuff all day, so you, you know, I am just kind of feeding you with a fire hose and take what you want out of it and we will be happy to come back in the future for any questions -- you know, grab me, grab Dawn, whatever.

I have one other request. The word DNA databank and DNA database has been thrown around. Call it CODIS. We want a national standard database that we all use, that there is no doubt this is CODIS.

So given that, let me just get started. Well -- one other thing. First, I have a couple of axes to grind, so I am going to tell you right up-front what they are, and I'll revisit them at the end as well.

My first axe is every time we speak in public, try to make everyone aware of what we see as the critical success factors for CODIS to succeed, and they are pretty simple in concept. They are difficult to implement. They are, first, the scope of the convicted offender legislation that authorizes the collection and analysis of blood samples needs to be appropriate to cover the appropriate crimes -- you know, cover the appropriate offenses to help solve these violent crimes.

Second, states need to be collecting all of those samples and analyzing them -- so just because you have a law doesn't mean that those samples are being collected, all of them are being collected and analyzed.

Then third, as a country we need to be able to work cases where the police have not identified a suspect, known as "unknown suspect cases."

If you can do those three things, a tool like CODIS can help solve these violent crimes which would otherwise go unsolved -- so that is my first axe. I just want everyone to know up-front that is how we view, you know, what it takes to succeed.

Second is what does the future look like? Now I am going to give you my view as CODIS Program Manager. I think it's the challenge before this Commission to define a vision of the future and then make recommendations consistent with that vision. I think that is the challenge on you. I can give you my opinion. You can take it for what it is worth.

But some trends we see happening -- first of all, the legislation covering the collection and analysis of offender samples is being broadened and we see that eventually it is going to cover all felons.

Second, DNA technology, the work of the Research Unit at Quantico and other state laboratories are addressing the problem of getting more powerful techniques to get results faster and quicker. That trend will continue and I would also suggest that along with that it's going to come down in price, kind of like the same way computer power has dropped in price over time. That is going to happen with DNA technology.

Third, what we would like to have happen in the future is any case that has DNA evidence that could likely be used to solve that case is worked and is searched against CODIS and that CODIS is implemented standard throughout the country -- everyone is using it.

So that is kind of the future we would like to see happen and I think -- which leads me to my third point. The big issues that I see facing this committee is balancing what is scientifically possible versus what we as a country find socially acceptable.

For instance, say in the year 2010 or 2015 there are DNA markers that can tell the eye color, hair color, physical characteristics of the perpetrator of a crime -- but we don't look anywhere in that today -- but it would be technically possible to do that in the future. Should we do that?

That is a question. I don't know the answer to that question. I would suggest that this committee, you know, might want to consider that.

Second, along the same lines, as the technology becomes more powerful and faster, what we are doing right now in states is collecting all these samples from convicted offenders, typing them and we are also saving it in a freezer, saving a piece of that sample in the freezer, and my take -- when I speak in public on the concern about that -- isn't what we are doing with that data in the CODIS database, it's the fact that that sample is sitting in a freezer somewhere and is that being protected? How do we know it is not being sold to an insurance company -- those kind of questions, okay?

So again, in the future as technology becomes cheaper we can identify samples more quickly, more immediately -- you know, do we want to perpetuate having samples in a freezer? That is another issue.

And then finally I think the simplest one, which everyone or Dr. Ferrara and Jan Bashinski and others have all mentioned already -- we have a serious infrastructure problem in this country to be able to work the samples, work the cases to solve the crimes, so I am just assuming you are going to handle that, you know -- you guys will take care of that.

So that is kind of, you know, the big three themes as I see it.

May I have my next slide, please.

I would like just to go briefly through some boring statistics and talk about rape. Obviously DNA is useful in a lot of other crimes than rape, but the recidivism on sexual assaults -- you know, it solves a lot of sexual assault crimes.

So the nation has two crime measures -- the Crime Victimization Report and the Uniform Crime Reports by the FBI.

This, the Crime Victimization Survey, the first measure, tries to get an inkling into crimes that occurred that weren't reported to the police, and you can see, yes, 250,000 to 300,000 rape or

attempted rapes per year, of which one in three was one of those cases where the victim did not know the identity of her attacker -- a prime case for CODIS to solve. Next slide.

If you look at the Uniform Crime Reports by the FBI, of that 250,000 - 300,000, 100,000 or so are being reported to the police. Where did the other go? Who knows? Of which about half of those, the cases are cleared by arrest. Next slide.

Of those arrests we have roughly 20,000 convictions, which the sentence is 14-15 years, of which about half of that is time served. Next slide.

So these individuals convicted are released, roughly half of their sentence served, are back out on the street, and this graph gives you an inkling of where they are, and you can see that, you know, the vast majority of all those in the care and custody and control of the law enforcement are out on the street. Next slide, please.

And so my tried and true recidivism slide, which many of you have seen and commented, individuals convicted of crimes are back out on the street.

What's happening? Well, this was a very old study done in the '80s that addresses recidivism a little bit. It's only dealt with 83 -- it was interviewed 83 convicted offenders and asked a series of questions and what I will draw your attention to is the third bullet there and the interviewers asked the question how many offenses did you occur? How many sexual assaults did you initiate in which it was never detected by the police? And the answers there ranged all the way up to 250 times.

The survey designers cut back -- wouldn't take any answers over 50 but you can still see an average of 5.2.

Now that is one thing that this study shows, that a lot of recidivism studies don't show -- the undetected recidivism, and again we have the serial offender out on the street committing these crimes again and again, you know, and that is what CODIS is about, solving those crimes, and that is why this statistic is particularly enlightening.

In fact, I don't know of any other studies that get at undetected recidivism. Next slide, please.

So what is the big idea? The big idea is let's build a database.

Let's combine computers, DNA technology, store this information in a database where it can be quickly searched to solve these violent crimes -- and that is what CODIS is about.

We have three indexes. I don't want to talk about the Population File. We'll just go by that. Let's talk about convicted offenders.

That index contains DNA profiles from individuals convicted of crimes covered by state legislation. I won't say it's just sexual assault because there's a variation among those laws and

Dawn is going to get into that a little bit, so anyway it's someone who statute covers a state's ability to draw that sample, type it, and put it in a database.

The second index is a Case Worker Forensic Index where DNA evidence obtained at the crime scene, analyzed at the crime scene is put into this database and searched against that Convicted Offender Database. If we get a match, qualified DNA analysts get on the phone with each other, say, hey, it looks like we have a match. If they verify this match, they can tell the police, law enforcement and their respective agencies, you know, hey, we have got a match here -- we have solved the crime.

You can also take that Forensic Database and search it against itself and just allow serial crime scenes to be connected to one another. Next slide, please.

So what we are doing in the FBI Laboratory is the CODIS Program is about deploying this computer technology to all laboratories in the United States, public laboratories doing DNA analysis and the system basically has three different tiers.

We have a National DNA Index System -- that is what NDIS stands for. We have multiple State DNA Index Systems and again Local DNA Index Systems.

The concept of operations is pretty simple. A local laboratory will develop evidence based on a case submitted to them by the law enforcement agencies they serve and they can put it in their own local database, search it against other cases in their jurisdiction, solve crimes that way.

If they so choose they can share that data with the rest of the state by sending it up to the State DNA Index System. At that point two things happen. First, those casework DNA profiles are searched against other casework DNA profiles and the serial crimes can be linked together, and it is searched against profiles from other laboratories in that state.

The other thing that happens at the state level is that casework profile will be searched against their Convicted Offender Database.

At the state level, the state agency can so choose to share this data with the rest of the country by sending it to the National DNA Index system.

NDIS, as we call it, is operated by the FBI Laboratory. I have a few slides of that coming up. It's in test phase right now and it will be operational this year. Next slide, please.

So the DOE offer, public laboratories doing DNA, is the FBI will provide the CODIS software free of charge, will provide training, will provide a help desk, and we'll operate the National DNA Index System. The state and local laboratories are responsible for buying, purchasing the IBM PCs, the commercial software necessary to run and operate CODIS.

You can see where in 83 laboratories, obviously our goal, the program goal, is to be in every laboratory doing DNA analysis, everyone searching their data against everyone else's. Next slide, please.

So that is kind of the big idea of what we are trying to do. What else I can provide here is a snapshot of the status of DNA in the U.S. today.

Now this data comes from an informal survey our office conducts every summer of all the crime labs in the country doing DNA, so don't take the numbers down to the nth degree, but it does give you a flavor for what is happening.

The first question we have is we have 48 states with laws covering collection of samples, how many are actually collecting, how many have been collected, and as of Summer '97, 450,000 have been collected in 35 states.

The color code there, in case you can't see it in the back, is the aqua or bluish color is one to 1000; green is 1000 to 10,000; yellow is 10,000 to 50,000, and red is more than 50,000 have been collected -- that's collected.

A concern to us here, every state with a law -- we would like to see them collecting. This slide doesn't get into are they collecting for every offense they can be collecting for, are they collecting from individuals on parole, et cetera. Next slide, please.

Of those 450,000, by now a half a million samples collected, how many have been analyzed? And here the number starts dropping off. You can see 131,000 -- that RFLP technology. There's also PCR technology with about 4,000, so we have a lot collected, a smaller subset analyzed. Next slide, please.

That was with the RFLP technology, which I am not going to get into and I am sure Dr. Budowle can answer any questions you have about that.

The other technology, PCR, 6,000. Next slide, please.

So that is what our offenders look like. Again, a concern from the CODIS program, we want to see everyone using CODIS and using the same DNA technique, PCR or RFLP. Everyone is doing the same thing so the results are comparable.

These slides show a little bit about cases, what is going on casework-wise. You can see last year, '97, we had 5400 cases that were analyzed with RFLP only and about 1500 both RFLP and PCR. Next slide.

PCR, 9300 samples analyzed, casework sample analyzed, crime scene, and 1400 again both RFLP and PCR.

What is the significance here? Well, there's these offender databases, primarily RFLP. The casework laboratories are primarily doing PCR. The results are incompatible. That is a structural issue we have in this country that we will need to address. Dr. Budowle and the FBI and a whole bunch of state and local laboratories have collaborated to try to solve this problem with a standard technology -- the SDRs, which I am sure you will hear about later -- so again, a structural impediment to solving violent crimes. Next slide, please.

I will go through these quickly. Here's just graphing. We are looking at casework here. The top line shows how many cases were received by laboratories. The next line is how many were analyzed. The bottom line -- how many are in CODIS.

What you can see is the gaps between those lines represent backlog that needs to be addressed. Next slide.

That was 1997. Here is 1996. There is a little bit of improvement. Next slide.

Here we are with offenders -- same deal. We have collected a lot more than we have analyzed and not all of those are even in CODIS -- something we need to improve. This is the infrastructure issue. Next slide.

That is how it looked in 1996. What was nice to see about 1997, if you can switch back, go backwards for one second, you see how the analyzed and collected lines appear to be starting to converge. We will be looking for that in the future. Hopefully, you know, we will be cutting away at that backlog. Next slide -- and the next slide.

The other big thing I talked about was suspect cases versus cases with no suspects. The vast majority, like 92-93 percent, of cases analyzed are cases with suspects and we work very hard with NIJ and others to make laboratories -- well, they are all aware of this issue but to give funding resources to help them address this issue, because the reason these unknown suspect cases aren't being worked is because there is not the manpower equipment, space to work them. Next slide, please -- that is the same thing, just shown as pie charts. Next slide.

So how are we doing? The system works. CODIS works. This is a summary of hits -- which I don't even want to get into explaining because I don't like the way the slide is designed, but I designed it so it is my problem, but anyhow states like Florida have 100 hits already made by CODIS, cases that would not otherwise be solved. The system does work if you pay attention to the legislation, the collection, and analyzing these samples and working on those suspect cases. Those are the three critical factors. Next slide.

So let me just talk briefly about this national component. It is being tested right now. We had a bunch of things we had to do before we could activate this national system and Dawn is going to talk about those as well but we are in test phase still. We have 18 laboratories in eight states participating.

The current national database has about 100,000 profiles in it, all of which are RFLP, and the day we turned the national system on and searched it in this test phase, we made a match -- well, we didn't. The credit goes to the Illinois State Police and the Minnesota Bureau of Criminal Apprehension. They immediately linked the case. Minnesota had worked an attempted homicide/rape case that occurred back in the late '80s for Wisconsin, and that matched against a convicted offender in prison in Illinois -- so the victim of that crime at least knows who committed it at this point and that that person is still incarcerated. Next slide, please.

I know you are, some of your committees are going to be looking at cost-benefit analysis when you get at this infrastructure question -- where to put the money, you know, where's the bang for the buck -- and it is a tough question.

It is a question we have looked at and where it gets tough is quantifying the benefit of stopping a rape, stopping a murder, how do you do that? How do you put a dollar amount on that?

I just throw up this particular study again by NIJ -- how much a rape costs society -- $87,000 per -- so that's just something for you guys to consider in your analysis.

So I just want to go back to my third axe to grind. What does the future look like? You know, how do we want DNA to look in this country 10 or 15 years from now? Like I said, we want every case that can be solved with DNA being done on it. We want everyone using CODIS, everyone searching.

But the question you get in are two things like that were addressed already by the committee is do these -- should these laws expand to arrests, not just convictions, on arrests? Should it be more than just felonies? And this slide just gives you some numbers.

If you want to say we're going to do every felon in the country and we need the capacity to do that, you're looking at a million -- roughly a million per year, 910,000. Currently we work about 150,000. Now if you want to talk about casework, and someone mentioned the idea of put your finger in a device at the crime scene and it's automatically searched and identified, if you use as an analogy DWIs, how often do we use those DWI kits? That's 1.4 million a year.

As a country we work 18,000 cases a year today. That's the gap in infrastructure we need to look at. How big might this data base get? If you just look at the ten- print fingerprint cards in the FBI files, 74 million individuals, 217 million cards, that's the size, the scope, that this can grow to.

Next slide, please.

At this point I'm going to turn it over to Dawn Herkenham, and she's going to talk about legislative issues.

Thank you.

MS. HERKENHAM: Thanks.

Like Steve, I appreciate the opportunity to be here before the Commission today, and I did just want to make the Commission aware, there is a fair amount of legislation that's already out there, both Federal and State, with respect to DNA data bases.

First, contained within the Violent Crime Control and Law Enforcement Act of '94 was the DNA Identification Act. As you may well know, that created the DNA Advisory Board, which was established March 10 of 1995 and was charged with recommending quality assurance standards to the FBI Director. The status of that project is that the Board just met again last month, revised

the standards in response to some Office of General Counsel comments that we had at the FBI, and we'll be recommending those standards again to the Director of the FBI.

Also contained within the DNA Identification Act was $40 million over a five-year period for a grant program to State and local governments. This was referred to earlier by Mr. Travis. That program is administered by the National Institute of Justice, and it's now in its third year of funding.

Additionally appropriations were contained in that act for the FBI's CODIS program. And most importantly, contained within the act was the authorization for the FBI Director to establish a national DNA identification index. This index may contain DNA records of convicted offenders, analysis of crime scene evidence, and analysis of DNA obtained from unidentified human remains.

The records -- the DNA records and analyses in the index must comport with three requirements. First, they must be based upon analyses performed in accordance with standards that meet or exceed the quality assurance standards that are to be issued by the FBI Director, and in the interim time until such standards are issued the TWGDAM guidelines are the de facto standards across the nation.

Secondly, they must be prepared by laboratories that undergo external proficiency testing at routine intervals that do not exceed every 180 days.

And third, and probably equally important, is that this information must be maintained by criminal justice agencies that allow limited disclosure to the following groups: first, for criminal justice agencies for law enforcement identification purposes; secondly, in judicial proceedings if otherwise admissible pursuant to applicable statutes and rules; third, for criminal defense purposes, to a defendant who shall have access to the samples and analyses performed in connection in the case in which he or she is charged; and finally, only if personally identifiable information is removed.

This information can be available for establishment of a population statistics data base, for research, identification, and protocol development purposes, or for quality control purposes.

Access to the index, the national index, is subject to cancellation if the quality control and privacy requirements are not met. Additionally, the act also prescribes penalties not to exceed a fine of $100,000 for the knowing unauthorized disclosure of identifiable DNA information or unauthorized obtaining of DNA samples.

Next slide, please.

As I mention, the DNA Board has a five-year life, and there are 16 members. A number of those members are also on this Commission.

Next slide, please.

I will also mention the quality assurance standards, and one point I did want to make is that the Board's charter was expanded by the Director of the FBI to include standards for acceptance of DNA data into CODIS, and that is one of the issues that the Board is currently looking at.

Next slide, please.

Just one final thing on proficiency testing before I talk about State DNA data base laws. Under the DNA Act, NIJ was charged with sponsoring a grant to determine one of three things. If a blind external proficiency testing program was currently available, or to determine if one could be made available, or finally, if it was feasible to have such a blind external proficiency testing program for forensic DNA analysis. And I believe that grant is still continuing. It is being performed by Drs. Gaensslen and Peterson at the University of Illinois at Chicago.

Additionally there are proficiency testing requirements imposed on the FBI by the DNA Identification Act. FBI personnel who perform DNA analyses must undergo external proficiency testing within the 180-day interval as well, and we report annually to Congress on the results of those tests.

Now, with respect to State DNA data base statutes. I think this is a fairly impressive depiction to show you that pretty much the whole country is covered at this point. As Steve mentioned, there are 48 States that have enacted DNA laws. The two remaining States do have proposals pending before their legislature, and they have indicated to me they're very optimistic that those bills will pass this year.

I think one of the focal points of these data- base laws is the qualifying offenses, and the one thing I would note is that all 48 State statutes cover sex offenders. In speaking of expansions, Steve had mentioned expanding to all felony offenses, there have now been a number of States that have joined Virginia as far as covering all felony offenses, and that would be Alabama, New Mexico, and Wyoming, also cover all felony offenses. About one-half of these State statutes cover murder, manslaughter, and other assault offenses. Close to one-half cover the other violent offenses such as robbery and kidnaping.

Now I think owing to some of the increasingly violent nature of crime committed by juveniles, close to one-third of these State statutes now cover juveniles within their scope as well. And because of some experiences that States like Virginia are having with inclusion of all felonies, a number of State statutes are also expanding to burglary. That seems to be a crime that anecdotally there's some linkage with sex offenses.

Although DNA data base laws were enacted as early as 1989, the earlier statutes have far less detail than the later ones. People have learned from the States that have actually implemented the programs. But for the most part, all of them do include a requirement with respect to collection, such as indicating the agency responsible for collection, who is authorized to collect, and providing indemnification provisions for those who collect from civil and criminal liability if the collection's performed in accordance with generally accepted medical practices.

There is a challenge for States implementing their laws with respect to collection, and that challenge lies primarily in the area of collection from those offenders who are on some type of supervised release. Apparently it's much easier to arrange collection and intake for offenders who are convicted of crimes and who are incarcerated in State and local correctional facilities, but it's much more difficult to first identify the population that you have out there on supervised release and then determine how to collect from them. So that's another challenge that States are currently facing with respect to trying to get all the samples they're entitled to under their State laws.

For the most part the majority of State laws also include what I call access and disclosure provisions, and those are very similar to the four items that I had just read with respect to who may have access to this information. Most State statutes also cover expungement, which would be generally based upon a reversal of that particular conviction that qualified you for inclusion in the index, and the burden is generally also on the offender to request expungement.

And I would also say the majority of State statutes also prescribe criminal penalties for the unauthorized disclosure of DNA information. It's generally punishable as a misdemeanor, and some States also criminalize tampering with a DNA sample, and that's generally punishable as a felony.

I would also note while there's been a lot of activity in the past couple of years with respect to DNA data base laws being enacted, there's also been considerable activity in those States. Probably about a dozen States have gone back in and amended their laws to expand the list of qualifying offenses to hit the other violent felony offenses that they may not have covered originally.

I would also note that as mentioned by Dr. Ferrara, State DNA data base laws have been challenged in both State and Federal courts in Illinois, Kansas, Oregon, North Carolina, Virginia, and Washington, on the grounds that these laws violate the fourth amendment, but these State courts have upheld the constitutionality of the State DNA data base laws.

And I'd also mention just of interest that there is currently a case pending in Massachusetts. They had recently enacted a law and had begun the collection of samples from their population that was out on supervised release, and a group of those offenders brought an action to enjoin the collection, and the court did grant the preliminary injunction on the grounds that the Massachusetts State Police had failed to issue regulations on the collection process. Those regulations have been issued as emergency regulations and they are now awaiting a final decision on the merits by the court.

Next slide, please.

Another piece of Federal legislation that I did want to just briefly touch on is the Antiterrorism and Effective Death Penalty Act of '96. This particular act included a provision that the FBI Director may expand CODIS to include Federal crimes and crimes committed in the District of Columbia. Although this particular provision has been deemed insufficient to actually implement a collection program on the Federal level, it does support our current efforts to obtain legislation in this area.

And additionally, another important fact is that this act establishes yet another grant program relating to State identification systems and CODIS compatibility is one of the authorized purposes for this funding.

Next slide, please.

This particular grant program is administered by the Bureau of Justice Assistance, and it has an annual appropriation in both '97 and '98 of $9.5 million. The important issue with respect to this grant program is that unlike the NIJ grant program, eligibility for this grant program requires that a State have a law that requires offenders convicted of felony sex offenses to provide a sample for DNA analysis. And I think this is what we can probably attribute a lot of the activity in enacting DNA data base statutes to in the past couple years.

Next slide, please.

There are two additional purposes that can be funded under this grant program, and there are two other identification systems, IAFIS and NCIC.

Next slide.

And because there's been a lot of mention of privacy issues, I did want to note that pursuant to the Privacy Act, we are required to publish a notice whenever a new system of records is being created, and this notice is ordinarily published in the Federal Register. Accordingly, we have -- our NDIS privacy notice declares that the purpose of our system is to provide a national storage medium for DNA records that are contributed by Federal, State, and local criminal justice agencies.

Now obviously the 100,000 records that Steve alluded to earlier are all contributed at this point by State and local criminal justice agencies. This system also includes records about DNA personnel, and these are maintained to control the acceptance of the records and to facilitate follow-up on potential DNA candidate matches. This notice further defines the categories of individuals covered in NDIS which are directly related to the DNA Identification Act, such as convicted offenders, missing persons victims, and DNA personnel.

The categories of records, their routine uses, and procedures for storage, retrievability, retention and disposal, records access, and contesting records are all described in this notice, which was published on July 18, 1996. And I think in your binder under the CODIS section I've included a copy of all this legislation, and the Privacy Act notice.

Next slide, please.

And finally, a recent amendment in the Department of Justice's 1998 appropriations authorization with the Coverdell amendment. And this amendment requires the Attorney General to prepare a report which includes an implementation plan for requiring Federal convicted sex offenders to provide a DNA sample prior to their release for inclusion in a national DNA data base. This plan that we're preparing is due in May, and it is to include recommendations on

collection, analysis, making the DNA information available for law enforcement purposes, guidelines for coordinating with existing data bases, and procedures and penalties for prevention of improper disclosure.

And finally, in closing, I did just want to make you aware of another case that we became aware of last night, and it's not a CODIS case, but it does tell you a little something about the power of DNA technology. It's actually a 22-year-old murder case in Maine. A 30-year-old woman was shot to death and her body was recovered in the trunk of her car in 1976. That crime remained unsolved until recently. Forensic evidence from the woman's body had been retained by the Maine State Police crime lab. Hair samples had been taken from a suspect in 1977, and compared with hairs found in the car, and there had been no positive comparisons at that time noted. So this evidence was also retained.

The forensic evidence taken from the body of the victim was recently compared to the hair samples using DNA analysis, and they matched. The suspect was arrested in Florida yesterday.

An interesting fact for this particular case I thought was that the suspect had been convicted of murder in Illinois in 1964, and had received a sentence of 50 to 75 years. He was paroled less than nine years later, in '93 -- in '73, I'm sorry. So I don't know if that's an issue that this Commission has within its scope, but it's obviously something that occurs frequently. And again I'd just like to thank you for the opportunity, and I think we have a few minutes for questions.

Steve?

CHIEF JUSTICE ABRAHAMSON: This is not your last opportunity to ask questions about CODIS. It's your first, at least first with this Commission. Any comments or questions?

Mike.

PROFESSOR SMITH: On the slide that had the three hard disks -- the population file -- and I thought you were going to come back to that. I'm curious what that represents.

MR. NIEZGODA: The population files contain DNA profiles. However, the source of that DNA was anonymous, so you can't track it back to an individual. And the idea being that the population file eventually finds its way into the population statistics calculations presented in court. So it's anonymous, anonymous.

PROFESSOR SMITH: But if is -- CODIS then has no connections to data base, DNA information not collected in the criminal justice context?

MR. NIEZGODA: That's correct.

Yes.

DR. REILLY: If I may, I'd like to ask a question about the meaning of the word "anonymous." Would it be correct to interpret it as meaning it would be absolutely impossible for any individual -- to do it with individuals to establish a connection between two data points?

MR. NIEZGODA: It is not absolutely anonymous.

DR. REILLY: I would like to point out that there is a tremendous debate within the clinical genetics community and the scientific research community about the use and definition of that term "anonymous" that's really raging right now, for example at the National Institutes of Health, that has to do with the use of archived tissue samples. The term has acquired meanings in other contexts that your definition would fail.

MR. NIEZGODA: I can point you to the notification in the Federal Register. We tried to explain the one particular situation when that anonymity could be breached. The only other thing I would note is with CODIS we don't search casework or offender against that population file. We might search it against itself to see if there are duplicate people with the same DNA profiles, but at the national level it's not used to help solve crimes. It's purely for population statistics.

DR. REILLY: I wasn't pointing out so much as a challenge as to point out there is rapidly evolving at a national level a separate and parallel track, a separate standard about the term "anonymous," and I'm worried about a potential collision course between the two definitions.

MR. NIEZGODA: Thank you.

Yes.

PROFESSOR SCHECK: In that connection, first, Dawn, you mentioned in passing that with respect to the State legislation and the limitations on access that you regarded the State statutes as being "similar" to the Federal, which is laid out at I guess page 280 of the tab. You're talking about law enforcement identification purposes only? I mean, how many other statutes other than New York actually limit it that way, as opposed to just saying that the data is accessible for "law enforcement purposes"?

MS. HERKENHAM: Okay. I won't mean to give you a long response to this, but actually in 1991 the FBI had I guess issued, published some legislative guidelines for State DNA data base laws, and the same listing that you find in the DNA Identification Act of '94, which was actually around a lot longer before it got passed in '94, was recommended in there to States to be used as far as their access provisions, and you will find out clearly the majority of State statutes do mimic that language, and for the most part the States that will need to participate and want to participate in NDIS, the national system, will need to comply with that, as they now need to comply with that if they are receiving federal funding.

PROFESSOR SCHECK: Well, just to follow up on that, you're saying the certification provision that's in the Federal legislation here that says you have to certify that access will only be for these "law enforcement identification purposes," which are specifically defined. But that does not necessarily cover, does it, the blood samples which are stored in each State? In other words,

access to the blood samples themselves will be covered by State law, or do you read -- or does the certification include within it some pledge by the State that access to the blood samples as opposed simply to the data that's been sent to the FBI and the data that the FBI will send back, that is, the actual DNA profilings, is limited in this fashion?

Do you understand my question?

MS. HERKENHAM: I understand what you're getting at. This certification that I described is specifically limited to DNA records and analysis, so the scope of the Federal certification would not reach the samples, which I think is what you're asking. A number of State statutes do have additional proscriptions on how the samples are to be used, and in fact a couple State statutes actually require that the samples be destroyed.

PROFESSOR SCHECK: Which States are those? Do you know?

MS. HERKENHAM: I'd have to get back to you on that.

CHIEF JUSTICE ABRAHAMSON: Any other comments or questions?

Well, thank you, Steve, and thank you, Dawn, and I'm sure we'll be hearing more from you and about you.

We will proceed now to an introduction of working groups and the discussion, but before I do that, I just wanted to first say that we have been derelict in not appropriately recognizing Dr. Rau, so I think most of the people around the room know him, but if you would stand, we would appreciate that, and say thanks for all your work on this.

[Applause.]

Introduction of Working Groups and Discussion

CHIEF JUSTICE ABRAHAMSON: And the other thing I want to say before we move into the introduction of the working groups is just a few and very few of our Commissioners are not here. We were advised they were not coming and Chris met with them to tell them where we are and where we are going, so he met with Lloyd Cutler and with Bill Webster --

MR. ASPLEN: I have not yet met with Mr. Webster.

CHIEF JUSTICE ABRAHAMSON: I'm sorry.

MR. ASPLEN: -- but we'll in fact do that.

CHIEF JUSTICE ABRAHAMSON: And Mayor Schmoke.

MR. ASPLEN: And Mayor Schmoke has a representative here today in the audience. Colonel Daniels is here on behalf of Mayor Schmoke to take back to the Mayor what it is that transpires today and we appreciate your being here today, Colonel.

CHIEF JUSTICE ABRAHAMSON: So I wanted to have you all advised as to what was happening with the others and they hoped to be here but something kept them from this meeting.

I thought what we would do now is introduce these five working groups with the fifth, post-conviction issues, really going into depth this afternoon at 2:00, so we will do the other four now.

A Commissioner has been asked to chair of the groups. There has also been a request for reporters for at least of these four, and we will talk about that.

The members of these working groups have not been appointed or selected, and in each of the tabs there is a request that each of you suggest people for any of these working groups and you should not limit yourself to people in your fields of expertise but others that you know and we'll go and try and put these working groups together -- and it is always open here to discuss other working groups or issues within the working groups.

I call your attention to again Tab G, which has the minutes of the planning group in Tab G for each of these working groups. There's a further discussion of the issues that that working group might look at.

So we will start with -- are you ready, Jim?

Jim Crow is going to be a double-header double- hitter. He is going to be the Chair and the Reporter for Research and Technology -- again, unassigned. If you would just briefly describe it and then we can talk about it.

DR. CROW: All right. Let me just read the description. That's what happened last week, and I am not very well prepared -- not at all prepared.

The Research and Development Working Group will examine trends in DNA technology which may be implemented by the forensic community for either casework or convicted offender databasing. The working group will discuss the impact of these new implications on the criminal justice system. A vision of forensic DNA application in the future will be gleaned.

CHIEF JUSTICE ABRAHAMSON: Wonderful.

DR. CROW: It's a great description and I guess I just have to say that I have given no thought yet as to how to go about doing this, so mostly this is an open discussion, and I guess I'll stop with that.

CHIEF JUSTICE ABRAHAMSON: All right. If you will look at page 1 on the Tab G, it talks about technology research and development -- issues such as role of the technology given five or 10 years. What are the new technologies? What effect will chip technology have on expense? What effect will new technology have on the crime scene issues, and who is driving what parts of technology are issues that came to the fore in that discussion.

We are open to other issues and other discussion.

DR. CROW: One of the issues that I personally care strongly about but I think doesn't come out in the course of discussion is the cost of DNA testing is a problem.

I think one can foresee that as the technology gets to be better and better, as it becomes possible to test more loci, the great profession of population genetics will become more and more irrelevant and the issues will tend to move more in the direction of laboratory standards, laboratory errors, questions of this kind.

I think it is easy to foresee tremendous advances in the DNA technology itself, in the speed, the ability to use poorly preserved specimens, the ability to find things from the relatively distant past -- all of these are going to happen, and I presume our committee will report on that in some detail.

CHIEF JUSTICE ABRAHAMSON: Dr. Reilly, before you do, I also call your attention to pages 12 and 13 at Tab G, which again talked about some of the issues on technology research and development. Dr. Reilly.

DR. REILLY: If it hasn't yet been done, Chris, I would make a recommendation. I believe that if a dialogue was established with the National Center for Human Genome Research at NIH that Question C -- might be approximated, will make approximate answers.

The Federal Government outside of this department is spending on the order of $200 million a year on the Human Genome Project, much of it in significant polymorphism research, things of that nature, and it may well be that there is much information there that while not directly on point is so close to some of these issues that it could give us a leap forward in thinking about new technologies, so I would think Francis Collins's office at NIH could be very helpful.

Recently $25 million was spent to establish a major sequencing laboratory, for example.

MR. ASPLEN: Thank you.

DR. CROW: Certainly one thing we can look forward to is instead of just studying locus by locus is studying sequences next -- sooner or later -- probably sooner it's going to be part of the genome technology.

CHIEF JUSTICE ABRAHAMSON: Any other comments about research and technology? Do you have any comments on that?

You will have to stand up and come to a microphone, please -- or you have got a microphone coming to you.

DR. FORMAN: Thank you. My only comment would be from a forensics standpoint one of the issues that we want to consider in terms of research and development is the issue of technology transfer and some of the proprietary issues that come up when you're talking about the development of new technologies that have a forensic application.

CHIEF JUSTICE ABRAHAMSON: What kind of people would you want on this taskforce?

PROFESSOR SCHECK: A patent lawyer.

CHIEF JUSTICE ABRAHAMSON: Good.

PROFESSOR SCHECK: I am perfectly serious, based on what Lisa was saying before, that there were serious concerns that we had from 1989 forward with some of these probes and trivial variants in some of these problems that were then resold at greater expense.

I think that that is something to be looked into. You could save a lot of money fast.

DR. ADAMS: I would also like to encourage participation from either the state or the national level in this area from the CODIS Working Group, because everything that we do in research to move technologies forward is going to have a tremendous impact on what we can do at the state and national level for identifying unsolved crimes and from the convicted offender databases.

CHIEF JUSTICE ABRAHAMSON: Dr. Reilly.

DR. REILLY: I have a sense that private industry has a huge role in driving this technology forward and there are many companies for example known to me, in which I have no connection whatsoever, that might well be able to provide representatives to give you just the latest cutting edge insight into what is under development out there.

I mean I can provide you a list of at least a dozen companies which might have potential candidate members for the working group.

DR. CROW: Well, thank you for saying it, but I had the same idea -- so much is being driven now by private companies developing new and better and eventually cheaper, not now, technologies that I think we should have people from that area represented.

I can suggest some names too --

CHIEF JUSTICE ABRAHAMSON: I hope you all suggest names, because that is why these sheets are there and that you do it preferably before you leave -- then we're sure to get them. Go ahead. Speak up.

MR. ASPLEN: You'll notice that you have two sheets. One if for nominations for actual participation on the working group or presentation to the working group, but there's also suggestions for reviewers who, again in an attempt to throw our net as far as we can, to have other input by -- by after the work is done or perhaps at the interim levels, to send it out to individuals who may have appropriate and valuable comment to make.

CHIEF JUSTICE ABRAHAMSON: Any other comments on that?

On page 12 there is a discussion that one of the objectives of this committee would be to set up protocols for the training of expert witnesses, and that is part of the improving of the process -- so we should consider that -- this is under Tab G -- and compatibility among tests.

Paul?

[END OF VIDEO 2] 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 [BEGINNING, VIDEO 3]

MR. WOOLEY: We have appended to that -- and to say that, I would preface it with a comment that I think is probably obvious but all of these issues have existed for a long time in other settings and there are existing rules about discovery and the admissibility of evidence and error rates and validation and controls, and I think that this group should be asking the question, "Should DNA" -- I mean sort of as a starting point -- "be subjected to any different legal treatment?"

I think this bleeds over into the postconviction area where we do have legal standards regarding the preservation of evidence, and when a convicted offender is entitled to a review of that, and I think that we should almost use those perhaps as a starting point, because at the end of this report if the committee were to find that the existing rules are inadequate to address DNA issues, we would be proposing to the Attorney-General to propose changes to the Criminal Discovery Rule 16, changes to the Federal Rule of Evidence 702, so I think that we need to address that as part of this group.

MR. THOMA: I have a couple other areas that I would like to address as well, and I am also going to nominate myself for this committee.

The database collection and discovery issues -- it's been an overwhelming problem; particularly being a defense attorney, getting access to and being able to review databases from other

laboratories; contamination issues, how that is to be treated; equal access to evidence as the NRC- 2 mandates how that is going to be accommodated in each jurisdiction or overall federally; which type of DNA testing.

I noted Barry brought up the situation in New York where they have gone to STRs or they are going to STRs. STRs to date are disfavored in California based on stutter bands and some other problems. The courts have not been very readily accepting them at least there, and then some standardization of testing and proficiency testing, which I realize is an overlap of what we were just discussing in the last two committees, but I think it would be a legal issue as well.

PROFESSOR SCHECK: I don't want to be on the committee anymore.

[Laughter.]

CHIEF JUSTICE ABRAHAMSON: Anything else anyone wants to say about that? What about education and training of judges, prosecutors, the defense, bar and jurors.

MR. THOMA: Yes. I was trying to bring up those aspects that weren't -- I think every subject that was brought up in the planning is also relevant, but I was just trying to add some.

CHIEF JUSTICE ABRAHAMSON: One of the issues that has come up in a variety of discussions was how does DNA affect how we view other evidence?

You have got a tool that can, say, one, it can exclude somebody; two, it can tell you a rate or what would be the correct estimate, population estimate -- which sounds really quite probable that you have got the right person; and then I think to many people many the most persuasive evidence is eyewitness identification -- you know? You have all seen it on Perry Mason. That's it -- she's someone in the back of the courtroom or defense counsel table.

Yet the psychologists tell us that may not be such good evidence, and so if people get accustomed to a one out of "x" million, how are they going to view other kinds of evidence, even fingerprint, handwriting, eyewitness, et cetera?

PROFESSOR SCHECK: Well, already it is having a legal impact. Some of that other evidence by comparison just isn't very good, but in terms of the -- what I mean to say is that under the Daubert case -- frankly, it should even have been under Frye -- because of the scrutiny that DNA has withstood, people are going back and looking for the -- do you have any real scientific foundation to tell us whether or not you can do handwriting comparisons, and courts have begun to say, well, we are not so sure you really do.

Hair comparisons, however, I would commend to our attention as perhaps the one area that we should look at the hardest within these various different subcommittees, if only because, number one, we all know that by definition hair is -- hair comparisons are just for class characteristics, that DNA in many of these cases has demonstrated that what was a hair -- I don't know if you can use the term "match" -- it's supposed to be like or the same as the other hair turned out to be misleading to the fact- finder in a whole bunch of cases, but now with the mitochondrial DNA

assay, there is a real tool available to even go further in examining the bona fides of hair, in terms of even laboratory funding questions.

I know Paul struggled with this question in Virginia. If you have DNA testing, to what extent do you still need to do hair comparison analysis? Or should you be doing it? So I think that one in particular that in policy terms is something for this group to struggle with and address.

CHIEF JUSTICE ABRAHAMSON: Any other comments on the legal issues?

DR. DAVIS: Let me comment a little bit.

I have been a great believer that if there is evidence available, readily available -- not at great unusual cost -- but if evidence is available it should be obviously obtained and analyzed regardless of whether it is witness testimony, whether it is questioned document, hair or what.

I think if we rely or focus in on one item to the exclusion of anything else we have done a great disservice, because it is a jigsaw puzzle, no matter how you look at it, and if you only pick out a few pieces of that jigsaw puzzle and say that these substitute for the total jigsaw puzzle, sooner or later a great misjustice will ensue.

MR. CLARKE: Not just that. I think Joe is absolutely right. Jurors also hold the Government to that as well. Obviously DNA typing is generally only being used in our most serious cases, and if the law enforcement community as well as even we as prosecutors haven't done everything we can to exclude that person excused of that crime, jurors will hold that against us.

They expect all of those t's to be crossed and i's to be dotted, so I think the good news is sometimes we sell jurors short. In reality, and going back to what Barry mentioned, I think jurors have a healthy disrespect for eyewitness identification.

In fact, the most nerve-wracking are cases where we sometimes feel the most at risk are eyewitness identification cases without corroborative scientific evidence, so I think that also is an issue that certainly should be raised during the process.

MR. GAHN: Chief Justice, may I just make one comment that also will echo those, but something for the law enforcement community, something that I have noticed, although now it is oftentimes in jest, but I will have a case and be doing a DNA case where we have very impressive DNA evidence along with eyewitness identification, but I get the sense sometimes that the detectives seem to think, well, we've got DNA and that's enough, and I think that there may be in the future as this technology advances maybe not going out -- the traditional beating of the bushes -- and investigative work that should be done from the start, and there is an attitude developing that, well, if we have got semen, we'll get DNA and some things may start to fall by the wayside that we may be very sorry for later down during trial.

It is just a caution I think at this point I think to all law enforcement --

PROFESSOR SMITH: Well, it is a caution that in conjunction with the financial discussion we started to have it seems to me has great importance, because if we invest -- if we recommend investments of the magnitude that is beginning to be suggested in this technology, in effect we are suggesting this investment elsewhere, and a corollary to Norm's comment, however, also has to do with prosecutors.

I think that prosecutors can fall into the same trap. I was talking to a victim advocate at one time where she asked me whether or not I thought that DNA ever affected the way that I handled a victim, and my immediate response was, well, of course not -- I am very victim advocacy oriented. That is why I am a prosecutor prosecuting sex crimes.

Then I thought about it and I thought, you know, if I have a pile of cases on my desk -- two piles of cases -- and one pile are the bad cases and the other pile are the really, really bad cases, but I have DNA in a case what to do. Well, it goes to this pile and what happens? I probably spend a little bit less time on victim preparation because this case probably just a little bit closer to a guilty plea, and that is a very real dynamic that is also something from an educational standpoint I think we need to suggest, remind prosecutors of.

CHIEF JUSTICE ABRAHAMSON: Okay. A couple of comments then I will just go five minutes into, if we can, the lunch hour, so you can fill out some of these forms or at least start them, and then proceed.

Go ahead. Sorry.

DR. FERRARA: I wanted to answer your -- try to address your original question.

I mean when -- when you have hair evidence, a microscopic hair comparison on one hand, and you have a DNA match, there's orders of magnitude difference in terms of the weight with which those two have to be accorded -- plain and simple.

Somebody may disagree with me, and that's fine, but if I have a six-probe DNA match vis-a-vis a subjective, microscopic examination of a not particularly representative sample, one I can quantitate by saying the likelihood of a false -- the likelihood of a random match is one in five billion, I can't say that with a hair comparison, and it becomes very difficult -- it becomes incumbent on the expert to somehow explain to the court how much weight should be accorded that hair, which was considerably less than the DNA.

Now I try to eliminate hair comparisons. Whenever we have DNA evidence in a rape case I said I am not going to do the hair, and the prosecutors had a hissy fit, and understandably because, one, a hair comparison could tend to support the DNA work. My argument is that it's not as probative as a vaginal swab, but there's a lot of -- there is a lot of technical arguments and vagaries to this whole issue, not only with respect to hair but hair comparisons -- of course, fingerprints of course are much more self-evident to a court, which is a great advantage. Hair comparisons, less so, so that is very difficult.

I just have one last point here --

CHIEF JUSTICE ABRAHAMSON: One last point, quickly and --

PROFESSOR SCHECK: A question about how we function in a research notion, and that is that one of the things that Chris mentioned before was trying to get at the budgetary implications of saying invest in the database -- it is in the long-run interests of the state and local or city authorities, but one thing that we could research but haven't yet, and that is -- that would be very persuasive one way or the other, I think -- is to what extent do DNA cases, once you have an inclusion or an exclusion, actually save money within the system.

In other words, if you frontload the system, as many of our studies seem to be indicating were going in terms of databases, typing cases when they come in, or if you get very quickly exclusions or inclusions, how much money does that save you along the line?

Are you really getting faster guilty pleas and thereby saving money from the judiciary budget, public defenders, the prosecutors, et cetera, where if you exclude people out of the system very quickly if is that really happening it would be very useful it seems to me to know with some particularity whether we really are saving money with the DNA, and if we could prove that, that would help with policy recommendations.

CHIEF JUSTICE ABRAHAMSON: Okay. Anyone else have something they want to say before everybody leaves for lunch? Okay. That usually gets everybody.

Can we just take a few moments, without interfering with our lunch plans, let's take a few moments, if we can, to write out some names, and then we will continue that process.

[Pause.]

CHIEF JUSTICE ABRAHAMSON: All right.

[Pause.]

MR. ASPLEN: If I could make a general announcement at this point, [inaudible] how many folks were here. If you would care to join us for lunch, and you been able to pay, you are going to have to pay your -- how much, $11, $10 -- $11, please feel free to join us. If not, and you are going to go out for lunch, we'll make sure that we have escorts when you return, if you return this afternoon, to walk you back into the building.

And if you have decided since this morning that you would like to stay, and you would like to pay someone, see us, a representative will be in the back to take your money. Okay.

We will -- we will start Dr. Budowle's presentation at approximately -- between ten and quarter after, say ten after.

Lunch is directly through these doors here.

[Whereupon, the meeting was recessed, to reconvene later this same day.]

Presentation by Dr. Bruce Budowle, Forensic Science Research Unit, Laboratory Division, FBI Academy

CHIEF JUSTICE ABRAHAMSON: If I can have your attention, please. Our luncheon speaker is Dr. Bruce Budowle.

I met Dr. Budowle when we were both, and as we still are, serving on the DNA Advisory Board and I was assigned the task of drafting the by-laws. And I will say not too many people were interested in that, but Bruce Bodowle was, and he read it carefully, called me, sent comments, checked my draft against the federal statute and against federal rules and made enormous corrections in it, and I was very thankful. And so I assumed that he was a lawyer, and no greater compliment could be paid in my household than to call somebody a lawyer. With a fine analytical mind, and with a love of the language, and a very, very careful reader.

I then found out that his doctorate was a Ph.D. in genetics and that is second in my house. My son and I are the lawyers and my husband is the Ph.D. in genetics.

Doctor Budowle joined the FBI in 1983 and he has been spending, and maybe it is this week he is at the Forensic Science Research and Training Center at the FBI Academy. That's what you do, it's called Club Fed.

DR. BUDOWLE: Yes.

CHIEF JUSTICE ABRAHAMSON: All right. He has authored over 200 publications. He has testified many times, approximately 60, and that's more times than he ever wanted to testify. In the late 1980s, he was chiefly responsible for developing DNA methodologies that were so robust that they could be transferred to state and local laboratories without extraordinary or sensitive technological equipment. Because of his thoughtful, streamlined approach to technology transfer issues, state and local laboratories were able to perform DNA testing on criminal evidence and independently present these results in court.

He has been instrumental in virtually every aspect of forensic DNA analysis since that time, and every time I see him, which is several times a year, when we are not talking about the Antarctic, which we have both visited, we talk about how he is going to be on one or more of these working task forces to help us.

He is also Vice Chair of the DNA Advisory Board, substituting when Dr. Lederberg is not there, and so I am delighted that he agreed to be our luncheon speaker, and delighted that he will continue to work with us.

Bruce, I still think you're a lawyer.

DR. BUDOWLE: Thank you, mom. I think we have a problem here, the power actually isn't hooked up. That will be fine.

I thought what I would do here is sort of give an eclectic presentation because we have a wide group of people here with a lot of different experiences. Some of you have street experience,

some are lawyers. I am not sure I am going to take that as a compliment, that you thought of me as a lawyer, but some have some scientific background, some have not been exposed to any of this, so I am going to give you a little bit of the science, a little bit of history, a little philosophy, some opinions, try to put it together so that you get a taste of some of the things that have happened.

So what I thought we could do is just start off with the idea of forensic science DNA, and I am going to make this a high tech presentation also, so when we have technology transfer, you can start thinking of how we can do some of this.

I think any time we are going to do a DNA presentation we should start off with a time line so you can have some idea of how much has happened in what short time it actually has happened. We should start off -- no DNA talk should start off without having a double helix back in the early '50s, the year I was born. Jim, I'm sorry. A little before, just a little.

Restriction enzymes in the early '70s, the ability to cut DNA into fragments at specific places was -- enabled us to use this technology later on. Mid-'70s, southern blotting, the ability to take these fragments and put them in a -- on a support, what looks like a piece of paper to you non-scientists, so we could produce patterns that could be reviewed.

VNTRs, these genetic markers, which I will show in a minute, I put down two arrows, 1980 and 1985, because of the significance each has in forensics. 1980, Ray White at the Howard Hughes at the Medical Institute was the first one to describe a VNTR sequence. But in 1985 the work of Al Jeffries is what really pushed forward the emphasis in the forensic community. So we should give credit to both.

PCR, this technique where we can take small sub- analytical quantities of DNA, put it in a test tube and, within a relatively short time of an hour or two hours, produce analytical quantities that can be tied to it in a manner that is much easier than it would have been without that technique.

And then the forensic science interests, and I might say that around the mid-'80s, most people give credit to the British. They were the first, with Al Jeffries, to do the work. The others actually, in my history lesson there, it was the life cultures actually doing in first, and then I believe the home office was next. Then there was a PCR case and then you saw a lot of the other work. The FBI was -- began some research in 1986 and we have been there ever since.

CODIS and TWGDAM both got their birth around late '80s and early 1990, where there was an emphasis of trying to bring the community together to do the work, as opposed to individual groups just doing work of the mom and pop type or cottage industry, because we really benefit in this consortium approach.

STRs got their birth around 1991, and I put mitochondria DNA as forensic use with the FBI in the mid- 1990s. As you can see, there has been a big concentration from about 1985 to the present, where most of this work has occurred. Now, I know the Director was asked, and I wasn't asked, and I am the after-thought, but I know if the Director was here, that he would have emphasized that the FBI has been a major player in the development of DNA technology and

will continue to be a major player in that technology for the future. And maybe a lot of what is done and is decided today, the character and the personality of that has its birth from the efforts of the FBI.

And the FBI, as Shirley had mentioned, was instrumental in developing robust technology. When this technology first came to forefront, it wasn't easy to do. It was an academic type of scientific research and people would tweak it, they would manipulate it. In research, you don't have to be correct all the time either, you know, you can tolerate an error or two here or there, and then you report it, then you find your error, then you publish another paper on the error, and you can perpetuate your publication list quite well by your mistakes.

Well, we can't tolerate that kind of tweaking and errors and such. We have to build things that will be able to be transferred to many laboratories, not only in the United States, but around the world, and this was actually the first real endeavor that made that possible, the FBI did that.

We also established criteria for validation reliability. We actually wrote the criteria that TWGDAM uses for validation studies. Interpretation guidelines, matches, exclusions, inclusions, the wording, the semantics, statistical methods. The first method, the fixed bin method was an FBI creation that was litigated many times, Barry. Computer software for imaging, calculations, data bases, to this day are still being developed by the FBI.

As I mentioned, TWGDAM and CODIS, again, we really want to stress this consortium approach, that bringing people together to set standards is a benefit to the community, and if you want to do something, I strongly stress this approach as part of your considerations. Validation studies, putting on symposia to bring the community together. Case work. I would say 80 to 90 percent of the FBI's casework actually is for state and local laboratories, not the federal government. Publication has been mentioned. Testimony support. I seem to spend time testifying for other people than the FBI, much to my chagrin. Consultation and I may add training.

One of the big areas that you are talking about and considering is technology transfer, building up a formal infrastructure in the community. We have trained over 500 people in various courses on DNA, and I think it is just a dent of what needs to be done.

For those who are not familiar with it, the genetic marker that was first used is known as a variable number of ten and repeat, where there is a sequence of DNA that I will call -- in this block here, that is repeated over and over again, and that the number of repeats that vary determines the size of this fragment and the differences amongst individuals. So in this case here, we have a fragment that has four repeats, here we have one that has six repeats. One is bigger than the other, and they can be separated and typed.

The arrows are those restriction enzyme sites where you cut the DNA, and I can reproducibly do that if I use proper protocols, and then afterward will generate a DNA profile where we will have reference standards. Two bands from the suspect, each band being -- the one at the top here being a larger piece with more repeats, the one under here being a smaller piece with less repeats. Compare it to the victim, which has two bands in this case, different sizes from these, so you can actually compare those then with the evidence.

And by just a visual comparison, we can see that the suspect is excluded as being a source of the material, and it matches the victim. And one can then proceed onward by doing more tests and provide more information.

Now, the DNA typing methods that we just described here is called RFLP, and it was the mainstay and still is the most robust technology to date that is being used. It is polymorphic. It is the best one, polymorphic meaning that is good for discriminating amongst individuals. It is good for elucidating contributors of a mixture. Those take a couple of weeks to develop the results, though. It does take some effort and labor, and you need a certain amount of DNA of a certain quality to get results.

If we take advantage of that PCR methodology that I briefly described, where I am going to make copies of the original target DNA, I can get faster results. With automation, it can become less labor-intensive, and use far less DNA. The DNA can be exposed to the environment and salted to some degree and yet still give results. We can have, as I said, automation. But then, again, we have to consider contamination as a more or a greater concern than we had with the RFLP methods.

So there is no perfect method. One has to understand the limitations of any method, be it PCR, RFLP, STRs, whatever. One has to understanding the limitations of technology and always work within that technology.

Now, one of the mark systems, and I am just going to give one example, this Dot Blot system, in which, in this particular case, we will have several genetic markers that have two forms, an A or a B, and that if one has a particular type, it will produce a pattern that can be read, and it can be easily determined within its limitations that a person here has the B, for this marker has A, this one got AB, a B, a B, and it's a fairly easy to interpret procedure within its own bounds.

And that many genetic marker systems can be typed using this Dot Blot kind of approach. And I am not going to go into technology, but the basis of this approach is also the same basis as much of the chip technology that was bandied about a little bit earlier today.

Now, PCR based methods that have been used predominantly in the United States to date, have been what is known as the D1S80 locis, which is a VNTR, and the amelogenin, which enables one to determine the gender of a contributor of a sample, and those DQ alphapoly markers. They are very robust within their own bounds again, but they have limitations interpreting mixtures. So, again, we do have a desire to look for additional markers that will help us with violent crimes and mixtures.

And that's where the STR markers come in. They are more informative than the polymarker DQ alpha. There are a large number of them and, with proper design, we can put many of them together into one assay and achieve a high power of discrimination with less effort than we did beforehand. So that's where most of the work is being done today.

And STR is much like a VNTR where we have repeat, except the size of the repeats was just a little smaller. But it's the same principle. But instead of cutting the DNA, as we would have

before, we are going to do a PCR process. So for those who are not familiar, I thought I would actually show you how that works. The DNA is double- stranded, and by applying heat, you can break it into single strands, and each strand can then serve as a template to make a copy. And what happens is we add small pieces of DNA into the process, they bind outside of the repeat area, and then, with proper conditions, we make copies of that area. Then if we -- that would be one cycle of PCR. We apply heat to it again, we can denature them again, add in more primers and get extensions over and over.

Now, for those who are interested, if you notice, these -- this one here and this one down here, these two have very prescribed sizes that are actually dictated by the number of repeats. And in a short time, that is all we are going to see in the reaction, an exponential increase of those particular fragments. In the end, we don't see the original DNA because it is swamped by the copies that have been in vitro. And yet, if you do the work properly, you can demonstrate that the repeats themselves are faithful and the sizes can be evaluated from the product.

Okay. So we have a little bit of technology we are looking at. We are interested in now applying that. We are going to want to apply it not only in case work but, as was said this morning by Steve Niezgoda, we don't want to have technologies that -- where you are working in case work with one kind of marker system and data banking with another system. You want technology and efforts to draw it so that there is compatibility across the board, and these STRs are going to do that for CODIS, and Steve has already described that.

Now, another part of CODIS, though, is taking that resource from a consortium of individuals in the crime lab community to try to identify those markers to get a core set of loci or markers so that we can be effective.

And one thing our CODIS people did was support a project that the FBI coordinated, in a somewhat dictatorial fashion, it was not a democratic project. They were given assignments and they must report back with that. There wasn't a lot of room for playing around, because we had a goal in mind we wanted to achieve. And that was to improve the technology, to get markers that everybody would use and, at the same time, by bringing a consortium together, to raise the standard in the community, because we would be educating people in the process. Some had a long way to go to get in that process. But by the end of it, we have a lot of labs that are proficient now because of this effort.

The purpose again, select a core loci for CODIS, but not just for CODIS, but for case work analyses. And how we accomplished that was this collaborative project. These are just some of the labs, where they represent from around the country, who were involved and everybody seemed to be eager to be involved. And there was a large set of genetic markers that were looked at and tested. And we tested it in a particular way. We went and did performance tests on the markers and population data bases which are being analyzed as we speak.

The performance testing was done in several ways, because something you think about in technology transfer is who should dictate the quality of the machinery, the markers, the technology or whatever, it should be the users. And what happens is -- what happened was when

we started DNA technology, we dictated the quality to the manufacturers. We dictated the protocols, what was acceptable.

But when we started going to PCR, particular STRs, we found that industry was starting to dictate what was acceptable, and that is not acceptable to us. So part of this process was to evaluate, go back to industry and say you need to improve this, you need to fix this up. Now, what's the benefit of that? We have a more robust technology that can be transferred to the state and local labs. Industry has a market, because if they have a high quality product, everybody is happy. So it actually worked out to be mutually beneficial in the process. And then, of course, the forensic validation studies, the FBI has already completed all those.

Population typing was done in this study, and I just want to put up some of the samples of what we have done so we can answer some of the questions, which do fit into the technology issue as well, because the application of statistics is a technological issue. But we want to address that, and we always want to address that, to take that up as an issue up front, so we know what the limitations are and what to do. Based on the recommendations of the NRC II report, we can use what is appropriate for application.

The core loci actually through this effort had been decided and there are 13 of them, so that we can actually look at a profile and get a high degree of discrimination and probably uniqueness in this situation, even for a relative. And I guess the closest relative we will consider in this case, other than the identical twin, which we won't consider, is the brother scenario, and we can discriminate quite effectively here with these -- these markers.

Also, and I will bring this up in the sense of comparably -- in a minute -- comparability. One thing for people to understand is, is that we also have to be practical. It is the requirement to be a CODIS user that you will attempt all 13 of these markers on case work, because we want that high power of discrimination. But note where it says attempt, because we know there is a reality here and that case work will have limitations and not all markers will be typable. So one thing we have to decide here, what is the minimum number that will be allowable for CODIS to enter case work profiles? But it won't be all 13 in every case.

However, for the following data base, all 13 will have to be typed, because we want that high discrimination. So we have -- when someone identifies a profile, the turnaround time is quick, the provisional hits are small, and with a large number of markers, we can resolve mixtures more effectively and have a very valuable data base.

We -- our counterparts in England don't enter up mixtures on their data bank because of the -- they only use a limited number of markers compared to what we have, about half. We want to enter mixtures in there because they are valuable information. If we can resolve them, that would be beneficial.

I should say that when we take charge of the technology and we define the markers, then we also push industry to meet our needs. If we don't, industry isn't going to do that. Both manufacturers, and this gets into the patent issue, which we discuss -- because I have my own opinions on that. There are two manufacturers that have access to, or the rights currently to generate kits for STRs.

And those manufacturers are not going to have the exact same reagents between them, and that is an issue that has to be considered, and they didn't have the same markers between them, but by redefining it, they are now moving in that direction.

For instance, one of the manufacturers had nine of the 13 markers in a particular kit, and they have now manufacturer, are producing a second kit to accommodate all 13. So we are able to drive industry based on a definition. The same with the other manufacturer, had eight, and is building a new kit with some internal controls to assure higher quality. So we have a real effect.

I'll just mention the British. One, I may say they use less, but every marker they have that they use routinely, are in our core set. So, therefore, we can have compatibility and communication and sharing internationally which would be advantageous, from a data base value to some odd cases, I would say.

So the real benefit is that the community has played a direct role in developing these systems. They have grown up with it, they have better experience. And they dictated the criteria for what is considered acceptable.

They effected the changes to improve the performance in the kits, so now when people get these kits, they are going to perform at a higher level than would have been otherwise. We have expedited the commercial availability of these kits. By defining the criteria, manufacturers are moving because they have a pathway to go. They know what to follow to get there. And if you have better kits and better robust technology, you can streamline the interpretational guidelines so that we can avoid some of the interpretational difficulties that might have occurred previously.

So what did we get out of this? We get implementation by the FBI, implementation by state and local labs, increased utilization of CODIS. So, again, this consortium concept is what brings that forward, built that infrastructure, and as any concept of technology transfer, it should really be thought of in the consortium and infrastructure building as just -- as opposed to just a quick fix of throwing money into buying equipment.

Now, another technology is DNA sequencing where we can actually read the letters code of a stretch of DNA. Now, traditionally, the way that was done, and I have separated them out here, is that it was done by radioactive detections so all the banks looked black, so we had to use four different lanes on a gel, which means it took up four times the space to do a typing. And one could read it by, if this was A and this was G, this was C and that was T, read the A first and then you would say here's a C, a C, an A, and you read up the ladder, and it was an arduous process. But with the advent of flourescent technology and so forth, and you add in the colors, it makes it easier.

I know when there's -- where red or blue, you know, yellows and greens are, and I can merge them into one lane so I can improve my efficiency and I can use automated readers to detect that. So that when I have -- oops -- so that when I have an actual analysis, I can just run one lane, I can run the evidence, and I can compare them, and wherever there is a difference, I can evaluate that and proceed forward. Again, nothing is new in the way that one does forensic comparisons, we are just using some of the technology to facilitate that.

I bring up the DNA sequencing because that is the methodology of choice currently for doing the typing of mitochondrial DNA.

Now mitochondrial DNA is slightly different than the DNA we've been talking about up to this point, because it's outside the nucleus, and it's only inherited by the mother. Now if you remember on the first couple of slides I showed two bands for the suspect, two for the victim, two for the evidence. You don't get that situation generally from mitochondria, because you inherit it from your mother. The father does not contribute the DNA. And that has implications in interpretation as well.

The advantage of mitochondrial DNA is that there are many more copies of it in a cell than there is of this nuclear DNA. We have two copies of the nuclear DNA. We can have hundreds to thousands of the mitochondrial DNA. So cases that have been exposed to the environment longer or are older or whatever or a very limited amount of DNA, we have a better chance of typing them with the mitochondrial DNA than we do with nuclear DNA, such as a hair shaft and so forth.

The main area where it has a great value has been in hairs, bones, and teeth, and, I mean, we use it at the FBI a majority of the cases with hair, some with bones, and you're going to see a great value in this in the future to resolve some of those cases.

It has polymorphic value in that it can discriminate amongst individuals, but we had some discussion earlier about six nuclear markers being one in a bazillion or whatever that number would be. You do not have that power of discrimination.

However, there are some situations where this is more powerful than the nuclear DNA. With the nuclear DNA we compare with close relatives such as brother to brother, son to father, maybe even to a maternal grandmother or a paternal grandfather or something, but after that it breaks down quickly. With the maternal -- with mitochondrial DNA, because it's maternally inherited, any maternal relative can be compared that can be quite distant from the individual being considered at that particular point, the example being the czar's bones that were found was actually compared several generations away to royalty in England who's living today to make that comparison. So there are situations where this would be far more informative than any test around. So one has to understand when it can be used and what it can be used for, and use it appropriately.

I mentioned the heteroplasmy because this is an issue that is arising now not for any reason other than one might expect, other than the fact to consider is that some individuals carry more than one type. In fact, every individual carries more than one type, but some can be detected and some cannot. And one has to consider that in the interpretation issues and so forth.

Okay. You've got your taste of technology. We always have to remember a lot of things that have happened in the past can be learned from that your committee can use, so you don't try to just do things again because you think it's a good idea at the moment. It's actually been probably addressed already.

There have been a lot of previous issues that came up, and population statistics and data bases. We have an NRC report No. 2, 1996, because of population statistics, addressing everything from assumption of independence, specific population issues, applications, validation studies.

No matter what anybody decides here, no matter what you say, it will be good enough for somebody, and it won't be good enough for somebody else. That's the nature of the system, and we have to accept that, and that will continue.

Contamination. It can be utterly devastating in some cases, and can be ignored because of the use in another situation. You can see some concern post-convictions, maybe not taking as great a concern about it as it might be in let's say the O. J. Simpson case. It's not going to go away. Potential error, I heard some discussion we're going to address errors and legal issues on errors. I can't imagine why. But it's there, it's been discussed, it's been addressed. And bias. Jim Crow mentioned some of that, and I'll bring that up in a minute.

In population genetics, this was addressed -- this was actually probably a vehement discussion, to be nice about it, for a number of years, the data have been collected. They are consistent with the history. I'd just like to show a couple for STRs, and I bring up the African American, because one of the early critics said that African American data bases could never be collected because the variation would be so great and it could never be done.

All data to date says that's not a problem. Here is just some histograms of African Americans from the United States and where the peaks are going to be relative to frequencies for the particular forms of this STR compared to those from the Bahamas, those Africans from Trinidad, to those from Jamaica. Now they're all different groups, they're ethnically distinct, they're culturally distinct, they have their own subdivision characteristics, yet for the practical consideration if you chose any one of those data bases, you wouldn't get an estimate that would be substantially different. This is consistent with our findings.

The same with other genetic markers. I just put this one up and you can't see it from the back there, but we have things like Caucasians compared to African Americans to Japanese to Italians and Turks. The Caucasians are all similar to each other. The Africans are similar to each other. The Asians are similar to each other. But they are different compared to each other, one another. And that's consistent, and we will have that data so we don't go through these issues again as much.

Bias perspective. I'd like bring that up, because Jim Crow was discussing this a little bit, I think he was alluding to it, is there's an argument about bias perspective, the working for law enforcement and, you know, you're just cops in white coats, and that's something that comes up. And I think part of that one has to take into consideration that's an adversary system, and there is an adversary system, and there's no getting around it. That's the way it is. We need to accept that and work in that framework and go forward.

Because let's look at the bias in a sense. When there's exclusions, I don't see people coming up and saying I disagree with that, I want my client to go through the court test anyway because of the exclusion. Bias is raised to an ideal standard. So when we have inclusions, you frame

something in the adversary setting, where one side is -- you've got a biased sampling. You're only looking at those cases where you failed to exclude and you're moving forward. And that's just the reality of the system.

So when you think of an inclusion, you are ignoring all the other data that's been collected, and you have to take that into consideration. But once an inclusion occurs, the adversary system comes into play, and it's their job to attack it. One person -- the person being attacked may not like it, but that's the fact, and that's the way it is, and ultimately the adversary system has a benefit that I see in the United States over the rest of the world is that the standard is higher in the United States. There's not -- it's not a negative thing the adversary system exists, but when you consider these discussions you had this morning, let's remember that that exists there and everything we do is biased, what we're looking at at the moment.

I put this one up here about the telepathic modulation. That's a term actually coined by Joshua Lederberg, because he's the only one that can use those big words like that and make sense out of it. But the data can be reviewed. People can't make the bands migrate by thought into a position. The dots appear by position. One of the advantages we have today is that there is far more documentation than ever before. High technology drives more documentation, makes it available for review, and that means also that's that specter for people as well. And I think that's driving a higher standard, and I think far less of this bias issue than before.

And then retesting, which has been advocated. I'm a strong believer in retesting, that if there is a question, let's go ahead and resolve it in the best way as opposed to arguing there might have been a mistake, there could have been a mistake, and that could be a real value. Because if you do that, you know, it can be very happy there. You didn't see that did you? Watch this. This is a happy person, so --

Now to close up, I talk a little about the future, and some of the things that are going to happen. Let's keep in mind in the future the adversary system will still be there, and no amount of wishing of you to change the legal rules of evidence or whatever is going to change. That's not going to change. It's going to be there. We're advocates of it. We don't want to see it go away. Okay. So everything's framed around that.

And why is that important? Because as new techniques come in, not everybody is going to accept to use it, because the older techniques that are well established have been through the courts, they've been through the challenges, they can rely on that, and there's going to be a desire to gravitate towards that as opposed to the new technologies, even though they sound better and they offer you more. You have to keep that in consideration when you start saying well, let's just move ahead.

Routine use. Yes, we're going to see far more use of it for human identification, we're going to see it for maybe plants, drug identification, a whole set of areas that haven't been considered yet, and in a lot of difficult ones. We talk about profiling of individuals. I don't know where it's going to go, but that is going to be one of those ethics issues as well.

Felon data bases. Felon data bases are going to drive the technology in this community, because it's going to be the throughput in automation that is going to be the greatest concern for people. And once the felon data base is in place, then they're going to want to start using it. The automation, again driven by the felon data bases, is where most of the effort's going to be going for the next two to five years.

Resource needs. Training and equipment obviously, you know, I don't think we need a lot of committee work to say we need more of that. But that alone is not enough, and if you think you just throw money in and get equipment and that's going to do the job, then I think there's a real problem, because we can get a lot of equipment in, we can do a lot more cases, but unless you have people report those cases and go in court and endure all the hardships and whatever it is they go through, it doesn't matter, there's a bottleneck. There has to be an infrastructure of people who are highly educated, who are going to take high tech and become high-tech people. So if you're going to invest, that's where we have to go from the ground up.

I mentioned personnel. And nonsuspect cases. Again, I think that that is going to drive it, because what's the use of creating a data base if you're not going to solve the cases where you don't have a suspect? So what I try to do in this time here is give you a little bit of a taste of a lot of different things from a little bit of opinion there, I don't believe anything I said, so I'm still objective at this point, and if there's any questions, I'll take them now.

Thank you.

[Applause.]

CHIEF JUSTICE ABRAHAMSON: Any questions? Phil?

DR. REILLY: Bruce, this is a little bit tangential to your presentation, a question that came up I shared with the Chair at lunch.

What discussions, if any, I'm sure you've had some, have you had about coordinating this effort with Canada and Mexico in particular, given the common border we share. We often talk about cold hits across State lines. This must equally be true across those two borders.

DR. BUDOWLE: Well, we've spent most of our effort with Canada, because they do have the infrastructure in place to do that, and Mexico is not quite up there with these particular markers yet. There is a resource problem they have. But with Canada, they were part of our CODIS working group, intentionally, and they're also part of TWGDAM. And that's been that way since the beginning, because we do believe we have common borders and concerns. So they have adopted the same concepts, the same markers, to proceed forward.

DR. REILLY: Any special evidentiary problems because of different systems of law that you know of?

DR. BUDOWLE: Evidentiary problems? I haven't addressed that per se. I mean, we're just dealing with this as a technical problem per se, what happens after that. Although they seem to

inherit, you know, sort of like that big United States and little Canada kind of scenario. They inherit our problems, but on a more civil level than we endure.

Barry.

PROFESSOR SCHECK: I was intrigued by your comment concerning mitochondrial DNA that everybody is heteroplasmic, it's just that it can't necessarily be detected. Could you explain a little bit of what you mean by that?

DR. BUDOWLE: Well, I can't go into a biology class here, but remember, there are thousands of mitochondria per cell, and the replication of the mitochondria to make new cells or new mitochondrial DNA is less stringent than the process that's done at the nuclear DNA level. So there are chances for errors that can be tolerated in the replication. In other words, you don't get a faithful copy all the time.

So if I were to go in and be able to pluck out any single one, I might find one that has a base -- a letter different than another, but when I look at thousands of them at one time, I can't see it. But there are some individuals -- well, look at a thousand molecules. One may be different. You just can't see that. It's not even noise in the background. It's undetectable. But there are some individuals that have a higher population of another type in their bodies, and it can be -- they can carry two types, either in the same cell or in different cells. And when I say different, I don't mean that I have a type that's so dramatically different that it would -- I would confuse two people. It's usually like one letter different in the DNA code.

CHIEF JUSTICE ABRAHAMSON: Thank you on behalf of all of us for spending a day here and for his contribution at lunch, and not only of his own personal contribution, but the contributions of the FBI and the FBI laboratories in this. It was a thoughtful and creative talk, and we appreciate that.

Our schedule -- we're going to continue with the agenda, but our schedule's going to be somewhat at the mercy of the Attorney General's schedule. She was delayed in Atlanta, but she will be here later in the afternoon. So we'll proceed with a postconviction task force, and our speaker will be Professor Margaret Berger of Brooklyn Law School, who's the author of a very prominent textbook on evidence, and she's had two successful sessions already. Judge Reinstein would ordinarily have introduced her, and he's attended both those meetings, but family matters kept him from being here today.

So, Professor Berger, if you would take over. Thank you.

Postconviction Issues Working Group Report, Prof. Margaret Berger, Brooklyn Law School

PROFESSOR BERGER: I thank you very much, Chief Justice Abrahamson and Members of the Commission for this opportunity to appear before you to advise you about what the postconviction issues working group has been doing.

Since there is no opportunity to tell you about who was on that working group, I thought perhaps I should start off by telling you a little about that. Three Members of the Commission are on the group. As you heard, Judge Reinstein is on it, as is Barry Scheck, and as is Catherine Turman. In addition, not only do we have a member of the judiciary, a defense counsel, a victim's advocate, and of course Barry also is a law professor, but we also have representatives from the prosecution end. We have someone from Cellmark who is on the working group as well, and so we really have a very balanced group, I would say.

The working group certainly realizes the urgency of its task. It simply is not tolerable for persons to be incarcerated when evidence exists that can exonerate them. As Barry Scheck mentioned this morning, to date there have been at least 53 cases in which convictions have been vacated on the basis of DNA testing. About half of these convictions were vacated after 1996.

The technological innovations that have occurred in DNA testing now make it possible to obtain conclusive results in cases where previous testing had simply yielded inconclusive results, which means that in the future there will not only be requests for testing in cases in which DNA testing was never done, but also requests for retesting using these new technologies.

Certainly the innocent persons who are presently incarcerated need assistance. You've heard about the backlogs of cases needing testing. That impacts on this as well. And I'll describe some of the problems that the working group has been dealing with that illustrate how difficult it is to handle some of these cases. The working group is doing its best to rationalize and accelerate the process that leads to the exoneration of a wrongly convicted inmate.

The working group has already met for two full days, and we're meeting again on Friday of next week.

At our meetings to date, the group has identified numerous issues that will have to be addressed in the final report, and has begun drafting guidelines to assist prosecutors, defense counsel, victim advocates and judges.

The objective is to publish these guidelines in brochures that would be widely distributed. The working group realizes, however, that some of the more troublesome problems posed by post-conviction DNA testing are not amenable to solution through guidelines. Accordingly, the group is also considering at least two other mechanisms, model legislation that could be adopted by the states and the possibility of perhaps using federal funding, as was said by Chief Justice Abrahamson this morning, as either as a carrot or a stick to get cooperation with the states in adopting some of this model legislation.

We expect to present all our recommendations to the Commission by the end of the summer. These recommendations will encompass an enormous range and variety of issues. Legal, financial, practical and educational. The complexity of the problems and how the group is progressing can perhaps be seem most clearly if we look at how requests for post-conviction DNA testing proceed. So I am going to work my way through some of the problems that develop when someone requests DNA testing an inmate or someone on behalf of the inmate.

Barry Scheck has been talking about his Innocence Project and we know that many requests for testing are initially received by the Innocence Project. We also know, however, that many others are approached. Inmates, their family and friends contact prosecutors, defense counsel, courts, elected officials, and even law professors for help and information and, undoubtedly, others as well. For instance, NIJ staff told us that their receptionist sometimes gets telephone inquiries about what to do.

The guidelines will provide information about appropriate organizations to contact for assistance and advise persons who are contacted about these organizations such as the Innocence Project or a public defender's officer to which inquiries should be forwarded. It may be possible to set up some kind of a national registry of organizations and individuals that have the capacity to screen requests for testing.

The guidelines will also explain to inmates or requestors on their behalf how to proceed with a request for testing. Many inmates seeking relief will probably not be represented by counsel. Sample forms in the guidelines will set forth the information that an inmate must provide in order for a request for testing to be evaluated. And a good deal of information is needed in order to begin the screening process.

Obviously, one needs to know where and when the offense and trial took place, what the sentence was, who the attorneys were, both the prosecutor and defense counsel, at all stages of the case. In terms of what is being asked for, one needs to know what scientific evidence was collected and what biological evidence was introduced at trial. What testing, if any, was conducted? What the defense was at the trial, and what material the inmate has available, such as transcripts, police reports, laboratory reports, Appellate briefs and post-conviction briefs.

Funneling a request to an appropriate person or organization who will obtain information from the inmate is but the tip of the problem. Obviously, post-conviction testing is possible only if crime scene biological samples have been saved. When an inquiry is received, it is imperative for the person handling the request to immediately contact all persons who might have samples to ask them to preserve any remaining evidence. The samples may be in the courthouse, the police department, the prosecutor's office, or the crime laboratory.

Barry Scheck told us that in approximately 70 percent of the cases, he estimates that the original response is that there is no biological evidence. With considerable probing and persistence, and a refusal to take no for an answer, evidence samples are eventually located in some of these cases. The samples not infrequently turn up in places other than in the official files, like desk drawers and car trunks.

If the sample was properly dried and kept in a cool, dry atmosphere, the lack of refrigeration may not matter, although refrigeration is strongly recommended.

The working group views as one of the most important components of its work, and the commission's work, recommendations about evidence gathering and preservation. We heard about some of these issues this morning. But, certainly, if you look at this issue from the standpoint of the post-conviction process, you can see how imperative it is. An innocent person may not be able to prove his innocence if evidence has been destroyed, and that destruction may have been done in perfectly good faith, it simply has been done because there is no real procedure out there for making sure that samples are retained.

Recommendations about preserving evidence can be incorporated into model legislation. And, certainly, in terms of some of the comments this morning, this is an area where there working group on post-conviction remedies could well profit by some interchange with some of the other working groups that will be dealing with the same issue from different vantage points.

Finding a sample that is testable is essential, but far from all that has to be done in screening a request. An extensive investigation needs to be carried out before it can be determined whether DNA testing could lead to a successful outcome in a post-conviction proceeding. Even when a biological sample is available, test results may be incapable of resolving the issues that are posed by the inmates defense.

The transcript of the trial is needed in order to determine the impact DNA testing could have in light of the evidence in the case and the defense asserted. For instance, if the inmate claimed consent in a rape case, or self-defense in a murder case, DNA test results will simply be irrelevant.

The working group has discussed whether DNA testing should be provided only when the usual legal standard for vacating a conviction on the basis of newly discovered evidence is met. That standard is -- Does a reasonable probability exist that, had the results been admitted at the inmate's trial, the verdict would have been more favorable to the defendant?

Or should one use a more liberal standard and say that access to testing should also be available in non- frivolous cases in which favorable test results would not justify vacating the conviction, but would, for instance, support a request for executive clemency?

One possible solution might be to allow testing, even though the legal standard for vacating convictions is not satisfied, if the inmate or the person requesting the testing bears the administrative costs of searching for and producing the evidence as well as the costs of testing.

Another issue that we have talked about is whether testing should be available for a person no longer in custody who may perhaps be precluded by that conviction from obtaining a job. Certainly, the circumstances under which a state would pay for testing if the inmate is indigent need to be set out in model legislation.

It may also become apparent to the person evaluating the inmate's file that testing the crime scene samples will be useless unless they can be compared with other samples that cannot be found or that were never taken. For instance, in a rape case, a sample from the victim, from third party consensual sex partners of the victim, or from co-defendants might be needed for comparison with the crime scene DNA sample. An application for testing will founder if the results can not be meaningful in the absence of samples from these third parties.

Troublesome issues arise about the extent to which third parties should be urged to cooperate and about a court's power to order the testing of third parties.

Another extremely serious obstacle to DNA post- conviction testing is that many states have statutes of limitation that greatly restrict post-conviction relief. Only six states have no time limits on post-conviction relief based on the discovery of new evidence.

Obviously, in light of the work that has to be done in screening a request for testing that I have just talked about, it is very possible for the time in which the petition for post-conviction relief must be commenced to run before it is possible to find the evidence, review the transcript and evaluate the impact of DNA testing on the inmate's defense.

If the commission proposes model legislation, a recommendation should be included about post-conviction DNA motions being allowed even if a state otherwise puts time limits on when newly discovered evidence of innocence motions can be filed.

The guidelines will also contain separate sections on the appropriate roles of prosecutors, defense counsel, and the courts at various stages of processing an inmate's request. Different scenarios are possible. For instance, testing may occur without any court involvement if it is ordered by the prosecution on its own, which does happen, when the prosecution is contacted and agrees that this is an appropriate case for retesting, in which case, however, the prosecution should notify the defense, certainly, if the sample will be consumed in testing, so that a defense expert or a neutral expert can be present.

Sometimes testing occurs in accordance with agreements between the prosecution and defense and the results will dictate what happens after that. Sometimes the testing starts out being an issue for the court because an inmate files a habeas corpus application and the court will be involved from the outside in the investigation of the viability of DNA testing.

What we are trying to do in the guidelines is to provide a blueprint for all these different situations should be handled in terms of the different kinds of problems that can be arise -- that can arise.

Now, this very brief overview of some of the issues that have to be considered in conjunction with an inmate's request for DNA testing has omitted some other extremely important subjects with which guidelines must deal.

One delicate issue is designing appropriate procedures for dealing with victims and surviving family members. Even when no sample is needed from the victim, it may be extremely traumatic

for a victim to learn that the person convicted for a crime against the victim is now seeking post-conviction relief. It is very important to provide crime victims and surviving family members with information and to approach them with great sensitivity. This is especially critical when the conviction was based primarily upon eyewitness identification testimony by the victim who thinks that she made an accurate identification.

Numerous issues arise in these cases, ranging from when to notify the victim that the inmate is seeking post- conviction relief -- certainly, the last thing we want to happen is for the victim to discover this through the media -- and to how should do the notifying, preferable victims advocates or prosecutors.

Notification, however, may not always be desirable. If DNA turns out not to be possible, or appropriate, or turns out to incriminate rather than exonerate the inmate, which we know happens in quite a few cases, then there would be reason to disturb victims or their families. But in other cases, victims and survivors will have to be provided with a simple but thorough explanation of how DNA testing may be used in their case, the process and procedures used, and the potential outcomes of testing.

Victims and survivors need to be advised about the status of the inmate's DNA testing request in cases where notification has taken place, and reminded about issues such as their right to refuse media interviews. Steps also need to be taken to ensure that information about the location of victims and survivors remains confidential.

If the testing is carried out, the victim may need a great deal of support and reassurance, and if the testing results in vacating the conviction, the victim needs to be assured that the expanding data bases that we have been hearing about will increase the likelihood that the true perpetrator will be identified.

The guidelines will also detail the information that must be furnished inmates who request DNA testing. It is vital that they understand enough about DNA analysis to comprehend that DNA testing will confirm their identify as the true perpetrator if they are guilty. This is not a game to enter lightly by a defendant. Furthermore, DNA testing may identify the inmate as a perpetrator in other crimes if the results are placed in a statewide or nationwide DNA data bank.

The Innocence Project requires its clients to sign waivers that the results of any testing will be available to all. Another issue that has to be dealt with by the working group and ultimately the commission.

DNA testing that confirms an inmate's guilt may have an adverse effect on a parole board if the inmate has been consistently denying his guilt, and may preclude executive clemency sought on other grounds.

Yet another set of issues arises about the consequences of a test that seemingly exonerates the inmate. What has to be done about expunging a record? Should compensation be available to the inmate? These are matters that are dealt with in some state statutes and, again, may be an appropriate subject for model legislation.

Finally, the working group has been exploring the desirability of establishing a commission that might serve a number of different functions, a permanent commission. For instance, one function of such a commission might be to study the cases in which convictions are vacated after DNA testing, to report on what went wrong at trial, to make recommendations that would avoid such results in the future and, if nothing else, produce statistics on error rates in our system that are presently unobtainable.

We think that such a commission might have an enormous effect not just on the issue of cases and DNA evidence, but on justice in general. Canada and Great Britain already have such commissions, and the working group plans to review their experience.

Another important role for a commission would be to furnish assistance in troublesome cases. For instance, there are cases in which there is no consensus on whether DNA testing would be sufficient to justify vacating a conviction. It might be possible for such a commission to assist courts by setting up panels comprised of neutral experts, a mediator or a judge, and disinterested prosecutors and defense attorneys who will evaluate the case.

A commission could also assist judges in finding neutral experts who could then testify as court appointed experts in evaluating DNA test results at trial. Obviously, numerous important issues with regard to such a commission need further thought and clarification but it is an idea which we are discussing.

As you can see from this overview of the issues which the working group has been discussing, we have a great deal on our plates. At this point, we are making progress. First drafts have been completed of guidelines for defense counsel, prosecutors, victims advocates and judges. We also have some tentative drafts of sections that could be incorporated into a model statute.

We welcome this opportunity to tell you about what we are doing and we would be extremely grateful for any comments, suggestions or questions. Thank you.

[Applause.]

CHIEF JUSTICE ABRAHAMSON: You have set a hard and fast pace for the rest of the working groups. Jim?

DR. CROW: Could you or Barry give any kind of an estimate or guess as to how many possible people there are out there that would benefit by such an agreement if you didn't have personnel and budgetary limitations?

PROFESSOR BERGER: Certainly Barry is the one to answer that.

PROFESSOR SCHECK: Well, I think that there are lots of different ways of looking at the question.

How many cases are there which have been typed, that have come through the system where DNA testing could be dispositive on the issue of guilt or innocence?

Many eyewitness identification, sexual assault cases or rape/homicides are usually the ones in question because those are usually, you know, the ones that are done in casework because identity is usually the dispositive issue.

There are many jurisdictions I am sure in this country where there just hasn't been a lot of DNA testing. What we have to recognize as well is that even when there was testing in the era of RFLP technology there were many, many cases where there was inconclusive results.

Quite a number of the recent exonerations, since this study in June of 1996, have been instances of persistent people who first had RFLP testing done. The results were inconclusive and then followed up with PCR- based testing. I dare to say that if mitochondrial becomes prevalent, there might well be some additional advances there as the sensitivity of the techniques increase.

We know -- we are very -- we are a shoestring operation. One of the things that I think came across in the working group is that everybody saw all our guidelines, our screening processes and they saw how much information we have to gather from the inmates.

We have to get the transcripts, and establish whether the DNA testing would make a difference, and there is no money for testing. There is no money for investigation and it is very, very hard to find the evidence because of the problems we have in the systems across the country where people literally can't find the evidence.

I mean they don't know whether it is in the lab, the police department, et cetera, so I would estimate that there have to be thousands, and it's a simple issue that as a statistician you know much better than I.

I mean no matter what kind of error rate you posit for this system, given the thousands or the hundreds of thousands of convictions, if it is only, you know, one-half of one percent, that would be a gigantic number, wouldn't it?

We just have some reason to believe from looking at these exonerations based on eyewitness identification evidence, based on convictions that seem to come about from hair identification alone or close to alone, certain kinds of cases are just becoming very, very troubling, so there's probably thousands of cases out there and the real limit is access. The real limit is getting to those cases and performing the testing before the evidence literally disappears.

PROFESSOR BERGER: Well, I mean I guess one bit of information that we have is we do somewhere have an estimate by I guess the FBI that in 30 percent of the cases where they now do DNA testing there is an exclusion, and the question is before there was DNA testing how many of those cases would have gone to trial with the suspect.

Maybe some of the prosecutors here have some sense that they are sort of seeing cases that in the past would have continued on in the trial process, but now simply you never see -- they disappear because one doesn't go ahead with them.

DIRECTOR GAINER: What you are raising for me -- I am bit confused on this -- it seems in just giving a flip through the research on the convicted by juries, exonerated by evidence, I am aware of a couple of the Illinois cases.

I am confused as to whether you are talking about cases in which there has been minimal genetic markers or prosecutorial or police misconduct or incidence of error rates. You used the term "troublesome cases" -- Barry used, I think it was used, said looking at the transcripts and whether it would make a difference.

Are we talking about cases where we think there's a problem or is this the preliminary step to go into cases notwithstanding what the particular state's law may be on opening postconvictions, to say let's go back and test and use DNA wherever biological evidence exists and it simply wasn't used either because we weren't testing that or it wasn't raised?

PROFESSOR SCHECK: No, I think that the notion is -- the notion is simply if an inmate makes a request to have testing done, we all, I think, had -- there was a strong consensus that if it is the kind of case where everybody could agree that if the biological evidence were tested and the results were favorable that it would be dispositive of the issue of guilt or innocence then we all felt very strongly that the testing should be done.

The problem of course that we all recognized is that in some cases, and not an inconsiderable number of cases, reasonable people could differ about whether it would be outcome dispositive.

I mean a simple example that will arise more and more -- it's one thing to talk about a sexual assault case where you have sperm on a vaginal swab. It's quite another thing to talk about a homicide case where you are pulling -- you are doing fingernail scrapings and you may find some flesh or hair under a fingernail and the question is if that is excluded does that mean that the convicted individual isn't the attacker in certain instances?

You can begin to see how there would be various cases where it would be useful evidence for a postconviction challenge, but not necessarily in and of itself dispositive.

I think we spent more of our time discussing those cases, whereas the experienced prosecutors and defense lawyers felt pretty clearly that there is one class of cases where we all know that this evidence is going to be close to outcome determinative, barring sample handling error, contamination, and other things that can lead to false exclusions.

DIRECTOR GAINER: I guess the problem I am having is trying to -- I am trying to envision if there aren't cases where from an ethics point of view we shouldn't have to trouble ourselves. I am going out on a defense limb here -- have to trouble ourselves with whether again there was -- whether it was dispositive or not, whether there was error or not, whether the identification was good or not, the eyewitness identification -- just simply that I know in my career the scores of homicide cases I worked on there was biological material that was never examined because we weren't using those processes then.

And do inquiring minds want to know whether we should go back in and say let's take a look at that?

PROFESSOR BERGER: Yes. I think that certainly the working group has not gotten to the point where it is making recommendations, but certainly many people at our discussions felt that, yes, if that biological material exists that was never tested, and it would be dispositive under the facts of the case, then there might be good reason for doing so.

Now one of the other questions, of course, that arises is what other evidence was there in the case? Are we talking about a case with simply an eyewitness identification or are we talking about a case in which there was fingerprint evidence, there was all kinds of other evidence, or it may be that those need to be handled differently.

DIRECTOR GAINER: One more. I guess what I am wondering is how you have separated in your mind the need to have a persistent convicted offender versus someone's obligation to just say I am going to do something on behalf of this ignorant person who was not persistent and just went away to do his time, not knowing that he, he or she, had these other alternatives.

MR. ASPLEN: I think that the issue that you are talking about I think we loosely refer to as floodgate concerns occasionally, and how do we keep this from becoming an issue that the entire prison population says, hey, here's a way to spend a couple days in court, at least, if nothing else.

We have spent and we will continue to spend a lot of time and attention on ways to weed out of the system those cases that don't belong in that posture for the reasons that we spoke about.

The first thing you do is you look at the trial transcript and if it was self-defense or it was consent it is not an issue, but one way that we may handle that is by way of if a defense attorney is representing an individual and takes it to court to have the matter reopened, they may have to allege certain things, and the work will be on them to say that we believe that in this particular case this biological sample does exist or this evidence is amenable to testing.

So that the point that you bring up is one that we well recognize and that we are looking for ways to avoid the scenario where this just becomes kind of defense du jour and clogs the system rather than something that effectively deals with those cases that should.

As Barry said, there are going to be cases where we all reach agreement and there are other cases where we don't reach agreement because what Barry believes is a strong case one way or the other may not necessarily be what I believe to be a strong case one way or the other, and those matters will have to be addressed, but the idea here, generally speaking, is to limit those areas of disagreement where we can and where it is appropriate and to let the adversarial process take place where it has to, but to look at it.

The key to that is really education --

DIRECTOR GAINER: Chris, I'd guess I'd say it may be just not only a cost benefit but a fundamental fairness issue, and if it takes time and effort to have an incarcerated individual raise

the issue, get a hold of an attorney, research the material, decide whether I've got an appeal -- it might be easier to say, hey, run the friggin' test -- it will cost you, you know, a buck, $2.49, and that will kind of decide us whether we are going to spend any more time in this area or not.

PROFESSOR SCHECK: That is one of the reasons we are developing these protocols.

MR. ASPLEN: Right.

PROFESSOR SCHECK: There are these anomalies that exist. The State of Virginia is a state where you only have 21 days from the time of final judgment to bring on a postconviction motion for newly discovered evidence of innocence, so in other others it's virtually impossible.

Nonetheless, in the State of Virginia, even though there isn't legislation that says save the evidence for any considerable period of time, by local legal culture they just happen to save it in rural courthouses in ways that we can access it and find it.

We also have Hall in the State of Virginia and we have now reached a point because we have had, what, five pardons -- and it doesn't matter who the Governor is -- could be Governor Allen, Governor Wilder, different sides, ends of the political spectrum -- they will pardon the people.

Right now in Virginia, we pick up the phone and the prosecutor says you're right -- we use it to convict people. This is an appropriate case. Let's call Paul and he said that's right, let's call Paul -- we don't need a private laboratory, we trust him. We have been through this. And it's just done and we save a lot of time and effort, but I thought you were actually getting to another point.

I think these cases, particularly as we enter into the era of the databases, I think a lot of focus -- what I am trying to get the New York State Police to do and the New York City Police is to find these samples because there are old unsolved cases.

So many of these cases, and increasingly this is true, we not only exonerate somebody who is wrongfully convicted but we find the real perpetrator. The classic prototypical case is the Kevin Greene case in Orange County, California, which was a guy that went to jail for 17 years for the assault of his wife, and when the lab investigators when out and started resurrecting evidence from the old -- what they called the "Bedroom Basher" case which were I think five unsolved rape/homicides, they did the typing. They found one common DNA profile. They realized it was a single individual and they got a hit in their sex offender databank. They went to that individual and he confessed to the Kevin Greene case, although frankly there was actually some suspicion on the lab that they were looking at Kevin Greene before they interrogated this inmate, and they said this really does look like a Bedroom Basher case, and for awhile they thought in the initial investigation it was a Bedroom Basher case, and then they moved on and they convicted him.

So I mean I really see these things as part of a continuum. What I thought you were saying before is that there may be a whole class of cases that law enforcement itself says maybe you want to go look at these again.

DIRECTOR GAINER: Actually, both.

PROFESSOR SCHECK: Yes.

DIRECTOR GAINER: It's just causing me to wonder whether in addition to all the cases we're working or the nonsuspect cases that there's a whole other classification that we should be saying, gee, I ought to go back and look at those -- I shouldn't have to wait for a defense attorney or defendant to raise the issue to me.

PROFESSOR SCHECK: There is one that I have read about but I haven't been able to verify yet, that in the State of Florida there was DNA databank hit and they basically -- they connected somebody in Florida to a crime that a mentally retarded fellow had pled guilty to in North Carolina and had done 35 years, but nobody had ever heard from him protesting his innocence, so I think it will work this way.

PROFESSOR BERGER: It may also be of course that when one does the testing, one discovers that the person was not only guilty of that crime but of a series of other unsolved crimes.

MR. ASPLEN: And I think one of the things that we discover is that really what wastes the most time and the most resources is a lack of understanding of the issues and a lack of understanding what you need to spend time on and what you don't.

A prosecutor who doesn't understand the issues could spend a tremendous amount of time with the case, objecting to this, that, and the other thing, and responding to motions, where if he understood the scientific issues he would look at them and say, yes, this would resolve the issue pretty quickly -- let's do it -- exactly what you said.

So one of the key components necessarily has to be the education the prosecutors, defense attorneys and the judiciary.

MR. CLARKE: It may be stating the obvious. I think we do have to remember though that this is dealing with something of a limited subset, for lack of a better term. Obviously, by far the majority of people in state prison are there because they stood up and admitted they did it in open court, so we are dealing with something of a limited subset.

I know I can give you the experience in a county of over 3 million. We have had two requests ever. One of them actually has written a book and it's described. The second resulted in results that at least invaded reasonable doubt and so we dismissed on that basis, so Barry obviously has more experience than I in this area -- thousands -- though I am a little concerned about. I think it may not amount to that, but this has been repeated before -- any number is significant and obviously have to be dealt with.

MR. GAHN: I might add you can look at the front end of this too, and I have used it in Milwaukee County, I have oftentimes been somewhat troubled on the case where we have the sexual assault victim who has no idea who her assailant was, and the police will ask her to come down and go through the BFI and go through these hundreds of pages of photos and photos and photos.

All of a sudden she says oh, there he is -- he looks just like the guy. They'll go out, round him up, do a lineup and pick him out.

I've always been a little troubled with those cases, whether she picked him out because of seeing the photo -- was that actually the one? -- and I've had two of those recently and did the DNA testing before any charging, and both were excluded, so I think in cases like that, I am looking at the front-end of it too, but having not had DNA I have a lineup ID -- may have charged him.

PROFESSOR BERGER: I think, if I may add, I think that is very important in terms of what we need to know about the reliability of the eyewitness testimony in the sense that in the past the experiments that were done about the reliability of eyewitness tests may have been based on simulations and then people would say, oh, but that's a simulated situation, you know -- it's some psychologist who is running a test.

Now we really are beginning to get some real statistics on how often a lineup identification and a DNA match don't -- and then there is no DNA match so that one simply throws the case out.

I think it would be valuable to gather some of that information.

PROFESSOR SMITH: One of the things that I don't understand, talking about this, is that if one needs to -- that is, if you don't take your view and one feels the need to examine the other evidence to see whether or not the DNA would be dispositive, I should think that an awful lot of these cases would have been resolved by a plea of guilty because of an assessment made that there wasn't any way of gauging reasonable doubt in the face of an ID.

If that were so, there isn't going to be a whole lot of other evidence to review, you know, to see whether or not the DNA typing would be dispositive, which inclines me a little bit towards your view. I mean if the evidence exists, you know, look for somebody to come forward and claim innocence, if all you have got is a guilty plea.

PROFESSOR SCHECK: I wish I could agree with you. Experience teaches that there are so many of these cases where, you know, you will have codefendants. It becomes multiple assailant situations are very complicated because what you really have to do to get a clean exoneration is you have to get a gene type of all the different possible contributors.

It is not enough simply to exclude somebody who, even if the witness testified at the time of trial was an assailant who ejaculated, the point can be fairly made, well, when the evidence was collected you didn't necessarily get the sample from that particular defendant. It came from somebody else, so a lot of these situations are, you know, getting increasingly complicated and it is not always so simple on the face of the record to say, you know, this is a clear exoneration.

There are many, many cases that fall into this nether area. I mean one of the things that does happen, frankly, is that you look at -- a judge looks at the record or someone looks at the record and says, well, maybe this is one where the favorable results would be an exoneration, maybe not.

On the other hand, if you get access to the evidence, you do the tests, and you get an exclusion, all of a sudden other pieces of evidence in the case that seemed so good are not so good anymore, and everybody takes a much more serious look at the case, so there are -- it is a serious issue we are struggling with.

I guess the one distinction that Margaret mentioned that we have come up with at this point in terms of the floodgates problem is that on the one hand there will be cases where you can look at the cold record and say a DNA test could be outcome determinative, but, you know, let's just get this done right away, you know, it's going to waste everybody's time and effort. The state should do it, pay for it, get it done.

There will be another class of cases where people may disagree, at which point you put the burden of paying for it, paying for the search of the evidence, paying for the testing on the inmate, because it becomes a legal question about access to the evidence, particularly if you want to get executive clemency, and so those are the tentative distinctions --

MR. WOOLEY: Let me ask you a follow-up to what Professor Smith said.

How many cases do you have in your system -- that weren't guilty pleas?

PROFESSOR SCHECK: Oh, how many -- what is our percentage?

MR. WOOLEY: Yes. I mean do you have people that walked into court, said I did it in front of a judge who said there is a factual basis for the plea.

PROFESSOR SCHECK: Very few. Very few people have replied who were guilty pleas. Very few.

They are all people that have been convicted after trial and what is interesting is that while there have been inclusions, right, the percentage -- the number of cases that finally get to the laboratory for testing, the number of exonerations far outnumbers the number of inclusions.

I mean I am not saying that is going to remain true over time but it may be some kind of self-selection in the sample that the most persistent people at the beginning tended to have the most valid claims, and then after awhile and everybody gets to hear it, they'll say I'll take a chance.

I don't doubt that. We have even had people write us letters and say withdraw him after a year. It's one I showed Chris, one of our favorite letters saying you took this so seriously -- I don't want to waste your resources. I really did it. I withdraw my letter.

But, you know, we are pretty backlogged and we really need to reach out and get other law schools' and other institutions' help.

MR. WOOLEY: Is one of your criteria about whether they pled guilty? Acceptance?

PROFESSOR SCHECK: No, I have one criteria. We don't -- the guilty people -- guilty plea people simply aren't soliciting us, but our one and only criteria, the one that we recommend in these protocols is what the biological evidence, if tested, would make a difference, you know, be outcome determinative.

That is the only standard.

MS. BASHINSKI: I have a question that I don't know the answer to, and maybe Paul or maybe someone here from the FBI can tell me.

The 25 and 30 percent exclusion rates, we have certainly experienced the same thing but I have always wondered what proportion of those -- are those that would have normally been eliminated, in other words, they aren't necessarily the prime suspect or who might not necessarily have proceeded with prosecution which routinely will come with several names, knowing obviously that only one of them could be the perpetrator.

Do we have any feel of that 25 to 30 percent what proportion would have gone on to be charged and prosecuted?

PROFESSOR SCHECK: No, I don't think we do.

As a matter of fact, one of the things that we don't know that would be useful to find out is when we look at those, I think the exact number is 26 percent in the FBI database. Primary suspects are excluded prospectively, you know, and obviously some of those people would have been acquitted after trial if there hadn't been DNA testing.

I like to think at a higher rate than the average acquittal rate because after all they are presumptively innocent and should be acquitted but we don't even know very much about what happened to the cases that the FBI did.

In other words, how many of these inclusions led to quick guilty pleas or even led to convictions at trial, and then what percentages of the inclusions that the FBI did, and out of the 26 percent that were exclusions, how many resulted in prosecutions being dropped and how quickly?

I mean I think that is useful data to know.

MS. BASHINSKI: Yes. I don't even know if it is available to be had.

DR. ADAMS: I certainly don't have those type of data available, other than to say clearly less than 5 percent of the inclusions do we get called out into a trial, and it might be less than that.

As far as the 25 to 30 percent exclusions, that is a pretty good number, but it is not exact, and let me give you some examples as to why it is not exact.

We may have a case like the Central Park Jogger case with 15 defendants. All 15 are excluded as a semen contributor. That is one exclusion in the way we count it but we have really excluded 15 individuals.

Another case may --

PROFESSOR SCHECK: That is actually an under-estimate then?

DR. ADAMS: Yes, that's exactly right. Another case may include a consensual partner and a suspect and others, so just keep in mind that when we use that 25 to 30 percent, it is a good estimation. It is not an exact figure.

DR. FERRARA: Some law enforcement agencies, particularly in high-profile cases, with all due respect, tend to use what we call a shotgun approach to suspects, so you will get over the course of a year 10, 15 suspects' samples being submitted to compare against the crime-scene material, and you eliminate them one at a time. But it's hard to extrapolate from that point and say well, what would have happened if you wouldn't have excluded them? It's real tough.

VOICE: We also need to remember that when you talk about these exclusions, don't you -- the 25, 26 percent doesn't always translate -- you don't know if that means the person was innocent. You have no idea. Right? I mean, the Central Park rape case, those people -- a majority of them that were excluded pleaded guilty and in pleas admitted that they'd held her arm or held her down or punched her or whatever. So that --

DR. ADAMS: You're exactly right. And that's kind of why I brought that one particular case up, because it showed an exclusion, but there are certainly other factors out there that are very important to consider.

CHIEF JUSTICE ABRAHAMSON: That's the exclusion versus the exoneration issue.

I'm going to close this for the moment. We will come back to it. I'm going to call a break now, but I would like everybody back in their seats by about 3:12, because the Attorney General will be here at about 3:15. So I would really hope everybody would be polite and be in their seats. Okay? So we'll break from now to about 3:12.

[Recess.]

Keynote Address and Charge of the Commission, Attorney General Janet Reno

CHIEF JUSTICE ABRAHAMSON: This is somewhat anticlimactic, but let me say the Attorney General of the United States, Janet Reno.

[Applause.]

ATTORNEY GENERAL RENO: I thank you for that warm reception, but I really should thank you for your service, and I should be the one applauding you for taking the time from a busy schedule each one of you I know has, and participating in what I think is one of the most important efforts that we are undertaking.

I am particularly gratified that we have such a cross-section of people from the system here. You have one of my mentors in the criminal justice system, a man who I cite more often than probably anybody else, Dr. Joe Davis. You have been so helpful to me on so many issues, the defense bar chief, it's good to have you here. It's exciting. It's just very -- I think what the criminal justice system should be about, when we discuss problems of mutual concern.

As some of you may know, I got interested in just what could be done when Walter Dellenger at one of our 8:30 meetings of a weekday morning said, "I just saw this newspaper article that said 16 people have been found innocent because of DNA. Why don't we study this and understand what happened." And that's the booklet that you have and the publication, and NIJ did a wonderful job of that, and we were able to follow through. But I think that raises a number of questions.

I think that law enforcement as we know it is going to face challenges that stagger the imagination and make us think, doctor, that it was -- we could not possibly have solved all the crimes we did with the technology we had ten years ago. But I think it's going to be critical that we plan with the limited resources we have the right way. How are we going to afford DNA in the best possible scientific terms for all of law enforcement, the small- town, small-county sheriff, and the big-city police department? How are we going to have the advantage of the best expertise, the best equipment, the best training, both at the crime-scene level and in the courtroom as people testify?

We're going to see this problem in other sectors of the criminal justice system, in the issue of cybercrime, how will we ever be able to afford the expertise that will enable us to match wits with the bad guy? How will we be able to develop a global information network that enables us to immediately transmit the DNA sample and understand what's happening? Will the States have enough money to do that? Will the local police department have enough money to do that? I think we will if we plan in a reasonable way based on principles of federalism, with the Federal Government sharing with State and local on a regional basis at times in other interchanges, and I need your recommendations as to how we can best do that and how we can best structure that.

Today is an anniversary of some note, the anniversary of the Gideon decision. And this morning I had an op-ed piece on the need to focus on indigent defense. Dr. Davis and I come from a State that makes its counties pay for everything, and so the defense bar has for indigent defense I think resources that I find lacking in many other jurisdictions. How are we going to make sure that that

defense lawyer has the tools for his indigent defendant that will help him ensure that justice is done?

Now there is a tendency to say from my prosecutor's point of view those defense lawyers spend too much money. What we're talking about again is a person's life and liberty. We have seen because of this remarkable tool the fact that innocent people do get charged, they do get convicted, and they do spend time in prison. And this tool can be a marvelous way to avoid it. And I have not met anybody in the system or out of the system that would like to do otherwise.

I would appreciate your suggestions as to how we can ensure a balanced approach that will provide for appropriate resources for indigent defendants as we deal with this issue.

What is the process -- in postconviction proceedings, how do we proceed? These are some of the areas that I would like to have considered. How do we develop systems? There are so many questions, and I will tell you really how I learned how much I don't know about it.

Jeremy invited me to the first group that met to discuss this, and I sat there just amazed and listened around the table and went back and forth just like this like a ping-pong ball at the tremendous opportunities that were available. I need to know how to use the Justice Department to advance those opportunities for law enforcement in the best way that I possibly can. I need to know from the scientists what comes next after DNA.

There is going to be an extraordinary opportunity for scientists and prosecutors and defense attorneys to work together as never before, because the technology is changing so fast that if we don't work together, we are going to lose some opportunities. If they are working together, the scientist is going to learn from the lawyer, and the lawyer from the scientist, the tools that we can develop that will be important to the criminal justice system. The scientist will learn from the lawyer what needs to be done, what tool needs to be developed, and I need your suggestions as to what we can do in terms of research, in terms of grants, that will spur that type of research and development that is critical to the issue.

Those are some of the points that I would like to make, but if I might indulge you for -- if you would indulge me for a moment, I would like to hear from you as of now what I can already start doing without waiting around to promote what you have already started today. What lessons can I learn from you today so far?

CHIEF JUSTICE ABRAHAMSON: Well, here's your chance, Commissioners.

ATTORNEY GENERAL RENO: Believe me, what you are doing is so important, and I want to put it into effect, not two years from now, not five years from now, if you have an immediate proposal or suggestion as to an area that I should pursue and explore.

CHIEF JUSTICE ABRAHAMSON: Dr. Reilly?

DR. REILLY: Good afternoon. I've been following this field outside of law enforcement for some time. I've been impressed by the amount of State legislation that now as we know 48 States

that have enacted laws for DNA felon data banking. But I'm a little discouraged by the lack of funding at the State level, and there was already efforts afoot to make funds available to the States, but I put a triple underline under the urge to get money to State governments as soon as possible, to frankly not to wait for the two years' time that it may take to produce this report I think is already very strong evidence to at least open that faucet, funds that are available.

ATTORNEY GENERAL RENO: The scientists may put some brakes on me, but if there are specifics that you can suggest, we are already about this. I just have had a chance to talk a number of people both at the local level and at the State level about how we can better organize all of law enforcement, still maintaining the principles of federalism, but whether it be cybertools, DNA technology, information technology, protection against information infrastructure attacks, whatever it is, we are going to have to share resources as never before. Any suggestions you have specifically I would appreciate on an ongoing basis so we don't wait the two years, because I think the funding issue is critical, and I would be very grateful for, if you will, interim suggestions as to what could be done and how it should be structured.

DR. FERRARA: With regard to the funding issue, Ms. Reno, on a preliminary level, we have already looked at a document which has been put together by a coalition of many of the States, and in fact I believe you may have already been briefed on this particular document. It's referred to as the National Forensic Science Improvement Act.

ATTORNEY GENERAL RENO: Yes.

DR. FERRARA: And I have a copy of the latest version of it here. While it has not gone through our committees and the full Commission, I might offer this as at least a starting point.

ATTORNEY GENERAL RENO: We are well started on that, and that arose because Buddy Nicks and Tim Moore came to me with some other colleagues and said -- they came right after our budget cycle, and I said you got your timing all wrong. And, secondly, you can't come just as six, you've got to develop a more comprehensive effort. So they immediately latched onto the IACP, and I think it's really getting organized. We would appreciate -- I would appreciate -- your thoughts on this proposal and what can be done to shape it, because I think it can -- that's what we're trying to focus on.

And I don't know what's feasible and what's not. I am just absolutely committed to doing everything I can to get it done, and the more we involve a great cross-section of people with familiarity in different disciplines, the more it's going to be accepted.

Let me just put one caution on it. There is a remarkable speech by Dwight Eisenhower, his farewell address, that I think is one of the most -- it's a great political speech, and it's never received much attention, because it was given just as he was leaving office. But amongst many other things in the speech, he warned us of the industrial-military complex and the effect that that would have on spending and initiatives, and I think we have got to be very careful about an industrial-law enforcement complex as we downsize the military and as we depend on the private sector, we've got to build partnerships in which they have an investment, if you will, in solid law enforcement and in public safety.

But it's going to have to bring -- be a partnership built on trust, and that's going to be a very interesting issue, and I would appreciate your suggestions and thoughts on that as well: how we build a working relationship with the private sector that recognizes that they have a right to make a profit, that they don't have a right to sell us a gimmick, that we need to work together to develop the best possible equipment and technology for law enforcement. And I have been impressed by the private sector's commitments to date, but I think we need to explore further, and this is a good basis for doing it.

Other ideas?

Yes?

DR.WEEDN: I'd like to mention one other area. We in Alabama, in trying to do information sharing within the State, find that a significant problem we have is not a single number for a case or case evidential sample. In order to do the information sharing there has to be at least one number that's in common with all the systems. And I believe that complexity also exists among the different States, too. So some way that we can come down with a single number that everybody recognizes would be of use.

ATTORNEY GENERAL RENO: If I can get your name afterwards or Jeremy, can't see your name tag, but I'd like to put you in touch with Steve Colgate, who is the Assistant Attorney General in charge of the Justice Management Division. And he is responsible for first of all setting up a interoperable network within the Department of Justice, and then on behalf of the Government, a global information network. The key to that is the development of an appropriate network with State and locals as well. It is a mammoth undertaking, but key to it I think is what you're talking about, and how we communicate. So I would like if I may to put you in touch with him so we can follow up on that suggestion. Is that agreeable?

Other ideas?

MS. BALLOU: Good afternoon. It's a pleasure to be here. My name is Susan Ballou, Montgomery County Crime Lab, in Rockville, Maryland. And I'm in total agreement on the funding issue, which everybody has been clamoring about. If you've attended any of the technical working groups that have been promoted, TWGDAM, TWGMAT, et cetera, our whole issue has been funding, and what we were trying to do is increase the level of their average, and I want to say average, forensic scientist, who you don't normally hear from or see speaking at any conferences or what not, who would like to increase their educational capabilities but do not have the funds to through their governments or laboratory system. And some of these individuals are in States where there is no nearby academic structure, so it would be very difficult for them to attain additional education.

So if there would be some way that this group could possibly look into supplying education through the computer network, whether it be through a setup such as the National Institute of Forensic Science and Technologies down in Florida, that would be also another possibility. But I do know these forensic scientists want to increase their education to provide better services, but at the State level where they are located cannot accommodate this.

ATTORNEY GENERAL RENO: I think this is going to -- I think your idea of computer assisted learning and video conferencing and the like is very important. I think it's going to be important for us all as technology just bursts forth with new ideas in so many different areas affecting law enforcement and national security that we figure ways to be competitive with the private sector and we're in the process of doing that. I'm hoping that in the next couple of months the Justice Department can do some work in that just for the technology within the Justice Department and learn from what we might do. But then how we make sure that every State in this nation has available the resources that you talk about, and a minimal level of expertise in a wide variety of areas. You make sure, Jeremy, we follow up on that lead.

Other ideas?

MR. THOMA: Ms. Reno, first I want to thank you for coming, and as a public defender I want to tell you how much I appreciate your administration. I think you're doing an incredible job. But I would like to discuss at as early a juncture as we can proficiency testing for all lab technicians, and to get some uniform type of blind proficiency testing for any laboratory that is testifying throughout the country, because sometimes we have laboratories that are outside of a jurisdiction testifying inside of a jurisdiction and we have multiple problems there with their quality and proficiency.

ATTORNEY GENERAL RENO: Again, we will -- I don't want to go off on a tangent without the Commission, but as you develop ideas or specifics, we would welcome them on a continuing basis so that when you reach consensus on certain points, that we are aware of the consensus and can move more immediately than the final report, if that's agreeable, Jeremy.

CHIEF JUSTICE ABRAHAMSON: That's agreeable to me.

[Laughter.]

ATTORNEY GENERAL RENO: The final point is in the whole legal area, and it is going to be very important for people to talk in a collegial way, in a nonadversary way, about the critical legal issues that we face in this area, and that we develop an understanding of what should be done. Again, as you identify issues, we would appreciate knowing about them so that we can immediately begin the research that would be appropriate.

I think -- it's fascinating to me to hear the scientists so often say there go those prosecutors at the Department of Justice. They just want to change the Constitution. And I can assure you that there is at least one prosecutor at the Department of Justice that does not want to change the Constitution that believes that it is a living document that is the most remarkable document that I know of in terms of the law. And what I want to do is figure out how that Constitution maintains all its force, effect, vigor, strength, and magnificence while at the same time coping with the new technology. And I think it's possible, and I would just welcome the suggestions of legal issues that you see or that you have confronted already in actual practice so that we might begin to address those.

Thank you very, very much for your willingness to do this. It is so important.

[Applause.]

MR. ASPLEN: As we find ourselves nearing the end of the day, I would like to address a couple of housekeeping issues until the -- until the Chief Justice returns. First of all, each of the commissioners will find in their individual manual or handbook, their own biography. That is not because we are concerned you don't know who you are, it is because what we would like you to do is to take some time to edit that biography so that we can use those in the future. As we advertise and promote the good works of the commission, we want to make sure that what -- who we say you are is in fact who you are any, and any recent accomplishments that we may not have had, that are important, that we do, in fact, have.

You don't need to do that before you leave. If you would like to take them with you and send them back, fax them back to us, that's perfectly fine.

Also, you will be receiving, if you have not already, you may have been -- it may have been passed out to you, the June -- a June calendar. It's with my materials that I moved. You will be receiving a blank calendar for the month of June and we would like to schedule the next commission meeting for June, so what we would like you to do is to put down your available and/or unavailable dates on that calendar and give those back to us so that we can accommodate as many commissioners as possible. Obviously, we will never -- it is very unlikely we will ever have everyone here at the same time. However, we will do the best we can, and this is one way that we will try to accomplish that goal.

Another thing I would like to do is talk about our web page a little bit and that is because it is going to be one of our primary tools to advertise to the public and promote again the work that the commission is doing. It is also the way that we will comply with federal law in terms of making the minutes of this particular commission meeting available to the public. It could be found through our -- it is a link through our NIJ web page.

However, another idea that has come up that we are going to look at in more depth when we get back to the office is the idea of not just having a web page and an e- mail address, which we also have, but also of having a bulletin board, if you will, again, to cast our net as far and as wide as we can to invite public comment on the bulletin board. That has been suggested to us and, in fact, that suggestion was made by Dr. Joshua Lederburg at the last DAB meeting. He thought that, given this age of technology that we are in, that we could do better in terms of inviting public comment and that was probably an appropriate way to do it.

So we will look into that possibility and we will let you know if, in fact, we are able to accomplish that.

Continuation of the Postconviction Working Group Discussion

CHIEF JUSTICE ABRAHAMSON: The housekeeping being done, we will continue with the post-conviction group. Margaret. Any comments or questions on this?

[No response.]

CHIEF JUSTICE ABRAHAMSON: I had one, if I could. I am trying to get a picture in my mind of what the ultimate product looks like, and I am assuming that there may be some model legislation proposed. And then do you foresee a protocol?

PROFESSOR BERGER: Yes. And I think really we were looking at --

CHIEF JUSTICE ABRAHAMSON: In the microphone, please.

PROFESSOR BERGER: At our last meeting, these national guidelines for death investigation, and I think that somewhat of the same format might be usable for the various guidelines that we would have. Divided into different ones depending on the role that the person is playing in the case. It may be that we would also have to have some kind of a report about issues that need to be discussed in depth. We really have not given too much thought to this as yet. In other words, something like a recommendation for a commission that I was talking about at the end certainly isn't something that fits into a guideline, and it doesn't even fit into model state legislation perhaps. It really would require probably some Congressional action or just a report item that we would forward on to you.

Would you get as specific as recommending a statute of limitations, in terms of years, or not recommending one at all? Or saying to the state, look at what you got? That kind of thing.

PROFESSOR SCHECK: We -- I think we had -- I hesitate to say this, but I mean we did have, I think, a pretty strong consensus on the statute that said post-conviction -- if you can show by the facts of the case that you have -- that DNA testing would raise your probability of a different outcome at your trial, then you should be able to go into court and get that testing done, regardless of what the statute of limitation is in your particular state. Now, we haven't voted on that or anything. But -- and we discussed the different problems in terms of cases that are less clear, but, you know, I think we might well have pretty clear recommendations.

MR. ASPLEN: And, quite frankly, one of the reasons that we considered that issue in that way was in anticipation of even greater technology. One of the issues was, well, what if, you know, a case that we can't look at today, ten years from now, we can look at it for some reason. We wanted to prepare for that possibility also. We are already facing that issue. Some of the cases that come up, our initial RFLP analysis was done yielding little or no results, so it is not that DNA testing wasn't done at all, it is that now we want to do PCR testing, so that's why the thought is perhaps no statute of limitations, providing they can --

PROFESSOR SCHECK: And that's a big one, because in 33 states of the country, six months or less.

PROFESSOR BERGER: And, certainly, if there are recommendations about the preservation of evidence, that would tie in with that, because that would be the reason for preserving it. Otherwise, really, in those states that have a statute of limitations that would be a very effective bar, there really doesn't seem to be much of a reason then for preserving the evidence, except in the remote case that it somehow might enter into a clemency application. That's an enormous kind of procedure to set in place just so that there will be a few clemency applications.

CHIEF JUSTICE ABRAHAMSON: Do you have any other comments or questions for the -- anyone?

MR. GAHN: I think what was just said, I can't echo that more. We are running into this now in Milwaukee County. Our statute of limitations is six years on a trial. We have all this evidence. The police want to get rid of it. It's all stacked up, they have no place to go with it, and they can't understand why they can't destroy it. And in the DA's office, of course, we say, no, we want you to keep it, especially in -- you know, suspect cases. And it is a real problem and the police can't understand it, why we want to keep this, but we do, and I -- you know, the faster we can get all these suspect cases into the data bank.

And then I think maybe you could make an assessment on do we need to keep everything that was gathered. You could make a reasoned approach, but I don't think that can be done until the data bank has the samples entered into them.

PROFESSOR SCHECK: I should really add, I have been on a circuit recently with Dr. Warrick, David Warrick, from the Home Office Research Establishment in Great Britain, talking about the DNA data bank in Great Britain and I guess many of the people here know this data, but it is extraordinary to me that they have 246,000 samples in their system. And they type each new case that come in. So they will take a sample from a burglary case or a homicide case, robbery case, whatever comes in, and they will do immediate PCR based STR testing, and in 40 percent of the new samples coming in, they are getting a crime scene-crime scene hit or an offender to crime scene hit.

Now, one thing to note, which is very exciting on the one hand; on the other hand, it raises all these privacy concerns and is a real reason to clean up any loopholes that there are in state privacy statutes, and that is, in Great Britain, when somebody is arrested, be it a juvenile or an adult, they take buccal swab and they do a DNA profile. And then they run that into the system against all the crime scene samples. If the arrested individual is exonerated, they expunge it, much the way we handle fingerprints. But, frankly, that is one of the reasons, I believe that they are getting such a high rate of offender to offender and crime scene to crime scene hits. Now, that is the wave of the future.

We don't -- I mean you saw the statistics, we don't have anything close to that number of samples in the system. I think when you reach that threshold, you get a few hundred thousand in your system, and you begin to do all new cases coming in, this is going to be a remarkably powerful law enforcement tool.

MR. ASPLEN: I wish that all of you on the commission, and even out there in the public seating, I wish you could all see the discussion and watch what transpires in that working group meeting. It is truly wonderful to get all aspects of the system together and have that dialogue, that aggressive dialogue. And one of the really wonderful things that occurred was that there was almost immediate consensus not only that this should be done, but that it could be done, and that it had to be done quickly. And to have those individuals sit there and say, yes, we can expedite this process. Yes, we are willing to meet once a month, to fly, in some cases, from California to Brooklyn, once a month and to do this, not wait two years, as the Attorney General requested we not do, but rather to have something produced by September, was really, really marvelous.

At the same time, there are times when we get in these discussions and some issues come up like rape shield issues considerations, which I had never thought about before, and I thought had thought about this issue a lot, and just various and sundry issues come up, and what happens, I'll look across the table, and I will look at Margaret, and I'll say to myself, thank goodness we have Margaret Berger here to put all this together. She is a tremendous asset. And when I think that there will be no way that we can communicate what is going on, we look with great appreciation to Professor Berger, and I just want to thank her for her contribution.

[Applause.]

CHIEF JUSTICE ABRAHAMSON: Now, with that, if --

MR. WOOLEY: Your Honor, could I ask a question before I look my train -- I just wanted to -- to those of

you that are in the working group, you have told us that there was a consensus that there should be no statute of limitations on filing a motion for post-conviction relief based on the desire to do DNA testing, and that there are such statutes in most jurisdictions. Are you suggesting, or are you proposing that there should be no statute at all period, or no statute just for DNA, or no statute for just scientific evidence? Because I don't know that we can presume that anybody else is stagnant in their scientific things as well.

PROFESSOR SCHECK: Well, yeah, the present state of the law is that there are six states that have no limitations on the right of an inmate to present newly discovered evidence of innocence. Thirty-three states have statute of limitations that I think are six months and less. In other words, you are time-barred within six months or less.

New York has a statute that permits an inmate to get a DNA test at state expense by the state lab if you can meet the threshold of proving that the evidence would raise a reasonable probability of innocence. Illinois just passed a statute along those lines, although I think it is more general in terms of the term scientific. It is not DNA limited. I think that's premature. I think that we are talking about actually is a specific, both for practical, political and in terms -- and in terms of the jurisdiction of the committee. We just said DNA.

CHIEF JUSTICE ABRAHAMSON: And, of course, the issue is always you say DNA, but then it raises other issues and we have to be aware of that.

MR. WOOLEY: Yeah, it is my opinion. I think that that's -- those aren't small other issues.

CHIEF JUSTICE ABRAHAMSON: No.

MR. WOOLEY: There are other people that are talking about their disciplines and how they are getting better and smarter and learning more and more all the time, and I think that you have to view these things --

SPEAKER: Which way is that taking you? Is that taking you towards [inaudible]?

MR. WOOLEY: Towards making sure that if we are going to suggest, as a commission -- I don't know, I am not there yet -- that DNA should be singled out for separate treatment from other things legally, that there's a damn good reason why, for this, as opposed to other things.

People have talked about different admissibility standards for DNA, different discovery for DNA, different standards for post-conviction relief. When those suggestions come without an articulation as to why decades of jurisprudence should be changed just for this science, I think they fall on deaf ears.

CHIEF JUSTICE ABRAHAMSON: Maybe that is at least a first test for this. And the commission's -- the working task force's recommendations will be brought in and will be discussed here, and perhaps at each meeting that we meet, we might have several issues brought forth with what the consensus is and why and a discussion from the group, so that we don't wait until the end, if that was all right with you all. To the extent we can do it piecemeal.

DR. DAVIS: Let me go back to this question of retention of evidence. Every police agency has its own property and evidence custodian, bureau or department, or section, division, whatever they want to call it. Many people have their network, they develop their systems and they have some commonalities in the way they handle evidence.

And it would seem to me that it would be advisable to bring somebody in who represents that thinking, get them in here and get them early, so that DNA evidence, when it is submitted, the rape kit, the whatever it is, they come up with an accepted way of putting that aside, because when you go into these property bureaus, there is tons of stuff and they have got to get rid of it.

And if you have the evidence on one case all together, the problem of going back and finding one small part of that evidence to set aside is an impossible problem to solve. So as it comes in, it should be diverted into a special pathway for potential retention and that -- my suggestion is try to find where that person is can join this group and tell you how to do it.

CHIEF JUSTICE ABRAHAMSON: Terry.

DIRECTOR GAINER: I was just going to say, I think that will be one of the areas we will be exploring in our working group. That's a good point.

MR. CLARKE: And, actually, also the different forms of DNA, starting from original evidence through extracted DNA, amplified DNA. I know our local laboratories constantly ask, do we need to keep all of these different forms of DNA from the same evidence? And sometimes they are difficult questions to answer.

DR. FERRARA: In Virginia, we were discussing this issue, the Clerks of the Court, incidentally, were incidental in defeating a bill of this nature, because of their concerns about storage of evidence. And one of the points we made was -- they said, well, can we just keep the perp. kits, and the fact of the matter is that often in these cases, the -- what might ultimately truly be dispositive evidence is not in the perp. kit itself, but on perhaps clothing or other material left at a crime scene, and if you -- if we just kept the perp. kit, you are losing potential evidential material. So, Joe, you know, that is very much to what you say about, if you say you are getting just a piece, you might be missing the pie.

CHIEF JUSTICE ABRAHAMSON: Okay. Before we leave on that issue, I wanted to introduce Charlotte Word who is here from Cellmark Diagnostics and she is on the post- conviction task force. Dr. Word.

Thank you for coming and do you have anything you wanted to add?

DR. WORD: Not really. It's a great group that has been put together, and I think the committee is working very, very well together and addressing many important issues, and I am proud to be on it.

CHIEF JUSTICE ABRAHAMSON: And anybody on the commission still has an opportunity to join that group if you would like to do that.

Questions from the Public and the Press

It's -- the magic hour of 4:00 is approaching, so that unless I hear anything else from any of the commissioners, I am going to open this up to questions from the public and press, as set forth in the agenda. If you would stand, please, and identify yourself.

MS.GROHOVSKY: Hi. My name is Julie Grohovsky. I am with the U.S. Attorney's Office here in Washington, D.C. We are getting a lot of requests right now from the Metropolitan Police Department in Washington, D.C. on this very issue of what evidence they should save, what evidence they can destroy. And one thing the commission could help with is, once you do make some preliminary findings about what evidence you think is necessary to keep, if that could someone be published or posted somewhere, so that we can give them to our law enforcement entities and ask them to keep those specific pieces of evidence. I know that would be very helpful. Especially right now in the District, there is a very big problem with storage space.

CHIEF JUSTICE ABRAHAMSON: Thank you.

PROFESSOR SCHECK: I should add, I follow up on Paul said, because it is -- excuse me -- such an important point, and just to add that as the new cases come in, and is storage is done, remember, you know, one era's DNA evidence, you know -- DNA evidence -- evidence that is not DNA evidence in one year is DNA evidence in the next. And when you gather all this stuff together and you are thinking about just even mitochondrial testing on hairs, how were those collected? You know, how were they being stored and segregated from other samples? That may become, you know, a really critical issue down the line.

You know, even in closed cases, there may be unapprehended individuals. So, very frequently, yes. So, you know, when you are talking about a closed case, you may have gotten a conviction in one case, but there were other people at the crime scene, or other people that were involved in the perpetration of the crime, and there's biological evidence there that remains untested, or even -- you know, even if it were tested, it was unattributed, I should say, and you are going to find those people in the future, particularly as you enter into the data base era.

So I vote in general for figuring out good ways to do it, but I think you err on the side of saving and saving intelligently.

CHIEF JUSTICE ABRAHAMSON: Easily said.

[Laughter.]

MS. BALLOU: Do you want me to hold off? I don't mean to grab the floor. I do have a page here. So just to introduce myself again, Susan Ballou, from Montgomery County Crime Lab in Maryland. And I understand the issue that's been going back and forth on saving samples, and that's not actually what I wanted to address, but just something else to keep in mind, again what Paul was mentioning, our laboratory's just getting into DNA, and right now for the last ten years every time we analyze a case, we take it through its entirety.

Samples are collected from each item. It is stored in a single envelope. Each one is separated from another. And that case file is frozen unless there is -- until if additional work is needed on it. So we're able to store these for ten years now.

The problem we see coming up with DNA is the fact that a lot of agencies to cut back on evidence that's analyzed are going with best-evidence rule. You go to the first sample, you get a hit, don't go any further. So is that going to cause a problem now? Because in the past we were able to take the case through the entirety, help the investigators put together the case scenario as to what took place, which helps in trial, substantiating anybody else's testimony. So I think that's another separate issue that almost has to be looked at. Do we go with just the best- evidence rule that a lot of agencies are doing, or do we go further than that?

And stepping aside from that, I'd like to address this to Terry Gainer. I'm sorry, I don't have your title. I don't want to -- I could say colonel or lieutenant, but that might get me off on the wrong foot here.

DIRECTOR GAINER: Your Grandness would be good.

MS. BALLOU: Okay. Now we're bowing to that one. All right.

Since you're doing the crime scene investigation, I just wasn't clear, are you basically looking at protocols to how people would collect evidence at the crime scene, or are you just looking into ways to fund agencies to increase their capabilities for doing it?

DIRECTOR GAINER: No, much more towards how they -- the best practice of how to do it.

MS. BALLOU: How to do it. Have you been in contact with the other groups that have already put together protocols that have spelled out exactly what should be handled for just general evidence such as some of the technical working groups as I mentioned before? I know TWGDAM was basically working with protocols within the laboratory, but the Technical Working Group on Materials Examinations handled evidence collection, what should be done point by point, as well as ASTM has a whole section on how evidence should be handled. And my only concern there is if you do look at those, DNA evidence might be needed to mode those a little differently to hit that particular collection area.

But I would consider also the possibility that you might be hindering another type of evidence, if you pinpoint just to DNA collection. I'm assuming if we go overboard on one hand, some of the technicians might concentrate on yes, I'll collect this for DNA, how to do it, and then overlook the other physical attributes of the evidence that might be there. So that could be a touchy situation to make sure that you're not stepping on somebody else's area as well.

DIRECTOR GAINER: Good point.

MS. BALLOU: And then also I believe I mentioned it previously about the fact that their training is the big issue. And my concern here is a lot of the directors of agencies agree, yes, we should have more training for our bench-level examiners, but it's not necessary at this time. Not

that the funds aren't there for them to proceed further, but they just don't see it's useful for their time to put in the request to a group like this to ask for the funding. So the poor examiner is then left on the side, and they have no way of going over their administration to try to get that type of funding, and I don't know how that can be addressed as well. And then the technical working groups is a main issue for the bench-level examiner, wanting to promote themselves but getting stonewalled in their own administration.

CHIEF JUSTICE ABRAHAMSON: Thank you.

Professor Berger.

PROFESSOR BERGER: Thank you. In hearing the various questions raised about the preservation of evidence, since our task force is on a different time frame than the others, whether it might not be helpful, perhaps, to have a subcommittee that consists of people from a number of the different task forces to work on this issue, because it seems to me that there is some additional expertise that our committee does not have and that would be needed if we are to come up with some recommendations in our very short time for working.

CHIEF JUSTICE ABRAHAMSON: I notice there was no one from law enforcement on. Is that right? We'll look at that and we'll be continuing to talk to you about that.

MS. SOUSSA: Hi. I'm Amanda Soussa from Fair Parks Identify Laboratories. We're a high-volume DNA testing lab that does work with States in processing CODIS samples from the time of collection to the time of analysis, and one issue that I wanted to bring up that was kind of alluded to but wasn't brought out directly and has to do with future DNA technologies I think is that it's important also to look at sample collection. It's very important to look at future technologies in the DNA analysis, but you have to collect a sample from each individual. And this can sometimes be a very time-consuming process, and can be a very expensive process when you're collecting samples from a large area and trying to bring all those samples into one testing facility. So I think that's an important issue to look into.

CHIEF JUSTICE ABRAHAMSON: Thank you.

MR.HEURICH: Chuck Heurich from the Montgomery County Crime Lab in Rockville also.

I had two comments to make, the first dealing with the postconviction issue, and I was somewhat relieved at the end to hear that Charlotte was on that committee, because coming from a small laboratory, one of my concerns is not only are we inundated with a technology which is increasing the number of types of samples we are able to look at from saliva to feces to whatever, but now we're going to be inundated with investigators asking us to pull cold cases. And I think that one of the things that should be looked at is maybe some sort of guideline for laboratories across the board to prioritize these cold cases as they come in and sort of fit them in with their current working caseload, not to give too much emphasis to one or the other, but obviously the resources aren't available to develop cold case sections of crime laboratories as they do in some homicide sections and what not. But I think smaller laboratories on the whole

are going to be overwhelmed in some cases by the number of cold cases or old cases that are going to come into their laboratory.

Secondly, I think one of the things that was hit on earlier also is I believe very highly in what the DNA Advisory Board is setting as far as guidelines across the board for all laboratories to follow as far as accreditation. I think what needs to happen and as a part of this committee is that we really need to focus on the collection and preservation of the evidence, because the DNA laboratories can follow all the guidelines in the world, and if, as Mr. Scheck showed in the Simpson case, if you can attack the heck out of the collection and preservation of the evidence, the standards don't mean anything, because the case is going to be shot down anyway from where it originates, and that's at the crime scene.

CHIEF JUSTICE ABRAHAMSON: Thank you. Terry?

DIRECTOR GAINER: Could I comment, because you raised an interesting point to me concerning the guidelines and the old cases. Our lab, like the FBI, does about 90 percent of our work for local law enforcement, and we force the scientists to work very hard to keep that backlog down, to keep the cases in the queues. I alluded to before. What we found ourselves on those nonsuspect cases where we were working very hard to turn around especially the rape kits that we were giving it back to local departments and we finally asked ourselves the question what are they doing with it? We work hard to get it back to them, and we discovered to our dismay that we were working very hard, we were pushing it out, using the overtime, and then it went to some detective in some department, and they were on to their next issue in life, and they weren't following up on it.

So I think it's a real critical issue that we're working with our local clients to decide if you're pushing us, we want to see some outcome, and at first our scientists said we shouldn't be in the business of pushing the locals, to which we said no, that's not the case. We're in this together, and if we're going to spend the time and effort doing it, you've got to take it and make use of it. So it's a good point.

CHIEF JUSTICE ABRAHAMSON: Paul, did you want to say something?

Any other comments? Questions?

Yes.

MS. COMLEY: Hello, I'm Sara Comley, and I would like to say that I would like to see unedited transcripts of this Commission and all the Commission meetings be put on the Web. If it's a choice between the BBS and an unedited transcript, I will take the unedited transcripts any day. And I would also like to see public notices of all working group meetings. I was really surprised to learn that one of the working groups have already met, yet it was my understanding that today's meeting was the first day of meeting of the Commission.

CHIEF JUSTICE ABRAHAMSON: Thank you, Sara. It's good seeing you again.

We plan to get all these out on the Web. Isn't that right?

MR. ASPLEN: Yes, the minutes of the Commission meetings themselves.

CHIEF JUSTICE ABRAHAMSON: Good. Any objection to the working groups being announced?

The working groups are not technically public under the Federal rules. The Federal rules.

Any other comments or questions?

Going back to the Commission for a moment, is there any other working group that anyone would like to see formed in addition to these five?

Anything we've forgotten?

Research and technology, crime scene investigation, laboratory funding, legal issues, and postconviction. They're all very broad, so we can fit quite a bit into each of them. And I don't mean to encourage a sixth, but I do wish to leave that open.

SUPERINTENDENT HILLARD: Judge, if --

CHIEF JUSTICE ABRAHAMSON: Yes, Chief --

SUPERINTENDENT HILLARD: What Dr. Berger was talking about, if you just happen to form a subcommittee on evidence and recovered property, I have a lieutenant I'd really like to put on that subcommittee.

CHIEF JUSTICE ABRAHAMSON: Good. Working with the postoffender at the moment.

Would anyone else like to work on that subcommittee?

If we don't have volunteers, we'll call you.

And you might suggest others, Chief, that might want to work on that. And others here might suggest. Okay?

Any other comments? Anything else from the Commissioners?

First shot, not last shot.

Lisa, do you have anything you want to add? Christopher?

MR. ASPLEN: No, I don't.

CHIEF JUSTICE ABRAHAMSON: Mr. Travis?

Mr. Boyd?

Dr. Rau?

DR. RAU: The one that, the superintendent, I think that is very important, particularly if you look at what's going on in the District of Columbia today, and they're trying to put the department and so forth together, and it may not be the only place in the country where that is needed. So I'm very supportive that that be put together as quickly as we can and get some decision at least from them on it.

CHIEF JUSTICE ABRAHAMSON: Okay. Thank you.

Hearing no one else, I will declare this meeting at an end. We will meet again in June at a time and date that is convenient to most of us. I hope to see you then. You may communicate by e-mail or otherwise with all of us, and those that wish to communicate with any Commission Member are free to do that. So we stand adjourned in time to make all our planes and the rest of you to get right in the middle of Washington traffic.

[Laughter.]

Thank you.

[Applause.]

[Whereupon, the hearing was concluded.]